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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas
Tyler Bailey, Esq., Special Referee

Case No. **2018-CP-32-02997**

Arthur Robert Buskirk. .....Respondent,

v.

Jeffri Hergert.. .....Appellant.

APPELLANT'S MOTION TO REINSTATE

Appellant Jeffri Hergert moves, pursuant to Rule 221 and 240 of the South Carolina Appellate Court Rules, to reinstate the appeal dismissed December 2, 2019, because this appeal involves an appealable order denying a motion to set aside default and default judgment.

STATEMENT OF FACTS

This matter arises out of an auto accident on or about March 6, 2016, involving a vehicle driven by the Respondent, Mr. Arthur Buskirk, and another vehicle driven owned by AMS 50, LLC and driven by the Appellant, Jeffri Hergert. On March 20, 2019 the Lexington Country Clerk of Court entered default against Appellant and referred the matter to Tyler Bailey to serve as Special Referee.

Following receipt of notice of the suit and default, Appellant filed a Motion for Relief from Default on June 19, 2019. See Motion for Relief from Default attached as **Exhibit A**.

Despite the pendency of this Motion, an Order of Default Judgment was entered on June 21, 2019.

Thereafter, on July 1, 2019, Appellant filed a Motion requesting reconsideration of the Entry of Default Judgment and arguing, among other things, that the default and default judgment should be set aside. See Motion to Reconsider, attached as **Exhibit B** (asserting that "Entry of Default and Default Judgment should be set aside...."). See also Memorandum Supporting and Supplementing Motion for Relief from Default and Motion for Reconsideration, attached as **Exhibit C**.

On September 18, 2019, Appellant appeared before Special Referee Tyler Bailey, Esq. for a hearing on the pending Motion to Set Aside Default and a Motion to Reconsider Order of Default Judgment. At that hearing, Appellant argued, among other things, that the default judgment order was improper and that the entry default and default judgment should be set aside.

On October 7, 2019, Special Referee Bailey filed a Form 4 Order stating that "Defendant's Motion to Reconsider Order of Default Judgment". See Order attached as **Exhibit D**. Special Referee Bailey has indicated that this Form 4 Order was intended to deny both Appellant's Motion to Set Aside Default and Motion to Reconsider. See Email from Tyler Bailey attached as **Exhibit E**.

Appellants filed this appeal of Special Referee Bailey Order November 5, 2019. On December 2, the Court of Appeals filed an ordered dismissing the appeal on the basis that Special Referee Tyler Bailey's order was not an appealable order. However, as set forth below, because the Order denied a motion to set aside entry of default and default judgment, the Order is appealable.

ARGUMENT

While an appellant may not appeal from a default judgment, an appeal may be taken from the denial of a motion to set aside default judgment. See Winesett v. Winesett, 287 S.C. 332, 333-34, 338 S.E.2d 340, 341 (1985) ("The proper procedure for challenging a default judgment is to move the trial court to set aside the judgment pursuant to Rule 60(b), SCRCP. An appeal may then be taken from the denial of this motion.").

As demonstrated by the attached Form 4 Order and email correspondence from Special Referee Bailey, the October 7, 2019 Form 4 Order is an Order denying Appellant's motions to set aside default and default judgment. Thus, pursuant to Winesett, the Order was appealable, and Appellant respectfully requests this Court reinstate its Appeal.

CONCLUSION

Based upon the foregoing, the Appellant requests that the Court enter an Order granting Appellant's Motion to Reinstate this Appeal.

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STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	
COUNTY OF LEXINGTON	)	**THE ELEVENTH JUDICIAL CIRCUIT**
Arthur Robert Buskirk	)	**Civil Action No.: 2018CP3202997**
Plaintiff,	)	
v.	)	**MOTION FOR RELIEF FROM ENTRY OF DEFAULT**
Jeffri Hergert	)	
Defendant.	)	

Defendant Jeffri Hergert hereby moves for an Order Setting Aside Entry of Default, pursuant to Rule 55(c) of the South Carolina Rules of Civil Procedure. Justice will be promoted by setting aside an entry of default in this case and having a trial on the merits. Furthermore, Plaintiff will not be prejudiced by setting aside an entry of default in this case. Accordingly, the Defendants request that the Court set aside its entry of default in this case. This Motion may be supported by filed Affidavits and Memorandum of Law prior to a hearing on the Motion.

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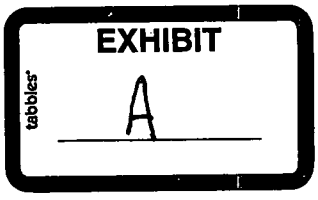

Respectfully submitted,

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ATTORNEYS FOR DEFENDANT

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June 19, 2019

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	
COUNTY OF LEXINGTON	)	**THE ELEVENTH JUDICIAL CIRCUIT**
Arthur Robert Buskirk	)	**Civil Action No.: 2018CP3202997**
Plaintiff,	)	
v.	)	**JEFFRI HERGERT'S MOTION TO RECONSIDER ORDER OF DEFAULT JUDGMENT**
Jeffri Hergert	)	
Defendant.	)	

Defendant Jeffri Hergert requests the Court's reconsideration of the Order of Default Judgment entered June 21, 2019, for the reasons set forth herein, including but not limited to the following:

1. Entry of Default and Default Judgment are not proper in this matter because Mr. Hergert was not properly served with the Complaint as required by Section 15-9-380.
2. Entry of Default and Default Judgment should be set aside because, upon information and belief, Plaintiff attempted to serve the Complaint at an address at which Mr. Hergert no longer resided.
3. The Order of Default Judgment, filed June 21, 2019, should not have been entered prior to a hearing on Mr. Hergert's Motion to Set Aside Entry of Default. Mr. Hergert's Motion to Set Aside Entry of Default was filed on June 19, 2019, prior to entry of the Order of Default Judgment
4. The damages hearing and any resulting order should be set aside because referral of this matter to a Special Referee by the Clerk, and not by a circuit court judge, is

EXHIBIT
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improper. Further the referral was improper because it occurred without disqualification or disability of the Master-in-Equity.

5. The damages award is not supported by a preponderance of the evidence, and as a result the award is excessive.

This Motion may be supported by filed Affidavits and Memorandum of Law prior to a hearing on the Motion.

Respectfully submitted,

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ATTORNEYS FOR DEFENDANT

Columbia, South Carolina

July 1, 2019

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	
COUNTY OF LEXINGTON	)	**THE ELEVENTH JUDICIAL CIRCUIT**
Arthur Robert Buskirk	)	**Civil Action No.: 2018CP3202997**
Plaintiff,	)	
v.	)	**JEFFRI HERGERT'S MEMORANDUM SUPPORTING AND SUPPLEMENTING MOTION FOR RELIEF FROM DEFAULT AND MOTION FOR RECONSIDERATION**
Jeffri Hergert	)	
Defendant.	)	

Pursuant to Rules 55(c) and 60, SCRCP, counsel for Defendant Jeffri Hergert submit this memorandum of law in support of his July 2, 2019 Motion to Reconsider and June 19, 2019 Motion for Relief from Entry of Default. Mr. Hergert requests relief because, among other things:

1. Mr. Hergert was not properly served with the Complaint as required by § 15-9-380;
2. The Special Referee lacked jurisdiction to enter default judgment because there was no referral by a circuit judge and because the Master-in-Equity was not disqualified;
3. The default judgment is void because Mr. Hergert was entitled to notice and a hearing, which he was not provided;
4. The default judgment should be set aside due to surprise, fraud, misrepresentation, or other misconduct of an adverse party;
5. Even had the complaint been properly served and jurisdiction obtained, good cause exists to grant relief from entry of default; and

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6. The damages award is not supported by a preponderance of the evidence, and as a result the award is excessive.

BACKGROUND

This matter arises out of an auto accident on or about March 6, 2016, involving a vehicle driven by the Plaintiff, Mr. Arthur Buskirk, and another vehicle driven owned by AMS 50, LLC and driven by Jeffri Hergert. Per the accident report, Plaintiff's vehicle was struck in the rear as both vehicles slowed for traffic. Neither driver reported injuries to the responding officer.

National Interstate Insurance Company ("National Interstate") provided AMS 50's automobile policy, and following the accident, National Interstate began investigating the accident with Mr. Buskirk's cooperation. Over a year after the accident, but before the claims were resolved, Mr. Buskirk retained Bradley Lanford as counsel. As a result, National Interstate began communicating with Mr. Lanford's office regarding continued claims investigation and negotiations. These discussions continued even after, unbeknownst to National Interstate, Plaintiff filed a Complaint against Mr. Hergert on August 30, 2018. Despite the ongoing communication, however, Plaintiff's counsel never informed National Interstate that it had instituted suit or that Mr. Hergert was allegedly in default.

Rather, without notice to National Interstate or its insureds, on March 19, 2019, Plaintiff filed a motion for entry of default and for referral to a Special Referee. On March 20, 2019, the Lexington County Clerk of Court entered default and referred the matter to Tyler Bailey to serve Special Referee. Notably, the Deputy Clerk—and not a circuit judge as required by statute—executed the referral order. Also contrary to statute, the referral to a special referee occurred without disqualification of the Master-in-Equity.

Thereafter, the Special Referee conducted a damages hearing on March 21, 2019—only one day after the Court's Order of referral. No notice of the hearing was posted to the docket or otherwise provided to Mr. Hergert or National Interstate.

Undersigned counsel obtained a copy of the Complaint and Entry of Default from the Lexington County online docket on June 12, 2019 and immediately forwarded the same to National Interstate for review and internal analysis. Undersigned counsel were then retained to draft and file Motion for Relief and, out of an abundance of caution, file an Answer. Counsel timely filed a Motion and Answer.

No Default Judgment Order was entered, however, until several days *after* Mr. Hergert's Answer and Motion for Relief were filed, despite the fact that Mr. Hergert was never provided notice, a hearing on damages, or a hearing on his earlier-filed motion for relief from default. Mr. Hergert filed a timely Motion to Reconsider the June 21, 2019 Order on July 1, 2019.

MOTION TO SET ASIDE DEFAULT JUDGMENT

1. **Default Judgment should be set aside because the Default Judgment is void and because relief is otherwise required under Rule 60, SCRCP.**

As is set forth below, Defendant Hergert is entitled to relief pursuant to Rule 60, SCRCP from the Entry of Default Judgment.

a. Mr. Hergert was not properly served.

Default Judgment should be set aside because Plaintiff failed to serve the Complaint as required by SC Code. Ann. §§ 15-9-350 through 380. South Carolina Code Ann. §§ 15-9-350 through 380 provide specific requirements to effect service of a non-resident motorist. Section 15-9-370 provides for service on an out-of-state motorist through the DMV via certified mail. If certified mail delivery fails, however, the statute requires Plaintiff to send notice and copy of the pleadings "by open mail" and to file both (a) the open mail envelope and (b) the affidavit of

mailing with the clerk of court. SC Code Ann. § 15-9-380 (emphasis added). Where the Plaintiff fails to follow these requirements, **including the filing of the open mail envelope**, no service is accomplished. SC Code Ann. § 15-9-380; see also Breland v. Ricky Long & Miller Transp., LLC, No. 5:17-CV-00070-JMC, 2017 WL 3910866, at *2 (D.S.C. Sept. 7, 2017) (stating that "**Plaintiff did not file an open mail envelope**" and that, pursuant to S.C. Code Ann. §§ 15-9-370 and 15-9-380, "**service is not accomplished until the filing of the envelope**..." (emphasis added)).

In the present case, no open mail envelope was filed with the Court. Thus, pursuant to § 15-9-380, service on Mr. Hergert has not been accomplished. See Breland, 2017 WL 3910866, at *2. Because Mr. Hergert was not properly served with the summons and complaint as required by South Carolina Code Ann. § 15-9-350 et seq., the entry of default and default judgment against Mr. Hergert should be set aside. In addition, because Mr. Hergert has not been properly served in this action, he should be dismissed as a party. See Graham Law Firm, P.A. v. Makawi, 396 S.C. 290, 300, 721 S.E.2d 430, 436 (2012) ("an order granting a motion to set aside an entry of default for improper service effectively dismisses an improperly served party from the action") (internal citations omitted).

b. Default Judgment is void because Mr. Hergert was entitled to, but was not provided, notice and a hearing prior to entry of default judgment.

Where a party appears in a matter prior to entry of default judgment, the party is entitled to both notice and a hearing prior to entry of default. "Rule 55(b) (2)... provides, in pertinent part, that a party who has 'appeared' in the action is entitled to notice and a hearing before judgment by default may be entered." Stark Truss Co. v. Superior Const. Corp., 360 S.C. 503, 511, 602 S.E.2d 99, 103 (Ct. App. 2004) (finding that default judgment was void where party appeared prior to entry of default judgment and that "court's refusal to set aside the void default

judgment was error"). Even if filed late, an answer constitutes an appearance entitling a defendant to "notice and a hearing on the motion for default judgment." Id. Where a party has appeared but is given no notice and the Court does not provide the party a hearing, the default judgment is void. Id. at 511-512, 602 S.E.2d 99, 103; see also Dymon, Inc. v. Hyman, 305 S.C. 170, 172, 406 S.E.2d 388, 389 (Ct. App. 1991) ("The **failure to provide 55(b)(2) notice... is a serious procedural irregularity** that usually justifies setting aside a default judgment or reversing a failure to do so." (Emphasis added)) (internal citations omitted).

In the present matter, Defendant Hergert filed both an Answer and Motion for Relief from Default prior to entry of the Order of Default Judgment.[1] Because Mr. Hergert had thus appeared prior to entry of the Order, he was entitled to notice and a hearing prior to entry of default judgment. However, Mr. Hergert was never provided notice of the hearing. Further, while Plaintiff's counsel represented that notice was provided to Mr. Hergert as indicated by the documents filed in Exhibit 3, the documents attached at Exhibit 3 (labeled "Exhibit C" in the list provided by Plaintiff to undersigned counsel) do not provide notice of a hearing; rather, they are Plaintiff's correspondence sending the Summons and Complaint. Further, the latest of these letters is dated October 19, 2018, before Plaintiff had even moved for entry of default. See "Exhibit C" from May 21, 2019 Damages Hearing, at pp. 10-16 (attached as Exhibit 1).

Further, there was no way Plaintiff could have timely provided notice to Mr. Hergert. Plaintiff's Motion for Entry of Default and for Referral to Tyler Bailey as Special Referee was filed on March 19, 2019. The next day, at 3:11 p.m., March 20, 2019, the Clerk entered an Order of Reference to Special Referee, referring the matter directly to the Special Referee (notably, the Order of Reference also provides no notice of the hearing date and time). See NEF Entry on

[1] Again, as noted above, Plaintiff failed to serve Defendant, and so Mr. Hergert's Answer was technically not even required but was rather filed out of an abundance of caution.

Lexington County Online Docket, https://publicindex.sccourts.org/Lexington/PublicIndex/CaseDetails.aspx?County=32&CourtAgency=32002&Casenum=2018CP3202997&CaseType=V&HKey=771131001191098351674911576105122106761037183112685011010449105687010951514887116545011910856105101771028 9. Less than 24 hours later, at 1pm on May 21, 2019—without any notice to Defendant and moreover without sufficient time passing for notice of the hearing to be mailed and received—the Special Referee conducted a hearing. See Transcript of Hearing, attached as Exhibit 2.

Thus, only two days elapsed between the motion for entry of default and the hearing, and less than 24 hours elapsed between the referral and the actual hearing. There was no possible way for Plaintiff to provide timely notice to an out-of-state defendant to appear at a hearing. As a result, Plaintiff's representation that notice was provided to Mr. Buskirk, and the finding in the Order of Default Judgment that "Defendant was properly notified of this hearing pursuant to Rule 55, SCRCP," are in error.

In summary, because Mr. Hergert was never given notice of the hearing as required under Rule 55, SCRCP, and furthermore because default judgment was entered *after* Mr. Hergert had appeared but before he was given notice and a hearing, the default judgment is void.

c. The Clerk Erred in Referring this Matter to the Special Referee, and the Special Referee thus lacked subject matter jurisdiction to conduct a hearing, execute or enter an order, or to conduct other proceedings.

Appointment of a Special Referee is governed by SC Code Ann. § 14-11-60. This section provides for appointment of a special referee (a) **by a circuit judge**, and only where (b) the **office of master-in-equity is vacant,** the **master-in-equity is disqualified or disabled,** or where cause is otherwise shown. Because referral in this case was performed by the clerk,

In the present case, Plaintiff's counsel submitted an Affidavit of Default and Motion for Entry of Default and Referral on March 19, 2019. The Affidavit and Motion, which are contained in one 2-page document, fails to allege—much less to establish—that the master-in-equity office was vacant or that the master-in-equity was disqualified or disabled. In fact, the Motion contains no grounds for referral to the Special Referee at all.

Further, the March 20, 2019 Order of Reference to Special Referee is also deficient in several respects. First, the Order of Reference is signed only by the Deputy Clerk of Common Pleas, not by a circuit judge as required by § 14-11-60. Further, the Order makes no findings that the Master-in-Equity's office was vacant, that the Master-in-Equity was disqualified or disabled, or that any other cause existed for referral to the Special Referee. Thus, the referral was in violation of § 14-11-60.

In summary, (a) because there was no showing to the circuit judge that the master-in-equity was disqualified, disabled, or that the office of master in equity was vacant, and (b) because the referral order was signed only by a deputy clerk without statutory authority to refer this matter to a special referee, the Special Referee lacked subject matter jurisdiction to conduct proceedings in this matter. As a result, the proceedings conducted by the Special Referee and the Order entered by the Special Referee are void.

d. Relief is appropriate based on surprise, fraud, misrepresentation, or other misconduct of an adverse party.

Even if the judgement was not void for the reasons set forth above, relief from default judgment is appropriate under Rule 60 based on the surprise, misrepresentation, or other misconduct of an adverse party. "[A]n insurer may, under the proper circumstances, be entitled to an order setting aside a default judgment where the insurer is involved in ongoing negotiations with a claimant but is not informed that he defendant has been served with a summons and

complaint." McClurg v. Deaton, 380 S.C. 563, 571, 671 S.E.2d 87, 92 (Ct. App. 2008), aff'd, 395 S.C. 85, 716 S.E.2d 887 (2011). Further, Rule 60's surprise or excusable neglect requirement may be met where it is reasonable for an insurance company and/or an employer to believe, at the very least, that plaintiff's counsel would provide the insurer a copy of any pleadings in the matter if the matter was filed. Id. Thus, where there is history of contact and negotiations between plaintiff's counsel and the insurer, plaintiff's counsel's failure to simply notify the insurer of a complaint "raises serious concerns for this court and quite possibly satisfies the misrepresentation and misconduct envisioned by Rule 60(b)(3)." Id.

In the present matter, National Interstate and the Plaintiff, Robert Buskirk, began communicating regarding Mr. Buskirk's claim in 2016 following the accident. Mr. Buskirk later retained counsel, Bradley L. Lanford, who contacted National Interstate by letter dated March 8, 2018, indicating that future correspondence should be directed to him. Thereafter, National Interstate's claims representatives had at least three different telephone calls with staff from Mr. Lanford's firm, who told National Interstate that Mr. Buskirk was still treating. See Affidavit of Jason Ramsey, attached as Exhibit 3. On one occasion in particular, a claims representative spoke with Plaintiff's counsel's staff on November 16, 2018, after Plaintiff had already filed his Complaint. National Interstate was told that Plaintiff's counsel was still trying to "piece a lot together" and never indicated that suit had already been filed. Id. National Interstate further sent Plaintiff's counsel at least two letters, one dated March 15, 2018, and another dated October 11, 2018, requesting information regarding Mr. Buskirk's injuries and treatment and requesting a settlement demand. Id. Thereafter, National Interstate's claims rep reached out to Mr. Lanford's office by on at least two more occasions—once on December 17, 2018, and again on January 15, 2019—and yet Plaintiff's counsel still failed to inform National Interstate of the lawsuit, to send

a courtesy copy of the lawsuit, or to provide any information at all that would have indicated Mr. Hergert had been sued and had failed to answer. Id.

By engaging National Interstate in communication and reporting that Plaintiff was still treating, while also failing to inform National Interstate of the pending Complaint and default, Plaintiff's counsel and/or representatives misguided National Interstate regarding the status of this claim. Further, by then seeking entry of default without providing notice to National Interstate of either the Complaint or alleged default, despite ongoing and active communication regarding the claim from National Interstate, it appears Plaintiff's counsel engaged in tactics designed to surprise National Interstate and its insureds while avoiding proceedings on the merits.

Thus, Rule 60's surprise or excusable neglect requirement is met in this case because Mr. Hergert's insurer reasonably believed plaintiff's counsel would provide the insurer a copy of any pleadings in the matter if the matter was filed. Further, the history of contact and negotiations between Plaintiff's counsel and the insurer, especially after Plaintiff had already filed suit, satisfies the misrepresentation and misconduct envisioned by Rule 60(b)(3). Thus, relief is appropriate under Rule 60 in this case.

2. Entry of Default should be set aside under Rule 55, SCRCP.

While relief from default judgment would be appropriate even under Rule 60 as set forth above, the proper standard for review of this case is under Rule 55 because the default judgment is void, as also set forth above. Rule 55(c) of the South Carolina Rules of Civil Procedure establishes a mere "good cause" standard for setting aside entry of default. Sundown Operating Co. v. Intedge Indus., Inc., 383 S.C. 601, 607 (2009). This "good cause" standard is a "minimal standard," id., and it is to be "liberally construed to promote justice and dispose of cases on the

merits." Dixon v. Besco Eng'g, 320 S.C. 174, 178, 463 S.E.2d 636, 638 (Ct.App.1995); *Ricks,* 293 S.C. at 374–75, 360 S.E.2d at 536; see also Mann v. Walker, 285 S.C. 194, 328 S.E.2d 659 (Ct.App.1985). Public policy favors the disposition of cases "on their merits rather than on technicalities." Mictronics, Inc. v. South Carolina Department of Revenue, 345 S.C. 506, 511, 548 S.E.2d 223, 226 (Ct.App.2001) citing Columbia Pools, Inc. v. Galvin, 288 S.C. 59, 339 S.E.2d 524 (Ct.App.1986); see also Lewis v. Cong. of Racial Equal. &/or C. O. R. E., Inc., 275 S.C. 556, 560, 274 S.E.2d 287, 289 (1981) ("It is the policy of the law to favor the trial of cases on the merits."). Under Rule 55(c)'s minimal standard, a party seeking relief from an entry of default must simply provide an explanation for the default, "give reasons why vacation of the default entry would serve the interests of justice," and show (1) that it promptly moved for relief; (2) that it has a meritorious defense; and (3) that the Plaintiff will not be prejudiced by the granting of relief. Id. at 608 (citing Wham v. Shearson Lehman Bros., Inc., 298 S.C. 462, 465 (Ct.App.1989)). If the record contains sufficient evidentiary support for the finding of the lack of good cause, the trial court is not required to make specific findings of fact as to each of the Wham factors. While a decision of whether to grant relief from entry of default is within the trial judge's discretion, "[a]n order based on an exercise of that discretion, however, will be set aside if it is controlled by some error of law or lacks evidentiary support." Wham, 298 S.C. 462, 465 (Ct. App. 1989).

In the present case, good cause exists for the vacation of default as set forth below.

a. Explanation for Default

Regarding the first issue—Mr. Hergert's explanation for default—Mr. Hergert was never served with the Complaint pursuant to SC Code. Ann. §§ 15-9-350 through 380, as set forth above in Section 1(a). Second, Plaintiff mailed the summons and complaint, through the DMV,

to an address several years old, and at which Mr. Hergert was not living at the time of Plaintiff's attempt at service. Specifically, Plaintiff mailed the summons and complaint to 1289 Lake Shore Drive, Naples, Florida, which was the address from the *March 6, 2016* accident report. Plaintiff's mailing of the summons and complaint occurred over two and a half years later, after the Naples Florida property had been transferred from its prior owner, and Mr. Hergert was not a resident of the house when it was transferred. Further, Mr. Hergert was not a resident of the house after it was transferred to its new owner, Pamela Newman Bogdanoff, as Ms. Bogdanoff used the property as a short-term rental. Ms. Bogdanoff had no contact with Mr. Hergert, and further she never received a complaint on Mr. Hergert's behalf, nor did she provide notice to Mr. Hergert of any Complaint. Defendant has requested an affidavit from Ms. Bogdanoff, although contact with Ms. Bogdanoff's was initially delayed due in part to Hurricane Dorian (Ms. Bodganoff still lives in Florida). Defendant will file same upon receipt.

In summary, because Mr. Hergert was not a resident of the address where Plaintiff mailed the summons and complaint, and because Mr. Hergert did not otherwise receive notice, he did not have the ability to respond. Further, as set forth above, Plaintiff never effected proper service as required by statute such that Mr. Hergert was required to respond. Thus, Defendant has provided ample explanation for default.

b. Defendant promptly and timely filed its Motion for Relief

Furthermore, the remaining Wham factors are also satisfied. First, regarding timing, Counsel for Mr. Hergert promptly filed an answer promptly upon discovering the alleged default in this matter and the purported service of a complaint. Undersigned counsel first discovered the Complaint and entry of default by encountering the filing on the court docket on June 12, 2019. Counsel promptly forwarded the information to the insurance carrier, and after analysis to

confirm coverage and that the named defendant and allegations in the Complaint were related to the accident on file with the carrier, the carrier retained counsel to draft an appearance and motion for relief. Mr. Hergert's answer and motion were filed June 19, 2019, less than five business days from discovery of the Complaint. As a result, Defendant meets the timing factor under Wham.

c. Mr. Hergert has Meritorious Defenses.

Second, Mr. Hergert has meritorious defenses to Plaintiff's claims. "[A] meritorious defense need not be perfect nor one which can be guaranteed to prevail at a trial. It need be only one which is worthy of a hearing or judicial inquiry because it raises a question of law deserving of some investigation and discussion or a real controversy as to real facts arising from conflicting or doubtful evidence." McClurg v. Deaton, 380 S.C. 563, 575, 671 S.E.2d 87, 94 (Ct. App. 2008), aff'd, 395 S.C. 85, 716 S.E.2d 887 (2011).

As an initial matter, regarding liability, Plaintiff's Complaint alleges he was struck from behind after slowing for traffic. However, even where a driver is struck from behind, several defenses may apply. South Carolina's Supreme Court has stated that "[i]n determining issues of negligence and contributory negligence arising out of collisions between vehicles proceeding in the same direction, we have held that **a leading vehicle has no absolute legal position superior to that of one following**." Still v. Blake, 255 S.C. 95, 104, 177 S.E.2d 469, 473–74 (1970). The Court continued, stating that "[e]ach driver must exercise due care under the circumstances," and that "[a]s a general rule, the **driver of the leading vehicle is required to make reasonable observations under the circumstances to determine that the particular movement of his vehicle, such as** turning, **slowing up, or stopping**, can be made with safety to others, and to give adequate warning or signal of his intentions." Id.

Plaintiff's unsafe acts in slowing down and/or stopping on the interstate present Mr. Hergert with the defenses of comparative negligence. See, e.g., Hopson v. Clary, 321 S.C. 312, 315, 468 S.E.2d 305, 308 (Ct. App. 1996) (upholding grant of summary judgment to defendant who struck Plaintiff's vehicle in the rear where Plaintiff performed precarious maneuver in front of defendant's vehicle); see also Edwards v. Ferguson, 254 S.C. 278 (1970) (holding that defendant presented a meritorious defense where defendant, although drunk at time of accident, presented defense of contributory negligence).

Next, Plaintiff has alleged that he slowed or stopped to accommodate traffic. Thus, Mr. Hergert's defenses include the intervening and superseding acts of the others on the road that caused both Plaintiff and Mr. Hergert to encounter the emergency hazard of stopped traffic on the highway. Also, following the accident, Mr. Hergert indicated that at the time of the accident he had reacted to another vehicle encroaching on his lane; thus, Mr. Hergert encountered a second intervening and superseding act that contributed to the accident.

In addition, Mr. Hergert was confronted with a sudden emergency due to the sudden slowing of traffic on the interstate and with another vehicle that turned into his lane without proper warning. "When the driver of an automobile is confronted with a sudden emergency brought about by the negligence of another and not by his own negligence, and compelled to act instantly to avoid a collision or an injury, is not guilty of negligence if he makes such a choice as a person of ordinary prudence placed in a like position might make, even though he did not make the wisest choice. Still v. Blake, 255 S.C. 95, 105, 177 S.E.2d 469, 474 (1970).

Mr. Hergert also has meritorious defenses on the issue of Plaintiff's damages. For example, during Plaintiff's pre-suit contact with National Interstate, Plaintiff indicated that there were only approximately $20,000 in medical costs, with no recommendation of future surgery.

See Affidavit of Jason Ramsey at ¶ 10. Yet Plaintiff obtained an award of $400,000 in actual damages in the default judgment order, an amount *twenty times* Plaintiff's actual medicals reported to National Interstate. Furthermore, Plaintiff's medical index provided to Defendant by Plaintiff shows damages of only $34,633.43, well less than *one-tenth* of the award. Notably, Plaintiff's medical index also does not show the purpose of the alleged medical visits, the services provided, or how they relate to the auto accident.

In summary, Defendant is aware of multiple defenses to Plaintiff's damages at this stage. For example, the Plaintiff had pre-existing medical issues, including pre-existing hip issues, independent of the accident. As a result, it appears that at least a portion of Plaintiff's alleged medicals—including in particular his hip replacement surgery—are not related to the accident. Moreover, Plaintiff's counsel's office reported to National Interstate that Mr. Buskirk had not received surgery and was not recommended for surgery; however, upon information and belief, Mr. Buskirk sought damages related to surgery at his damages hearing. Thus, because Defendant has meritorious defenses, it has established this element of the Wham factors.

d. Plaintiff will not be prejudiced by relief from default.

The final Wham factor for the Court's consideration is the degree of prejudice to the Plaintiff if relief from entry of default is granted. In the present case, relief from entry of default would not prejudice Plaintiff. Defendant's motion for relief from default was filed before entry of the Special Referee's order granting default judgment. Further, Defendant is aware of no evidence in the case that is no longer available or which has been impaired by the brief delay. Maxwell v. Genez, 350 S.C. 563, 570, 567 S.E.2d 496, 500 (Ct. App. 2002), rev'd, 356 S.C. 617, 591 S.E.2d 26 (2003) ("There is no showing by the defendants that evidence is not available or has been impaired by this brief delay or hiatus from the trial docket.").

Furthermore, any delay in the case is due not to the Defendant's default, but rather by (1) Plaintiff's failure to properly serve Mr. Hergert; (2) Plaintiff's failure to inform the insurance carrier of the suit, despite the ongoing contact by the carrier with Plaintiff's counsel's office; and (3) Plaintiff's mailing of the Complaint to an address which was over two-and-a-half years old at the time of mailing, among other things. Thus, relief from entry of default would not prejudice defendant, and to the extent any delay occurs, such is the result of Plaintiff's actions, not of actions by Defendant.

e. Relief from Entry of Default serves the interest of justice and due process.

This "good cause" standard is a "minimal standard," id., and it is to be "liberally construed to promote justice and dispose of cases on the merits." Dixon v. Besco Eng'g, 320 S.C. 174, 178, 463 S.E.2d 636, 638 (Ct.App.1995); *Ricks,* 293 S.C. at 374–75, 360 S.E.2d at 536; see also Mann v. Walker, 285 S.C. 194, 328 S.E.2d 659 (Ct.App.1985). Public policy favors the disposition of cases "on their merits rather than on technicalities." Mictronics, Inc. v. South Carolina Department of Revenue, 345 S.C. 506, 511, 548 S.E.2d 223, 226 (Ct.App.2001) citing Columbia Pools, Inc. v. Galvin, 288 S.C. 59, 339 S.E.2d 524 (Ct.App.1986); see also Lewis v. Cong. of Racial Equal. &/or C. O. R. E., Inc., 275 S.C. 556, 560, 274 S.E.2d 287, 289 (1981) ("It is the policy of the law to favor the trial of cases on the merits."). Where, as here, there is evidence of surprise, misconduct and misrepresentation, where Defendant has meritorious defenses and Plaintiff had established communication with the insurer prior to seeking default, and where Defendant was not served with the Complaint or with notice of the subsequent default process, relief from default plainly serves both the interests of justice and due process.

3. The damages award is not supported by a preponderance of the evidence, and as a result the award is excessive.

"Whether a defendant is or is not in default, it is incumbent upon the judge and/or the jury to make a judicial determination of the amount of damages based on the proof, and such proof must be by the preponderance of the evidence." Lewis v. Cong. of Racial Equal. &/or C. O. R. E., Inc., 275 S.C. 556, 561, 274 S.E.2d 287, 289 (1981). "In the case of unliquidated damages a defendant, though in default as to liability, has a right to expect that the judgment of the court, or the verdict of the jury, will be in keeping not only with the allegations of the complaint and the prayer for relief, but also the proof which has been submitted." Id. at 560, 274 S.E.2d at 289. Where an award is grossly out-of-proportion to the tort alleged in the complaint, the Court should not allow the award to stand. Id. "A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment." SCRCP 54(c).

As set forth above, Plaintiff's alleged damages reported to the insurance company totaled approximately $20,000, and Plaintiff's damages from the medical index only totaled approximately $34,000. However, Plaintiff's award of $400,000 is well over ten times even the $34,000 amount, and twenty times the amount reported to the insurer. Further, Plaintiff has not carried his burden to establish these damages, nor to show that such alleged damages were causally related to the accident. No medical bills are attached as exhibits to the Special Referee's damages hearing, no medical records are attached to show the nature of the treatment or the cause of Plaintiff's need for treatment, and even the medical index drafted by Plaintiff and referenced in the Order does not appear in the exhibits. Further, Plaintiff provided no medical records supporting his allegations that his doctors recommended future hip surgery, that such surgery would cost $120,000, or that such surgery was causally related to the accident. Where damages of over 10 times the alleged medicals are awarded, the defendant has a right to expect

that the verdict will be in keeping with the allegations of the Complaint *and the proof submitted.* See Lewis, 275 S.C. at 560, 274 S.E.2d at 289. Plaintiff's self-serving testimony and the medical index created by Plaintiff—which was not even introduced as an exhibit—are the only evidence of Plaintiff's damages, bills, or causation. The award in this case was not in keeping with the proof submitted, and as a result, the award is excessive.

CONCLUSION

For the reasons set forth above, Cincinnati Insurance Company respectfully requests that the Court provide relief from default pursuant to Rules 59 and 60 of the South Carolina Rules of Civil Procedure as set forth herein, and that Plaintiff's award be reduced.

Respectfully submitted,

SWEENY, WINGATE & BARROW, P.A.

s/Brandon R. Gottschall
Mark S. Barrow, SC Bar No. 7821
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Sweeny, Wingate & Barrow, P.A.
Post Office Box 12129
Columbia, SC 29211
(803) 256-2233

ATTORNEYS FOR DEFENDANT

Columbia, South Carolina
September 9, 2019

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2018 CP-32-02997

Arthur Robert Buskirk — PLAINTIFF(S)

Jeffri Hergert — DEFENDANT(S)

Submitted by:	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk : Defendant's Motion to Reconsider Order of Default Judgment is DENIED.

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge | Judge Code | Date

SCRCP Form 4C (02/2017)

EXHIBIT D tabbies

For Clerk of Court Office Use Only

This judgment was entered on the day of , 20 and a copy mailed first class or placed in the appropriate attorney's box on this day of , 20 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

Arthur Robert Buskirk,

Plaintiff,

vs.

Jeffri Hergert,

Defendant.

IN THE COURT OF COMMON PLEAS FOR THE ELEVENTH JUDICIAL CIRCUIT

Case No.: 2018-CP-32-02997

ORDER DENYING DEFENDANT'S MOTION TO RECONSIDER ORDER OF DEFAULT

Hearing Date:	**September 18, 2019**
Presiding Judge:	**Special Referee Tyler Bailey, Esq.**
Plaintiff's Attorney:	**Andrew L. Johnson, Esq.**
Defendant's Attorney:	**Brandon R. Gottschall, Esq.**
Type:	**Order/Relief**

AND IT IS SO ORDERED.

Tyler D. Bailey
Special Referee

IT IS SO ORDERED.

LEXINGTON COUNTY CLERK OF COURT

Lexington, South Carolina

_____, 2019

Brandon R. Gottschall

From: Tyler D. Bailey <tyler@baileylawfirmsc.com>
Sent: Monday, December 09, 2019 5:43 PM
To: Brandon R. Gottschall
Cc: Andrew Johnson; Mark S. Barrow; Assistant Bailey Law Firm
Subject: Re: 2018-CP-32-02997, Buskirk v. Hergert

Mr. Gottschall,

Thank you for following up with me about this for clarification. My Form 4 was intended to address both Motions.

Please let me know if you have any further questions.

Thank you.

On Mon, Dec 9, 2019 at 5:26 PM Brandon R. Gottschall <BRG@swblaw.com> wrote:

Good afternoon Mr. Bailey,

We received a copy of your October 7, 2019 Form 4 Order following our motion to set aside default and motion to reconsider in the above-referenced matter. We argued both motions at the hearing at your office and the Order states that the Defendant's Motion to Reconsider the Order of Default Judgment is denied but does not explicitly reference the motion to set aside.

Will there be a separate order on the Motion to Set Aside Default, or is the Form 4 intended to address both motions?

Thank you.

Brandon

S·W·B

Brandon Gottschall | *Attorney*
Sweeny, Wingate & Barrow, P.A.

1515 Lady St. (29201)
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Columbia, SC 29211

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Web | Email

EXHIBIT
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINTON COUNTY
Court of Common Pleas
Tyler Bailey, Esq., Special Referee

Civil Action No. 2018-CP-32-02997

Arthur Robert Buskirk ..... Respondent,

v.

Jeffri Hergert ..... Appellant,

PROOF OF SERVICE

I certify that I have served a copy of Appellant's Motion to Reinstate on Respondent, Arthur Robert Buskirk, by depositing a copy of the same in the United States Mail, Postage Prepaid, on December 17, 2019, addressed to Arthur Robert Buskirk's Counsel of record referenced below.

December 17, 2019

Mark S. Barrow
Brandon R. Gottschall
Sweeny, Wingate & Barrow, P.A.
Post Office Box 12129
Columbia, SC 29211
(803) 256-2233
Attorneys for Appellant

Other Counsel of Record:

Bradley L. Lanford, Esq.
Andrew Johnson, Esq.
Law Office of Kennth E. Berger, LLC
5205 Forest Drive, Suite 2
Columbia, SC 29206
Attorneys for Respondent

S·W·B

SWEENY WINGATE & BARROW P.A.

December 17, 2019

Reply to: Main Office

Brandon R. Gottschall
(803) 256-2233 x7132
brg@swblaw.com

HAND DELIVERY
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

RE: Arthur Robert Buskirk v. Jeffri Hergert
Civil Action No.: 2018CP3202997
Claim No.: 1228138
Our File: 5558-12241

To Whom it May Concern:

Enclosed please find the original and 1 copy of the Motion to Reinstate and Proof of Service in connection with the above-referenced matter along with our firm check in the amount of $50.00. Please file the original and return the remaining clocked copy to me in the envelope provided.

By copy of this letter to opposing counsel, I am serving them with same.

Thank you for your assistance, and should you have any questions, please do not hesitate to contact me.

Yours truly,

SWEENY, WINGATE & BARROW, P.A.

Brandon R. Gottschall

BRG/jln
Enclosures
w/enclosure