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

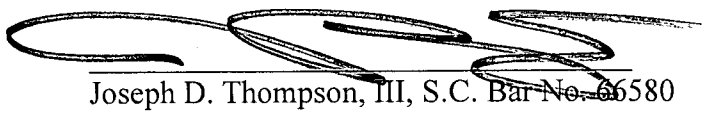
DANIEL ERIC KNIGHT, Respondent,

v.

PHILLIP RAY CAUSEY, Appellant.

FINAL BRIEF OF APPELLANT

Respectfully submitted,



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Dated: May 7, 2018

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STATEMENT OF THE CASE

On April 27, 2016, Daniel Eric Knight ("Respondent") and Phillip Ray Causey ("Appellant") were involved in a motor vehicle accident. On December 16, 2016, Respondent filed suit in the Horry County Court of Common Pleas against Appellant alleging negligence, gross negligence, carelessness and recklessness, seeking recovery of actual, special, consequential and punitive damages. (R. pp. 81-89). On January 2, 2017, Appellant was personally served with the Summons and Complaint. After Appellant failed to file an Answer, Respondent filed an Affidavit of Default on February 14, 2017. (R. pp. 321-322). Respondent then filed a Motion for Default Judgment against Appellant on February 16, 2017, and on February 24, 2017, the Circuit Court entered an Order declaring the Appellant in Default and that judgment be entered in an amount to be determined at a damages hearing. (R. pp. 323-326; p. 2). The Motion for Default Judgment was served on Appellant before the Order was issued by the Circuit Court declaring Appellant in default.

On March 2, 2017, Respondent filed a Notice of Motion and Motion for Referral to Special Referee. (R. pp. 327-330). Unlike the Motion for Default Judgment, Respondent did not serve the Motion for Referral to Special Referee on Appellant before the Court entered an Order granting that relief. The case was referred to Special Referee Nate Fata by Order of Referral filed March 22, 2017. The Order of Referral stated, in pertinent part:

> It further appearing that a hearing to ascertain damages should be held to determine the amount owed to Plaintiff. Accordingly,
>
> IT IS ORDERED that this matter be referred with finality to Nate Fata, Esquire, as Special Referee, for a hearing on damages, with any appeal directly [sic] to the South Carolina Court of Appeals.
>
> The Order of Referral did not reference or make any mention of Rule 53, SCRCP. (R. pp. 3-4)

The case proceeded to a hearing on damages in front of the Special Referee on April 18, 2017. Although Appellant appeared at the damages hearing, he was not represented by counsel. The Special Referee did not indicate or enter any award for Respondent at the damages hearing.

On April 21, 2017, counsel filed a Notice of Appearance on behalf of Appellant and, on April 25, 2017, filed a Motion to Set Aside Default. (R. p. 31). In an email to the Special Referee on the same date, Appellant's counsel stated, "As a result of this filing [Motion to Set Aside Default], the Defendant Causey respectfully requests that an Order/Judgment of the Special Referee should not be issued/held in abeyance until after the Circuit Court disposes of the now pending motion." (R. p. 1577; p. 152, line 9 – p. 153, line 4). At the time of the filing of the Motion to Set Aside Default, the Special Referee had not issued any order/judgment or any directive as to the disposition of the damages hearing.

Despite the pending Motion to Set Aside Default and despite the request of Appellant's counsel, the Special Referee issued a letter outlining his decision on damages the next day (April 26, 2017) and directed Respondent's counsel to draft an Order regarding same. (R. pp. 39-40). On May 30, 2017, the Special Referee filed his Order Granting Judgment with an award of THREE MILLION FOUR HUNDRED EIGHTY-NINE THOUSAND TWO HUNDRED SIX DOLLARS AND 14/100 ($3,489,206.14) in favor of Respondent and against Appellant.[1] (R. pp. 5-9).

On June 6, 2017, Respondent filed a memorandum in opposition to Appellant's Motion to Set Aside Default. On June 8, 2017, Appellant filed Post Judgment Motions and Memorandum in Support. (R. pp. 332-344). On June 13, 2017, Appellant filed a Motion for Relief from

[1] By letter dated May 16, 2017, the Special Referee set the hearing for Appellant's Motion to Set Aside Default for June 2, 2017. (R. p. 1573). At the request of Appellant's attorneys, the Special Referee, by email dated May 18, 2017, agreed to reschedule the hearing to June 13, 2017. (R. pp. 1574-1576). Despite full knowledge of the scheduled hearing and Appellant's objections to the entry of an Order prior to the hearing on Appellant's Motion to Set Aside Default, the Special Referee's Order Granting Judgment was entered May 30, 2017.

Judgment Pursuant to Rule 60, SCRCP. (R. pp. 345-346). On June 22, 2017, Appellant filed an Affidavit of Phillip Ray Causey in support of all of Appellant's pending motions. (R. pp. 1578-1583). On June 29, 2017, the Special Referee held a hearing on Appellant's motions. On the same day, Respondent filed and served memoranda opposing Appellants' pending motions as well as an affidavit of witness Shawana Palsey-Shaw. (R. p. 1584).

On August 3, 2017, the Special Referee entered his Order Denying Defendant's Motions. (R. pp. 10-38). Appellant filed the present appeal on September 1, 2017, appealing the Order Granting Judgment, entered May 30, 2017, and the Order Denying Defendant's Motions, entered August 3, 2017.

FACTS OF THE CASE

The crux of this case is whether the almost $3.5 million default damages award of the Special Referee, specifically selected by Respondent's counsel without consent of the *pro se* Appellant, should be allowed to stand in light of the questionable procedural history and even more questionable evidence on which the Special Referee based his award. In the final analysis, there is no justification, either procedurally or substantively, for the Special Referee's almost $3.5 million default damages award.

I. Accident Facts

The vehicles of Appellant and Respondent collided on April 27, 2016 on U.S. Highway 701 in Horry County. The Appellant was traveling northbound on U.S. Highway 701 and the Respondent was traveling southbound when the vehicles collided near the center line. While Appellant's procedural default prevented him from arguing the liability issue, it is clear from the Affidavit submitted in support of his Motion to Set Aside Default that Appellant specifically denied crossing the center line prior to the impact and that he had a meritorious defense. (R. p.

1579). Without question, had default not been entered, Appellant's sworn testimony would have been sufficient to have the case submitted to, and decided by, a jury in Horry County.

On the same date of the hearing on Appellants' pending motions (June 29, 2017), Respondent submitted the affidavit of witness Shawana Palsey-Shaw and the Special Referee admitted the affidavit over Appellant's objections. (R. p. 174, lines 3-18). While the affidavit testimony provided by the witness supported Respondent's version of the accident, it would not have been sufficient to overcome, as a matter of law, the contradictory sworn testimony of Appellant with regard to how the accident occurred. In other words, in the absence of the default, the case would have been submitted to a jury for it to decide the competing and contradictory evidence and liability, if any, for the accident.

II. Damages Facts

The Special Referee concluded that Respondent "suffered permanent injuries, permanent scarring, and significant emotional distress and loss of enjoyment of life." (R. p. 7). The Special Referee concluded that Respondent sustained the following damages:

1. Past Medical Bills:	$177,134.76[2]
2. Future Medical Bills:	$ 97,425.00
3. Past Lost Wages:	$ 10,578.00
4. Five Weeks of Future Wages:	$ 4,068.38

In addition to the foregoing, the Special Referee awarded $3.2 million "for permanent scarring, past and future pain and suffering, and past and future loss of enjoyment of life" resulting in a total judgment against the *pro se* Appellant of Three Million Four Hundred Eighty-nine Thousand Two Hundred Six and 14/100 Dollars ($3,489,206.14). (R. p. 8).

While there is little doubt that Respondent sustained an injury that required certain medical attention,[3] the evidence readily demonstrated that Respondent had made, or was destined

[2] The overwhelming majority of the "past medical bills" were the result of surgical procedures performed on May 15, 2016 and July 8, 2016, and the associated hospitalizations.

to make, a good recovery with no permanency other than residual cosmetic torso scarring from the surgical procedures.

Dr. Gilbertas Rimkus was the surgeon who performed all post-accident procedures on Respondent and he was the only treating medical professional qualified as an expert witness at the damages hearing. Consequentially, Dr. Rimkus was the most qualified witness to speak to Respondent's injuries and recovery, especially given the unique nature of the alleged injury, *i.e.* a perforated bowel/injury to the small intestines. While the Special Referee found that Respondent sustained "permanent injuries," Dr. Rimkus' testimony does not support this finding. Perhaps the most definitive statement was elicited by Respondent's counsel during direct examination:

> Q. And will his digestive system ever be the same as it was prior to this collision?
>
> A. Yes, I expect so.

(R. p. 119 (Tr. p. 114), lines 20-22). There is no evidence in the hearing record to contradict Dr. Rimkus' testimony with regard to the lack of permanent injury to Respondent's digestive system. Instead, the uncontradicted testimony of Dr. Rimkus is that there has been no permanent injury to Respondent's digestive system. Additional testimony from Dr. Rimkus supported his opinion that Plaintiff did not sustain a permanent injury. For example, as to the assertion by Respondent that he had permanent diet restrictions, Dr. Rimkus specifically testified:

> Q: And as a result of these surgeries that he's gone through are there certain food restrictions, diet restrictions that he now has?
>
> A. Not at this point, not at this point.

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[3] More specifically, on May 15, 2016, Respondent submitted to surgery for repair of a perforation of the terminal ileum which included resection of the small intestine and ileostomy. On July 8, 2016, Respondent submitted to a second surgery for ileostomy takedown.(R. p. 117 (Tr. p. 107), lines 4-14; p. 118 (Tr. p. 109), lines 14-17). At the time of the damages hearing on April 18, 2017, Respondent was scheduled for a third procedure for repair of a hernia (May 8, 2017). (R. p. 118 (Tr. p. 111), lines 11-13, 18-20).

(R. p. 118 (Tr. p. 110), lines 17-22). Dr. Rimkus further clarified his testimony opining that "once a person is considered to be recovered from intestinal surgery at this point he doesn't have diet restrictions." (R. p. 118 (Tr. p. 111), lines 2-5).

As for the need for any medical care and/or operative intervention following the May 2017 hernia repair, Dr. Rimkus specifically opined that, "I don't expect that.... If he recovers without complications, he will not need anything else." (R. p. 119 (Tr. p. 113), lines 13-17). And finally, as to any alleged physical restrictions, Dr. Rimkus testified that, at the time of the hearing on April 18, 2017, Respondent had a 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."). At no point in his testimony did Dr. Rimkus ever offer an opinion that Respondent sustained any permanent injury, damage or restrictions.[4] In fact, there simply is no evidence in the record indicating that Plaintiff has sustained any permanent medically/scientifically-documented restrictions on either his vocational or recreational activities.[5]

Importantly, at the time of the damages hearing on April 18, 2017, Respondent was scheduled for a hernia repair on May 8, 2017. Consequentially, at the time of the hearing in April 2017, Respondent produced evidence of estimates for Respondent's future medical needs, including an estimate for the hernia repair. However, at the time the Special Referee issued his Order Awarding Judgment on May 30, 2017, the surgery had been completed and the expenses

[4] To be sure, Dr. Rimkus confirmed that Respondent sustained certain superficial abdominal scarring as a result of the surgical incisions. That said, there is no evidence in the record to indicate that Respondent sustained any permanent medical/scientific restrictions as to any physical activity.

[5] The 1,100 pages of medical records entered as Respondent's Exhibit 19 (R. pp. 417-1572) include additional evidence of the lack of permanent injury and/or support for a $3.5 million judgment. For example, in an office note dated October 18, 2016, just over six (6) months following the accident, 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).

for same would have been certain. As a result, at the time the award was entered by the Special Referee, it did not accurately reflect the actual damages incurred by Respondent.

APPELLANT'S ARGUMENTS

I. THE SPECIAL REFEREE ERRED IN DENYING APPELLANT A NEW TRIAL PURSUANT TO SCRCP 52(b), SCRCP 59(a)(2), SCRCP 59(e) BECAUSE THE ORDER GRANTING JUDGMENT FOR $3,489,206.14 WAS GROSSLY EXCESSIVE, SHOCKED THE CONSCIENCE AND WAS NOT SUPPORTED BY ADMISSIBLE EVIDENCE IN THE RECORD.

No evidence of permanent impairment.

No evidence of permanent restrictions on work or social activities.[6]

No evidence of permanent injury with the exception of cosmetic scars from surgical incisions.

All of this and yet the Special Referee, specifically selected by Respondent's counsel, rendered a default damages award of almost $3.5 million.

Unfortunately, this is one of those cases which the Supreme Court has recognized as a "great concern" as it involves a large 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). Here, the Special Referee's default damages award was so grossly excessive and so shockingly disproportionate to the Respondent's claimed injuries and damages that it had to have been founded on something other than the evidence in the record and, consequentially, it

[6] On August 11, 2016, a month following the second surgery, Respondent's surgeon Dr. Gilbertas Rimkus returned Respondent to work as a physical therapy assistant with no restrictions. (R. p. 1346).

is the duty of this Court to set it aside. Sanders v. Prince, 304 S.C. 236, 238, 403 S.E.2d 640, 642 (1991).

The evidence in the record is straight-forward. The motor vehicle accident occurred April 27, 2016. On May 15, 2016, Respondent submitted to surgery for repair of a perforation of the terminal ileum which included resection of the small intestine and ileostomy. On July 8, 2016, Respondent submitted to a second surgery for ileostomy takedown. (R. p. 117 (Tr. p. 107), lines 3-14; p. 118 (Tr. p. 109), lines 14-17). In an office note dated October 18, 2016, just over six (6) 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). Respondent subsequently developed an incisional hernia and, at the time of the default damages hearing on April 27, 2017, was scheduled for surgical repair on May 8, 2017. (R. p. 118 (Tr. p. 111), lines 11-13, 18-20). While the hernia repair was outstanding at the time of the default damages hearing, Respondent's treating surgeon Dr. Gilbertas Rimkus dispelled any doubts and/or speculation as to the expectation of a complete recovery for Respondent without any permanent sequelae.

Importantly, Dr. Rimkus was the surgeon who performed all post-accident procedures on Respondent and he was the only treating medical professional qualified as an expert witness at the default damages hearing. Consequentially, Dr. Rimkus was the most qualified witness to speak to Respondent's injuries and recovery, especially given the unique nature of the alleged injury, *i.e.* a perforated bowel/injury to the small intestines. While the Special Referee found that Respondent sustained "permanent injuries," Dr. Rimkus' testimony specifically contradicts

the Special Referee's findings. Perhaps the most definitive statement was elicited by Respondent's counsel during direct examination:

> Q. And will his digestive system ever be the same as it was prior to this collision?
>
> A. Yes, I expect so.

(R. p. 119 (Tr. p. 114), lines 20-22). With no expectation of permanency, Dr. Rimkus did not offer any testimony as to any permanent impairment rating. In fact, there is no competent medical/scientific evidence in the hearing record to contradict Dr. Rimkus' testimony with regard to the lack of permanent injury to Respondent's digestive system.

Further testimony from Dr. Rimkus demonstrated additional direct contradiction to the Special Referee's finding of permanent injury. For example, as to the assertion by Respondent that he had permanent diet restrictions, Dr. Rimkus specifically testified:

> Q: And as a result of these surgeries that he's gone through are there certain food restrictions, diet restrictions that he now has?
>
> A. Not at this point, not at this point.

(R. p. 118 (Tr. p. 110), lines 17-22). Dr. Rimkus further clarified his testimony opining that "once a person is considered to be recovered from intestinal surgery at this point he doesn't have diet restrictions." (R. p. 118 (Tr. p. 111), lines 2-5).

As for the need for any medical care and/or operative intervention following the then-scheduled May 2017 hernia repair, Dr. Rimkus specifically opined that, "I don't expect that [future surgeries] . . . If he recovers without complications, he will not need anything else." (R. p. 119 (Tr. p. 113), lines 13-17). And finally, as to any alleged physical restrictions, 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."). At no point in his testimony did Dr. Rimkus ever offer an opinion that Respondent sustained any permanent injury, damage or restrictions.[7] In fact, there simply is no evidence in the record indicating that Respondent sustained any permanent medically/scientifically-documented restrictions on either his vocational or recreational activities.

Given the documentary evidence and testimony submitted at the hearing, and more importantly, the limited factual findings contained in the Special Referee's Order Awarding Judgment, there simply is no evidentiary basis for an award of almost $3.5 million for actual damages, and the entry of same by the Special Referee was grossly excessive, shocks the conscious and should be set aside. Consequentially, Appellant respectfully submits that he is entitled to a new trial.

II. THE SPECIAL REFEREE ERRED IN AWARDING FUTURE DAMAGES FOR SURGERY WHEN, AT THE TIME THE ORDER AWARDING JUDGMENT WAS ENTERED, RESPONDENT'S "FUTURE" SURGERY HAD OCCURRED. AS A RESULT, THE SPECIAL REFEREE ERRED IN DENYING APPELLANT'S MOTION TO ALTER OR AMEND THE JUDGMENT PURSUANT TO SCRCP 52(b), SCRCP 59(a)(2), SCRCP 59(e) AND/OR, ALTERNATIVELY, IN DENYING APPELLANT'S MOTION FOR NEW TRIAL.

At the default damages hearing conducted by the Special Referee on April 18, 2017, Respondent submitted evidence of "future damages" primarily in the form of projected expenses for an anticipated surgery 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" at all. In what can only be described as an unreasonable rush to judgment, the Special Referee entered an award for future damages which, at the time of the entry of the judgment, did not exist.

[7] To be sure, Dr. Rimkus confirmed that Respondent sustained certain superficial abdominal scarring as a result of the surgical incisions. That said, there is no evidence in the record to indicate that Respondent sustained any permanent medical/scientific restrictions as to any physical activity.

Consequentially, Appellant timely moved pursuant to Rules 52(b), 59(a)(2) and 59(e) for an Order altering and/or amending the Order Awarding Judgment to allow for the introduction of evidence of the actual damages incurred as a result of the May 8, 2017 surgery. The Special Referee denied the motion, despite the fact that both parties had an equally compelling interest in the accurate calculation of Respondent's actual damages.[8]

Unlike in a jury trial, the presiding judge in a bench trial has the authority to amend his findings and to make additional findings after the entry of judgment, especially where the sufficiency of the evidence is in question. In fact, Rule 52(b) specifically provides:

> Upon motion of a party made not more than 10 days after receipt of written notice of entry of judgment the court may amend its finding or make additional findings and may amend the judgment accordingly, and the motion may be made with a timely motion for a new trial. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the trial court an objection to such findings or has made a motion to amend them or a motion for judgment.

Rule 52(b), SCRCP. The Rules allow the trial judge to open a previously entered judgment, take additional testimony and alter/amend existing findings and/or conclusions and even make new findings and/or conclusions. Rule 59(a)(2) provides that:

> On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings of and conclusions, and direct the entry of a new judgment.

Rule 59(a)(2), SCRCP.

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[8] While Appellant would be more concerned with the potential for over-compensation of Respondent should the "future damages" be more than the actual expenses incurred for the surgery, Respondent would have an equal concern with the potential for under-compensation should the "future damages" be less than the actual expenses incurred for the surgery. However, Respondent clearly lacked any significant interest in this detail given the grossly excessive award he received from the Special Referee.

Here, the Special Referee entered judgment which included an award for estimated future damages which did not exist given that surgery had already been completed.[9] When given an opportunity to correct this error, the Special Referee refused simply holding that the testimony at trial supported the award of future damages. (R. pp. 23-24). At a minimum, the Special Referee abused any vested discretion by refusing to consider proof of the actual damages incurred by Respondent and, instead, awarding future damages that did not exist.[10] Respectfully, the Special Referee erred in failing to grant the Appellant's Motion to Alter/Amend and/or Motion for a New Trial and, consequentially, Appellant respectfully submits that he is entitled to a new trial.

III. APPELLANT DID NOT RECEIVE PROPER NOTICE OF THE DEFAULT DAMAGES HEARING AND, THEREFORE, THE DEFAULT JUDGMENT SHOULD BE VOIDED, VACATED AND/OR SET ASIDE.

The default damages hearing was conducted by the Special Referee on April 18, 2017. Appellant received notice of the default damages hearing no earlier than April 13, 2017, five days prior to the damages hearing.[11] In accordance with SCRCP 6(d), Respondent was required to provide Appellant notice of the default damages hearing "not later than ten days before the time specified for the hearing." Rule 6(d), SCRCP. Since Respondent failed to comply with the

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[9] In the Order Awarding Judgment, the Special Referee awarded "future medical bills" in the amount of $97,425 on the strength of the testimony of the life care planner Kimberly Piacquadio. Specifically, the Special Referee awarded future damages for such things as medical/surgical expenses, home health aide, nurse case manager and counseling associated with the expected hernia surgery. Those elements of damages, to the extent they existed, should have been ascertainable with reasonable certainty either 1) prior to the time the Order Granting Judgment was entered (May 30, 2017) and/or 2) at the time of the motions hearing (June 29, 2017). After all, Dr. Rimkus testified that he would expect a recovery 4-6 weeks following surgery. (R. p. 118 (Tr. p. 111), line 25, (Tr. P. 112), lines 1-4).

[10] Alternatively stated, this argument is also grounds for setting aside the judgment pursuant to SCRCP 60(b) as Respondent's post-hearing surgery would constitute "newly discovered evidence" that did not exist prior to the time of the damages hearing. It goes without saying that the post-hearing evidence of the surgery was not available at the time of trial (including medical expenses and associated care) and the receipt and consideration of same would necessarily have changed the characterization/calculation of Respondent's actual damages and was clearly material to the central issues raised at the damages hearing.

[11] In his Order Denying Defendant's Motions, the Special Referee found that Respondent's counsel "gave the Defendant six days' notice of the damages hearing" based on the fact that the hearing notice was placed in the mail to Appellant on April 12, 2017. (R. p. 38). Appellant was personally served with the notice of the default damages hearing on April 13, 2017. Regardless of whether Appellant received notice five or six days in advance of the default damages hearing, it still did not comply with the ten day notice requirement of Rule 6(d), SCRCP.

required notice period, the Order Granting Judgment issued as a result of the default damages hearing should be voided, vacated and/or set aside.[12]

In denying Appellant's motion on this issue, the Special Referee specifically, and erroneously, concluded that "Rule 6 does not apply and the Defendant was not entitled to ten days [sic] notice." (R. p. 37). As justification, the Special Referee relied on a Supreme Court decision that pre-dated the adoption of the South Carolina Rules of Civil Procedure.[13] However, a simple application of the express language of the South Carolina Rules of civil Procedure demonstrates the notice required in the subject case was, in fact, ten days.

First and foremost, it is well-established that a defaulting party is entitled to proper notice of a hearing to establish damages where the claims are unliquidated. See Rule 55(b)(2), SCRCP; Rule 5(a), SCRCP. When a defaulting party "has appeared in the action", Rule 55(b)(2) states that 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." Rule 55(b)(2), SCRCP. Since it is uncontested that Appellant never made an appearance in this action prior to the default damages hearing, the notice period required in Rule 55(b)(2) is not applicable.

At the end of Rule 55(b)(2), it is provided that "[p]ursuant to Rule 5(a), notice of any trial or hearing on unliquidated damages shall also be given to parties in default by first class mail to the last known address of such party whether or not such party has appeared in the action." Rule

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[12] This is also a basis and argument for Appellant's Motion for Relief from Judgment Pursuant to Rule 60. In short, since Appellant did not receive proper notice of the default damages hearing, the Special Referee should not have proceeded with the hearing and should not have subsequently issued his Order Granting Judgment. The judgment was void and, therefore, the Special Referee erred by not setting it aside pursuant to SCRCP 60(b)(4).

[13] In a 1981 decision, the Supreme Court held that "hereafter in all unliquidated-damages default hearings, even when no appearance has been made, it is the better practice for claimant's counsel to give to the defending party four days' notice, as set out in § 15-9-960 of the Code, of the time and place of the hearing." Lewis v. Congress of Racial Equality, 275 S.C. 556, 561, 274 S.E.2d 287, 289 (1981). Not only did the Supreme Court's decision in Lewis pre-date the adoption of the Rules of Civil Procedure but it was founded on a statute that has been repealed. As a result, the Supreme Court's decision in Lewis should have no precedential and/or authoritative value and it was error for the Special Referee to rely on same.

55(b)(2), SCRCP. While this provision does not include a proscribed time period, it would be a completely useless provision if the hearing notice could be placed in the mail and yet not be delivered in the ordinary course of the mail to the defaulting party prior to the damages hearing.[14] Remarkably, while Rule 5(a) simply states that "notice of any trial or hearing on unliquidated damages shall also be given to parties in default," like Rule 55(b)(2) it does not provide a time period for accomplishing same on non-appearing parties in advance of the default damages hearing.

In the final analysis, no legal and/or mental gymnastics are required to understand the application of Rule 6 in this case. Respondent filed motions to maneuver the case to a hearing in front of the Special Referee and, specifically, filed a Motion for Default Judgement in which a damages hearing was requested. Since the default damages hearing was the direct result of Respondent's motions practice, it fell within the ambit of Rule 6(d) which specifically provides:

> A written motion other than one which may be heard ex parte, and notice of the hearing thereof, shall be served not later than ten days before the time specified for the hearing, unless a different period is fixed by these rules or by an order of the court.

Rule 6(d), SCRCP. While it has been demonstrated herein that Rule 55(b)(2) alters the notice period for defaulting parties who have made an appearance in an action (from ten days to three), Rule 55(b)(2) does not alter the required notice period for defaulting parties who have not made an appearance, like Appellant in the instant case. While it is difficult to fathom how the Special Referee disregarded the express language of the South Carolina Rules of Civil Procedure in favor of a Supreme Court decision that not only pre-dated the adoption of the Rules of Civil Procedure but was based on a repealed statue, it is easy to conclude that Appellant did not receive the

[14] For example, putting the hearing notice in the mail to a defaulting party the day before a damages hearing would appear to comply with the mailing requirement but would certainly not provide the defaulting party any reasonable notice of the damages hearing.

required notice of the damages hearing and, therefore, the Order Granting Judgment should be voided, vacated and/or set aside.[15]

IV. THE SPECIAL REFEREE ERRED IN HEARING AND DECIDING APPELLANT'S MOTION TO SET ASIDE DEFAULT AND DEMAND FOR JURY TRIAL BECAUSE THE SPECIAL REFEREE LACKED THE POWER, AUTHORITY AND/OR JURISDICTION TO DO SO.

In his Notice of Motion and Motion for Referral to Special Referee, Respondent identified his preferred Special Referee and specifically requested referral "for the purpose of determining damages with finality with any appeal direct to the South Carolina Court of Appeals." (R. pp. 327-330). In granting the requested relief, the Circuit Court issued its Order of Referral which set forth the purpose of the referral:

> IT IS ORDERED that this matter be referred with finality to Nate Fata, Esquire, as Special Referee, for a hearing on damages, with any appeal directly [sic] to the South Carolina Court of Appeals.

(R. pp. 3-4). (emphasis added). Importantly, the Order of Referral did not include a reference to SCRCP 53 and it did not include any directive that any matters, outside of a hearing on damages, would fall within the province of the Special Referee.

It is well-established that a special referee referred a case pursuant to Rule 53 has no power or authority except that which is given to him by the order of reference. Smith v Ocean Lakes Family Campground, 315 S.C. 379, 381, 433 S.E.2d 909, 910 (Ct. App. 1993). When a case is referred under the rule, a special referee "is given the power to conduct hearings in the same manner as the circuit court unless the order of reference specifies or limits the [special referee's] powers." Bunkum v. Manor Properties, 321 S.C. 95, 98, 467 S.E.2d 758, 760 (Ct. App. 1996). Here, the Circuit Court specified and limited the Special Referee's authority and power to

[15] Importantly, 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 allowed 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.

presiding over "a hearing on damages."[16] Consequentially, 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, which was filed before the Special Referee had indicated, much less filed, any default damages award.

On April 25, 2017, Appellant filed his Motion to Set Aside Default which included a jury trial demand.[17] Since the Order of Referral specifically limited the Special Referee's power and authority to a damages hearing, the Special Referee was required to send the case back to the Circuit Court to hear Appellant's Motion to Set Aside Default. Instead, the Special Referee defiantly issued his letter summarizing his award the day after the Appellant's Motion to Set Aside Default had been filed.[18]

The importance of the timing of the Special Referee's actions cannot be understated. At the time of the filing of Appellant's Motion to Set Aside Default pursuant to SCRCP 55, no judgment or semblance of a judgment had been indicated and/or entered by the Special Referee. As a result, whether the motion was heard by the Special Referee or the Circuit Court, the standard for setting aside the default would have been good cause. See Rule 55(c), SCRCP. Had the Circuit Court granted the Motion to Set Aside Default, the case would have stayed in the

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[16] 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.

[17] Pursuant to SCRCP 38, a jury trial demand "may be endorsed upon a pleading of the party." Rule 38, SCRCP. In his Motion to Set Aside Default, Appellant specifically included a trial by jury as part of the requested relief. Pursuant to the express language of SCRCP 53(b), "upon the filing of a jury demand, the matter shall be returned to the circuit court." SCRCP 53(b) (emphasis added). Since there is nothing in the Rule to suggest a point at which such demand is waived, the Special Referee was required to return the case to the Circuit Court once the jury trial demand was made. As a result, the Special Referee lacked the power, authority and/or jurisdiction to conduct any further proceedings or issue any further decisions in the case following the Appellant's jury trial demand filed with the Motion to Set Aside Default on April 25, 2017. Without the power, authority or jurisdiction, the Special Referee's Order Granting Judgment is void as a matter of law.

[18] Despite full knowledge of Appellant's Motion to Set Aside Default, the Special Referee not only did not return the case to the Circuit Court for it to hear Appellant's Motion, but the Special Referee proceeded with the issuance of his findings and judgment for Respondent without hearing Appellant's Motion to Set Aside Default.

circuit court and the Special Referee would have had no further power, authority and/or jurisdiction. However, not only did the Special Referee err in hearing the Appellant's Motion to Set Aside Default in the first instance, he compounded the error by not hearing it until after the Order Awarding Judgment had been filed when a Rule 55 motion would be unsustainable. Simply stated, the Special Referee's actions predetermined that Appellant's Motion to Set Aside Default would be futile.

The short of the matter is that the only power, authority and/or jurisdiction vested in the Special Referee was to conduct "a hearing on damages." As a result, the Special Referee was not vested with the power, authority or jurisdiction to determine the validity of the Appellant's Motion to Set Aside Default and/or jury trial demand. Furthermore, once the Appellant's Motion to Set Aside Default was filed on April 25, 2017, the Special Referee lacked any further power, authority or jurisdiction to proceed and was required by the express language of Rule 53(b) to return the case to the Circuit Court. Consequentially, Appellant respectfully submits that the Order Granting Judgment should be voided, vacated and/or set aside; that the Special Referee be recused/disqualified from any further handling of this case; and that the case be returned to the Circuit Court for further disposition including, but not limited to, a hearing on Appellant's Motion to Set Aside Default and a new trial set before a jury.

V. ASSUMING *ARGUENDO* THAT THE SPECIAL REFEREE POSSESSED THE POWER, AUTHORITY AND JURISDICTION TO HEAR THE APPELLANT'S MOTION TO SET ASIDE DEFAULT, THE SPECIAL REFEREE ERRED IN FAILING TO GRANT THE APPELLANT'S MOTION.

As discussed hereinabove, Appellant's Motion to Set Aside Default pursuant to Rule 55 was filed and served before the Special Referee rendered any decision regarding the default damages hearing and well before the final Order Granting Judgment was executed and filed. While Appellant did not concede, and specifically contested, the power, authority and

jurisdiction of the Special Referee to hear the Motion to Set Aside Default, the Special Referee refused to return the case to the Circuit Court. Not only did the Special Referee err in hearing the Appellant's Motion to Set Aside Default, but he compounded the error by failing to actually hear the Appellant's Motion before executing and filing his final Order Granting Judgment. Of course, when he finally heard the Appellant's Motion, well after the Order Granting Judgment had been entered, the Special Referee then erred a third time by failing to grant Appellant's requested relief.[19]

It is well established that the standard for setting aside an entry of default is good cause. Rule 55(c), SCRCP; Wham v. Shearson Lehman Bros., Inc., 298 S.C. 462, 465, 381 S.E.2d 499, 501 (Ct. App. 1989). Once the moving party provides an explanation for the default, the trial court is required to consider the Wham factors including "(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." Id. at 465, 381 S.E.2d at 501-02. Here, all elements were satisfied and the Special Referee abused his discretion in failing to set aside the default.

In the first instance, Appellant established a satisfactory explanation for the default.[20] Although Appellant graduated high school in Mississippi in 1995, he has no legal training and had never been sued by anyone for a motor vehicle accident prior to the subject case. While he had no money to hire a lawyer, Appellant had every intent to contest his liability arising from the accident with Respondent. In fact, all of Appellant's demonstrated prior experience with the

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[19] The timing of the Special Referee's actions essentially eliminated due consideration of Appellant's Motion to Set Aside Default pursuant to Rule 55. After all, a judgment had been entered against Appellant and, therefore, a Rule 55 motion would have been ineffective in setting aside the default judgment. See Sundown Operating Co. v. Intedge Indus., 383 S.C. 601, 608, 681 S.E.2d 885, 888 (2009)("Once a default judgment has been entered, a party seeking to be relieved must do so under Rule 60(b), SCRCP.").

[20] There really should be no dispute as to how the interests of justice would be served by setting aside default in this case. If "[i]t is the policy of the law to favor the trial of cases on the merits," Renney v Dobbs House, Inc., 272 S.C. 562, 566, 274 S.E.2d 290, 292 (1981), then the interests of justice would undoubtedly be best served by having a jury hear and resolve the hotly contested liability issue in this case.

legal system was either in general sessions and/or traffic court where he represented himself and, in doing so, was able to contest his liability. (R. p. 166, lines 7-17, p. 167, lines 13-25, p. 168, line 1); (R. p. 1581).

As the matter developed, everything went as Appellant thought it would. That is, after receiving initial papers regarding the accident, Appellant then received papers setting a hearing regarding the accident. Appellant arrived at the hearing location with every expectation that he was going to contest his alleged liability, only to learn that he would not be able to do so. (R. pp. 1580-1581). In the final analysis, this is not a case of intentional neglect or indifference; to the contrary, this is a case where a layperson, relying on his prior experience with the legal system, had every expectation and intent to contest his liability, on his own, at a duly scheduled hearing. He did everything his limited experience taught him to do and he expected to defend himself the best he could. Unfortunately for Appellant, his prior limited legal experience and reliance on same left him with no ability to do the one thing he really wanted to do – contest his liability for this accident. Under the circumstances, Appellant has demonstrated a satisfactory explanation for the default and how the interests of judgment would be served by setting aside the default.

As to the first Wham factor, the Motion to Set Aside Default was filed April 25, 2017, two months after the Circuit Court entered the default (February 24, 2017). While the Motion to Set Aside Default was filed and served one week after the default damages hearing was held, neither an award nor a judgment had been indicated or entered by the Special Referee. More importantly, at the time of the default damages hearing, Respondent had not even reached a point of maximum medical improvement as he was scheduled for a third surgery three weeks after the default damages hearing. In other words, Respondent had not even fully realized the extent of

his actual damages by the time of the filing of the Appellant's Motion to Set Aside Default, so the timing of same cannot be considered a factor in favor of Respondent.

As to the second Wham factor, there cannot be any dispute that this factor was readily demonstrated. The case concerns a motor vehicle accident that occurred near the center line of a two lane highway. In his affidavit, Appellant specifically and unequivocally testified that his vehicle did not cross the center line. (R. p. 1579). While Appellant's testimony would not prevail over Respondent's testimony as a matter of law, it is well-established that a meritorious defense does not equate to an absolute defense. To the contrary, the Supreme Court has held:

> [A] meritorious defense need not be perfect nor one which can be guaranteed to prevail at 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 evidence or doubtful evidence.

Graham v. Town of Loris, 272 S.C. 442, 453, 248 S.E.2d 594, 599 (1978). In what can only be considered evidence of a continued bias and an intent to deny Appellant fair consideration, the Special Referee inexplicably concluded that Appellant's affidavit testimony was not credible[21] and that it did not overcome the combination of Respondent's testimony and the erroneously admitted affidavit of witness Shawana Palsey-Shaw.[22] In short, instead of weighing whether there was evidence of a factual dispute that would warrant determination by a factfinder, the

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[21] For example, the Special Referee concluded that Appellant's affidavit testimony denying liability was irreconcilable with the fact that Appellant "did not deny liability at the hearing on damages." (R. p. 18). Of course, the Special Referee did not allow Appellant to deny liability when the Special Referee opened the default damages hearing with "[s]o under the case law of South Carolina all the allegations that are pled with factual particularity in the lawsuit are deemed admitted and so really the only issue for me to determine is not whether someone did something wrong, but the injuries or the compensation that was caused by those actions that are alleged in the complaint." (R. p. 92 (Tr. p. 7), lines 10-17).

[22] The affidavit of Shawana Palsey-Shaw was first presented and served upon Appellant's counsel in the moments before the Special Referee's hearing on the Appellant's then-pending motions on June 29, 2017. The Special Referee overruled Appellant's objection to the admission of the affidavit as being untimely pursuant to SCRCP 6(d). (R. p. 17). This was clear error and, the fact that the Special Referee included an extended analysis of Palsey-Smith's testimony demonstrates his erroneous reliance on same.

Special Referee exercised the factfinder's role in concluding Appellant had no meritorious defense despite the patently conflicting sworn testimony.[23]

As to the third Wham factor, it was readily demonstrated that Respondent would have experienced little prejudicial effect if the default had been set aside. When considering this factor, it is not whether the Respondent would experience prejudice at all but the "degree of prejudice" Respondent would experience in the event default is set aside. Wham v. Shearson Lehman Bros., Inc., 298 S.C. 462, 465, 381 S.E.2d 499, 502 (Ct. App. 1989). The only prejudicial effect advanced by Respondent was the fact that the default damages hearing had already occurred and that he had expended roughly $1,300 in expenses to prosecute same.[24] Of course, at the time the default damages hearing was conducted (April 18, 2017), Respondent had not even reached maximum medical improvement as he had a third surgery scheduled for just three weeks later (May 8, 2017). Had the Appellant's Motion been considered prior to the issuance of the Order Granting Judgment and had it been granted, there would have been time for Respondent to reach maximum medical improvement and to have a hearing on concrete, actual damages rather than speculative "future damages." As has been discussed herein, any concern and/or interest Respondent might have had with regard to full and fair consideration of his actual damages was eliminated by the Special Referee's grossly excessive $3.4 million plus award.

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[23] During the hearing on Appellant's motions, the Special Referee conceded that "there's obviously conflicting affidavits. The affidavit by Mr. Causey says one thing and then there's the witness affidavit, which I'm going to allow, which says something completely opposite." (R. p. 197, lines 13-17). In his Order Denying Defendant's Motions, the Special Referee concluded that "[w]ithout question, Defendant's denial of liability in his affidavit meets the definition of a defense, but the Court does not believe it constitutes a 'meritorious defense.'" (R. p. 18).

[24] Respondent's counsel identified the following expenses related to the default damages hearing: 1) $900 for the trial appearance of Dr. Gilbertas Rimkus and 2) $412 for the trial appearance of Respondent's retained expert witness Kim Piacquadio. While counsel also identified $2,554.20 in expenses related to Piacquadio's report fee, that expense would have been incurred by Respondent regardless of whether a default damages hearing took place or not. (R. p. 176, lines 15-19).

In sum, the Special Referee abused his discretion in failing to hear Appellant's Rule 55 motion until after a judgment had been entered and in failing to set aside the default in accordance with Rule 55. Consequentially, Appellant submits that this Court should set aside the default, set aside the erroneously issued award, and remand the case to the Circuit Court for a jury trial.

VI. THE REFERRAL OF THE CASE TO THE SPECIAL REFEREE WAS PROCEDURALLY DEFECTIVE AND, THEREFORE, THE SPECIAL REFEREE LACKED THE POWER, AUTHORITY AND/OR JURISDICTION TO HOLD A DAMAGES HEARING. CONSEQUENTIALLY, THE ORDER GRANTING JUDGMENT SHOULD BE VACATED AND/OR SET ASIDE AND THE SPECIAL REFEREE RECUSED/DISQUALIFIED FROM FURTHER PROCEEDINGS IN THIS MATTER.

Appellant was not served with notice of the hearing on Respondent's Notice of Motion and Motion for Referral to Special Referee. As a result, the Circuit Court's referral to the Special Referee was procedurally deficient and, as such, the Special Referee not only lacked the power, authority and jurisdiction to conduct a damages hearing but also lacked the power, authority and jurisdiction to consider any further legal proceedings in the case.

Importantly, referral to a special referee pursuant to SCRCP 53 is not a matter of right, even in a default case. Instead, the Rule specifically provides that, "[i]n a default case . . . some or all of the causes of action in a case may be referred to a master or special referee by order of a circuit judge . . .." Rule 53(b), SCRCP (emphasis added). Since Respondent sought the referral to the special referee via motion practice, it was incumbent upon Respondent to comply with the Rules of Civil Procedure with regard to providing notice of same to the Appellant.

Here, the record reflects that Respondent initially filed a Motion for Default Judgment on February 16, 2017, in which Respondent specifically requested "a hearing on damages at the court's earliest convenience." (R. pp. 323-326) A Certificate of Service indicated that the Motion

for Default Judgment was served on Appellant via certified mail. (R. p. 326). By this filing, Respondent provided express notice to Appellant that he intended to seek a damages hearing before the Circuit Court and, consequentially, Appellant had the right to expect a hearing from a Circuit Court judge. However, Respondent then made a tactical decision to change the mode of trial, and the presiding officer for same.

The record reflects that Respondent filed a Notice of Motion and Motion for Referral to Special Referee and, on March 22, 2017, the Circuit Court entered an Order of Referral "based on Plaintiff's Motion for Referral." (R. pp. 3-4). There is no evidence that Respondent's Motion for Referral was ever served on Appellant at any time prior to the entry of the Order referring the case to the Special Referee. There is no evidence that Appellant was provided with any notice of Respondent's request for relief prior to it being granted by the Circuit Court. To the contrary, the record readily reflects that Respondent provided notice to Appellant that he would seek a damages hearing from the Circuit Court but then, surreptitiously and without any notice to Respondent, unilaterally changed the requested procedure to a hearing conducted by a Special Referee specifically selected by Respondent's attorneys.

With proper notice of the Motion for Referral, Appellant, at a minimum, could have contested not only the referral itself, but also the selection of the Special Referee. The Supreme Court has held that "a defaulting party does not lose its right to have an impartial master or referee, and may still raise an objection to same based on such grounds." Roche v. Young Bros., 332 S.C. 75, 86, 504 S.E.2d 311, 315 (1998). In the subject case, Respondent denied Appellant this substantial right by failing to provide notice that he would seek recovery of damages from a private practice attorney, selected by his own attorneys, as opposed to a duly elected and sitting Circuit Court judge (the method that Respondent actually notified Appellant he would employ).

As a result of improper notice and the impairment of a substantial right to contest the referral, Respondent's Notice of Motion and Motion for Referral to Special Referee and the resulting Order of Referral were legally defective and failed to transfer the power, authority and subject matter jurisdiction of this case to the Special Referee. Consequentially, Appellant respectfully submits that the Order Granting Judgment should be voided, vacated and/or set aside; that the Special Referee be recused/disqualified from any further handling of this case; and that the case be returned to the Circuit Court for further disposition.

VII. THE SPECIAL REFEREE ERRED IN DENYING APPELLANT A NEW TRIAL FOR FAILURE OF DUE PROCESS AFFORDED APPELLANT AND/OR DEMONSTRATED BIAS OF THE SPECIAL REFEREE.

Regardless of what it is called and/or how it is characterized, Appellant did not receive due process, impartial justice or fair consideration from the Special Referee. Perhaps the most egregious example is the fact that the Special Referee, over the express objection of Appellant's attorneys, entered the Order Granting Judgment on May 30, 2017, two (2) weeks before the date the Special Referee set for hearing Appellant's Motion to Set Aside Default, which was filed April 25, 2107.[25] In other words, the Special Referee pronounced judgment in the case before he ever heard the grounds for Appellant's Motion to Set Aside Default.[26] There can be no greater example of a rush to judgment and a complete disregard of Appellant's due process rights. The hearing record provides additional insight and evidence of the lack of impartiality exhibited by the Special Referee.

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[25] By letter dated May 16, 2017, the Special Referee set the hearing for Appellant's Motion to Set Aside Default for June 2, 2017. At the request of Appellant's attorneys, the Special Referee, by email dated May 18, 2017, agreed to reschedule the hearing to June 13, 2017. Despite full knowledge of the scheduled hearing and Appellant's objections to the entry of an Order prior to the hearing on Appellant's Motion, the Special Referee's Order Granting Judgment was entered May 30, 2017.

[26] As discussed herein, Appellant continues to maintain that the Special Referee did not have the power, authority and/or jurisdiction to hear Appellant's Motion to Set Aside Default.

For starters, the hearing record readily demonstrates that Appellant never indicated that he desired or intended to proceed *pro se*. Importantly, there is no evidence in the record that the Special Referee ever inquired as to the fairness of proceeding under the circumstances. For example, Appellant's misunderstanding and confusion is apparent from the first moment he was addressed by the Special Referee:

> The Court: So what we'll do, we will have testimony. Everyone will be sworn in as a witness and then after counsel asks questions, you have the right to cross examine and ask questions, okay? And I don't know if I have seen ---
>
> Appellant: I mean I got this paper in the mail like yesterday. I mean this package came in the mail yesterday and I mean I didn't even know ---

(R. p. 92 (Tr. p. 7), lines 24-25, (Tr. p. 8), lines 1-8). The record reflects that before Appellant could finish his statement, the Special Referee asked Respondent's counsel for a copy of the Complaint and never addressed Appellant's concerns and, arguably, his objection to proceeding on short notice. (R. p. 92 (Tr. p. 8), lines 9-16). There is no evidence in the record that the Special Referee made any inquiry or addressed the concerns raised by Appellant regarding, at a minimum, the timing of the proceeding and/or whether *pro se* Appellant was prepared to move forward.[27]

Appellant appeared at the hearing with his father Ottis Causey, Jr., and, through his sworn affidavit, Appellant asserted his father was refused entry and/or observance of the damages hearing by the Special Referee. (R. p. 1582). While the court reporter noted the activity

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[27] Prior to the filing of the suit, Respondent's counsel was intimately aware and knowledgeable of the fact that an insurance company provided liability insurance coverage for the benefit of Appellant. Importantly, at the time of the hearing, no one, including the Special Referee, made any inquiry on the record as to whether Appellant had counsel or was voluntarily electing to proceed *pro se*. It was error for the Special Referee to proceed with the hearing without first determining the fairness to Appellant of proceeding with the hearing and/or inquiring as to the possible existence of a responsible insurance carrier to provide legal representation to Appellant arising out of the motor vehicle accident.

as "(Off the record briefly. Mr. Causey's dad tries to enter the hearing)," there was no further description of what transpired, although it is clear that the result was Appellant's father did not remain in the room. (R. p. 92 (Tr. p. 7), lines 22-23). Importantly, neither party nor the Special Referee moved to go off the record and it was error for the court reporter to stop recording. While the damages hearing was conducted by a special referee, it was no less public than any other court hearing conducted in a South Carolina courtroom. Moreover, the record does not reflect a motion/request by Respondent to sequester potential witnesses as required by SCRE 615. This is a significant irregularity that should not be pardoned or readily dismissed as it goes to the very core of the integrity of the system and the process.[28]

Things did not get better for Appellant. After inviting and listening to an opening statement by Respondent's counsel, the Special Referee did not give, much less offer, Appellant the same opportunity. (R. pp. 92-93 (Tr. p. 8), lines 17-25, (Tr. p. 9), lines 1-25, (Tr. p. 10), lines 1-11). During Respondent's testimony, Appellant expressed his frustration and confusion with the process:

The Court:	When he's done being examined by his lawyers then you can ask him questions.
Appellant:	Well, I've never been in a situation like this. I just ---
The Court:	I understand.
Appellant:	I mean I just ---

(R. p. 97 (Tr. p. 26), lines 10-19). Before Appellant could compete his sentence, an exhibit was marked as evidence and direct examination questioning continued. (R. p. 97 (Tr. p. 26), lines 21-

[28] The fact that the hearing was conducted in the presence of a court reporter is no excuse to this irregularity. One can easily conceive of closed door proceedings where less intellectually-inclined individuals may not be able to fend for themselves when a family member, friend or otherwise could provide support, guidance and counsel, all without making an appearance or committing the unlawful practice of law during the proceeding. In the present circumstance, Appellant was denied such support and the record readily reveals how much he floundered thereafter.

24, (Tr. p. 27), lines 1-16). When Respondent's counsel subsequently moved to admit certain photographs, the following exchange occurred:

The Court: Any objection? No objection.

Appellant: I mean I have no ---

The Court: Admitted.

(R. p. 99 (Tr. p. 33), lines 9-13).

Perhaps the most significant example of the unfairness of the hearing process occurred when Respondent's counsel moved to admit Exhibits 15 and 19, which encompassed seventy (70) pages of medical bills and 1,156 pages of medical records that had not previously been provided to Appellant for his review and consideration. As to Exhibit 15, the following exchange occurred:

Mrs. Eaves: At this time I would offer this into evidence as Exhibit 15, Plaintiff's Exhibit 15, into evidence.

Appellant: I have no idea what I am looking at. I mean ---

The Court: Those appear to be the medical bills. Do you have any objection?

Appellant: Yeah, I mean that's fine. But I mean I have no idea what I'm looking at. That's fine. I mean it's a mess of paperwork. I don't know what ---

The Court: So admitted.

(R. p. 101 (Tr. p. 44), lines 10-25). As to Exhibit 19, encompassing over 1,100 pages of medical records which, again, had not been produced to Appellant prior to the hearing, the following exchange occurred:

Mrs. Eaves: And I offer Plaintiff's Exhibit 19 into evidence.

Appellant: It'd take me six years to Sunday and read all that.

The Court: Admitted.

(R. p. 103 (Tr. p. 52), lines 4-8). Despite Appellant's expressed unfamiliarity with the proffered evidence (over 1,100 pages in total), there is no evidence of any offer by the Special Referee or Respondent's counsel to allow Appellant time to review same. Without any opportunity for substantive review, Appellant had no opportunity to form any objections to same. It is respectfully submitted that no Circuit Court judge in the State of South Carolina would admit 1,100 pages of records into evidence at trial without giving opposing counsel the opportunity to review same.

At the conclusion of the direct examination of Respondent, Appellant was offered the opportunity to cross-examine him. After attempting to explain the accident itself and being told by the Special Referee that he was limited to asking questions about Respondent's damages, Appellant explained:

> Well, I don't --I mean I can't -- how can I -- I don't -- I can't I mean judge -- I can't say anything about what he did or didn't go to because I wasn't there. So I don't know if he -- if any -- every bit of that could be false if it's or it could be – which it's all true. I don't know because I wasn't there. So how am I supposed to object to something I don't even know what ---

(R. p. 109 (Tr. p. 74), lines 4-13). While he did not express it as concisely as a lawyer might, the clear upshot/takeaway of Appellant's statement was an objection to the hearsay nature/quality of the proffered evidence. Appellant readily acknowledged that he was not with Respondent during his treatment and would have no way to determine the truth of the statements contained in the records that were being offered into evidence. Given that the 1,100+ pages of medical records were/are rife with volumes of inadmissible hearsay, it was clear and prejudicial error for the Special Referee to admit the evidence over *pro se* Appellant's objection.

Following Respondent's counsel's closing argument, the Special Referee offered Appellant an opportunity to speak. Appellant's frustration and resignation with a process that to him, appeared to be pre-determined, was clear:

> The Court: Okay. Mr. Causey do you have anything you'd like to say to the Court?
>
> Appellant: I don't - - looks like it's already situated so it don't look like much of anything I got to say matters --- .

(R. p. 121 (Tr. p. 123), lines 23-25, (Tr. p. 124), lines 1-3). While he has no legal training, the *pro se* Appellant essentially stated what is argued herein, *i.e.* that he did not receive impartial and unbiased consideration by the process and/or the Special Referee.

VIII. THE SPECIAL REFEREE ERRED IN DENYING THE APPELLANT'S MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO SCRCP 60.[29]

Appellant filed his Motion for Relief from Judgment Pursuant to SCRCP 60 on June 13, 2017. It ended up being the last of Appellant's motions argued and considered by the Special Referee at the motions hearing on June 29, 2017. By that time, the Special Referee had already heard and denied Appellant's Motion to Set Aside Default pursuant to Rule 55. Given that the standard for granting relief from a default judgment pursuant to Rule 60 is more rigorous than the standard for setting aside default pursuant to Rule 55, Sundown Operating Co. v. Intedge Indus., 383 S.C. 601, 608, 681 S.E.2d 885, 888 (2009), the Special Referee wasted little time in denying the Appellant's Rule 60 motion. However, just as the Special Referee erred in denying the Motion to Set Aside Default, he also erred in denying Appellant's Rule 60 motion, even when applying the more rigorous standard.

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[29] For the same reasons that the Special Referee lacked the power, authority and jurisdiction to consider and decide Appellant's Motion to Set Aside Default, the Special Referee lacked the power, authority and jurisdiction to consider and decide Appellant's Motion for Relief from Judgment Pursuant to Rule 60. Consequentially, the discussion and argument contained in Section IV hereinabove are equally applicable and incorporated herein.

As referenced hereinabove, Appellant argued that the default judgment was void throughout the motions hearing, primarily due to the fact that the Special Referee exceeded his power, authority and/or jurisdiction when he failed to return the case to the Circuit Court for determination and disposition of the Appellant's Motion to Set Aside Default prior to the Special Referee entering final judgment. While incorporating the Appellant's prior arguments herein without repeating them verbatim, it is clear that the default damages judgment issued by the Special Referee was void for lack of power, authority and/or jurisdiction to issue same in the face of Appellant's then-pending Motion to Set Aside Default. As a result, the Order Granting Judgment was void and the Special Referee erred in failing to grant Appellant's motion for relief from same. See Rule 60(b)(4), SCRCP.

Additionally, as argued hereinabove, Appellant was not provided the required notice of the default damages hearing pursuant to Rule 6(d) and, therefore, the judgment arising from that proceeding should be void. Accordingly, the Special Referee erred in denying Appellant's Rule 60 motion for relief from the void judgment. See Rule 60(b)(4), SCRCP.

Finally, in Section IV herein, Appellant set forth the facts demonstrating Appellant's intent, at all relevant times, to defend his liability, albeit on his own. It was only when he appeared for the default damages hearing that he learned, for the first time, that he would not be able to do the one thing he wanted to do – contest his liability. There is little doubt that Appellant's actions in the subject case, mistakenly based on his prior experience with legal proceedings where he represented himself, fit the rubric of "mistake, inadvertence, surprise, or excusable neglect." Rule 60(b)(1), SCRCP. Under the circumstances it was error for the Special Referee to deny Appellant's Rule 60 motion.

IX. CONCLUSION

Based on the foregoing, Appellant respectfully submits that he is entitled to one or more of the following remedies:

A. The Order of Reference vacated; the Order Granting Judgment voided; and the case returned to the Circuit Court for final disposition;

B. The Order Granting Judgment voided, vacated, and or set aside; the Special Referee recused/disqualified; and the case returned to the Circuit Court for final disposition;

C. The Order Granting Judgment voided, vacated, and or set aside; the Special Referee recused/disqualified; and a new trial granted, including a trial by jury;

D. The Order Granting Judgment be opened; the Special Referee recused/disqualified; and for a new Special Referee to take testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment;

E. The Order Granting Judgment be altered or amended to reflect the actual evidence received at the hearing on damages presided over by the Special Referee;

F. The Order Granting Judgment voided, vacated and/or set aside; the entry of default set aside; and the case returned to the Circuit Court for final disposition.

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.

PROOF OF SERVICE

I certify that I have served the Final Brief of Appellant upon the Respondent by way of U.S. Mail, stamped First Class delivery, on May 7, 2018, addressed to Respondent's attorneys of record as follows:

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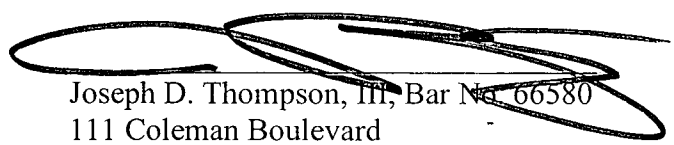

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Dated: May 7, 2018

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CERTIFICATE OF COUNSEL

I certify that the Final Brief of Appellant in this matter complies with Rule 211(b) of the South Carolina Appellate Court Rules.

Respectfully submitted,

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