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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
in the Supreme Court

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

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

Appellate Case No. 2024-000642

Kacey Green and Charinrath Green, ... Respondents,

v.

Mervin Lee Johnson, ... Petitioner.

BRIEF OF PETITIONER

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November 12, 2024

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STATEMENT OF THE ISSUES ON APPEAL

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

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

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

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

STATEMENT OF THE CASE

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

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

Mr. West emailed again on July 5, 2018, and provided medical and billing records for the Greens' medical treatment after the accident. (App. p. 142). On July 23, Ms. Shields and Mr. West spoke by telephone and she emailed instructions for submitting a claim for the diminution in value[1] of their vehicle. (App. pp. 143-145). The next day, Mr. West provided a more complete description of the Greens' claims and rejected the insurer's $22,000 settlement offer. (App. pp. 146-147). It is apparent from the letter that Mr. West lacked authority to make a formal demand as he notes his intention to recommend to the Greens a settlement value of $192,390.00. *Id*. Mr. West also provided a copy of the Greens' dashcam video[2] of the accident.

The Greens' insurer submitted a subrogation demand to Insurer provided invoices showing payments made for repairs to the Greens' Tesla and for nine days of rental car fees. (App. pp. 138-140). On February 1, 2019, the Insurer sent a check to the Greens' automobile insurer to satisfy its $2,006.55 subrogation claim. (App. pp. 149-150).

Without notifying CDS Transport, Inc. or the Insurer, the Greens filed their personal injury lawsuit in Orangeburg County on January 11, 2019. (App. pp. 34-39). Only Mervin Johnson was named as a defendant. On January 29, 2019, the Greens filed an affidavit attesting to personal service on Helen Johnson, whom the affidavit describes as "Parent=Co-Resident." (App. p. 40). The Greens moved for an order of default, which Judge Edgar W. Dickson issued on March 8, 2019.

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[1] Among other things, the instructions requested an expert witness assessment of the decline in value. (App. p. 143). Mr. West never responded to this request.

[2] Mr. Green testified in the damages hearing that he was driving a driving a 2016 Tesla Model S 90D "with the Autopilot 1.0 package" and had installed a dash camera with "one facing inside the cabin and one facing out to the road." (App. p. 47, lines 22-25). The video recording submitted to the Insurer included only the camera view oriented from the windshield towards the driver and passenger seats.

Mr. West never communicated a settlement demand to the Insurer on behalf of the Greens. Instead, on July 7, 2019, the Greens' attorney sent Ms. Shields, via first-class mail, a copy of the July 5, 2019, Default Damages Order awarding the Greens $1,760,000.00 in personal injury, property, and punitive damages.

On or about June 17, 2019, Johnson appeared through counsel and filed a Notice of Motion and Motion to Dismiss, or in the Alternative, to Set Aside Entry of Default and Order of Damages and Allow Defendant to Responsively Plead ("Motion to Dismiss"). (App. pp. 104-106). His Rule 60(b) motion sought an order relieving Johnson from default judgment and cited the Greens' damages allegations as justification for such relief. (App. p. 105). In support of that motion, Johnson submitted the Affidavit of Nikole Shields, a claims representative for the Insurer. (App. pp. 110-112). The Master held a hearing on Johnson's Motion to Dismiss on October 21, 2019. (App. pp. 102-103). The issues of Johnson's entitlement to relief under Rule 60(b)(1) for "mistake, inadvertence, surprise, or excusable neglect" and his meritorious defense based on the excessive damages award were raised at the hearing. However, there was no court reporter present and the hearing was not recorded.

On November 4, 2019, the Master issued an order (the "Rule 60 Order") denying Johnson's motion and erroneously finding that precedent barred evidence presented at the hearing and did not permit a defense based on damages. (App. pp. 13-18). Johnson timely filed his S.C. R. Civ. P. 59(e) Motion to Alter or Amend the Master's order on November 14, 2019. (App. pp. 117-122). The trial court held a hearing on Johnson's motion on July 13, 2020. (App pp. 102-103). At that hearing, the Master denied the motion as to liability, but amended the damages awarded in the

order of June 5, 2019.[3] (App. pp. 19-30). On August 24, 2020, the Greens timely filed a S.C. R. Civ. P. 59(e) Motion to Alter or Amend the Amended Order on Damages. (App. pp. 162-167). They also submitted an uninvited proposed order. (App. pp. 152-161).

Despite the stay imposed by their Rule 59(e) motion, the Greens served their Notice of Appeal on September 14, 2020. In reliance on this stay of the appeal deadline, Johnson did not serve a Notice of Appeal on the 30-day deadline. Johnson sought the Master's guidance regarding the status of the Greens' outstanding Rule 59(e) motion. (App. p. 168). The Master informed Johnson that the trial court no longer had jurisdiction to consider the motion. *Id*. Therefore, Johnson on September 25, 2020, served his Notice of Cross-Appeal based on the date of the Master's correspondence.

The Court of Appeals on February 4, 2021, granted Johnson's Motion to Hold Appeals in Abeyance and remanded this matter to the Master to consider the Greens' Rule 59(e) motion. The Master denied that motion by Form 4 Order dated March 8, 2021. (App. pp. 31-33). Johnson served on April 7, 2021, his Notice of Appeal[4] of the following orders filed by the Honorable James B.

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

[4] This Court declined cert as to the issue of the timeliness of the Greens' appeal. By way of brief explanation, Johnson argued that the Greens' initial notice of appeal was untimely due to their Rule 59(e) motion pending before the Master. Though Johnson raised the issue with the clerk, the court did not dismiss without prejudice the Greens' appeal and remand the case back to the Master. Thereafter, the court granted Johnson's motion to hold the appeals in abeyance. Thirty days after the Master denied the outstanding Rule 59(e) motion by Form 4 order, Johnson noticed and filed a second appeal. The Greens later served and filed an amended notice of appeal to incorporate the Master's Form 4 order. The parties each filed motions to dismiss the other's appeal. By order dated June 28, 2021, the court denied the motions to dismiss and, citing the multiple notices of appeal, issued new briefing deadlines.

Jackson, Jr.: Order denying Defendant's Motion to Dismiss, filed on November 14, 2019; and, Amended Order denying, in part, Defendant's Motion to Alter or Amend, filed on August 14, 2020.

The Court of Appeals heard oral arguments on October 10, 2023. The court issued an unpublished, *per curiam* opinion affirming the Master's denial of Johnson's request to set aside default, vacating the Amended Damages Order, and reinstating the Default Damages Order, which awarded the Greens $1,760,000.00 in compensatory damages (bodily injury and property) and punitive damages. The court denied Johnson's Petition for Rehearing on March 21, 2024. This Court granted writ of certiorari on October 11, 2024.

I. THE MASTER'S DECISION REDUCING THE DEFAULT JUDGMENT AWARD WAS BASED ON EVIDENCE TIMELY PRESENTED.

The Court of Appeals erred by concluding (albeit without explicitly stating as much) that Johnson's partial relief from judgment relied exclusively on evidence presented at the Rule 59(e) hearing. (App. 270). However, Johnson's challenge to this default judgment was adequately supported by evidence presented at the default damages hearing and in the Affidavit of Nikole Shields,[5] which was submitted in support of Johnson's Rule 60 motion. As to Johnson's burden to demonstrate that the default resulted from surprise or excusable neglect and that he had a meritorious defense, the additional evidence submitted with Johnson's Rule 59(e) motion was merely cumulative of evidence already before the Master. Because his conclusions were not

[5] Johnson also submitted the Affidavit of Breeann Richardson, a claims administrator for CDS Transport, Inc. the trucking company Johnson worked with at the time of the subject accident. (App. pp. 107-109). Because the affidavits of Shields and Richardson provide essentially the same set of facts, and because Plaintiff's attorney only communicated with Ms. Shields, Johnson will refer only to her affidavit in this brief.

without evidentiary support, the Master did not abuse his discretion when, on reconsideration, he reduced the patently excessive damages award. By reversing the Master, the Court of Appeals improperly substituted its own judgment as to the significance of evidence Johnson submitted in support of his initial Motion to Dismiss and plainly relied on in the Master's Amended Damages Order.

The Master's Amended Damages Order should "not be disturbed on appeal absent a clear showing of an abuse of that discretion." *Sundown Operating Co., Inc. v. Intedge Indus., Inc.*, 383 S.C. 601, 606, 681 S.E.2d 885, 888 (2009). Despite the Court of Appeals' citation to the correct standard of review, it never explicitly found that the Master abused his discretion. Instead, the court overreached when it disagreed with the Master's evaluation of the record evidence. "An abuse of discretion in setting aside a default judgment 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." *In re Est. of Weeks*, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct. App. 1997). The court's order to vacate the Amended Damages Order should be reversed because it was controlled by factual conclusions that are not without evidentiary support.

A. The Affidavit of Nikole Shields Provided Sufficient Evidence that the Default Resulted from Surprise.

According to S.C. R. Civ. P. 60(b)(1), the court may relief a party from default judgment due to "mistake, inadvertence, surprise, or excusable neglect." The Court of Appeals' opinion correctly quotes its decision in *McClurg v. Deaton* for the proposition that the surprise or excusable neglect requirement under Rule 60(b)(1) may be satisfied based on pre-suit correspondence between a plaintiff's attorney and a defaulting defendant's insurer. 380 S.C. 563, 573, 671 S.E.2d 87, 92-93 (Ct. App. 2008), *aff'd*, 395 S.C. 85, 716 S.E.2d 887 (2011) (*McClurg I*). (App. pp. 271).

The *McClurg I* court concluded that it was reasonable for [the insurer] to believe that any suit filed would include [the trucking company] as a defendant or, at the very least, that counsel would provide [the insurer] a copy of any pleadings in the matter when filed." *Id*. 380 S.C. at 573, 671 S.E.2d at 92.

Shortly after the Greens provided the Insurer with the Default Damages Order, Johnson appeared through counsel and filed a motion seeking relief from default judgment ("Motion to Dismiss"). (App. pp. 104-106). In support of that motion, Johnson submitted the Affidavit of Nikole Shields, a claims representative for Claims Direct Access, Johnson's employer's insurer[6] (the "Insurer"). (App. pp. 110-112).

That affidavit alone was sufficient to establish Johnson's entitlement to relief under Rule 60(b)(1) as applied by the court in *McClurg I*. According to Ms. Shields, she learned of the subject accident in March of 2018, spoke with the Greens' attorney on July 23, to negotiate a settlement of the claim, and received on August 7th what she describes as a settlement demand. (App. p. 110). That attorney also provided a copy of a video recording of the accident. Despite these communications, prior to June 7, 2019,[7] the Greens' attorney never informed Ms. Shields that he filed a summons and complaint or that he served the same on Johnson. (App. p. 111). The Greens' attorney also failed to inform her that an order of default was entered against Johnson and a damages hearing took place before the Master. *Id*.

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[6] As attested to by Ms. Shields, CDS Transport, Inc. was insured by Claims Direct Access. (App. p. 110, at ¶ 3). The importance of the distinction that Johnson's employer, and not Johnson himself, is the insured will be discussed in the context of FMS-90 Endorsements in Section IV.

[7] Two days prior on June 5, 2019, the Master issued the Default Damages Order and awarded the Greens $1,760,000.00 in damages. (App. pp. 2-12).

B. The Amended Damages Order Appropriately Relied on Evidence Offered in Support of Johnson's Rule 60 Motion and Justifying Relief Under Rule 60(b)(1)'s Surprise or Excusable Neglect Standard.

On November 4, 2019, the Master issued his order denying Johnson's Motion to Dismiss citing an absence of evidence of any communication between the Greens' attorney and Johnson (as opposed to his employer's Insurer) and suggesting that under *McClurg I*, an insurance company lacks standing to make arguments to set aside default judgment. (App. pp. 13-18). Johnson timely moved under Rule 59(e) for the trial court to reconsider its denial of the Motion to Dismiss. (App. pp. 117-120). In his memorandum of law,[8] Johnson quoted Ms. Shields' affidavit and *McClurg I* court's finding that that "the trial court erred in its implicit finding that because New Prime was not a party to the initial lawsuit it could not make a Rule 60(b) motion." (App. pp. 125-126). The Master agreed with Johnson's arguments and issued his Amended Damages Order relieving Johnson, in part, from default. (App. pp.19-30).

In the Amended Damages Order, the Master concluded that the Greens' attorney's contacts with Ms. Shields satisfied Rule 60(b)(1)'s mistake, inadvertence, surprise, or excusable neglect standard as articulated in *McClurg*. (App. p. 25). In reaching this conclusion, the Court cited Shields' affidavit[9] specifically. (App. p. 21, at ¶¶ 2-5). The order found that the affidavit of an insurance representative met Johnson's evidentiary burden. (App. pp. 26-27, at ¶ 9). The amended findings of fact quoted the affidavit to find that Johnson was "an independent contractor for CDS Transport, Inc., which is insured by Claims Direct Access." (App., at 21). The order found that in

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[8] Johnson also referenced additional evidence offered with his Rule 59(e) motion, the effect of which is discussed in Section II below.

[9] Whether the Master erred as a matter of law in admitting the affidavit is not an issue on appeal. The Master's order denying Johnson's Rule 60(b) motion cites the affidavits and does not find them inadmissible. (App. pp. 13-18). Accordingly, any challenge to the admissibility of the affidavits expired ten-days after the Rule 60 Order.

her role with the Insurer, Ms. Shields spoke with the Greens' attorney by telephone and sought additional information to investigate the Greens' claims. *Id*. The order concluded that the Greens' attorney's contacts with the Insurer, and the subsequent failure to notify her of the lawsuit, satisfied the Rule 60(b)(1) standard and cited McClurg. (App. p. 25, ¶ 5).

All of these findings relied on in the Amended Damages Order were based on the affidavit submitted with Johnson's initial Motion to Dismiss. Even discounting the additional evidence presented with Johnson's Rule 59(e) motion, the affidavit evidence justified the Master's decision under Rule 60(b)(1). Thus, the Master did not abuse his discretion because his conclusion that surprise existed was not "without evidentiary support." *In re Est. of Weeks*, 329 S.C. at 259, 495 S.E.2d at 459.

C. Evidence Offered at the Default Damages Hearing, was Adequate to Demonstrate Johnson's Meritorious Defense as to Damages.

Relying on its faulty evaluation of Johnson's entitlement for relief from default under Rule 60(b), the Court of Appeals declined to reach the question of whether the Master erred in concluding that Johnson possessed a meritorious defense sufficient to escape default judgment. (App. p. 273). Even if this Court agreed that the Master erred in considering evidence offered for the first time at the Rule 59(e) hearing,[10] the evidence already before the trial court was sufficient to establish Johnson's meritorious defense as to damages.[11]

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[10] The additional evidence presented with Johnson's Rule 59(e) motion included correspondence between the Greens' counsel and the Insurer, a picture from the accident scene, and documentation of the Greens' insurer's subrogation claim against the Insurer for repairs to the Greens' Tesla. (App. pp. 133-151).

[11] As will be discussed in Section IV, the question of whether a defense as to the amount of a default damages award can satisfy *Wham*'s meritorious defense standard has not been answered by our courts. *McClurg v. Deaton*, 395 S.C. 85, 87, 716 S.E.2d 887, 888 (2011) (declining to decide whether a meritorious defense as to damages alone is an adequate basis for relief under Rule 60).

To meet the Rule 60(b) standard, Johnson was obligated to show that relief was justified by, among other things, the existence of "a meritorious defense." *Wham v. Shearson Lehman Bros., Inc.*, 298 S.C. 462, 465, 381 S.E.2d 499, 501-502 (Ct. App. 1989). The trial court's Rule 60 Order erroneously stated that *McClurg I* forbids a meritorious defense[12] based on a challenge to the amount of damages awarded in default. (App. pp. 16-17).

On reconsideration, the Master concluded that Ms. Shields' affidavit could provide *prima facia* evidence of a meritorious defense as set forth in *Williams v. Carpenter*, 273 S.C. 339, 341-342, 256 S.E.2d 316, 317 (1979). (App., at 26-27). The Master also corrected the erroneous finding in the Rule 60 Order by concluding that his excessive damages award provided Johnson a meritorious defense. As is evident from his own comments during the Rule 59(e) hearing, the Master simply regretted the excessive damages award.[13] The Master concluded that "I think the damages that I previously awarded are too high. And so I'm going to reduce those damages, okay." (App. pp. 93-94). Referencing the earlier hearing, the Master explained that "when there's nobody here defending it, you know, and the Court only hears one set of argument on the damages … it's just kind of hard." *Id*.

What is not hard is concluding that the evidence presented to the Master at the default damages hearing was sufficient to support his decision that the original award was excessive. The Greens testified and presented record evidence at the May 22, 2019, default damages hearing.

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[12] Instead, the *McClurg I* court held that New Prime's meritorious defense arguments were not raised to the trial court and thus not preserved for appeal. 380 S.C. at 575, 671 S.E.2d at 94. Unlike New Prime, Johnson clearly raised his meritorious defense to the Greens' damages claims in his Motion to Dismiss, in his Rule 59(e) motion, and at the hearing on that motion. (App. pp. 70-74, 104, 118, & 126-129).

[13] This award was a breach of the court's discretion. "[I]it is well established that the determination of the amount of damages …must be based on the evidence. *Gauld v. O'Shaugnessy Realty Co*., 380 S.C. 548, 559–60, 671 S.E.2d 79, 85–86 (Ct. App. 2008).

(App. pp. 41-56). Counsel for the Greens entered medical bills totaling $12,826.00 and suggested that "anywhere from 100 to 150 times medical expenses" was appropriate for an actual damages award. (App. pp. 53-54). Mr. Green testified that repairs to their Tesla was "$3,000.00 or something." (App. p. 49). Mr. Green explained that when attempted to sell the vehicle, he showed prospective buyers photos of damage caused by the collision and told them "See, look, it -- it didn't look bad." (App. p. 51). Appellants offered a video of the relatively minor accident, which the Master viewed during the hearing. (App. pp. 24 & 44-45).

As Chief Justice Toal noted in her dissent in *McClurg*, the evidence relied on by the Master to reconsider his excessive award is especially important because it was "supplied by the plaintiff, not the party seeking to have the judgment set aside." *McClurg v. Deaton*, 395 S.C. 85, 94, 716 S.E.2d 887, 891 (2011) (*McClurg II*) (Toal, CJ dissenting). Accordingly, the Master's decision to reduce the damages award was based on evidence presented well before the Rule 59(e) hearing and not necessarily on newly admitted evidence. Moreover, the judge who hears the evidence and is more familiar with the evidentiary atmosphere at trial possesses a better-informed view of the damages than a reviewing court. *Rush v. Blanchard*, 310 S.C. 375, 426 S.E.2d 802 (1993). Accordingly, great deference should be given to Master's decision to reduce his own damages award. *Id*.

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

The Court of Appeals erred when it held that the Master improperly considered evidence presented for the first time with Johnson's Rule 59(e) motion. However, the Greens failed to preserve their argument by raising it in their Rule 59(e) motion. Despite its own prior decision to the contrary, the court held that "the Greens preserved this argument because they presented it to

the master in their proposed order denying Johnson's Rule 59(e) motion." (App. p. 270). The court also held that the master implicitly "rejected their argument in the Amended Damages Order by considering the evidence … and holding that the evidence supported granting relief from default judgment." *Id*. Based on this holding, the court affirmed the denial of Johnson's request to set the default judgment aside and vacated the Amended Damages Order.[14]

A. The Greens Cannot Rely on a Proposed Order to Preserve Objections to Evidence Offered in Support of Johnson's Rule 59(e) Motion.

In *S.C. Dep't of Transp. v. M & T Enterprises of Mt. Pleasant, LLC*, the Court of Appeals held that an issue raised in a proposed order submitted in lieu of a brief to the trial court is insufficient to preserve the issue for appellate review. 379 S.C. 645, 660 n. 7, 667 S.E.2d 7, 15 n. 7 (Ct. App. 2008). This case involved a commercial tenant's appeal from the master-in-equity's order allocating to the landlord the entire compensation award from a partial taking by condemnation of leased property. *Id*., 379 S.C. at 651, 667 S.E.2d at 11. The condemnation involved a strip of land along Highway 17 in Charleston County. Despite arguing at trial that the allocation was a contractual issue governed by the parties' lease, the tenant argued on appeal that the master should have considered the inequity of the allocation. The tenant never filed a post-trial motion asserting the equity argument. *Id*., 379 S.C. at 659, 667 S.E.2d at 15. Thus, despite addressing the issue in the tenant's proposed order, the master-in-equity was never asked to revisit the equitable apportionment argument after issuance of his decision.

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[14] As argued in Section I, the Amended Damages Order was sufficiently supported by evidence offered at either the default damages hearing or with Johnson's Motion to Dismiss. Therefore, even if the Greens adequately preserved this argument in their proposed order, and even if the Court of Appeals correctly held that evidence may not be admitted for the first time with a Rule 59(e) motion, the court erred when it vacated the Amended Damages Order.

The court in *S.C. Dep't of Transp. v. M & T Enterprises of Mt. Pleasant, LLC*, relied on this Court's guidance in footnote four of *Elam v. S.C. Dep't of Transp*., 361 S.C. 9, 602 S.E.2d 772 (2004).

> [t]he losing party must first try to convince the lower court it has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred. This principle underlies the long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments....

S.C. Dep't of Transp., 379 S.C. at 658, 667 S.E.2d at 15 (*quoting Elam*, 361 S.C. at 24 n. 4, 602 S.E.2d at 780 n. 4). In the instant appeal, the Greens raised their objections to the new evidence in an uninvited proposed order instead of raising the issue in their own Rule 59(e) motion.[15] (App. pp. 162-167). The danger of this tactic is that a trial court is not obligated to read, much less rule upon, a proposed order. Moreover, the Greens compounded this error by appealing the Amended Damages Order prior to obtaining a ruling on their Rule 59(e) motion.

Courts outside of this State likewise reject attempts to preserve issues by hiding them in proposed orders. For instance, the Alabama Supreme Court explained the imprudence of permitting preservation by such means.

> A proposed order and a motion for a protective order are clearly distinguishable and are not equivalent or interchangeable. A motion affords the trial court an opportunity to make a specific ruling, thereby preserving any alleged error on the part of the trial court for appellate review. A proposed order on the other hand is nothing more than a suggested order, which the trial court can either sign or reject by drafting a completely different order…. But, rejecting a proposed order is not the same as denying a motion, nor does the failure of a trial court to adopt a

[15] Perhaps the Greens recognized the incongruity of challenging the admission of evidence at a Rule 59(e) hearing while submitting with their own Rule 59(e) motion an affidavit, which contained evidence offered for the first time. (App. p. 166-167). In that affidavit, the Greens challenged the Master's reversal of property damages awarded in the Default Damages Order, but for which the Greens had already been compensated.

> proposed order give rise to a right to appellate review or provide grounds to place a trial court in error.

Ex parte Harbor Freight Tools USA, Inc., No. 1190969, 2021 WL 222035 (Ala. Jan. 22, 2021) (Sellers, J., concurring) (denying a petition for mandamus to review a discovery order).

As they argue in their Rule 59(e) motion, the Greens were required to raise their concerns with the Amended Damages Order to the trial court. (App. pp. 162-167). Missing, however, from the motion is any argument that evidence may not be offered for the first time[16] in support of a Rule 59(e) motion. The Master never ruled on the substance of these objections and instead denied the Greens' Rule 59(e) motion by Form 4 order. (App. pp. 31-33). By failing to contest in their Rule 59(e) motion the Master's consideration of evidence submitted at Johnson's Rule 59(e) hearing, the Greens failed to preserve that issue on appeal. Because of this omission, the Master's reliance on the evidence is "right or wrong, the law of the case." *Gibbons v. Aerotek, Inc.*, 441 S.C. 180, 185–86, 893 S.E.2d 326, 329 (Ct. App. 2023).

B. Even if these Issues Were Preserved for Appeal, Evidence Presented at a Hearing to Determine Johnson's Entitlement to Relief from Default Judgment are Exempt from Prohibitions of Evidence of the Type Offered Here.

Even if the Greens' objections to evidence offered at the Rule 59(e) hearing were properly before this Court, the Greens cite no authority barring the introduction of evidence[17] in a litigant's effort to obtain relief from default judgment. Instead, cases such as *McClurg v. Deaton*

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[16] The Greens' Rule 59(e) motion did raise objections based on improper foundation and hearsay concerning a single photograph (*see* App. p. 150) offered at the hearing. (App. p. 164, ¶ 15).

[17] Furthermore, the additional evidence presented with Johnson's Rule 59(e) motion was cumulative and its admission was, at most, harmless. The evidence included correspondence between the Greens' counsel and the Insurer, a picture from the accident scene, and documentation of the Greens' insurer's subrogation claim against the Insurer for repairs to the Greens' Tesla. (App. pp. 133-151).

demonstrate the practical necessity of such evidence when a party is seeking relief from default. Insofar as the Greens challenge the admission of correspondence related to the pre-suit negotiations between their attorney and Nikole Shields or her employer, Claims Direct Access (the "Insurer"), this evidence is not categorically prohibited under our rules. See *McClurg*, 380 S.C. 563, 671 S.E.2d 87 (wherein the trial court relied extensively on evidence of the parties' pre-suit correspondence and negotiations that were not offered prior to default judgment). Our courts clearly permit the admission of evidence for the first time in these situations to allow defendants in default to meet their burden to establish their entitlement to relief. "The admissibility of evidence is within the sound discretion of the trial court and will not be reversed on appeal absent an abuse of discretion or the commission of legal error prejudicing the defendant." *Wright v. Craft*, 372 S.C. 1, 33, 640 S.E.2d 486, 503 (Ct. App. 2006).

The Greens argue that a "party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not." *Hickman v. Hickman*, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App 1990). This authority is plainly distinguishable. Johnson simply could not have offered this evidence prior to judgment because judgment was entered by default, prior to his appearance. The rule stated in *Hickman* stands for the proposition that a party cannot use Rule 59(e) to raise issues they could have, but failed to, offer to court. For instance, *Hickman* was a divorce action in which the wife argued that the husband's civil service retirement fund should impact the court's distribution of marital property. *Hickman*, 301 S.C. at 456, 392 S.E.2d at 482. This evidence was not presented until after a remand from appeal. These limitations on evidence in Rule 59(e) motions cannot apply where the party is challenging a default judgment.

C. Evidence of a Judgment of Previously Satisfied, Released, or Discharged Claims is Admissible to Prevent a Double Recovery.

The Court of Appeals' error is particularly acute considering the evidence offered at the Rule 59(e) hearing that the Default Damages Order inappropriately awarded the Greens a double recovery for property damages claims the Greens had already settled[18] by subrogation. In some instances, a "double recovery constitutes extraordinary circumstances which justify relief from judgment." *F.D.I.C. v. United Pac. Ins. Co.*, 152 F.3d 1266, 1275 (10th Cir. 1998) (reversing denial of Rule 60(b) motion and remanding for determination of whether liquidation of collateral and damages award amounted to double recovery). "[A] district court does not have discretion to require two satisfactions." *Id.*; *see also Johnson Waste Materials v. Marshall*, 611 F.2d 593, 599 (5th Cir. 1980) (noting that when there is "practically conclusive evidence" that judgment has been satisfied, judgment should be set aside to prevent a "windfall" and "manifest miscarriage of justice").

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

[18] In his Rule 59(e) memorandum, Johnson argued that the evidence that the Greens settled their property damage claims through subrogation justified relief under Rule 60(b)(5), which provides that judgments may be set aside if "the judgment has been satisfied, released, or discharged." (App. p. 129).

damage claims arising on or about 2/28/2018." *Id*. Admission of these records was essential to prevent the Greens from obtaining a double recovery against Johnson for these damages. "The law in South Carolina is unequivocal on the issue of satisfaction. A plaintiff may have but one satisfaction for a wrong done." *Garner v. Wyeth Laboratories, Inc*., 585 F.Supp. 189, 192 (D.S.C. 1984).

There was no testimony during the default damages hearing regarding USAA's subrogation of the Greens' property damages. (App. pp. 41-56). Despite having previously settled and released their property damage claims, Kasey Green testified to the costs to repair his Tesla. (App. pp. 16-18). The Master asked Mr. Green "So you've suffered … property damages … that you need to recover? A. Yes." (App. p. 52, lines 17-21). Based on this erroneous testimony, the Master awarded[19] the Greens $10,000.00 in property damages. (App. pp. 2-12). This Court should defer to the Master's discretion in admitting evidence that allowed him to correct an order awarded the Greens a double recovery on their property claims.

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

On appeal, Johnson argued that he is entitled to relief from default because neither the Default Damages Order, nor the Amended Damages Order, provided a single finding of fact supporting the punitive damages award. (App. pp. 9 & 30). Even the Greens agree that the Master failed to set forth mandatory findings to justify exemplary damages. As argued in their Rule 59(e)

[19] The Greens complaint does not allege entitlement to property damages. "In a default case, … the award of damages must be in keeping not only with the allegations of the complaint and the prayer for relief…." *Jackson v. Midlands Human Res. Ctr*., 296 S.C. 526, 529, 374 S.E.2d 505, 506 (Ct. App. 1988) (citations omitted).

motion, the Amended Damages Order "contains an award for punitive damages and hereby seeks clarification on the findings of fact which support the award." (App. pp. 162-167). The Greens did not question the Master's punitive damages award in the Default Damages Order. Despite its decision reinstating the Default Damages Order, the Court of Appeals did not address the absence of factual grounds in its opinion.

Although the trial court is not required to "make findings of fact for each factor to uphold a punitive damage award," the Master's orders failed to provide the slightest justification for the Greens' exorbitant award. *Welch v. Epstein*, 342 S.C. 279, 306, 536 S.E.2d 408, 422 (Ct. App. 2000). Upon review of a punitive damages award, the trial judge's factual findings specific to that award must be reasonably supported by the evidence in the record. *Austin v. Specialty Transp. Services, Inc.*, 358 S.C. 298, 314, 594 S.E.2d 867, 875 (Ct. App. 2004) (citing *Carjow, LLC v. Simmons*, 349 S.C. 514, 563 S.E.2d 359 (Ct. App. 2002)). However, neither the Master's June 5, 2019, Default Damages Order, nor his August 14, 2020, Amended Damages Order, contain a single factual finding that Johnson's misconduct was willful, wanton, or in reckless disregard of the plaintiff's rights. *Taylor v. Medenica*, 324 S.C. 200, 479 S.E.2d 35 (1996).

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

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

The Court of Appeals erred by failing to affirm the Master's conclusion that Johnson was entitled to partial relief from default under Rule 60(b)(1) because the Insurer had a reasonable belief, as a result of Mr. West's conduct, that it would receive notice before the Greens filed their lawsuit and that the trucking company would be named as a defendant in any suit. Based on this conclusion, the Court of Appeals did not address whether the Master correctly found that Johnson possessed a meritorious defense. The court further erred by declining to analyze Johnson's entitlement to relief under Rule 60(b)(3) based on the Greens' attorney's misrepresentations, and under Rule 60(b)(5) to set aside judgment for property damage claims that were demonstrably satisfied, released, or discharged. This Court should reverse the Court of Appeals and find that Johnson is entitled to relief from judgment. In the alternative, the Court should reverse the Court of Appeals and reinstate the Amended Damages Order. As argued below, the public policies announced in this state's courts strongly support granting relief from default in this action.

A. The Court of Appeals Erred in Failing to Grant Relief from Default Judgment Under S.C. R. Civ. P. 60(B)(1) Because Surprise or Excusable Neglect Resulted from Counsel's Pre-Suit Conduct.

When it reversed the Amended Damages Order, the Court of Appeals wrongly concluding that the affidavits submitted with Johnson's Motion to Dismiss did not evidence that the Insurer was surprised when the Greens' lawsuit did not inform the adjuster that suit had been filed. (App. p.272). The court also erroneously based its decision on the absence of a promise by the Greens' attorney to provide a copy of any pleadings. Instead, the *McClurg* court cited the "reasonable" belief of the insurance representative based on the conduct of the plaintiff's attorney without ever using the word "promise." 380 S.C. at 573, 671 S.E.2d at 92.

On March 13, 2018, only a few weeks after the accident, Mason West, counsel for the Greens', provided notice of representation to Claims Direct Access, Johnson's employer's insurer (the "Insurer"). (App. p. 133).[20] A claims representative for Claims Direct Access named Nikole Shields responded by fax on March 27th seeking additional information for the Insurer to investigate Plaintiffs' claims. (App. pp. 134-135). The next day, Mr. West sent an email acknowledging Ms. Shields' fax and representing that he would, "[u]pon receipt of all medical records … submit the appropriate demand." (App. p. 136).

Mr. West emailed again on July 5, 2018, and provided medical and billing records for the Greens' medical treatment after the accident. (App. p. 142). Ms. Shields and Mr. West spoke on July 23rd and she sent him instructions for submitting a claim for the diminution in value of their vehicle. (App. pp. 143-145). On July 24, 2018, Mr. West provided a more complete description of Plaintiffs' claims and rejected Ms. Shields' $22,000 settlement offer. (App. pp. 146-147). He also provided a copy of the Greens' dashcam video[21] of the accident. It is apparent from the letter that Mr. West lacked authority to make a formal demand as he notes he intended to recommend to the Greens a settlement sum of $192,390.00. *Id*.

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[20] As argued in Section I above, the Court of Appeals erred by failing to find that evidence offered during the default damages hearing and through affidavits submitted with Johnson's Motion to Dismiss met the Rule 60(b)(1) surprise or excusable neglect standard. Johnson satisfied his *prima facia* burden of showing surprise or excusable neglect by submitting Ms. Shields' affidavit. (App. pp. 110). According to Ms. Shields, she learned of the subject accident in March of 2018. She spoke with the Greens' attorney on July 23, to negotiate a settlement of the claim. On August 7, she received what she describes as a settlement demand from Mr. West. (App. p. 110). Mr. West also provided a copy of a video recording of the accident. Despite these communications, Mr. West never informed Ms. Shields that he filed a summons and complaint or that he served the same on Johnson until after June 7, 2019. (App. p. 111). Mr. West also failed to inform her that an order of default was entered against Johnson and a damages hearing took place before the Master. *Id*.

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

Without notifying CDS Transport, Inc. or Johnson's insurer, the Greens filed their personal injury lawsuit in Orangeburg County on January 11, 2019. Only Mervin Johnson was named as a party-defendant. Mr. West never communicated a settlement demand on behalf of the Greens. Instead, on July 7, 2019, the Greens' attorney sent Ms. Shields, via first-class mail, a copy of the July 5, 2019, Default Damages Order awarding the Greens $1,760,000.00 in personal injury, property, and punitive damages.

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

Moreover, Mr. West never informed Ms. Shields of a deadline after which suit would be filed. The Greens' counsel did, however, represent to Ms. Shields that he would send a formal demand after the medical records were complete. (App. p. 136). Despite this representation, Mr. West did not send a formal demand when he provided a summary of medical bills. Instead, Mr. West provided a summation of the Greens' claims and noted that he would recommend a settlement value of $192,390 to his clients. (App. pp. 146-147). It must be inferred from this statement that Mr. West did not, at that time, have authority to assert such a demand. Again, Ms. Shields entertained the entirely reasonable belief that, as he represented, Mr. West would follow

up with a demand authorized by his clients. Surprisingly, that demand never arrived. Moreover, Ms. Shields sent a request for additional information to support the Greens' diminution in value claim. Mr. West never responded to that request. (App. pp. 143-144). Instead, on Friday, June 7, 2019, he sent a copy of the Default Damages Order awarding the Greens $1,760,000.00.

Based on Mr. West's conduct, it would be unreasonable for Ms. Shields not to expect that Plaintiffs would sue the trucking company (either solely or in addition to Johnson) and that Mr. West would provide the Insurer with notice of the suit. According to the Court of Appeals reading of Ms. Shields' affidavit, she should not have been surprised when the Greens' attorney filed their lawsuit without providing notice to the Insurer, prior communications notwithstanding. This interpretation flies in the face of the conduct expected of lawyers as described by Chief Justice Hern and Chief Justice Toal in their vigorous dissenting opinions in the *McClurg* cases.

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

> [G]iven this history of contact and negotiations between counsel and Zurich, most notably the representations made by counsel to Zurich, the conduct of the McClurgs' counsel in failing to simply notify Zurich of the complaint filed against Deaton raises serious concerns for this court and quite possibly satisfies the misrepresentation and misconduct envisioned by Rule 60(b)(3).

Id., 380 S.C. at 573, 671 S.E.2d at 92–93. In a spirited dissent, Justice Hearn cited language describing conduct of counsel analogous to the present case as "'smack[ing] of chicanery and

unfair advantage' which could not be tolerated." *McClurg I*, 380 S.C. at 583, 671 S.E.2d at 97 (Hearn, C.J., dissenting). In her dissent from this Court's order affirming the *McClurg I* decision, Chief Justice Toal described the attorney's conduct as "trickery and deception." *McClurg II*, 716 S.E.2d at 889, 395 S.C. at 89 (Toal, C.J., dissenting).

Arguably, the conduct in the instant case is more pernicious. At oral argument before this Court, the McClurg's lawyer "admitted he was trying to fly under the radar in serving [the driver] because of the prolonged, and seemingly unsuccessful, settlement negotiations with Insurer." *McClurg II*, 395 S.C. at 98, 716 S.E.2d at 894 (Toal, C.J., dissenting). In fact, the correspondence between the insurer and counsel in *McClurg I* lasted for years. The letter of representation in that action arrived in September of 2002, but the plaintiff did not file the complaint until April of 2005. However, the Greens' counsel wasted no time. The Greens filed their complaint on January 11, 2019, approximately four months after his last communication with Ms. Shields.

The Court Erred in its Rule 60(b)(1) Analysis by Relying on the Absence of a Promise by the Greens' Attorney, the Lack of Evidence that Johnson Eluded the Insurer, and the Insurer's Notice of the Claim.

The Court of Appeals opinion shares the Greens' misapprehension that *McClurg* depended on a promise made by the McClurg's attorney. (App. p. 271). In their brief, the Greens describe the "previous promise made to Zurich by [the McClurg's] counsel that 'I will file suit and serve the [New Prime] and send you a courtesy copy of the pleadings.'" (App. p. 220). However, the *McClurg I* case didn't turn on whether the attorney made a promise. Instead, *McClurg I* turns on the insurer's reasonable belief it would be notified of any lawsuit based on the attorney's conduct in negotiating the claim. *McClurg I,* 380 S.C. at 573, 671 S.E.2d at 92. The word "promise" does not appear in the Court of Appeals decision in *McClurg I*.

Applying this flawed analogy, the Greens find it significant that Shields' affidavit does not suggest "that Plaintiffs' counsel promised (or even suggested) that a copy of any pleading would be forwarded to" the Insurer. (App. p. 231). There was no promise made in the *McClurg* case either, merely a representation. Similarly, Mr. West represented to Ms. Shields that he would send a demand after he reviewed the medical records. (App. p. 136). In this context the line between a promise and a representation is a distinction without a difference. As an inquiry into the reasonableness of the insurer's belief or expectation, the court invokes an objective standard. What matters is whether the degree of contact with the attorney would cause a reasonable insurance adjuster to believe that the attorney will continue negotiating and inform the adjuster if and when a lawsuit is filed. Therefore, by relying on the absence of an explicit promise, the Court of Appeals erred when it vacated the Master's Amended Damages Order.

The Court of Appeals agreed with the Greens' that Ms. Shields' affidavit provides "no evidence that Johnson attempted to elude" his employer's Insurer. (App. p. 271). In their brief on appeal, the Greens also argued that Shields' affidavit did not explain why Johnson's medical issues "precluded [him] from cooperating with his insurers or participating in this case." (App. p. 231, n. 6). They cite the absence of an affidavit from Johnson explaining his failure to answer the complaint. The Court of Appeals appears to have agreed. (App. pp. 272-272 n.4).

In *McClurg I,* the question of whether the driver-employee avoided contact with his employer's insurer never entered into the court's consideration. Instead, the court's Rule 60(b)(1) surprise analysis focused on the plaintiff's attorney's contacts with the driver's employee's insurer and not with the employee-driver. *Id*., 380 S.C. at 573, 671 S.E.2d at 92-93. As with the word

"promise," the *McClurg I* case does not include the word "elude" or even suggest that Deaton attempted to avoid contact with New Prime's insurer.[22]

Alternatively, the Greens may be attempting to argue that the absence of elusive contact, references to Johnson's health, and lack of affidavit from Johnson demonstrate his failure to meet the threshold requirement to show good cause for default. That issue, however, was not preserved for appeal. In denying Johnson's Motion to Dismiss, the Master found that portions of Shields' affidavit describing Johnson's open-heart surgery and diabetes diagnosis did not provide an adequate reason for Johnson's failure to act promptly. (App. p. 15). On reconsideration, the Master concluded that Johnson satisfied the factors[23] announced in *Wham* justifying partial relief from default. (App. p. 25-27). However, the Master did not specifically address the preliminary inquiry in the *Wham* analysis: whether Johnson "put forth a satisfactory explanation for the default." *Wham*, 298 S.C. at 465, 381 S.E.2d at 501–02. In their Rule 59(e) motion, the Greens did not challenge this omission, nor did they raise the Master's conclusions regarding timing of Johnson's motion for relief and the absence of prejudice. (App. pp. 162-164). As such, any criticism of the Master's handling of these *Wham* factors is not preserved for appeal.[24]

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[22] In the context of commercial trucking cases, the trucking company, not the driver operating the vehicle, is typically the insured under the FMC-90 Endorsement. The significance of this distinction is discussed in Section IV.D below.

[23] "[T]he 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*, 298 S.C. at 465, 381 S.E.2d at 501-502. The Court of Appeals addresses only the meritorious defense element.

[24] The Court of Appeals did not address the good cause standard. In *McClurg I*, the court applied a slightly modified Rule 60(b) analysis directing "the trial judge [to] consider: (1) the promptness with which relief is sought, (2) the reasons for the failure to act promptly, (3) the existence of a meritorious defense, and (4) the prejudice to the other party." 380 S.C. 563, 573, 671 S.E.2d 87, 93 (*quoting Mictronics, Inc. v. S.C. Dep't of Revenue,* 345 S.C. 506, 510–11, 548 S.E.2d 223, 226 (Ct.App.2001)). Yet the court never explicitly addresses the second element.

Finally, the Court of Appeals agreed with the Greens' that *McClurg I* is distinguishable because "Johnson's insurers were notified of the claim." (App. p. 271). The significance of this finding is far from obvious. The Greens argued that this case was distinguishable from *Edwards v. Ferguson*, 254 S.C. 278, 175 S.E.2d 224 (1970) because, unlike the insurer in that case, the Insurer was "notified of the claim almost immediately." (App. p. 230). This alleged distinction is irrelevant to the analysis at hand. Mr. West sent his letter of representation to the Insurer[25] two-weeks after the accident, on March 13, 2018. (App. p. 133). Similarly, the plaintiff's attorney in *McClurg I* notified Zurich the month after that accident. 380 S.C. 563, 567, 671 S.E.2d 87, 89. As in *McClurg I*, the significance of this timing is that it contributes to the Insurer's reasonable expectation that the attorney will negotiate in good faith without resorting to sly tactics.

B. The Court of Appeals Erred in Failing to Grant Relief From Default Judgment Under S.C. R. Civ. P. 60(B) Because Johnson Established Meritorious Defenses to the Damages Awards.

The Court of Appeals did not reach the question of whether Johnson was entitled to relief from default based on his meritorious defenses that the damages award was grossly excessive and the Master's award of previously settled property damage claims. By vacating the Amended Order, the Court of Appeals reinstated the Default Damages Order, thus reimposing the $1.76 million award, which the Master clearly regretted, and restoring their double recovery for property damages. (App. p. 273).

In *McClurg I*, this Court held that "[b]ecause New Prime failed to make the necessary *prima facie* showing of a meritorious defense required to set aside a judgment under Rules 60(b)(1) and 60(b)(3), the trial court did not commit reversible error in refusing to set aside the default

[25] According to her affidavit, Ms. Shields spoke with the Greens' attorney within five months of the accident. (App. p. 110).

judgment." 380 S.C. at 576, 671 S.E.2d at 94. New Prime argued that it proffered "evidence of a meritorious defense as to damages based on a judgment award of $800,000 and the fact that the McClurgs had earlier offered to settle the matter for a total of $170,000." *Id.*, 380 S.C. at 575, 671 S.E.2d at 94. The Court disagreed and concluded that the meritorious defense argument was not preserved. *Id.* This Court affirmed *McClurg I* because "the issue of a meritorious defense was neither raised to nor ruled upon by the circuit court." *McClurg II*, 395 S.C. at 87, 716 S.E.2d at 888 (declining to decide whether a meritorious defense as to damages alone is an adequate basis for relief under Rule 60 or whether a meritorious defense to the damages awarded in the default proceeding would be entitled to have the entire judgment set aside or merely the damages award). Accordingly, the *McClurg* court did not hold that excessive damages cannot provide a defaulting defendant with a meritorious defense justifying relief from default.

1. Unlike *McClurg*, Johnson's meritorious defense was raised before the Master and preserved for appeal.

The Court of Appeals failed to appreciate the significance of issue preservation in distinguishing this action from *McClurg.* In that case, "New Prime never even raised the issue of a meritorious defense before the trial court." *McClurg,* 380 S.C. 563, 575, 671 S.E.2d 87, 94. This finding was central to this Court's rejection of that defendant's argument that the plaintiff's attorney's misrepresentations entitled him to an order setting aside default judgment pursuant to Rule 60(b)(1).

In contrast, Johnson raised his meritorious defense argument in his Motion to Dismiss, which was filed on June 17, 2019, twelve days after the Master issued the Default Damages Order. (App. p. 20). Johnson continued to press his meritorious argument in his proposed order to the Master's hearing on the Motion to Dismiss, in his Motion to Alter or Amend the November 14,

2019, Order, in his Supplemental Memorandum of Law in Support of his Motion to Alter or Amend, and finally at the hearing on his Motion to Alter or Amend. (App. pp. 57, 107, 113, 117, & 123).

As argued above, the Master did not abuse his discretion in amending his damages order because evidence before the Master prior to the Rule 59(e) hearing adequately demonstrates that the $1.76 million damages award was patently excessive. Therefore, this Court should hold that Johnson is entitled to relief from default and remand this case to the trial court for adjudication on the merits. Alternatively, this Court should reverse the Court of Appeals and reinstate so much of the Master's Amended Order that credited Johnson's meritorious defense and revised its damage award.

2. *McClurg* Suggests the Validity of Johnson's Meritorious Defense Based on the Master's Excessive Damages Award.

The Rule 60(b) analysis requires the trial court to consider whether the defendant in default has a meritorious defense. *McClurg I*, 380 S.C. at 573–74, 671 S.E.2d at 93. As discussed below, Johnson not only possesses meritorious defenses to the Master's default judgment, these defenses were raised to the trial court and preserved for review. Critically, Johnson's preservation of his meritorious defense cures the deficiency fatal to the defendant in *McClurg*.

In her dissent in *McClurg I*, Justice Hearn parted company with the majority and argued that New Prime established a meritorious defense to the damages award despite failing to contest its liability.

> I agree there was no showing by [New Prime or the driver] concerning [the driver's] lack of responsibility for causing the accident, but I would hold there was evidence of a meritorious defense, provided by the McClurgs' own attorney, which related to the amount of damages. In negotiations with New Prime's carrier, Zurich, which were ongoing prior to and beyond the filing of suit, McClurgs' counsel made a

> settlement demand of $170,000. I would hold this course of conduct by McClurgs' attorney is sufficient to satisfy Rule 60(b)'s meritorious defense requirement.

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

On writ, this Court affirmed the Court of Appeals and held that the defendant failed to raise their meritorious defense with the trial court. Chief Justice Toal disagreed. In dissent, she argued that the default defendants "raised a meritorious defense in their original pleadings before the circuit court by noting the substantial discrepancy between the damages awarded upon default and the medical expenses incurred or the settlement offer advanced by the plaintiffs." *McClurg II*, 395 S.C. at 89, 716 S.E.2d at 889 (Toal, C.J., dissenting).

3. Johnson has a Meritorious Defense to Damages Because the Damages Award was Grossly Excessive and Without Evidentiary Support.

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

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

Id., 380 S.C. at 575, 671 S.E.2d at 93–94. To "obtain relief from a default judgment under Rule 60(b)(1) ... not only must the movant make a proper showing he is entitled to relief based upon one of the specified grounds, he must also make a *prima facie* showing of a meritorious defense." *Id.* As Chief Justice Toal noted, "the standard for finding a party raised a meritorious defense is a low one." *McClurg II*, 395 S.C. at 94, 716 S.E.2d at 892 (Toal, CJ dissenting).

After their accident, the Greens' combined medical bills totaled only $12,826.00. (App. p. 4). Nevertheless, the Master awarded compensatory and punitive damages of $1,760,000.00, a sum exceeding 130-times the Greens' actual damages. The best evidence that the award was excessive is that the very judge that made the award later regretted his decision. At the hearing on Johnson's Rule 59(e) motion, the Master concluded that "I think the damages that I previously awarded are too high." (App. pp. 93-94). He explained that "when there's nobody here defending it, you know, and the Court only hears one set of argument on the damages … it's just kind of hard." *Id.*

Even the Greens' counsel concluded this case did not justify a judgment of the magnitude provided in this Court's Order. On July 24, 2018, Mason West, counsel for Plaintiffs, issued a provided additional documentation to the Insurer. In that letter, Mr. West informs Ms. Shields that he is recommending his clients demand $192,390.00. (App. p. 146-147).

Moreover, the Master's Default Damages Order awarded punitive damages[26] of $750,000.00. (App. p. 9). However, the order contains no factual findings justifying such an excessive amount. Although the trial court is not required to "make findings of fact for each factor to uphold a punitive damage award," the Master's orders failed to provide the slightest justification for the Greens' exorbitant award. *Welch*, 342 S.C. at 306, 536 S.E.2d at 422.

Finally, Johnson has a meritorious defense because the Default Damages Order inappropriately awarded the Greens a double recovery for property damages[27] claims previously already settled by subrogation and their claims released. At the default hearing, the Greens did not inform the court that their automobile insurer had already paid them for vehicle repairs and loss of

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[26] Deficiencies arising from the punitive damages award are addressed more specifically in Section III.

[27] The Greens property damage claims are discussed more fully in Section II. The only evidence of their prior settlement and release was presented with Johnson's Rule 59(e) motion. (App. p. 138-149).

use expenses. (App. pp. 41-56). Despite having previously settled and released their property damage claims, Kasey Green testified to the costs to repair his Tesla. (App. pp. 16-18). Based on this inaccurate testimony, the Master awarded the Greens $10,000.00 in property damages. (App. pp. 2-12).

4. Courts Widely Recognize that Rule 60(b) Permits Meritorious Defenses as to Damages.

"[W]hether a meritorious defense as to damages alone and not as to liability is an adequate basis for the grant of Rule 60 relief" has not been decided by South Carolina's appellate courts. *McClurg II*, 395 S.C. at 87, 716 S.E.2d at 888. However, excluding from the definition of "meritorious defense" an essential element to the tort formula[28] defies logic. Finding that Johnson possesses a meritorious defense on the ground that the damages awarded were grossly excessive compared to the evidence presented to the Master at the default damages hearing is a simple extension of established principle.

The majority of courts in other jurisdictions have held that in the context of a Rule 60(b) motion, an allegation that the amount of damages could have been different from what was awarded under the default judgment is sufficient to satisfy the meritorious defense requirement. *See, e.g., Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corp.*, 843 F.2d 808 (4th Cir. 1988) (discussing the meritorious defense raised: "[a]lthough these statements address the amount, rather than the propriety, of Augusta's claim, we believe that taken together they are a sufficient proffer of a meritorious defense"); *Wainright's Vacations, L.L.C. v. Pan American Airways Corp.*,

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[28] To establish negligence, the plaintiff must prove: "(1) a duty of care owed by defendant to plaintiff; (2) breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach of duty." *Pope v. Heritage Communities, Inc.*, 395 S.C. 404, 415, 717 S.E.2d 765, 771 (Ct. App. 2011).

130 F.Supp.2d 712 (D. Md. 2001) (applying *Augusta Fiberglass* to conclude the defendant "proffered a meritorious defense" by raising "a viable dispute about the amount it owes" in default); *Pennsylvania Nat'l Mut. Cas. Ins. Co. v. Generali-U.S. Branch*, 345 F.R.D. 592, 596 (D. Md. 2024) (*citing Wainwright's Vacations, LLC* and noting that defenses that go merely to the amount of damages rather than the question of liability still satisfy the meritorious defense inquiry); *Esteppe v. Patapsco & Back Rivers Railroad*, C/A No. H–00–3040, 2001 WL 604186 (D. Md. May 31, 2001) ("it is apparent from allegations of the complaint that the amount of damages to which plaintiffs might be entitled is certainly in doubt"); *Lawrence M. Clarke, Inc. v. Richco Const., Inc.*, 489 Mich. 265, 282-283, 803 N.W.2d 151, 162 (2011) ("By contesting the damages awarded to the plaintiff, the defendants have presented facts showing a meritorious defense to plaintiff's contract claim sufficient to justify relief from the judgment under [Michigan Court Rules providing substantially similar standard to Rule 60(b), SCRCP] for avoiding default judgment"); *Cook v. Rowland*, 49 P.3d 262 (Alaska 2002) (finding that the defendant in default established a potentially meritorious defense insofar as he has shown that the amount of damages awarded against him might be lower if he were allowed to participate in a damages hearing); *Gardner v. Jones*, 570 S.W.2d 198, 201 (Tex. Civ. App. 1978) (default judgment reversed and remanded upon finding that defendant in default established a meritorious defense to part of the plaintiff's claim for damages); *Hertz v. Berzanske*, 704 P.2d 767 (Alaska 1985); *Syphard v. Vrable*, 751 N.E.2d 564 (Ohio Ct. App. 2001); *Ferguson & Co. v. Roll*, 776 S.W.2d 692 (Tex. App. Dallas 1989); *Beal v. State Farm Mut. Auto. Ins. Co*., 151 Ariz. 514, 729 P.2d 318 (Ariz. Ct. App. 1986).

This Court should hold likewise. It defies logic to require a complete defense to liability in order to set aside a default judgment. Even in the absence of a complete defense to liability, courts

must have the discretion to reconsider an excessive damages award based on evidence of moderate injuries.

C. The Court of Appeals Erred in Failing to Grant Relief From Default Judgment Under S.C. R. Civ. P. 60(B)(3) Based on Misrepresentations the Greens' Attorney Made to the Insurer Prior to Filing Suit.

"[T]he court may relieve a party or his legal representative from a final judgment, … for … misrepresentation, or other misconduct of an adverse party." SCRCP, Rule 60(b)(3). The Greens' counsel's conduct in negotiating this claim with the Insurer, representing that he would make a demand, and indicating that the trucking company would be a defendant to the action satisfies the misrepresentation and misconduct standard justifying relief from default judgment under Rule 60(b)(3).

In *McClurg I* the plaintiffs' counsel submitted to the insurer a draft complaint naming "New Prime as a defendant, and alleged New Prime was vicariously liable for Deaton's actions and was also liable for its negligent hiring, retention, and training of" the driver. *McClurg I*, 380 S.C. at 567, 671 S.E.2d at 90. Just as in the Greens' lawsuit, the McClurg's attorney named only the driver in the filed complaint.

> [G]iven this history of contact and negotiations between counsel and Zurich, most notably the representations made by counsel to Zurich, the conduct of the McClurgs' counsel in failing to simply notify Zurich of the complaint filed against Deaton raises serious concerns for this court and quite possibly satisfies the misrepresentation and misconduct envisioned by Rule 60(b)(3).

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

attorney's conduct as "trickery and deception." *McClurg II*, 716 S.E.2d at 889, 395 S.C. at 89 (Toal, C.J., dissenting). Chief Justice Toal explained her rationale for dissenting from this Court's majority opinion.

> On the facts in the record, I believe New Prime undoubtedly met both the surprise element of Rule 60(b)(1) and the misconduct element of Rule 60(b)(3) when moving to have the default judgment set aside. At oral argument before this Court, Lawyer admitted he was trying to fly under the radar in serving Deaton because of the prolonged, and seemingly unsuccessful, settlement negotiations with Insurer. Although prolonging settlement negotiations in hopes of surpassing the statute of limitations is a disdainful practice some insurance companies keep, this in no way justifies the type of "gotcha" game played by McClurgs' counsel in this case.

McClurg II, 395 S.C. at 98–99, 716 S.E.2d at 894 (Toal, C.J., dissenting).

As discussed above, the Greens' attorney clearly indicated his intent to sue CDS Transport, Inc. for negligent entrustment by writing that "in no fashion should [Johnson] be entrusted with the safety and security of other drivers on the roads of South Carolina" and by citing prior claims against the company under the Unfair Trade Practices Act. (App. pp. 146-147). This conduct meets the misrepresentation standard forecast in the *McClurg* dissents and entitles Johnson to relief from default judgment.

D. Public Policy Supports Reversing the Court of Appeals Decision.

For all of the reasons set forth above, the Court of Appeals erred in failing to reverse the Master's decision refusing to set aside the default judgment. This failure supports a technical resolution and endorses procedural gamesmanship disfavored in South Carolina law. "It is generally recognized that courts should closely scrutinize default judgments to prevent harsh results and drastic action. It is the policy of the law to favor the trial of cases on the merits." *Renney v. Dobbs House, Inc.*, 275 S.C. 562, 274 S.E.2d 290 (1981). Moreover, "[p]ublic policy favors the

disposition of cases "on their merits rather than on technicalities." *Mictronics, Inc*., 345 S.C. at 511, 548 S.E.2d at 226.

Moreover, federal regulations governing interstate commercial trucking likely render many default judgments unenforceable.[29] Affirming the Court of Appeal's refusal to set aside default judgment will endorse a litigation strategy that will likely leave deserving plaintiffs with unsatisfied judgments. This is particularly so where plaintiff's attorneys intentionally choose not to name the motor carrier as a defendant. This is because federal law does not require a motor carrier's insurer to satisfy a judgment against someone other than its insured. Federal courts increasingly find that the "insured" in the context of the MCS–90 is not the driver, but the motor carrier. An attorney who, believing they can obtain an easy default judgment against a motor carrier's driver, ultimately risks securing an unenforceable judgment instead of obtaining actual compensation for a deserving, injured motorist.

The Motor Carrier Act of 1980 ("MCA") provides that commercial motor carriers must be "willing and able to comply with minimum financial responsibility requirements...." 49 U.S.C. § 13902(a)(1)(A)(vi). Motor carriers transporting non-hazardous property must demonstrate financial responsibility of at least $750,000. *See* 49 C.F.R. § 387.9; see also 49 U.S.C. § 31139(b)(2). They can demonstrate this responsibility in three ways, one of which is an MCS–90 Endorsement. *See* 49 C.F.R. § 387(d)(1)-(3).

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[29] Unlike New Prime in *McClurg I*, Johnson's employer, CDS Transport, Inc., did not seek to intervene in the Greens' lawsuit. Accordingly, the employer's insurer's insurance policy and coverage obligations were not before the courts below. There is no record in this case of any issues relating to insurance. The argument here made is hypothetical and solely for the purpose of demonstrating policy issues arising from default judgments obtained against commercial vehicle operators and not their employers.

A majority of courts interpreting the MCS–90 Endorsement have held that the Endorsement only applies where "the underlying insurance policy to which the endorsement is attached does not provide coverage for the motor carrier's accident." *Carolina Cas. Ins. Co. v. Yeates*, 584 F.3d 868, 871 (10th Cir. 2009). For example, a motor carrier's underlying policy may bar coverage when one of its insured drivers fails to inform the carrier of a lawsuit or fails to cooperate in the defense of the claim. In that case, the MCS-90 would provide coverage if, and only if, the named insured is responsible for the judgment.

According to the U.S. Department of Transportation, "Form MCS–90 …[is] not intended, and do[es] not purport, to require a motor carrier's insurer … to satisfy a judgment against any party other than the carrier named in the endorsement…." FMCSA Regulatory Guidance, 70 Fed. Reg. 58065, 58066 (Oct. 5, 2005); *see Sentry Select Ins. Co. v. Thompson*, 665 F. Supp. 2d 561, 567–68 (E.D. Va. 2009) (concluding "that, in light of the unambiguous regulations defining 'insured,' and its broader statutory and regulatory context, the MCS–90 requires payment for a judgment against the named insured only").

If, relying on these authorities, an insurer denies that it is obligated under the MCS-90 to satisfy a judgment, an otherwise deserving plaintiff could be denied monies because of their counsel's failure to sue, in addition to the driver, the trucking company. When an attorney obtains a default judgment against a driver because he opted not to sue the trucking company, he does so to the detriment of his client. The Court of Appeals' decision affirming the Master's refusal to relief Johnson from default judgment risks encouraging a litigation strategy that will not serve the public interests.

CONCLUSION

For these reasons, Petitioner respectfully requests the Court reverse the Court of Appeals decision vacating the Master-in-Equity's Amended Damages Order. In so doing, the Court will restore the deference due to trial judges in the rigorous art of deciding what evidence is proper to the adjudication of justice.

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