STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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

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

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

Respondent,

vs.

Chris Anderson and Danielle Anderson,

Appellants.

FINAL REPLY BRIEF OF APPELLANTS

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ARGUMENTS IN REPLY

The Appellants have appealed from a $30 million judgment that was rendered against them by a Special Referee after they were held in default as a sanction for a discovery violation. The judgment should be reversed because the award of $30 million to the parents for the loss of their three-year-old daughter is grossly excessive in comparison to other awards for the wrongful death of minor children as reviewed in opinions from the South Carolina Appellate Courts and because the Special Referee improperly considered matters beyond the legitimate, recoverable elements of damages for a wrongful death award.

The Appellants have also appealed from the post-trial orders and certain interlocutory/pretrial orders on grounds apart from the issues presented regarding the grossly excessive amount of the wrongful death award. The judgment should be reversed because the process was unlawful on the grounds that the imposition of default as a Rule 37 discovery sanction was not justified and too harsh under the circumstances and legal standards. In addition, the judgment should be vacated on the ground that the Special Referee lacked jurisdictional authority over any and all aspects of this case because the appointment and order of reference by the Clerk of Court was invalid and void without the consent of the Appellants/Defendants.

Plaintiff/Respondent argues that the Appellants' issues were untimely, unpreserved, waived, and unsupported by legal authority. As presented in the opening brief, the record shows that the issues raised on this appeal have not been waived; rather, they have been timely preserved, and they are aptly supported by legal authority as cited and discussed therein. Without revisiting all the points previously raised and argued in the opening brief in this Reply, the Appellants will address certain points for clarifying and distinguishing the Respondent's contentions and arguments.

I. APPEALABILITY ISSUES

Respondent contends that the sanction order and/or the order of reference are binding as the law of the case and the issues associated with these orders cannot be reviewed in this appeal because the Defendants waived any challenge when they did not immediately appeal from those orders. Appellants maintain that the law of the case doctrine does not apply because the Appellants were not required to take an immediate appeal of those interlocutory orders; rather, under the ruling in Link v. School District, 302 S.C. 1, 393 S.E.2d 176 (1990), the Appellants had the option to appeal from the interlocutory, non-final orders on appeal from the final judgment.

As to the sanction order, there is case law that indicated that the Appellants would not have been allowed to take an immediate appeal from that interlocutory sanction order. 5Star Life Ins. Co. v. Peek Performance, Inc., 434 S.C. 334, 336, 863 S.E.2d 468, 469 (Ct. App. 2021) (dismissing an interlocutory appeal). The decisions in Gossett v. Gilliam, 317 S.C. 82, 452 S.E.2d 6 (Ct. App. 1994), and Edwards v. Timmons, 297 S.C. 314, 377 S.E.2d 97 (1988), as cited by the Respondent, do not support her contention that these Appellants were required to take an immediate appeal from the sanction order or from the order of reference because no issue is raised herein regarding any right to a jury trial.[1]

As to the order of reference, while there is case law that an order of reference is subject to an immediate appeal if the right to a jury trial is implicated,[2] there also is support for the position that an immediate appeal is not allowed where the right to a jury trial is not implicated. *See* N.

[1] The Court's ruling in Ralphs v. Trexler, No. 2005-UP-219, 2005 WL 7083860 (S.C. Ct. App. Mar. 24, 2005), that a defendant in default should have appealed from the sanction order and denial of an associated Rule 59(e) while pursuing a collateral challenge by a Rule 60(b) motion does not support the Respondent's contention that these Appellants were required to take an interlocutory appeal of the sanction order before entry of a final judgment on the merits.

[2] *See* Creed v. Stokes, 285 S.C. 542, 331 S.E.2d 542 (1985), and discussion of Creed in Link, supa.

Carolina Fed. Sav. & Loan Ass'n v. Twin States Dev. Corp., 289 S.C. 480, 481, 347 S.E.2d 97, 97 (1986) (dismissing appeal from order of reference in foreclosure action). These decisions align with other case law which holds that lack of jurisdiction, as in the power to render a judgment, can be raised at any time – even posttrial or on appeal. Limehouse v. Hulsey, 404 S.C. 93, 104, 744 S.E.2d 566, 572 (2013).

Respondent argues that the Special Referee's jurisdictional power to act does not amount to the "power to act" referenced in Limehouse, citing Wellin v. Wellin, 427 S.C. 15, 828 S.E.2d 767 (Ct. App. 2019), and Coon v. Coon, 364 S.C. 563, 614 S.E.2d 616 (2005). However, these cases do not support her contention. First, Wellin dealt with an issue of waiver of any challenge to personal jurisdiction, but the issue raised herein has nothing to do with personal jurisdiction. Second, the issue on appeal in Coon, was whether a monetary limit on the family court's power over military retirement pay under the Uniformed Services Former Spouses' Protection Act[3] amounted to a limit of subject matter jurisdiction, but again, the issue here is not comparable. The jurisdictional defect is concisely stated as follows: the Special Referee had no power to act because the Clerk of Court was without power to appoint the Special Referee or to sign an order referring this case to his appointee without the consent of the Defendants/Appellants as required by applicable statutes.

II. THE SPECIAL REFEREE'S LACK OF JURISDICTIONAL AUTHORITY

Appellants have raised two issues challenging the Special Referee's jurisdiction in this matter. First and fundamentally, the Appellants maintain that the Special Referee lacked jurisdictional authority to rule on any motions or to award damages because the Clerk of Court did not have jurisdictional authority to appoint the Special Referee under S.C. Code §14-11-60 or to

[3]10 U.S.C.A. § 1408.

sign an order of reference without the Defendants' consent as required by S.C. Code §14-17-250. Appellants also maintain that the Special Referee lacked jurisdictional authority to rule on the Rule 55 motion to set aside the default entered on Judge Burch's Rule 37 sanctions order.

A. The Clerk of Court lacked jurisdictional authority to appoint the Special Referee or to sign an order of reference without consent of the Defendants.

The order of reference and the appointment of the Special Referee was made by the Clerk of Court under the purported authority of Rule 53, S.C.R.C.P. [ROA 18; Order, 2/10/23.] As discussed in more detail in the opening brief, Rule 53 does not and cannot authorize a clerk of court to appoint a special referee or to sign an order referring a matter to a special referee without consent of the Defendants because S.C. Code Ann. §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.

"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, 221 S.E.2d 851, 853 (1976). Rule 53(b) states that: "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." However, that rule cannot confer or limit jurisdiction as conveyed by statute: namely, §14-11-60 grants the authority/power to appoint a special referee to a presiding circuit court judge when the parties agree; and § 14-17-250 grants power to 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. Under these statutes, only a presiding judge can appoint a special referee, and while Darlington County does not have a master in equity, the Clerk of Court

did not have the jurisdictional authority to sign the order of reference to the Special Referee because the Defendants did not consent.

In Roche v. Young Bros., of Florence, 332 S.C. 75, 504 S.E.2d 311 (1998), the Supreme Court held that a circuit court judge could appoint a special referee without the consent of the defaulting defendant. Contrary to the arguments of the Special Referee and the Respondent, the Court's holding 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 the power to sign an order of reference without the consent of the Defendants. The Respondent argues that reference by a circuit judge as opposed to reference by clerk of court is "a distinction without a practical difference." [Resp. Brief p. 26.] However, as discussed in the Appellants' opening brief, there are important differences between the jurisdictional authority and judicial power of a circuit judge - who has been vetted and elected by the General Assembly – to delegate his judicial authority to a special referee in contrast to the administrative/ministerial powers of a clerk of court who is elected by popular vote with no required qualifications for study, training, or experience in the legal profession.

The Respondent also appears to argue that the General Assembly intended for Rule 53(b) to override the specific consent requirements of the statutes because an amendment to Rule 53 was submitted to the House and Senate Judiciary Committees and took effect when the General Assembly did not disapprove of the amendment. That argument directly conflicts with the fundamental principle that the Rules of Civil Procedure cannot limit or expand jurisdiction defined by statute. The Respondent also cites the South Carolina Judicial Department's clerk of court manual as stating, from Rule 53, that "in a default case . . . some or all of the causes of action in a case may be referred to a master or special referee by order of a circuit judge or the clerk of court."

[Resp. Brief p. 24 n. 2]. However, that manual cannot override the statutory provisions and expand the jurisdictional authority of the clerk of court.

As provided in Article V, Section 4 of the S.C. Constitution, the Supreme Court is constitutionally empowered to make rules of practice and procedure "subject to the statutory law." However, "[t]he 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, 668 S.E.2d 795, 796 (2008). In fact the SCRCP so expressly state: "These rules shall not be construed to extend or limit the jurisdiction of any court of this State …." Rule 82, SCRCP. See also Rule 81, 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….").

The Respondent argues that this practice/procedure of the clerk of court appointing a special referee and entering orders of reference is a longstanding and unchallenged practice and that accepting the Appellants' jurisdictional challenge would "upend decades of referral practice across the state." [Resp. Brief p. 29.] However, this "we always done it that way" argument is not a valid justification for allowing a clerk of court to exercise judicial powers outside of and beyond the limits of the powers granted by the statute. Likewise, the recognition of the jurisdictional defects in the current practices and potential consequences of having to revamp the procedures for referrals in default cases cannot justify creating an exception to the statutory grants of judicial power.

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

The law is a longstanding, well 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); Charleston Cnty. Dep't of Soc. Servs. v. Father, Stepmother, & Mother, 317 S.C. 283, 288, 454 S.E.2d 307, 310 (1995). Under this principal, the Special Referee did not have the power to review Judge Burch's Rule 37 sanctions order.

The Respondent argues that the Appellants waived this point of error because they "specifically invoked" the jurisdictional authority of the Special Referee by filing motions and appearing before him at the hearings. [Resp. Brief p. 20.] First, this lack of jurisdiction is not waivable. *See* In re Nov. 4, 2008 Bluffton Town Council Election, 385 S.C. 632, 637, 686 S.E.2d 683, 686 (2009); Amisub of S.C., Inc. v. Passmore, 316 S.C. 112, 114, 447 S.E.2d 207, 208 (1994). Further, as the transcript shows, the Appellants did not consent to the Special Referee's authority at the damages hearing; rather, the Appellants only agreed to the logistics of the hearing as proposed by the Special Referee:

> The Court: I will leave it up to the -- to counsel if y'all want to argue the -- the motion to set aside today. I'm glad to sit here and listen to it. If y'all want to have the chance, David and Ryan, to respond in writing to that, we can do it that way. I will leave it up to y'all. But we're going to go ahead and take the testimony, get this stuff done, and then I'll ask for proposed orders on both issues, if we need to, to go from there. Does that sound reasonable to everyone?
>
> Mr. Andrews: Sure. [ROA 347-348; Tr. 5/16 – 6/2.]

III. THE HARSH SANCTION DEFAULT

Judge Burch ordered entry of default against the Appellants as a sanction for failure to respond to discovery requests. On appeal, the Appellants submit that the Plaintiff/Respondent did not make a showing of egregious discovery violations to justify such a harsh sanction.

At the trial level, the Appellants sought review of Judge Burch's sanction order by filing a Rule 55 motion to set aside the entry of default judgment which was heard and denied by the Special Referee when he awarded the Parents $30 million. The Special Referee held that Rule 55

was not the proper motion for seeking review of the sanction order. However, there is case law supporting the use of Rule 55, namely, the Court of Appeals stated "[defendant] 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." Ralphs v. Trexler, No. 2005-UP-219, 2005 WL 7083860 *3 (S.C. Ct. App. Mar. 24, 2005).

As to the merits of the sanction order, the Appellants have maintained that 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 and the Appellants' insurer had only just received notice of the default status of the action. However, the Special Referee held that the Appellants were judicially estopped from asserting such a contention as good cause because they previously had alleged when notice was given to the insurer. However, the application of judicial estoppel was error because the allegation of "lack of notice" at the original Rule 55 motion was made in the context of the notice of the claim, while the "lack of notice" as alleged at the Rule 55 directed to sanction default was made in the context of the lack of notice of the progress and default.

The Special Referee also held that the abandonment ground was not timely raised or supported by any evidence. The Appellants maintain the issue regarding their attorney's inactions was raised at the hearing immediately following the Plaintiff/Respondent's presentation of evidence of damages when their new counsel explained that their previously retained counsel, 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. 65/5-7.] The abandonment issue also was pursued in connection with the posttrial motions in the supporting memoranda and the arguments at the hearing. The evidence of Mr. Brooker's abandonment was clearly evident

in the record from his repeated failures to respond to motions or appear at hearings which manifestly amount to exceedingly more than just mere neglect. Stearns Bank Nat. Ass'n v. Glenwood Falls, LP, 373 S.C. 331, 342–43, 644 S.E.2d 793, 799 (Ct. App. 2007) ("where an attorney's conduct transcends mere neglect and the party seeking relief establishes willful abandonment or withdrawal from the case.")

Contrary to the Respondent's argument, Mr. Brooker's self-serving, defensive allegations in his answer to the malpractice action filed by the Appellants after judgment was entered does not negate or excuse the evidence of Mr. Brooker's rampant and abject neglect that rose to the level of abandonment which was readily discernable on the record before Judge Burch and the Special Referee. Even if, as alleged by Mr. Brooker, the Defendants/Appellants failed to stay in contact or cooperate or follow his advice, he remained counsel of record, and as such, he was given notice of the filings and hearing notices to which he should have responded and made appearances. [See docket sheet as to notices.]

"[A]fter entering an appearance with the court, an attorney must receive a court order pursuant to Rule 11(b) in order to be relieved as counsel." Ex parte Strom, 343 S.C. 257, 262, 539 S.E.2d 699, 701 (2000). As discussed by the Court in Strom, the policy reason for this requirement is that: "An attorney not only is an employee of his client but also is an officer of the court. This dual relation imposes a dual obligation." *Id.* at 702 (quoting Smith v. Bryant, 264 N.C. 208, 141 S.E.2d 303 (1965)). Having been retained and having made an appearance as counsel of record, Mr. Brooker had the option to move to withdraw and be relieved as counsel of record consistent with Rule 1.16(b) of the Rules of Professional Conduct,[4] but he did not exercise that option by

[4] *See* Appellate Court Rule 407, Rules of Professional Conduct, Rule 1.16(b):

filing the requisite Rule 11(b) motion to withdraw. Accordingly, Mr. Brooker did not have any excuse for literally ghosting everyone or to justify his failure to communicate with opposing counsel, his failure to respond to motions, or his failure to attend noticed court hearings. His conduct amounted to abandonment as contemplated in Graham v. Town of Loris, 272 S.C. 442, 451, 248 S.E.2d 594, 598 (1978), and the Appellants should not be forced to bear the extremely

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> (b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:
>
> (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
>
> (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
>
> (3) the client has used the lawyer's services to perpetrate a crime or fraud;
>
> (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
>
> (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services or payment therefor and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
>
> (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
>
> (7) other good cause for withdrawal exists.
>
> (c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.
>
> (d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel,….

harsh consequences suffered as a result of Mr. Brooker's actions in abandoning his clients instead of following the required procedure in accordance with Rule 11 and Rule 1.16.

Despite of all the known and acknowledged incidents of no responses and no shows, the Respondent argues that the Special Referee was under no obligation to inquire about the obvious neglects of the Defendants' counsel. However, a presiding judge has the power – if not the duty – make reasonably necessary efforts to do justice. ("Courts have the inherent power to do all things reasonably necessary to insure that just results are reached to the fullest extent possible." Ex parte Dibble, 279 S.C. 592, 595, 310 S.E.2d 440, 442 (Ct. App. 1983) (addressing "the power to appoint lawyers to serve without compensation where it appears reasonably necessary for the court to do justice"). Sadly, these Defendants/Appellants were deprived of basic justice on multiple points in this wrongful death action -- from the harsh sanction of default to the unauthorized appointment of and reference to a Special Referee and ultimately to the final judgment awarding a grossly excessive award of $30 million.

IV. THE EXCESSIVE AWARD OF $30 MILLION IN ACTUAL DAMAGES

In their posttrial motion for a new trial, the Appellants challenged the amount of the Special Referee's award on the grounds that the award is based on improper considerations beyond the proper elements of damages laid out in the controlling caselaw, and the award of $30 million to the parents of their three-year-old child is grossly excessive when weighed against awards in comparable cases.

A. The Special Referee's $30 million damage award is improperly based on matters beyond the legitimate elements of damages recoverable in a wrongful death award.

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). While the Special Referee did not provide any itemized breakdown of his $30 million award, the order for judgment and the posttrial orders readily show that the Special Referee improperly considered certain matters of loss beyond these legitimate[5], 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 deceased Child's sibling, and (4) the Parents' emotional pain from witnessing the death of their Child.

Respondent argues that the Special Referee's improper consideration of these matters cannot be reviewed on appeal because the Appellants did not make any objection to the admissibility of the evidence at the default damages hearing. However, while the case law on the procedure for conducting default damage hearings allows a defendant in default to make objections to the admission of evidence, the Appellants are not raising evidentiary objections to the admission of the evidence. Rather, Appellants maintain that the Special Referee erred as a matter of law in considering these improper elements of damages in awarding $30 million. Moreover, the case law does not require evidentiary objections to preserve challenges to the judgment of a trial judge sitting in place of the jury in a bench trial. Brown v. Allstate Ins. Co., 344 S.C. 21, 27, 542 S.E.2d 723, 726 (2001) (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."). The issues were properly preserved by the posttrial motion, and the Special Referee's errors on each and all these points warrant reversal of the judgment.

In his posttrial order, the Special Referee addresses each of these elements and admits that he considered them, but he attempts to justify his reliance on those points as relevant to the Parents'

[5] 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).

emotional pain and suffering. Appellants maintain that this type of bootstrapping cannot justify consideration of these illegitimate/unrecoverable elements.

"Pecuniary Loss" -- In the case of a wrongful death of a child, the recoverable element of "pecuniary loss" might include any loss of wages/income the child might have contributed to the parents/family if there is evidence that the child actually had an earning capacity, but there is no case law to support recovery of the parents' lost work income and/or diminished earning capacity. *See* Gilliam v. S. Ry. Co., 108 S.C. 195, 93 S.E. 865, 867 (1917); Mock v. Atlantic Coast Line R. Co., 227 S.C. 245, 87 S.E.2d 830 (1955). Moreover, it is evident that the Special Referee did not limit his consideration of the Parents' work history as evidence of their emotional harm as can be seen in his amended judgment wherein he made specific findings of the Parents' loss of income and diminished earning capacity as pecuniary loss, and included those elements as pecuniary loss in his excessive award of $30 million.

The Parents' Broken Relationship: The concept underlying wrongful death damages, in a case such as this, is the relationship of the surviving parent to the deceased child, and thus, one of the recoverable elements of damages is the parent's loss of companionship of the deceased. Self v. Goodrich, 300 S.C. 349, 352, 387 S.E.2d 713, 715 (Ct. App. 1989). While the Respondent tries to defend the Special Referee's rationale with citation to federal district court orders[6] which mention the Parents' combined loss and a broken relationship, those trial court orders cannot be relied upon as controlling authority where there is no South Carolina appellate case law to support an award for the deterioration of the Parents' relationship after the loss of their child.

[6] Jimenez v. Chrysler Corp., 74 F. Supp. 2d 548, 575 (D.S.C. 1999); 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).

The Surviving Brother's Grief: The evidence of record shows that the Child's surviving older brother (Rylan) suffered emotionally from the loss of his little sister and he went through grief counseling after the accident. However, 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.

The Respondent argues that there is no law to support the Appellants' argument that the Parents cannot recover for Rylan's suffering, but the Court has held that the question in determining the damages recoverable in a wrongful death case is the damages sustained by the beneficiaries from the death, and the statutes themselves identify the beneficiaries who can recover in a wrongful death action. Smith v. Wells, 188 S.E.2d at 471.

The Respondent also argues that the award for Rylan's emotional suffering is proper because the Mother is legally obligated to care for her son's physical and mental well-being. However, the Mother's legal obligation to support her surviving son has no legal significance to an award to the Parents for the wrongful death of the deceased Child.

While the Special Referee acknowledged that the brother is not a statutory beneficiary, he still improperly considered the evidence of his grief/suffering by rationalizing that the brother's emotional harm added to the Mother's grief. This bootstrapping cannot be allowed when 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.

Bystander Emotional Distress: The Special Referee should not have allowed the Parents to recover for the emotional damage they suffered by witnessing the immediate aftermath of the accident because they dropped/abandoned the bystander claim. [ROA 403; 4/13/23 Tr. 61.]

B. The Special Referee's award of $30 million is grossly excessive.

By virtue of the default entered as a sanction for a discovery violation, the Appellants were deemed to have admitted liability; however, that default did not give the Plaintiff/Respondent a blank check to recover an unfounded or excessive award of damages.[7] 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," and the Plaintiff/Respondent still was required to prove an amount of recoverable damages.

While there is no mathematical formula or objective measurement for the intangible elements of damages for the loss of a life, 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. The Appellants cannot and do not dispute that there is evidence of the Parents's mental shock and suffering, wounded feelings, grief and sorrow, loss of companionship of their daughter, and deprivation of the use and comfort of the deceased Child's society. However, the Appellants do challenge the grossly excessive amount of the $30 million award.

Beyond challenging the excessiveness of award on the grounds that the Special Referee erred on points of law by considering and relying on facts outside the legitimate, recoverable elements, the Appellants are challenging the award of $30 million damages to the Parents for the death of a three-year-old child as grossly excessive in comparison to other awards in this State for the wrongful death of a child cases. Without addressing any of the specific appellate decisions cited and discussed by Appellants which clearly demonstrate the gross excessiveness of the $30

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

million award, the Respondent speciously argues that the Appellants' use of the comparative approach to assessing the excessiveness of the award is legally flawed because a strict comparison approach is not useful. However, while there is no established range of allowable awards, the Supreme Court has acknowledged the appropriateness of using a comparison approach in challenges to the excessiveness of a wrongful damages award, even if prior awards are not controlling:

> The appellants, relying on Zorn v. Crawford, 252 S.C. 127, 165 S.E.2d 640 (1969), assert this verdict exceeds any amount previously awarded in similar cases which have received the approval of appellate courts, and that such fact should be persuasive in determining whether the award is excessive. The comparison approach is helpful and sometimes forceful, however, each case must be evaluated as an individual one, within the framework of its distinctive facts

Lucht v. Youngblood, 266 S.C. 127, 136, 221 S.E.2d 854, 858 (1976).

> We have recognized that not only must the circumstances peculiar to each case be considered in determining the amount to be awarded for damages, but we have long recognized that past verdicts for similar injuries may be compared but are not controlling. Cabler v. Hart, 251 S.C. 576, 164 S.E.2d 574 (1968).

Smoak v. Seaboard Coast Line R. Co., 259 S.C. 632, 639, 193 S.E.2d 594, 597 (1972)[8]. Notably, the Special Referee acknowledged that the Supreme Court, in Lucht found "the comparison

[8] In Smoak, the Court stressed the importance of taking account of inflation in making comparisons:

> A comparison of today's verdict to those of yesterday is of only minimal value. Money represents buying power. A verdict which was excessive when a carpenter earned forty cents an hour, might not be excessive today, when a carpenter earns three or four dollars an hour. A verdict given when beans were seventeen cents a can, would not represent the same considerations as when beans are thirty-seven cents a can. In determining whether a verdict is excessive, the buying power of the verdict involved must be considered. Cabler v. Hart, supra. Money is not what it used to be. Adequacy, inadequacy, and excessiveness must be thought of in connection with buying power.

Smoak, 193 S.E.2d at 597. Heeding that direction, the Appellants have provided inflation calculations to the prior awards to provide the proper parameters for comparisons.

approach is helpful and sometimes forceful…" and the Special Referee made his own comparisons, though flawed, to awards in federal court actions [ROA 87; Order on posttrial motions, p. 33.] In contrast, the comparisons of wrongful death awards identified from South Carolina Appellate Courts and discussed by the Appellants in their posttrial motion and their opening brief may not be controlling, but they are forceful and compelling in the absence of any evidence particularly harrowing or grievous circumstances in this case that can rationalize an award so far beyond any prior award to parents who lost their children.

Strikingly, Zorn v. Crawford appears to be the only South Carolina appellate opinion holding that an award for the wrongful death of a child was excessive. Notably, the Court mentioned Zorn in Lucht. 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,[9] $250,000 in 1969 would be comparable to @ $2,100,000 in 2023. The other appellate decisions offered for comparison include:

- Hopkins v. Derst Baking Co., 221 S.C. 497, 499, 71 S.E.2d 407, 408 (1952), where the Supreme Court rejected an excessiveness challenge to a jury's wrongful death award of $22,500 [@ $260,000 in 2023] for the death of a two-year-old two who was run over and killed by a truck;
- Mock v. Atl. Coast Line R. Co., supra, where the Supreme Court held that a wrongful death award of $50,000 [@ $570,000 in 2023] to parents for the death of twelve-year-old boy as the result of automobile-train collision was not grossly excessive;

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

- Reid v. Swindler, 249 S.C. 483, 488, 154 S.E.2d 910, 912 (1967), where the Supreme Court held that a wrongful death award of $25,000 [@ $230,000 in 2023] for the death of a six-year-old girl struck by an automobile was not grossly excessive;
- Lucht v. Youngblood, supra, where the Supreme Court upheld a wrongful death award of $168,000, which was reduced by the trial court to $110,000 [@ $600,000 in 2023], for death of a sixteen-year-old girl who was killed in an automobile accident;
- Clark v. Ross, 284 S.C. 543, 550, 328 S.E.2d 91, 96 (Ct. App. 1985)[10], where the Court of Appeals held that a wrongful death award of $175,000 [@ $500,000in 2023] for the death of a six-year-old girl who died as result of medical malpractice was not grossly excessive;
- Knoke v. S.C. Dep't of Parks, Recreation & Tourism, 324 S.C. 136, 140, 478 S.E.2d 256, 257 (1996), where the Supreme Court held that a wrongful death award of $3,000,000 [@ $6,000,000 in 2023] for the death of a twelve-year-old son in a fire was not grossly excessive;
- Scott v. Porter, 340 S.C. 158, 170, 530 S.E.2d 389, 395 (Ct. App. 2000), where the Court of Appeals held that a wrongful death award of $1.5 million [@ $2.7 million in 2023] to a mother for death of a nineteen–month-old boy from medical negligence was not grossly excessive.

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 million in Knoke which was not deemed excessive by the Court of Appeals. The mere fact that the Special Referee's award is the highest in the identified range might not prove the award is

[10]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.

too grossly excessive to be affirmed, but it should be unquestionable that an award of $30 million -- five times higher than the $6 million Knoke award -- is not simply unduly liberal but grossly excessive and should not be allowed to stand in the absence of any evidence of specially, excruciating loss so much more than the parents in these other cases.

CONCLUSION

For each and all of the grounds as presented and discussed in the opening brief and in reply 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 to render the judgment because the Clerk of Court had no power to appoint him or to 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.

At the very least, the grossly excessive award should be vacated, and 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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May 24, 2024

Certification of Counsel

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

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May 24, 2024