THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

The Honorable James B. Jackson, Jr., Master-in-Equity

Case No. 2020-001254

Kacey Green and Charinrath Green, ... Appellants-Respondents,

v.

Mervin Lee Johnson, ...Respondent-Appellant.

MOTION TO HOLD APPEALS IN ABEYANCE

On August 24, 2020, Appellants-Respondents Kacey and Charinrath Green filed a S.C.R.Civ.P. 59 motion challenging Judge James B. Jackson's Amended Order on Damages. Exhibit A. Before the court ruled on that motion, Appellants-Respondents served their Notice of Appeal, which complains of the same order. The Rule 59 motion was never withdrawn and remains unresolved. Therefore, Appellants-Respondents' appeal is untimely. Respondent-Appellant Mervin Lee Johnson moves for an order holding Appellants-Respondents' Notice of Appeal, and Respondent-Appellant's Notice of Cross-appeal, (collectively, the "Appeals") in abeyance pending resolution of the unresolved Rule 59 motion. Respondent-Appellant relied on the stay imposed by that motion and now suffers from his position "between the proverbial rock and a hard place" predicted in *Elam v. South Carolina Dept. of Transp.*, 602 S.E.2d 772, 781, 361 S.C. 9, 25 (2004).

The procedural history in the trial court is summarized as follows. Appellants-Respondents filed their personal injury lawsuit in Orangeburg County on January 11, 2019. They moved for an order of default, which was entered on or about March 8, 2019.

> 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"). ... This Court held a hearing on Defendant's Motion to Dismiss on October 21, 2019. ... On November 4, 2019, this Court entered [a Form 4] order denying Defendant's motion. Defendant 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.

Exhibit B, Amended Order, dated August 14, 2020. At that hearing, Judge Jackson granted Respondent-Appellant's motion in part and amended the damages awarded in the June 5, 2019 order.[1] On August 24, 2020, Appellants-Respondents timely filed a S.C.R.Civ.P. 59 Motion to Alter or Amend the Amended Order on Damages. Notwithstanding the stay of the deadline to appeal imposed by their motion, Appellants-Respondents served a document purporting to be a Notice of Appeal on September 14, 2020. Appellants-Respondents did not withdraw their Rule 59 motion.

In reliance on the stay on the appeal deadline imposed by that Rule 59 motion, Respondent-Appellant did not serve a Notice of Appeal. However, Respondent-Appellant received on September 18, 2020 an email from the Master-in-Equity indicating that the Court no longer had

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[1] As the Amended Order on Damages notes, Plaintiffs' evidenced medical expenses totaling $12,826.00. The court's June 5, 2019 damages order awarded personal injury damages of $1,000,000.00, property damages of $10,000.00, and punitive damages of $750,000.00. The August 24, 2020 order awarded $190,000.00 in personal injury damages and $60,000.00 in punitive damages. Ex. B. The order recognized that Appellants-Respondents settled property damage claims with Respondent-Appellant's insurer prior to filing suit. *Id.*

jurisdiction over Plaintiffs' Rule 59 Motion. Exhibit C. Therefore, out of an abundance of caution Respondent-Appellant served on September 25, 2020 his Notice of Cross-Appeal.

Appellants-Respondents' timely Rule 59 motion stayed the time to appeal until "receipt of written notice of entry of the order granting or denying such motion." SCRCP, Rule 59(f). Appellants-Respondents' Rule 59 motion was filed within ten-days of Judge Jackson's Amended Order on Damages (the "Order"). Thus, their Notice of Appeal served on September 14th was premature.

Furthermore, as they argue in their Rule 59 motion, Appellants-Respondents were required to raise their concerns with the August 14th order to the trial court. "A party must file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." *Elam*, 361 S.C. at 24, 602 S.E.2d at 780. In their motion to reconsider, Appellants-Respondents argue that numerous issues were raised, but not ruled on, by Judge Jackson's Order. Ex. B. These include Appellants-Respondents' legal and factual arguments that:

- they needed "clarification on the findings of fact which support the award" of punitive damages;
- Judge Jackson "no longer had jurisdiction to modify its previous" damages order;
- pre-suit discussions and correspondence are not a basis for findings at a damages hearing
- the Court misconstrued [*McClurg v. Deaton*, 380 S.C. 563, 671 S.E.2d 87 (Ct. App. 2008)] as it pertains to the relationship between a plaintiff's counsel and the insurer;"
- the Court's "finding that all property damage claims were released by Plaintiffs' is inappropriate;"
- the Court's "findings of a meritorious defense as to damages only is an inappropriate reading of the factors elaborated in *Wham v. Shearson Lehman, Bros, Inc.*, 298 S.C. 462, 465, 381 S.E. 2d 499, 501-02 (Ct. App. 1989);"
- the Court improperly held that diminished value of the nearly new vehicle as well as loss of use of the vehicle" were not within the scope of Plaintiffs' release of property damage claims; and,
- photographs submitted at the hearing were inadmissible hearsay.

Ex. A, Plaintiffs' Motion to Reconsider, dated August 24, 2020. Appellants-Respondents never received a ruling on these issues.

For these reasons, the Court should grant Respondent-Appellant's motion and hold the Appeals in abeyance to allow Judge Jackson to rule on Appellants-Respondents' Rule 59 motion.

HOLCOMBE BOMAR, P.A.
P.O. Box 1897
Spartanburg, SC 29304
(864) 594-5300

By: Todd R. Flippin

William B. Darwin, Jr. (S.C. Bar No. 15109)
Todd R. Flippin (S.C. Bar No. 101197)
Attorneys for Respondent-Appellant

Spartanburg, South Carolina

December 9, 2020

Other Counsel of Record:

David R. Williams, Esq.
Charlie H. Williams III, Esq.
Virginia W. Williams, Esq.
WILLIAMS &WILLIAMS
1281 Russell Street
Post Office Box 1084
Orangeburg, S.C. 29116-1084
Phone: (803) 534-5218

E. Mason West, Esq.
WEST LAW FIRM, P.A.
P.O. Box 1869
207 Carolina Avenue
Moncks Corner, SC 29461
Phone: (843) 761-5626

Attorneys for Appellants-Respondents

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

The Honorable James B. Jackson, Jr., Master-in-Equity

Case No. 2020-001254

Exhibit A

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	)	
	)	**PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR RECONSIDERATION OF AMENDED FINAL ORDER**
Mervin Lee Johnson,	)	
	)	
Defendant.	)	

PLEASE TAKE NOTICE, pursuant to Rule 59(E), SCRCP, Plaintiffs Kacey Green and Charinrath Green hereby submit this motion for reconsideration of the Court Amended Order dated August 14, 2020. In support of this motion, the Plaintiffs show good cause as will be more fully set forth in Plaintiffs' forthcoming memorandum in support of this motion.

Plaintiff's expressly raises the issues as follows:

1. Plaintiff contends this Court appropriately ruled on all issues of law and fact as found in the Court's November 4, 2019 Order.
2. Plaintiff contends that after the previous Order of June 5, 2019 became final, this Court no longer had jurisdiction to modify its previous said Order.
3. Plaintiff contends that Defendants have not complied in the timeliness of their filings in motions as per the South Carolina Rules of Civil Procedure.
4. Plaintiff contends that pre-suit discussions and correspondence are not a basis for findings at a damages hearing.
5. Plaintiff contends the affidavits of insurance adjusters were not proper for consideration in the damages ruling.

6. Plaintiff contends that Claims Direct Access is not a party to this action. Claims Direct Access has never made a motion to intervene. Therefore, any evidence from Claims Direct Access cannot be considered.
7. Plaintiff contends that any evidence presented without Defendant's counsel having any contact or communication with the Defendant himself is improper evidence.
8. Plaintiff contends that a factual finding of the Defendant Johnson being an independent contractor is inappropriate as there has been no evidence presented by Johnson or his employer to suggest his employment agreement with CDS Transport, Inc.
9. Plaintiff contends that a factual finding that all property damage claims were released by Plaintiffs' is inappropriate as no proper evidence has been presented to suggest the same.
10. Plaintiff contends that findings of a meritorious defense as to damages only is an inappropriate reading of the factors elaborated in *Wham v. Shearson Lehman, Bros, Inc.*, 298 S.C. 462, 465, 381 S.E. 2d 499, 501-02 (Ct. App. 1989); see also *McClurg v. Deaton*, 380 S.C. 563, 671 S.E.2d 87 (Ct. App. 2008).
11. Plaintiff contends the Court inappropriately considered factors in Rule 60, SCRCP, wherein said factors had previously been considered in its November 4 Order.
12. Plaintiff contends that the Court's August 14, 2020 misconstrues the *McClurg v. Deaton*, 380 S.C. 563, 671 S.E.2d 87 (Ct. App. 2008). A non-party cannot claim mistake, inadvertence, surprise or excusable neglect." Defendant's counsel still to date cannot provide this Court with any explanation whatsoever of his failure to appear and reason for default. On information and belief, Counsel for Defendant still cannot

represent to this Court that he has had any personal contact with the Defendant at any time.

13. Plaintiff contends the Court misconstrued *McClurg, supra,,* as it pertains to the relationship between a plaintiff's counsel and the insurer. The Court also misinterpreted the rulings in *McClurg, supra,* as they pertain to a meritorious defense.
14. Plaintiff contends that the property damage claims were not released in full. Specifically, diminished value of the nearly new vehicle as well as loss of use of the vehicle constituted appropriate claims for property damage. See Exhibit A.
15. Plaintiff contends that any photographs submitted by Defense counsel are not appropriate for consideration and they are hearsay. Defendant's have not laid a proper foundation, and Defendant himself has not presented anything to corroborate that he took the picture or can verify the picture as accurate.
16. Plaintiff contends that the August 14, 2020 Order contains an award for punitive damages and hereby seeks clarification on the findings of fact which support the award.

WHEREFORE, the Respondent moves this Court to alter or amend its August 14, 2020 Order to reflect its prior Order of June 5, 2019, and Order affirming the same on November 4, 2019.

Respectfully submitted,

S/ Virginia Williams _____
Virginia Williams
Bar # 77898
David Williams
Bar #: 77899
Williams & Williams
1281 Russell Street
P.O. Box 1084

Orangeburg, SC 29116

August 24, 2020
Moncks Corner, SC

E. Mason West _____
E. Mason West, Esq.
Bar # 100788
WEST LAW FIRM, P.A.
P.O. Box 1869
207 Carolina Avenue
Moncks Corner, SC 29461
843.761.5626 (Telephone)
843.761.5627 (Fax)
Mason@WestLawFirmSC.com

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In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
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The Honorable James B. Jackson, Jr., Master-in-Equity

Case No. 2020-001254

Exhibit B

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

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In The Court of Appeals

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Exhibit C

Holcombe Bomar, P.A.

101 W. St. John Street, Suite 200,
Spartanburg, SC 29306

P.O. Box 1897
Spartanburg, SC 29304

phone (864) 594-5300
fax (864) 585-3844

Direct Dial: (864) 594-5323

www.holcombebomar.com

tflippin@holcombebomar.com

William U. Gunn
Koger M. Bradford
William B. Darwin, Jr.
W. McElhaney White
A. Todd Darwin
Todd R. Flippin
Konstantine S. Diamaduros

Neville Holcombe, 1902-1983
Horace L. Bomar, 1912-1994

September 17, 2020

Via E-Mail & US Mail
The Honorable James B. Jackson, Jr.
151 Docket St. (Room 305)
Orangeburg, SC 29116

RE: Kacey D. Green and Charinrath Green v. Mervin Lee Johnson
C/A No.: 2019-CP-38-00053
Our File No: 15580

Dear Judge Jackson:

I hope you are doing well and that things are returning to normal for your courtroom.

Plaintiffs filed on August 24th a Motion to Reconsider the Court's August 10, 2020 Amended Order on damages. Will you please advise if there is a specific date by which the Court requires Defendant's response to that motion?

Very Respectfully,

HOLCOMBE BOMAR, P.A.

Todd R. Flippin

Todd R. Flippin

TRF/vcc

cc: E. Mason West, Esq. (Via E-Mail)
Virginia "Ginny" Williams, Esq. (Via E-Mail)

Todd Flippin

From: Valerie Coleman
Sent: Friday, September 18, 2020 11:16 AM
To: Todd Flippin
Subject: FW: -FW: -FW: Kacey D. Green and Charinrath Green v. Mervin Lee Johnson C/A No.: 2019-CP-38-00053 HB File No: 15580
Attachments: Judge Jackson 9.17.20.pdf

Todd,

See the email below that I received on this letter we sent yesterday.

Let me know what we should do next?

Thanks

Valerie Coleman, Paralegal

Holcombe Bomar, P.A.
P.O. Drawer 1897
101 W. St. John Street, Suite 200
Spartanburg, SC 29304 (29306)
Direct Dial: (864) 594-5326
Fax: (864) 585-3844
vcoleman@holcombebomar.com

From: Barbara O. Beach <BBeach@orangeburgcounty.org>
Sent: Friday, September 18, 2020 11:04 AM
To: Valerie Coleman <vcoleman@holcombebomar.com>; Mason West (mason@westlawfirmsc.com) <mason@westlawfirmsc.com>; Virginia Williams <ginny@williamsattys.com>
Cc: James B. Jackson <JBJackson@orangeburgcounty.org>
Subject: -FW: -FW: Kacey D. Green and Charinrath Green v. Mervin Lee Johnson C/A No.: 2019-CP-38-00053 HB File No: 15580

Ms. Coleman,

Judge Jackson noted the Clerk of Court shows that a Notice of Filing Appeal was filed by the Plaintiff's counsel on September 14, 2020. Therefore, Judge Jackson has stated this Court no longer has jurisdiction in this case.

Barbara

From: James B. Jackson
Sent: Friday, September 18, 2020 9:55 AM
To: Barbara O. Beach
Subject: -FW: Kacey D. Green and Charinrath Green v. Mervin Lee Johnson C/A No.: 2019-CP-38-00053 HB File No: 15580

From: Valerie Coleman [mailto:vcoleman@holcombebomar.com]
Sent: Thursday, September 17, 2020 4:39 PM
To: James B. Jackson <JBJackson@orangeburgcounty.org>
Cc: mason@westlawfirmsc.com; Virginia Williams <ginny@williamsattys.com>
Subject: Kacey D. Green and Charinrath Green v. Mervin Lee Johnson C/A No.: 2019-CP-38-00053 HB File No: 15580

Dear Judge Jackson,

Please find the attached correspondence in reference to the above matter. A hard copy was also placed in the mail to you today.

Thank You

Holcombe Bomar, P.A.

Valerie Coleman, Paralegal

Holcombe Bomar, P.A.
P.O. Drawer 1897
101 W. St. John Street, Suite 200
Spartanburg, SC 29304 (29306)
Direct Dial: (864) 594-5326
Fax: (864) 585-3844
vcoleman@holcombebomar.com

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
Dec 09 2020
SC Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

The Honorable James B. Jackson, Jr., Master-in-Equity

Case No. 2020-001254

Kacey Green and Charinrath Green, ... Appellants-Respondents,

v.

Mervin Lee Johnson, ...Respondent-Appellant.

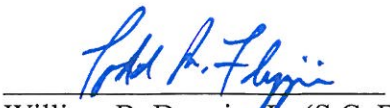
PROOF OF SERVICE

The undersigned hereby certifies that on the 9th day of December, 2020, he has served the Motion to Hold Appeals in Abeyance, along with the appropriate Exhibits in this matter e-mailing copies of the same to the following addresses:

Court Administration
1220 Senate Street, Suite 200
Columbia, SC 29201
tpclark@sccourts.org

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201
ctappfilings@sccourts.org

RESPECTFULLY SUBMITTED,

By: 

William B. Darwin, Jr. (S.C. Bar No. 15109)
Todd R. Flippin (S.C. Bar No. 101197)
HOLCOMBE BOMAR, P.A.
P.O. Box 1897
Spartanburg, SC 29304
(864) 594-5300
Attorneys for Respondent-Appellant

Other Counsel of Record:

David R. Williams, Esq.
david@williamsattys.com
Charlie H. Williams III, Esq.
chwilliams@williamsattys.com
Virginia W. Williams, Esq.
ginny@williamsattys.com
WILLIAMS &WILLIAMS
1281 Russell Street
Post Office Box 1084
Orangeburg, S.C. 29116-1084
Phone: (803) 534-5218

&

E. Mason West, Esq.
mason@westlawfirmsc.com
WEST LAW FIRM, P.A.
P.O. Box 1869
207 Carolina Avenue
Moncks Corner, SC 29461
Phone: (843) 761-5626

Attorneys for Appellants-Respondents

Holcombe Bomar, P.A.

101 W. St. John Street, Suite 200,
Spartanburg, SC 29306

P.O. Box 1897
Spartanburg, SC 29304

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Konstantine S. Diamaduros

Neville Holcombe, 1902-1983
Horace L. Bomar, 1912-1994

December 9, 2020

VIA ELECTRONIC MAIL ONLY
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

RE: *Kacey Green v. Mervin Lee Johnson*
App. Case No. 2020-001254
Our File No. 15580

Dear Ms. Kitchings:

Please find attached with this correspondence the Respondent-Appellant's Motion to Hold Appeals in Abeyance with the appropriate Exhibits, along with the Proof of Service for the same. A $50.00 check was placed in the US Mail to you today.

Please do not hesitate to contact me if you have any questions or concerns.

Sincerely,

Todd R. Flippin

Todd R. Flippin

cc: David R. Williams, Esq.(via email only)
Charlie H. Williams III, Esq. (via email only)
Virginia W. Williams, Esq. (via email only)
E. Mason West, Esq. (via email only)
S.C. Court of Administration (via US Mail)