

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**

RECEIVED
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SC Court of Appeals

Arthur Robert Buskirk.....Respondent,

v.

Jeffri Hergert.....Appellant.

INITIAL BRIEF OF APPELLANT JEFFRI HERGERT

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

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE SPECIAL REFEREE ERR FAILING TO FIND THAT SERVICE ON APPELLANT WAS INSUFFICIENT?
- II. DID SPECIAL REFEREE ERR IN FAILING TO SET ASIDE DEFAULT JUDGMENT AND ENTRY OF DEFAULT BASED ON INSUFFICIENT NOTICE AND SERVICE OF PROCESS?
- III. DID THE SPECIAL REFEREE ERR IN FAILING TO FIND THAT THE DEFAULT JUDGMENT WAS VOID BASED ON THE LACK OF NOTICE AND THE LACK OF A HEARING ON DEFAULT JUDGMENT AFTER APPELLANT APPEARED?
- IV. DID THE SPECIAL REFEREE ERR IN FAILING TO SET ASIDE DEFAULT UNDER RULE 55, S.C. R. CIV. P.?
- V. DID THE SPECIAL REFEREE ERR IN FAILING TO SET ASIDE DEFAULT AND DEFAULT JUDGMENT UNDER RULE 60, S.C. R. CIV. P.?
- VI. DID THE SPECIAL REFEREE ERR IN FAILING TO FIND THAT PROCEEDINGS CONDUCTED BY THE SPECIAL REFEREE WERE VOID FOR LACK OF JURISDICTION?
- VII. DID THE SPECIAL REFEREE ERR INF AILING TO SET ASIDE THE DAMAGES AWARD EXCESSIVE AND UNSUPPORTED BY A PROPONDERANCE OF THE EVIDENCE?

STATEMENT OF THE CASE

This matter arises out of an auto accident on or about March 6, 2016, involving a vehicle driven by Respondent, Mr. Arthur Buskirk, and a vehicle owned by AMS 50, LLC and driven by Appellant, Mr. Jeffri Hergert. (R. p. ___; Pl. Cmpl. ¶ (Aug. 30, 2018)). Per the accident report, Respondent's vehicle was struck in the rear as both vehicles slowed for traffic. (R. p. ___; Accident Report p. 1, attached as Exhibit B to Affidavit of Default and Motion for Entry of Default and Referral). Neither driver reported injuries to the responding officer. (R. p. ___. *Id.* p. 2).

Following the accident, AMS 50's insurance carrier, National Interstate Insurance Company ("National Interstate"), began investigating the accident with Mr. Buskirk's involvement. (*See* R. p. ___; Aff. of Jason Ramsey at ¶¶ 2-4, attached as Exhibit 3 to Jeffri Hergert's Memorandum Supporting and Supplementing Motion for Relief from Default and Motion for Reconsideration). Over a year after the accident, but before the claims were resolved, Mr. Buskirk retained Bradley Lanford as counsel. (R. p. ___; *Id.* at ¶ 5). At Mr. Lanford's request, National Interstate began communicating with Mr. Lanford's office regarding continued claims investigation and negotiations. (R. p. ___; *Id.* at ¶¶ 6-15). These discussions continued even after, unbeknownst to National Interstate, Mr. Lanford filed a Complaint on Respondent's behalf on August 30, 2018, alleging claims against Mr. Hergert. (R. p. ___; *Id.* at ¶¶ 9-15); Pl. Cmpl. (Aug. 30, 2018)). Despite National Interstate's ongoing communication with Respondent's counsel, however, Respondent's counsel never informed National Interstate that it had instituted a suit or that Appellant was allegedly in default. (R. p. ___; Aff. of Jason Ramsey at ¶¶ 15-16).

Rather, without notice to National Interstate or its insureds, on March 19, 2019, Respondent filed a motion for entry of default and for referral to a Special Referee. (R. p. ____; Pl. Mot. for Entry of Default (Mar. 19, 2019)). On March 20, 2019, the Lexington County Clerk of Court entered default and referred the matter directly to Tyler Bailey to serve as Special Referee. (R. p. ____; Order Grant. Mot. for Entry of Default and Referral (Mar. 20, 2019)). The referral to the special referee occurred without any finding by a circuit judge that the master-in-equity's office was vacant or that the master-in-equity was disqualified or disabled. (R. p. ____; *Id.*). Thereafter, the Special Referee conducted a damages hearing on May 21, 2019. (R. p. ____; Transcript from May 21, 2019 Hearing). Appellant was never served with notice of the hearing, nor did notice of the hearing even appear on the state court index.

Appellant and National Interstate were unaware of the lawsuit until Undersigned Counsel obtained a copy of the Complaint and Entry of Default from the Lexington County online docket on June 12, 2019. Undersigned Counsel immediately forwarded the same to National Interstate for review and internal analysis. (*See* R. p. ____; Aff. of Jason Ramsey at ¶ 16). Shortly thereafter, Respondent filed its Motion for Relief from Entry of Default and, out of an abundance of caution, an Answer, on June 19, 2019. (R. p. ____; Motion for Relief (June 19, 2019); Answer (June 19, 2019)).

No Default Judgment Order was entered, however, until several days *after* Respondent's Answer and Motion for Relief were filed. (R. p. ____; Order of Default J. Against Def. Jeffri Hergert (June 21, 2019)). On July 1, 2019, Respondent filed a timely Motion to Reconsider the June 21, 2019 Default Judgment Order. (R. p. ____; Def.'s Mot. to Recons. (July 1, 2019)). On September 18, 2019, Appellant appeared before Special Referee Tyler Bailey, Esq. for a hearing on the pending Motion to Set Aside Default and Motion to Reconsider Order of Default

Judgment. (R. p. ___; Transcript from September 18, 2019 Hearing). At that hearing, Appellant argued, among other things, that the Special Referee lacked jurisdiction, that the default judgment order was void, and that the entry of default and default judgment should be set aside. (R. p. ___; *Id.*).

On October 7, 2019, Special Referee Bailey filed a Form 4 Order denying Respondent's Motion to Reconsider Order of Default Judgment. (R. p. ___; Form 4 Order (Oct. 7, 2019)). On November 5, 2019, Appellant filed this appeal. (R. p. ___; Notice of Appeal (Nov. 5, 2019)). Special Referee Bailey later clarified that his October 7, 2019 Form 4 Order addressed both Appellant's Motion to Set Aside Default and Motion to Reconsider. (R. p. ___; Email from the Honorable Tyler D. Bailey (December 9, 2019)).

DISCUSSION

As set forth below, the Special Referee erred (1) by failing to find that the court lacked jurisdiction over Appellant due to lack of service on Appellant and that because it lacked jurisdiction, the entry of default and of default judgment were void; (2) by failing to find that because Appellant was not provided notice and a hearing on Respondent's Motion for Entry of Default Judgment, default judgment was void, and further that default should be set aside under Rule 55, S.C. R. Civ. P.; (3) by failing to find that even if default judgment was not void, relief from default judgment and entry of default was appropriate under Rule 60, S.C. R. Civ. P.; (4) by failing to find that the matter was improperly referred to the Special Referee by the Clerk rather than by the Circuit Court, and that the referral improperly bypassed the Master in Equity, and that as a result, proceedings conducted by the Special Referee were void; and (5) by failing to find that the damages award was not supported by a preponderance of the evidence, resulting in an excessive award.

I. BECAUSE RESPONDENT FAILED TO PROPERLY SERVE PROCESS ON APPELLANT, THE SPECIAL REFEREE ERRED IN FAILING TO FIND THAT SERVICE WAS INSUFFICIENT AND IN FAILING TO SET ASIDE DEFAULT JUDGMENT AND ENTRY OF DEFAULT.

A. Standard of Review

Subsection B.1. below involves statutory interpretation, which constitutes “a question of law for the court.” *Catawba Indian Tribe of S.C. v. State*, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007). Questions of statutory interpretation are reviewed de novo. *See id.*

Subsection B.2. below involves findings of fact which are subject to reversal because they are wholly unsupported by the evidence, are manifestly influenced, or are controlled by an error of law. *See Brown v. Carolina Emergency Physicians, P.A.*, 348 S.C. 569, 583, 560 S.E.2d 624, 631 (Ct. App. 2001) (reversing trial court and finding that plaintiffs failed to show sufficient compliance with service rule where individual served lacked authority to accept service of process).

B. Argument

“A court generally obtains personal jurisdiction by the service of a summons” *BB & T v. Taylor*, 369 S.C. 548, 551, 633 S.E.2d 501, 503 (2006). Here, because service never occurred, the trial court never obtained personal jurisdiction and the subsequent entries of default and default judgment were void, as set forth below.

1. The Special Referee Erred in Interpreting Respondent’s Actions as Complying with the Service Statute.

South Carolina policy strongly favors disposition of cases on their merits and default judgments are disfavored as a general matter. *Caldwell v. Wiquist*, 402 S.C. 565, 575, 741 S.E.2d 583, 588 (Ct. App. 2013). Thus, to avoid resolving litigation by default, alternative means of service are subject to strict compliance. *See id.* at 574, 741 S.E.2d at 588 (citing *McDuff v.*

McDuff, 252 Miss. 459, 173 So.2d 419, 420 (1965) for the proposition that “the statutory method of giving notice to either a non-resident defendant, or a resident defendant temporarily out of the state, must be strictly complied with, or that the full equivalent thereof be adhered to”). Moreover, notice and service are required by the South Carolina and Federal constitutions. *See* S.C. Const. art. I, § 22 (“No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard....”). *See also* U.S. Const. amend. XIV, § 1. In addition, “plaintiff has the burden of showing the court has personal jurisdiction over defendant.” *Brown*, 348 S.C. at 584, 560 S.E.2d at 632 (citing *Jensen v. Doe*, 292 S.C. 592, 594, 358 S.E.2d 148, 148–49 (Ct.App.1987)).

Respondent purportedly attempted service on Appellant under S.C. Code Ann. §§ 15-9-350 through 380. These sections govern service of an out-of-state motorist through the DMV. Under § 15-9-370, “service shall be sufficient upon the nonresident if” notice and service of process are sent “*to the defendant....*” In addition, if certified mail delivery fails, the statute requires the 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. S.C. Code Ann. § 15-9-350 (emphasis added). Where the plaintiff fails to follow these requirements, *including the filing of the open mail envelope*, no service is accomplished. S.C. Code Ann. § 15-9-380 (emphasis added). *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)). Because this statute provides for an alternative means of service, it is subject to strict compliance. *See Caldwell*, 402 S.C. at 574, 741 S.E.2d at 588.

In the present case, because the Special Referee's Order denied Appellant's Motions to Set Aside Default and for Reconsideration, the Order demonstrates that the Special Referee erred in interpreting the service statute. First, it was undisputed below that Appellant never received the summons and complaint because Respondent directed the documents to an address—1289 Lake Shore Drive, Naples, Florida—at which Appellant no longer lived. (*See* R. p. ___; *See* October 19, 2018 Letter from S.C. Dept. of Motor Vehicles to Bradley L. Lanford, Affidavit of Natasha Thomas (Oct. 25, 2018), and September 18, 2018 Letter from Dept. of Motor Vehicles to Jeffri Hergert (collectively indicating address to which Complaint was mailed). *See also* Affidavit of Pamela Newman Bogdanoff (indicating Appellant did not reside at 1289 Lake Shore Drive at times of purported service, that she was aware of no attempts at service, and that she did not forward any documents to Appellant)). Further, the current owner of 1289 Lake Shore Drive confirmed that she owned the property at the time of Respondent's purported service but that she does not know the Appellant, that she has not received service of documents from Respondent, and that she has not provided notice of any such documents to Appellant. (*See* R. p. ___; *See* Affidavit of Pamela Newman Bogdanoff). There is no evidence that Respondent attempted to serve the Appellant at any other address. There is no evidence that Respondent performed any investigation to confirm this address was correct. As a result, the undisputed record shows that Respondent failed to send notice and process "*to the defendant*" as required by S.C. Code Ann. § 15-9-370, and the Respondent has failed to carry his burden of establishing proper service.

Further, Appellant failed to file any open mail envelope with the Court. (*See* R. ____; *See, e.g.*, Transcript of September 18, 2019 Hearing at 13:16–17:17). This step is part of the alternative service requirements under S.C. Code Ann. §§ 15-9-350 through 380, and strict compliance is therefore necessary as part of the state's policy disfavoring default and further to

comply with state and federal constitutional notice requirements. *See Caldwell*, 402 S.C. at 575, 741 S.E.2d at 588 (Ct. App. 2013); S.C. Const. art. I, § 22; U.S. Const. amend. XIV, § 1. In the context the constitutional requirements and South Carolina's public policy favoring litigation on the merits, the purpose of the filing requirement appears plain: it demonstrates that the open mail requirement was, in fact, accomplished, and further demonstrates the address to which the notice was mailed. *See, e.g., Hess v. Pawloski*, 274 U.S. 352, 356, 47 S. Ct. 632, 633, 71 L. Ed. 1091 (1927) (finding out-of-state motorist statute constitutional where it required receipt demonstrating that notice of service and copy of process was actually provided). Because the envelope was not filed, pursuant to § 15-9-350, service on Appellant has not been accomplished. *See Breland*, 2017 WL 3910866, at *2. Further, compliance with this provision is simple: even if the original envelope is not returned to Plaintiff, a simple copy of the envelope showing the address can be made prior to mailing and filed with the Court.

The Special Referee's interpretation of the service statute to find proper service, which is demonstrated by his denial of Appellant's Motions, should be reviewed de novo. Because Appellant was never provided with service of process and Respondent failed to file the open mail envelope, the only proper interpretation of the service statute can be that there was no compliance with the service statute and there is no presumption of proper service. *See McClurg v. Deaton*, 380 S.C. 563, 579, 671 S.E.2d 87, 96 (Ct. App. 2008), aff'd, 395 S.C. 85, 716 S.E.2d 887 (2011). For these reasons, the Special Referee's Order is in error and should be reversed, and the Court should find that service was insufficient and set aside default and default judgment.

2. Even Had Respondent Complied with the Service Statute, Appellant Rebutted Any Presumption of Service.

Further, even had Respondent complied with the service statute, compliance creates only a "presumption of proper service." *McClurg v. Deaton*, 380 S.C. 563, 579, 671 S.E.2d 87, 96

(Ct. App. 2008), aff'd, 395 S.C. 85, 716 S.E.2d 887 (2011). This presumption may be rebutted by a showing of facts entitling the opposing party to relief. *See id.* (holding that where plaintiff establishes compliance with the rules, the party seeking relief then has the burden of presenting evidence entitling him to relief). Appellant is not aware of a single case in South Carolina finding service on a defendant where the defendant demonstrated, without any evidence to the contrary, that the defendant did not and could not have received the service papers.

Not only did Respondent fail to comply with the service statute as demonstrated above, even had Respondent demonstrated compliance, Appellant rebutted any presumption of service. Appellant presented the affidavit of Pamela Bogdanoff, the owner of 1289 Lake Shore Drive, which established that Appellant did not and could not have received service at the address used by Respondent. (*See* R. ____; Jeffri Hergert's Memorandum Supporting and Supplementing Motion for Relief from Default and Motion for Reconsideration pp. 10-11; Aff. of Pamela Newman Bogdanoff; Transcript of September 18, 2019 Hearing pp. 12:10-13:14). Moreover, this showing was unchallenged below. (*See* R. ____; Transcript of September 18, 2019 Hearing). Any finding by the Special Referee to the contrary can only constitute an abuse of discretion because the record contains no evidentiary support for such a finding. Further, given the lack of evidentiary support for any such finding, the Special Referee's Order is controlled by an error of law. As a result, the Order denying Appellant's Motions should be reversed.

In summary, because Appellant was not served with the Summons and Complaint as required by South Carolina Code Ann. § 15-9-350 et seq., the Special Referee erred by failing to find that service was insufficient and by failing set aside entry of default and default judgment against Appellant.

II. IN THE ALTERNATIVE, BECAUSE APPELLANT WAS NOT PROVIDED NOTICE AND A HEARING, THE SPECIAL REFEREE ERRED IN FAILING TO FIND THAT THE DEFAULT JUDGMENT WAS VOID AND BY FAILING TO SET ASIDE DEFAULT UNDER RULE 55, S.C. R. CIV. P.

A. Standard of Review

Subsection B.1. below involves questions of statutory interpretation. “The issue of interpretation of a statute is a question of law for the court.” *Catawba Indian Tribe of S.C. v. State*, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007). As a result, these questions of statutory interpretation are subject to de novo review. *See id.*

Regarding Section B.2., “[t]he decision whether to set aside an entry of default judgment lies solely within the sound discretion of the trial judge.” *Sundown Operating Co. v. Intedger Industries, Inc.*, 383 S.C. 601, 606, 681 S.E.2d 885, 888 (2009). However, the trial court’s decision may be reversed on appeal where there is “a clear showing of an abuse of that discretion.” *Id.* “An abuse of discretion occurs when the judge issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support.” *Id.* at 607, 681 S.E.2d at 888 (citing *In re Estate of Weeks*, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct. App. 1997)).

Further, even under an abuse of discretion standard, reversal is appropriate when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. *See State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000). Thus, even under the abuse of discretion standard, an appellant is entitled to a reversal if the appellant shows “both error and resulting prejudice.” *Gibson v. Wright*, 403 S.C. 32, 38, 742 S.E.2d 49, 52 (Ct. App. 2013).

B. Argument

Even had Respondent properly served Appellant, the Special Referee's default judgment order should have been set aside as void for lack of notice and hearing, and the Special Referee should have then set aside default under the lower standard of Rule 55, S.C. R. Civ. P.

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

"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 Cons. 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") (citing Rule 55, S.C. R. Civ. P.). 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. *Stark Truss Co.* at 511-12, 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, Appellant filed both an Answer and Motion for Relief from Default prior to entry of the Order of Default Judgment.¹ (*See* R. ____; Answer by Defendant (June 19, 2019); Motion for Relief from Entry of Default (June 19, 2019); Order of Default Judgment Against Defendant Jeffri Hergert (June 21, 2019)). Because Appellant had thus appeared prior to

¹ Because Respondent failed to serve Appellant, Appellant's Answer was technically not required but was filed out of an abundance of caution.

entry of the Order, he was entitled to notice and a hearing prior to entry of default judgment. *See* Rule 55(b)(2), S.C. R. Civ. P. *See also Stark Truss Co.*, 360 S.C. at 511, 602 S.E.2d at 103. However, Appellant was never provided notice of the hearing, nor was a hearing provided following his appearance in the case. While Respondent's counsel represented below that notice of the hearing was provided to Appellant, Respondent's correspondence was sent to 1289 Lake Shore Drive, Naples, Florida, on or about May 14, 2019. (*See* R. ____; May 14, 2019 Letter from Andrew Johnson, attached as Plaintiff's Exhibit 2 to Transcript of September 18, 2019 Hearing). At the time of this letter, Appellant had not lived at the property for over at least a year and a half. (*See* R. p. __; *Aff. of Pamela Bogdanoff* (indicating that when the property was deeded to her in October of 2017, Mr. Hergert was not living there)). As a result, Appellant was never provided the required notice or hearing.

In summary, because Appellant was never provided notice or a hearing as required under Rule 55, SCRCP, the Special Referee erred in interpreting Respondent's actions as compliant with Rule 55. As a result, the Special Referee's Order should be reviewed de novo and reversed, and the default judgment should be found void.

2. Because the Default Judgment was void, Entry of Default should have been set aside under Rule 55, SCRCP.

Because the Special Referee should have found that the default judgment was void as set forth above, he further should have set aside entry of default under Rule 55, S.C. R. Civ. P. Rule 55(c) establishes a mere "good cause" standard for setting aside entry of default. *Sundown Operating Co.*, at 607. 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 v. Weinrauch*, 293 S.C. 372, 374-75, 360 S.E.2d 535, 536 (Ct. App. 1987); *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.” *Micronics, Inc. v. S.C. Dep’t 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. *Sundown*, 383 S.C. at 608, 681 S.E.2d at 888 (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. *Id.* 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, the Special Referee’s order is controlled by an error of law and lacks evidentiary support, and the Special Referee’s lack of specific findings of fact as to each of the *Wham* factors is not justified.

a. Explanation for Default.

Regarding the first issue—Appellant’s explanation for default—Appellant was never served with the Complaint pursuant to S.C. Code Ann. §§15-9-350 through 380, as set forth

above in Section I(B). Respondent mailed the summons and complaint, through the DMV, to 1289 Lake Shore Drive, Naples, Florida. This address, which the Respondent pulled from the March 6, 2016 accident report without further investigation or due diligence, was no longer valid two and a half years later when Respondent attempted to serve the Complaint. (*See* R. p. ___; Accident Report (Sept. 11, 2019); Affidavit of Default ¶ 4). Specifically, in the interim, the house was transferred to a new owner, Pamela Newman Bogdanoff, after which Mr. Hergert no longer resided at the property. (R. p. ___; Aff. of Pamela Bogdanoff). Ms. Bogdanoff had no contact with Appellant and she never received a complaint on Appellant’s behalf, nor did she provide notice to Appellant of any Complaint. (R. p. ___; *Id.*).

In addition, in addition to the lack of service as an explanation of default, the discussion set forth *infra* at Section III.B. provides further explanation. The surprise, excusable neglect, and misconduct factors which support setting aside default judgment also provide an explanation for the default under Rule 55(c). *See Sundown*, 383 S.C. at 608, 681 S.E.2d at 889 (holding that “the criteria for obtaining relief from judgment under Rule 60(b)—mistake, inadvertence, excusable neglect, surprise, newly discovered evidence, fraud, misrepresentation—are relevant in determining whether good cause has been shown under Rule 55(c)”, while also cautioning that “[n]o trial court should ever find good cause lacking based solely on the absence of a Rule 60(b) factor”).

In summary, because Appellant was not a resident of the address where Respondent mailed the summons and complaint, and because Appellant did not otherwise receive notice, he did not have the ability to respond. Further, as set forth above, Respondent never effected proper service as required by statute such that Appellant was required to respond. Finally, further

explanation of the default is demonstrated under surprise, excusable neglect, and misconduct factors. For these reasons, Appellant demonstrated ample explanation for the default.

b. Appellant promptly and timely filed its Motion for Relief.

The remaining *Wham* factors are also satisfied. First, regarding timing, Counsel for Appellant promptly filed an answer upon discovering the alleged default in this matter and the purported service of a complaint. Undersigned counsel first discovered the Complaint and the 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 immediately retained counsel to draft an appearance and motion for relief. (R. p. ___; Aff. of Jason Ramsey (Sept. 11, 2019)). Appellant's answer and motion were filed June 19, 2019, less than five business days from discovery of the Complaint. (R. p. ___; Answer (Sept. 11, 2019); Mot. for Relief (Sept. 11, 2019)). As a result, Appellant meets the timing factor under *Wham*.

c. Appellant has meritorious defenses.

Appellant has meritorious defenses to Respondent'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*, 380 S.C. at 575, 671 S.E.2d at 94.

In this case, Appellant has several meritorious defenses. First, as discussed *supra* at Section I.B., service of process was defective. Second, as also discussed *infra* Section IV.B., the

Special Referee lacked jurisdiction to conduct proceedings in this matter. Both of these defenses are substantial and worthy of judicial inquiry.

Third, Appellant presented a number of defenses as to liability. (R. p. ____; Jeffri Hergert's Memorandum Supporting and Supplementing Motion for Relief from Default and Motion for Reconsideration pp. 12-14). For example, Respondent's Complaint alleges he was struck from behind after slowing for traffic. (R. p. ____; Pl. Cmpl. (Aug. 30, 2018)). 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) (emphasis added). 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.* (emphasis added). Appellant argued that Respondent was comparatively negligent, including in his unsafe acts in slowing down and/or stopping on the interstate. *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 the plaintiff's vehicle in the rear where the 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).

Also as to liability, Appellant raised the defense of intervening and superseding acts of others. Specifically, Respondent indicated that he stopped or slowed to accommodate other traffic, and Appellant argued that the acts of others caused both Respondent and Appellant to encounter the emergency hazard of stopped traffic on the highway. Also, following the accident, Appellant indicated that at the time of the accident he had reacted to another vehicle encroaching on his lane; thus, Appellant encountered a second intervening and superseding act that contributed to the accident. Based on these incidents, Appellant also raised the defense of sudden emergency. “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*, 255 S.C. at 105, 177 S.E.2d at 474.

Fourth, Appellant also has meritorious defenses on the issue of Respondent’s damages. (R. p. ____; Jeffri Hergert’s Memorandum Supporting and Supplementing Motion for Relief from Default and Motion for Reconsideration pp. 13-14). For example, during Respondent’s pre-suit contact with National Interstate, Respondent indicated that there were only approximately \$20,000 in medical costs, with no recommendation of future surgery. (R. p. ____; Aff. of Jason Ramsey at ¶ 10). Yet Respondent obtained an award of \$400,000 in actual damages in the default judgment order, an amount *twenty times* Respondent’s actual medicals reported to National Interstate. Furthermore, even using Respondent’s medical index provided by Respondent (the accuracy of which Appellant challenges), Respondent listed damages of only \$34,633.43, well less than *one-tenth* of the award. (See R. p. ____; See Plaintiff’s Medical Index). Notably, Respondent’s medical index does not show the purpose of the alleged medical visits, the services

provided, or how they relate to the auto accident. In addition, the Respondent had pre-existing medical issues, including pre-existing hip issues, independent of the accident. (*See* R. p. ____; *See* Aff. of Jason Ramsey at ¶ 20; Jeffri Hergert’s Memorandum Supporting and Supplementing Motion for Relief from Default and Motion for Reconsideration at p. 14; Transcript of September 18, 2019 Hearing at p. 31:2-32:8). As a result, it appears that at least a portion of Respondent’s alleged medicals—including his hip replacement surgery—are not related to the accident. Moreover, counsel for Respondent reported to National Interstate that Respondent had not received surgery and was not recommended for surgery. (*See* R. p. ____; *See* Aff. of Jason Ramsey at ¶ 11). However, upon information and belief, Respondent sought damages related to surgery at his damages hearing. Transcript of May 21, 2019 Hearing at p. 7:14-23.

In summary, Appellant raised meritorious defenses related to insufficient process, lack of jurisdiction, liability, and damages. Thus, Appellant has established the meritorious defenses element of the *Wham* factors.

d. Respondent will not be unfairly prejudiced by relief from default.

The next *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 unfairly prejudice Respondent. (R. p. ____; Jeffri Hergert’s Memorandum Supporting and Supplementing Motion for Relief from Default and Motion for Reconsideration pp. 14-15). Respondent has failed to demonstrate any evidence in the case that would have become unavailable or impaired had the trial court set aside default. *See Maxwell v. Genez*, 350 S.C. 563, 567 S.E.2d 496, 500 (Ct. App. 2002), *rev’d on other grounds* 356 SC. 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.”). To the degree Respondent argued

that relief from default would require Respondent to face delay incumbent in litigation on the merits, this is not unfair prejudice for several reasons. (See R. _____; Transcript of September 18, 2019 hearing at p. 40:9-10). First, litigation on the merits is favored and “[t]he South Carolina Rules of Civil Procedure... permit a defendant to fully investigate the merits of a plaintiff’s case.” *Patterson v. McNeill-Patterson & Assocs., Inc.*, 312 S.C. 471, 472, 441 S.E.2d 328, 329 (Ct. App. 1994). As a result, any such delay to permit the Defendant a chance to litigate on the merits and investigate the claim is not unfairly prejudicial but is rather a proper part of litigation. Further, as Appellant argued below, any delay was caused by Respondent’s failure to properly serve the driver and to seek assistance or acceptance of service by the insurance carrier. (See R. _____; Transcript of September 18, 2019 hearing at p. 26:4-27:22). There is no evidence on the record of any actions Respondent took to confirm Mr. Hergert’s address, and Respondent withheld any information about the suit from National Interstate who was actively attempting to negotiate and assist in reaching a resolution. See Discussion *infra* Section III.B.

For these reasons, relief from entry of default would not unfairly or improperly prejudice Appellant.

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

Relief from Entry of Default serves both the interests of justice and due process. As an initial matter, the “good cause” standard in Rule 55, S.C. R. Civ. P. 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.” *Micronics, Inc.*, at 511, 548 S.E.2d at 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*, 275 S.C. at 560, 274 S.E.2d at 289 (“It is the policy of the law to favor the trial of cases on the merits.”).

In the present case, the minimal good cause standard under Rule 55 is readily met. (*See* R. p. ____; Jeffri Hergert’s Memorandum Supporting and Supplementing Motion for Relief from Default and Motion for Reconsideration p. 15). First, it is uncontested that Appellant never received service of process or notice of the default judgment hearing, as set forth *supra* at Section I.B., and Appellant has further established that it has many meritorious defenses, as set forth *supra* at II.B.2.c. In addition, Respondent knew from contact with the insurance carrier that the carrier intended to negotiate and be involved in adjustment of the claim, and as a result Respondent was on notice that the claim was not being ignored. Thus, relief from entry of default serves both due process and public policy favoring litigation of the case on the merits.

Second, Appellant has presented evidence of surprise, misconduct and misrepresentation as set forth *infra* at Section III.B., conduct which runs contrary to the interests of justice. The Special Referee’s failure to set aside default in light of these circumstances rewards rather than discourages such conduct. In these circumstances, relief from default plainly serves both the interests of justice and due process.

For these reasons, Appellant has established each of the *Wham* factors and has shown that good cause exists to set aside default. Further, the Special Referee’s failure to set aside default under Rule 55 was in error and should be reversed.

III. EVEN IF THE DEFAULT JUDGMENT WAS NOT VOID, BECAUSE RELIEF FROM DEFAULT WAS APPROPRIATE UNDER RULE 60, S.C. R. CIV. P., THE SPECIAL REFEREE ERRED IN FAILING TO SET ASIDE DEFAULT AND DEFAULT JUDGMENT.

A. Standard of Review

The decision of whether to set aside an entry of default judgment lies solely within the sound discretion of the trial judge. *Sundown*, 383 S.C. at 606, 681 S.E.2d at 888. However, the trial court's decision may be reversed on appeal where there is "a clear showing of an abuse of that discretion." *Id.* "An abuse of discretion occurs when the judge issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support." *Id.* at 607, 681 S.E.2d at 888 (citing *In re Estate of Weeks*, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct. App. 1997)).

Further, even under an abuse of discretion standard, reversal is appropriate when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. *See McDonald*, 343 S.C. at 325, 540 S.E.2d at 467. Thus, even under the abuse of discretion standard, an appellant is entitled to a reversal if the appellant shows "both error and resulting prejudice." *Gibson*, 403 S.C. at 38, 742 S.E.2d at 52.

B. Argument

For the reasons set forth below, if the judgment was not void, the Special Referee erred in failing to grant relief from default judgment under Rule 60, SCRCP, based on the surprise, misrepresentation, or other misconduct of an adverse party. (*See* R. p. ____; Jeffri Hergert's Memorandum Supporting and Supplementing Motion for Relief from Default and Motion for Reconsideration pp. 7-9). Rule 60(b), SCRCP provides in pertinent part as follows:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
(1) mistake, inadvertence, surprise, or excusable neglect;

...
(2) fraud, misrepresentation, or other misconduct of an adverse party

Rule 60, S.C. R. Civ. P. “[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 the defendant has been served with a summons and complaint.” *McClurg*, 380 S.C. at 571, 671 S.E.2d at 92. 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 the 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 the plaintiff’s counsel and the insurer, the 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.*

Other courts have held likewise, and at least two such cases were identified by Justice Hearn in her concurrence in part to *McClurg*. *See id.*, 380 S.C. at 582, 671 S.E.2d at 98 (Hearn, C.J., concurring in part) (citing *McGee v. Reynolds*, 618 N.E.2d 40 (Ind. Ct. App. 1993)). As described by Justice Hearn, the *McGee* court affirmed a decision granting an at-fault driver’s motion to set aside default judgment “where the plaintiff’s attorney failed to give notice of the lawsuit to the defendant’s insurer.” *McClurg* at 582, 671 S.E.2d at 98. Justice Hearn cited the *McGee* court’s description of the attorney’s behavior as “bad faith and ‘smack[ing] of chicanery and unfair advantage’ which should not be tolerated.” Justice Hearn further cited *Boles v. Weidner*, 449 N.E.2d 288, 290 (Ind.1983), which found that a plaintiff’s failure to notify the defendant’s insurer of the existence of the lawsuit after negotiations had occurred was a “proper

consideration to give in granting the motion to set aside the default judgment.” *Boles*, 449 N.E.2d 288, 290 (Ind. 1983).

In the present matter, relief from default is justified under the Rule 60 standard, including the surprise, excusable neglect, or other misconduct factors. (*See* R. p. ____; Jeffri Hergert’s Memorandum Supporting and Supplementing Motion for Relief from Default and Motion for Reconsideration pp. 7-9). The insurance carrier, National Interstate, and Respondent, Robert Buskirk, began communicating regarding Respondent’s claim in 2016 following the accident. (R. p. ____; *Aff. of Jason Ramsey*). Respondent 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. (R. p. ____; *id.*). 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 Respondent was still treating. (R. p. ____; *id.*). On one occasion in particular, a claims representative spoke with Respondent’s counsel’s staff on November 16, 2018, *after* Respondent had already filed his Complaint. (R. p. ____; *id.*). National Interstate was told that Respondent’s counsel was still trying to “piece a lot together,” and at no point was National Interstate informed that suit had already been filed. (R. p. ____; *Id.*). National Interstate sent Respondent’s counsel at least two additional letters, one dated March 15, 2018, and another dated October 11, 2018, requesting information regarding Respondent’s injuries and treatment and requesting a settlement demand. (R. p. ____; *id.*). Thereafter, National Interstate’s claims representative reached out to Respondent’s counsel’s office on at least two more occasions—once on December 17, 2018, and again on January 15, 2019—and yet Respondent’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 Appellant had been sued and had failed to answer. (R. p. ___; *id.*).

National Interstate had reasonable justification to believe that it would be informed of the status of the lawsuit. Respondent's counsel affirmatively indicated to National Interstate that National Interstate should direct further correspondence to him. (*See* R. ___; *id.*). Further, National Interstate engaged with Respondent's counsel in attempts to negotiate the suit, and was even told—after a complaint had been filed—that things were still being pieced together. (*See* R. ___; *id.*). By engaging National Interstate in communication and reporting that Respondent was still treating, while also failing to inform National Interstate of the pending Complaint and default, Respondent's counsel and/or representative 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 the alleged default, despite ongoing and active communication regarding the claim from National Interstate, it appears Respondent's counsel engaged in tactics designed to surprise National Interstate and its insureds while avoiding proceedings on the merits. *See McGee*, 618 N.E.2d at 41 (“The decision of [plaintiff's] attorney not to answer [the insurance carrier's] inquiry showed a lack of good faith to settle the claim and was a decision to conceal the status of his client's law suit.”).

In addition to the above, the evidence set forth *supra* at Section II.B.2. also supports relief under Rule 60. In particular, the factors showing an explanation for default under Rule 55 are relevant to showing surprise, excusable neglect, misrepresentation, and misconduct relevant under Rule 60.

In summary, Appellant met Rule 60's surprise, excusable neglect, misrepresentation, and misconduct requirements, especially given the history of contact and negotiations between

Respondent's counsel and the insurer, which continued even after Respondent had already filed suit. Rule 60(b)(1), (3), SCRPC. Therefore, relief is appropriate under Rule 60, SCRPC, and the Court should reverse the ruling of the Special Referee and set aside default and default judgment.

IV. IN THE ALTERNATIVE, BECAUSE THIS MATTER WAS REFERRED TO THE SPECIAL REFEREE BY THE CLERK RATHER THAN BY THE CIRCUIT COURT JUDGE, AND BECAUSE THE REFERRAL AS REQUESTED BYPASSED THE MASTER IN EQUITY, THE SPECIAL REFEREE ERRED IN FAILING TO FIND THAT PROCEEDINGS CONDUCTED BY THE SPECIAL REFEREE WERE VOID.

A. Standard of Review

"The issue of interpretation of a statute is a question of law for the court." *Catawba Indian Tribe of S.C.*, 372 S.C. at 524, 642 S.E.2d at 753.

B. Argument

Appointment of a Special Referee is governed by S.C. Code Ann. § 14-11-60, which 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*. S.C. Code Ann. § 14-11-60. "Pursuant to Rule 53, SCRPC, a master has no power or authority except that which is given to him by the order of reference." *Deep Keel, LLC v. Atl. Private Equity Grp., LLC*, 413 S.C. 58, 75, 773 S.E.2d 607, 616 (Ct. App. 2015). Further, where an order of reference purports to provide authority beyond that which may be referred under South Carolina law, the master-in-equity lacks jurisdiction to conduct those acts. *See First-Citizens Bank & Tr. Co. of S.C. v. Hucks*, 305 S.C. 296, 298, 408 S.E.2d 222, 223 (1991) (finding that master-in-equity lacked jurisdiction to conduct jury trial despite order of reference from circuit court purporting to provide such authority). "Without jurisdiction, a court cannot proceed at all in any cause; jurisdiction is the power to declare law, and when it ceases to exist,

the only function remaining to a court is that of announcing the fact and dismissing the cause.” *Limehouse v. Hulsey*, 404 S.C. 93, 104, 744 S.E.2d 566, 572 (2013).

In the present case, this matter was improperly referred by the Clerk directly to the Special Referee based on a Motion for Entry of Default and Referral filed by Respondent on March 19, 2019. (*See* R. p. ____; *See* Aff. of Default (Dec. 7, 2018); Mot. for Entry of Default (Mar. 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. As a result, the referral was improper under S.C. Code Ann. § 14-11-60.

In addition, the March 20, 2019 Order of Reference is signed only by the Deputy Clerk of Common Pleas, not by a circuit judge as required by § 14-11-60. *See* R. p. ____; Order of Reference to Special Referee (March 20, 2019); S.C. Code Ann. § 14-11-60 (stating that “the presiding circuit court judge... may appoint a special referee....”). As a result, the referral was not effective to convey jurisdiction to a special referee.

In summary, the Special Referee lacked subject matter jurisdiction to conduct proceedings in the matter because (a) 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) the referral order was signed only by a deputy clerk without statutory authority to refer this matter to a special referee. Thus, the proceedings conducted by the Special Referee and the Order entered by the Special Referee are void.

Further, because the default judgment proceedings conducted by the Special Referee are void, Appellant requests that this court further set aside entry of default under Rule 55, S.C. R. Civ. P., as set forth *supra* at Section II.B.2.

V. BECAUSE THE DAMAGES AWARD WAS NOT SUPPORTED BY A PROPONDERANCE OF THE EVIDENCE, THE DEFAULT JUDGMENT AWARD IS EXCESSIVE AND SHOULD HAVE BEEN SET ASIDE.

A. Standard of Review

“The decision whether to set aside an entry of default judgment lies solely within the sound discretion of the trial judge.” *Sundown*, 383 S.C. at 606, 681 S.E.2d at 888. However, the trial court’s decision may be reversed on appeal where there is “a clear showing of an abuse of that discretion.” *Id.* “An abuse of discretion occurs when the judge issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support.” *Id.* at 607, 681 S.E.2d at 888 (citing *In re Estate of Weeks*, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct. App. 1997)). Reversal is appropriate when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. *See McDonald*, 343 S.C. at 325, 540 S.E.2d at 467. Thus, even under the abuse of discretion standard, an appellant is entitled to a reversal if the appellant shows “both error and resulting prejudice.” *Gibson*, 403 S.C. at 38, 742 S.E.2d at 52.

B. Argument

As a final matter, the Special Referee erred in his award of damages. “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*, 275 S.C. at 560, 274 S.E.2d at 289. “[I]n 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.” Rule 54(c), SCRPC.

Here, the damages were not in keeping with the allegations of the complaint or the proof submitted. (R. p. ____; Transcript of September 18, 2019 Hearing p. 31:2-32:8). As discussed *infra* at Section II.B.2.c., Respondent’s alleged damages reported to the insurance company totaled approximately \$20,000, and Respondent’s damages from the medical index totaled only about \$34,000. However, the Special Referee awarded \$400,000—well over ten times even the higher amount of \$34,000, and twenty times the \$20,000 amount reported to the insurer. Further, Respondent 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 were attached as exhibits to the Special Referee’s damages hearing, no medical records were attached to show the nature of the treatment or the cause of Respondent’s need for treatment, and even the medical index drafted by Respondent and referenced in the Order does not appear in the exhibits to the Order. (*See* R. p. ____; Transcript of May 21, 2019 Hearing (indicating three exhibits introduced to record, none of which were medical index)).

Respondent 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. (*See* R. p. ____; Transcript of May 21, 2019 Hearing). In any case, but especially where damages of over 10 times the alleged medical 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 which has been submitted.*” *See Lewis*, 275 S.C. at 560, 274 S.E.2d at 289. Respondent’s self-serving testimony and the medical index created by Respondent—which

was not even introduced as an exhibit—are the only alleged evidence of Respondent’s damages, bills, or causation, and these are not sufficient to support the excessive award in this case. As a result, the award was not in keeping with the proof submitted and the judgment of the Special Referee should be reversed.

CONCLUSION

In light of the arguments above, Appellant respectfully requests this Court to hold that the circuit court erred by (1) failing to find that the default judgment was void; (2) failing to set aside default; (3) failing to set aside default judgment; and/or (4) failing to find that the damages award was excessive.

Respectfully submitted,

May 21, 2020

s/Brandon R. Gottschall
Mark S. Barrow
S.C. Bar No. 7821
Brandon R. Gottschall
S.C. Bar No. 100621
Sweeny Wingate & Barrow, P.A.
Post Office Box 12129
Columbia, South Carolina 29211
(803)256-2233
Attorneys for Appellant Jeffri Hergert

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Civil Action No. 2018-CP-32-02997

RECEIVED
May 21 2020
SC Court of Appeals

Arthur Robert Buskirk..... Respondent,

v.

Jeffri Hergert Appellant,

PROOF OF SERVICE

I certify that I have served a copy of Appellant's Initial Brief, via email and by depositing a copy of the same in the United States Mail, Postage Prepaid, on May 21, 2020, addressed to Arthur Robert Buskirk's Counsel of record referenced below.

May 21, 2020

s/Brandon R. Gottschall
Mark S. Barrow, SC Bar No. 7821
Brandon R. Gottschall, SC Bar No. 100621
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 Kenneth E. Berger, LLC
5205 Forest Drive, Suite 2
Columbia, SC 29206
Attorneys for Respondent



SWEENY WINGATE & BARROW P.A.

May 21, 2020

Reply to: Main Office

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

VIA ELECTRONIC FILING

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

RECEIVED

May 21 2020

SC Court of Appeals

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 Initial Brief of Appellant Jeffri Hergert, the Designation of Matter to be Included in the Record on Appeal, as well as Proofs of Service for each in connection with the above-referenced matter, which I am hereby filing electronically.

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.

s/Brandon R. Gottschall

Brandon R. Gottschall

BRG/mha
Enclosures

cc: All counsel of record