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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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

App. Case No. 2023-001016
Ct. App. Op. 2025-UP-165, Filed May 14, 2025

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

Respondent,

vs.

Chris Anderson and Danielle Anderson,

Petitioners.

PETITION FOR A WRIT OF CERTIORARI ON BEHALF OF CHRIS ANDERSON AND DANIELLE ANDERSON

In this negligence action arising from the death of three-year-old Marlayna Joan Carwile, the Circuit Court Judge struck the Petitioners/Defendants' answer and placed them in default for failing to respond to discovery requests, and thereafter, the Special Referee who was appointed by the Clerk of Court awarded $30 million dollars to the parents. The Petitioners are challenging the judgment on multiple grounds, including: (1) the imposition of a default was a too harsh sanction where the record shows that their Attorney's failure to respond to discovery requests and appear for hearings was tantamount to abandonment, (2) the Clerk of Court lacked jurisdictional authority to sign an order of reference and/or appoint the Special Referee without the consent of the Petitioners/Defendants, and (3) the judgment awarded by the Special Referee considered matters

beyond the legitimate, recoverable elements of damages for a wrongful death award and was grossly excessive. The Court of Appeals has reversed the amount of the judgment as grossly excessive but affirmed the judgment in all other respects. Pursuant to Rule 242, SCACR, the Appellants respectfully petition the Court to review the opinion of the Court of Appeals because this appeal presents a novel question of law regarding whether a clerk of court has jurisdictional authority to refer a default and appoint a special referee without consent of all the parties. In addition, this appeal presents other special and important reasons regarding the scope of the Court's holding in Roche v. Young Bros., of Florence, 332 S.C. 75, 504 S.E.2d 311 (1998), as considered together with a substantial issue regarding the constitutional and statutory parameters of the jurisdictional authority of a clerk of court.

CERTIFICATION BY COUNSEL

The Court of Appeals issued its opinion on filed May 14, 2025. The Appellants timely filed a Petition for Rehearing on May 29, 2025, which was denied by order filed June 10, 2025.

QUESTIONS PRESENTED FOR REVIEW

I. Did the Court of Appeals err in affirming the judgment rendered by the Special Referee where the Clerk of Court lacked jurisdictional authority to appoint and refer the default to the Special Referee?

   A. Did the Court of Appeals err in concluding that Rule 53(b), SCRCP, authorized the Clerk of Court to appoint and refer the default to the Special Referee without the Andersons' consent where S.C. Code §14-11-60 and §14-17-250 both require consent of the parties?

   B. Did the Court of Appeals err in its consideration of preservation issues where the law provides that the Defendants were not required to immediately appeal from the

interlocutory order of reference and that a lack of jurisdictional authority can be raised at any time?

II. Did the Court of Appeals err in ruling that the Special Referee had authority to rule on the motion to set aside the default entered on Judge Burch's Rule 37 sanctions order?

III. Did the Court of Appeals err in affirming the judgment rendered on a default entered as a discovery sanction where the Plaintiff did not make a sufficient showing of egregious discovery violations to justify such a harsh sanction?

IV. Did the Court of Appeals err in holding that the Special Referee could render a verdict based on evidence of matters beyond the legitimate, recoverable elements of damages for a wrongful death award?

STATEMENT OF THE CASE

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

As alleged in the Complaint, the Andersons had invited and/or permitted the Child to play at their house on that day and that they "agreed to care for, babysit, and otherwise watch" the

Child as well as her minor brother[1], and her 14-year-old uncle, at the Anderson home. It is further alleged in the Complaint that, by agreeing to babysit and welcoming the children into their home, the Andersons assumed a duty to supervise the children, and that they breached that duty by allowing the children to play in the yard unsupervised.

When the Defendants failed to answer, Plaintiff made a motion for entry of default filed June 10, 2020. [ROA 111, 107, 109.] The Clerk of Court entered default on June 15, 2020. [ROA 1.] On June 29, 2020, Thurmond Brooker, Esq. made a Notice of Appearance on behalf of the Defendants along with a Rule 55(c) motion to set aside entry of default. [ROA 753, 114.] Affidavits were filed on August 3, 2020, in support of the Defendants' Rule 55(c) motion. [ROA 136, 137.] The Rule 55(c) motion came before the Honorable Roger E. Henderson, Circuit Judge, who granted the motion and set aside the entry of default by order filed May 26, 2021. [ROA 3.] Thereafter, an answer was filed on June 11, 2021. [ROA 197.] However, the Andersons had denied in their answer that they invited the children to play at their home and denied that they agreed or promised to care for the children. [ROA 197.] Accordingly to Mrs. Anderson, the Child (along with the older brother and teenage uncle) showed up at her house asking to play with her children but she said no, and said they had to return home. [ROA 138.]

During discovery, Defendants failed to respond to discovery requests including Requests for Admission, Standard and Supplemental Interrogatories, and Requests for Production. [ROA 203; See Motion to Compel.] Plaintiff's counsel contacted Defendants' counsel regarding the discovery requests, but when Mr. Brooker failed to respond to the inquiries, Plaintiff then filed a motion to compel on June 23, 2022. [ROA 200, 203, 258.] Defense Counsel did not respond to the motion to compel and neither Defense Counsel nor the Defendants appeared at the hearing on

[1] The minor brother – Rylan – was approximately 7 years old. [ROA 442/13-19.]

the motion. [See ROA 9.] Judge Burch granted the motion and issued an order compelling discovery on July 21, 2022. [ROA 9.]

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

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

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

The damages hearing was held before the Special Referee on April 13, 2023. [ROA 343-417.] At the hearing, Plaintiff withdrew her claims for survival, negligent infliction of emotional distress, and punitive damages. Plaintiff limited her request for default judgment to the wrongful death claim. [ROA 348-349, 403.] Mr. MacLeod appeared for the Defendants.

Since the Andersons had been ruled in default, there was virtually no evidence regarding the alleged agreement by the Andersons to babysit or their allegedly negligent supervision of the neighbor children. Instead, the evidence presented by the Plaintiffs centered on damages as

separately discussed below in connection with the challenge to the damage award. The Special Referee also heard argument on the Rule 55(c) motion. Thereafter, on May 23, 2023, the Special Referee issued his order finding that each parent was entitled to damages of $15,000,000, for a total judgment award of $30,000,000. [ROA 2.] On May 23, 2023, the Special Referee issued a separate order denying the Rule 55 motion. [ROA 30.]

On June 2, 2023, the Defendants filed a posttrial motion pursuant to Rules 52(b) and 59(e), to alter and/or amend the judgment. [ROA 27.] The Defendants also filed a Rule 59(e) for reconsideration of the denial of the Rule 55 motion to set aside the entry of default. [ROA 279.] When the Special Referee had not ruled upon the posttrial motions within 30 days, the Defendants filed a notice of appeal on June 22, 2023. [ROA 733.] The Plaintiff/Respondent moved to dismiss the appeal as premature because the posttrial motions were still pending, but the Court ordered that the appeal be held in abeyance and remanded the case to the Special Referee to rule on the pending motions. [ROA 738, 741, 742.]

On remand, the parties submitted memoranda as directed by the Special Referee and the motions were heard on September 15, 2023. [ROA 286, 320, 478-528.] On November 2, 2023, the Special Referee issued two orders: (1) an Order denying the June 2nd posttrial motions; and (2) an Amended Order of Default Judgment with certain revisions but without any change of the award of $30 million. [ROA 36, 55.] The Defendants filed and served an amended notice of appeal on November 13, 2023. [ROA 744.] The Court of Appeals issued its opinion on filed May 14, 2025, affirming the judgment on liability, but finding the $30 million award grossly excessive, and remanding for a new damages award. The Appellants timely filed a Petition for Rehearing on May 29, 2025, which was denied by order filed June 10, 2025.

ARGUMENT

THE SPECIAL REFEREE'S LACK OF JURISDICTIONAL AUTHORITY

I. THE COURT OF APPEALS ERRED IN AFFIRMING THE JUDGMENT OF RENDERED BY THE SPECIAL REFEREE WHERE THE CLERK OF COURT LACKED JURISDICTIONAL AUTHORITY TO APPOINT AND REFER THE SANCTION DEFAULT TO THE SPECIAL REFEREE.

A. The Court of Appeals erred in concluding that Rule 53(b), SCRCP, authorized the Clerk of Court to appoint and refer the default to the Special Referee without the Petitioners' consent.

In this appeal, Petitioners are challenging the judgment on the jurisdictional ground that the Special Referee lacked authority to rule on any motions or award damages because the Clerk of Court lacked the jurisdictional authority to appoint the Special Referee or sign an order of reference without their consent as required by S.C. Code §14-17-250 and §14-11-60. However, the Court of Appeals has held that Rule 53(b), SCRCP, authorizes a clerk of court to appoint and refer a default to a special referee without consent of the defendants. Thus, this appeal presents a novel issue of whether Rule 53 of the Rules of Civil Procedure can grant authority to a clerk of court in contravention of the statutory requirements.

Rule 53(b), SCRCP, provides, in pertinent part: "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." As defined in Rule 53(a): "The term "special referee" means a member of the South Carolina Bar to whom a matter has been referred under S.C. Code Ann. § 14-11-60. The Court of Appeals has ruled that Rule 53(b) allowed the Darlington County Clerk of Court to appoint the Special Referee in this default case without the Appellants' consent with citation to Roche v. Young Bros., of Florence, 332 S.C. 75, 504 S.E.2d 311 (1998). In so holding, the Court of Appeals has overlooked or

misapprehended the ruling in Roche and the requirements of the controlling statutes that authorize appointment of special referees and that authorize a clerk of court to sign orders of reference.

By enactment of § 14-11-60 -- which is specifically identified in Rule 53(a) -- General Assembly has authorized a "presiding circuit court judge" to appoint a special referee "upon agreement of the parties." Similarly, by enactment of § 14-17-250, the General Assembly has authorized a clerk of court to sign orders of reference on two conditions (1) where the county does not have a master in equity and (2) if the parties consent. Here, Darlington County does not have a master-in-equity so § 14-17-250 could authorize the clerk of court to sign an order of reference – but only with the consent of the parties. In addition, as to the corollary issue of the appointment of a special referee, § 14-11-60 only authorizes a presiding circuit court judge to make such an appointment and only with agreement of the parties. The Petitioners did not consent to a reference or appointment of a special referee, and thus, the Clerk of Court did not have the jurisdictional authority to appoint the Special Referee and make a reference of the matter to him.

In its reading of Rule 53 as justification for extending a clerk of court's authority beyond the bounds of the statutes, the Court of Appeals had overlooked and misapprehended the fundamental principle that the Rules of Civil Procedure cannot limit or expand jurisdiction defined by statute. While the Supreme Court is constitutionally empowered, by S.C. Const. Art. V, § 4, to make rules of practice and procedure, it has been held that : "The South Carolina Rules of Civil Procedure provide no guidance in determining the jurisdiction of the circuit court." Skinner v. Westinghouse Elec. Corp., 380 S.C. 91, 668 S.E.2d 795, 796 (2008). This jurisdictional point also is addressed in the express terms of the Rules of Civil Procedure wherein Rule 82, SCRCP states: "These rules shall not be construed to extend or limit the jurisdiction of any court of this State …," and Rule 81, SCRCP provides : "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***….". (Emphasis added.)

In Stokes v. Denmark Emerg. Med. Serv., 315 S.C. 263, 433 S.E.2d 850, 852 (1993), the Supreme Court addressed the constitutional provision in § 4 of Article V and held that, where the question is one of practice and procedure in the courts, a court rule is subordinate to the statutory law. *See also* Grazia v. S.C. State Plastering, LLC, 390 S.C. 562, 703 S.E.2d 197, 201 (2010) (tacitly acknowledging the general rule that any conflict between a statute and court rule must be resolved in favor of the statute); State v. Cottingham, 224 S.C. 181,77 S.E.2d 897, 900 (1953) ("Statutes override rules of court, if in conflict.").

By relying on this Court's decision in Roche v. Young Bros. to uphold the Clerk of Court's order, the Court of Appeals misapprehended that the holding in Roche does not support their holding because of a key distinguishing point. In Roche, ***a circuit court judge*** issued the order appointing the special referee and making the reference, and thus, that ruling simply does not support the conclusion that Rule 53 allows ***a clerk of court*** to appoint a special referee or sign an order of reference without the consent of the defaulting party where the statutory language is so clear. While the Court of Appeals did acknowledge that Roche dealt with an order of reference from a circuit court judge, the Court found that "the same principles apply when a clerk of court refers a default case." In so finding, the Court of Appeals failed to consider the significant differences between the judicial powers of a circuit judge in contrast to the administrative/ministerial powers of a clerk of court.

Under the South Carolina Constitution, a clerk of court is a county official elected by popular election without any requirement of legal training: "There shall be elected in each county by the electors thereof a clerk of the circuit court, a sheriff, and a coroner; and in each judicial

circuit a solicitor shall be elected by the electors thereof." S.C. Const. Art. V, § 24. This particular constitutional provision governing clerks of court further provides the Legislature with the power to delineate the duties of a clerk of court: "The General Assembly shall provide by law for their duties …." In accordance with that constitutional provision, the General Assembly has enacted statutes governing clerks of court in Title 14, Chapter 17 of the South Carolina Code of Laws. Article 1 provides for "Office; Election; Qualification; Vacancies"; however, these statutory provisions do not set any qualifications regarding legal training. S.C. Code Ann. §§14-17-10 through 70. Article 3 provides for "General Duties and Powers." S.C. Code Ann. §§14-17-210 through 370. As set forth above, the duties/powers of the clerk of court in regards to signing orders of reference are expressly limited to cases where the parties consent.

Notwithstanding that the holding in Roche seemingly allows a presiding judge to appoint a special referee without the consent of a defaulting defendant, Rule 53 should not be read to override the consent requirements in the statutory provisions to allow a clerk of court to select a special referee and sign an order of reference. The distinction between appointment by a "presiding circuit court judge," as referenced in §14-11-60, and a clerk of court is readily understandable when viewed in the context of the distinctive roles of a circuit court judge and a clerk of court in our judicial system. For example, circuit court judges are elected by the General Assembly, but the State Constitution sets certain requirements for circuit court judges, including that a judge must be at least at least thirty-two years old and have been a licensed attorney at law for at least eight years. S.C. Const. Art. V, § 15. In contrast, a clerk of court is an elected official who may not even be a licensed attorney or have any legal training. Given that the only requirement for appointment of a special referee is that the person must be a licensed member of the South Carolina Bar, it is only fair and reasonable (in the absence of the parties' consent) for

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

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

B. The Court of Appeals erred in its consideration of preservation issues where the law provides that the Defendants were not required to immediately appeal from the interlocutory order of reference and that a lack of jurisdictional authority can be raised at any time.

The Special Referee held that the lack of jurisdictional authority issue had been waived and the Court of Appeals also questioned whether the issue was properly preserved. However, both the Special Referee and this Court overlooked or misapprehended the well-settled law that lack of jurisdictional authority can be raised at any time. Gantt v. Selph, 423 S.C. 333, 814 S.E.2d 523, 525–26 (2018) ("[l]ack of subject matter jurisdiction may be raised at any time, and may be raised for the first time on appeal.") "At any time" includes posttrial motions. Limehouse v. Hulsey, 404 S.C. 93, 744 S.E.2d 566, 572 (2013). In addition, contrary to the Special Referee's

ruling and the Court of Appeals' decision, the lack of jurisdictional authority, as in the power to rule, cannot be waived by a party appearing and submitting to a damages hearing. *See* Chabek v. Nationwide Mut. Fire Ins. Co., 303 S.C. 26, 397 S.E.2d 786, 787 (Ct. App. 1990).

The Special Referee also rejected the Petitioners jurisdictional challenge on a separate issue preservation ground, ruling that "Defendants waived any right to challenge the Order of Reference by not filing an appeal within thirty (30) days of that order" and the order was law of the case. [ROA 64, 67.] The Petitioners have challenged that ruling because they were not required to appeal from the interlocutory order of reference. Although the Court of Appeals did not address the issue, the Petitioners respectfully renew the challenge and maintain that the holding in Link v. School District, 302 S.C. 1, 393 S.E.2d 176 (1990), gave them the option to appeal from the interlocutory, non-final orders on appeal from the final judgment. As discussed in more detail in their briefs, the Petitioners submit that since they have not challenged the order of reference as abridging their right to a jury trial, it does not fall into the type of "mode of trial" order which must be immediately appealed. The challenge is one of jurisdictional authority that was properly brought before the Special Referee in the posttrial motions and also is properly presented to this Court in this appeal from the final judgment.

THE HARSH SANCTION DEFAULT

II. The Court of Appeals erred in ruling that the Special Referee had jurisdictional authority to rule on the motion to set aside the default entered on Judge Birch's Rule 37 sanctions order.

"It is settled that one circuit judge does not have the power to review, modify, affirm or reverse the findings of another circuit judge." State ex rel. Medlock v. Love Shop, Ltd., 286 S.C. 486, 334 S.E.2d 528, 529 (Ct. App. 1985) (citing Cook v. Taylor, 272 S.C. 536, 252 S.E.2d 923 (1979)). "There is a long-standing rule in this State that one judge of the same court cannot

overrule another." Charleston Cnty. Dep't of Soc. Servs. v. Father, Stepmother, & Mother, 317 S.C. 283, 454 S.E.2d 307, 310 (1995). In addition to the challenge to the Special Referee's jurisdictional authority as discussed above, the Petitioners/Appellants also have raised a more specific challenge to the Special Referee's authority to rule on their Rule 55 Motion to Set Aside Entry of Default, filed April 12, 2023, based on the ground that the sanction order which placed the Defendants in default was issued by Judge Burch.

In rejecting this challenge and upholding the Special Referee's denial of the Rule 55 motion, the Court of Appeals has overlooked or misapprehended that there is no cited precedent for the concept that Mr. Brooker's failure to appear at the sanctions hearing and to make a record could justify disregarding the jurisdictional principle embedded in the one-judge rule.

Similarly, contrary to the Court of Appeals' stated reasoning, the Clerk of Court's order of reference purporting to give the Special Referee authority over any motions related to the entry of default cannot override the one-judge rule and transfer the authority of Judge Burch to reexamine his sanction order. As discussed above, the Clerk of Court had no authority in the first place to enter an order of reference and appoint a special referee without consent of the Petitioners. Moreover, there is no cited precedent for the concept Judge Burch had the power to cede authority over his sanction award to a Special Referee appointed by the Clerk of Court.

III. The Court of Appeals erred in affirming the judgment rendered on a default entered as a discovery sanction where the Plaintiff did not make a sufficient showing of egregious discovery violations to justify such a harsh sanction and the record showed good cause to set aside the default sanction.

The Petitioners challenged the judgment on multiple grounds related to the imposition of a default as a discovery sanction. Petitioners maintain that the Circuit Judge abused his discretion in striking the Defendants' answer where the Plaintiff did not make a sufficient showing of egregious discovery violations to justify the harsh sanction that placed them in default. And, in addition to

challenging the jurisdictional authority of the Special Referee as discussed above, the Petitioners contend that the Special Referee abused his discretion in denying the Rule 55 motion where the they made a showing of good cause to set aside the entry of the sanctions default.

As to the imposition of default as a discovery sanction in the first place, the Court of Appeals and the lower court overlooked or misapprehended that under the applicable standard for Rule 37, imposition of a sanction that results in default is viewed as harsh and should not be administered without a showing of egregious discovery violations. Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co., 334 S.C. 193, 511 S.E.2d 716, 718–19 (Ct. App. 1999). Judge Burch did not make any findings of bad faith, willful disobedience or gross indifferent to the Plaintiff's rights. Instead, he placed the Petitioners/Defendants in default based on the mere fact that they did not answer interrogatories or requests to produce. The Court of Appeals faults the Andersons for failing to produce any explanation for why they did nothing in the litigation from July 2021 until April 2023. However, as the moving party, the Plaintiff bears the responsibility to show bad faith, willful disobedience or gross indifference to its rights to justify such a harsh sanction. Davis v. Parkview Apartments, 409 S.C. 266, 762 S.E.2d 535, 544 (2014).

While the docket history and record does show that the Petitioners did not provide the discovery, the facts recited by the Court of Appeals overlooks and misapprehends the evidence as to the extent of Andersons' participation in this litigation which is highly relevant to showing that striking the answer and placing them in default was an unjustified harsh sanction. For example, the Court of Appeals states, as fact, that: "The Andersons were permitted to file an answer, but after that, the Andersons and their counsel did virtually nothing to participate in the litigation." There is no evidence that the Andersons themselves willfully failed to participate in the litigation. The evidence of record shows that all communications regarding the discovery and the subsequent

motions and courts hearings were directed to the Andersons' retained Counsel, Thurmond Brooker. The record shows that, in fact, Plaintiff's counsel had acknowledged that his office had received responses to Plaintiff's Requests for Admission at some point. [ROA 12 n. 1.]

The Court of Appeals summarized the procedural history as: "The case was referred to a special referee. At that point, a new lawyer appeared for the Andersons and requested the second default be set aside. The referee denied the motion, and after a hearing on damages, entered a $30 million default judgment to be split evenly between Marlayna's parents." This abbreviated recitation of the facts shows that the Court of Appeals overlooked or misapprehended the details of procedural history that demonstrate the "rush to judgment" that unfairly prejudiced the Petitioners. The Record shows that the Plaintiff moved to refer the case to a special referee on February 9, 2023. The very next day, on February 10, 2023, without allowing any time for response or hearing, the Clerk of Court granted the Plaintiff's motion and appointed Patrick J. McLaughlin as Special Referee. Plaintiff filed a motion for a damages hearing on March 7, 2023. The next day, March 8, 2023, the Special Referee set the hearing for April 13, 2023. On March 30, 2023, the Petitioners/Defendants' home insurance carrier received a subpoena from Plaintiff's counsel for policy documents, which was the first notice of the legal action it had received since Mr. Brooker began representing the Defendants. Upon learning of the status of the action, the carrier retained counsel for the Defendants on April 6, 2023, and on April 12, 2023, Andrew MacLeod, Esq., made an appearance on behalf of the Defendants and filed a Rule 55 motion to set aside the sanction entry of default. Again, the Record does not show that the Andersons personally received any notice of these proceedings. All notices went to the counsel of record – Mr. Brooker.

When the Rule 37 motion came before the Circuit Court, the proceedings as evidenced in the docket, showed that Mr. Brooker had virtually abandoned defending his clients:

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

In this State, there is a general rule that "the neglect of the attorney is attributable to the client." Graham v. Town of Loris, 272 S.C. 442, 248 S.E.2d 594, 598 (1978). In Graham, the Supreme Court discussed abandonment as an exception to the general rule where the facts in a case show more than mere neglect, inadvertence, or mistake of counsel. A court can, and should, distinguish the difference between an attorney's negligence and a situation "where an attorney's conduct transcends mere neglect and the party seeking relief establishes willful abandonment or withdrawal from the case." Stearns Bank Nat. Ass'n v. Glenwood Falls, LP, 373 S.C. 331, 644 S.E.2d 793, 799 (Ct. App. 2007) (ruling on a Rule 60 motion). "To overcome the general rule that the neglect of the attorney is attributable to the client, the client must establish that its former attorney willfully and unilaterally abandoned it." Id.

Based on the clear evidence of Mr. Brooker's abandonment of his client in the docket, the Circuit Judge should have been aware that something was seriously amiss and made further inquiry before imposing the harsh sanction of placing the Petitioners/Defendants in default without any means to defend the allegations on liability and limiting their ability to contest the Plaintiff's demand for damages. And, regardless of how the issue was framed and articulated in the Rule 55

motion to set aside the second default, all this glaring evidence of abandonment was readily apparent on the record and made a sufficient showing of good cause to set aside the entry of the sanctions default.

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The Court of Appeals did not specifically address several other issues raised by the Petitioners in challenge of the default sanction. In an effort to preserve these issues for further review in this Court, the Petitioners raised the importance of these points in their Petition for Rehearing and asked that the Court address these issues. However, the Court of Appeals denied the Petition for Rehearing without addressing these issues.

The Petitioners maintain that the Special Referee erred in ruling that the Rule 55 motion to set aside the sanctions default was not a timely and proper procedure to seek review of Judge Burch's sanction order. Contrary to the ruling of the Special Referee, there is nothing in the cited opinions in Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co., 334 S.C. 193, 511 S.E.2d 716 (Ct. App. 1999) or QZO, Inc. v. Moyer, 358 S.C. 246, 594 S.E.2d 541 (Ct. App. 2004), that supports a proposition that a Rule 59(e) motion was the only available process to seek review of Judge Burch's sanction default order. In contrast, the Court of Appeals' opinion in Ralphs v. Trexler, No. 2005-UP-219, 2005 WL 7083860 (S.C. Ct. App. Mar. 24, 2005), does offer support for the use of a Rule 55 motion as an acceptable option for review of Judge Burch's sanction order.[2]

The Petitioners also maintain that the Special Referee erred in ruling that they took

[2] While Rule 268, SCACR, limits citation to unpublished opinions, citation to the opinion in Ralphs is reasonable and appropriate where the published opinions cited by the Special Referee do not support his holding that a Rule 59(e) motion was the ***only*** available process for review of the sanction order.

inconsistent positions about the defaults and in misapplying judicial estoppel. Also as more fully presented in their Briefs, the Petitioners maintain that the Special Referee misapplied judicial estoppel because they did not take inconsistent positions about the defaults. The position that the Petitioners gave Allstate notice of the claim in June 2020 is different from the position that Allstate did not have notice of the progress of the ongoing litigation -- or the sanction default – until March 2023. These are not inconsistent positions and they do not support any application of judicial estoppel as addressed in Auto-Owners Ins. Co. v. Rhodes, 405 S.C. 584, 748 S.E.2d 781, 788 (2013).

THE IMPROPER AWARD OF $30 MILLION IN ACTUAL DAMAGES

IV. The Court of Appeals erred in holding that the Special Referee could render a verdict based on evidence of matters beyond the legitimate, recoverable elements of damages for a wrongful death award.

The Petitioners challenged the amount of the Special Referee's damages award as grossly excessive and improperly based on evidence of matters beyond the legitimate, recoverable elements of damages for a wrongful death award. The Court of Appeals has correctly ruled that the $30 million judgment was grossly excessive. However, the Court of Appeals has rejected the Petitioners' challenges to the Special Referee's improper consideration of matters beyond the legitimate, recoverable elements of damages for a wrongful death award without discussion of the individual issues raised. The Petitioners submit that the Court of Appeals overlooked or misapprehended the applicable case law on each of those issues as raised and argued in their briefs, including the points discussed below.

Elements of Damages Recoverable by Parents for Wrongful Death of a Child

A defendant in default is deemed to have admitted liability so the plaintiff does not have to prove liability for the asserted claims. However, the plaintiff does not get a blank check to recover

an unfounded or excessive award of damages. The plaintiff still must prove an amount of recoverable damages by the preponderance of the evidence. Howard v. Holiday Inns, Inc., 271 S.C. 238, 246 S.E.2d 880, 882 (1978). 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." Hopkins v. Hopkins, 266 S.C. 23, 221 S.E.2d 113, 114–15 (1975) ("A defendant who is in default for a failure to answer has the right to assume that the judgment will be limited to the cause of action stated in the complaint.")

There is no mathematical formula or objective measurement for the intangible elements of damages for the loss of a life. "These are intangibles, the value of which cannot be determined by any fixed yardstick." Lucht v. Youngblood, 266 S.C. 127, 221 S.E.2d 854, 859 (1976). "There is no mathematical formula which can easily establish the value of this kind of loss [of a child], and it is not this court's place to do so." Scott v. Porter, 340 S.C. 158, 530 S.E.2d 389, 395 (Ct. App. 2000). However, the damages awarded for wrongful death of a child still must be a reasonable amount under the facts relative to the legitimate, recoverable elements as set forth in the applicable caselaw.

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

"In determining the amount of the damages to be awarded in an action under the statute for wrongful death, the question is not one of the value of the human life, but is rather the damages sustained by the beneficiaries, (here, the father and mother), from the death of the deceased." Zorn v. Crawford, 252 S.C. 127, 165 S.E.2d 640, 645 (1969). 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, 188 S.E.2d 470, 471 (1972). While the Special Referee did not make specific awards for each element, it is apparent that his award is based on evidence beyond these elements, namely (1) the parents' pecuniary loss of their own employment earnings, (2) the deterioration of the parents' relationship, (3) the emotional pain suffered by the child's sibling, and (4) the parents' emotional pain from witnessing the death of their child.

Evidence of Damages Presented at Default Hearing

According to the testimony at the damages trial, the Mother and Father, who were not married, had an "atypical coparenting" relationship. [ROA 362/20.] After the Child was born, the Father would visit regularly, but at some point, he moved into the Mother's home and they were cohabitating at the time of the accident. [ROA 364.] Both Mother and Father were home at the time of the accident. [ROA 366, 391.] Mother had laid down to take a nap after she got off of work, and the Father was washing dishes. [ROA 366, 39.] Mother was awoken by Father who told her to call 911, and then she rushed outside where she saw her Child laying in the arms of the minor uncle. [ROA 366.] As a nurse, Mother knew that her daughter was gone. [ROA 367, 383.] The EMS arrived quickly and confirmed that the Child was dead. [ROA 368.]

The Mother testified about how her life changed the months following this tragedy, including experiencing difficulties with sleep, loss of appetite, headaches, somach aches, panic

attacks, nightmares, anxiety, stress, loneliness, grief and sorrow. [ROA 371, 377, 379, 400.] She was diagnosed with P.T.S.D., severe anxiety, and depression. [ROA 376.] She was out of work from her job as a registered nurse for 11 months.[3] [ROA 379.] Some months after the accident, the Mother and her son moved to Florida to get away from triggering bad memories. [ROA 372, 376.] The Mother testified that the death of their Child broke the relationship she had with the Father. [ROA 375, 378.] The Mother also testified that the death of the Child affected her surviving son, who had trouble at school, bad grades, and explosive emotions. [ROA 375.]

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

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

The Plaintiff also presented depostion testimony from a licensed mental health counselor who testified regarding her trauma counseling with the Mother and her surviving son. [ROA 418.] The counseling sessions began the day after the accident and continued for eight months until they moved to Florida. [ROA 430, 433.] The counselor testified that the Mother experienced depression, hopelessness, feelings of shame and guilt, and that she had trouble sleeping, lack of energy, and trouble dealing with everday tasks. [ROA 435-437.] The counselor also testified that after the accident, the Mother had difficulty with her relationship with the Child's Father, and trouble connecting with her surviving son. [ROA 434, 435.] The counselor opined that the Mother suffered wounded feelings, mental shock and suffering, grief, and sorrow. [ROA 440-441.] The counselor further opined that the Mother would need long-term, if not permanent, counseling and treatment to deal with the trauma. [ROA 440.] The counselor testified that the surviving son was sad, mopey, disengaged, and suffered feelings of guilt. [ROA 442-443.]

A. In his amended judgment, the Special Referee specifically identified the Parents' loss of work income and diminished earning capacity as a recoverable pecuniary loss, and he also made specific findings of fact and conclusions of law regarding the parents' lost wages and diminished earning capacity as recoverable damages. The Court of Appeals has overlooked or misapprehended that the Special Referee erred in considering the Parents' loss of work income and diminished earning capacity because those matters do not constitute legitimate, recoverable "pecuniary loss" for the wrongful death of their child. Under the analysis and reasoning found in the existing caselaw cited and discussed in the Appellants' briefs, it is clear that. in the case of a child, recoverable "pecuniary loss" refers to the lost wages/income of the deceased child, not the surviving parent(s). *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); *see also* Patrick v. United States,

316 F.2d 9, 11 (4th Cir. 1963). The Special Referee improperly relied on the evidence of the parents' loss of income and diminished earning capacity and that evidence should not be considered on remand in awarding judgment in a reasonable amount based on the proper consideration of the relevant evidence under the applicable legal principles.

B. The Special Referee's Amended Judgment reflects that his award is based on an impermissible consideration of the deterioration of the Parents' relationship. The Court of Appeals has overlooked or misapprehended that the Special Referee erred in considering the deterioration of the Parents' relationship with each other because any such loss is not a legitimate, recoverable element of damages. One of the recoverable elements of damages is identified as "loss of companionship and deprivation of the use and comfort ***of intestate's society*** as the beneficiaries may have sustained as the result of the death of the intestate." Self v. Goodrich, 300 S.C. 349, 387 S.E.2d 713, 715 (Ct. App. 1989) (emphasis added). While the Special Referee relied upon the district court's order in Jimenez v. Chrysler Corp., 74 F. Supp. 2d 548 (D.S.C. 1999), as supporting authority on this point, nothing in that order justifies considering the deterioration of the parents' interpersonal relationship in awarding damages for the death of their child where that judgment was vacated on appeal to the Fourth Circuit in Jimenez v. DaimlerChrysler Corp., 269 F.3d 439 (4th Cir. 2001). The Special Referee improperly relied on the evidence of the parents' loss of their relationship with each other when the Father left and severed his relationship with the Mother to start a new life with a new family. That evidence should not be considered on remand.

C. The Court of Appeals also has overlooked or misapprehended that the Special Referee erred in considering evidence as to the emotional damage suffered by the Child's surviving brother. 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. While the Special Referee

acknowledged that the brother is not a statutory beneficiary, he still improperly considered that evidence by bootstrapping the brother's emotional harm to the Mother's grief. This bootstrapping is not allowable and the evidence of the brother's emotional damage should not be considered on remand.

D. Finally, the Court of Appeals has overlooked or misapprehended that the Special Referee erred in allowing the Parents to recover for the emotional damage they suffered by witnessing the immediate aftermath of the accident because they had dropped their bystander claim. [ROA 403.] *See* Kinard v. Augusta Sash & Door Co., 286 S.C. 579, 336 S.E.2d 465 (1985) (recognizing the cause of action).

The Court of Appeals' summary affirmance on these points impact the appropriate determination of a proper award on remand. This Court should remand with instructions to the factfinder -- whether that be a circuit court judge or a properly appointed special referee -- that none of the evidence on these points should be considered in awarding a judgment in a reasonable amount based on evidence of only the legitimate, recoverable elements of damages.

CONCLUSION

WHEREFORE, based on the foregoing together with the issues raised and argued in their final briefs, the Petitioners respectfully maintain and renew the challenge to any and all rulings by the Special Referee because the Clerk of Court had no power to sign an order of reference and to appoint him. On this point, the Petitioners request that the Court grant this petition and issue a writ of certiorari to review the Court of Appeals' decision in affirming the Clerk of Court's appointment of the Special Referee and to vacate the judgment and remand to allow a Circuit Court Judge to order a reference and appoint a Special Referee.

In addition, and in the alternative, the Petitioners petition the Court to review the decision of the Court of Appeals affirming the Special Referee's denial of the Rule 55(c) motion, and instead, reverse the judgment because 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. Petitioners are confident that given the procedural history which demonstrates that Mr. Brooker abandoned his clients, the sanction default should be set aside, and the Petitioners should be allowed the opportunity to provide discovery and ultimately proceed to trial on the merits.

In addition, and in the alternative, the Petitioners ask the Court to remand with instructions to the factfinder to render a damage award in a reasonable amount based on evidence of only the legitimate, recoverable elements of damages.

Respectfully submitted,

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Chris Anderson and Danielle Anderson

July 10, 2025

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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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

Appellate Case No. 2023-001016
Ct. App. Op. 2025-UP-165, Filed May 14, 2025

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

Respondent,

vs.

Chris Anderson and Danielle Anderson,

Petitioners.

CERTIFICATE OF SERVICE

The undersigned certifies that on this **10th** day of **July, 2025**, a copy of the Petition for a Writ of Certiorari on behalf of Chris Anderson and Danielle Anderson was served by emailing a copy of each to the AIS email addresses listed below, per the attached email:

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July 10, 2025

Via E-Filing and U.S. Mail
The Honorable Patricia A. Howard
Clerk, South Carolina Supreme Court
Supreme Court Building
1231 Gervais Street
Columbia, SC 29201

Re: Samantha Joanne Carwile, individually and as the Personal Representative of the Estate of Marlayna Joan Carwile v. Chris Anderson and Danielle Anderson
App. Case No. 2023-001016
Ct. App. Op. 2025-UP-165, Filed May 14, 2025
HLF File No. 12.002

Dear Ms. Howard:

Today we have electronically filed and served a Petition for a Writ of Certiorari on behalf of Chris Anderson and Danielle Anderson in the above referenced case. Enclosed please find a check for the $250 filing fee. We have electronically served all other Counsel of Record as indicated by our Certificate of Service which we electronically filed. In addition, we are filing the Petition with the Court of Appeals.

Kind regards,

Yours truly,

/s/ James B. Hood

James B. Hood

JBH/spc
Enclosure(s)
cc [***Via E-Mail***]:
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