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SC Court of Appeals

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

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

v.

Mervin Lee Johnson, ...Respondent-Appellant.

RESPONSE TO APPELLANTS-RESPONDENTS' INITIAL BRIEF

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STATEMENT OF THE ISSUES ON APPEAL

I. WHETHER THE TRIAL COURT ERRED IN CONSIDERING A NOVEMBER 14, 2019, MOTION, FILED PURSUANT TO S.C.R.CIV.P. 59(E), SEEKING TO ALTER, AMEND, OR RECONSIDER THE MASTER'S ORDER DENYING JOHNSON'S *MOTION TO DISMISS, OR IN THE ALTERNATIVE, TO SET ASIDE ENTRY OF DEFAULT AND ORDER OF DAMAGES AND ALLOW DEFENDANT TO RESPONSIVELY PLEAD*, WHICH REQUESTED DISMISSAL OF THE SUMMONS AND COMPLAINT, RELIEF FROM THE ENTRY OF DEFAULT, AND RELIEF FROM THE JUNE 5, 2019 DEFAULT JUDGMENT AND DAMAGES ORDER.

II. WHETHER THE COURT ERRED BY RELYING ON EVIDENCE FILED ON THE MORNING OF THE RULE 59(E) MOTION HEARING.

III. WHETHER THE COURT MISAPPLIED *MCCLUNG* IN CONCLUDING THAT JUSTIFICATION FOR RELIEF FROM DEFAULT JUDGMENT EXISTED.

STATEMENT OF THE CASE

This appeal arises from a default judgment entered against Respondent-Appellant Mervin Lee Johnson ("Johnson"). Appellants-Respondents Kacey Green and Charinrath Green's (collectively the "Greens") claims against Johnson arose from a collision on Interstate 26 in Charleston County, South Carolina on February 28, 2018. Johnson was operating a tractor trailer for CDS Transport, Inc. and was insured by Prime Insurance Company. None of the parties were treated by emergency medical services at the scene and each drove their vehicle after their being cleared by law enforcement.

The Greens filed their personal injury lawsuit against Mervin Johnson in Orangeburg County on January 11, 2019. On January 29, 2019, the Greens filed an affidavit attesting to personal service on Helen Johnson, whom the affidavit describes as "Parent=Co-Resident." The Greens moved against Johnson for an order of default, which Judge Edgar W. Dickson signed on March 8, 2019.

On or about June 17, 2019, Defendant appeared through counsel and filed 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"). The motion cited S.C.R.Civ.P. 60(b) and sought an order relieving Johnson from the default judgment and citing the Greens' damages allegations as justification for such relief. Mot. to Dismiss, at pg. 2. The Master held a hearing on Defendant's Motion on October 21, 2019. Although the issue of the Greens' property damages was argued by the parties at the October 21, 2019 hearing, there was no court reporter present and hearing was not recorded.[1] On November 4, 2019, the Master issued his order denying Johnson's motion and omitting to address several issues, including the Greens' property damage award, raised in Johnson's motion and at the hearing. Defendant timely filed his S.C.R.Civ.P. 59(e) Motion to Alter or Amend the Master's order 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 Master denied the motion as to liability, but amended the damages awarded in the June 5, 2019 order.[2] The Master issued the Amended Order on August 14, 2020. On August 24, 2020, the Greens timely filed their S.C.R.Civ.P. 59(e) Motion to Alter or Amend the Amended Order on Damages. Despite the stay imposed by that motion, the Greens served their Notice of Appeal on September 14, 2020.

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[1] The undersigned was not present at the October 21, 2019 hearing on Johnson's Motion to Dismiss. However, the Greens' counsel noted in the July 13, 2020 hearing that the arguments presented that day were "basically all the same arguments [the Master] heard after this motion to dismiss." July 13, 2020 Hearing Transcript ("Tr."), 23:3-12.

[2] As the Amended Order on Damages notes, the Greens' presented evidence of medical expenses totaling $12,826.00. The Master'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. Order, at pg. 8. The Amended Order on Damages awarded $190,000.00 in personal injury damages and $60,000.00 in punitive damages and noted that the Greens settled their property damage claims prior to filing suit. Amended Order, at pgs. 10 & 12.

I. WHETHER THE TRIAL COURT ERRED IN CONSIDERING A NOVEMBER 14, 2019, MOTION, FILED PURSUANT TO S.C.R.CIV.P. 59(E), SEEKING TO ALTER, AMEND, OR RECONSIDER THE MASTER'S ORDER DENYING JOHNSON'S *MOTION TO DISMISS, OR IN THE ALTERNATIVE, TO SET ASIDE ENTRY OF DEFAULT AND ORDER OF DAMAGES AND ALLOW DEFENDANT TO RESPONSIVELY PLEAD*, WHICH REQUESTED DISMISSAL OF THE SUMMONS AND COMPLAINT, RELIEF FROM THE ENTRY OF DEFAULT, AND RELIEF FROM THE JUNE 5, 2019 DEFAULT JUDGMENT AND DAMAGES ORDER.[3]

The Greens' argument that Johnson's June 17, 2019 Motion to Dismiss, or in the Alternative, to Set Aside Entry of Default and Order of Damages and Allow Defendant to Responsively Plead[4] was an untimely Rule 59(e) motion is without merit. The Greens erroneously argue that Johnson could not challenge either the March 8, 2019 entry of default, or the June 5, 2019 damages order, more than 10-days after those orders.[5] However, Johnson's June 17, 2019 Motion to Dismiss, the Master's November 14, 2019 order, and the transcript of the July 13, 2020 hearing all show that Johnson's timely motion sought relief from default judgment under Rule 60(b). The Greens' appeal should therefore be dismissed.

A. Johnson's June 17, 2019 Motion Timely Sought Relief from Default Judgment Under Rule 60(b).

Even if the Greens' argument that Johnson's motion was an untimely Rule 59(e) motion was properly before the court, this theory is entirely without merit. Johnson's first appearance in this action was his June 17, 2019 Motion to Dismiss under Rule 60(b). "Once a default judgment has been entered, a party seeking to be relieved must do so under Rule 60(b), SCRCP." *Sundown*

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[3] The Greens' first issue on appeal states "The Court Erred in Entertaining What Was, in Effect, an Untimely Motion to Amend/Alter the June 5, 2019 Damages Award." In this response, Johnson revises this issue to accurately describe the purpose of his Rule 59(e) motion. That motion asked the trial court to alter or amend its earlier denial of Johnson's Rule 60(b) motion seeking relief from default judgment.

[4] For the purpose of this response, this motion is referred to as either the "Motion to Dismiss" or the "Rule 60(b) Motion."

[5] Preliminarily, the Greens' argument that Johnson's June 17, 2019 motion was untimely is not properly before the court because the issue was not preserved of appeal. This issue is discussed at length in Section I(E) below.

Operating Co. v. Intedge Indus., Inc., 383 S.C. 601, 608, 681 S.E.2d 885, 888 (2009). Johnson was clearly prohibited from appealing directly from the Master's default judgment order. "[A] direct appeal does not lie from a default judgment." *Winesett v. Winesett*, 287 S.C. 332, 333, 338 S.E.2d 340, 341 (1985). *Winesett* involved an appeal from a family court order terminating alimony that was entered by default. *Id.* In dismissing the appeal the supreme court noted that "a default judgment may not be appealed to this Court." *Id.* at 334, 338 S.E.2d at 341. "The proper procedure for challenging a default judgment is to move the trial court to set aside the judgment pursuant to Rule 60(b), SCRCP. An appeal may then be taken from the denial of this motion." *Id.* at 334, 338 S.E.2d at 341. Therefore, Johnson's June 17, 2019 Motion was procedurally appropriate. The Greens' appeal erroneously attempts to recast Johnson's motion as a Rule 59(e) motion to alter or amend. There is simply no justification for this characterization.

Johnson's motion for relief from default judgment makes no mention of Rule 59(e) and did not ask the court to alter or amend its judgment. Instead, through that motion, Defendants sought:

> [P]ursuant to Rules 4, 6(b), 12(b)(4), 12(b)(5), 12(h)(1), 55(c), 56, and 60 ... for an Order dismissing Plaintiffs' Summons and Complaint for improper service of process, or, in the alternative, Defendant moves this Court to (a) set aside the Entry of Default (filed March 8, 2019) and Order of Damages (filed June 5, 2019) against him and/or (b) relieve Defendant from the June 5, 2019 Order of Damages.

Motion to Dismiss, at pg. 1. The Greens, in their response in opposition[6] to Johnson's Rule 59(e) motion, admit that Johnson originally challenged the default judgment "under Rule 60, as evidenced in Defendant's Motion to Dismiss, ... filed June 17, 2019." Resp. in Opp., at pg. 5.

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[6] At the conclusion of the July 13, 2020 hearing on Johnson's Rule 59(e) motion, the Master asked defense counsel to draft an order consistent with the rulings from the bench. July 13, 2020 Hearing Tr., at 42:2-11. At that time, the Master accepted the Greens' counsel's request to brief arguments that the motion was untimely or otherwise deficient. *Id.* Instead, the Greens emailed the Master a document styled as a "Proposed Order Denying Defendant's Motion to Alter or Amend." *See* Email to Chambers, dated July 23, 2020. This document was not filed with the Clerk of Court and the Master did not adopt the language, or conclusions, the Greens' counsel proposed.

Furthermore, Johnson submitted with his Motion to Dismiss a proposed order granting relief from judgment. That proposed order, which was not adopted by the Master, cites Rule 60(b)(1) as authority for relief from the Master's "final judgment, order, or proceeding for ... mistake, inadvertence, surprise, or excusable neglect." Proposed Order, dated October 21, 2019, at pg. 2. Johnson's proposed order suggested the Master find that he "acted with reasonable promptness to have the entry of default and damages order set aside, and [that] because Defendant alleges meritorious defenses to the claims in Plaintiffs' Complaint, including, but not limited to calling into question Plaintiffs' causation and damages allegations, Defendant has satisfied the requirements of good cause under Rules 60(b) and 55(c) of SCRCP." *Id.* at pg. 3. By its own terms, Johnson's Motion to Dismiss eviscerates the Greens' claim that the motion was an untimely Rule 59(e) motion.

B. The Master's Order Denying Johnson's Motion Relies on Rule 60(b).

The Master's order denying Johnson's Rule 60(b) motion denied the relief sought and applied Rules 55 and 60(b) in its flawed analysis. Specifically, the order held that Johnson could not meet the "requirements under Rule 60 to set aside the default and the damages order... [because] Johnson has not set forth a meritorious defense." Order, at pg. 4. In so holding, the Master erred as a matter of law finding that under *McClurg v. Deaton*, a dispute over the amount of damages is not a meritorious defense." *Id.* Unfortunately, no court reporter was present at the October 21, 2019 hearing on Johnson's motion and no recording was made of the proceeding. Although an appeal could be taken from that order, the issues raised in Johnson's motion and at the hearing were not then preserved for appeal.

C. Counsel's Arguments at the July 13, 2020 Hearing Show that His Motion Was for Relief from Default Judgment Under Rule 60(b).

The Greens attempt to apply a single statement made to the Master to convert Johnson's Rule 60(b) motion into a procedurally deficient motion to alter or amend. The Greens argue that Johnson's counsel's statement 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" completely recharacterizes the motion. July 13, 2020 Tr., at 3:22-25. However, the arguments of counsel at that hearing clearly articulate the grounds asserted in Johnson's motion.

At the hearing, Johnson's counsel accurately described the Rule 60(b) motion as "a motion to dismiss, as well as a motion to set aside the entry of default or the default judgment order." *Id.*, at 6:4-8. Counsel went on to argue as follows.

> [P]laintiffs' attorney's contacts with the defendant's insurer and subsequent failure to notify the insurer of a lawsuit may amount to the sort of misrepresentation that would justify relief from a final judgment under Rule 60(b). So Rule 60(b) obviously provides the mechanism by which this court may, on proper grounds shown, reverse an entry of default or judgment of default and the damages order which came about because of that judgment or entry.

Id., at 6:21-7:5. Moreover, the relief sought in Johnson's Rule 60(b) motion was not simply a reduction in the Master's damages order, but relief from the entry of default and default judgment. Johnson's counsel argued "that in fact the Court erred in not adjusting, or rather finding that that -- that the damages evidenced to the Court didn't justify setting aside the default judgment based in part upon the excessive damages award." *Id.*, at 16:24-17:3.

D. Under Rule 59(e), Johnson Was Required to Challenge the Master's November 14, 2019 Order to Preserve Issues for Appeal.

Undoubtedly, Johnson could have appealed from the Master's order denying the Rule 60(b) motion for relief from default judgment. "[T]he denial of a motion under ... Rule 60(b) to set aside

a default judgment is immediately appealable...." *Thynes v. Lloyd*, 294 S.C. 152, 154, 363 S.E.2d 122, 123 (Ct.App. 1987) (*citing* 10 C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 2693 at 477 n. 7 (1983)). However, appealing that order, which did not address issued raised in the motion, and where there is no transcript of the hearing before the Master, would leave Johnson's arguments unpreserved. "When a trial court does not explicitly rule on an argument raised, and the appellant makes no Rule 59(e), SCRCP, motion to obtain a ruling, the appellate court may not address the issue." *Smith v. NCCI, Inc.*, 369 S.C. 236, 247–48, 631 S.E.2d 268, 274 (Ct.App. 2006) (citing *Noisette v. Ismail*, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991)).

As set forth in Johnson's initial appellate brief, he was required to file a motion to reconsider because the hearing on his Rule 60(b) motion was not transcribed. Furthermore, the Master's order erred in finding that *McClurg v. Deaton* prohibits a party from asserting a meritorious defense on the basis of a damages award. 380 S.C. 563, 671 S.E.2d 87 (Ct.App. 2008), aff'd *McClurg v. Deaton*, 395 S.C. 85, 716 S.E.2d 887 (2011). The supreme court affirmed the trial court's denial of the motion for reconsideration in *McClurg* because "the issue of a meritorious defense was neither raised to nor ruled upon by the circuit court." *McClurg v. Deaton*, 395 S.C. 85, 87, 716 S.E.2d 887, 888 (2011).

Unlike the defendant in *McClurg*, Johnson clearly raised his defenses to the Greens' damages claims in his Rule 59(e) Motion. *See* Motion to Alter or Amend, at ¶¶ 3 & 7, dated November 14, 2019; Suppl. Brief, dated July 13, 2020, & Ex. A; July 13, 2020 Tr., *passim*. An appeal from the Master's November 4, 2019 order would have exposed Johnson to dismissal on the basis that the issues forming the basis of his appeal were neither ruled on by the trial court nor preserved for appeal.

In the absence of a transcript of the hearing and given the paucity of facts relating to the Greens' property damages in the damages order, Johnson properly filed a Rule 59(e) motion to preserve that issue for appeal. The necessity of such a motion was addressed by the court in *Home Medical Systems, Inc. v. South Carolina Dept. of Revenue*, 382 S.C. 556, 677 S.E.2d 582 (2009). In *Home Medical Systems, Inc.*, the court discussed the purposes of motions for reconsideration under Rule 59(e). A "party must file [a Rule 59(e), SCRCP] motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." 382 S.C. at 562, 677 S.E.2d at 586 (quoting *Elam v. South Carolina Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004)).

Johnson's Rule 59(e) motion challenging the Master's orders on the Greens' property damages was vital to ensure that issue could be challenged on appeal.

> If the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party **must** file a motion to alter or amend the judgment in order to preserve the issue for appellate review. Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered **all** relevant facts, law, and arguments.

Home Medical Systems, Inc., 382 S.C. at 562, 677 S.E.2d at 586 (quoting *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000)). Therefore, Johnson's timely Rule 59(e) motion preserved the Master's erroneous property damages award for appeal.

This court recently affirmed the correct procedure for challenging the trial court's order in the context of a motion to set aside entry of default. In *Campbell v. City of North Charleston*, the court held that a motion to set aside entry of default under Rule 55(c), the denial of which is challenged with a Rule 59(e) motion, is sufficient to preserve the issue for appeal, and the appealing party was not also obligated to challenge the default judgment with a Rule 60(b) motion. 431 S.C. 454, 848 S.E.2d 788 (Ct.App. 2020).

> Here, the City moved pursuant to Rule 55(c) to set aside the entry of default prior to the entry of the default judgment, and the circuit court ruled upon the motion as well as the City's subsequent Rule 59(e) motion to reconsider. Therefore, the issue of whether the court erred by refusing to set aside the entry of default is properly before this court.

Campbell, 431 S.C. at 461, 848 S.E.2d at 792. In the instant action, Johnson filed a Rule 60(b) motion seeking relief from default judgment. After that motion was denied, and because the hearing was not transcribed and the order did not address arguments raised to the Master, Johnson timely challenged order with a Rule 59(e) motion. Thus, Johnson's challenges to the Master's refusal to grant relief from default judgment are preserved for appeal.

E. Any Criticism of the Timeliness of Johnson's Motion is Not Preserved for Appeal.

The Greens' argument that Johnson's Motion to Dismiss was untimely is not properly before the court as it was not preserved for appeal. A claims administrator for Johnson's insurer testified by affidavit that she did not receive notice of the lawsuit, the order of default, or the damages hearing until June 7, 2019.[7] Aff. of Nikole Shields, at ¶ 11. Johnson's Rule 60(b) motion was filed within ten-days of that notice. The Master held a hearing on Johnson's motion on October 21, 2019. As noted above, no court reporter was present at the hearing and the proceeding was not recorded. Most significantly, the Master's order denying Johnson's Rule 60(b) Motion did not address the timeliness of that motion. *See* Order, dated November 4, 2019. Accordingly, to preserve their objections to the timeliness of that motion, Plaintiffs were required to file a Rule 59(e) motion seeking specific factual findings regarding that issue within ten-days of the

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[7] As discussed in Johnson's initial appellant brief, the Greens' counsel, Mason West, spoke and corresponded with Johnson's insurer, Nikole Shields on numerous occasions. Mr. West assured her that he would submit a settlement demand and described the Greens' claim against CDS Transport, Inc., the trucking company Johnson was driving for at the time of the accident. Despite these assurances, on Friday, June 7, 2019 the Greens' counsel sent a copy of the damages order by first-class mail. Although Mr. West and Ms. Shields corresponded via email and fax, the damages order was mailed to Johnson's insurer in Sandy, Utah by ordinary mail.

November 4th order. *Overland, Inc. v. Nance*, 423 S.C. 253, 256, 815 S.E.2d 431, 433 (2018) ("the ten-day deadline in Rule 59(e) is an absolute deadline").

In *USAA Property and Cas. Ins. Co. v. Clegg*, the supreme court discussed the necessity of filing a motion to alter or amend judgment in circumstances such as these. 377 S.C. 643, 661 S.E.2d 791 (2008). *Clegg* involved an action for declaratory judgment to determine whether the automobile insurer had a duty to defend a party to a wrongful death action. *Clegg*, 377 S.C. at 648, 661 S.E.2d at 793. More than ten days after the trial court issued an order granting partial summary judgment to the insured on the issue of coverage, counsel for the insurer filed a Rule 59(e) motion to reconsider. The insurer's counsel claimed that she did not receive notice of the order until a date after it issued. On appeal, the court determined that analyzing the timeliness of the Rule 59(e) motion required a credibility determination as to whether counsel was being truthful when representing the date she received notice of entry of the order. *Clegg*, 377 S.C. at 652, 661 S.E.2d at 795.

> Because there is no record of the hearing, this Court is unable to determine whether USAA's counsel's representations to the circuit court were under oath. Furthermore, the circuit court's order is silent regarding the basis for its decision finding that USAA's motion for reconsideration was timely filed. In light of this procedural posture, it was incumbent upon [the insured] to file a motion pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure to request that the circuit court provide specific factual findings for its decision.

Clegg, 377 S.C. at 652, 661 S.E.2d at 795. See also *Noisette*, 304 S.C. at 58, 403 S.E.2d at 124 (holding that where a trial court does not explicitly rule on an argument raised, and appellant makes no Rule 59(e) motion to obtain a ruling, the appellate court may not address the issue); *Floyd v. Floyd*, 365 S.C. 56, 73, 615 S.E.2d 465, 474 (Ct.App. 2005) ("When a trial judge makes a general ruling on an issue, but does not address the specific argument raised by the appellant and the

appellant does not make a motion to alter or amend pursuant to Rule 59(e), SCRCP, to obtain a ruling on the argument, the appellate court cannot consider the argument on appeal.").

Not only is the Greens' attempted recharacterization of Johnson's Rule 60(b) motion without merit, any challenge to the timeliness of the motion is not preserved for appeal. Therefore, the Greens' appeal should be dismissed.

II. WHETHER THE COURT ERRED BY RELYING ON EVIDENCE FILED ON THE MORNING OF THE RULE 59(E) MOTION HEARING

The Greens' second issue on appeal is whether the trial court erred in considering new evidence presented by Johnson at the hearing on his Rule 59(e) motion. For the same reasons cited above, this argument is not preserved for appeal. For this reason alone, Plaintiffs' appeal should be dismissed. Even if it were timely, the Greens' initial brief cites no authority for their argument that the evidence[8] considered at the July 13, 2020 hearing was admitted in error.

Specifically, the Greens' Initial Appellant Brief finds fault with the Master's consideration of the following documents: correspondence between Johnson's insurer and counsel for the Greens; a single photograph of the accident scene; and, records of the Greens' settlement of their property damage claims arising on the date of the subject accident through a subrogation claim against their insurer. However, a "party must file [a Rule 59(e), SCRCP] motion[9] when an issue

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[8] Although not raised in their initial appellate brief, the same argument applies to the Affidavits of Breeann Richardson and Nikole Shields, which were filed on October 17, 2019 in support of Johnson's Rule 60(b) motion. The Master's order denying the Rule 60(b) motion quotes the affidavits. The order also quotes *McClurg* for the erroneous statement that "if an insurance company is not a party to the case, then it does not have standing to make arguments to set aside a judgment." Order, dated November 4, 2019, at pg. 4. However, the Master never expressly rules that the affidavits are inadmissible. Any challenge to these affidavits expired ten-days after the order.

[9] The Greens did, of course, file a timely Rule 59(e) motion. However, they argue in their return to Johnson's Motion to Hold Appeals in Abeyance that "[a]ll issues were addressed by the lower court the previous two times it considered the original damages order." Return, dated

or argument has been raised, but not ruled on, in order to preserve it for appellate review." *Home Medical Systems, Inc.*, 382 S.C. at 562, 677 S.E.2d at 586 (quoting *Elam*, 361 S.C. at 24, 602 S.E.2d at 780).

A. The Greens' Objections to Evidence Offered in Support of Johnson's Rule 59(e) Motion Were Not Preserved for Appeal

On August 24, 2020, the Greens timely filed a Rule 59(e) Motion to Alter or Amend the Amended Order on Damages. *See* Docket & Motion, dated August 24, 2020. According to their return to Johnson's Motion to Hold Appeals in Abeyance, they did this "out of an abundance of caution to timely and fully preserve their rights."[10] Return to Motion to Hold Appeals in Abeyance, at pg. 1. Notwithstanding the stay of the deadline to appeal imposed by their motion, the Greens served a document purporting to be a Notice of Appeal on September 14, 2020. The Greens did not, however, withdraw their Rule 59(e) motion.

The supreme court has unequivocally stated that an appeal noticed after a timely Rule 59(e) motion should be dismissed without prejudice to allow the trial court to consider the issues raised in such a motion.

> IT IS ORDERED that in the event timely post-trial motions are filed under Rule 59, simultaneously with or subsequent to the filing of a Notice of Appeal, the appellant shall notify the Clerk of this Court in writing. Upon receipt of such notice, the appeal shall be dismissed without prejudice. Any party can appeal within ten (10) days after the order disposing of the post-trial motions.

Hudson v. Hudson, 290 S.C. 215, 216, 349 S.E.2d 341, 341–42 (1986). The purpose of the rule is so that "all ancillary matters can be timely heard, and appealed, if necessary, in an efficient and

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December 18, 2020. Although the lower court addressed the Greens' objection to the evidence presented at the hearing, the amended order does not discuss their objections to the evidence.

[10] In the same filing, the Greens argue that "[a]ll issues were addressed by the lower court the previous two times it considered the original damages order." Return to Motion to Hold Appeals in Abeyance, at pg. 1.

wholesale manner." *Holmes v. East Cooper Community Hosp., Inc.*, 408 S.C. 138, 162, 758 S.E.2d 483, 496 (2014) (citing *Hudson*, 290 S.C. at 216, 349 S.E.2d at 341–42)).

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

Furthermore, as they argue in their Rule 59(e) motion, the Greens 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 alter or amend, the Greens argue that numerous issues were raised in the hearing, but not ruled on, in the Master's Order. Ex. B. These include the Greens' legal and factual arguments that:

- they needed "clarification on the findings of fact which support the award" of punitive damages;
- the Master "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 Master 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 Master's "finding that all property damage claims were released by Plaintiffs' is inappropriate;"
- the Master'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 Master 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, Motion to Reconsider, dated August 24, 2020. The Master never ruled on these objections, which fully encompass the evidentiary issues raised in the Greens' initial appellate brief.

Therefore, their appeal challenging the Master's admission of evidence at the Rule 59(e) hearing should be dismissed.

B. Even if these Issues Were Preserved for Appeal, Evidence Presented at a Hearing to Determine Johnson's Entitlement to Relief from Default Judgment are Exempt from Prohibitions of Evidence of the Type Offered Here.

On appeal, the Greens challenge evidence submitted[11] to the Master in support of Johnson's motion to alter or amend the order dismissing his Motion to Dismiss. The Greens cannot, however, meet the high standard of reversing the Master's decision to admit evidence of their attorney's communications with Johnson's insurer. "The admissibility of evidence is within the sound discretion of the trial court and will not be reversed on appeal absent an abuse of discretion or the commission of legal error prejudicing the defendant." *Wright v. Craft*, 372 S.C. 1, 33, 640 S.E.2d 486, 503 (Ct.App. 2006).

In support of this argument, the Greens cite case law stating the proposition that a "party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not." *Hickman v. Hickman*, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct.App 1990). These cases are plainly distinguishable from the case below. Johnson simply could not have offered this evidence prior to judgment because judgment was entered by default, prior to his appearance. The rule stated in *Hickman* stands for the proposition that a party challenging a judgment cannot use a Rule 59(e) to raise arguments never before offered for the trial court's consideration. For instance, *Hickman* was a divorce action in which the wife argued that the husband's civil service retirement

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[11] The Greens complain that the evidence was offered "for the first time, on the morning of the motion hearing" and that the supplemental memorandum was filed at 3:41am that morning. These are precisely the sort of concerns that the Master should be permitted to consider prior to appeal. There is, of course, no standard in the South Carolina rules requiring memoranda of law be filed a particular amount of time prior to a hearing. It is entirely routine for such briefs to be exchanged for the first time at a hearing. Moreover, the Greens were afforded an opportunity to present a supplemental brief on the issues raised at the hearing. See July 13, 2020 Tr., at 42:2-15.

fund should impact the court's distribution of marital property. *Hickman*, 301 S.C. at 456, 392 S.E.2d at 482. This evidence only arose after a remand from appeal and after the wife was represented by new counsel. These limitations on evidence in Rule 59(e) motions cannot apply where the party is challenging a default judgment.

Insofar as the Greens challenge the admission of correspondence related to the pre-suit negotiations between Mr. West and Johnson's insurer, this evidence is not categorically prohibited under our rules. See *McClurg v. Deaton*, 380 S.C. 563, 671 S.E.2d 87 (Ct.App. 2008) (wherein the trial court considered New Prime's motion to set aside judgment and relied extensively on evidence of the parties' pre-suit correspondence and negotiations). This evidence was not offered to "prove liability for or invalidity of the claim or its amount" but for the purpose of demonstrating Johnson's meritorious defense to the Greens' claims and his entitlement under Rule 60(b)(1) to relief from default judgment under. SCRE, Rule 408.

The Greens' initial brief challenges the admission of Johnson's insurer's prior settlement of the Greens' property damages claims. After the accident, Johnson's insurer received a subrogation demand from the Green's automobile insurer, USAA Casualty Insurance Company ("USAA"). Suppl. Memo., at Ex. A, pg. 8-9. USAA provided invoices showing payments made for repairs to the Greens' Tesla and for nine days of rental car fees with Enterprise Leasing Company. *Id.*, at pgs. 10. This demand included instructions to make the subrogation payment to "USAA as subrogee of Kacey Green." *Id.*, at pg. 9. On February 1, 2019, Johnson's insurer sent a check to USAA to satisfy the $2,006.55 subrogation claim. *Id.*, at pgs. 18-19. In bold print on the face of the check, which was written to "USAA a/s/o Kacey Green," are the words "Full and Final Settlement of any and all property damage claims arising on or about 2/28/2018." *Id.* Admission of these records was essential to prevent the Greens from obtaining a double recovery against

Johnson for these damages. "The law in South Carolina is unequivocal on the issue of satisfaction. A plaintiff may have but one satisfaction for a wrong done." *Garner v. Wyeth Laboratories, Inc.*, 585 F.Supp. 189, 192 (D.S.C. 1984).

There was no testimony during the first damages hearing regarding USAA's subrogation of the Greens' property damages. Despite having previously settled and released their property damage claims the June 5, 2019 damages order awarded the Greens $10,000.00 in property damages. The June 5th order was deficient because it did identify any facts substantiating the Greens' property damage claim. Order, *passim.*

Finally, the Greens complain of a single photograph taken by Johnson at the accident scene. Initial Brief, at pgs. 10-11. To the extent this evidence was erroneously admitted into evidence, such error was cumulative. In the Amended Order, the Master finds as a matter of fact that the video[12] offered by the Greens showed a relatively minor rear-end collision. Am. Order, at pg. 6. Even Mr. Green testified that according to pictures of damage to the Tesla, "it didn't look bad." May 22, 2019 Tr., at 18:11-16.

Even if these evidentiary issues were properly before this court, the Greens cite no authority barring the introduction of evidence in a litigant's effort to obtain relief from default judgment. Instead, cases such as *McClurg v. Deaton* demonstrate the necessity of such evidence to correct misrepresentations on the court when a party engages in "chicanery and unfair advantage" in pre-suit negotiations with an insurer. *McClurg*, 380 S.C. 563, 671 S.E.2d at 97 (Hearn, C.J., dissenting).

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[12] Mr. Green testified in the damages hearing that he was driving a driving a 2016 Tesla Model S 90D "with the Autopilot 1.0 package" and had installed a dash camera with "one facing inside the cabin and one facing out to the road." May 22, 2019 Hearing Tr., at pg. 12:22-25. The Greens' counsel submitted the video to the Master at the damages hearing. *Id.*, at 5:10-6:5.

III. WHETHER THE COURT MISAPPLIED *MCCLUNG* IN CONCLUDING THAT JUSTIFICATION FOR RELIEF FROM DEFAULT JUDGMENT EXISTED

As argued above, the Greens' claim that the Master erred in his application of the *McClurg* decision is not preserved for appeal. Therefore, their appeal should be dismissed. Even if this issue was properly before the court, the Greens' Initial Appellant Brief fails to identify any meaningful distinctions between this case and those discussed in the opinions cited.

In *McClurg*, the court found that the surprise or excusable neglect standard under Rule 60(b)(1) was satisfied when the plaintiff's counsel failed to provide the defendants' insurer notice of suit. 380 S.C. at 573, 671 S.E.2d at 92–93. The court concluded that the "insurer had a reasonable expectation it would be notified of any lawsuit arising from the employee's accident, or at least given copies of the filed pleadings, based on the plaintiffs' conduct in negotiating the claim." *Id.* at 573, 671 S.E.2d at 92.

The Greens argue that an allegation in the insurer's employee's affidavit regarding the value of the settlement "was the only 'evidence' to challenge the damages award subsequent to defendants' default and, as noted by the appellate court, insufficient in that it did not pertain to the 'meritorious defense' argument post-default." Initial Brief, at pgs. 16-17 (quoting *McClurg*, 671 S.E.2d at 94). In so arguing, the Greens misconstrue the court's conclusion in that case. See *McClurg v. Deaton*, 395 S.C. 85, 87, 716 S.E.2d 887, 888 (2011) (noting that "the issue of a meritorious defense was neither raised to nor ruled upon by the circuit court").

The Greens anchor their critique of the Master's application of *McClurg* on the distinction that the attorney's "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.'" Initial Brief, at pg. 14. It is insignificant "that Plaintiffs' counsel promised (or even suggested) that a copy of any pleading would be forwarded to" Ms. Shields. Initial Brief, at pg. 16. Mr. West represented to Ms. Shields

that he would send a demand after he reviewed the medical records. Supp. Brief, Ex. A, at pg. 4. This distinction was presented to the Master on July 13, 2020. Tr., at 31:17-33:16. As argued by Johnson's counsel,

> The *McClurg* case doesn't turn on whether the representation was specifically made. The *McClurg* case, in fact, says that it wasn't so much a promise reduced to writing or even a verbal promise; it was that the insurer had a reasonable expectation it would be notified of any lawsuit arising from the employee's accident, at least be given copies of the filed pleadings, based on the plaintiff's conduct in negotiating the claim.

Id., at 32:12-20. Therefore, the Greens cannot show clear error in the Master's amended damages order.

Appellant argues that "[m]ost 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.'" Initial Brief, at pg. 16 (quoting *McClurg*, 380 S.C. at 573, 671 S.E.2d at 92). Strangely, the Greens attempt to distinguish Mr. West's conduct by stating that "the present case was filed against Johnson alone and the Defendant was properly served ...." *Id.* There is simply no distinction in this comparison. Moreover, the plaintiffs in *McClurg* were criticized for communicating their intent to sue the driver *and* the trucking company. Without notice to the company or the insurer, the plaintiffs sued only the driver. Similarly, Mr. West in his settlement demand clearly indicated his intent to sue CDS Transport, Inc. for negligent entrustment. He wrote that "in no fashion should [Johnson] be entrusted with the safety and security of other drivers on the roads of South Carolina." Suppl. Brief., Ex. A, at pgs. 14-15. He further noted that CDS Transport, Inc. has been previously sued for Unfair Trade Practices, and has been involved in other crashes in the last 24 months." *Id.* Based on these representations, Johnson's insurer could reasonably expect that the trucking company would be a named party in any action against the driver.

Given that the Rule 60(b)(1) analysis in *McClurg* turns on the reasonableness of the insurer's expectation to receive notice of suit, it is significant that unlike the attorney in *McClurg*, Mr. West never notified Shields of his intent to file suit and he never sent a copy of a complaint he intended to file. Thus, Johnson is entitled to relief for the surprise and excusable neglect prompted by Mr. West's representations to Johnson's insurer. The *McClurg* court forecast that such conduct would warrant relief from default judgment and the Master's order did not err in reaching that outcome.

CONCLUSION

For these reasons, Respondent-Appellant respectfully requests the Court to dismiss Appellants-Respondents' appeal.

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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

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

v.

Mervin Lee Johnson, ... Respondent-Appellant.

PROOF OF SERVICE

The undersigned hereby certifies that on the 13th day of January, 2021, he has served counsel for Appellants-Respondents with copies of the **RESPONSE TO APPELLANTS-RESPONDENTS' INITIAL BRIEF** in this matter by mailing copies of the same by United States mail, postage prepaid, to the following addresses:

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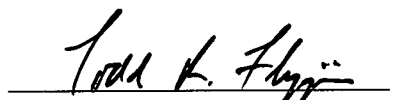
By: 

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January 13, 2021

VIA First Class U.S. Mail
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:

Attached please find the Respondent-Appellant's Response to Appellants-Respondents' Initial Brief, along with the Proof of Service for the same.

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

Sincerely,

Todd R. Flippin

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