STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF ORANGEBURG)	
)	C/A No. 2019-CP-38-00053
Kacey Green and Charinrath Green,)	
)	
Plaintiffs,)	
versus)	**AMENDED ORDER**
)	
Mervin Lee Johnson,)	
)	
Defendant.)	

THIS MATTER CAME BEFORE THIS COURT on July 13, 2020, as to Defendant's Motion to Alter or Amend filed on November 14, 2019, pertaining to this Court's order entered on November 4, 2019, denying Defendant's Motion to Dismiss, or in the Alternative, to Set Aside Entry of Default and Order of Damages and Allow Defendant to Responsively Plead ("Motion to Dismiss"). Present at the hearing were: Todd R. Flippin of Holcombe Bomar P.A. for the Defendant, Virginia W. Williams for the Plaintiffs, and E. Mason West for the Plaintiffs (appearing remotely).

The procedural history of this action is summarized as follows. Plaintiff filed this lawsuit on or about January 11, 2019, alleging negligence, recklessness, carelessness, willfulness, wantonness, and gross negligence. Plaintiffs served Helen Johnson by personal service at 348 High Street, Orangeburg, SC 29115, Defendant Mervin Lee Johnson's address of record, on January 26, 2019. The Court concluded that Defendant Johnson was properly served with the summons and complaint. Nevertheless, Defendant did not timely answer or make an appearance in this matter. An order of default was entered on or about March 8, 2019. Defendant was properly notified of this hearing but did not appear.

A damages hearing was held May 22, 2019. This court's order of damages was filed June 5, 2019. On or about June 17, 2019, Defendant appeared, through counsel, by filing a Notice of Motion and Motion to Dismiss, or in the Alternative, to Set Aside Entry of Default and Order of Damages and Allow Defendant to Responsively Plead ("Motion to Dismiss"). On October 17, 2019, Defendant filed two affidavits, one from insurance adjuster and one from a trucking company representative. This Court held a hearing on Defendant's Motion to Dismiss on October 21, 2019. Present at the hearing were A. Walker Barnes for the Defendant, and David R. Williams and E. Mason West for Plaintiffs. On November 4, 2019, this Court entered an order denying Defendant's motion and found the damages order remained in effect. Defendant then filed his Motion to Alter or Amend on November 14, 2019. The Court held its hearing on Defendant's Motion to Alter or Amend on July 13, 2020.

At that hearing, the Court denied the motion insofar as Defendant's liability was concerned but granted the motion on the issue of the amount of damages awarded in the June 5, 2019 damages order. Plaintiffs requested leave of Court to brief the issue of the timeliness of Defendant's Motion to Alter or Amend. Plaintiffs thereafter submitted a proposed order denying Defendant's motion as to both liability and damages. Because the Court finds Plaintiffs' arguments on the timing of Defendant's motion unavailing, its rulings from the bench stand. Therefore, the Court's June 5th damages order is withdrawn. The Court's amended findings of fact and conclusions of law are as follows.

I. Amended Findings of Fact

1. On or about February 28, 2018, Plaintiff Kacey Green was a driver of a vehicle traveling westbound on Interstate 26, near or around exit 209, State of South Carolina, County of Charleston. Plaintiff Charinrath Green was riding as a passenger in same vehicle.

Defendant Johnson was an operator of a 2005 tractor-trailer truck, traveling westbound on Interstate 26, positioned to the rear of the Plaintiffs, when Defendant Johnson violently collided with Plaintiffs, striking Plaintiffs' vehicle with multiple impacts, resulting in injuries and damages to Plaintiffs.

2. Defendant Johnson was an independent contractor for CDS Transport, Inc., which is insured by Claims Direct Access ("CDA").
3. Plaintiffs' counsel provided Defendant's insurer, CDA, with notice of representation on March 13, 2018.
4. A representative of Defendant's insurer, Nikole Shields, responded to that notice on March 27th seeking additional information for the insurer to investigate Plaintiffs' claims.
5. In the course of their correspondence, Plaintiffs' counsel provided Ms. Shields with medical records and bills. The two spoke by phone and communicated by email on multiple occasions. Plaintiffs' counsel provided a video recording of the accident. Defendant's insurer made an initial offer of settlement, which Plaintiffs rejected. Plaintiff's counsel indicated his intention to recommend the settlement sum of $192,390 to his clients.
6. Plaintiffs' property damage claims were settled through a subrogation claim against Plaintiffs' insurer, USAA. Defendant's insurer satisfied this claim by paying Plaintiffs' insurer with a check releasing any and all property damage claims arising on or about February 28, 2018. USAA's subrogation demand indicated damages to Plaintiffs' 2016 Tesla totaling $1,737.46.
7. Plaintiff filed this lawsuit on or about January 11, 2019, alleging negligence, recklessness, carelessness, willfulness, wantonness, and gross negligence. The complaint does not allege property damage claims.

8. Defendant Mervin Lee Johnson was served this lawsuit by personal service upon Helen Johnson, pursuant to S.C. Code Ann. Section 15-9-350, at 348 High Street, Orangeburg, SC 29115, on January 26, 2019, as more fully evidenced in affidavit of personal service filed with this court. The Court finds Defendant was properly served with the summons and complaint

9. Defendant did not timely file an answer or make an appearance in this matter.

10. An order of default was entered on or about March 8, 2019.

11. Defendant was properly notified of this Court's May 22, 2019 damages hearing.

12. At the damages hearing, this Court found as follows:

    a) Defendant was negligent:

        i. In failing to maintain a proper lookout;
        ii. In traveling too fast for conditions;
        iii. In failing to take evasive action to avoid colliding with Plaintiffs;
        iv. In operating his vehicle in disregard for the safety of others on the highway, including Plaintiffs;
        v. In failing to keep proper control of his vehicle;
        vi. In failing to yield the right-of-way to Plaintiffs;
        vii. In failing to exercise the degree of care that a reasonably prudent person would have exercised under the same or similar circumstances.

    b) Defendant's conduct was in violation of, but not limited to, S.C. Code Ann. §§56-5-580, 56-5-1520, 56-5-1930.

    c) Defendant's negligent conduct was the direct and proximate cause of Plaintiffs' injuries and damages, to include but not limited to:

        i. personal injuries;
        ii. great pain and suffering, past, present and future;
        iii. medical expenses, past, present and future;
        iv. shock, embarrassment and mental distress, past, present and future;
        v. mental anguish;
        vi. permanent physical injuries;
        vii. loss of enjoyment of life; and,
        viii. all corresponding damages.

d) The allegations contained in Plaintiffs' Complaint are sufficient to justify a damages award.

e) Plaintiffs incurred significant medical expenses as a result of this accident, including:

Plaintiff Kacey D. Green	(44-year life expectancy)	$5,970.00
Roper ER – Northwoods $857.00		
Roper Physicians $214.00		
Charleston Pain & Rehabilitation $4615.00		
Pharmacy $284.00		
Plaintiff Charinrath Green	(52-year life expectancy)	$6,856.00
Roper Hospital ER – Northwoods $857.00		
Roper Physicians - $214.00		
Charleston Pain & Rehabilitation $3131.00		
South Eastern medical – MRI $2250.00		
Pharmacy $404.00		
	TOTAL:	$12,826.00

The testimony presented conclusively finds that these expenses were not only reasonable and necessary, but that they were all the result of Plaintiffs' injuries suffered as a result of the car accident on February 28, 2018.

f) The medical records and testimony presented substantial evidence of pain and suffering beginning on the date of the collision to the present.

g) The medical records and testimony presented substantial evidence of the need for future medical treatment.

h) The medical records and testimony presented substantial evidence of emotional and mental anguish, anxiety, and loss of enjoyment of life from the date of the collision to the present and into the future.

i) The testimony also conclusively finds that Defendant was negligent in his conduct.

13. In Defendant's supplemental filing in support of his motion to alter or amend this Court's denial of his motion to dismiss, Defendant presented evidence in the form of a video recording of the subject collision. This video was received from Plaintiffs' counsel by Defendant's affiant, Nikole Shields, and previously included in Defendant's Motion to

Dismiss. The video, which the Court has reviewed, shows a relatively minor rear-end collision. The Court did review this same video at the original damages hearing.

14. Defendant's supplemental filing also included a photograph purporting to show the rear of Plaintiffs' vehicle after the collision.

II. Amended Conclusions of Law

1. "[B]y suffering a default, the defaulting party is deemed to have admitted the truth of the plaintiff's allegations and to have conceded liability.' *Austin v. Specialty Transp. Servs. Inc.*, 358 S.C. 298, 319 (Ct. App. 2004) (quoting *Roche v. Young Bros. Inc.*, 332 S.C. 75, 81 (1998)). Therefore, inasmuch as the Defendant in this action is in default, the factual allegations of the Complaint relating to his liability are taken as true. Additionally, it appears to this Court by a preponderance of the evidence, the Defendant's negligence caused injuries and damages to Plaintiff.

2. A motion to alter or amend the judgment under Rule 59(e) must be "served not later than 10 days after receipt of written notice of the entry of the order." SCRCP Rule 59(e). Defendant's Rule 59(e) motion was timely filed on November 14, 2019, which is within 10-days of this Court's November 4, 2019 order denying Defendant's motion to dismiss. The Defendant's Motion of June 17, 2019 included a request to Set Aside Entry of Default and Order of Damages. This Court's Order of November 14, 2019 upheld the previous Order issued as to liability but did not address damages as it should have. Therefore, the Defendant's Motion to Alter or Amend is appropriate for the Court to reconsider the amount of damages previously awarded.

3. Defendant's motion to alter or amend argued that the default judgment should be set aside pursuant to Rules 6(b), 55(c), and 60(b), SCRCP. The motion further sought

reconsideration of Defendant's motion to dismiss citing Rules 12 and 56, SCRCP alleging improper service of process and arguing that the damages awarded were disproportionate to the medical damages exhibited before the Court.

4. If, as is the case here, when "a judgment by default has been entered, [it] may likewise [be] set aside in accordance with Rule 60(b)." Rule 55, SCRCP. Rule 60(b) allows relief from a final judgment or order for five reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud, misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application. Rule 60(b), SCRCP.
5. In *McClurg v. Deaton*, 380 S.C. 563, 573, 671 S.E.2d 87, 92–93 (Ct. App. 2008), the Court of Appeals held that plaintiff's attorney's contacts with the defendant's insurer, and subsequent failure to notify the insurer of the lawsuit, may amount to misrepresentation and misconduct, which justify relieve from "a final judgment [or] order" under Rule 60(b)(3). The Court does not conclude that Plaintiffs' counsel engaged in any intentional misconduct. However, much like the court in *McClurg*, the Court's findings of fact "at least, support[s] relief based on mistake, inadvertence, surprise or excusable neglect." 380 S.C. at 573, 671 S.E.2d at 92–93. Therefore, the Court grants, in part, Defendant's motion.
6. The trial judge has discretion to grant a motion to set aside default when 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." *Sundown Operating Co v. Intedge*

Indus., 383 S.C. 601, 606, 681, S.E.2d 885, 888 (2009). "[A] party seeking relief from an entry of default [must] provide an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice." *Id.* If there is a satisfactory explanation for default, the court then considers "(1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted." *Id.* (citing *Wham v. Shearson Lehman Bros., Inc.*, 298 S.C. 462, 465, 381 S.E.2d 499, 501-02 (Ct. App. 1989)).

7. The Court finds that Defendant's appearance in this action on June 17, 2019, within 10-days of learning of the default judgment on June 7, 2019, was adequate to satisfy the first *Wham* factor. See *Sundown Operating Co.*, 383 S.C. at 607, 681 S.E.2d at 888 (providing that "[o]nce a party has put forth a satisfactory explanation for the default, the trial court must also consider" the *Wham* factors).

8. As to the second *Wham* factor, the Court finds as a matter of law that Defendant has not evidenced a meritorious defense as to his liability for causing the February 28, 2018 accident. However, the Court amends its July 5, 2019 order finding a meritorious defense to the damages award.

9. To the extent Plaintiffs challenge Defendant's proffer of the affidavits of Defendant's insurer's agents, the Court finds this evidence meets Defendant's burden in it motion to alter or amend. The *McClurg* court relied on *Edwards v. Ferguson*, to determine that a Rule 60(b) motion is properly made by an insurer in circumstances such as those present in this case. *McClurg*, 380 S.C. at 571–72, 671 S.E.2d at 92 (citing *Edwards v. Ferguson*, 254 S.C. 278, 175 S.E.2d 224 (1970)). Further, in *Williams v. Carpenter*, the court found that an affidavit from the defendant's counsel indicating the existence of a meritorious defense

"constituted a *prima facie* showing of a meritorious defense to the plaintiff's action. 273 S.C. 339, 341–42, 256 S.E.2d 316, 317, (1979) (citing *Bledsoe v. Metts*, 258 S.C. 500, 189 S.E.2d 291 (1972)).

10. As to the burden to establish that he has a meritorious defense, Defendant Johnson need not show that he would prevail on the merits, but only that his defense is meritorious. *McClurg*, 380 S.C. 563, 575, 671 S.E.2d 87, 93–94 (citing *Thompson v. Hammond*, 299 S.C. 116, 120, 382 S.E.2d 900, 903 (1989)). Defendant has presented sufficient evidence that the Court's order dated June 5, 2019 awarding property damages, which the parties had previously settled, presents a meritorious defense.

11. As to the third *Wham* factor, the prejudice to the parties, the Court finds that any inconvenience to Plaintiffs in amending the Court's June 5th order cannot compare to the prejudice Defendant would suffer from a damages award disproportionate to the losses alleged and evidenced to the Court or to the award of previously settled property damages.

12. Finding that the essential elements of Plaintiffs' claim have been established, and in light of the amended findings of fact, the Court now amends its calculation of damages that the preponderance of the evidence shows will fairly and adequately compensate Plaintiffs for the injuries they suffered. The evidence reflects that because of the incident, Plaintiffs indeed sustained the injuries indicated in the Amended Findings of Damages, *supra*. The Court concludes that these injuries and damages, the attendant pain and suffering, and the incurring by Plaintiff of medical expenses for treatment all resulted from the Defendant's negligence.

13. Where a case comes before the Court for a bench trial, "[t]he trial judge has considerable discretion regarding the amount of damages, both actual and punitive." *Austin*, 358 S.C. at 310, 594 S.E.2d at 873.

14. Generally, in order for damages to be recoverable, the evidence should be such as to enable the court or jury to determine the amount thereof with reasonable certainty or accuracy.... While neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation, proof with mathematical certainty of the amount of loss or damage is not required. *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 43, 691 S.E.2d 794, 135, 146 (2010) (quoting *Whisenant v. James Island Corp.*, 277 S.C. 10, 13, 281 S.E.2d 794, 796 (1981)).

15. "Actual damages are properly called compensatory damages, meaning to compensate, to make the injury party whole, to put him in the same position he was in prior to the damages received insofar as this is monetarily possible." *Austin*, 358 S.C. at 311, 594 S.E.2d at 874. The goal is to restore the injured party, as nearly as possible through the payment of money, to the same position he was in before the wrongful injury occurred." *Id.*

16. In determining the amount of compensation for personal injuries, it is proper to consider past and present aspects of the injuries. This would include physical and mental pain and suffering, expenses incurred for necessary medical treatment, loss of time and income which resulted from the impairment of the ability to work and earn a livelihood, the loss of enjoyment of life suffered as a result of the injury, and any other losses which are reflected by the character of the injury.

17. The injured party may recover for those future damages that are reasonably sure to result from the injuries. The principle underlying compensation for future damages is that only

one action can be brought and, therefore, only one recovery had. It is proper to include in the estimate of future damages compensation for loss of capacity for work or attention to the plaintiff's ordinary business, future medical expenses, and pain and suffering which will, with reasonable certainty, result. See *Boan v. Blackwell*, 343 S.C. 498, 541 S.E.2d 242 (2001). "[E]xpert testimony admitted to prove future damages need not meet the most probable standard. To be admissible, future damages do not need to be proved to a mathematical certainty. Oftentimes a verdict involving future damages must be approximated." *Pearson v. Bridges*, 337 S. C. 524, 529, 524 S.E.2d 108, 111 (1999).

18. Plaintiff is also entitled to damages for "loss of enjoyment of life" and "pain and suffering." See *Boan*, 343 S.C. at 499, 541 S.E.2d at 243 (2001). These are two separately compensable elements of damages. See *id.* "Pain and suffering compensates the plaintiff for the physical discomfort and the emotional response to the sensation of pain caused by the injury itself." *Id.* at 501-02, 541 S.E.2d at 244.

19. Further, "[s]eparate damages are given for mental anguish where the evidence shows, for example, that the injured person suffered shock, fright, emotional upset, and/or humiliation as the result of the defendant's negligence." *Boan*, 343 S.C. at 502, 541 S.E.2d at 244 (citing *Turner v. A B C Jalousie Co. of North Carolina, Inc.*, 251 S.C. 92, 160 S.E.2d 528 (1968)).

20. Damages for loss of enjoyment of life, on the other hand, "compensate for the limitations, resulting from the defendant's negligence, on the injured person's ability to participate in and derive pleasure from the normal activities of daily life, or for the individual's inability to pursue his talents, recreational interests, hobbies, or avocations." *Boan*, 343 S.C. at 502, 541 S.E.2d at 244.

21. There is no definite standard by which standard to compensate the plaintiff for pain and suffering. The fact finder has the authority to determine the amount, if any, to be allowed for pain and suffering, using calm and reasonable judgment to ensure that the damages are just and reasonable in light of the testimony and evidence presented in the case. See *Smalls v. South Carolina Dep't of Educ.*, 339 S.C. 208, 528 S.E.2d 682 (Ct. App. 2000).

III. Amended Award

Given Plaintiffs' uncontested medical bills of $12,826.00; and the additional evidence presented at the hearing, **IT IS SO ORDERED** that Plaintiffs are awarded $ 250,000.00 to be divided *pro rata* according to each Plaintiff's medical expenses as indicated below in actuals for their medical expenses, expected future medical expenses, pain and suffering, future pain and suffering, loss of enjoyment of life, future loss of enjoyment of life, and punitive damages as a result of this accident.

Personal injury claim –

Plaintiffs Kacey Green and Charinrath Green	$ 190,000.00
Punitive Damages	$ 60,000.00
TOTAL:	$ 250,000.00

The Honorable James B. Jackson
First Judicial Circuit, Master-In-Equity

August 10, 2020

Orangeburg, South Carolina