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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

James B. Jackson, Master-in-Equity

Case No. 2019-CP-38-00053

Kacey Green and Charinrath Green, Appellants-Respondents,

v.

Mervin Lee Johnson, Respondent-Appellant.

INITIAL BRIEF OF APPELLANTS-RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

1. Whether the trial court erred in considering a November 14, 2019, motion, filed pursuant to SCRCP 59(e), seeking to alter, amend, or reconsider a Damages Award entered June 5, 2019.

2. Whether the trial court erred in considering new evidence presented by Defendant at the Defendant's Rule 59(e) motion hearing.

3. Whether the trial court misapplied *McClurg v. Deaton*, 380 S.C. 563, 671 S.E.2d 87 (Ct. App. 2008), in determining that Defendant had met the surprise or excusable neglect requirement of SCRCP 60(b)(1).

STATEMENT OF THE CASE

Appellants-Respondents, Kacey and Charinrath Green (collectively "Greens" or "Plaintiffs") initiated this action by Summons and Complaint, filed in the Orangeburg Court of Common Pleas on January 11, 2019, alleging negligence, recklessness, carelessness, willfulness, wantonness, and gross negligence. Despite being properly served, Respondent-Appellant Mervin Lee Johnson ("Johnson" or "Defendant") failed to timely answer and a default order was entered on March 8, 2019. Following a damages hearing on May 22, 2019, an Order ("Damages Order") was entered on June 5, 2019 awarding Plaintiffs $1,760,000.00.

On June 17, 2019 Johnson made his first appearance, filing a Motion to Dismiss, or in the Alternative, to Set Aside Entry of Default and Order of Damages and Allow Defendant to Responsively Plead. Four months later, on October 17, 2019, Johnson filed two affidavits in support of his motion. A motion hearing was held on October 21, 2019. On November 4, 2019, the court denied the motion, leaving the June 5, 2019 order in effect.

On November 14, 2019, Defendant filed a second motion, styled a Motion to Alter or Amend the November 4, 2019 Order. The motion was heard on July 13, 2020. On the morning of the motion hearing, four months after initially filing the motion, Johnson filed a memorandum of law and attached an 18-page exhibit in support. During the hearing, counsel for the Plaintiffs challenged both the introduction of the new evidence and the attempt by Defendant to relitigate issues previously decided. Nevertheless, the court considered the evidence and granted Defendant's motion as to damages. The court denied Defendant's motion as it related to liability. By an Amended Order, dated August 10, 2020, Plaintiffs' award was reduced to $250,000.00. Having received written notice of the Amened Order on August 14, 2020, Plaintiffs filed their notice appealing this order on September 14, 2020. Johnson filed a notice of appeal on October 5, 2020.

ARGUMENT

I. Standard of Review

The court's August 14, 2020 Amended Order was issued in response to a motion brought pursuant to SCRCP 59(e) and ultimately granted relief from judgment pursuant to SCRCP 55 and 60(b). Decisions to grant or deny motions pursuant to these rules lie within the sound discretion of trial courts and a review of such decisions is limited to determining whether the court abused this discretion. *See Campbell v. City of N. Charleston*, 431 S.C. 454, 459, 848 S.E.2d 788, 791 (Ct. App. 2020), *reh'g denied* (Oct. 29, 2020) (Rule 55); *Pollard v. Cty. of Florence*, 314 S.C. 397, 402, 444 S.E.2d 534, 536 (Ct. App. 1994) (Rule 59); *Landry v. Landry*, 430 S.C. 153, 160, 843 S.E.2d 491, 494 (2020) (Rule 60); *BB & T v. Taylor*, 369 S.C. 548, 551, 633 S.E.2d 501, 502–03 (2006) (same). An abuse of discretion occurs "where the judge issuing the order was controlled

by an error of law or where the order is based on factual conclusions that are without evidentiary support." *BB & T*, 369 S.C. at 551, 633 S.E.2d at 503.

II. The Court Erred in Entertaining What Was, in Effect, an Untimely Motion to Amend/Alter the June 5, 2019 Damages Award

The Amended Order in dispute was issued in response to a motion filed by Johnson on November 14, 2019. While this motion states that it seeks "to alter and/or amend the Court's November 4, 2019 Form 4 Order Denying Defendant's . . . Motion to Set Aside Default," Def.'s Mot. to Alter/Amend at 1, the Defendant freely admitted the actual purpose during the motion hearing when counsel explained to the court that "we are here on Defendant's motion which is to ask this court to reconsider its prior order awarding damages flowing out of the default action against my client." July 13, 2020 Hearing Transcript ("Tr.") at 3:22-25. This prior order was issued June 5, 2019. *See generally*, Damages Order. The trial court ultimately acceded to this request at the hearing, *see id.* at 37:25-38:3 ("I think that the damages that I previously awarded are too high. And so I'm going to reduce those damages, okay. I don't know how much. I'll review all this stuff."), and again in the Amended Order. *See* Am. Order at 6 ("the Defendant's Motion to Alter or Amend is appropriate for the Court to reconsider the amount of damages previously awarded."); *id*. at 12 (reducing amount awarded to Plaintiffs to $250,000). By amending the Damages Order, the trial court ran afoul of the time requirements for amended judgments expressly addressed in the South Carolina Rules of Civil Procedure.

The Rules provide that "[a] motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of the entry of the order." SCRCP 59(e). While the Rules allow for some leeway in the timing of other motions, *see generally* SCRCP 60(b), this flexibility is not extended to Rule 59 motions. *Id*. ("[t]he time for taking any action under rule[] .

. . 59 . . . may not be extended except to the extent and under the conditions stated in [the Rule]"). Addressing the plain meaning of these rules, the Supreme Court of South Carolina has recently reiterated "that the ten-day deadline in Rule 59(e) is an absolute deadline." *Overland, Inc. v. Nance*, 423 S.C. 253, 256, 815 S.E.2d 431, 433 (2018). As a result, "[a] trial court does not have the power to alter or amend a final order if more than ten days passes and no Rule 59(e) motion has been served, nor does a trial court have any power to grant the moving party an extension of time in which to file a Rule 59(e) motion." *Id.* at 256–57, 815 S.E.2d at 433 (internal citation omitted). The passage of ten days from the receipt of notice of entry of the order, "converts the order into a final judgment, and the aggrieved party's only recourse is to file a notice of intent to appeal." *Id.* at 257, 815 S.E.2d at 433.

The Defendant tacitly recognized the time limitation placed upon him by Rule 59(e), given that he did not request relief under this rule in his initial pleading filed outside the ten-day limit on June 17, 2019. *See* 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 ("Def.'s Mot. to Dismiss") at 1 (seeking relief pursuant to Rules 4, 12, 55, 56, and 60). By drafting his November 14, 2019 motion to alter or amend as one seeking review of a November 4, 2019 order, while simultaneously acknowledging in the motion hearing that he was seeking to amend the June 5, 2019 order, *see* Tr. at 3:22-25, the Defendant deftly attempted to perform procedural sleight of hand. Allowing a party to reset the ten-day deadline of Rule 59(e) by simply filing an intermediary motion, however, would undermine the *Overland* court's ruling that Rule 59(e) sets an "absolute deadline". 423 S.C. at 256, 815 S.E.2d at 433.

The procedural interplay between Defendant's original motion to set aside (which the Trial Court denied) and Defendant's motion to alter or amend is significant here. The requisite timing

for such motions is clearly expressed by the plain language of Rule 59. Respectfully, as discussed herein below, Plaintiff submits that Defendant's June 17, 2019 motion was not timely filed and fell outside of the 10-day window mandated by Rule 59(e). Defendant should not be able to circumvent these clear mandates through procedural gamesmanship; Defendant should not be given two bites at the Rule 59 'apple'. Yet that is precisely what transpired and what the amended damages order provides. Defendant's November 14, 2019 motion *facially* appears to comport with the requisite timeframe. But that motion necessarily invited and received alteration or amendment of this Court's June 5, 2019 order, which had long since become the law of the case in this matter when Defendant failed to appeal the denial of the motion to set aside.

Plaintiff submits the trial court misunderstood that procedural interplay as the June 5, 2019 damages order was a final unmodifiable order. Respectfully, this was error.

Defendant's request by motion that the court modify the amount awarded in the damages order was untimely and moot. The court entered default against Defendant on March 8, 2019. No Rule 59(e) motion was presented prior to March 18, 2019; that order was final and removed the matter from this court's jurisdiction pursuant to Rule 59(e). *See discussion, supra*. Thus, Defendant pursued his remedy under Rule 55 of the South Carolina Rules of Civil Procedure on June 17, 2019 (see 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, filed June 17, 2019). This court denied that Motion in its entirety on November 4, 2019, and thus restored the March 8, 2019 entry of default. That November 4, 2019 denial became a final unmodifiable order on November 14, 2019 by operation of law.

Similarly, this court issued a damages order on June 5, 2019. That judgment became final and unmodifiable upon the expiration of the 10-day window for reconsideration and amendment

under Rule 55 on or about June 15, 2019, thus removing any additional authority from the court to change that order under Rule 59(e). Recognizing this, Defendant pursued his remedy under Rule 60 (see *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*, filed June 17, 2019). That remedy was denied by this court on November 4, 2019, and thus restored the June 5, 2019, damages order. Defendant's remedy at that point was to *appeal* the damages order.

As noted herein above, the pendency of a Rule 60 motion does not toll the time for appeal on a judgment on the merits. *Coward Hund Const. Co., Inc. v. Ball Corp.*, 336 S.C. 1, 5-6 (1999); *see also Aikens v. Ingram*, 652 F.3d 496 (4th Cir. 2011) ("This court has repeatedly recognized that a Rule 60(b) motion is not designed to serve as an alternative to an appeal."). Defendant has failed to appeal within 30 days from the November 4, 2019 order and thus relinquished any further argument pertaining to the damages order. Additionally, this court no longer has jurisdiction to reconsider or otherwise modify its order denying Defendant's Rule 60(b) motion. *See discussion, supra*.

Furthermore, as indicated *supra*, a Rule 59(e) motion is for the purpose of reconsidering matters addressed in "a decision on the merits." *Arnold v. Sate*, 309 S.C. 157, 172. This Court decided the merits of the litigation in entering default and ordering damages in March and June of 2019. Through Defendant's arguments to set aside the default, Defendant's improperly and impermissibly invited this court to reconsider those orders far outside of the prescribed and inflexible period and affect the substance of those orders. *See also Coward Hund Const. Co., Inc. v. Ball Corp.*, 336 S.C. 1 (1999). This Court erred in considering Rule 60 factors where said factors had been properly considered in the Court's November 4, 2019 Order.

Because this Court no longer had jurisdiction to modify the entry of default or damages order, the arguments raised by Defendant's 59(e) motion were not only untimely, they were also moot in that it sought to change the damages order that was final as of June 15, 2019, and unappealable as of July 5, 2019. Specifically, Defendant invited the Court to strike the punitive damages award and reduce the actual and punitive damages award. The Court's acceptance of this invitation was in error. The motions presented by the defense on June 17, 2019, did not request a modification of the judgment, simply relief from it. The defense did not appeal the damages order within thirty days of its entry and the motion the defense did file did nothing to toll the time for appeal from the final judgment. As such, any arguments to reduce the damages amount awarded are untimely and moot. The amended order is erroneous.

The Damages Order issued on June 5, 2019, was converted into a final judgment long before the Defendant filed his motion to alter or amend the Damages Order, nor the power to grant the Defendant an extension of time in which to file a Rule 59(e) motion. *See Overland* at 256-57, 815 S.E.2d at 433. By entertaining, and then granting in part, the Defendant's November 14, 2019 motion, the trial court effectively attempted to do both. Accordingly, the trial court abused its discretion, its Amended Order must be vacated, and the June 5, 2019 Damages Order reinstated.

III. The Court Could Erred by Relying on New Evidence Filed at the Rule 59(e) Motion Hearing

In order to set aside a default judgment, a party must demonstrate "good cause" or have the court "set it aside in accordance with Rule 60(b)." SCRCP 55(c).[1] Once justification to set aside a default judgment is provided, a trial court "must also consider: (1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to

[1]This requirement, and the court's errors in addressing the requirement, is discussed in greater detail in § IV of the argument.

the plaintiff if relief is granted." *Sundown Operating Co. v. Intedge Indus., Inc.*, 383 S.C. 601, 607–08, 681 S.E.2d 885, 888 (2009) (citing *Wham v. Shearson Lehman Bros., Inc.*, 298 S.C. 462, 465, 381 S.E.2d 499, 501–02 (Ct. App. 1989)). As explained below, the trial court's determination regarding a meritorious defense in the case at bar was premised on evidence erroneously submitted to the court for the first time as support for the Defendant's Rule 59(e) motion. Accordingly, even assuming arguendo that the trial court could entertain the November 14, 2019 motion, the trial court's conclusion that Johnson possessed a meritorious defense as to damages improperly relied on upon evidence submitted, for the first time, on the morning of the motion hearing. The evidence Defendant presented in support of his 59(e) motion was available at the time of his first motions' hearing on October 21, 2019, but he chose not to present it. Defendant filed a supplemental memo with nineteen pages of attachments, none of which had been previously filed with the court. These documents included pre-settlement negotiations, pictures from the accident scene, and documentation relating to the property subrogation in 2018 and in January 2019.

Throughout the motion hearing Defendant's counsel drew the court's attention to a variety of documents contained within "Exhibit A." *See, e.g.*, Tr. at 7:20-23, 15:11-15, 18:20-24. These documents were submitted to the court as an exhibit to the memorandum of law submitted to the court on the morning of the hearing.[2] *See* Supplemental Memorandum of Law in Support of Defendant's Motion to Alter or Amend ("Def.'s Alter or Amend Memo.") Ex. A. The trial court's reliance on this exhibit can be seen from the numerous references to the documents throughout the Amended Order. *See, e.g.*, Am. Order at 3, ¶¶ 5-6 (referencing correspondence and emails between Plaintiffs' counsel and Defendant's insurer as well as a copy of a check issued by Plaintiffs'

[2]The Docket reflects that the memorandum was initially filed at 3:41am before being refiled at 8:41am.

insurer); *id*. at 6 ¶ 14 ("Defendant's supplemental filing also included a photograph purporting to show the rear of Plaintiff's vehicle after the collision"); *id.* at 9 ¶¶ 10-11 (implicitly referencing the check copy as evidence of "previously settled property damages"). In ultimately amending the award, the trial court explicitly states the decision is based upon "uncontested medical bills of $12,826.00; *and the additional evidence presented at the hearing*[.]" *Id*. at 12.

While the Defendant's desire to present additional evidence and raise new factual issues for the court is understandable, the courts of South Carolina have routinely cautioned that "[a] party cannot use a motion to reconsider, alter or amend a judgment to present an issue that could have been raised prior to the judgment but was not." *Poch v. Bayshore Concrete Prod./S.C., Inc.*, 386 S.C. 13, 31, 686 S.E.2d 689, 699 (Ct. App. 2009), *aff'd as modified*, 405 S.C. 359, 747 S.E.2d 757 (2013); *see also Gartside v. Gartside*, 383 S.C. 35, 43, 677 S.E.2d 621, 625 (Ct. App. 2009); *Spreeuw v. Barker*, 385 S.C. 45, 68–69, 682 S.E.2d 843, 855 (Ct. App. 2009) (refusing to consider a form that "appears only as an attachment to his Rule 59(e) motion"); *Jones v. Builders Inv. Grp., LLC*, 415 S.C. 321, 330 n. 7, 781 S.E.2d 737, 742 (Ct. App. 2015) (noting attempt to introduce new evidence at a 59(e) hearing was denied by the trial court with a subsequent attempt to supplement the record denied by the Court of Appeals). This refusal to consider previously available evidence by South Carolina courts is consistent with application of the similar federal procedural rule. *See* Wright, Miller & Kane, 11 Fed. Prac. & Proc. Civ. § 2810.1 (3d ed.) (a "Rule 59(e) motion may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment."); *see also Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 22, 602 S.E.2d 772, 779 (2004) (noting that "Rule 59(e) in the South Carolina and federal rules of civil procedure is practically identical," and citing to § 2810.1 as authority for treating Rule 59(e) motions as a "motion to reconsider").

This information was fully available to Defendant at the time he filed his June 17, 2019 motion to set aside default and the October 21, 2019 hearing on that motion. It is highly improper to present that evidence after the denial of that motion to set aside and to solicit the court's consideration of such evidence, particularly without availing Plaintiff the opportunity to respond. It is undisputed that none of this information constitutes "newly discovered evidence". Furthermore, even if the court could consider this information, there is no evidentiary foundation for its relevance much less its admissibility. The law is clear that pre-settlement negotiations are "not admissible to prove liability for or invalidity of the claim or its amount." SCRE Rule 408. *See also Hunter v. Hyder*, 236 S.C. 378, 387, 114 S.E.2d 493, 497–98 (1960) ("This Court has held that compromises are favored and evidence of an offer or attempt to compromise or settle a matter in dispute *cannot be given in evidence* against the party by whom such offer or attempt was made." (emphasis added)) (citing *Robertson, et al. v. Blair & Co*., 56 S.C. 96, 34 S.E. 11; *Holden v. Cantrell,* 88 S.C. 281, 70 S.E. 815; *Neal v. Clark*, 199 S.C. 316, 19 S.E.2d 473)). Defendant improperly invited this Court to entertain evidence of pre-suit negotiations as the basis of a damages award. This contravenes well-settled procedural and evidentiary tenets and must be disregarded. To the extent the amended damages order relies on such pre-suit negotiations, it is erroneous.

Defendant's counsel also presented to the court photographs purportedly of the wreck for the first time at the hearing but offered no foundation or basis for the accuracy or validity of such photographs. The court in *State v. Hurell*, 818 S.E.2d 21, 27 (S.C. Ct. App. 2018), quoted Alex Sanders & John S. Nichols, *Trial Handbook for South Carolina Lawyers* § 19:12 (Sept. 2017), and explained:

> Whenever counsel intends to admit photographic evidence into the record, it is necessary to lay proper foundation testimony as to authentication, identification,

> and verification. The extent of foundation testimony required in each case is largely a function of the purpose for which the photograph is offered.
>
> Normally, it is sufficient for the admission of photographs that a person familiar with the subject, such as a scene, testify that the photographs truly represent what they purport to depict.

Here, there has been no such testimony to authenticate the photographs or lay the proper foundation for admission. And again, the court has yet to hear any testimony or evidence directly from Defendant. Even if they could be considered, these photographs are hearsay and/or vague and unreliable for purposes of evaluating whether Defendant had a meritorious defense and have no bearing on the issue of good cause. *See* S.C. Rules of Evid. Rules 901 and 802.

Moreover, the defense presented documentation of a property subrogation claim indicating Plaintiffs' insurance carrier was compensated at least partially for the property damages. The defense then argued because a subrogation claim was paid, it was improper for the court to award property damages in the damages order. This evidence, even if it could be considered, is also incomplete and inconclusive. There is no record evidence of an executed release indicating Plaintiff relinquished his right to recover a full property damage award much less any testimony from witnesses suggesting the same. In fact, the property damages claims were not fully released. Without such evidence in the record, Plaintiffs' property damage claims remain fully recoverable here.[3] Ergo, the amended finding of fact (P.3, ¶ 6) on that point is wholly unsupported by the record and is in error.

Stripped of this improper evidence,[4] the Defendant is left only with the items submitted in support of his June 17, 2019 Motion to Dismiss: the affidavits of Nikole Shields and Breeann

[3] Specifically, the diminished value of Plaintiff's nearly new vehicle as well as the loss of use of the vehicle are appropriate claims here for property damage.

[4] The record is devoid of any suggestion by the Defendant that the evidence was not, or could not be, obtained and submitted prior to the filing of his June 17, 2019 Motion to Dismiss.

Richardson. These nearly identical affidavits provide little to no insight as to a meritorious defense on the issue of damages. Both reference a video recording of the accident and recite that the video "seems to indicate that the February 28, 2018 MVA was relatively minor in nature, in terms of impact speed." Richardson Aff. ¶ 10; Shields Aff. ¶ 9. Both then offer the conclusory statement that "[f]ortunately for all involved, the property damage to Plaintiffs' vehicle was relatively minor." Richardson Aff. ¶ 11; Shields Aff. ¶ 10.

Interestingly, the video originally submitted to the court by the Defendant (and supposedly viewed by the affiants) was not of the wreck in question. *See* Tr. at 27:1-5 ("On the matter of a meritorious defense, I think it's important for Your Honor to note the video that was submitted by the insurance company as the video that this adjuster considered was the wrong video"). This oversight by the Defendant was immaterial however, as the court had already been provided the correct video prior to issuing the June 5, 2019 Damages Order. *See id*. at 27:8-11 ("Your Honor, I think you considered that, the nature of that wreck. You had the video at the damages order. It was presented to you on a thumb drive"); *see also* Richardson Aff. ¶ 14 (admitting that the affiant had "no understanding as to whether Plaintiffs presented to Judge Jackson for his consideration the video-recording of the February 28, 2018 MVA"); Shields Aff. ¶ 13 (same). Able to consider the video itself, the court could gain nothing from the mere recitation of what the affiants believed the video "seem[ed] to indicate." Richardson Aff. ¶ 10; Shields Aff. ¶ 9. Moreover, the mere statement that by the affiants that "[f]ortunately for all involved, the property damage to Plaintiffs' vehicle was relatively minor," Richardson Aff. ¶ 11; Shields Aff. ¶ 10, in the absence of any facts or analysis, were merely "conclusive assumptions by insurance adjusters of the impact as 'minor.'" November 4, 2019 Order Denying Defendant's Motion to Dismiss at 4.

In its November 4, 2019 Order, the court had already concluded the affidavits submitted by the Defendant were insufficient to establish a meritorious defense. It is unsurprising, therefore, that the court only reconsidered its prior rulings based upon "the additional evidence presented at the [reconsideration] hearing." Am. Order at 12. A Rule 59(e) motion cannot be used as a vehicle to introduce new issues which a party belatedly realizes should have been previously submitted. *Poch*, 386 S.C. at 31, 686 S.E.2d at 699; *Gartside*, 383 S.C. at 43, 677 S.E.2d at 625; *Spreeuw*, 385 S.C. at 68–69, 682 S.E.2d at 855; *Jones*, 415 S.C. at 330 n.7, 781 S.E.2d at 742. By basing its decision to issue the Amended Order on such improper evidence, the trial court abused its discretion. Accordingly, its Amended Order must be vacated, and the June 5, 2019 Damages Order reinstated.

IV. The Court Misapplied McClung in Concluding that Justification for Relief from Default Judgment Existed

As previously noted, to set aside a default judgment, a party must demonstrate "good cause" or have the court "set it aside in accordance with Rule 60(b)." SCRCP 55(c). Justification under the latter provisions includes

> (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.

SCRCP 60(b). In the case at bar the trial court found justification for relief from default by relying upon Rule 60(b)(1) and the case of *McClurg v. Deaton*. *See* Am. Order at 7 ¶¶ 4-5. An

examination of that case reveals, however, that the court wholly misapplied the logic of *McClung* and its predecessors.

In *McClung*, the defendant's employer, New Prime, was not originally named a party to the action. *See McClurg*, 380 S.C. at 568, 671 S.E.2d at 90 ("[u]nbeknownst to Zurich and New Prime, counsel filed a summons and complaint on April 27, 2005, naming only Deaton as a defendant"). The decision not to file suit against New Prime represented a marked departure from the plaintiff's prior contacts with New Prime and its insurer, Zurich. Counsel had previously sent Zurich a letter, "enclosing a copy of a complaint he prepared in the matter and indicating his intent to 'proceed to litigation' if the matter was not soon settled." *See id*. at 567, 671 S.E.2d at 90. The draft complaint "named only Ann McClurg as a plaintiff and New Prime as a defendant, and alleged New Prime was vicariously liable for Deaton's actions and was also liable for its negligent hiring, retention, and training of Deaton." *Id*. This draft was consistent with a previous promise made to Zurich by counsel that "I will file suit and serve the [New Prime] and send you a courtesy copy of the pleadings." *Id.*

After initially agreeing to delay filing suit, McClung's counsel "[u]nbeknownst to Zurich and New Prime, counsel filed a summons and complaint on April 27, 2005, naming only Deaton as a defendant." *Id.* at 568, 671 S.E.2d at 90. Deaton failed to respond to the complaint and Zurich received a copy of the default judgment entered against Deaton on October 7, 2005. *Id.* At a lost to explain what had occurred, and unable to locate Deaton, Zurich engaged "the services of several private investigators . . . [and] Deaton was finally located on January 23, 2006." *Id.* Piecing together what had transpired, "New Prime filed a motion to intervene and likewise moved to set aside the judgment pursuant to Rules 60(b)(1) and 60(b)(3)." *Id.* at 569, 671 S.E.2d at 90. While the trial court granted the motion to intervene, it denied the motions to set aside the judgment. *Id*.

On appeal, the *McClung* court highlighted a letter sent by plaintiff's counsel to Zurich "indicating an intention to file suit against both Deaton and New Prime . . . and stat[ing] counsel would file suit and serve the Defendant and send Zurich a courtesy copy of the pleadings." *Id.* at 572–73, 671 S.E.2d at 92. These representations were reinforced by the follow-up letter enclosing a draft complaint naming only New Prime as a defendant. *Id.* at 573, 671 S.E.2d at 92. Based upon this conduct, the court found it reasonable for Zurich and New Prime to believe that "any suit filed would include New Prime as a defendant or, at the very least, that counsel would provide Zurich a copy of any pleadings in the matter when filed." *Id.* at 573, 671 S.E.2d at 92. Accordingly, "New Prime was taken by surprise when counsel filed the action solely against Deaton and failed to inform Zurich or New Prime of this action." *Id.* This failure to notify both the insured and insurer "[met] the surprise or excusable neglect requirement under Rule 60(b)(1)." *Id.*

This conclusion, the *McClung* court explained, was consistent with prior case law holding that "a Rule 60(b) motion is properly made by an insurer under such circumstances." *Id.* at 573, 671 S.E.2d at 93 (referencing *Edwards v. Ferguson*, 254 S.C. 278, 175 S.E.2d 224 (1970)). In *Edwards*, the "circumstances" were equally egregious as those outlined in *McClung*. The insured defendant, Ferguson, "never reported the accident to State Farm, and it was not until fourteen months after the wreck . . . that the company received a letter from plaintiff's attorney advising that plaintiff asserted a claim and asking that the company's representative make contact regarding a possible settlement." *Edwards*, 254 S.C. at 280, 175 S.E.2d at 225. Compounding matters, State Farm had trouble locating Ferguson as he "apparently stayed at the home of his parents most of the time; he was an alcoholic, and hard to catch." *Id.* at 280–81, 175 S.E.2d at 225.

An examination of the affidavits submitted by Johnson[5] readily distinguish the case at bar from both *McClung* and *Edwards*. Far from being caught completely unaware, as State Farm was in *Edwards*, Johnson's insurers were notified of the claim almost immediately. *See* Richardson Aff. ¶ 5 ("In March 2018, I learned of the February 28, 2018 MVA and a potential claim involving the same"); Shields Aff. ¶ 5 (same). Unlike *McClung*, neither affiant suggests that Plaintiffs' counsel promised (or even suggested) that a copy of any pleading would be forwarded to her. While the insurers in McClung and Edwards were forced to hire private investigators and hunt down the individuals they represented, neither affiant suggests that Johnson made attempts to elude them or prevent contact.[6] Most importantly, in *McClung*, "New Prime was taken by surprise when counsel filed the action solely against [a third party] and failed to inform Zurich or New Prime of this action." *McClurg*, 380 S.C. at 573, 671 S.E.2d at 92, while the present case was filed against Johnson alone and the "Defendant was properly served with the summons and complaint." Am. Order at 4 ¶ 8.

This matter is more akin in this regard to the *McClurg* case, *supra*, wherein the defaulted defendant pointed to an allegation in an insurance company employee's affidavit about the damages valuation discussed in presuit settlement negotiations. *McClurg*, 671 S.E.2d at 94. This was the only 'evidence' to challenge the damages award subsequent to defendants' default and, as

[5]As previously discussed, *supra* § III, the letters, emails, and other documents attached as exhibit A to Johnson's memorandum in support of his Rule 59(e) motion should not be considered given that they were first produced on the morning of the motion hearing.

[6]Both affiants state that they were "informed" of a variety of physical ailments affecting Johnson. See Richardson Aff. ¶ 15; Shields Aff. ¶ 14. Neither affiant offers any indication as to how they were "informed" or the basis for their belief in the information. The affidavits are equally silent on how any of these ailments would have precluded Johnson from cooperating with his insurers or participating in this case. *See e.g., Tri-Cty. Ice & Fuel Co. v. Palmetto Ice Co.*, 303 S.C. 237, 243, 399 S.E.2d 779, 783 (1990) (no excusable neglect from mere existence of medical conditions where "[t]here is no evidence that these ailments caused any enduring incapacity"). While such information could theoretically have been supplied by Johnson, he never submitted an affidavit for the court's consideration.

noted by the appellate court, insufficient in that it did not pertain to the 'meritorious defense' argument post-default. *Id*. The *Wham* case, on which the amended damages order relies, does not in any way discuss a damages award but rather only reiterates the three factors a court reviews *after* determining the defendant has established good cause for his default. *See Wham v. Shearson Lehman Bros., Inc.*, 381 S.E.2d 499, 501 (S.C. Ct. App. 1989). Thus, the amended 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).

As previously stated, the court has no jurisdiction to alter the damages order because the damages order is now a final order. Defendant's sole remedy to alter the damages order was to file an appeal, not a 59(e) motion requesting reconsideration of the order not to set aside the default. Defendant did not avail himself of an appeal. Defendant's Rule 59(e) motion, even if timely filed, cannot reinvest this court with jurisdiction on a final unmodifiable order. The amended damages order is in error.

By invoking *McClung* in the Amended Order, the trial court improperly expands the holding of that case. While the specific, egregious facts presented in that case "at least, support[ed] relief based on mistake, inadvertence, surprise or excusable neglect," *McClurg*, 380 S.C. at 573, 671 S.E.2d at 93, the evidence adduced by the Defendant in the case at bar falls staggeringly short. By relying upon an inapposite case, the Amended Order is based upon an error of law and the trial court therefore abused its discretion. Accordingly, its Amended Order must be vacated, and the June 5, 2019 Damages Order reinstated.

CONCLUSION

For the foregoing reasons, Appellants-Respondents respectfully request that this court vacate Amended Order of the Honorable James B. Jackson, dated August 10, 2020, and reinstate the Order of Damages dated June 5, 2019.

Dated: December 14, 2020

Respectfully submitted,

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PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing Initial Brief of Appellants-Respondents was served via email to opposing counsel, Todd Flippin, on December 14, 2020, at tflippin@holcombebomar.com.

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