THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DARLINGTON COUNTY
Court of Common Pleas

Paul M. Burch, Circuit Court Judge
Patrick J. McLaughlin, Special Referee

Appellate Case No. 2023-001016

Samantha Joanne Carwile, individually and
as the Personal Representative of the Estate
of Marlayna Joan Carwile,……..……..……Respondent,

v.

Chris Anderson and Danielle Anderson,……..Appellants.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Samantha Carwile and Justin Baxter watched their three-year-old daughter die in front of them after she was hit by a truck while crossing the road from Appellants Chris and Danielle Anderson's house.

On March 17, 2020, ("Carwile")[1] filed a complaint against the Andersons for Marlayna's death. (R. p. 96). Carwile properly served the Andersons and, when they failed to answer, the Clerk of Court entered default on June 15, 2020 ("the first default"). (R. pp. 111-13, 1-2). The Andersons filed a motion to set aside the entry of default, which the circuit court granted on May 26, 2021. (R. pp. 114-16, 3-7).

On June 11, 2021, the Andersons filed an answer. (R. p. 197). On June 23, 2022, Carwile filed a motion to compel for the Andersons' failure to respond to discovery requests. (R. pp. 200-02). After the Andersons failed to respond or attend the hearing, the court granted the motion to compel on July 21, 2022. (R. p. 9). On September 28, 2022, Carwile filed a motion for sanctions for failure to comply with the court's order. (R. pp. 259-61). When the Andersons failed to respond or attend the hearing, the court granted sanctions, striking the answer. (R. pp. 12-15). On November 29, 2022, the Court entered default against the Andersons ("the second default"). (R. pp. 16-17). On February 10, 2023, the Clerk entered an Order of Reference to Special Referee. (R. pp. 18-20).

On April 12, 2023, the Andersons moved to set aside the second default. On April 13, the Special Referee held a damages hearing and heard the Andersons' motion. On May 23, 2023, the Special Referee filed an Order denying the motion and an Order of default judgment. (R. pp. 21-35).

On June 2, 2023, the Andersons filed motions to reconsider the orders and a motion for a new trial. (R. pp. 275-81). On June 22, 2023, while those motions were pending, the Andersons filed a Notice of Appeal. (R. pp. 733-34). Carwile moved to dismiss the appeal as premature. (R.

[1] "Carwile" refers to the party in this lawsuit. Samantha and Justin's first names are used in the brief when referring to them as individuals.

p. 738). On July 17, 2023, this Court held the appeal in abeyance and remanded to the Special Referee to rule on the post-trial motions. (R. p. 742). On November 2, 2023, the Special Referee denied the motion as to entry of default and denied in part and granted in part the motion as to the judgment. (R. pp. 30-35, 55-94). The Special Referee filed an Amended Order of Default Judgment. (R. pp. 36-54).

On November 13, 2023, the Andersons filed an Amended Notice of Appeal purporting to appeal seven orders. (R. pp. 744-46).

FACTS

Samantha and Justin saw their three-year-old daughter, Marlayna Joan Carwile, die in front of them after she was hit by a truck while crossing the road to go home from the Andersons' house. It wrecked their lives and is a daily, constant source of pain and grief.

I. Marlayna's family, her death, and evidence of her parents' physical and mental grief and suffering

Samantha Carwile and Justin Baxter had one daughter—Marlayna. (R. p. 352). They lived together in Darlington, South Carolina, with Samantha's older son, Rylan, and Samantha's mother and brother. (R. p. 352).

Marlayna was born in July 2014 and, for Samantha, "[s]he was everything good in the world. She was my sunshine." (R. p. 353). Marlayna always woke up happy, and "seeing that smile in the morning just made everything better" for Samantha. (R. p. 354). Shortly after Marlayna's first birthday, Samantha started nursing school. (R. p. 362). She got her L.P.N. license and became a Registered Nurse. (R. pp. 351-52). Samantha traveled with Marlayna to Michigan, New York, and Florida to meet her family. (R. pp. 356-58). Family was important to Samantha and Justin. (R. p. 358).

Marlayna loved to sing and dance around the house. (R. p. 359). Marlayna and Rylan were especially close. "[H]e was her best friend" and "her favorite person." (R. p. 360). Samantha said "[i]t was the best thing" to watch Rylan and Marlayna play together. (R. p. 360).

Samantha described her and Justin's parenting relationship as "atypical" in the best sense. (R. p. 362). They did not live together when Marlayna was born but Justin was at the hospital for her birth and came to see her on his days off from work. (R. pp. 362-63). Samantha taught Justin how to be a parent. (R. p. 388). Samantha said "the connection the two of them [Justin and Marlayna] had . . . it was beautiful." (R. p. 363). "[T]hey absolutely loved each other." (R. p. 363). Samantha noticed a change in Justin "from the day he met her." (R. p. 364). He "wanted to make sure that his daughter had everything that he didn't. And she worshiped him." (R. p. 364). Justin eventually moved in with them. (R. p. 365). Justin testified, "I couldn't have asked for a better mother for [Marlayna] to have a daughter with." (R. pp. 390-91).

Justin testified about his relationship with Marlayna: "[S]he was my best friend. She was my favorite person in the world. She was my first opportunity to have what I thought to be unconditional love. She was my rock." (R. p. 388).

Justin worked as an armed nuclear security officer at the Robinson Nuclear Power Plant making $50,000 to $60,000 a year. (R. p. 387). He worked there for seven years. (R. p. 387). It was "the best job" of his life because he "always wanted to be part of the military or a team." (R. p. 394). He "did everything that [he] could to better [him]self and further [his] career" because he "planned on being there until [he] retired." (R. pp. 394-95).

On December 6, 2017, Samantha and Justin's lives changed forever. (R. p. 366).

Justin was doing dishes before dinner and looked out of the door to call the children home. (R. p. 391). When he looked out of the door, he "saw the worst thing [he] had ever seen in [his]

life." (R. p. 391). Samantha was taking a nap after work and was awoken by Justin screaming to call 911. (R. p. 366). She went outside and, when she saw her brother holding Marlayna at the Andersons' house, she sprinted to her. (R. p. 367). What Samantha saw was horrific. Justin remembered "[p]anic and terror," explaining that he was trained to deal "with all these things, but there's no training that can prepare you for what I saw." (R. p. 391).

Three-year-old Marlayna had been hit by a car while crossing the road from the Andersons' house. She "had blood everywhere at her face. It was coming out of her ears. It was coming out of her eyes." (R. p. 367). Justin said Marlayna "came out of her shoes." (R. p. 391). When Samantha saw Marlayna's eyes, she knew that Marlayna "wasn't there anymore." (R. p. 367). Samantha asked Justin to feel for a pulse but she "was just frozen." (R. p. 368). Justin had first responder training and started CPR on Marlayna but Samantha, even as a nurse, "couldn't do it, not on my daughter." (R. pp. 368, 391). EMS arrived and thought "there was no point" because "she wasn't there" and, although they shocked her at Samantha's insistence, she was dead. (R. p. 368).

Justin got the other children inside so they would not see any more death. (R. pp. 391-92). After that, Samantha "just wanted to hold her. I didn't want that to [] be the last thing that I ever seen." (R. p. 368). Samantha's mother ran into the street and fell to her knees. (R. p. 368). The driver of the car that hit Marlayna was crying and listening to Marlayna's family "just wail" in grief. (R. p. 369). Justin sat in the yard with ants crawling on him and biting him but unable to care, "[j]ust crying." (R. p. 392). When EMS finally left, Samantha went into her house and thought "this can't be real" and "what do you do after" watching your child die. (R. p. 369).

The days after the accident were "just one breath after the next" and Samantha telling herself "to keep breathing." (R. p. 369). Samantha asked Justin not to leave her because she was

"very scared that he was going to kill himself." (R. p. 374). When Marlayna died, Justin's "whole world was gone" because she "was the reason that he did . . . everything that he did . . . [and] he wanted to be a good person, a good role model, a good everything for her." (R. p. 374). Without her, Justin "didn't have any reason to live anymore" and Samantha was scared for him. (R. p. 374). In the days after Marlayna's death, Justin "had no sense of self, [] no sense of purpose, no ambition, no drive, no happiness" and felt like he "was walking into an abyss." (R. p. 392).

They cremated Marlayna because Samantha "wanted to take" Marlayna with her and "didn't want her to be in the ground." (R. p. 369). Samantha wears Marlayna's ashes every day in a necklace. (R. p. 369).

Christmas was only a few weeks later, and Samantha "didn't want to do it" because "there was nothing happy. There was nothing there." (R. p. 370). Samantha did not have money to buy anything for Rylan because she had not been back to work, but other people brought gifts for him. (R. p. 370). She "just went through the emotions" and tried not to give up. (R. p. 370). Samantha described herself as "frozen in time" and reliving Marlayna's death every day. (R. p. 371). She wanted to sleep all of the time as an "escape" but, every time she woke up, she realized "again and again that I was living my worst nightmare" and her "nightmares were terrible." (R. p. 371). It then "became so difficult to even fall asleep, to lay down and think about what I was going to have to go through in the morning to wake up and have to relive it and relive it. It was like a constant punch in the face." (R. p. 371). She explained "you just don't bury your kids. That's not how it's supposed to be." (R. p. 371). Justin described Samantha as "devastated and someone who had had their world shattered. . . . [S]he was broken." (R. p. 397).

Justin spent about three months in bed, moving from the bedroom to the living room and doing what he "could to survive, just exist." (R. pp. 392-93).

Marlayna's death eventually broke Samantha and Justin's relationship. (R. pp. 375, 398). At first, Samantha said that it brought them closer because "we were the only person that understood what we were going through." (R. p. 375). Then, as they began to cope differently with her death, "it became hard because we couldn't – we couldn't really talk to each other anymore. . . . the connection that we did have through our daughter wasn't there. And it broke us." (R. pp. 375, 378). Justin said the accident "destroyed" their relationship. (R. p. 398).

Marlayna's death also greatly affected Rylan. (R. p. 375). Rylan saw "the whole thing" of her getting hit by the car and dying. (R. p. 375). He was seven years old. (R. p. 384). He began to get into trouble at school, could not control his emotions, and got bad grades. (R. p. 375).

Samantha and Rylan got counseling from Vanessa Lobo within days of the accident. (R. pp. 372, 376). Lobo is a licensed professional counselor who focuses on trauma-based care. (R. pp. 424-27). Samantha saw Lobo the day after Marlayna's death, and Lobo described her as "numb," "detached," and "zombie-like" "but very emotional at the same time," "shaking" and "crying" with "extreme, profound despair." (R. pp. 430-31). Lobo explained that there is a grief and loss from a parent's loss of a child but, in this situation, there is the added trauma of Samantha witnessing Marlayna's "gory" death. (R. pp. 429-30, 432). This caused Samantha to have flashbacks. (R. pp. 431-32). Samantha told Lobo that she needed Justin in her grief but knew he was depressed and suicidal. (R. pp. 433-34). Samantha doubted her ability to ever return to work and could not complete daily tasks such as grocery shopping, driving, and caring for Rylan. (R. p. 435). Lobo found Samantha suffered from depression, hopelessness, sleep issues, lack of energy, lack of motivation, "[e]xtreme shame," survival guilt, and "a lot of what-ifs" such as dwelling on what she could have done differently. (R. 436-37).

Lobo testified that Samantha's relationship with Rylan suffered because she had nothing to give him as a mother in her grief. (R. pp. 435-36). In Lobo's treatment of Rylan, she found he experienced survival guilt for Marlayna's death and because his "whole family is sad." (R. p. 442). Rylan witnessed a "gory, morbid" death and stopped allowing himself to be a kid and withdrew from activities and play. (R. pp. 442-44). He struggled with depression, grief, frustration, anger, impulsivity, and low self-esteem. (R. pp. 444-46).

Lobo testified that Samantha and Rylan need long-term counseling. (R. pp. 439-40, 445).

Justin "tried to self-medicate after the accident because [he] was desperate just to feel anything," and then got rehabilitative services at a local facility for a few months. (R. pp. 393-94). He saw multiple counselors and therapists. (R. p. 394).

Samantha could not work after Marlayna died. (R. p. 377). Some days "were okay" but, on others, "[i]t was like a punch to the stomach." (R. p. 377). Samantha could not breathe and "would shake so bad" and "get angry at people just for no reason." (R. p. 377). She did not return to work for eleven months after Marlayna's death. (R. p. 379).

Justin also never returned to work at the nuclear power plant after Marlayna's death. (R. p. 387). On the night she died, Justin called his supervisor to come and take Justin's guns so he would not shoot himself. (R. p. 393). He was on and off disability and out of work for about three years before he could "be a productive member of society." (R. p. 393).

Samantha began treatment with a doctor for headaches caused by her depression. (R. p. 377). She also experiences stomach aches, shaking, anxiety, panic attacks, loss of appetite, loneliness, and hopelessness. (R. pp. 377-79). She withdrew from society because "it just changes, who I was before the accident and who I am after the accident." (R. p. 379). She has suicidal thoughts of turning into oncoming traffic to not have the pain anymore. (R. pp. 379-80).

Samantha and Rylan eventually moved to Florida because she "couldn't live here [in South Carolina] anymore." (R. pp. 372, 433, 438-39). Lobo treated Samantha and Rylan for eight months until the move. (R. pp. 433, 438-39). Justin lived with them in Florida for a little while until their relationship ended. (R. pp. 397-98). At the damages hearing, Samantha testified that "coming back here [to South Carolina] is almost triggering in itself. It's like it just hits me – hits me all the time of the – the things we would do and the things that I wanted to do and the things that I can't do anymore." (R. pp. 372-73). Rylan continued counseling after the move. (R. p. 376).

Justin moved approximately fifteen times in the years following Marlayna's death. (R. p. 386). At the time of the hearing, Justin lived in Virginia with his girlfriend and infant daughter. (R. p. 385). He works at a resort in security and special services making $24,000 per year—less than half of his salary at the time of Marlayna's death. (R. pp. 386-87). He struggles to pay bills. (R. p. 395). He is still treating at a behavioral health facility and is medicated. (R. p. 396). Justin was diagnosed with post-traumatic stress disorder, severe anxiety, depression, and intermittent explosive disorder. (R. p. 396). He struggles with severe depression, loss of appetite (eating only once a day), sleeplessness, nightmares, loneliness, and withdrawal from society. (R. pp. 400, 402). He avoids building friendships for fear that "they could just be gone in an instant." (R. p. 401). Every few months he goes to the emergency room or calls EMS because he feels like he is having a heart attack, drowning, or dying, along with chest pain, uncontrolled breathing, and numbness. (R. pp. 401-02). With Marlayna, Justin "felt complete," that he finally got a family and everything that he "was looking for in life." (R. p. 402). After her death, Justin "felt like the world was an empty place and there wasn't anything for [him] to move forward for." (R. p. 402).

Samantha tries to keep Marlayna's memory alive. She bought Marlayna gifts for holidays and made a shelf of Marlayna's favorite things. (R. p. 373). But she realizes that, now, Marlayna

would be an older child and "she would have changed." (R. p. 373). "Every day" Samantha thinks about "what [Marlayna] would have been like" now and that she will "never get to see [Marlayna] go to prom" or "see her get married, never meet my grandkids." (R. p. 373). Samantha testified she will feel grief and sorrow "all the rest of [her] life." (R. pp. 373-74).

Samantha's life always centered around family – as a child, her "favorite thing to do was to be around family." (R. p. 376). After Marlayna's death, she gets through holidays and birthdays for Rylan's sake and does her "best not to even acknowledge" Mother's day "because it just doesn't feel right" because Marlayna's "not here." (R. p. 377).

Justin never looked forward to holidays as a child because he "didn't have the greatest upbringing" and lost his grandmother on Thanksgiving. (R. p. 399). When Marlayna was born, that changed and he "finally got to see" why people love holidays and being with family. (R. p. 399). After Marlayna's death, holidays for Justin were "[f]ull of jealousy, envy, rage, sadness," and he "just hated them." (R. p. 399).

II. The Andersons' First Default

On March 17, 2020, Carwile filed a complaint against the Andersons for Marlayna's survival and wrongful death. (R. pp. 96-105). After Carwile properly served the Andersons, they did not file an answer. (R. pp. 107-110). The court entered default on June 15, 2020. (R. pp. 1-2).

The Andersons hired attorney Thurmond Brooker to defend them, and he moved to set aside the entry of default. The Andersons asserted there was good cause because their home owner's insurer at the time of Marlayna's death—Allstate—had denied coverage on the basis that the Andersons did not have a current Allstate policy. The Andersons' current insurer—American Modern Home Insurance Company—denied the claim because the death predated its coverage period. (R. pp. 114-16).

Carwile opposed the motion based on the law that the negligence of an insurance company is imputed to the defaulting litigant, but the lower court granted the motion and set aside the entry of default. (R. pp. 118-25, 3-8). The Andersons then filed an answer generally denying the allegations but asserting no affirmative defenses. (R. pp. 197-98).

III. The Andersons' Second Default

Carwile proceeded with the case by serving discovery requests. When the Andersons did not respond, Carwile filed a motion to compel. (R. pp. 200-02). The court held a hearing, but neither the Andersons nor their counsel appeared. (R. p. 260). Judge Paul M. Burch granted the motion and entered an order compelling the Andersons to respond to discovery, deeming the requests for admission admitted, and awarding fees and costs. (R. pp. 9-11). The Andersons did not move to reconsider or appeal.

When the Andersons still did not respond to the discovery, Carwile filed a motion for sanctions. (R. pp. 259-61). The court held a hearing on the motion, but neither the Andersons nor their counsel appeared. (R. p. 12). On November 17, 2022, the court granted Carwile's motion for sanctions. (R. pp. 12-15). It struck the Andersons' answer and ordered that default be entered upon Carwile's application for it. (R. pp. 12-15). The Andersons did not move to reconsider or appeal.

On November 28, 2022, pursuant to the sanctions order, Carwile filed a motion for entry of default and for a damages hearing. (R. pp. 262-65). On November 29, 2022, the court filed an order for entry of default and to set the case for a damages hearing. (R. pp. 16-17). The Andersons did not move to reconsider or appeal this order.

Carwile then filed a motion for order of reference to a special referee. (R. pp. 266-67). On February 10, 2023, the clerk of court filed an Order of Reference to Special Referee under Rule 53, SCRCP. (R. pp. 18-20). The Andersons did not move to reconsider or appeal this order.

Carwile then filed a motion for a damages hearing and default judgment, and gave notice to the Andersons' counsel of a hearing on April 13, 2023. (R. pp. 268-71). The day before the hearing, new counsel for the Andersons hired by Allstate filed with the Special Referee a motion to set aside the entry of default. (R. pp. 272-74). The motion did not contest the Special Referee's authority or jurisdiction. Instead, it asked the Special Referee to act. The motion stated that Allstate hired counsel and filed the motion only after it received a subpoena from Carwile's counsel for policy documents. (R. pp. 272-73). Allstate claimed the subpoena was the first notice it received about the case since Mr. Brooker began representing the Andersons. (R. pp. 273, 406-07). The Andersons did not include any new supporting documentation for the motion but, instead, referenced an August 3, 2020, affidavit of Mrs. Anderson that had been filed with the motion for relief from the first entry of default. (R. pp. 272-73, 406-07). The motion provided no explanation for the failure to respond to discovery or appear at motions hearings. (R. pp. 272-73, 406-07).

On April 13, 2023, the Special Referee held a hearing and explained it would proceed with the damages hearing (since Marlayna's parents had traveled from out of town) and the motion to set aside the default. (R. p. 347). Counsel for all parties consented to this procedure. (R. pp. 347-48). Carwile withdrew the claims for survival, negligent infliction of emotional distress, and punitive damages. (R. pp. 348-49, 403). She proceeded on the wrongful death claim. (R. p. 403).

Carwile entered into evidence the deposition of Vanessa Lobo, a licensed professional counselor, and family photos. At the hearing, over five years after Marlayna's death, Samantha and Justin testified live before the Special Referee. The depth of their love for Marlayna and their suffering over her loss is raw and palpable in the transcript pages. Counsel for the Andersons cross-examined Samantha, asking her only a few questions about the accident and nothing about damages. (R. pp. 382-84). Counsel chose not to cross-examine Justin. (R. p. 403).

IV. The Special Referee's denial of the motion to set aside the entry of default; entry of default judgment

After the damages hearing, the Special Referee heard the Andersons' motion to set aside the entry of default. (R. p. 405). Again, counsel for the Andersons consented to having this motion heard after the damages hearing. The basis for the motion is Allstate's claim that it did not receive notice of the lawsuit until the end of March 2023, *i.e.*, that the Andersons had not provided notice when they were served. (R. p. 406). Allstate presented no evidence of that claim—only argument of counsel. The only evidence is from the Andersons—who filed an affidavit three years earlier stating they notified Allstate and were told there was no coverage. (R. pp. 408, 136-39).

Carwile argued that Rule 55(c), SCRCP, is not the correct procedure to challenge default because this is a default due to a sanctions order and, regardless, the negligence of an attorney or insurance agent is imputed to the defendant and is not good cause. (R. pp. 410-11). Carwile argued, under the proper Rule 37, SCRCP, analysis, the Andersons never filed a motion to reconsider the sanctions order or appealed it, making it the law of the case. (R. p. 412).

The Special Referee noted that the only affidavit before it on the Andersons' argument was the same affidavit relied upon by the court to set aside the first default. (R. p. 413).

On May 23, 2023, the Special Referee filed an order denying the motion for relief from entry of default on four independent grounds. (R. pp. 30-35). First, he found the Andersons "failed to set forth a satisfactory explanation for the default" because they took inconsistent positions. (R. p. 33). To get out of the first default, the Andersons represented to the court that they put Allstate on notice of the lawsuit in April 2020 after service but, to get out of this second default, the Andersons (now with counsel hired by Allstate) represent that Allstate did not have notice until March 2023. (R. p. 33). Relying on judicial estoppel, the Special Referee found the Andersons cannot "maintain these inconsistent positions." (R. pp. 33-34). Second, the Special Referee found

the negligence of the Andersons' counsel that led to the sanctions order is not good cause because the negligence of an attorney is imputed to the party. (R. p. 34). Third, according to Mrs. Anderson's affidavit, they hired Mr. Brooker only after Allstate failed to defend, and the negligence of an insurer is imputed to the defaulting party. (R. p. 34). Fourth, a motion for relief from entry of default is not proper procedure for relief from a default based on a sanctions order and the Andersons did not file a Rule 59(e) motion or appeal the sanctions order. (R. pp. 34-35).

The Special Referee also filed an Order of Default Judgment on May 23, 2023. (R. pp. 21-29). He found "the testimony of both parents to have been extremely credible" and found their "pain and grief . . . visible." (R. p. 23). The order notes the extreme loss, breakup of the family, moves to new states, and profound daily suffering of Samantha and Justin. The Special Referee found that, although "Rylan is not a statutory beneficiary, . . . the effects of his sister's death on him directly affect Ms. Carwile and compound her own" anguish. (R. p. 25). Samantha and Justin both lost significant time at work, and Samantha, Rylan, and Justin require long-term counseling. (R. 26-29). Noting that the purpose of actual damages is to restore an injured party to the same position as before the wrongful death, the Special Referee entered judgment in the amount of $30 million, which included $15 million to Samantha and $15 million to Justin. (R. p. 29).

V. The Andersons' post-judgment motions; untimely attack of the sanctions order; and untimely challenge to the order of reference

On June 2, 2023, the Andersons filed two motions—a motion to reconsider the order denying motion to set aside the entry of default and a motion to reconsider or for a new trial as to the order of default judgment. (R. pp. 275-81).

As to both orders, the Andersons argued for the first time that the Special Referee "did not have authority and/or jurisdiction" to rule on the Rule 55 motion that they filed with him because

the judge who granted the sanctions must rule on it. (R. pp. 275, 279). As to the entry of default, they also challenged the Special Referee's bases for the ruling. (R. pp. 279-81).

As to the default judgment, the Andersons argued the amount of the award is against the weight of the evidence, grossly excessive, and outside of a reasonable range of recovery allowed for the wrongful death of a child. (R. pp. 276-77). They argued certain types of damages are not recoverable although they did not object to any evidence at the damages hearing. (R. pp. 277-78). Carwile filed memoranda in opposition to both motions. (R. pp. 286-319).

On June 22, 2023, while those motions were pending, the Andersons filed a Notice of Appeal of five orders: (1) May 23, 2023 Order of default judgment, (2) May 23, 2023 Order denying Defendants' Rule 55 motion to set aside entry of default, (3) February 10, 2023 Order of referral to special referee, (4) November 29, 2022 Order for entry of default, and (5) November 17, 2022 Order granting sanctions. (R. pp. 733-34). Carwile filed a motion to dismiss the appeal as premature. On July 17, 2023, this Court held the appeal in abeyance and remanded the case to the Special Referee to rule on the post-trial motions. (R. p. 742).

The Special Referee then held a hearing on the motions on September 15, 2023. (R. p. 478). For the first time in this case, the Andersons argued that the order of reference to the Special Referee is void because it was signed by a clerk of court and not a circuit court judge. (R. pp. 483-89). Notably, the Andersons' counsel specified that the argument "doesn't have anything to do with subject matter jurisdiction" but is about "the third prong of jurisdiction," which he described as "the court's ability to grant the relief that a party is seeking." (R. p. 484). In addition to the arguments made in their motion, the Andersons argued (for the first time in their reply memorandum) that Mr. Brooker's negligence in handling their defense was actually "abandonment" that is subject to "a different [and higher] standard" for default. (R. p. 494). The

Andersons also directly challenged the sanctions order, which was entered 13 months earlier and as to which they did not file a motion to reconsider or an appeal. (R. pp. 496-97).

VI. The Special Referee's general denial of the Andersons' motions

On November 2, 2023, the Special Referee filed an Order denying the Andersons' motion to reconsider the denial of relief from entry of default, and granting in part and denying in part the motion to reconsider and for a new trial as to the default judgment. (R. pp. 55-94).

Denial of the motion for relief from entry of default

The Special Referee found he had authority to hear the case based on the unappealed Order of Reference. (R. p. 60). He found the clerk of court properly and with authority signed the order of reference under Rule 53(b), SCRCP. (R. pp. 61-64). The Special Referee held the Andersons' challenge to his authority is waivable, they waived it by failing to raise it until the hearing on post-trial motions, and the order of reference was immediately appealable and is now the law of the case. (R. pp. 64-67).

The Special Referee found that a Rule 55 motion was not the proper procedure for the Andersons to challenge the entry of default because the default was based on a Rule 37 sanctions order. (R. p. 67). Even if procedurally proper, the Special Referee denied the motion because they failed to set forth a satisfactory explanation for default and are judicially estopped from taking inconsistent positions on notice to Allstate. (R. pp. 67-69). The Special Referee rejected the Andersons' new argument that Mr. Brooker's conduct is abandonment because there is not evidence to support it and, in defense of the professional negligence claim against him, Mr. Brooker alleges the Andersons contributed to this situation by failing to keep contact with him, cooperate, or follow his advice. (R. pp. 70-71).

Denial in part and grant in part of motion to reconsider Order of Judgment

The Special Referee found he properly considered evidence of the parents' lost wages and diminished earning capacity, the deterioration of their relationship, their emotional trauma from seeing Marlayna at the scene, and the impact on Rylan and his need for future counseling. (R. pp. 72-84). He found this evidence directly relevant to the depth and duration of the parents' grief and sorrow, and it helped him understand the impact of that grief on their lives.

The Special Referee issued an Amended Order of Default Judgment and specified that he did not award an amount of damages for any lost wages or diminished earning capacity but, "instead," considered those as "evidence of the duration and intensity of the extreme non-pecuniary damages the statutory beneficiaries have suffered." (R. pp. 51-52). The Special Referee maintained the award of $30,000,000.00, specifying it is to be split evenly between Samantha and Justin. (R. 37, 54).

The Special Referee denied the Andersons' motion for a new trial absolute. The damages evidence "substantially overcame the preponderance of the evidence burden" and Samantha and Justin's testimony of suffering "was unfeigned, unvarnished, and unadulterated." (R. p. 85). Finally, the Special Referee found the award is not grossly excessive based on the Andersons' comparable verdict argument and is not unduly liberal. (R. pp. 85-94).

STANDARD OF REVIEW

The standard of review is stated within the argument section for each issue.

ARGUMENT

At every step of this case, Carwile has complied with the rules to pursue the action. Each time, the Andersons have failed to respond. The Special Referee went to great lengths to fully explain his rulings and reasoning for the amount awarded. A cold reading of the damages hearing

transcript is itself moving, but the Referee heard Samantha and Justin's voices and saw their faces as they relived Marlayna's death and their constant sufferings. Their suffering is unique to Marlayna's life, their family unit, and their loss and grieving. It supports a $30 million award.

The objective of the Andersons' appeal is to void the order of reference **and** to be able to challenge the sanctions order because, without both of those things, the law of the case is that the Andersons' answer is "stricken from the record." (R. p. 13). With this goal in mind, it is apparent why and how they have crafted the arguments now presented to this court—many of which are untimely, unpreserved, and waived.

Through no fault of her own, Carwile has suffered through three years of the Andersons' failures to respond to this lawsuit, even after being let out of default and being given chances to respond to discovery and appear at hearings. With whom the fault lies among the Andersons, Allstate, and Mr. Brooker is not the concern of this case. The point is that Carwile has done everything possible to try to litigate this case. Now, after years of failures, the Andersons make untimely and legally unsupported jurisdictional and procedural arguments.

The Special Referee and Clerk of Court followed proper procedures in this case, and all of the orders are valid. The orders are also fully supported by the law and evidence, and this Court should affirm them and remand for enforcement of the judgment.

I. <u>The Sanctions Order and Order of Reference are the unappealable law of the case.</u>

The Court should dismiss the Andersons' appeal of the Sanctions Order and the Order of Reference as untimely because they were required to immediately appeal both orders.

On November 17, 2022, Judge Burch entered the Sanctions Order. (R. pp. 12-15). It ordered the Andersons' "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." (R. p. 13). The court entered the corresponding Order for Entry

of Default on November 29, 2022. The Andersons did not file a motion to reconsider or immediately appeal either of these orders, which should be construed together as effectively a single order. An immediate appeal was mandatory under S.C. Code Ann. § 14-3-330(2)(a) and (c).

The entry of default under Rule 37 resulted in the Andersons' waiver of their right to a jury trial under Rule 38(d), SCRCP. *Gossett v. Gilliam*, 317 S.C. 82, 87, 452 S.E.2d 6, 9 (Ct. App. 1994) ("Where a party is in default, the right to a jury trial is waived pursuant to Rule 38(d), SCRCP."). Because this affected the mode of trial, they were required to immediately appeal. As this Court held, "[o]rders affecting the mode of trial affect substantial rights protected by statute and must, therefore, be immediately appealed." *Satcher v. Satcher*, 351 S.C. 477, 490, 570 S.E.2d 535, 542 (Ct. App. 2002). "[A]n interlocutory order that falls within the purview of § 14-3-330(2)(a) must be immediately appealed if it is to be considered at all, and [] there is no review available after final judgment." *Neeltec Enters. v. Long*, 397 S.C. 563, 567, 725 S.E.2d 926, 928 (2012). Here, because the Sanctions Order and Order for Entry of Default had the effect of eliminating the right to a jury trial, the Andersons were required to immediately appeal both orders.

Likewise, the Order of Reference was entered on February 10, 2023, and referred the case to the Special Referee for a damages hearing. (R. pp. 18-20). Under Rule 53(c), SCRCP, "[o]nce referred, the master or special referee shall exercise all power and authority which a circuit judge sitting **without a jury** would have in a similar matter." (emphasis added). This falls under § 14-3-330(2) and necessarily affects the mode of trial. As such, the order must be immediately appealed. *Edwards v. Timmons*, 297 S.C. 314, 316, 377 S.E.2d 97, 97 (1988) ("Seller did not appeal the order of reference which is therefore the law of the case."); *Creed v. Stokes*, 285 S.C. 542, 543, 331 S.E.2d 351, 352 (1985) (holding "[t]he order [of reference to a master] was not

interlocutory, and should have been appealed immediately because it affected the mode of trial, a substantial right," and citing S.C. Code Ann. § 14-3-330(2)).

The Andersons argue that, because they do not challenge "the order of reference as abridging their right to a jury trial," it does not affect the mode of trial. (Br. of App. p. 19). The Andersons cannot manipulate appealability by how they frame a challenge to an order. The relevant point is the effect of the order. *See Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 303, 705 S.E.2d 475, 478 (Ct. App. 2011) (stating "a narrow construction of section 14-3-330(2)(c) requires us to focus on the effect of the order, not the label given to the motion or to the order granting it"). The effect of the Order of Reference is to remove the case from a jury.

Finally, *Link v. School Dist. of Pickens Cnty.*, 302 S.C. 1, 393 S.E.2d 176 (1990), does not support the Andersons' argument that they could wait to appeal. *Link* involved an order granting summary judgment on one but not all claims before a trial. *Id.* at 3, 393 S.E.2d at 177. This case involves an order of reference. The effects of those orders are wholly different.

Because the Andersons did not file an appeal within thirty days of the orders, their appeal is untimely, this Court lacks jurisdiction, and it must dismiss the appeal as to the orders.

II. The Andersons waived any challenge to the Special Referee's authority by specifically invoking it and failing to timely object.

Even if the Andersons' appeal of the Order of Reference is viewed as timely, the Special Referee correctly ruled the Andersons waived any challenge to the order by specifically invoking the Referee's authority and failing to object at the damages and motion hearing. (R. pp. 64-67).

The Andersons waived a challenge to the Special Referee's authority first by failing to appeal the Order of Reference, second by invoking his authority when they filed a motion to set aside default with him, and third by failing to object to the Special Referee's authority at the damages hearing. During each of these times, the Andersons were represented by counsel.

The Andersons argue their appellate argument may be raised at any time because it challenges jurisdiction, citing to law that subject matter jurisdiction may be raised at any time. (Br. of App. pp. 16-17). The Andersons are conflating actual subject matter jurisdiction—which they do not challenge—and "jurisdictional authority, as in the power to rule," citing to *Limehouse v. Hulsey*, 404 S.C. 93, 744 S.E.2d 566 (2013). (Br. of App. p. 17; R. p. 484). *Limehouse* merely explains that "jurisdiction is composed of three elements: (1) personal jurisdiction; (2) subject matter jurisdiction; and (3) the court's power to render the particular judgment requested." *Id.* at 104, 744 S.E.2d at 572 (internal quotation and alteration marks omitted). "'Power' refers to the court's ability, when it has subject matter jurisdiction, to grant equitable and legal relief to a party." *Id.* at 106, 744 S.E.2d at 573 (internal quotation marks omitted).

The Circuit Court doubtless had subject matter jurisdiction over this personal injury action and personal jurisdiction over the parties. The Andersons do not suggest otherwise. The Circuit Court also had the third prong of jurisdiction, as it undoubtedly had the power to enter a monetary judgment against the Andersons. Of course, a special referee acts in the shoes of the Circuit Court and has the same subject matter jurisdiction as the Circuit Court and the same power of the court to enter a monetary judgment in a personal injury action.

The Circuit Court's referral of the case to a master-in-equity or special referee, as contemplated and authorized in Rule 53, does not implicate "the court's power to render the particular judgment requested" or "the court's ability, when it has subject matter jurisdiction, to grant equitable and legal relief to a party." An order of reference is not a "judgment." It is not "equitable or legal relief to a party." It is simply a procedural mechanism to appoint a master or referee to serve in the role of trial judge in a particular case. That by no means implicates the

Circuit Court's jurisdiction of any type, whether the order of reference is signed by a judge or the clerk on behalf of the Circuit Court.

In *Limehouse*, the state court's "power" jurisdiction was implicated because only one court—the federal court—had the power to act once the case had been removed and not fully remanded. 404 S.C. at 109-10, 744 S.E.2d at 575. Here, there is no struggle over which court had the power to act. A special referee is the Circuit Court. *Limehouse* simply does not apply.

Even if "power" jurisdiction were implicated, it would not mean that the Andersons can object to the Order of Reference at any time. That the power to render a particular judgment is part of a court's "jurisdiction" does not equate it to subject matter jurisdiction for purposes of waiver and issue preservation. On the contrary, just like a challenge to personal jurisdiction may be waived, so too can an objection to the court's power to enter a particular judgment. *See Wellin v. Wellin*, 427 S.C. 15, 24-25, 828 S.E.2d 767, 772 (Ct. App. 2019) ("A defendant may waive any complaints he may have regarding personal jurisdiction by failing to object to the lack of personal jurisdiction and by appearing to defend his case."); *Coon v. Coon*, 364 S.C. 563, 566-69, 614 S.E.2d 616, 617-18 (2005) (distinguishing between "subject matter jurisdiction" and a court's "authority" to grant particular relief and concluding that a judgment entered without subject matter jurisdiction is void but a judgment entered without authority is not void).

The Andersons cite to *Chabek v. Nationwide Mut. Fire Ins. Co.*, 303 S.C. 26, 397 S.E. 786 (Ct. App. 1990). (Br. of App. p. 17). The Chabeks filed a bad faith action, the case was referred to the master, and they later filed a separate action to reform the policy that the master then also ruled upon. 303 S.C. at 27, 397 S.E.2d at 787. This Court held "the master lacked **subject matter jurisdiction**" on the reformation action because "[u]ntil an action is commenced, . . . there is

nothing to refer." *Id.* at 27-28, 397 S.E.2d at 787 (emphasis added). Because *Chabek* did not involve the court's authority to render a judgment, it does not support the Andersons' argument.

Because the Andersons' challenge to the Order of Reference is not jurisdictional, they were required to raise it prior to a post-trial motion hearing. Since they failed to timely object, the Court should affirm the Special Referee's holding that the Andersons waived a challenge to his authority.

III. The Clerk of Court properly entered the Order of Reference and conferred authority to the Special Referee to rule on all matters related to this action.

Even if timely appealed and not waived, the Anderson's challenge to the Order of Reference is legally incorrect. The Clerk of Court, empowered by statutes and rules of civil procedure, properly signed the Order of Reference in this case. It is long-standing, decades-old practice throughout South Carolina for a Clerk of Court to sign an order of reference to a special referee. This Court should affirm the validity of the Order of Reference and the Special Referee's subsequently-issued orders in this case because the Clerk of Court may sign an order of reference to a special referee when a defendant is in default, with or without that defendant's consent.

While subject matter jurisdiction is not at issue in this appeal, Respondent agrees that the Court's review of jurisdiction in this case is a question of law to which a de novo standard applies. *Deborah Dereede Living Tr. v. Karp*, 427 S.C. 336, 346, 831 S.E.2d 435, 441 (Ct. App. 2019).

A. Rule 53, SCRCP, expressly allows a Clerk of Court to refer a case in default to a Special Referee without a defendant's consent.

"In an action where the parties consent, **in a default case**, **or** an action for foreclosure, some or all of the 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). Under Rule 53(b), there are three situations when a clerk of court may refer a case to a special referee—with consent, in default, or in a foreclosure. The rule does not require a defaulting party's consent for referral by a clerk of court. On the contrary, the Notes to Rule 53 expressly state "the authority of the clerk

of court to issue orders of reference in default cases **and** where all the parties consent." Rule 53, SCRCP (notes to 1994 Amendment) (emphasis added). This is consistent with the plain language of the rule and with the Judicial Department[2] and Clerks of Court's decades-long interpretation and application of Rule 53. This Court should apply the plain language of Rule 53(b) and affirm the validity of the Order of Reference.

B. The Supreme Court already ruled that consent is not required.

In *Roche v. Young Brothers*, 332 S.C. 75, 504 S.E.2d 311 (1998), the Supreme Court ruled that consent is not required to refer an action in default to a special referee. The Special Referee cited to *Roche* as support for finding the order of reference valid, and this Court should do the same. (R. pp. 61-63).

Roche was a second appeal in a default case. The defendants failed to answer, went into default, and, without notice to them, the circuit court held a damages hearing and entered judgment. 332 S.C. at 78-79, 504 S.E.2d at 312. After the circuit court denied their Rule 60(b), SCRCP, motion to set aside the judgment, the defendants appealed. *Id.* at 79, 504 S.E.2d at 312. The Supreme Court upheld the entry of default but vacated the judgment and awarded a new damages hearing because of the failure to give the defendants notice of the hearing. *Id.*

On remand, the plaintiff filed an *ex parte* motion for referral to a special referee, and the circuit court granted the motion. *Id.* On appeal after entry of a judgment by the special referee, the Court of Appeals held that "when there is a defaulting party who has made an appearance before the court, the plain language of Rule 53(a), SCRCP, requires agreement between the parties

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[2] The South Carolina Judicial Department's clerk of court manual states that "**in a default case** . . . some or all of the 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**." https://www.sccourts.org/clerkOfCourtManual/displaychapter.cfm?chapter=6#6.4.5, § 6.4.5. (emphasis added).

as to the identity of the special referee." *Roche v. Young Bros.*, 326 S.C. 488, 492, 485 S.E.2d 110, 112 (Ct. App. 1997), *rev'd by Roche*, 332 S.C. 75, 504 S.E.2d 311.

The Supreme Court reversed. It began by addressing S.C. Code Ann. § 14-11-60, which states, in part, that "[i]n case of a vacancy in the office of master-in-equity 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." § 14-11-60 (emphasis added). The Court then compared § 14-11-60 to the language in Rule 53(a) referring to the special master as "a person agreed upon by the parties" and in Rule 53(b) which allows "a judge or the clerk of court" to refer a case "where the parties consent **or** in a default case." *Roche*, 332 S.C. at 80-81, 504 S.E.2d at 313-14 (citing Rule 53(a)-(b), SCRCP) (original emphasis omitted, emphasis added). The Court then identified the "problem:" "Section 14-11-60 and 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." *Id.* at 81, 504 S.E.2d at 314.

Relying on principles of statutory interpretation and the fact that a defaulting party's consent is generally not required in numerous procedural scenarios, the Court held that "although section 14-11-60 and Rule 53(a) do not specifically address default situations, it would be anomalous to interpret these provisions as requiring the consent of a defaulting party whenever the circuit court chose to refer the case to a special referee." 332 S.C. at 82, 504 S.E.2d at 314. The Court affirmed the referral without the defendant's consent. *Id.* at 83, 504 S.E.2d at 315.

The same result is warranted in this case. The Andersons' consent was not required for the clerk of court to refer the case to a special referee because they were in default. The referral was proper, and this Court should affirm.

It is notable that, since the *Roche* decision, an amendment to Rule 53(a) was submitted "to the Judiciary Committee of each House of the General Assembly" pursuant to S.C. Const. Ann. Art. V, § 4A, and the General Assembly did not disapprove of the amendment that left intact Rule 53(b)'s express statement of the clerk of court's authority to refer a default case to a special referee without consent. *See Williams v. Gov't Emples. Ins. Co.*, 409 S.C. 586, 602, 762 S.E.2d 705, 714 (2014) ("The General Assembly is presumed to know the law . . . .").

The Andersons attempt to distinguish *Roche* by arguing that it involved an order of reference signed by a circuit court judge and this case involves an order signed by a clerk of court. (Br. of App. pp. 12-13). This is a distinction without a practical difference and is too narrow of a reading of *Roche*. The *Roche* Court never indicated an intention to limit its holding to only orders of reference signed by a judge. The Andersons' argument is outcome-oriented—they want to change decades of practice and procedure throughout the state and burden circuit court judges just to get a favorable outcome in their single case.

Their argument is also impracticable. In the majority of default situations, a plaintiff cannot get a defendant to respond to any communication, so there is no way to get consent to a referral by a clerk. It would create an immense burden (or impossibility) on the plaintiff to require he or she to get the consent of a party who has made no appearance in the action before the case could be referred by a clerk of court. The result would be that a circuit court judge would be forced to assume the work of ruling on every motion for an order of reference in default cases.[3] A basis for the *Roche* Court's ruling is that consent is generally not required from a defendant in default. That reasoning does not change simply because the referral is made by a clerk rather than a judge.

[3] The backlog of cases in South Carolina is documented and could be worsened by the practical effect of the Andersons' arguments. *See* https://www.sccourts.org /2021AnnualReport.pdf.

C. Rule 53, SCRCP, does not conflict with any statutory provisions.

Given the plain language of Rule 53(b) and *Roche*, the Andersons argue that the Rule is overridden by two statutes. A review of the statutes shows that there is no conflict between them and Rule 53. The Court reviews "questions of statutory interpretation de novo." *Books-A-Million, Inc. v. S.C. Dep't of Revenue*, 437 S.C. 640, 642, 880 S.E.2d 476, 477 (2022).

The two statutes that supposedly conflict with Rule 53(b) are S.C. Code Ann. § 14-11-60 and § 14-17-250. "Words in a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's application." *Epstein v. Coastal Timber Co.*, 393 S.C. 276, 285, 711 S.E.2d 912, 917 (2011). Using the plain and ordinary meaning of § 14-11-60 and § 14-17-250, neither statute applies to this case.

Rule 53(a), SCRCP, defines a "special referee" as "a member of the South Carolina Bar to whom a matter has been referred under S.C. Code Ann. § 14-11-60." Section 14-11-60 states:

> In case of a vacancy in the office of master-in-equity 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 of a master-in-equity.

S.C. Code Ann. § 14-11-60. This statute does not apply to this action because it was filed in Darlington County, which does not have a master in equity.[4] There is not a "vacancy" because there is no "office of master-in-equity" in the first place.[5] Based on its limited application, § 14-11-60 does not conflict with Rule 53(b). Further, the Judiciary Committee knew the language of § 14-11-60 (last amended 1989) when it reviewed and did not disapprove the language of Rule

[4] A search of Darlington County on https://www.sccourts.org/countyLookup.cfm states "There is no Master-In-Equity for this county."

[5] *Roche* was filed in Florence County, which does have a Master in Equity. https://www.sccourts.org/mastersCourt/mastersMap.cfm

53(b) in 1999 that expressly states a clerk may refer a case in default with no consent requirement. S.C. Const. Ann. Art. V, § 4A; *Williams v. Gov't Emples. Ins. Co.*, 409 S.C. 586, 602, 762 S.E.2d 705, 714 (2014) ("The General Assembly is presumed to know the law . . . .").

Section 14-17-250 states in part:

> The clerk of any county in which the office of master does not exist may, by consent of parties, sign orders of reference **in vacation** and may also, upon proper proceedings filed, grant orders for the partition of real or personal estate and for the admeasurement of dower in cases where the right of partition or dower is not contested or the same has been ascertained by a decree of the court.

S.C. Code Ann. § 14-17-250 (emphasis added). This section applies to "orders of reference in vacation." The phrase "in vacation" means the time between the end of one term of court and the beginning of another.[6] Based on its purpose, § 14-17-250 also does not conflict with Rule 53(b). *See Roche*, 332 S.C. at 81, 504 S.E.2d at 314 (stating "statutes are to be construed with reference to the whole system of law of which they form a part").

"Statutory language must be read in a sense that harmonizes with its subject matter and accords with its general purpose." *Epstein v. Coastal Timber Co.*, 393 S.C. 276, 285, 711 S.E.2d 912, 917 (2011). Rule 53 can be read in harmony with §§ 14-11-60 and 14-17-250. Rule 53 does not "expand the powers granted to the clerk" by statute. (Br. of App. p. 14). Rather, it works in

[6] *See, e.g.*, the use of "in vacation" in other statutes: S.C. Code Ann. § 15-43-30 ("In such action the court or the judge **in vacation** shall . . . allow a temporary writ of injunction . . . ." (emphasis added)); S.C. Code Ann. § 15-43-70 ("In case of the violation of any injunction . . . the court or, **in vacation**, a judge thereof may summarily try and punish the offender." (emphasis added)); S.C. Code Ann. § 15-43-110 (referring to filing a bond for "the full value of the property, to be ascertained by the court or, **in vacation**, by the county auditor's records" (emphasis added); S.C. Code Ann. § 29-5-140 ("The petition may be filed in term or in the clerk's office **in vacation** . . . ." (emphasis added)); S.C. Code Ann. § 15-78-180 (stating "the Office of Regulatory Staff shall make application to a circuit court or a judge thereof **in vacation** for an injunction . . . " (emphasis added)); S.C. Code Ann. § 58-17-650 (stating a stockholder who refuses to convert his stock may "apply, by petition, to the court of common pleas of the county in which the chief office of the company may be kept or to a judge of such court **in vacation**" (emphasis added)).

tandem with them and consistent with the common law that a defaulting defendant party's consent is not required. *Roche*, 332 S.C. at 82, 504 S.E.2d at 314.

Even though there is no conflict, Carwile addresses the Andersons' argument that "differences between" and the "roles of" a judge and clerk of court support their interpretation of the statutes. (Br. of App. pp. 14-16). They argue that, because the only qualification of a special referee is that he or she be a member of the South Carolina bar, a judge—elected by the General Assembly—should choose that person instead of a clerk—popularly elected with no need for legal training. (Br. of App. pp. 14-16). The crux of their complaint is that a clerk of court appointed a special referee who "imposed" a "judgment of $30 million." (Br. of App. p. 16). The amount of the judgment has nothing to do with the validity of the appointment. A clerk of court, who manages sophisticated and complicated court dockets, is just as capable as a judge is to select a licensed bar member to serve as a special referee. The varying legal background between a judge and a clerk of court cannot form the basis of statutory or rule interpretation.

Finding a conflict as the Andersons argue would upend decades of referral practice across the state and require a circuit court judge to address practically every default referral—wasting already limited time and resources. This could not be the General Assembly's intention. "All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute." *Allen v. S.C. Pub. Emple. Benefit Auth.*, 411 S.C. 611, 616, 769 S.E.2d 666, 669 (2015). Sections 14-11-60 and 14-17-250 address specific situations separate from the general application of Rule 53(b), and the General Assembly has allowed them to co-exist for decades. There is no basis to vacate the Order of Reference, which was properly

entered by the Clerk of Court in this default case. This Court should affirm the Special Referee's finding that the Order of Reference properly conferred authority in this case.

IV. The Special Referee had authority to rule on the Rule 55, SCRCP, motion to set aside default.

As their last effort to challenge the Special Referee's authority, the Andersons argue that he could not rule on their Rule 55 motion to set aside the default entered under the Rule 37 sanctions order because Judge Burch entered the sanctions order and one judge may not overrule another. (Br. of App. pp. 19-21). Not only is this argument waived since the Andersons did not raise it until they filed post-trial motions, but also the argument is meritless.

The Andersons cite to the unpublished Court of Appeals' decision in *Ralphs v. Trexler*, 2005-UP-219 (Ct. App. March 24, 2005).[7] *Ralphs* is not applicable. In *Ralphs*, the circuit judge entered a sanctions order placing the defendant in default for failing three times to attend his deposition. The defendant filed Rule 59 and 60 motions, and the judge denied the Rule 59 motion. A master heard the Rule 60 motion and held he could not overrule the decision of another judge. 2005-UP-219, at *1. This Court held the master correctly ruled he did not have authority to determine whether the circuit judge erred in entering default as a sanction. *Id.* at *3.

Unlike in *Ralphs*, the Andersons' Rule 55 motion did not ask the Special Referee to overrule or even address the merits of the Sanctions Order. Instead, they only argued lack of notice and a meritorious defense. *See* R. pp. 406-08, 272-73. Because they made no argument to overturn the merits of the sanctions order, *Ralphs* is inapplicable for the point the Andersons argue.

[7] This unpublished decision has no precedential value and cannot be cited in this case. Rule 268(d)(2), SCACR ("Memorandum opinions and unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved."); *Bell v. Bentley*, 438 S.C. 619, 885 S.E.2d 409, 413 (Ct. App. 2023) ("As to the circuit court's reliance on *Pressley*, this is an unpublished decision and therefore has no precedential value.").

However, to the extent *Ralphs* may be cited, it supports Carwile's argument that the Andersons' appeal of the Sanctions order is untimely. This Court held in *Ralphs* that a Rule 60 motion was an improper way to seek relief from the sanction order by collateral attack and that the defendant should have timely appealed from the denial of his Rule 50 motion. *Id.* at *2. For that reason, and those stated above in Argument I., the Special Referee properly held that the law of the case prevented the Andersons from challenging the sanctions order. *Contra* Br. of App. p. 20. The order was immediately appealable and such an appeal was mandatory. *Supra* Argument I.

V. The Special Referee correctly held a Rule 55, SCRCP, motion was an improper procedure to challenge a Sanctions Order.

The Special Referee held that the correct way to challenge the Sanctions Order was to file a Rule 59(e), SCRCP, motion and not a Rule 55(c) motion. (R. p. 67). The law supports this ruling, and it is an independent basis to deny the appeal of the Sanctions Order.

The Sanctions Order was entered on November 17, 2022, striking the Andersons' answer. (R. pp. 12-15). On April 12, 2023, the Andersons filed a motion to set aside the default. (R. pp. 272-73). By that time, the Sanctions Order was already the final, unappealed order and is the law of the case. *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) ("An unappealed ruling is the law of the case and requires affirmance."). The Sanctions Order leaves no legal avenue for the Andersons to file an answer. The only relief provided by Rule 55 is to "set aside an entry of default." Rule 55(c), SCRCP. Even if the Special Referee granted it, the Andersons would still have a stricken answer under the Sanctions Order. The Special Referee correctly held that a Rule 55 motion cannot afford the relief sought in this particular situation.

The Andersons' explanation for why they filed a Rule 55 motion is that, when anyone thought to review the Sanctions Order, "it was already too late to make a Rule 59(e) motion since

more than 10 days had passed." (Br. of App. p. 26). That they missed the applicable deadline for review does not invoke Rule 55 as a proper remedy.

Ralphs is the only authority the Andersons cite. As explained above, it does not support their position but, instead, supports Carwile's position that they cannot collaterally attack the Sanctions Order under the guise of Rule 55. (Br. of App. p. 25). The Andersons did not ask the Special Referee to overrule the Sanctions Order based on the conduct underlying the order. They merely argued good cause for **not filing an answer** and a meritorious defense. Neither of those bases could undo that their answer is stricken for failure to **comply with a court order** compelling them to respond to discovery.

The Andersons attack the Special Referee's citations to *Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.*, 334 S.C. 193, 511 S.E.2d 716 (Ct. App. 1999), and *QZO, Inc. v. Moyer*, 358 S.C. 246, 594 S.E.2d 541 (Ct. App. 2004). (Br. of App. pp. 24-25). They miss the point that the Special Referee cited those cases for the proposition that the sanctions were within the trial court's discretion and a proper review of the order would be through a Rule 59(e) motion. Notably, the Andersons cite no authority allowing a defendant to circumvent a final sanctions order striking their answer by challenging an entry of default based on that final order.

This Court should affirm the Special Referee's finding that a Rule 55 motion was a procedurally improper way to attempt to challenge the Sanctions Order.

VI. Even if timely appealed and properly challenged, the Sanctions Order is supported by the law and evidence.

To address the merits of the Sanctions Order, the Court must first find the Andersons' appeal is timely and the challenge is procedurally proper. Even if the Court finds these things, it should still affirm the Sanctions Order as a proper exercise of Judge Burch's discretion. The

Andersons do not contest that some sanction is warranted—they simply challenge the specific sanction given. (Br. of App. p. 24).

"The imposition of sanctions is generally entrusted to the sound discretion of the trial judge." *Barnette v. Adams Bros. Logging, Inc.*, 355 S.C. 588, 593, 586 S.E.2d 572, 575 (2003). "A trial judge's exercise of his discretionary powers with respect to sanctions imposed in discovery matters will not be disturbed on appeal absent a clear abuse of discretion." *Id.* at 593, 586 S.E.2d at 575. "The burden is on the party appealing from the order to demonstrate the trial court abused its discretion." *Id.* "An abuse of discretion may be found where the appellant shows that the conclusion reached by the trial court was without reasonable factual support and resulted in prejudice to the rights of appellant, thereby amounting to an error of law." *Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.*, 334 S.C. 193, 198, 511 S.E.2d 716, 718 (Ct. App. 1999). The Andersons do not meet their burden to show a clear abuse of discretion.

When a party fails to comply with a court order, the judge "may make such orders in regard to the failure as are just" including "[a]n order striking out pleadings . . . or dismissing the action . . . or rendering a judgment by default against the disobedient party." Rule 37(b)(2)(C), SCRCP. "If a party fails to obey an order to provide or permit discovery, the trial court may impose sanctions such as striking pleadings, dismissing the action, or rendering a default judgment." *Griffin Grading*, 334 S.C. at 198, 511 S.E.2d at 718. "Where the sanction would be tantamount to granting a judgment by default, the moving party must show bad faith, willful disobedience or gross indifference to its rights to justify the sanction." *Id.* at 199, 511 S.E.2d at 719.

The Andersons argue that Judge Burch did not make a finding of bad faith, willful disobedience, or gross indifference. (Br. of App. p. 23). This is an incorrect reading of his order. The Sanctions Order details the history of the Andersons' conduct ignoring discovery and the court

itself. Importantly, the Andersons were already let out of default once and, after being granted that second chance, they merely filed an answer and then largely ignored the litigation by failing to respond to discovery, to respond to motions, and to attend hearings after notice from the court.[8] (R. pp. 56-57). This conduct shows willful disobedience of the order compelling discovery and gross indifference to Carwile's rights to conduct discovery.[9] The record and law support the exercise of discretion to grant sanctions in this case.

The Andersons argue that Mr. Brooker "abandoned" them and Judge Burch should have realized "that something was seriously amiss and made further inquiry" before striking their answer. (Br. of App. p. 24). There is no requirement for a judge to personally inquire into why a party does not respond to discovery or comply with a court order. It is the Andersons' responsibility to litigate their own case, and the Andersons' logic would put an undue, unfair, and likely unethical burden on judges to litigate a case for a party.

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[8] The Andersons' only explanation for these failures is that Mr. Brooker abandoned them, in response to which Mr. Brooker alleges the Andersons contributed to this situation by failing to keep contact with him, cooperate, or follow his advice. (R. pp. 70-71).

[9] Our appellate courts have affirmed sanctions of dismissal or striking pleadings under Rule 37(b)(2) when a party willfully fails to comply with discovery orders. *See Davis v. Parkview Apts.*, 409 S.C. 266, 283, 762 S.E.2d 535, 544 (2014) (upholding dismissal sanction when appellants "willfully and repeatedly failed to comply with the circuit court's orders"); *McNair v. Fairfield Cnty.*, 379 S.C. 462, 467, 665 S.E.2d 830, 832-33 (Ct. App. 2008) (finding lower court properly determined appellant's willful disobedience of previous discovery orders warranted striking appellant's answer); *QZO, Inc. v. Moyer*, 358 S.C. 246, 257, 594 S.E.2d 541, 547 (Ct. App. 2004) (affirming sanction striking appellant's answer and declaring him in default where evidence supported the lower court's finding that appellant willfully destroyed evidence and violated a TRO); *Barnette*, 355 S.C. at 594-96, 586 S.E.2d at 575-76 (affirming a dismissal sanction when a party failed to exchange witness and exhibit lists, and failed to submit social security records in violation of a discovery order); *Griffin Grading*, 334 S.C. at 199, 511 S.E.2d at 719 (affirming order striking a pleading when there were multiple discovery abuses impeding the ability to conduct meaningful discovery); *Halverson v. Yawn*, 328 S.C. 618, 620-21, 493 S.E.2d 883, 884-85 (Ct. App. 1997) (finding dismissal of complaint appropriate where appellant failed to timely respond to discovery requests, in violation of an order).

The facts before Judge Burch support the sanction of striking an answer, and the Andersons fail to show a clear abuse of discretion. This Court should affirm the Sanctions Order.

VII. The Special Referee correctly found the Andersons failed to show good cause under Rule 55, SCRCP.

Even if Rule 55, SCRCP, is the proper procedure to challenge a sanctions order, the Special Referee correctly held that the Andersons failed to show good cause to warrant setting aside the entry of default. (R. pp. 67-71).

"The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the circuit court." *Regions Bank v. Owens*, 402 S.C. 642, 647, 741 S.E.2d 51, 54 (Ct. App. 2013). "The circuit court's decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion." *Id.* at 647, 741 S.E.2d at 54. "An abuse of discretion occurs when the judgment is controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support." *Id.*

"For good cause shown the court may set aside an entry of default . . . ." Rule 55(c), SCRCP. The "good cause" standard "requires a party seeking relief from an entry of default under Rule 55(c) to provide an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice." *Sundown Operating Co. v. Intedge Indus.*, 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009). "Once a party has put forth a satisfactory explanation for the default, the trial court must also consider: (1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted." *Id.* at 607-08, 681 S.E.2d at 888 (citing *Wham v. Shearson Lehman Bros., Inc.*, 298 S.C. 462, 465, 381 S.E.2d 499, 501-02 (Ct. App. 1989)). However, "if there is sufficient evidentiary support on the record for the finding of the lack of good cause," then "[t]he trial court need not make specific findings of fact for each [*Wham*] factor." *Sundown*, 383 S.C. at 608, 681 S.E.2d at

888; *see also Regions Bank v. Owens*, 402 S.C. 642, 649, 741 S.E.2d 51, 55 (Ct. App. 2013) ("Because we find the master did not err in finding Owens failed to show good cause for failing to answer the complaint, we need not consider the *Wham* factors.").

Here, the Special Referee held the Andersons failed to show good cause to set aside the second entry of default. He found judicial estoppel barred them from taking inconsistent positions as to when Allstate received notice of the claim. (R. pp. 68, 33-34). He separately rejected the Andersons' argument that good cause existed because Mr. Brooker's "abandonment" led to the second default. (R. p. 70). The Special Referee explained that the Andersons raised abandonment for the first time in a reply memorandum on a motion to reconsider and, regardless, there is conflicting evidence as to his conduct because, in their professional negligence case against Mr. Brooker, he denies the allegations and asserts a defense that they failed to cooperate or follow his advice. The Special Referee properly exercised his discretion.

A. The evidence and law support a finding of judicial estoppel.

The Andersons' sole argument on judicial estoppel is that their positions on notice to Allstate are not "'totally inconsistent' positions." (Br. of App. p. 28). The evidence shows otherwise, and supports the Special Referee's finding of inconsistent positions.

"Judicial estoppel is an equitable concept that prevents a litigant from asserting a position inconsistent with, or in conflict with, one the litigant has previously asserted in the same or related proceeding." *Cothran v. Brown*, 357 S.C. 210, 215, 592 S.E.2d 629, 631 (2004). The elements of judicial estoppel are:

> (1) two inconsistent positions taken by the same party or parties in privity with one another; (2) the positions must be taken in the same or related proceedings involving the same party or parties in privity with each other; (3) the party taking the position must have been successful in maintaining that position and have received some benefit; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent.

Id. at 215-16, 592 S.E.2d at 632. The Andersons dispute only the finding that they "took two 'totally inconsistent' positions." (Br. of App. p. 28). They argue the position that they give Allstate notice in April 2020 is not inconsistent with a "position that Allstate did not have notice of the progress of the ongoing litigation . . . until March 2023." (Br. of App. pp. 28-29).

After the first entry of default, the Andersons filed a motion to set aside the entry of default on the basis that they notified Allstate and American Modern insurance companies and neither one would provide a defense. (R. pp. 114-16). In her affidavit in support of the motion, Mrs. Anderson swore that, around April 10, 2020, after they were served with the lawsuit, she "immediately contacted Allstate to file a claim with them." (R. p. 136). The court granted the motion in reliance on those representations, explaining the Andersons "immediately contacted Allstate insurance" and this "conduct suggests they took the Complaint seriously once it was served on them and made reasonable attempts to address the Complaint." (R. p. 5).

After the second entry of default, the Anderson's filed another Rule 55(c) motion. (R. pp. 272-74). This time they represented that "Allstate received notice of the continuing and ongoing legal proceedings on March 30, 2023, when it received a subpoena from Plaintiff's counsel." (R. p. 273). Their counsel stated at the motion hearing that:

> They [Allstate] first tell me that they found out about this case March 30, 2023 . . . . And they are in that position because way back in 2020 when the case was filed and served, they tell me that 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.
>
> . . . Allstate finds out about this case approximately two weeks ago.

(R. pp. 406-07) (emphasis added). These are two totally inconsistent positions.

If the Andersons gave Allstate notice of the claim in 2020, then it cannot be true that Allstate "first . . . found out about this case" in March 2023. (R. pp. 406-07). The assertion that

the Andersons gave notice in 2020 contradicts an assertion that Allstate first received notice in 2023.

The Andersons' attempt to characterize the second default argument as one of keeping up with the progress of the case rather than notice ignores the record. Counsel plainly stated that Allstate was "not given notice of that lawsuit" in 2020 and that it "f[ound] out about this case approximately two weeks" before the hearing in 2023. (R. pp. 406-07). Further, they provide no explanation for why Allstate would have thought the case was not ongoing.

Because the record supports the Special Referee's finding that the positions are totally inconsistent, this Court should affirm the application of judicial estoppel as a basis to deny the motion to set aside the entry of default.

B. The evidence and law support the Special Referee's finding that the Andersons failed to show good cause because they did not establish abandonment by Mr. Brooker.

The Special Referee correctly found the Andersons raised abandonment for the first time in a reply memorandum to Carwile's opposition to their motions to reconsider. The Referee also correctly found that even considering the late arguments, the Andersons did not establish abandonment because Mr. Brooker alleges in response to their professional negligence claim that they were comparatively negligent for failing to keep in contact with him, failing to cooperate, and failing to follow his advice. (R. pp. 70-71). The evidence and law support these discretionary rulings.

"Whether good cause is established is within the sound discretion of the court." *Williams v. Vanvolkenburg*, 312 S.C. 373, 375, 440 S.E.2d 408, 409 (Ct. App. 1994). "This Court will not disturb a discretionary ruling on appeal unless it appears the ruling is without evidentiary support or controlled by some error of law." *Id.* "The issue before this Court, therefore, is not whether we

believe good cause existed to set aside the default, but rather, whether the master's determination is supportable by the evidence and not controlled by an error of law." *Id.*

Because the Andersons do not challenge the Special Referee's holding that they raised abandonment too late, it is the law of the case. *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) ("An unappealed ruling is the law of the case and requires affirmance."). Regardless, the Special Referee correctly held that "[a]n issue may not be raised for the first time in a motion to reconsider." *Johnson v. Sonoco Prods. Co.*, 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009). The Andersons' situation is worse than that because they did not raise abandonment until a reply memorandum on a motion to reconsider. The issue is not preserved, and this Court should affirm for that reason alone.

On the merits, the Andersons did not establish abandonment to overcome "the general rule in this jurisdiction [] that the neglect of the attorney is attributable to the client." *Graham v. Loris*, 272 S.C. 442, 451, 248 S.E.2d 594, 598 (1978). "To overcome the general rule that the neglect of the attorney is attributable to the client, the client must establish that its former attorney willfully and unilaterally abandoned it." *Stearns Bank Nat'l Ass'n v. Glenwood Falls, Ltd. P'ship*, 373 S.C. 331, 342, 644 S.E.2d 793, 798-99 (Ct. App. 2007).

In *Graham*, the court found abandonment where the defendant's attorney sent a letter resigning from representation the day before a summary judgment hearing and the defendant had no knowledge of the hearing. 272 S.C. at 452, 248 S.E.2d at 599 (describing as "rare circumstances" for an attorney to "withdraw[] from the case at a crucial stage without reasonable notice to his client"). In *Stearns*, the court found "evidence of willful abandonment is missing" when an attorney began to represent the defendant over a month before a hearing where he failed to appear or to contest an entry of default. 373 S.C. at 336, 644 S.E.2d at 795 (finding "no abuse

of discretion in the master's refusal to find excusable neglect" where "the scant record [] does not permit the additional finding of willful abandonment"). *Stearns* is controlling in this case.

Here, the argument for abandonment is that Mr. Brooker failed to respond to discovery, communicate with Carwile's counsel, comply with a court order, and appear at hearings. (Br. of App. p. 29). He did not resign or withdraw from representation. The Andersons provide no evidence of Mr. Brooker's conduct or their communications with him. Instead, they baldly assert that the non-responsiveness alone is abandonment. On the contrary, Mr. Brooker's non-responsiveness, while neglectful, does not "establish that" he "willfully and unilaterally abandoned" the Andersons. *Stearns*, 373 S.C. at 342, 644 S.E.2d at 798-99. Further, the Special Referee correctly held that, given Mr. Brooker's allegations in response to the professional negligence case, they have not established abandonment.[10] Rather, each party's conduct is in question. In that situation, this court must "decline to speculate in a manner that favors" the Andersons. *Stearns*, 373 S.C. at 345, 644 S.E.2d at 800. The evidence and law support the Special Referee's finding that the Andersons did not establish willful and unilateral abandonment to overcome the general rule and, thus, did not establish good cause.

VIII. The Special Referee properly denied the motion for a new trial absolute because he considered all of the damages evidence and awarded only recoverable damages.

The Special Referee considered all of the damages evidence, which was presented without objection at the hearing. It included evidence of Samantha and Justin's lost wages and earning capacity, the deterioration of their relationship due to Marlayna's death, Rylan's suffering after her death, and the grief they suffered from seeing Marlayna die. The Andersons ask for a new trial

[10] *See Paul Davis Sys. v. Deepwater of Hilton Head, LLC*, 362 S.C. 220, 226-27, 607 S.E.2d 358, 361 (Ct. App. 2004) (refusing to find abandonment where the alleged failure of the attorney was actually "attributable to" the client's "unreasonable belief that it had been discharged from the case and its failure to monitor the progress of the case").

absolute arguing that these are not recoverable damages. The Special Referee properly exercised his discretion to deny the motion because they failed to object to any of the evidence and because he considered the evidence as relevant to the depth and extent of Samantha and Justin's suffering, grief, and wounded feelings rather than awarding an amount of money for them.

As an initial matter, the Andersons waived any argument on the recoverability of damages by not objecting to evidence of them at the damages hearing. *See Howard v. Holiday Inns, Inc.*, 271 S.C. 238, 241, 246 S.E.2d 880, 882 (1978) (holding a defaulting defendant's participation in a damages hearing is limited to cross-examination of witnesses and objection to evidence); *Limehouse v. Hulsey*, 404 S.C. 93, 116, 744 S.E.2d 566, 578-79 (2013) (adhering to *Howard* after the adoption of Rule 55, SCRCP). The attempt on appeal to portray their argument as not about the admission of the damages evidence but about whether the damages are recoverable is merely an effort to avoid waiver. If the Andersons found the evidence objectionable, they should have contemporaneously objected and argued at the hearing that the damages are not recoverable. The only purpose of the hearing was to award damages. Given the Andersons' failure to object, they waived and did not preserve an argument that the damages are not recoverable. The Court should affirm on this basis alone. Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.").

If the Court finds the issue not waived and reaches the merits, it should affirm the Special Referee's rulings. "An action in tort for damages is an action at law." *Solley v. Navy Fed. Credit Union, Inc.*, 397 S.C. 192, 202, 723 S.E.2d 597, 602 (Ct. App. 2012) (internal quotation marks omitted). "In an action at law, the appellate court corrects errors of law, but affirms the special referee's factual findings unless no evidence reasonably supports those findings." *Id.* at 202, 723 S.E.2d at 602; *Ritter & Assocs. v. Buchanan Volkswagen, Inc.*, 405 S.C. 643, 649, 748 S.E.2d 801,

804 (Ct. App. 2013). The reviewing court "must look at the evidence in the light most favorable to the respondents and eliminate from consideration all evidence to the contrary." *Solley*, 397 S.C. at 202, 723 S.E.2d at 602 (internal quotation marks omitted).

For the Court to rule in the Andersons' favor it would have to determine that the Special Referee did not mean what he wrote. That is outside of the bounds of the standard of review. Considering the recoverable damages for the wrongful death of a child, and the Special Referee's actual rulings, this Court should affirm the award.

"Damages recoverable in a wrongful death action include: (1) Pecuniary loss, (2) mental shock and suffering, (3) wounded feelings, (4) grief and sorrow, (5) loss of companionship, and (6) deprivation of the use and comfort of the intestate's society, the loss of his experience, knowledge, and judgment in managing the affairs of himself and of his beneficiaries." *Scott v. Porter*, 340 S.C. 158, 168, 530 S.E.2d 389, 394 (Ct. App. 2000) (internal quotation marks omitted). Damages elements 2 through 6 "are intangibles, the value of which cannot be determined by any fixed yardstick. Their loss to the beneficiaries must be estimated by the jury in the exercise of their sound judgment under all of the facts and circumstances of the case." *Lucht v. Youngblood*, 266 S.C. 127, 137, 221 S.E.2d 854, 859 (1976). The Special Referee's award complies with these recoverable damages.

A. The Special Referee properly considered the parents' loss of earning capacity and inability to work as evidence of their mental shock, suffering, wounded feelings, grief and sorrow.

The Special Referee did not make a monetary award for Samantha and Justin's lost wages or lost earning capacity. (R. pp. 75-76, 51-52). Instead, he considered evidence of their inability to work in the wake of Marlayna's death as evidence of the depth of their mental and emotional suffering and grief.

> The [] finding that these two parents suffered lost wages and diminished earning capacity is merely recognition by the Court that there has been some pecuniary loss suffered by these two parents because of the extreme non-pecuniary damages proximately caused by their daughter's death. As such, the Court has **not included** in its damages award any specific amount for those types of pecuniary damages, instead finding they were incurred as evidence of the duration and intensity of the extreme non-pecuniary damages the statutory beneficiaries have suffered.

(R. pp. 51-52) (emphasis added).

The disagreement on appeal is whether the Special Referee awarded damages for lost wages or earning capacity. The Andersons accuse him of "bootstrap[ping] that element of pecuniary damages into the non-pecuniary damages." (Br. of App. p. 38). This ignores his express explanation that he did not award pecuniary damages for lost wages or earning capacity.

Regardless, even if the Court disregarded the Special Referee's express statement and found he awarded damages, there is no law prohibiting them. *See Doe v. Greenville Cnty. Sch. Dist.*, 375 S.C. 63, 68, 651 S.E.2d 305, 307-08 (2007) (stating a parent may recover "for the loss of services and earning capacity of his minor child" and "for **other pecuniary losses**, including medical expenses incurred as a result of the injury" (emphasis added)). Because the Special Referee did not actually award damages for lost wages or earning capacity, there is no issue on appeal about whether that is recoverable. The Court should find the Special Referee did what he said and affirm the award.

B. The Special Referee properly considered the deterioration and loss of Samantha and Justin's relationship as evidence of their mental shock, suffering, wounded feelings, grief, and sorrow.

The Andersons argue damages are not recoverable for the breakup of the parents' relationship after their child's death, *i.e.*, that only the loss of relationship with the child is recoverable. (Br. of App. p. 39). They do not cite to law supporting that proposition, because there is none. The Special Referee explained that he considered "evidence of the deterioration of" Samantha and Justin's relationship "to be helpful in understanding the impact, intensity and

duration of their mental shock and suffering, wounded feelings and grief and sorrow." (R. p. 78). In the Amended Judgment, he explained this evidence shows "how difficult it will continue to be for them to deal with their ongoing grief and sorrow" because "[t]hey no longer have each other for support." (R. p. 51). This is a proper consideration.

The Andersons' reliance on *Self v. Goodrich*, 300 S.C. 349, 387 S.E.2d 713 (Ct. App. 1989), is misplaced. (Br. of App. p. 39). *Self* held that a parent could not recover pecuniary damages for the loss of her child but could recover for noneconomic damages, including "such mental shock and suffering, wounded feelings, grief and sorrow, loss of companionship and deprivation of the use and comfort of intestate's society as the beneficiaries may have sustained as a result of the death of the intestate." *Id.* at 352, 387 S.E.2d at 715 (internal quotation marks omitted). The Andersons contend the use of "intestate's society" means Samantha and Justin can recover for only the loss of their relationship with Marlayna and not with each other. This is not the purpose of *Self* and ignores the reality of a family unit.

The loss of Marlayna is felt not only by Samantha and Justin individually but also by their family unit. She made them a family, and her death broke the family. The Special Referee properly considered that in his award of noneconomic damages. He cited two cases in which Judge Norton considered the loss of the family unit to assess damages for the wrongful death of a child. *Hurd v. United States*, 134 F. Supp. 2d 745, 776 (D.S.C. 2001) ("Both parents must endure their own separate loss, and a combined loss as well."); *Jimenez v. Chrysler Corp.*, 74 F. Supp. 2d 548, 575 (D.S.C. 1999), *overruled on other grounds* 269 F.3d 439 (4th Cir. 2001) ("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"). The Andersons do not address *Hurd*

and, as to *Jiminez*, argue only that it was overruled on appeal. (Br. of App. pp. 39-40). They omit that it was overruled on other grounds. 269 F.3d 439.

Nothing in South Carolina law prohibits the consideration of the loss of the family unit in the assessment of noneconomic damages to parents who lost their only child together. The loss of the family unit was personally felt by Samantha and Justin and is an inextricable component of their wounded feelings, grief, and sorry. The Special Referee's consideration was proper (and without objection), and this Court should affirm.

C. The Special Referee properly considered evidence of Rylan's suffering as evidence of Samantha's damages for mental shock and anguish, wounded feelings, and grief and sorrow.

The Andersons argue the Special Referee should not have considered Rylan's suffering because he is not a statutory beneficiary. (Br. of App. pp. 40-41). There is no law to support that argument, and it is not a valid basis for error. The Andersons also misread or misstate the Special Referee's ruling. He expressly stated that "Rylan is not a statutory beneficiary." (R. p. 49). As a result, the Special Referee limited his consideration of Rylan's suffering to how it affected Samantha, who is a statutory beneficiary.

> [T]he Court finds that the effects of [Rylan's] sister's death on him directly affect Ms. Carwile and compound her own mental shock and anguish, wounded feelings, grief and sorrow, loss of companionship, and society of her daughter. In short, Ms. Carwile's ability to fully heal herself is impacted by her son's ability to fully heal.

(R. pp. 49-50, 83-84). This was proper because Samantha is legally obligated to care for Rylan's physical and mental well-being. S.C. Code Ann. §§ 63-5-20 & -30. As a seven-year-old, Rylan saw his little sister suffer a gruesome death. It is natural for Samantha to care for and worry about the impact it has on him and, given her own intense suffering, that this worry is a damage to her and hinders her healing. Rylan's pain and emotional trauma are part of Samantha's everyday life.

It was a proper consideration of damages to Samantha, a statutory beneficiary. The Special Referee did not err, and this Court should affirm.

D. The Special Referee properly considered that Samantha and Justin saw Marlayna at the scene as evidence of their mental shock and anguish, wounded feelings, and grief and sorrow.

The Andersons argue that, because Carwile withdrew the bystander cause of action, the Special Referee could not consider their emotional trauma from seeing Marlayna at the scene. (Br. of App. p. 41). They cite to no legal support for that position, because there is none. Regardless, the Special Referee did not award any bystander damages. He explained the evidence "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." (R. p. 81). There is no error because Carwile did not seek to recover for bystander damages and the Special Referee did not award them. To find for the Andersons on this issue, the Court would have to find that the Special Referee did not mean what he wrote.

Samantha testified that when she saw blood coming out of Marlayna's ears, she knew Marlayna "wasn't there anymore." (R. p. 367). She asked Justin to give her CPR and insisted that EMS shock Marlayna. (R. p. 368). Evidence that Samantha and Justin knew Marlayna was dead but were so broken and desperate that they tried lifesaving procedures is relevant and supports their recoverable damages.

The Andersons cite *Kinard v. Augusta Sash & Door Co.*, 286 S.C. 579, 336 S.E.2d 465 (1985), which only adopts the cause of action for negligent infliction of emotional distress. But nowhere does it say that a parent's **only** recovery for finding their dead child is through that cause of action. "Damages recoverable in a wrongful death action include: . . . (2) mental shock and suffering, . . . (4) grief and sorrow . . . ." *Scott v. Porter*, 340 S.C. 158, 168, 530 S.E.2d 389, 394

(Ct. App. 2000) (internal quotation marks omitted). The Special Referee properly considered the evidence (without objection), and this Court should affirm.

IX. The Special Referee correctly denied the motion for a new trial absolute because the award is not grossly excessive.

The Andersons make a limited argument that the award is excessive. They avoid addressing the actual evidence of loss in this case and focus solely on a comparison of the amount of this award with reported appellate decisions from minor wrongful death cases. (Br. of App. pp. 41-49). Comparison of other verdicts is not necessary to the determination of whether a verdict is grossly excessive. The Supreme Court has cautioned against overreliance on comparison to prior verdicts when judging for excessiveness, and instructed that instead each verdict "must be evaluated as an individual one, within the framework of its distinctive facts." *Lucht*, 266 S.C. at 136, 221 S.E.2d at 858. As such, the Andersons' entire argument is legally flawed. They have not challenged the amount of the award based on the evidence presented.

"Motions for a new trial on the ground of either excessiveness or inadequacy are addressed to the sound discretion of the trial judge." *Riley v. Ford Motor Co.*, 414 S.C. 185, 192, 777 S.E.2d 824, 828 (2015) (internal quotation marks omitted). A "grossly excessive" verdict is one "deemed the result of a disregard of the facts and of the court's instructions, and to be due to passion and prejudice rather than reason." *King v. Daniel Int'l Corp.*, 278 S.C. 350, 355, 296 S.E.2d 335, 338 (1982). "[A] verdict which may be supported by any rational view of the evidence, or as to which reasonable and disinterested men might draw different inferences, is not of this class" of excessive verdicts. *Mickle v. Blackmon*, 252 S.C. 202, 248, 166 S.E.2d 173, 194 (1969) (affirming the denial of a new trial absolute of "probably the highest verdict in a personal injury case in the history of this State"). In determining whether a verdict amount is excessive, "the facts must be viewed in

the light most favorable to the plaintiff." *Watson v. Wilkinson Trucking Co.*, 244 S.C. 217, 224, 136 S.E.2d 286, 289 (1964).

Viewing the facts in a light most favorable to Carwile, the verdict is supported by a rational view of the evidence. The evidence showed a violent and gruesome death of a three-year-old girl witnessed by both parents who tried to save her life. They saw blood coming out of her eyes and ears. Justin tried to breathe life into his daughter, and Samantha begged EMS to shock her back to life. Both were suicidal after her death and continue years later to suffer from regular panic attacks, anxiety, insomnia, loss of appetite, and severe social detachment. Both were unable to work after her death and had to move to other states to cope with their grief. Both sought counseling and medical treatment for physical manifestations of their grief that they still experience over five years later. The Special Referee's Amended Judgment and Order denying the Andersons' post-judgment motions explain in detail why he awarded $30,000,000.00. (R. pp. 36-94).

Marlayna served "as the glue and focal point of that family." (R. p. 91). Samantha and Justin lost out on decades of memories and experiences with her. (R. pp. 91-92, 45-46). Ms. Lobo testified to Samantha's extreme grief and compared her experience to PTSD due to the nature of Marlayna's death. (R. p. 42). The Special Referee explained:

> The damages hearing on this matter took place 1,954 days after Marlayna's death. Over five years after her passing, it was visibly obvious that neither Ms. Carwile nor Mr. Baxter were healed and that they still suffer extreme grief and sorrow. Given the extremely credible and authentic testimony they provided, the Court finds it more likely than not that these two parents' wounds from the unnatural loss of their daughter will never heal and that it is more likely than not they will continue to struggle with their loss for the remainder of their lives.

(R. p. 47). None of these findings are contested by the Andersons, and they fully support the verdict. The Special Referee heard the grief in Samantha and Justin's voices and saw the pain on their faces, and he found them both highly credible and genuine. The lower court, "being cognizant

of the evidentiary atmosphere at trial, is in a far better position to review the damages than this court. Accordingly, great deference is given to the circuit court, especially in the area of damages." *RRR, Inc. v. Toggas*, 378 S.C. 174, 184, 662 S.E.2d 438, 443 (Ct. App. 2008). The awards are not based on passion or prejudice but on the reality that these two individuals must deal with for the rest of their lives and the magnitude of their loss. The awards are not grossly excessive. *Howle v. PYA/Monarch, Inc.*, 288 S.C. 586, 602, 344 S.E.2d 157, 165 (Ct. App. 1986) ("We see nothing in the record that leads us to conclude that the jury was guided by anything other than a desire to compensate [plaintiff] fully for her serious personal injuries and resulting damages.").

The Andersons cannot bring themselves to argue that $30,000,000.00 is too much money for loss these two parents suffered and continue to suffer.

Because they will not address the actual standard for whether a verdict is grossly excessive, they focus on only a cold, brightline verdict-comparison analysis. The Special Referee correctly rejected this analysis and pointed out that even the approach itself is flawed because it is limited to only appellate level opinions, which are a small minority of civil damages awarded and paid for the wrongful death of a minor. (R. p. 94). South Carolina courts have long held that a strict comparison approach is not useful. "The difficulty in drawing comparisons with prior awards, in order to determine excessiveness, is especially evident in cases involving pain and suffering as an element of damage because the nature and extent of the injuries and the suffering resulting therefrom is seldom, if ever, alike in any two cases. *Haselden v. Atl. Coast Line R.R. Co.*, 214 S.C. 410, 426, 53 S.E.2d 60, 66 (1949) ("However, the fact that no verdict of this size has been given heretofore for a similar injury does not of itself portend excessiveness, passion, prejudice or capriciousness."); *Cabler v. L. V. Hart, Inc.*, 251 S.C. 576, 581-82, 164 S.E.2d 574, 577 (1968)

(noting "we have found a review of other awards of no aid in determining whether the judgment in this case was excessive").

The Andersons rely solely on a comparison analysis, which is not the standard for a new trial absolute. This alone is a basis to affirm the denial of their motion, and Carwile will not engage in a lengthy appellate argument comparing their daughter and their losses with someone else. Regardless, the other minor wrongful death verdicts cited by the Special Referee do support the amount of his award, especially given the unique nature of the evidence in this case of the family unit, Marlayna's role in it, and the acute suffering of Samantha and Justin after her death.

CONCLUSION

For these reasons, the Court should affirm the decisions of the lower court and remand for enforcement of the judgment.

May 23, 2024

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May 23 2024
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DARLINGTON COUNTY
Court of Common Pleas

Paul M. Burch, Circuit Court Judge
Patrick J. McLaughlin, Special Referee

Appellate Case No. 2023-001016

Samantha Joanne Carwile, individually and
as the Personal Representative of the Estate
of Marlayna Joan Carwile,……..……..……Respondent,

v.

Chris Anderson and Danielle Anderson,…….……..Appellants.

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that the Final Brief of Respondent complies with Rule 211(b), SCACR, and with the Supreme Court's Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, issued April 15, 2014.

Respectfully submitted,

May 23, 2024

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