THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Nate Fata, Special Referee

Lower Court Case No. 2016-CP-26-8032
Court of Appeals Case No. 2017-001817

DANIEL ERIC KNIGHT, Respondent,

v.

PHILLIP RAY CAUSEY, Appellant.

FINAL REPLY BRIEF OF APPELLANT

Respectfully submitted,

Joseph D. Thompson, III, S.C. Bar No. 66580
111 Coleman Boulevard
Suite 301
Mount Pleasant, South Carolina 29464
Telephone: (843) 720-3460
JThompson@hallboothsmith.com

Attorney for Appellant Phillip Ray Causey

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If there is one thing that Appellant and Respondent agree on, it is the fact that this case is exceptional, but not for the reasons expressed by Respondent. This case is exceptional because of Respondent's maneuvering of the case to a quick hearing in front of a Special Referee he designated, the lack of due process afforded Appellant, and the absence of competent evidentiary support or justification for a grossly excessive award of $3.2 million dollars in non-economic damages. Simply stated, this is the exceptional case which falls into the basket of cases for which the Supreme Court has expressed "great concern" given the extraordinary award in an unliquidated damages claim in default. Renney v Dobbs House, Inc., 272 S.C. 562, 566, 274 S.E.2d 290, 292 (1981). ("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.") Wells Fargo Bank, N.A. v. Marion Amphitheatre, LLC, 408 S.C. 87, 757 S.E.2d 557 (Ct. App. 2014) (citing Renney for the same proposition).

I. SHORT-TERM AND/OR TEMPORARY INJURIES DO NOT PROVIDE COMPETENT EVIDENCE TO SUPPORT A $3.2 MILLION DOLLAR AWARD FOR NON-ECONOMIC DAMAGES

Throughout his Brief, Respondent emphasizes the short-term and/or temporary injuries he sustained, presumably in an effort to justify the Special Referee's $3.2 million dollar award for non-economic losses. While there is little doubt that Respondent sustained some amount of temporary pain and suffering and/or loss of enjoyment of life, the Special Referee's award of $3.2 million dollars cannot be justified by evidence of a temporary and/or short-term loss alone.

By now, the Court is familiar with Respondent's most significant physical injury, a perforated small intestine. As illustrated in Appellant's Initial Brief, there is no competent evidence in the record to demonstrate any long term sequelae of that injury. Instead, even

without cross-examination, Appellant's treating surgeon, Dr. Gilbertas Rimkus, specifically opined that Respondent's digestive system would function the same as it did before the accident. (R. p. 119 (Tr. p. 114), lines 20-22). Dr. Rimkus did not offer any opinion regarding, or assess Respondent with, any impairment, disability or restriction as a result of the intestinal injury.[1] To the contrary, Dr. Rimkus specifically testified that Respondent had no dietary restrictions and that Respondent would not require any future medical care. There is no competent medical evidence in the record to the contrary.

Simply stated, Respondent's efforts to justify the Special Referee's grossly excessive award fall short and, if anything, support the Appellant's argument that the record is devoid of evidentiary support for a $3.2 million dollar award for non-economic damages. Unfortunately, in an effort to emphasize the significance of the temporary and/or short term injuries/damages, Respondent asks this Court to accept things that are simply not supported by evidence in the record and/or are irrelevant to this Court's consideration.

A. Alleged Loss of Consciousness

In an effort to demonstrate the "violence" of the automobile accident, Respondent testified that he lost consciousness for an undetermined amount of time.[2] (R. p. 96 (Tr. p. 22), lines 8-19). However, there is no objective evidence in the record to corroborate this testimony. In fact, Respondent denied loss of consciousness to the paramedics, to the E.R. nurse and physician, and to his primary care physician. (R. pp. 420, 1086, 1090 and 1246) If anything,

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[1] Dr. Rimkus testified that, at the time of the hearing on April 18, 2017, Respondent had a temporary lifting restriction of twenty (20) pounds due to the then-existing hernia. (R. p. 119 (Tr. p. 114), lines 9-12). ("Well, at this point yes because he – he developed a hernia in the midline.").

[2] Remarkably, Respondent's Initial Brief states that Respondent "likely lost consciousness" and references the damages hearing transcript. (Resp. Br. p. 5). However, Respondent more boldly testified that "I obviously lost consciousness..." (R. p. 96 (Tr. p. 22), lines 11-19). Given that there is no evidence to corroborate Respondent's testimony, it is not surprising that Respondent tries to downplay his hearing testimony.

Respondent's hearing testimony regarding loss of consciousness is a prime example of his lack of credibility and/or his willingness to exaggerate his claims in an effort to obtain an inflated award.

B. Alleged Hole in Stomach

In his Brief, Respondent asserts that he suffered "complicated and extensive medical damage" and that when he presented to the hospital in May 2016, doctors "discovered he had a hole in his stomach..." (Resp. Br. p. 5). Not only does Respondent's citation to the record fail to support this assertion, it is wholly without any evidence in the record. While Respondent, in fact, was successfully treated for a perforated small bowel, there is no evidence of any stomach perforation or any injury to the stomach. For clarity, Respondent's surgeon summarized Respondent's abdominal injury in his "Pre-Operative History & Physical", in his "Operative/Procedure Report", and in his "Discharge Summary", none of which identify any stomach injury, much less a hole in the stomach. (R. pp. 464-465, 946-947 and 456). This is another example of Respondent's willingness to exaggerate his alleged injuries and damages to justify a grossly inflated award.

C. Appellant's Counsel's Estimate of the Value of Respondent's Claims

During the hearing on Appellant's post-trial motions, the Special Referee pointedly asked Appellant's counsel what counsel's estimate would be for a reasonable amount to award for pain and suffering in light of the significant contest of the $3.2 million dollar award. (R. p. 236, line 12-p. 237, line 1). The Special Referee then put counsel's estimate in the Order Denying Defendant's Motions and Respondent has parroted it in his Initial Brief.[3] However, counsel's estimate provided during argument on the then-pending motions was not then, and is not now, "evidence" to support the Special Referee's grossly excessive $3.2 million dollar award for non-

[3] In his brief, Respondent argues that it is "noteworthy" that the Special Referee's award "falls within the parties' competing proposals of the case's value." (Resp. Br. p. 8).

economic damages. The fact that this non-evidence was even mentioned in the Special Referee's Order denying Appellant's post-trial motions is just another example of how the Special Referee's decision was founded on considerations other than the actual evidence in the case. Allstate Ins. Co. v. Durham, 314 S.C. 529, 530–31, 431 S.E.2d 557, 558 (1993) (citing Easler v. Hejaz Temple, 285 S.C. 348, 356, 329 S.E.2d 753, 758 (1985).

II. WITH THE EXCEPTION OF COSMETIC ABDOMINAL SCARRING, THE RECORD IS DEVOID OF EVIDENCE OF ANY PERMANENT INJURY OR FUTURE DAMAGES AND, THEREFORE, THE RECORD IS INSUFFICIENT TO SUPPORT A $3.2 MILLION DOLLAR AWARD FOR NON-ECONOMIC DAMAGES

Given that this Court will be focused on whether there is evidence to support the Special Referee's award, it is important to understand all of the "evidence" listed in Respondent's brief to support the claim for permanency and/or future damages.[4] Vortex Sports & Entm't, Inc. v. Ware, 378 S.C. 197, 208, 662 S.E.2d 444, 450 (Ct. App. 2008)("In reviewing a damages award, we do not weigh the evidence, but determine if any evidence supports the award."). In his brief, Respondent identified the following as evidence of long-term damage and/or permanent injuries to support the Special Referee's award:

a. Lower back and hip pain;
b. Inability to power lift;
c. Separation from spouse;
d. Inability to participate in pre-accident activities of daily living;
e. Increased risk of future hernias and future surgeries;
f. Ongoing anxiety, depression, anger, bitterness, and loneliness; and
g. Cosmetic abdominal scarring.

Even a cursory review of the record demonstrates that this "evidence" cannot possibly support the Special Referee's award of $3.2 million dollars in non-economic loss damages.

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[4] The evidence regarding Respondent's temporary or short-term claimed injuries and damages have been discussed herein and in Appellant's Initial Brief. Despite his penchant for citing "precedent", Respondent has not set forth any precedent that would justify the Special Referee's award of $3.2 million dollars in non-economic damages for temporary or short term injuries alone. Accordingly, the focus turns to the existence of any permanent and/or future damages.

A. Lower Back and Hip Pain

While Respondent offered testimony at the damages hearing regarding alleged continuing pain and dysfunction in his low back and hips, the only evidence in the record of any medical attention directed to Respondent's low back and/or hips is a single CT scan of the pelvis obtained on the date of the accident, which revealed a nonspecific finding of trace pelvic free fluid but an otherwise unremarkable CT scan. (R. p. 1101). There simply is no evidence of any complaints of low back or hip pain in the medical records, much less any diagnoses or medical care regarding same. A $3.2 million dollar award for non-economic damages based on simple complaints of continuing low back and hip pain, in the absence of any medical diagnoses and/or treatment, is not only grossly excessive, it is unconscionable.

B. Inability to Power Lift

In his Brief, Respondent asserts that "he had been told his ability to power lift was 'pretty much done.'" (Resp. Br. p. 6). What Respondent failed to disclose in his Brief is that he was allegedly told that by his treating surgeon Dr. Rimkus. (R. p. 105 (Tr. pp. 58), line 24-(Tr. p. 59) line 6). Of course, Dr. Rimkus was called as a witness at the damages hearing yet Respondent did not elicit any such testimony from Dr. Rimkus. To the contrary, it has been made abundantly clear throughout Appellant's briefing that Dr. Rimkus never provided any permanent lifting restrictions.[5] A $3.2 million dollar award for non-economic damages based on Respondent's self-limiting activities, without any medical evidence for same, is not only grossly excessive, it is unconscionable.

C. Separation from Spouse

[5] Additionally, just eight (8) months following the accident and three (3) months following the second surgery, Family Nurse Practitioner Rachel Collins noted that "Patient is back at work [as a physical therapy assistant]. Patient is back in the gym. Without any pain or discomfort with working out." (R. p. 1258). (emphasis added).

Interestingly, in the entirety of his testimony at the damages hearing, Respondent never uttered a single word or sentence regarding any negative emotional, spiritual or physical impact to him due to separation from his wife and the alleged loss of his marriage.[6] In fact, he spent more time testifying about bodybuilding and power lifting competitions (from seven or more years prior the accident) than he did mentioning his wife. (R. p. 104 (Tr. p. 53), line 5-(Tr. P. 55), line 15). The fact that this was argued as evidence to support a $3.2 million dollar award for non-economic damages is disingenuous, at best.

D. Inability to Participate in Pre-Accident Activities of Daily Living

As has been demonstrated throughout, there is no competent medical evidence in the record that Respondent has been, or is, restricted in any manner from participating in any of his pre-accident activities. To the contrary, it is abundantly clear that any alleged "restrictions" in his diet or his physical activities are self-imposed. A $3.2 million dollar award for non-economic damages based on Respondent's self-limiting activities, without any medical evidence for same, is not only grossly excessive, it is unconscionable.

E. Increased Risk of Future Hernias and Future Surgeries

In his Brief, Respondent argues that the retained nurse life care planner Kim Piacquadio, offered evidence of "increased risk of future surgeries and infections from future surgeries." (Resp. Br. p. 8). However, her actual testimony did not amount to anything other than rank speculation. To wit, Piacquadio testified, in pertinent part, that "there's really no telling how – how all this is going to continue in his future because of the multiple surgeries that he could still endure." (R. p. 112 (Tr. p. 87), lines 10-13) (Emphasis added). Importantly, the record is devoid of any opinion evidence regarding Respondent's need for any future surgery to the required most

[6] When he was asked what activities he did before the accident, he mentioned his daughter, but not his wife. (R. p. 103 (Tr. p. 52), line 19-R. p. 104 (Tr. p. 53), line 4).

probable standard. See Payton v. Kearse, 329 S.C. 51, 61, 495 S.E.2d 205, 211 (Ct. App. 1995) ("Before expert medical testimony is admissible on the question of causation between the plaintiffs injuries and the acts of the defendant, the testimony must satisfy the "most probably" rule."); Baughman v. American Tel. & Tel. Co., 306 S.C. 101, 111, 410 S.E.2d 537, 543 (1991). Of course, nurse Piacquadio's speculation about Respondent's need for future surgery(ies) cannot possibly be credited over the treating surgeon's direct testimony that future surgery(ies) would not be needed.[7] (R. p. 119 (Tr. p. 113), lines 10-17). Clearly, unsubstantiated speculation cannot possibly be considered evidentiary support for the Special Referee's $3.2 million dollar award for non-economic damages.

F. Ongoing Anxiety, Depression, Anger, Bitterness, and Loneliness

Similarly, Respondent argues that nurse Piacquadio offered evidence of permanency in her nurse life care plan, where she referenced Respondent's "ongoing anxiety, depression, anger, bitterness, and loneliness." (Resp. Br. p. 8). However, nurse Piacquadio never offered opinion testimony that Respondent would most probably suffer those things in the future. Even if she had, which she did not, it would have been outside the scope of her expert qualifications.[8] Similar to the Respondent's alleged low back and hip pain, there is no evidence in the record of a diagnosis and/or treatment directed to any long term, or permanent, mental health condition. A $3.2 million dollar award for non-economic damages based on alleged mental health difficulties,

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[7] Remarkably, while nurse Piacquadio specifically requested Dr. Rimkus' input regarding "his opinion and recommendations of Mr. Knight's future care", Dr. Rimkus never offered his approval of any of the items or recommendations in her report. Nurse Piacquadio even conceded at the damages hearing that she had not heard from Dr. Rimkus. (R. p. 114 (Tr. p. 93), lines 20-24). Respondent never asked Dr. Rimkus to offer any opinion regarding any aspect of nurse Piacquadio's Nurse Life Care Plan, despite the fact that he offered testimony immediately following nurse Piacquadio.

[8] At the damages hearing, Respondent qualified and offered nurse Piacquadio as "an expert in the field of nurse life care planning." (R. p. 110 (Tr. p. 78), lines 22-23). At the end of her testimony, nurse Piacquadio confirmed that all of her opinions were based on her expertise as a life care planner. (R. p. 115 (Tr. p. 97), lines 13-16). In other words, she was not offered, and was never qualified, as an expert in any field of medicine or practical nursing.

in the absence of any medical diagnoses and/or treatment, is the definition of a grossly excessive award without evidentiary support.

G. Cosmetic Abdominal Scarring

As conceded by Appellant in the Initial Brief, Respondent's cosmetic abdominal scarring is the ONLY permanent condition for which there is evidence in the record. Since the Special Referee based his $3.2 million dollar non-economic damages award on things other than the abdominal scar (however erroneous), the cosmetic scarring alone would be insufficient to support the Special Referee's award. As a point of emphasis, Respondent has not cited to any precedent that would stand for the proposition that a cosmetic abdominal scar alone would be competent and sufficient evidence to support an award of $3.2 million dollars in non-economic damages. Respectfully, in the absence of any photographic evidence to confirm the condition of Respondent's scar at the time of the damages hearing, Appellant submits that this is not the case to set new precedent regarding the value of a cosmetic abdominal scar. Accordingly, the cosmetic abdominal scar cannot be considered sufficient evidence to justify the Special Referee's $3.2 million dollar award for non-economic damages.

III. RESPONDENT ERRONEOUSLY MISCHARACTERIZES APPELLANT'S POST-TRIAL MOTIONS PURSUANT TO SCRCP 52(b), SCRCP 59(a)(2) AND SCRCP 59(e) AS A "MOTION TO ADMIT CUMULATIVE EVIDENCE"

At the Damages Hearing on April 18, 2017, Respondent submitted evidence of "future damages" primarily in the form of projected expenses, prepared by the nurse life care planner, for an anticipated future surgery to repair an incisional hernia which, at that time, was scheduled for May 8, 2017. However, at the time the Special Referee's Order Awarding Judgment was entered on May 30, 2017, the surgery had been completed and the "future damages" were no longer "future damages." As such, an award for estimated "future damages" on May 30, 2017,

was improper and not reflective of the actual damages sustained by Respondent prior to the entry of the Order.[9]

While Respondent argues otherwise, it is inconceivable how the Special Referee's refusal to reopen the record to receive the actual costs of the third surgery can be viewed as anything other than a complete abuse of discretion. After all, in refusing Appellant's motion, the Special Referee essentially stated that the actual facts of the case were inconsequential.[10] The cost elements associated with the third surgery were ascertainable as actual damages and, therefore, the Special Referee, pursuant to SCRCP 52(b) and/or SCRCP 59(a)(2), should have opened the judgment and received as evidence the actual costs Respondent incurred for the third surgery. The Special Referee's refusal to consider the actual facts of Respondent's damages constitutes a complete abuse of discretion, and is yet another example of the Special Referee's accommodation of Respondent's rush to judgment.

IV. RESPONDENT'S ANALYSIS OF APPELLANT'S POST-JUDGMENT MOTION PURSUANT TO SCRCP 60(b) IS NOT IN ACCORDANCE WITH SOUTH CAROLINA LAW

Respondent simply argues that the decision to grant or deny relief under Rule 60(b) is left to the discretion of the trial judge. (Resp. Br. p. 9). However, case law has established a paradigm for obtaining relief based on newly discovered evidence, to wit, a movant must establish that the evidence: (1) is of such magnitude that had the court known of it earlier, the outcome would likely have been different; (2) has been discovered since the trial; (3) could not have been discovered before the trial; (4) is material to the issue; and (5) is not merely

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[9] The Special Referee awarded "future medical bills" in the amount of $97,425 based on the testimony of the life care planner. However, Appellant has readily demonstrated how the nurse life care planner did not receive any input from the surgeon as to any aspect of the life care report casting significant doubt as to its accuracy.

[10] Perhaps just as disappointing as the Special Referee's refusal to reopen the record is Respondent's opposition to Appellant's Motion which indicates that Respondent had no interest in the actual truth of the matter.

cumulative or impeaching. Spreeuw v. Barker, 385 S.C. 45, 62–63, 682 S.E.2d 843, 852 (Ct. App. 2009). The Spreeuw elements were clearly established here.

At the damages hearing on April 18, 2017, Respondent was scheduled for a third surgery and, therefore, submitted evidence of estimated projected expenses which the Special Referee awarded as "future damages." The surgery was completed subsequent to the hearing but before the judgment was entered, therefore the actual expenses did not come into existence until after the damages hearing. Since the nurse life care planner conceded that she never discussed any of her report with the surgeon, and did not obtain cost estimates from the actual facility and/or surgeon,[11] there is little doubt that the outcome would have been different – instead of a generic estimate for future damages, evidence of actually incurred expenses would establish Respondent's actual loss. In the final analysis, the actual expenses incurred by Respondent for the third surgery cannot possibly be considered "cumulative" to the estimated expenses. To the contrary, the actual expenses should have been substituted for the estimated expenses, not considered in addition to.[12] Clearly, all of the Spreeuw elements were satisfied and the Special Referee abused his discretion in refusing to consider the actual costs associated with Respondent's third surgery.

V. APPELLANT DID NOT RECEIVE PROPER NOTICE OF THE DAMAGES HEARING

A. The Issue Was Preserved for Appellate Review as it was Raised to, and Ruled Upon, by the Special Referee

Respondent's argument that this issue was not preserved is completely without merit. At the hearing on Appellant's Post Judgment Motions, Appellant specifically set forth his argument

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[11] In her report, nurse Piacquadio indicates that all cost estimates were obtained from the generic *Physicians Fee Reference* book.

[12] Cumulative evidence is defined as "Additional evidence that supports a fact established by the existing evidence (esp. that which does not need further support)." *Black's Law Dictionary* (10th ed. 2014), *available at Westlaw* BLACKS.

that he was entitled to ten days' notice of the damages hearing pursuant to Rule 6(d) SCRCP, not the five days afforded by the Respondent. (R. p. 255, line 15-p. 260, line 4). The Special Referee specifically rejected Appellant's argument in the Order Denying Defendant's Motions. (R. pp. 36-37). The issue was not only raised, but ruled upon, by the Special Referee and, therefore, is appropriate for this Court's review. Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998)("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.").

B. Respondent's Analysis of the Notice Requirement is Legally Flawed

First and foremost, Respondent and the Special Referee cite to case law and practice prior to the adoption of the South Carolina Rules of Civil Procedure, none of which has any application and/or precedential value for the issue before this Court.

Second, Respondent's argument cannot withstand simple rules of statutory construction. The heart of Respondent's argument is that defaulting parties who have appeared in an action and defaulting parties who have not appeared in an action, are entitled to the same notice under Rule 55(b)(2). However, Rule 55(b)(2) specifically identifies the notice required to be provided to parties who have appeared in an action, while remaining silent as to the notice requirement for defaulting parties who have not appeared. See SCRCP 55(b)(2)("If the party against whom judgment by default is sought has appeared in the action, the party...shall be served with written notice of the motion or application for judgment at least 3 days prior to the hearing on such application."). "The canon of construction '*expressio unius est exclusio alterius*' or '*inclusio unius est exclusio alterius*' holds that 'to express or include one thing implies the exclusion of another, or of the alternative.'" Bruning v. SCDHEC, 418 S.C. 537, 545, 795 S.E.2d 290, 295 (Ct.App. 2016) (citing Hodges v Rainey, 341 S.C. 79, 86, 533 S.E.2d 578, 582 (2000)). Simply

stated, if the notice requirement of Rule 55(b)(2) was to be applied equally to both appearing and non-appearing defaulting parties, there would be no need for the language, "If the party against whom judgment by default is sought has appeared in the action...". See SCRCP 55(b)(2).

Accordingly, simple statutory interpretation principles mandate a finding that non-appearing defaulting parties are entitled to some notice different from that provided by Rule 55(b)(2). Appellant's Initial Brief outlines the argument that Appellant, as a non-appearing defaulted party, was entitled to ten (10) days' notice pursuant to Rule 6(d) and, therefore, the argument is incorporated herein by reference. Of course, the prejudice to Appellant for the failure of due notice is patent. Appellant's counsel was retained April 19, 2017, and made first contact with the Special Referee on that date. (R. p. 259, lines 5-7). Had Appellant been afforded the required ten day notice period to April 22, 2017 (assuming service effective April 12, 2017), Appellant would have been represented at the damages hearing.

VI. THE SPECIAL REFEREE DID NOT HAVE THE POWER, AUTHORITY AND/OR JURISDICTION TO HEAR APPELLANT'S MOTION TO SET ASIDE DEFAULT AND, THEREFORE, ERRED IN NOT RETURNING THE CASE TO THE CIRCUIT COURT

Respondent cites to two cases in his Brief in an effort to counter Appellant's argument that the Special Referee lacked the power, authority and/or jurisdiction to hear Appellant's Motion to Set aside Default pursuant to SCRCP 55. However, neither authority supports Respondent's argument.

In Bunkum v. Manor Properties, 321 S.C. 95, 98, 467 S.E.2d 758, 760 (Ct. App. 1996), this Court noted that "[t]he order of reference...authorized the master to enter a final judgment." Importantly, this Court duly recognized that the master did not have any power, authority or jurisdiction to hear or decide any matter outside of the final judgment and post-trial motions and, therefore, reversed the master's order regarding a hearing to assess costs, fees, expenses and

damages associated with an appeal bond. Here, Appellant's Motion to Set Aside Default did not involve "a hearing on damages" as specifically directed in the Order of Reference and, therefore, the Special Referee did not have the power, authority and/or jurisdiction to decide same. Instead, the case should have been remanded to the circuit court for hearing Appellant's Motion to Set Aside Default and it was clear error for the Special Referee to refuse same.

While the Bunkum case actually supports Appellant's argument, Respondent's reliance on this Court's decision in Smith Cos. of Greenville, Inc. v. Hayes, 311 S.C. 358, 360, 428 S.E.2d 900, 902 (Ct. App. 1993) is also misplaced. Unlike the order of reference in Bunkum, which authorized the master to enter a final judgment, the order of reference in Hayes provided that "'It appearing that this is an action for the foreclosure of a Bond Title ..., it is ordered that this action be ... referred.'" Id. This Court held that the order referring the entire action to the master in no way limited the master's powers. Id. at 360, 428 S.E.2d at 902. By arguing the Hayes case as support for the Special Referee's decision to hear the Motion to Set Aside Default in the subject case, Respondent is asking this Court to disregard the express limiting language in the Order of Reference and to engraft language referring the "action" without limitation.

Since the Circuit Court specified and limited the Special Referee's authority and power to presiding over "a hearing on damages",[13] the Special Referee grossly exceeded his power, authority and/or jurisdiction when he failed to return the case to the Circuit Court for a hearing on Respondent's Motion to Set Aside Default. Accordingly, the Special Referee lacked the power, authority and jurisdiction for everything that happened after April 25, 2017, including entry of the Order Granting Judgment filed May 30, 2017.

[13] If the Special Referee was to be granted full authority in accordance with Rule 53, the Circuit Court's Order not only would/should have referenced same but, more importantly, there would have been no reason to insert the limiting language "for a hearing on damages" in the Order.

VII. THE SPECIAL REFEREE ABUSED HIS DISCRETION IN ADMINISTERING THE PROCEEDINGS TO THE DETRIMENT OF APPELLANT'S DUE PROCESS RIGHTS

While Respondent correctly notes that a tribunal has discretion with regard to the management of a case, Respondent has completely missed the mark regarding how the Special Referee abused his discretion in the subject case. Consider the chronology of the following events:

- April 18, 2017 - Hearing on damages;
- April 21, 2017 - Notice of Appearance filed by counsel for Appellant;
- April 25, 2017 - Motion to Set Aside Default, with Jury Demand, filed by Appellant;
- April 26, 2017 – Special Referee's letter outlining his decision from the damages hearing and directing Respondent's counsel to draft an Order;
- May 30, 2017 – Entry of Order Granting Judgment.

As is readily apparent, Appellant filed and served his Motion to Set Aside Default before any judgment, or semblance of a judgment, had been implied and/or expressed by the Special Referee and, therefore, Appellant's motion pursuant to SCRCP 55 was ripe and primed for hearing.[14] Instead of taking up Appellant's Motion, the Special Referee issued a letter, the very next day, outlining his decision and asking Respondent's counsel to draft an order consistent with same. The Special Referee's Order Granting Judgment was then entered in the face of Appellant's outstanding Motion to Set Aside Default.

[14] As argued extensively by Appellant, the Special Referee lacked the power, authority and jurisdiction to hear the Motion to Set Aside Default. The argument advanced in this section and in Appellant's Brief is only relevant in the unlikely event that the Court concludes that the Special Referee had the power, authority and jurisdiction to hear the Motion to Set Aside Default. Appellant does not waive and/or concede that the Special Referee possessed the power, authority and jurisdiction to hear the Motion to Set Aside Default.

The Special Referee's abuse of discretion is patent. Despite the fact that the Motion to Set Aside Default was ripe for hearing, the Special Referee denied Appellant the opportunity to argue the Motion until after he had determined the outcome of the damages hearing and, worse yet, after a judgment had been entered. Once the judgment was entered, Appellant's Rule 55(c) motion was rendered a nullity. After all, by its very terms, Rule 55(c) is only applicable to those defaults where a judgement has not been entered. See SCRCP 55(c). While the Special Referee went through the charade of "hearing" Appellant's Rule 55(c) Motion after the judgment had already been entered, the damage had already been done and the Special Referee's abuse of discretion was complete. It is incomprehensible how the Special Referee's action in eliminating a party's otherwise viable motion can be considered anything other than a complete abuse of discretion. It is just another example of the Special Referee's accommodation of Respondent's rush to judgment.

Perhaps just as disconcerting and disappointing is Respondent's bold representation in his Brief that a "review of precedent discloses other instances where requests for relief under both Rules 55 and 60 have been considered together." (Resp. Br. p. 16). Contrary to Respondent's assertion, the cited cases do not validate the Special Referee's refusal to hear Appellant's Rule 55(c) Motion until after entering judgment.

In Melton v. Olenik, 379 S.C. 45, 664 S.E. 2d 487 (Ct. App. 2008), default was entered against the appellant, and the lower court continued the damages hearing, expressing concern appellant had not been properly served with the notice of hearing. The appellant then filed a motion to set aside default and, with respondent's consent, the damages hearing was continued. Importantly, the trial court first denied the motion to set aside default and then proceeded to enter judgment. In Melton, the trial court heard the pending motion to set aside default pursuant to

Rule 55(c) before it entered judgment, not after. Melton simply does not stand for the proposition asserted by Respondent.

In Stark Truss Co. v. Superior Constr. Corp., 360 S.C. 503, 602 S.E.2d 99 (Ct. App. 2004), the appellant did not file a motion to set aside default until after default judgment had been entered. Unlike in the subject case, the trial court in Stark Truss was never presented with the opportunity to entertain a motion to set aside default before entry of the default judgment. In the final analysis, Respondent has not provided this Court with any rule, statute or case law precedent that would validate the Special Referee's refusal to hear Appellant's Rule 55(c) Motion prior to entering judgment. The only conclusion to be drawn is that the Special Referee's action constituted a complete abuse of discretion and cannot be justified.

VIII. CONCLUSION

Based on the foregoing and the arguments contained in Appellant's Initial Brief, Appellant respectfully submits that he is entitled to the relief requested in his Initial Brief.