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SC Court of Appeals

**STATE OF SOUTH CAROLINA**

**IN THE COURT OF APPEALS**

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Appeal from Darlington County
Court of Common Pleas
Paul M. Burch, Circuit Court Judge
Patrick J. McLaughlin, Special Referee

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Case No. 2020-CP-16-00299
Appellate Case No. 2023-001016

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

Respondent,

vs.

Chris Anderson and Danielle Anderson,

Appellants.

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# FINAL BRIEF OF APPELLANTS

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## STATEMENT OF ISSUES PRESENTED ON APPEAL

### THE SPECIAL REFEREE'S LACK OF JURISDICTIONAL AUTHORITY

I. Did the Special Referee lack jurisdictional authority to rule on any motions or award damages where the Clerk of Court did not have jurisdictional authority to appoint the Special Referee or sign an order of reference without the Defendants' consent as required by S.C. Code §14-17-250 and §14-11-60?

  A. Did the Special Referee err as a matter of law in holding that Rule 53 authorized the Clerk of Court to appoint and refer a matter to a special referee without consent of the Defendants where §14-11-60 and §14-17-250 both require consent of the parties?

  B. Did the Special Referee err as a matter of law in ruling that the lack of jurisdiction had been waived because a lack of jurisdiction authority can be raised at any time?

  C. Did the Special Referee err as a matter of law in applying the law of the case doctrine because Defendants were not required to appeal from the interlocutory order of reference?

II. Did the Special Referee lack jurisdictional authority to rule on the motion to set aside the default entered on Judge Birch's Rule 37 sanctions order?

### THE HARSH SANCTION DEFAULT

III. Did the Circuit Court Judge abuse his discretion in striking the Defendants' answer where the Plaintiff did not make a sufficient showing of egregious discovery violations to justify the harsh sanction that placed the Defendants in default?

IV. Did the Special Referee err in ruling that the Rule 55 motion to set aside the sanctions default was not a timely and proper procedure to seek review of Judge Burch's sanction order?

V. Did the Special Referee abuse his discretion in denying the Rule 55 motion where the Defendants made a showing of good cause to set aside the entry of the sanctions default?

  A. Did the Special Referee err in ruling that the Defendants took inconsistent positions about the defaults and in misapplying judicial estoppel?

  B. Did the Special Referee err in considering the evidence of the course of the proceedings which showed that discovery violations were a result of Defense Counsel having abandoned his clients?

## THE EXCESSIVE AWARD OF $30 MILLION IN ACTUAL DAMAGES

VI. Did the Special Referee err in considering matters beyond the legitimate, recoverable elements of damages for a wrongful death award in making his award of $30 million?

  A. Did the Special Referee err in considering the Parents' loss of work income and diminished earning capacity because those maters do not constitute legitimate, recoverable "pecuniary loss" for the wrongful death of their child?

  B. Did the Special Referee err in considering the deterioration of the Parents' relationship with each other because any such loss is not a legitimate, recoverable element of damages?

  C. Did the Special Referee err in considering the emotional damage suffered by the Child's surviving brother because he is not a statutory beneficiary entitled to any recovery for the loss of his sister?

  D. Did the Special Referee err in allowing the Parents to recover for the emotional damage they suffered by witnessing the immediate aftermath of the accident because they had dropped their bystander claim?

VII. Is the Special Referee's award of $30 million unduly liberal and/or grossly excessive in comparison to other awards for the wrongful death of minor children as reviewed in opinions from the South Carolina Appellate Courts?

## STATEMENT OF THE CASE

This wrongful death action arises from the death of Marlayna Joan Carwile, the three-year-old daughter of Samantha Carwile and Justin Baxter, who died on Defccember 6, 2017, when she was struck by a car while crossing the road to return home from visiting at a neighbors' house. Samantha Carwile, individually and as personal representive of her child's estate, commenced this action against the neighbors, Chris Anderson and Danielle Anderson, alleging that they were negligeent in failing to supervise her daugther, and asserting claims for Breach of Fiduciary Duty and Assumed Duty In Loco Parentis, Negligence/Gross Negligence/Negligence Per Se, Negligent Infliction of Emotional Distress, Loss of Services and Companionship, a Survival Action, and a Wrongful Death action. [ROA 95; Complaint, filed March 17, 2020.]

When the Defendants failed to answer, Plaintiff made a motion for entry of default. [ROA 111, 107, 109; Motion, affidavits, filed June 10, 2020.] The Clerk of Court entered default on June 15, 2020. [ROA 1; Entry of Default.] On June 29, 2020, Thurmond Brooker, Esq. made a Notice of Appearance on behalf of the Defendants along with a Rule 55(c) motion to set aside entry of default. [ROA 753, 114; Notice, Motion.] Affidavits were filed on August 3, 2020, in support of the Defendants' Rule 55(c) motion. [ROA 136, 137. Affidavits.] The Rule 55(c) motion came before the Honorable Roger E. Henderson, Circuit Judge, who granted the motion and set aside the entry of default. [ROA 3; Order, filed May 26, 2021.] Thereafter, an answer was filed on June 11, 2021. [ROA 197; Answer.]

During discovery, Defendants failed to respond to discovery requests including Requests for Admission, Standard and Supplemental Interrogatories, and Requests for Production. [ROA 203; See Motion to Compel.] Plaintiff's counsel contacted Defendants' counsel regarding the discovery requests, but when Mr. Brooker failed to respond to the inquiries, Plaintiff then filed a

motion to compel. [ROA 200, 203, 258 Motion to compel June 23, 2022, with exhibits.] Defense Counsel did not respond to the motion to compel and neither Defense Counsel nor the Defendants appeared at the hearing on the motion. [ROA 9; see 7/21/22 Order.] Judge Burch granted the motion and issued an order compelling discovery on July 21, 2022. [ROA 9; Order.]

When the Defendants failed to comply with the order compelling discovery, the Plaintiff filed a Rule 37 motion for sanctions on September 28, 2022. [ROA 259; Motion.] Again, Defense Counsel did not respond to the motion for sanctions, and neither Defense Counsel nor the Defendants appeared at the hearing on the motion. [See ROA 12; 11/17/22 Order.] By order filed November 17, 2022, Judge Burch granted the motion and sanctioned the Defendants by striking their answer.[1] [ROA 12; Order.]

Plaintiff filed a motion of entry of default on November 28, 2022. [ROA 262; Motion.] The Clerk of Court entered the default on November 29, 2022. [ROA 262, 16; Motion, Order.] Plaintiff moved to refer the case to a special referee on February 9, 2023. [ROA 266; Motion.] The very next day, on February 10, 2023, without allowing any time for response or hearing, the Clerk of Court granted the Plaintiff's motion and appointed Patrick J. McLaughlin as Special Referee. [ROA 18; Order.]

Plaintiff filed a motion for a damages hearing on March 7, 2023. [ROA 268; Motion.] The next day, March 8, 2023, the Special Referee set the hearing for April 13, 2023. [ROA 270; Notice of hearing.] On April 12, 2023, Andrew MacLeod, Esq., made an appearance on behalf of the Defendants and filed a Rule 55 motion to set aside the entry of default. [ROA 272; Motion. See ROA 749; Docket sheet entry 4/12/23.]

[1] In this order, the Court recounts that Plaintiff's counsel had acknowledged that his office had, in fact, received responses to Plaintiff's Requests for Admission at some point. [ROA 12; 11/17/22 Order n. 1.]

The damages hearing was held before the Special Referee on April 13, 2023. [ROA 343-417; Tr. 1-74.] At the hearing, Plaintiff withdrew her claims for survival, negligent infliction of emotional distress, and punitive damages. Plaintiff limited her request for default judgment to the wrongful death claim. [ROA 348-349, 403; 4/13/23 Tr. 6-7, 61.] Mr. MacLeod appeared for the Defendants. Testimony was given by the Plaintiff Mother and the Father, and by a trauma counselor via deposition. [ROA 418; Ex. 1.] The Special Referee also heard argument on the Rule 55(c) motion. Thereafter, on May 23, 2023, the Special Referee issued his order finding that each parent was entitled to damages of $15,000,000, for a total judgment award of $30,000,000. [ROA 21; Order.] On May 23, 2023, the Special Referee issued a separate order denying the Rule 55 motion for relief from entry of default. [ROA 30; Order.]

On June 2, 2023, the Defendants filed a posttrial motion pursuant to Rules 52(b) and 59(e), to alter and/or amend the judgment. [ROA 275; Motion.] The Defendants also filed a Rule 59(e) for reconsideration of the denial of the Rule 55 motion to set aside the entry of default. [ROA 279; Motion.] When the Special Referee had not ruled upon the posttrial motions within 30 days, the Defendants filed a notice of appeal on June 22, 2023. [ROA 733; NOA, with cover letter.] The Plaintiff/Respondent moved to dismiss the appeal as premature because the posttrial motions were still pending, but the Court ordered that the appeal be held in abeyance and remanded the case to the Special Referee to rule on the pending motions. [ROA 738, 741, 742; Respondent's Motion to Dismiss, Appellants' Return, 7/17/23 Order of Remand.]

On remand, the parties submitted memoranda as directed by the Special Referee and the motions were heard on September 15, 2023. [ROA 286, 320, 478-528; Plaintiff's MIO, Defendants' Reply, 9/15/23 transcript.] On November 2, 2023, the Special Referee issued two orders: (1) an Order denying the June 2nd posttrial motions; and (2) an Amended Order of Default

Judgment with certain revisions but without any change of the award of $30 million. [ROA 36, 55; Orders.] The Defendants filed and served an amended notice of appeal on November 13, 2023. [ROA 744; Amended Notice of Appeal.]

## STATEMENT OF THE FACTS

Marlayna Joan Carwile [the Child] was the three-year-old daughter of Samantha Carwile and Justin Baxter. The Child died on December 6, 2017, when she was struck by a car while crossing the road to return to her home from the home of Chris and Samantha Anderson, who lived across the road from the Carwile/Baxter home. As alleged in the Complaint, the Andersons had invited and/or permitted the Child to play at their house on that day and that they "agreed to care for, babysit, and otherwise watch" the Child as well as her minor brother, and her minor uncle, at the Anderson home. The minor brother – Rylan – was approximately 7 years old. [ROA 442; Lobo Dep. 24/13-19.] The minor uncle, Mother's brother, who accompanied the Child on this visit across the street was 14 years old at the time. [ROA 367; 4/13/23 Tr. 25/19-21]

It is further alleged in the Complaint that, by agreeing to babysit and welcoming the children into their home, the Andersons assumed a duty to supervise the children, and that they breached that duty by allowing the children to play in the yard unsupervised. However, the Andersons had denied in their answer that they invited the children to play at their home and denied that they agreed or promised to care for the children. [ROA 197; Answer.] Accordingly to Mrs. Anderson, the Child (along with the older brother and teenage uncle) showed up at her house asking to play with her children but she said no, and said they had to return home. While Mrs. Anderson was unloading groceries from her car, she heard a scream and saw that the Child had been hit by a car. [ROA 138; Affidavit 8/3/20.] Since the Andersons had been ruled in default,

there was virtually no evidence regarding the alleged agreement by the Andersons to babysit or their allegedly negligent supervision of the neighbor children.

The Mother and Father were not married. However, according to the testimony at the damages trial, they had an "atypical coparenting" relationship. [ROA 362; 4/13/23 Tr. 20/20.] After the Child was born, the Father would visit regularly, but at some point, he moved into the Mother's home and they were cohabitating at the time of the accident. [ROA 364; 4/13/23 Tr. 22.] Both Mother and Father were home at the time of the accident. [ROA 366, 391; 4/13/23 Tr. 24, 49.] Mother had laid down to take a nap after she got off of work, and the Father was washing dishes. [ROA 366, 391; 4/13/23 Tr. 24, 49.] Mother was awoken by Father who told her to call 911, and then she rushed outside where she saw her Child laying in the arms of the minor uncle[2]. [ROA 366; 4/13/23 Tr. 24.] As a nurse, Mother knew that her daughter was gone. [ROA 367, 383; 4/13/23 Tr. 25, 41.] The EMS arrived quickly and confirmed that the Child was dead. [ROA 368; 4/13/23 Tr. 26.]

The other evidence adduced at the damages hearing predominantly revolved around establishing the Parents' emotional pain and suffering. The Mother testified about how her life changed the months following this tragedy, including experiencing difficulties with sleep, loss of appetite, headaches, somach aches, panic attacks, nightmares, anxiety, stress, loneliness, grief and sorrow. [ROA 371, 377, 379, 400; 4/13/23 Tr. 29, 35, 37, 58.] She was diagnosed with P.T.S.D., severe anxiety, and depression. [ROA 376; 4/13/23 Tr. 34.] She was out of work from her job as a registered nurse for 11 months.[3] [ROA 379; 4/13/23 Tr. 37.] Some months after the accident,

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[2] Mother's 14-year-old brother.

[3] There was no evidence presented regarding the monetary value of the Mother's lost wages.

the Mother and her son moved to Florida to get away from triggering bad memories. [ROA 372, 376; Tr. 4/13/23 30, 34.] The Mother testified that the death of their Child broke the relationship she had with the Father. [ROA 375, 378; 4/13/23 Tr. 33, 36.] The Mother also testified that the death of the Child affected her surviving son, who had trouble at school, bad grades, and explosive emotions. [ROA 375; 4/13/23 Tr. 33.]

The Father testified about how he experienced terror and panic when he saw his Child immediately after the accident. [ROA 391; 4/13/23 Tr. 49.] The Father further testified he suffered from severe depression with loneliness, panic attacks, high anxiety, nightmares, loss of appetite, trouble sleeping and withdrawal from society. [ROA 399-400, 402; 4/13/23 Tr. 57-58, 60.] The Father testified that he attended counseling and he was diagnosed with P.T.S.D., severe anxiety and depression, and intermittent explosive disorder. [ROA 396; 4/13/23 Tr. 54.] The Father had moved to Florida with the Mother and her son but after the split up, he moved around numerous times before settling in his home state of Virginia. [ROA 386, 397, 398; 4/13/23 Tr. 44, 55, 56.] At the time of the damages trial, the Father was living in Virginia with his girlfriend and their new seventh-month-old baby girl. [ROA 385; 4/13/23 Tr. 43.] The Father testified that at the time of the death of his Child he was employed as a security officer at the Robinson Nucleur Power Plant making $50,000-$60,000 annually. [ROA 387; 4/13/23 Tr. 45.] The Father did not work for three years after the accident, but he was receiving disability pay during that time. [ROA 393; 4/13/23 Tr. 51.] At the time of the hearing, the Father was working security as a resort in Virginia making $24,000 annually. [ROA 386; 4/13/23 Tr. 44.]

Testimony was also submitted in the form of a de bene esse depostion from a licensed mental health counselor, Vanessa Lobo, who testified regarding her trauma counseling with the

Mother and her surviving son. [ROA 418; Exhibit 1[4].] The counseling sessions began the day after the accident and continued for eight months until they moved to Florida. [ROA 430, 433; Dep. 12, 15.] The counselor testified that the Mother experienced depression, hopelessness, feelings of shame and guilt, and that she had trouble sleeping, lack of energy, and trouble dealing with everday tasks. [ROA 435-437; Dep. 17-19.] The counselor also testified that after the accident, the Mother had difficulty with her relationship with the Child's Father, and trouble connecting with her surviving son. [ROA 434, 435; Dep. 16, 17.] The counselor opined that the Mother suffered wounded feelings, mental shock and suffering, grief, and sorrow. [ROA 440-441; Dep. 22-23.] The counselor further opined that the Mother would need long-term, if not permanent, counseling and treatment to deal with the trauma. [ROA 440; Dep. 22.] The counselor testified that the surviving son was sad, mopey, disengaged, and suffered feelings of guilt. [ROA 442-443; Dep. 24-25.]

## ARGUMENT

### THE SPECIAL REFEREE'S LACK OF JURISDICTIONAL AUTHORITY

***Standard of Review*:**

"The jurisdiction of a court or of a particular judge over the subject matter of a proceeding depends upon the authority granted by the Constitution and laws of the state and is fundamental." Harden v. S.C. State Highway Dep't, 266 S.C. 119, 124, 221 S.E.2d 851, 853 (1976).

> Jurisdiction is generally defined as "the authority to decide a given case one way or the other. Without jurisdiction, a court cannot proceed at all in any cause; jurisdiction is the power to declare law, and when it ceases to exist, the only function remaining to a court is that of announcing the fact and dismissing the cause." 32A Am.Jur.2d Federal Courts § 581 (2007) (footnotes omitted). Specifically, "[j]urisdiction is composed of three elements: (1) personal jurisdiction; (2) subject matter jurisdiction; and (3) the court's power to render the

[4] The Counselor was deposed on August 3, 2020, before Judge Birch granted the Andersons' Rule 55(c) motion to set aside the original entry of default. The Andersons' attorney was not present.

> particular judgment requested." Indep. Sch. Dist. No. 1 of Okla. County v. Scott, 15 P.3d 1244, 1248 (Okla.Civ.App.2000).

Limehouse v. Hulsey, 404 S.C. 93, 104, 744 S.E.2d 566, 572 (2013). At issue in this appeal is the Special Referee's lack of jurisdictional authority to rule on any of the motions and render a final judgment against these Defendants.

Patrick J. McLaughlin, Esq. was appointed as Special Referee by the Darlington County Clerk of Court who signed an order referring this case to him under the purported authority of Rule 53, SCRCP. The Appellants maintain that the Clerk of Court lacked jurisdictional authority to appoint a special referee and refer this matter without the consent of both parties as required by S.C. Code Ann. §14-11-60 and § 14-17-250. This question of the Special Referee's and the Clerk of Court's jurisdictional authority to act is a question of law which is subject to de novo review on appeal. *See* Seels v. Smalls, 437 S.C. 167, 171–72, 877 S.E.2d 351, 353–54 (2022) ("Questions of law involving subject matter jurisdiction and statutory interpretation are reviewed de novo, without deference to the lower courts.").

**I. The Special Referee lacked jurisdictional authority to rule on any motions or award damages because the Clerk of Court did not have jurisdictional authority to appoint the Special Referee or sign an order of reference without the Defendants' consent.**

***Applicable Law regarding Appointment of and Referrals to Special Referees***

RULE 53, of the South Carolina Rules of Civil Procedure provides, in pertinent part:

> (a) Master and Special Referee Defined. The term "master" means the master-in-equity for the county. The term "special referee" means a member of the South Carolina Bar to whom a matter has been referred under S.C. Code Ann. § 14-11-60.
>
> (b) References. 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. In all other actions, the circuit court may, upon application of any party or upon its own motion, direct a reference of some or all of the causes of action in a case. Any party may request a jury pursuant to Rule 38 on any or all issues triable of right by a jury and,

> upon the filing of a jury demand, the matter shall be returned to the circuit court. A case shall not be referred to a master or special referee for the purpose of making a report to the circuit court. The clerk shall promptly provide the master or special referee with a copy of the order of reference.

S.C. Code Ann. § 14-11-60, as referenced in Rule 53, provides that "the presiding circuit court judge" can appoint a special referee if all the parties agree:

> 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. The special referee must be compensated by the parties involved in the action. (Emphasis added.)

S.C. Code Ann. §14-17-250, which grants certain powers to the clerks of court, allows a clerk of court to sign orders of reference on two conditions (1) where the county does not have a master in equity and (2) if the parties consent:

> Clerks may administer oaths and take depositions, affidavits and renunciations of dower. **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. All proceedings under such orders shall be filed at the next succeeding term of the court for the adjudication of the presiding judge, until which adjudication all equities of the parties shall be reserved. (Emphasis added.)

### A. Rule 53 does not and cannot authorize a clerk of court to refer a matter to a special referee without consent of the Defendants where §14-11-60 and §14-17-250 require the parties consent to authorize a presiding judge to appoint a special referee or to authorize a clerk of court to sign an order of reference.

As set forth above, by enactment of § 14-11-60, the General Assembly has authorized a "presiding circuit court judge" to appoint a special referee "upon agreement of the parties." Similarly, by enactment of § 14-17-250, the General Assembly has authorized a clerk of court to sign orders of reference on two conditions (1) where the county does not have a master in equity and (2) if the parties consent. Judge Burch did not appoint the Special Referee or enter any order

of reference; rather, the Clerk of Court appointed the Special Referee and signed an order of reference. Darlington County does not have a master-in-equity, but the Defendants did not consent to the appointment of the Special Referee or the order of reference. Thus, the Clerk of Court did not have the jurisdictional authority to appoint the Special Referee and make a reference of the matter to him.

The Special Referee rejected this jurisdictional challenge based on his analysis of the opinion in Roche v. Young Bros., of Florence, 332 S.C. 75, 504 S.E.2d 311 (1998)[5], wherein the Supreme Court held that a defaulting defendant's consent was not required prior to the circuit court appointing a special referee. [ROA 61-62; 11-2-23 Order, p. 7-8.] However, the holding in Roche does not control the issue presented here because of a key distinguishing point, namely, the question here is whether the Clerk of Court had the power to appoint a Special Referee and sign an order of reference without the consent of the Defendants.

In Roche, the Supreme Court discussed the conflict between Rule 53 and §14-11-60, and held that the consent of the defendant in default "was not required prior to the circuit court appointing [the] special referee." 504 S.E.2d at 315. A critical/key difference between the issue presented in Roche, in contrast to the issue presented in this case. is the fact of who appointed the special referee. In Roche, a circuit court judge issued the order appointing the special referee and making the reference[6], while here the Clerk of Court issued the order appointing the Special

[5] Reversing the Court of Appeals holding that an order of reference appointing a special referee was void. 326 S.C. 488, 485 S.E.2d 110 (Ct. App. 1997).

[6] *See* Court of Appeals decision, 485 S.E.2d at 111: "Roche filed an *ex parte* motion and accompanying affidavit **with a circuit court judge** requesting that the matter be referred to Eugene Fallon as a special referee. The order of reference was signed the same day with Young Brothers never having received a copy of the motion or any notice that the motion was being considered by **the circuit court judge**." (Emphasis added.)

Referee and making the reference. Thus, the question presented in Roche did not require any analysis regarding whether Rule 53 could extend the power given to the "presiding judge" by §14-11-60 to authorize a clerk of court to appoint a special referee and sign an order of reference in a default case where the party in default did not consent.

While the holding in Roche does not answer the question of whether Rule 53 can override the statutory limitations on a clerk of court's powers as set in §14-17-250, the answer to that question is found in the fundamental principle that the Rules of Civil Procedure cannot limit or expand jurisdiction defined by statute. The Supreme Court is constitutionally empowered to make rules of practice and procedure: "***Subject to the statutory law***, the Supreme Court shall make rules governing the practice and procedure in all such courts." S.C. Const. art. V, § 4 (emphasis added). However, as the Supreme Court has held that: "The South Carolina Rules of Civil Procedure provide no guidance in determining the jurisdiction of the circuit court." Skinner v. Westinghouse Elec. Corp., 380 S.C. 91, 94, 668 S.E.2d 795, 796 (2008). This jurisdictional point also is addressed in the express terms of the Rules of Civil Procedure:

- "These rules shall not be construed to extend or limit the jurisdiction of any court of this State .…" Rule 82, SCRCP.
- "These rules, or any of them, shall apply to every trial court of civil jurisdiction within this state, ***within the limits of the jurisdiction and powers of the court provided by law***…."

Rule 81, SCRCP. (Emphasis added.)

In Stokes v. Denmark Emerg. Med. Serv., 315 S.C. 263, 433 S.E.2d 850, 852 (1993), the Supreme Court addressed the constitutional provision in § 4 of Article V, and held that where the question is one of practice and procedure in the courts, a court rule is subordinate to the statutory law: "The clause 'subject to the statutory law' establishes the intent to subordinate to the General

Assembly the Court's rulemaking power in regard to practice and procedure." *See also* Grazia v. S.C. State Plastering, LLC, 390 S.C. 562, 570, 703 S.E.2d 197, 201 (2010) (tacitly acknowledging the general rule that any conflict between a statute and court rule must be resolved in favor of the statute, but finding that the Right to Cure statute was not incompatible with Rule 23); Jefferson by Johnson v. Gene's Used Cars, Inc., 295 S.C. 317, 317, 368 S.E.2d 456, 456 (1988) (holding that appellate jurisdiction is controlled by statute [§14-3-330] and not by Rule 72); Mathias v. Lexington Cnty., 79 S.C. 402, 60 S.E. 970, 971 (1908) (agency rule "must be held subordinate to the express limitation of the statute"); State v. Cottingham, 224 S.C. 181, 187, 77 S.E.2d 897, 900 (1953) ("Statutes override rules of court, if in conflict.").

The Court of Appeals also considered this constitutional provision in Marichris, LLC v. Derrick, 384 S.C. 345, 353, 682 S.E.2d 301, 305 (Ct. App. 2009), when it addressed an issue of conflict between a rule of civil procedure and a statute, and ruled that: "A rule of civil procedure may not limit the provisions of a statute." In accordance with that reasoning, Rule 53 cannot expand the powers granted to a clerk of court by §14-17-250 or the powers granted to a presiding judge by §14-11-60.

In considering this issue regarding the jurisdictional authority of the Clerk of Court, it is important to keep in mind some important differences between the judicial powers of a circuit judge in contrast to the administrative/ministerial powers of a clerk of court. A clerk of court is a county official elected by popular election without any requirement of legal training. "There shall be elected in each county by the electors thereof a clerk of the circuit court, a sheriff, and a coroner; and in each judicial circuit a solicitor shall be elected by the electors thereof." S.C. Const. Art. V, § 24. This particular constitutional provision governing clerks of court further provides: "The General Assembly shall provide by law for their duties …." The General Assembly has enacted

statutes governing clerks of court in Title 14, Chapter 17 of the South Carolina Code of Laws. Article 1 provides for "Office; Election; Qualification; Vacancies"; however, these statutory provisions do not set any qualifications regarding legal training. S.C. Code Ann. §§14-17-10 through 70. Article 3 provides for "General Duties and Powers." S.C. Code Ann. §§14-17-210 through 370. As set forth above, the duties of the clerk of court in regards to signing orders of reference expressly limit the clerk's power to cases where the parties consent.

Notwithstanding that the holding in Roche seemingly allows a presiding judge to appoint a special referee without the consent of a defaulting defendant, Rule 53 should not be read to override the consent requirements in the statutory provisions to allow a clerk of court to select a special referee and sign an order of reference. The distinction between appointment by a "presiding circuit court judge," as referenced in §14-11-60, and a clerk of court is readily understandable when viewed in the context of the distinctive roles of a circuit court judge and a clerk of court in our judicial system.

Circuit court judges are elected by the General Assembly, but state law has requirements and processes aimed at election of qualified judges. The South Carolina Constitution sets certain requirements for circuit court judges, including that a judge must be at least at least thirty-two years old and have been a licensed attorney at law for at least eight years. S.C. Const. art. V, § 15. In addition, a judicial candidate must first have been screened by the Judicial Merit Selection Commission and deemed qualified. S.C. Code Ann. §2-19-80.

In contrast, a clerk of court is an elected official who may not be a licensed attorney or even have any legal training. Given that the only requirement for appointment of a special referee is that the person must be a licensed member of the S.C. Bar, it is only fair and reasonable (in the absence of the parties consent) for the General Assembly to provide for judicial involvement in

the appointment of an attorney that will be authorized to adjudicate the parties rights and obligations and enter a final judgment. Here, it was not only unfair and unreasonable, but wholly improper, for the Clerk of Court to appoint the Special Referee who conducted a damages trial and imposed an excessive judgment of $30 million on these Defendants.

Based on the applicable, controlling provisions of the Constitution and statutes as construed by the Appellate Court, Rule 53 does not and cannot grant jurisdictional authority to a clerk of court beyond the statutory provisions which govern the appointment of a special referee and the signing of an order of reference. The Darlington County Clerk of Court did not have the power to appoint the Special Referee and sign an order of reference without the consent of these Defendants and all the orders entered by the Special Referee are void. Accordingly, the judgment and associated orders should be vacated and the case should be remanded to, at the least, allow a presiding circuit court judge to rule on the Plaintiff's motion for an order of reference to a special referee.

**B. The Special Referee's lack of jurisdictional authority to appoint a special referee and sign an order of reference is a matter of jurisdiction that cannot be waived and can be raised at any time.**

The Special Referee also rejected the Defendants' jurisdictional challenge on issue preservation grounds, ruling that: (1) "any challenge to the authority of the Special Referee to hear this matter has been waived" because the Defendants proceeded with the April 13, 2022 hearing without challenging the order of reference, and (2) "Defendants waived any right to challenge the Order of Reference by not filing an appeal within thirty (30) days of that order." [ROA 64, 67; 11/2/23 Order pp. 10, 13.] The Special Referee erred in so ruling because the Clerk of Court's lack of authority to appoint a special referee and to issue the order of reference is a matter of jurisdiction that cannot be waived and can be raised at any time.

It is well settled that "[l]ack of subject matter jurisdiction may be raised at any time, and may be raised for the first time on appeal." Gantt v. Selph, 423 S.C. 333, 338, 814 S.E.2d 523, 525–26 (2018). "At any time" includes posttrial motions. *See* Limehouse, supra (where the jurisdictional defect which rendered the judgment void had been raised in posttrial motions). "At any time" also includes in a collateral matter, such as a contempt/child support proceeding, where no appeal was taken from the void order. Hoover v. Hoover, 271 S.C. 177, 180, 246 S.E.2d 179, 180 (1978) ("Although this question was not raised in the circuit court or by timely appeal from the circuit court's order of February 14, 1977, since the acts of a court with respect to a matter over which it has no jurisdiction are void, lack of subject matter jurisdiction can be raised at any time.") "At any time" also allows the Court to vacate a void order where none of the parties have even raised the issue. In re Nov. 4, 2008 Bluffton Town Council Election, 385 S.C. 632, 637, 686 S.E.2d 683, 686 (2009) ("The lack of subject matter jurisdiction may not be waived, even by consent of the parties, and should be taken notice of by this Court."). *See also* Amisub of S.C., Inc. v. Passmore, 316 S.C. 112, 114, 447 S.E.2d 207, 208 (1994) ("Lack of subject matter jurisdiction may not be waived and should be taken notice of by this Court.")

Likewise, the lack of jurisdictional authority, as in the power to rule,[7] cannot be waived by a party appearing and submitting to a damages hearing. *See* Chabek v. Nationwide Mut. Fire Ins. Co., 303 S.C. 26, 28–29, 397 S.E.2d 786, 787 (Ct. App. 1990). In Chabek, the Court addressed an issue of whether a master had authority to rule and discussed the point that the master's lack of jurisdiction could not be cured by the parties consent to the order of reference, stating: "We deem as irrelevant the fact that both parties consented to the reference of the matter and, indeed, tried the matter before the master." Id. at 788 (citing Harden v. South Carolina State Highway

[7] See *Limehouse v. Hulsey*, supra.

Department, 221 S.E.2d at 853 ("Lack of jurisdiction of the subject matter cannot be waived even by consent and therefore such lack can and should be taken notice of by this Court *ex mero motu*."). By similar analysis, the appointment of and reference to a special referee is a matter of jurisdictional authority, and thus, the Special Referee's lack of jurisdiction could not be waived by proceeding with the April 13, 2022 hearing.

As to the second point, the fact that the Defendants did not immediately appeal from the order of reference does not render the order law of the case or constitute a waiver of the lack of jurisdictional authority. As the Defendants have maintained, the holding in Link v. School District, 302 S.C. 1, 393 S.E.2d 176 (1990), gave them the option to appeal from the interlocutory, non-final orders on appeal from the final judgment. [ROA 326; Reply to Plaintiff's Memorandum in Opposition to Defendants' Rule 52 and Rule 59 Posttrial Motion, filed August 2, 2023.]

In Link, after entry of a final judgment, the plaintiff sought to appeal an intermediate summary judgment order which struck his breach of contract claim. The Supreme Court held that the plaintiff was entitled to wait until final judgment was entered to appeal the summary judgment ruling against him under §14-3-330(1). The Special Referee rejected this point, reasoning that Link did not apply because "the Sanctions Order resolved all the causes of action by striking the answer. The only remaining issue at that point was the amount of damages." [ROA 66; 11/2/22 Order p. 12.] The Special Referee instead relied on the opinions in Creed v. Stokes, 285 S.C. 542, 331 S.E.2d 542 (1985), and Hagood v. Sommerville, 362 S.C. 191, 607 S.E.2d 707 (2005), for the proposition that an order depriving a party of mode of trial affects a substantial right and must be appealed immediately, or the order becomes law of the case and cannot be challenged on appeal from the final judgment.

In Link, the Court referenced the Creed opinion and noted that an order affecting the mode of trial must be immediately appealed, or the right to review would be lost. 393 S.E.2d at 178 n. 5. However, the Supreme Court has further ruled that "the 'mode of trial' exception to the general rule that only final orders are appealable is confined to orders which abridge a party's constitutional right to trial by jury." Fulmer v. Cain, 380 S.C. 466, 470, 670 S.E.2d 652, 654 (2008) (quoting from Salmonsen v. CGD, Inc., 377 S.C. 442, 461, 661 S.E.2d 81, 91 (2008) (J. Pleicones)). Since the Defendants have not challenged the order of reference as abridging their right to a jury trial, it does not fall into the type of "mode of trial" order which must be immediately appealed. The challenge is one of jurisdiction that was properly brought before the Special Referee in the posttrial motions and also is properly presented to this Court in this appeal from the final judgment.

## II. The Special Referee did not have jurisdictional authority to rule on the Rule 55 motion to set aside the default entered pursuant to Judge Birch's Rule 37 sanctions order.

In addition to the challenge to the Special Referee's jurisdictional authority as discussed above, the Defendants also have raised a more specific challenge to the Special Referee's authority to rule on the Defendants' Motion to Set Aside Entry of Default, filed April 12, 2023, because the sanction order which placed the Defendants in default was issued by Judge Burch:

> The Special Referee did not have authority and/or jurisdiction to rule upon the Rule 55 motion to set aside the default that had been entered when Judge Burch struck the Defendants' answer as a Rule 37 sanctions. Ralphs v. Trexler, No. 2005-UP-219, 2005 WL 7083860, at *3 (S.C. Ct. App. Mar. 24, 2005)[8] ("Judge Evans correctly determined he did not have the authority to determine whether Judge Lockemy abused his discretion in awarding sanctions under Rule 37(b). It is settled

[8] Defendants respectfully submit that notwithstanding Rule 268, SCACR, citation to the Court of Appeals' unpublished opinion in Ralphs is reasonable in view of the unique circumstances presented in this case. Further, there are a number of published opinions that fully support the proposition that one judge cannot review the findings of another judge, and a sampling of those opinions were cited to the Court. [ROA 320; 8/22/23 Reply memorandum.]

> that one circuit judge does not have the power to review, modify, affirm or reverse the findings of another circuit judge.")

[ROA 279; 6/2/23 Motion.]

"It is settled that one circuit judge does not have the power to review, modify, affirm or reverse the findings of another circuit judge." State ex rel. Medlock v. Love Shop, Ltd., 286 S.C. 486, 488, 334 S.E.2d 528, 529 (Ct. App. 1985) (citing Cook v. Taylor, 272 S.C. 536, 252 S.E.2d 923 (1979)).[9] "There is a long-standing rule in this State that one judge of the same court cannot overrule another." Charleston Cnty. Dep't of Soc. Servs. v. Father, Stepmother, & Mother, 317 S.C. 283, 288, 454 S.E.2d 307, 310 (1995) (citing Tisdale v. Amer. Life Ins. Co., 216 S.C. 10, 56 S.E.2d 580 (1950); Dinkins v. Robbins, 203 S.C. 199, 26 S.E.2d 689 (1943)).

The Special Referee rejected the challenge to his authority to review Judge Burch's sanctions order on the grounds that the Defendants in this case did not immediately appeal the Sanctions Order striking the answer or the Order of Reference and it was law of the case. [ROA 67; 11/2/23 p. 13.] The law of the case doctrine was improperly applied, for the reasons, as discussed above, the Defendants were not required to immediately appeal from the order of reference.

> The law of the case doctrine applies where a party does not challenge an issue on appeal when there has been an opportunity to do so. Where the party is not yet able to appeal due to the lack of a final judgment, the issue is not precluded by the law of the case doctrine as there was no prior opportunity for appeal.

Bone v. U.S. Food Serv., 399 S.C. 566, 576, 733 S.E.2d 200, 205 (2012).

As to the sanction order, it is arguable that the Defendants would not even have been allowed to take an immediate appeal from that interlocutory sanction order. In 5Star Life Ins. Co. v. Peek Performance, Inc., 434 S.C. 334, 336, 863 S.E.2d 468, 469 (Ct. App. 2021), the Court of

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[9] Also see additional citations for principle as listed in Cook.

Appeals dismissed an interlocutory appeal, stating: "The trial court entered an entry of default against 5Star, ordered it to respond to Peek's discovery requests, and denied its motion to set aside the entry of default. None of these rulings are immediately appealable."

It also is arguable that the sanction order, by striking the answer, might have been immediately appealable under S.C. Code § 14- 3-330(2) which allows an immediate appeal from: "(2) An order affecting a substantial right made in an action when such order … (c) strikes out an answer or any part thereof or any pleading in any action." *See* Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co., 334 S.C. 193, 195, 511 S.E.2d 716, 717 (Ct. App. 1999) (appeal heard from trial court's order striking answer as a discovery sanction without any discussion or holding on appealability). However, it is clear that these Defendants have the right to appeal from the intermediate sanction order along with the appeal from the final judgment awarding damages under the holding in Link, as discussed above. Accordingly, since these Defendants had the option to wait and appeal from the final judgment, the law of the case doctrine cannot apply to preclude reconsideration of the sanction order and the resulting entry of default at the trial level or appellate review of the sanction order.

## THE HARSH SANCTION DEFAULT

***Standard of Review***

The Clerk of Court entered default against the Defendants on November 29, 2022, pursuant to Judge Burch's order striking their answer as a discovery sanction for failing to respond to discovery requests. The Defendants filed and served a Rule 55(c) motion on April 12, 2023, seeking to set aside the entry of default that was entered by operation of Judge Burch's sanction order striking. The Special Referee denied the motion and the Defendants filed a motion for reconsideration pursuant to Rule 59, which was also denied by the Special Referee.

On appeal, Judge Burch's Rule 37 sanction order is reviewed for an abuse of discretion:

> [A]n appellate court will not interfere with "a trial court's exercise of its discretionary powers with respect to sanctions imposed in discovery matters" unless the court abuses its discretion. 'An 'abuse of discretion' may be found by this Court where the appellant shows that the conclusion reached by the lower court was without reasonable factual support, resulted in prejudice to the right of appellant, and, therefore, amounted to an error of law.'

Davis v. Parkview Apartments, 409 S.C. 266, 281–82, 762 S.E.2d 535, 543 (2014) (citations omitted).

The standard of review from an order denying a Rule 55(c) motion is found in Sundown Operating Co. v. Intedge Indus., Inc., 383 S.C. 601, 606–07, 681 S.E.2d 885, 888 (2009):

> The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the trial judge. The trial court's decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion. An abuse of discretion occurs when the judge issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support.

(Citations omitted). The appeal of the rulings on these motions present mixed questions of law and fact. The issues of fact are reviewed for evidentiary support, but the questions of law are subject to de novo review.[10] Town of Summerville v. City of N. Charleston, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008).

## III. The Plaintiff did not make a showing of egregious discovery violations to justify the harsh sanction that placed the Defendants in default.

Rule 37, SCRCP, provides for various sanctions if a party fails to obey an order compelling discovery, including "An order striking out pleadings or parts thereof, or … rendering a judgment

[10] The Special Referee rejected the Defendants' challenge to his authority to review Judge Burch's sanctions order on the grounds that they did not immediately appeal the Sanctions Order striking the answer. As discussed above, the Defendants maintain that the Special Referee erred as a matter of law on this issue preservation point of law because, under Link, they were not required to take an immediate appeal from that order, and because lack of jurisdictional authority can be raised at any time.

by default against the disobedient party." Under the applicable standard, imposing a sanction that results in default is viewed as harsh and should not be administered without a showing of egregious discovery violations:

> When the court orders default or dismissal, or the sanction itself results in default or dismissal, the end result is harsh medicine that should not be administered lightly. *See Orlando v. Boyd,* 320 S.C. 509, 466 S.E.2d 353 (1996). Therefore, the sanction should be aimed at the specific conduct of the party sanctioned and not go beyond the necessities of the situation to foreclose a decision on the merits of a case. *Balloon Plantation, Inc. v. Head Balloons, Inc.,* 303 S.C. 152, 399 S.E.2d 439 (Ct.App.1990). 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. *Baughman v. American Tel. & Tel. Co.,* 306 S.C. 101, 410 S.E.2d 537 (1991).

Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co., 334 S.C. 193, 198–99, 511 S.E.2d 716, 718–19 (Ct. App. 1999), *cited in* Davis v. Parkview Apartments, 409 S.C. 266, 282, 762 S.E.2d 535, 544 (2014)). Judge Burch abused his discretion by striking the answer and placing the Defendants in default without applying this heightened standard for imposing such a harsh sanction. Judge Burch did not make any findings of bad faith, willful disobedience or gross indifferent to the Plaintiff's rights. Instead, he placed the Defendants in default based on the mere fact that they did not answer interrogatories or requests to produce.

While Judge Burch's order compelling Defendants to respond to discovery requests may have been appropriate, striking their answer and placing them in default was not justified under the circumstances readily apparent from the course of the case as shown on the face of the docket. When the Rule 37 motions came before the Court, the proceedings as evidenced in the docket, showed that Mr. Brooker, Defendants' counsel, had virtually abandoned defending his clients:

- He had failed to respond to discovery requests;
- He had failed to respond to communications from Plaintiff's counsel regarding the outstanding discovery;

- He had failed to appear for the hearing on the motion to compel;
- He had failed to comply with the order compelling discovery;
- He had failed to respond to communications from Plaintiff's counsel regarding the order compelling; and
- He had failed to appear at the hearing on the Rule 37 motion.

At that point, Judge Burch should have been aware that something was seriously amiss and made further inquiry before imposing the harsh sanction of placing the Defendants in default without any means to defend the allegations on liability and limiting their ability to contest the Plaintiff's demand for damages. When the Defendants made the Rule 55 motion all this was apparent on the record and the entry of default should have been set aside. After the damages hearing, the extreme severity of this sanction manifested in a grossly excessive damages award of $30 million. For these reasons, the judgment should be reversed and the case remanded for further inquiry on whether the circumstances of the discovery violation warranted the harsh sanction of placing the Defendants in default.

## IV. The Rule 55 motion to set aside the sanctions default was a timely and proper procedure to seek review of Judge Burch's sanction order.

When new counsel was retained to represent the Defendants, he made a motion to set aside the entry of default pursuant to Rule 55. The Special Referee denied the motion, ruling that: "The Defendants waived any right to challenge Judge Burch's order because they did not file a Rule 59(e) motion within ten days," citing Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co., supra, and QZO, Inc. v. Moyer, 358 S.C. 246, 594 S.E.2d 541 (Ct. App. 2004). [ROA 67; 11/2/23 Order p. 13.] The Special Referee erred on this question of law because the cases cited by the Special Referee do not support any holding that a Rule 59(e) motion was the only available process to seek review of Judge Burch's sanction default order.

The Court of Appeals' opinion in Griffin Grading & Clearing, Inc does not contain any holding, or even any dicta, indicating that Rule 59 is the only process for review of a sanction default order, and in fact, there is no mention of any procedural point regarding a Rule 59(e) motion or other motion for reconsideration. In QZO, Inc. v. Moyer, the Court mentions, in the procedural background section, the fact that the appellant filed a motion to reconsider from an order striking the appellant's pleadings as a sanction, but the Court did not make any ruling about the propriety of the motion that could be viewed as supporting the Special Referee's legal conclusion that Rule 59(e) is the only method to seek review of the Rule 37 sanction order.

In contrast, the Court of Appeals' opinion in Ralphs v. Trexler, supra, does offer support for the use of a Rule 55 motion as an acceptable option for review of Judge Burch's sanction order. In Ralphs, the defendant made a Rule 60 motion to challenge an order wherein the circuit judge had granted a plaintiff's Rule 37 motion to strike the defendant's answer and to find him in default as a sanction for discovery violations.[11] On appeal, in discussing the defendant's Rule 60 motion, the Court of Appeals stated: "Trexler was found in default after the trial judge struck his answer as a sanction for his discovery abuse. In order to set aside the default, a motion pursuant to Rule 55 would have been necessary." 2005 WL 7083860 at *3. While Rule 268, SCACR, limits citation to unpublished[12] opinions, citation to the opinion in Ralphs is reasonable and appropriate where the published opinions cited by the Special Referee do not support his holding that a Rule 59(e) motion was the ***only*** available process for review of the sanction order. The Court of Appeals'

[11] The defendant also made a Rule 59 motion, but it was denied as untimely, and no appeal was taken from that order.

[12] As a practical matter, this "unpublished" opinion is readily available on the Court's own website (https://www.sccourts.org/opinions/searchunpublishedOpinions.cfm) as well as Westlaw (2005 WL 7083860) and Lexis (2005 S.C. App. Unpub. LEXIS 395), and the S.C. Bar's Fastcase.

dicta regarding the necessity of a Rule 55 motion provides persuasive authority in support of the proposition that these Defendants made an appropriate Rule 55 motion for review of the default resulting from Judge Burch's order striking defendants' answer as a Rule 37 sanction.

In this case, Rule 55 was the best option for the Defendants to seek review of the sanction default because it was already too late to make a Rule 59(e) motion since more than 10 days had passed. Rule 55, unlike Rule 59, does not have a specified time requirement; rather, "the timing of the motion for relief" is simply one of the factors to be considered. <u>Sundown Operating Co. v. Intedge Indus., Inc.</u>, 681 S.E.2d at 888. Here, the Rule 55 motion was promptly made after the Defendants' insurance carrier became aware that the Defendants/insureds were in default. The Defendants had been represented by their personal attorney since Mr. Brooker first made an appearance on their behalf on June 29, 2020. [See ROA 747; Docket sheet.] On March 30, 2023, the carrier received a subpoena from Plaintiff's counsel for policy documents, which was the first notice of the legal action since Mr. Brooker began representing the Defendants. Upon learning of the status of the action, the carrier retained counsel for the Defendants on April 6, 2023, and he filed the Rule 55 motion on April 12, 2023. Under these circumstances, the Rule 55 motion should be considered timely.

## V. The Defendants made a showing of good cause to set aside the entry of the sanctions default.

The standard for a Rule 55(c) motion is "good cause" as stated in <u>Sundown Operating Co. v. Intedge Indus., Inc.</u>, 681 S.E.2d at 888:

> The standard for granting relief from an entry of default under Rule 55(c) is mere "good cause." Rule 55(c), SCRCP. This 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. 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. *Wham v. Shearson Lehman Bros., Inc.,* 298 S.C. 462, 465, 381 S.E.2d 499, 501–02 (Ct.App.1989).

The Special Referee found that the Defendants did not make a showing of "good cause" because "[t]he Defendants have failed to set forth a satisfactory explanation for the default." [ROA 33; 5/23/23 Order p. 4.] In so finding the Special Referee erroneously found that the Defendants were taking inconsistent positions about the cause of the default and improperly applied the doctrine of judicial estoppel. The Special Referee also erred in relying on the general proposition that the negligence of a party's attorney is not an acceptable excuse for default because the record clearly showed that Mr. Brooker's failures amounted to more than mere negligence; rather, the record of Mr. Brooker's repeated failures to respond or appear on behalf of his clients shows a level of flagrant neglect amounting to abandonment.

### A. The Special Referee misapplied judicial estoppel because the Defendants did not take inconsistent positions about the defaults.

The Special Referee felt that the Defendant was taking inconsistent positions about the reason for the default and applied the doctrine of judicial estoppel to reject the Defendants' motion:

> Pursuant to the doctrine of judicial estoppel, the Defendants cannot successfully maintain these inconsistent positions. It would be fundamentally unfair to allow a party take one position to argue itself out of default, then change that position to attempt to escape default a second time. [ROA 34; 5/23/23 Order p. 5.]
>
> I FIND that allowing the Defendants to once again use Allstate, as the basis of good cause explanation for default would be fundamentally unfair and further prejudice the Plaintiffs in this matter; particularly where the Defendants are essentially challenging the validity of an affidavit which they previously offered to the Court and the Court accepted as a basis for setting aside default previously in this case. Accepting such an argument would allow the Defendants to adopt a position of fact in conflict with one they previously took in the same litigation. Judicial estoppel prohibits the Court from accepting such argument. [ROA 69-70; 11/2/23 Order pp. 15-16.]

The Special Referee erred in applying judicial estoppel and abused his discretion because the evidence does not support the Special Referee's impression of the Defendants arguments as inconsistent.

> '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 purpose of the doctrine is to ensure the integrity of the judicial process, not to protect the parties from allegedly dishonest conduct by their adversary." Id.

Auto-Owners Ins. Co. v. Rhodes, 405 S.C. 584, 597–98, 748 S.E.2d 781, 788 (2013). The doctrine of judicial estoppel does not apply unless "the two positions must be totally inconsistent." Id. Here, the record does not support a finding that the Defendants took two "totally inconsistent" positions.

Defendant Danielle Anderson submitted an affidavit, in connection with the original/first motion to set aside the entry of default entered in June 2020 for failure to answer, in which she averred that she had contacted Allstate almost immediately after being served but they told she did not have coverage; and she finally just hired her own attorney. [ROA 136; Affidavit filed 8/3/20.] In the second motion to set aside the entry of default entered in November 2022 as the result of Judge Burch's order striking the Defendants' answer as a Rule 37 sanction, the Defendants 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 for policy documents, … this March 30, 2023 subpoena was the first notice Allstate received on this case since Mr. Brooker began representing the Defendants." [ROA 273; 4/12/23 Motion p. 2. ROA 405-407; 4/13/23 Tr. pp. 63-65.] The position that the Defendants gave Allstate notice of the claim in June 2020 is different from the position that Allstate did not have notice of the progress of the ongoing litigation

-- or the sanction default – until March 2023. These are not inconsistent positions and they do not support any application of judicial estoppel.

**B. The evidence of record showed good cause to set aside the entry of default because the course of proceedings established that the discovery violations were a result of Mr. Brooker having abandoned his clients.**

As the Defendants new counsel explained to the Special Referee, Mr. Brooker had not taken any significant steps in defending his clients after the original entry of default was set aside and he filed the answer. [ROA 407; 4/13/23 Tr. 65/5-6.] As detailed above, Mr. Brooker had failed to respond to discovery, failed to respond to communications from Plaintiff's counsel, failed to comply with the court order compelling discovery, and failed to appear at motion hearings. The Special Referee seemingly shrugged off that evidence of blatant neglect as mere negligence and not sufficient to make a showing of good cause.

In this State, there is a general rule that "the neglect of the attorney is attributable to the client." Graham v. Town of Loris, 272 S.C. 442, 451, 248 S.E.2d 594, 598 (1978). However, a court can, and should, distinguish the difference between an attorney's negligence and a situation "where an attorney's conduct transcends mere neglect and the party seeking relief establishes willful abandonment or withdrawal from the case." Stearns Bank Nat. Ass'n v. Glenwood Falls, LP, 373 S.C. 331, 342–43, 644 S.E.2d 793, 799 (Ct. App. 2007) (ruling on a Rule 60 motion). "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." Id. In Graham, the Supreme Court discussed abandonment as an exception to the general rule:

> The general rule in this jurisdiction is that the neglect of the attorney is attributable to the client. **** However, under the facts of the present case, we are not merely considering neglect, inadvertence, or mistake of counsel. We are concerned with a wilful and unilateral abandonment of the client by counsel. There is authority for the proposition that the general rule is not applied to such a factual situation. This

> exception to the general rule is expressed at 46 Am.Jur.2d, Judgments, § 737 (1969) in the following language:
>
>> The rule that an attorney's negligence may be imputed to his client and prevent the latter from relying on that ground for opening or vacating a judgment does not necessarily prevail in the event of the attorney's abandonment or withdrawal from the case.

248 S.E.2d at 598-99 (citations omitted).[13]

All the repeated procedural defaults, as recounted by the Plaintiff herself and established in filings before the court, clearly established that Mr. Brooker's inaction, or more accurately, his utter failure to act on behalf of his clients, transcended mere neglect and established willful abandonment. Accordingly, this record establishes good cause for setting aside the default entered on the sanction order, the judgment should be vacated, and the case should be remanded to allow the case to complete discovery proceed to a full trial on the merits of liability and damages.

## THE EXCESSIVE AWARD OF $30 MILLION IN ACTUAL DAMAGES

***Standard of Review***

In a nonjury trial, the judge's role in a bench trial is "to admit all evidence and then evaluate it in a non-jury setting." Brown v. Allstate Ins. Co., 344 S.C. 21, 27, 542 S.E.2d 723, 726 (2001). Where a trial court, sitting nonjury, makes factual findings in a law action, those findings are equivalent to a jury's findings. King v. PYA/Monarch, Inc., 317 S.C. 385, 388–89, 453 S.E.2d 885, 888 (1995); Chapman v. Allstate Ins. Co., 263 S.C. 565, 567, 211 S.E.2d 876, 877 (1975); Jordan v. Judy, 413 S.C. 341, 348, 776 S.E.2d 96, 100 (Ct. App. 2015).

The scope of review of a judgment entered by a special referee (who has been properly appointed in compliance with the statutes) is the same as the standard of review of a judgment

[13] The issue in Graham came on appeal from an order granted under the old Code-pleading equivalent of Rule 60.

rendered by a circuit court judge sitting without a jury. Tiger, Inc. v. Fisher Agro, Inc., 301 S.C. 229, 237, 391 S.E.2d 538, 543 (1989) ("Our scope of review for a case heard by a [master] who enters a final judgment is the same as that for review of a case heard by a circuit court without a jury.") The appellate court review of a judgment rendered by the court without a jury in an action at law is "limited to correcting errors of law and determining whether the trial court's findings are supported by competent evidence." Baugh v. Columbia Heart Clinic, P.A., 402 S.C. 1, 28, 738 S.E.2d 480, 495 (Ct. App. 2013). "In an action at law, tried without a jury, the appellate court standard of review extends only to the correction of errors of law. The trial judge's findings of fact will not be disturbed on appeal unless the findings are wholly unsupported by the evidence or controlled by an erroneous conception of the application of the law." Pope v. Gordon, 369 S.C. 469, 474, 633 S.E.2d 148, 151 (2006) (citations omitted).

The issues raised by the Defendants in their posttrial motions, and on appeal, are not evidentiary in nature. The Defendants are not challenging the admission of any evidence and they are not challenging the sufficiency of the evidence[14] to support the factual findings. Rather, the Defendants are challenging the size of the $30 million damages award on the grounds that the Special Referee erred on points of law by considering and relying on facts outside the legitimate,[15] recoverable elements of damages for wrongful death of a child as defined in the controlling caselaw. The Defendants are also challenging the award of $30 million damages to the Parents for the death of a three-year-old child as unduly liberal or grossly excessive.

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[14] The Defendants are not conceding the factual findings; rather, they are acknowledging only that the findings of fact are supported by the evidence that was submitted solely by the Plaintiff without the Defendants being allowed to present a defense.

[15] The Court used the term "legitimate elements of damages" in Weaver v. Lentz, 348 S.C. 672, 681, 561 S.E.2d 360, 365 (Ct. App. 2002).

Under the general law, when a party moves for a new trial based on a challenge that a jury's verdict is excessive, the trial judge must distinguish between awards that are merely unduly liberal and awards that are actuated by passion, caprice, or prejudice. Allstate Ins. Co. v. Durham, 314 S.C. 529, 530–31, 431 S.E.2d 557, 558 (1993). Only the trial judge has the power to reduce a jury's unduly liberal verdict. "However, when the verdict is so grossly excessive or inadequate that the amount awarded is so shockingly disproportionate to the injuries as to indicate that the jury was moved or actuated by passion, caprice, prejudice, or other considerations not found in the evidence, it becomes the duty of the trial judge and this Court to set aside the verdict absolutely." Id.; *see also* Easler v. Hejaz Temple A.A.O.N.M.S. of Greenville, 285 S.C. 348, 356, 329 S.E.2d 753, 758 (1985).

Where a trial judge, or in this case a special referee, is sitting nonjury and makes factual findings in on a legal cause of action, those findings are equivalent to a jury's findings. King v. PYA/Monarch, Inc., 453 S.E.2d at 888; Chapman v. Allstate Ins. Co., 211 S.E.2d at 877. Correspondingly, where the verdict is rendered by a trial judge or special referee sitting nonjury, the excessiveness of that award should be reviewed on appeal by the same standards. The Special Referee should not have the only power and responsibility to review the size of his own verdict; rather, that review can and should fall to the Appellate Court to consider if his award is unduly liberal. Further, the Appellate Court has the duty to set aside the Special Referee's award if it is so grossly excessive and shockingly disproportionate that it indicates the Special Referee was motivated by passion, caprice, prejudice, or other considerations not founded on the evidence.

Under the appropriate review, the Court will find that the $30 million verdict award by the Special Referee is not merely unduly liberal but so grossly excessive and shockingly disproportionate that it indicates that the Special Referee was motivated by passion, caprice,

prejudice, or other considerations beyond the legitimate, recoverable elements of a wrongful death award allowed under the applicable caselaw.

## VI. The Special Referee's award is based on matters beyond the legitimate elements of a wrongful death award.

A defendant in default is deemed to have admitted liability, so the plaintiff does not have to prove liability for the asserted claims. However, the plaintiff does not get a blank check to recover an unfounded or excessive award of damages.[16] In accordance with Rule 54(c), SCRCP, "[a] judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment." "A defendant who is in default for a failure to answer has the right to assume that the judgment will be limited to the cause of action stated in the complaint." Hopkins v. Hopkins, 266 S.C. 23, 27, 221 S.E.2d 113, 114–15 (1975). In addition, the plaintiff still must prove an amount of recoverable damages by the preponderance of the evidence. Howard v. Holiday Inns, Inc., 271 S.C. 238, 241–42, 246 S.E.2d 880, 882 (1978); Renney v. Dobbs House, Inc., 275 S.C. 562, 566, 274 S.E.2d 290, 292 (1981); Solley v. Navy Fed. Credit Union, Inc., 397 S.C. 192, 203, 723 S.E.2d 597, 603 (Ct. App. 2012)("A defendant in default admits liability but not the damages as set forth in the prayer for relief."); Wells Fargo Bank, N.A. v. Marion Amphitheatre, LLC, 408 S.C. 87, 90, 757 S.E.2d 557, 558 (Ct. App. 2014).

There is no mathematical formula or objective measurement for the intangible elements of damages for the loss of a life. "These are intangibles, the value of which cannot be determined by any fixed yardstick." Lucht v. Youngblood, 266 S.C. 127, 137, 221 S.E.2d 854, 859 (1976). "There is no mathematical formula which can easily establish the value of this kind of loss [of a

[16] Webster v. Perrotta, 774 A.2d 68, 77 (R.I. 2001) (a default does not give a plaintiff a "blank check").

child], and it is not this court's place to do so." Scott v. Porter, 340 S.C. 158, 170, 530 S.E.2d 389, 395 (Ct. App. 2000). However, the damages awarded for wrongful death of a child still must be a reasonable amount under the facts relative to the legitimate, recoverable elements as set forth in the applicable caselaw.

**A. Elements of Damages Recoverable by Parents for Wrongful Death of a Child**

The logical starting point for evaluation of the challenge to the $30 million award is the statutes and case law that sets forth the legitimate, recoverable elements of damages. The wrongful death statute, S.C. Code Ann. § 15-51-40, defines who can recover for wrongful death by reference to the intestacy statute (S.C. Code Ann. § 62-2-103) which provides that if there is no surviving spouse or issue, then the decedent's parents take equally. Ballard v. Ballard, 314 S.C. 40, 42, 443 S.E.2d 802, 803 (1994) ("the distribution of those damages [for wrongful death] among the statutory beneficiaries, however, is controlled strictly by the share each would take as an heir in intestacy regardless of the proportion of damages suffered by each"). While these statutes do not define the recoverable damages, well-settled caselaw identifies the legitimate elements of damages the parents can recover for the wrongful death of a child.

"In determining the amount of the damages to be awarded in an action under the statute for wrongful death, the question is not one of the value of the human life, but is rather the damages sustained by the beneficiaries, (here, the father and mother), from the death of the deceased." Zorn v. Crawford, 252 S.C. 127, 137, 165 S.E.2d 640, 645 (1969); *see also* Lucht v. Youngblood, 221 S.E.2d at 858–59. Recoverable damages 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 ...." Smith v. Wells, 258 S.C. 316, 319, 188 S.E.2d 470, 471 (1972); Ballard v. Ballard, 443 S.E.2d at 802;

Welch v. Epstein, 342 S.C. 279, 304, 536 S.E.2d 408, 421 (Ct. App. 2000). While the Special Referee did not make specific awards for each element, it is readily apparent that his award is based on evidence beyond these legitimate, recoverable elements, namely (1) the parents' pecuniary loss of their own employment earnings, (2) the deterioration of the parents' relationship; (3) the emotional pain suffered by the child's sibling, and (4) the parents' emotional pain from witnessing the death of their child.

**B. The Parents' loss of work income and diminished earning capacity do not constitute a recoverable "pecuniary loss" for the wrongful death of their child.**

In his amended judgment, the Special Referee specifically identified the Parents' loss of work income and diminished earning capacity as a recoverable pecuniary loss. The Special Referee articulated his consideration of evidence of the loss of wages/income of both parents:

> Mr. Baxter never went back to work at Robinson Nuclear Power Plant, which was a "career" job he held for seven (7) years and intended to work the rest of his life. (T.p.53, l.16-18). He has moved at least fifteen (15) times since Marlayna's death. He now lives in Elkton, Virginia, where he grew up. He currently works as "security/special services" at a resort in Massanutten, Virginia, a job he describes as quite different ( essentially delivering keys to guests who are locked out of their rooms) from the "highly trained" armed security position he held at the Nuclear Power Plant. He now makes less than half of what he made working at the Nuclear Plant. (T.p.44, 1.11 - p.45, 1.21). [ROA 43-44; Amended Judgment pp. 8-9.]
>
> ****
>
> Ms. Carwile testified she was out of work for eleven (11) months. [ROA 44; Amended Judgment p. 9.]

The Special Referee also made specific findings of fact and conclusions of law regarding the parents' lost wages and diminished earning capacity as recoverable damages:

> 14. Ms. Carwile was unable to return to work for approximately eleven months after her daughter's death. [ROA 49; Amended Judgment p. 14.]
>
> ****

17. Mr. Baxter had planned to continue his career at Robinson Nuclear Power Plant all the way through retirement. However, his extreme grief and sorrow following his daughter's death, caused him to lose that career. Since Marlayna's death, Mr. Baxter has had trouble maintaining any consistent employment and is currently employed making approximately less than half the salary he was making prior to his daughter's death. [ROA 50; Amended Judgment p. 15.]

****

21. Based on the ample and credible evidence in the record, I find that the statutory beneficiaries sustained the following damages as a direct and proximate result of their daughter's death:

a. Mental Shock and Anguish;
b. Wounded Feelings;
c. Grief and Sorrow;
d. Loss of Companionship and the Use and Comfort of Their Daughter's Society;
e. ***Lost Wages; and***
f. ***Diminished Earning Capacity.*** (Emphasis added.) [ROA 51; Amended Judgment p. 16.]

****

23. Based on the ample and credible evidence in the record, I find Ms. Carwile and Mr. Baxter have proved by a preponderance of the evidence that they are entitled to recover all of the damages set forth above as a proximate result of the admitted negligence of Defendants. [ROA 52; Amended Judgment p. 17.]

****

31. Ms. Carwile and Mr. Baxter proved by a preponderance of the evidence, that they sustained severe mental shock and anguish, wounded feelings, grief and sorrow, loss of companionship, deprivation of the use and comfort of their daughter's society, ***lost wages, and diminished earning capacity***. (Emphasis added.) [ROA 53; Amended Judgment p. 18.]

While a number of appellate opinions list "pecuniary loss" as one of the legitimate elements of wrongful death damages, these appellate opinions do not hold that the Parent's loss of income is recoverable in a cause of action for the wrongful death of their minor Child. Rather, under the analysis and reasoning found in the existing caselaw, it is clear that. in the case of a child.

recoverable "pecuniary loss" refers to the lost wages/income of the deceased child, not the surviving parent(s).

As stated in Gilliam v. S. Ry. Co., 108 S.C. 195, 93 S.E. 865, 867 (1917), there is a presumption of a pecuniary loss when a surviving child is dependent on the earnings of a deceased parent: "When the relation between deceased and the beneficial plaintiff is that of husband and wife or parent and minor child, in the absence of evidence to the contrary, actual pecuniary loss will be presumed from the death." However, there is no corresponding presumption in a case involving the wrongful death of a minor child. Mock v. Atlantic Coast Line R. Co., 227 S.C. 245, 87 S.E.2d 830 (1955); *see also* Patrick v. United States, 316 F.2d 9, 11 (4th Cir. 1963) (applying South Carolina law as found in Mock, and vacating judgment for wrongful death of a child based on district court's error in including in its award anything on account of presumed pecuniary loss). The difference in these presumptions is discussed in the context of the different relationships between the beneficiaries and the deceased, as discussed in Mock, 87 S.E.2d at 836, where the Court stated:

> It does not appear that [the child] had any earning capacity or that he had ever done work for financial gain. It will be assumed that he was held in loving esteem by his parents and that they experienced the natural feelings of grief in the loss of a loving son. It cannot, however, be assumed that they suffered any pecuniary loss in his passing. The elements of damage in such a case are 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 the result of the death of the intestate.

Accordingly, "pecuniary loss" for a child's wrongful death only encompasses lost earnings of the deceased child, if any can be proven, but not any loss of earnings of a parent who misses work or changes jobs because of his/her mental suffering from the child's death.

In his Amended Judgment, the Special Referee eschewed this caselaw on pecuniary loss, and instead, he has attempted to bootstrap that element of pecuniary damages into the non-pecuniary damages:

> While statutory beneficiaries to a wrongful death are entitled to "pecuniary loss," the case law on what "pecuniary loss" encompasses is not fully developed. The above 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.

[ROA 51-52; Amended Judgment pp. 16-17.] Similarly, in the separate order ruling on the posttrial motions, the Special Referee stated: "[T]he consideration given by the Court to lost wages/diminished earning capacity was appropriate consideration of evidence speaking to the intensity and duration of the mental shock and suffering, wounded feelings, grief and sorrow these parents suffered and continue to suffer." [ROA 76; 11/2/23 Order p. 22.]

In so stating, the Special Referee contends that during the hearing on the posttrial motion, Defendants agreed that consideration of the loss of work evidence was appropriate for evaluation of the parents' non-pecuniary damages. [ROA 75; 11/2/23 Order p. 21.] However, the Special Referee's quote from that transcript was incomplete and ignored the full discussion on this point:

> MR. HOOD: Sure. I think the answer to your question is that how it impacted the parent would be admissible to show evidence to support their claim for the wounded feelings and the grief and sorrow. I think you can describe that. When you start to quantify and talk about it in terms of supporting a pecuniary loss, I think you can't. And you have a case like this where there really was no challenge to any of the evidence that was presented in terms of the emotional harm. ***I think when they included items and elements about -- or details about work, earning capacity, taking a reduction in his job and things like that, and that's referenced in the order, it's now supporting the pecuniary claim, is the way the order reads, it's got to be excessive. And that's just a function from my perspective of how the case was presented and how the order is written and how those items support it.*** (Emphasis added.) [ROA 521 - 522; 9/15/23 Tr. 44/21 – 45/13.]

It is apparent that the Special Referee did not limit his consideration of the Parents' work history as evidence of their emotional harm. Rather, he improperly relied on the evidence of loss of income and diminished earning capacity as can be seen in his amended judgment wherein he made specific findings of loss of income and diminished earning capacity as pecuniary loss, and included those elements as pecuniary loss in his excessive award of $30 million.

**C. The deterioration of the Parents' relationship with each other is not a recoverable element**.

One of the recoverable elements of damages is identified as "loss of companionship and deprivation of the use and comfort ***of intestate's society*** as the beneficiaries may have sustained as the result of the death of the intestate." Self v. Goodrich, 300 S.C. 349, 352, 387 S.E.2d 713, 715 (Ct. App. 1989) (emphasis added). The concept underlying wrongful death damages is the relationship of the surviving parent to the deceased child and the damages which arise from the loss of their relationship to their child, not their relationship with each other. The Special Referee's Amended Judgment reflects that his award is based on an impermissible consideration of the deterioration of the Parents' relationship.[17]

The Special Referee justified his consideration of the breakup of the parents' relationship based on a statement by a federal district court judge in Jimenez v. Chrysler Corp., 74 F. Supp. 2d 548, 575 (D.S.C. 1999): "Testimony showed that after the accident [parents] parted company because they could not be in each other's presence without being painfully reminded of their son." A district court's simple recitation of testimony does not constitute a legal holding that parents can recover damages for the emotional harm arising from the breakup of their relationship after the

[17] It does not appear from the record that they were married.

death of their child. Moreover, the district court's order cannot justify the Special Referee's reliance on such evidence as a recoverable element of damages where the judgment in that case was vacated on appeal to the Fourth Circuit in Jimenez v. DaimlerChrysler Corp., 269 F.3d 439 (4th Cir. 2001)[18]. *See* Brown v. Brown, 286 S.C. 56, 57, 331 S.E.2d 793, 793–94 (Ct. App. 1985) ("Generally, reversal of a judgment on appeal has the effect of vacating the judgment and leaving the case standing as if no such judgment had been rendered."). The recoverable element is damage from the Parents' loss of the relationship with their Child, not the loss of the relationship with each other when the Father left and severed his relationship with the Mother to start a new life with a new family.

**D. The emotional damage suffered by the Child's surviving brother is not a legitimate element recoverable by the parents.**

As recounted by the Special Referee, the Child's surviving older brother suffered emotionally from the loss of his little sister and he went through grief counseling after the accident:

> Marlayna looked up to, loved playing with and had an extremely close relationship with her older brother, Rylan Carwile, who is Ms. Carwile's son. Rylan was seven years old when Marlayna died. **** Ms. Carwile's son, Rylan witnessed his sister being struck by the automobile. **** Rylan was greatly affected by witnessing and experiencing his sister's death. Rylan suffered depression and required his own counseling following Marlayna's death. [ROA 48-50; Amended Judgment pp. 13-15.]

The brother's emotional damage is not a recoverable element of damages in this wrongful death action because he is not a beneficiary under the wrongful death statute, per S.C. Code Ann. § 15-51-40 and S.C. Code Ann. § 62-2-103. While the Special Referee acknowledged that the brother is not a statutory beneficiary, he still improperly considered that evidence by bootstrapping the brother's emotional harm to the Mother's grief:

[18] See discussion infra regarding further details of the grounds for reversing and vacating the judgment.

> While Rylan is not a statutory beneficiary, the Court finds that the effects of his 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. [ROA 49-50; Amended Judgment pp. 14-15.]
>
> ****
>
> It is axiomatic that if a child suffers, the parent suffers. Ms. Lobo's testimony establishes the worry and guilt Ms. Carwile struggled with over her ability to provide Rylan the love, affection and parenting he needed, "but not having anything else to give him," following his sister's death. [ROA 83-84; 11/2/23 Order pp. 29-30.]

The recoverable element of loss is the Mother's emotional harm from the death of her daughter, not any concomitant emotional distress associated with the brother's suffering.

### E. The Parents cannot recover for the emotional damage they suffered by witnessing the immediate aftermath of the accident because they dropped/abandoned the bystander claim.

It was improper for the Special Referee to consider evidence of the parents' emotional trauma arising from witnessing the injuries to their daughter at the scene immediately after the accident because they dropped their bystander cause of action for negligent infliction of emotional distress. [ROA 403; 4/13/23 Tr. 61.] *See* Kinard v. Augusta Sash & Door Co., 286 S.C. 579, 583, 336 S.E.2d 465, 467 (1985) (recognizing the cause of action).

## VII. The Special Referee's award of $30 million is excessive.

Appellate review of a challenge to the amount of a wrongful death award, such as here, can be difficult because as noted above, there is no mathematical formula or objective measurement for the intangible elements of damages sustained by the parents for the loss of the child's life. Lucht v. Youngblood, 221 S.E.2d at 859 ("These are intangibles, the value of which cannot be determined by any fixed yardstick."). However, while there is no articulated, measurable range of recovery to evaluate an excessiveness challenge to a wrongful death award, that does not mean

that the award is unassailable. Mock v. Atl. Coast Line R. Co., 87 S.E.2d at 839 (J. Legge concurring) ("Proper application of this power [to strike down a grossly excessive judgment] is always difficult, … because there is no fixed standard by which the court may ascertain and characterize the excessiveness.").

The damages awarded for wrongful death of the Child still must be a reasonable amount under the facts relative to the legitimate elements recoverable under the well-settled caselaw.[19] As discussed above, it is apparent that the Special Referee's award reflects elements not recoverable for wrongful death of a child and improper consideration of any or all of those improper elements show that the amount of $30 million should be reversed because it is not supported by the law under the facts.

In addition, the appellate court still has the power and the duty to consider a challenge to a verdict as unduly liberal or grossly excessive. Zorn, 165 S.E.2d at 645 ("[T]here must be some limitation on the amount to be award in such cases."). And, while evaluating challenges to the size of a wrongful death award may be difficult, South Carolina appellate opinions provide guidance and standards for evaluating challenges to the size of a verdict/award. Controlling legal authority can be found in the Supreme Court's opinion in Lucht v. Youngblood, supra, wherein the Court discusses the use of a comparison approach for determining whether an award is excessive. *See also* 11 S.C. Jur. *Damages* § 9 ("When establishing the excessiveness or adequacy of a damages award, it is helpful to compare awards in similar cases in the same jurisdiction *** One particular

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[19] Review of an excessive award can be particularly difficult when the award is made by a jury because the jury generally does not offer any explanation for their verdict. However, where, as here, a special referee is the fact finder and issues a detailed order with findings of fact and conclusions of law, the consideration of improper elements of unrecoverable damages can be more readily discerned.

factor that should be considered in evaluating excessiveness or adequacy of damages is inflation and its effect on the purchasing power of money.") (footnotes omitted).

In Lucht, the Court acknowledged that while each case must be evaluated on the distinctive facts, a comparison of verdicts in similar cases can be helpful. 221 S.E.2d at 858. The Lucht Court also noted that the significance and impact of inflation must be considered in making comparisons: "when comparing the amount of awards in previous cases, recognition must be given to the continuing erosion in the purchasing power of the dollar." 221 S.E.2d at 858-59. While each case presents unique and different facts, the award of $30 million in this case is not just unduly liberal, but grossly excessive, because it far exceeds comparable awards for wrongful death of a child addressed in published South Carolina appellate court opinions.[20]

It appears that the only South Carolina appellate opinion found holding that an award for the wrongful death of a child was excessive is Zorn v. Crawford, supra. In that 1969 opinion, the Court found that $250,000 was a grossly excessive award for loss of a 15-year-old child. Using an inflation calculator,[21] $250,000 in 1969 would be comparable to @ $2,100,000 in 2023.

Apart from Zorn, which is still good law despite the fact that the opinion was rendered in 1969, there are a number of opinions in which the South Carolina appellate courts have found that an award for the wrongful death of child was not excessive:

- In Hopkins v. Derst Baking Co., 221 S.C. 497, 499, 71 S.E.2d 407, 408 (1952), the Supreme Court rejected an excessiveness challenge to a jury's wrongful death award of

[20] Defendants do not represent that this list of cases discussed herein is exhaustive.

[21] https://www.usinflationcalculator.com. [See ROA 336 - 342; Exhibits to Rule 52 posttrial motion.]

$22,500 for the death of a two-year-old two who was run over and killed by a truck. Using an inflation calculator that amount would be @ $260,000 in 2023.

- In Mock v. Atl. Coast Line R. Co., supra, the Supreme Court held that a wrongful death award of $50,000 to parents for the death of twelve-year-old boy as the result of automobile-train collision was not grossly excessive. Using an inflation calculator that amount would be @ $ 570,000 in 2023.
- In Reid v. Swindler, 249 S.C. 483, 488, 154 S.E.2d 910, 912 (1967), the Supreme Court held that a wrongful death award of $25,000 for the death of a six-year-old girl struck by an automobile was not grossly excessive. Using an inflation calculator that amount would be @ $ 230,000 in 2023.
- In Lucht v. Youngblood, supra, the Supreme Court upheld a wrongful death award of $168,000, which was reduced by the trial court to $110,000, for death of a sixteen-year-old girl who was killed in an automobile accident. Using an inflation calculator the trial court's remitted amount would be @ $ 600,000 in 2023.
- In Clark v. Ross, 284 S.C. 543, 550, 328 S.E.2d 91, 96 (Ct. App. 1985)[22], the Court of Appeals held that a wrongful death award of $175,000 for death of a six-year-old girl who died as result of medical malpractice was not grossly excessive. Using an inflation calculator that amount would be @ $ 500,000 in 2023.
- In Knoke v. S.C. Dep't of Parks, Recreation & Tourism, 324 S.C. 136, 140, 478 S.E.2d 256, 257 (1996), the Supreme Court held that a wrongful death award of $3,000,000 for

[22]Later abrogated in part by Sherer v. James, 290 S.C. 404, 351 S.E.2d 148 (1986), on a proximate cause issue unrelated to the size of the verdict.

the death of a twelve-year-old son in a fire was not grossly excessive. Using an inflation calculator that amount would be @ $6,000,000 in 2023.

- In Scott v. Porter, supra, the Court of Appeals held that a wrongful death award of $1.5 million to mother for death of a nineteen–month-old boy from medical negligence was not grossly excessive. Using an inflation calculator that amount would be @ $2.7 million in 2023.

Accounting for inflation, these appellate opinions provide a range of awards for wrongful death of a child from $2.1 million which was deemed excessive by the Supreme Court in Zorn, to $6,000,000 in Knoke which was not deemed excessive by the Court of Appeals. In comparison to either or any of these opinions, it is clear that the $30 million awarded to these Parents is not simply unduly liberal but grossly excessive regardless of whether the award is based on considerations beyond the proper elements of damages laid out in the caselaw, as discussed above, or on some other factor not shown in the order.

In addressing the challenge to the excessive of his award raised in the Rule 52 motion, the Special Referee eschewed these comparables and rationalized his award of $30 million with reference to several federal court decisions: Jimenez v. Chrysler Corp., 74 F. Supp. 2d 548 (D.S.C. 1999), *reversed and vacated* Jimenez v. DaimlerChrysler Corp., 269 F.3d 439 (4th Cir. 2001); Hurd v. United States, 134 F.Supp.2d 745 (D.S.C. March 8, 2001), *aff'd* 34 Fed.Appx. 77, 2002 WL 730284 (4th Cir. 2002) (UP); Steinke v. Player & Beach Bungee, Inc., 145 F.3d 1325, 1998 WL 230828 (4th Cir. 1998)(UP-Table). It was not appropriate for the Special Referee to rely on these federal court decisions as comparables for analyzing the excessiveness challenge when there are a number of South Carolina appellate court decisions for comparison. Moreover, the federal

court decisions do not provide any reasonable support for the Special Referee's award of $30 million.

In Steinke, a jury awarded parents $12 million[23] for the death of their seventeen–year–old son who was killed at a bungee attraction near Myrtle Beach, and the district judge denied the defendants' motion challenging the verdict as excessive. The question of the excessiveness of that verdict came before the Fourth Circuit twice. Steinke v. Beach Bungee, Inc., 105 F.3d 192 (4th Cir. 1997) [Steinke I], *appeal after remand*, 145 F.3d 1325, 1998 WL 230828 (4th Cir. 1998) (UP–Table) [Steinke II.] On the first appeal, the Fourth Circuit affirmed the judgment on liability, but vacated the damage award and remanded the case to the district court for consideration of the defendants motion for a remittitur under South Carolina law. In so ruling, the Fourth Circuit addressed a then recent opinion from the U.S. Supreme Court, wherein the Court held that "a district court sitting in diversity must apply state law standards to determine whether a verdict is excessive": "[Erie] precludes a recovery in federal court significantly larger than the recovery that would have been tolerated in state court." Gasperini v. Ctr. for Humans., Inc., 518 U.S. 415, 431 (1996), *as quoted in* Steinke I, 105 F.3d at 197. The Fourth Circuit gave the district court a specific instruction on remand: "[T]he district court should look to South Carolina cases to determine the range of damages in cases analogous to the one at hand." 105 F.3d at 198. Likewise, the Special Referee should have looked to the available South Carolina appellate court decisions to determine the range of damages comparable to the case here.

On remand, the district court found that the $12 million verdict was not grossly excessive to justify a new trial absolute, but the district court did conclude that $12 million in damages was

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[23] "The $12 million verdict in this case was based entirely on compensatory damages for emotional distress in a case where no pecuniary loss was claimed." 105 F.3d at 198.

unduly liberal and reduced the amount to $6 million. On the appeal after remand, the Fourth Circuit affirmed the judgment for the remitted amount, stating: "Twelve million dollars is clearly an enormous sum of money, and significantly greater than the $3 million Knoke award, but given the facts of this case, it is not so grossly excessive as to 'shock the conscience of the court' and require a new trial absolute." Steinke II, 1998 WL 230828 at 4. The Fourth Circuit further held that the district court had properly considered South Carolina caselaw [noting that verdicts ranged from $22,000 in Hopkins in 1952 to $3 million in Knoke 1996[24]] and explained facts to remit the award to an amount higher than Knoke. Even if the federal district court's remitted award could be considered as a proper comparable for judging the size of verdict in this case, it does not justify the Special Referee's award of almost triple the district court's 1998 award of $6 million which would worth approximately $11.3 million in 2023.

As support for his award, the Special Referee also relied on the district court opinion in Jimenez v. Chrysler Corp., 74 F. Supp. 2d 548 (D.S.C. 1999), an action for wrongful death of a six-year-old boy, wherein the jury found for the plaintiff on three claims (strict liability, negligent design, and negligent misrepresentation) and awarded $12.5 million in actual damages and $250 million in punitive damages. The district judge ruled that the actual damages award was unduly liberal and granted a remittitur to $9 million. The Special Referee uses that remitted amount of $9 million (which would be approximately $16.6 million in 2023) as a comparable in his analysis to justify his $30 million award. There is no factual basis in this record to justify an award of $30 million which, accounting for inflation, is almost double the award in Jimenez.

Further, the Special Referee improperly discounted the fact that the judgment in the district court's judgment was vacated on appeal to the Fourth Circuit in Jimenez v. DaimlerChrysler Corp.,

[24] It does not appear from the opinion in Steinke II that the federal court considered inflation.

269 F.3d 439 (4th Cir. 2001). The Fourth Circuit reversed the negligent misrepresentation verdict and the punitive damages as unsupported by sufficient evidence; and the verdicts on the strict liability and negligent design claims were reversed on an evidentiary ground and remanded for retrial; but the Fourth Circuit never addressed any question about the size of the verdicts. When the Jimenez judgment was reversed and vacated, the district court's order effectively "became of no effect and was no longer in existence." Moore v. N. Am. Van Lines, 319 S.C. 446, 448, 462 S.E.2d 275, 276 (1995). *See also* Brown v. Brown, supra ("Generally, reversal of a judgment on appeal has the effect of vacating the judgment and leaving the case standing as if no such judgment had been rendered."). Reliance on the district court's ruling in Jimenez also is misplaced because the Fourth Circuit never addressed any challenge to the district court's remittitur of the damage award he considered unduly liberal. The Special Referee's reliance on a vacated federal district court order which was never reviewed for excessiveness by an appellate court is particularly inappropriate where the Special Referee made an award in almost double the amount of the Jimenez judgment while effectively ignoring the appellate decisions from the South Carolina Appellate Courts which have directly addressed excessiveness challenges to awards for wrongful death of children.

The Hurd case came before the federal district court within its admiralty jurisdiction on wrongful death and survival claims against the United States arising from the Coast Guard's wanton and reckless conduct in failing to properly execute a search and rescue mission for three teenage boys lost at sea. Finding for the plaintiff parents, the district judge awarded $6 million for the wrongful death of each child. Accounting for inflation[25], the 2001 award would be worth $10.4 million in 2023 as compared to the Special Referee's unwarranted and excessive award of

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[25] https://www.usinflationcalculator.com.

$30 million in this case. Moreover, the award in the Hurd case is not a fair comparable because it does not appear from the district court's order that the defendant made any challenge to the excessiveness of the verdict, and the Fourth Circuit's decision does not address any challenge to or concern about the size of the verdict. While comparison is a proper method for considering whether a verdict is excessive, an award, the size of which was never challenged and/or adjudged by an appellate court, is not a fair comparable.

****

The South Carolina appellate court decisions, accounting for inflation, provide a range of comparable awards for wrongful death of a child from $2.1 million which was deemed excessive by the Supreme Court in Zorn, to $6,000,000 in Knoke which was not deemed excessive by the Court of Appeals. Even if the federal cases relied upon by the Special Referee could be considered as appropriate and fair comparables, the range, accounting for inflation, is $10.4 million in Hurd to $16.6 million in Jimenez. Considering any and all of these comparables, the Special Referee's award of $30 million is so far beyond that range that it is not simply unduly liberal, but so shockingly disproportionate as to amount to a grossly excessive award that demands a new trial.

## CONCLUSION

For each and all of the grounds as discussed above, the Special Referee's award of $30 million to the Parents for the wrongful death of their Child, should be reversed and the case should be remanded.

First, as threshold matter, the Special Referee lacked jurisdictional authority because the Clerk of Court had no power to appoint him or sign an order of reference. Thus, any and every order issued by the Special Referee is void and should be vacated.

In addition or in the alternative, the Special Referee had no authority to rule on the Rule 55 motion for review of Judge Burch's sanctions order; and the case should be remanded to allow Judge Burch to rule on the Rule 55 motion seeking to set aside his sanction order striking the answer that placed the Defendants in default. Given the procedural history demonstrating that Mr. Brooker abandoned his clients, the sanction default should be set aside and the Defendants should be allowed the opportunity to provide discovery and ultimately proceed to trial on the merits.

Third, at the very least, the case should be remanded to allow a circuit court judge to make an award that is based on the legitimate, recoverable elements of damages and in a reasonable amount consistent and comparable with other wrongful death awards under South Carolina law.

Respectfully submitted,

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**Certification of Counsel**

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

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