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**May 17 2021**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM ORANGEBURG COUNTY  
Court of Common Pleas

James B. Jackson, Master-in-Equity

Appellate Case No. 2020-001254

Kacey Green and Charinrath Green,

Appellants-Respondents,

v.

Mervin Lee Johnson,

Respondent-Appellant.

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**RETURN TO MOTION TO DISMISS BY RESPONDENT-APPELLANT  
FILED MAY 7, 2021**

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The Motion to Dismiss filed by Respondent-Appellant Mervin Lee Johnson (“Johnson”) on or about May 7, 2021, argues the Notice of Appeal filed by Appellants-Respondents (“Greens”) in September of 2020 should be dismissed because the lower court had yet to decide the Greens’ 59(e) motion to reconsider the lower court’s Amended Damages Order. This motion must be denied as the 59(e) does not raise matters not previously presented to the court and was filed in an abundance of caution. The Greens’ September 14, 2020 appeal is properly before this court.

**PROCEDURAL HISTORY OF LOWER COURT CASE**

The Greens filed suit in the Orangeburg County Court of Common Pleas on January 11, 2019. Johnson was properly served, personally, but failed to timely answer. A default order was entered on March 8, 2019. The damages hearing was heard on May 22, 2019, and a damages order entered on June 5, 2019.

On June 17, 2019, twelve days after the damages order, Johnson filed a Motion to Dismiss, or in the Alternative, to Set Aside Entry of Default and Order of Damages and Allow Defendant to Responsively Plead. Johnson did not appeal the damages order at that time. Johnson also did not file a 59(e) motion to reconsider, presumably because more than ten (10) days had passed since the order was entered. A hearing on Johnson's motions was held on October 21, 2019, and an order denying those motions entered on November 4, 2019. This order in effect upheld and reinforced the June 5, 2019 Damages Order.

Johnson did not appeal the November 4, 2019 order nor the June 5, 2019 Damages Order at this time yet chose only to file a "Motion to Alter or Amend" the November 4, 2019 order. This motion was filed November 14, 2019 and heard July 13, 2020. On August 10, 2020, the lower court entered its order but did not serve it on the parties until August 14, 2020. This order affirmed Johnson was in default but granted reconsideration of the damages award, reducing the award from \$1,760,000.00 to \$250,000.00. The lower court's order effectively changed its June 5, 2019 Damages Order, after two reviews of that order (first review was pursuant to Johnson's June 17, 2019 motions and second review was pursuant to Johnson's November 14, 2019 motions). The Greens tend Johnson erred by not filing an appeal after the November 14, 2019, order. However, in the abundance of caution, they filed a Rule 59(e) motion to reconsider the August 14, 2020, Amended Damages order.

#### **PROCEDURAL HISTORY OF THE COURT OF APPEALS CASE**

At the same time as their motion to reconsider, the Greens filed a Notice of Appeal on September 14, 2020, appealing the lower court's August 10, 2020, Amended Damages Order and bringing the matter before this court. The parties worked to receive the transcript, and each filed one motion for extension to file their initial briefs.

On December 9, 2020, Johnson moved to hold the appeal in abeyance to allow consideration of the Greens' Rule 59(e) motion. The Greens filed their initial brief on December 14, 2020. On December 18, 2020, the Greens filed their return to Johnson's motion to hold the appeal in abeyance. On January 8, 2021, Johnson filed another motion, asking this court's permission to amend his Notice of Cross Appeal. The Greens also opposed that motion. This court has yet to rule on Johnson's motion to amend his cross appeal.

This court did rule on Johnson's Motion to Hold the Appeal in Abeyance, pending the lower court's consideration of the Rule 59(e) motion. The lower court issued a form 4 denying the motion on March 8, 2021, indicating a formal order would follow. Johnson then filed a notice of appeal on April 16, 2021.

On April 20, 2021, the Greens filed a motion for an extension of time to file their amended notice of appeal, and at the same time file their amended notice of appeal including the Rule 59(e) denial on March 8, 2021, as part of their original appeal, which again, appealed the lower court's August 14, 2020, order reducing the damages awarded in the June 17, 2019, order.

Now, on May 7, 2021, Johnson filed a motion to dismiss the Greens' initial Notice of Appeal as untimely, arguing it was premature and that allowing it to proceed prejudices Johnson. The Greens submit this return.

### **ARGUMENT**

The Greens' Rule 59(e) did not stay the time to file their notice of appeal because Johnson's initial motion in June of 2019 and Rule 59(e) motion of the November 4, 2019, order had already sufficiently presented the issues to the lower court as rendered in its August 14, 2020 order.

A Rule 59(e) motion to reconsider an order must be filed within 10 days after receipt of the entry of an order. Rule 59(e), SCRCP. A notice of appeal must be served on all respondents

within thirty days after receipt of the entry of an order. Rule 203(b)(1), SCACR. “A timely post-trial motion, including a motion to alter or amend the judgment pursuant to Rule 59(e), SCRCR, stays the time for an appeal for all parties until receipt of written notice of entry of the order granting or denying such motion.” Elam v. S.C. Dept. of Transp., 361 S.C. 9, 602 S.E.2d 772 (2004) (referencing Rule 203(b)(1), SCACR; Rules 50(e), 52(c), and 59(f), SCRCR).

A Rule 59(e) request asks “the trial judge to ‘reconsider matters properly encompassed in a decision on the merits.’” Arnold v. State, 309 S.C. 157, 172, 420 (S.E.2d 834, 842 (1992) (quoting *Budinich v. Becton Dickinson and Co.*, 486 U.S. 196, 200, 108 S.Ct. 1717, 100 L.Ed2d 178 (1988)). “As one authority has noted, ‘[o]nce the issue has been properly raised by a Rule 59(e) motion, it appears that it is preserved and a second motion is not required if the trial court does not specifically rule on the issue so raised.’” Coward Hund Const. Co., Inc. v. Ball Corp., 336 S.C. 1, 518 S.E.2d 56 (1999).

In *Coward Hund v. Ball Corp.*, the court found that subsequent Rule 59(e) motions did not stay the time to file an appeal. Id. In this case, the lower court entered a summary judgment against Hund leading to Hund filing a motion to reconsider, which was denied, and then a second motion to reconsider, which was also denied. Id. Hund then filed a notice of appeal within thirty (30) days of the order denying the second motion to reconsider, which prompted a motion before the Court of Appeals as to whether the second Rule 59(e) stayed the time for appeal. Id. In dismissing the appeal, the court reasoned:

We realize the second motion in this case was not merely a successive request to revisit an issue that had already been adjudicated in the first motion; nevertheless, the motion did not stay the time for Coward Hund to file its notice of appeal. First, Coward Hund is not challenging a new ruling in its second motion.

336 S.C. at 4, 518 S.E.2d at 58. Second, the trial court had already considered all of the issues on the first motion to reconsider. *Id.* Finally, the Court of Appeals reasoned, the second 59(e) motion was “more appropriately treated as a motion under Rule 60, SCRCP, and did not toll the time for the filing and service of its notice of appeal.” *Id.* at 5, 518 S.E.2d at 59 (analyzing *Brown v. United Ins. Co. of Am.*, 807 F.2d 1239 (allowing an appeal to proceed although a motion for clarification was filed at the same time because that motion was not timely and thus treated as a Rule 60(b), Federal Rules of Civil Procedure).

In the matter before this court, Johnson filed a motion questioning the validity of the entry of default and the damages amount ordered. See Ex. A (Motion June 17, 2019). This motion led to the lower court’s order entered on November 4, 2019. In that order, the lower court addressed whether Johnson showed good cause as to why he was unable to timely answer the complaint, the *Wham* factors, and Rule 60(b) SCRCP standards. See Ex. B (Order Nov. 4, 2019). Johnson then filed a 59(e) to reconsider this order on November 14, 2019, essentially restating his arguments initially raised in his June 17, 2019 motions. See Ex. C (Motion Nov. 14, 2019). The lower court then amended its November 4, 2019, confirming that default was properly entered but reduced the damages award based on reconsideration of its previous rulings under Rules 55 and 60(b), SCRCP. See Ex. D (Order Aug. 14, 2020). The Greens then filed a motion to reconsider, again raising concerns of the lower court’s analysis under Rules 55 and 60(b), SCRCP. See Ex. E (Motion Aug. 24, 2020). With this motion, the same questions of law had been presented before the court three times. However, the Greens filed their 59(e) motion because the lower court considered Johnson’s 59(e) motion even though the matter was at that point ripe for appeal. Nonetheless, the matters of law were consistently presented to the lower court from the June 17, 2019, motion through the August 14, 2020, order. The Greens’ Rule 59(e) motion was not necessary and superfluous to the

issues already sufficiently vetted and considered by the lower court. As such, the time for appeal was not stayed until after the Greens' rule 59(e) motion was denied on or about March 8, 2021.

The Greens timely presented their issues on appeal by notice of appeal on September 14, 2020.

Respectfully submitted,

s/ Virginia W. Williams

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Attorneys for Appellants-Respondents

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|-----------------------------------|---|--|
| STATE OF SOUTH CAROLINA           | ) | IN THE COURT OF COMMON PLEAS             |
|                                   | ) |  |
| COUNTY OF ORANGEBURG              | ) |  |
|                                   | ) |  |
| Kacey Green and Charinrath Green, | ) | C/A No. 2019-CP-38-00053                 |
|                                   | ) |  |
| <i>Plaintiffs,</i>                | ) | <b>DEFENDANTS' NOTICE OF MOTION</b>      |
|                                   | ) | <b>AND MOTION TO DISMISS, OR, IN THE</b> |
| versus                            | ) | <b>ALERNATIVE, TO SET ASIDE ENTRY</b>    |
|                                   | ) | <b>OF DEFAULT AND ORDER OF</b>           |
| Mervin Lee Johnson,               | ) | <b>DAMAGES AND ALLOW DEFENDANT</b>       |
|                                   | ) | <b>TO RESPONSIVELY PLEAD</b>             |
| <i>Defendant.</i>                 | ) |  |

TO: VIRGINIA W. WILLIAMS AND DAVID R. WILLIAMS, ATTORNEYS FOR PLAINTIFFS:

Defendant Mervin Lee Johnson ("Defendant"), by and through his undersigned counsel, hereby moves pursuant to Rules 4, 6(b), 12(b)(4), 12(b)(5), 12(h)(1), 55(c), 56, and 60 of the South Carolina Rules of Civil Procedure ("SCRPC"), 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. Defendant requests that he be allowed to responsively plead to Plaintiffs' Complaint.

In support of this Motion, Defendant states as follows:

1. Defendant, a professional truck-driver, had no attorney in this matter prior to June 10, 2019.
2. Plaintiffs' Summons and Complaint has not been properly served on Defendant in a manner prescribed by law and, as a result, this action has not been properly commenced under Rule 3, SCRP. Defendant cannot be in default on an action not yet properly commenced.
3. Even if Plaintiffs' Complaint were properly served, Defendant has acted with reasonable promptness to have the entry of default and damages order set aside, and because Defendant alleges meritorious defenses to the claims in Plaintiffs' Complaint, including, but not limited to the defenses of improper service and the existence of a video recording which does not

support – or calls into question – Plaintiffs’ causation and damages allegations, Defendant has satisfied the requirements of good cause under Rule 55(c) of SCRCF.

4. No prejudice will result to Plaintiffs as a result of the Court setting aside the entry of default and damages order since doing so will not impede the ability of Plaintiffs to present their claims, and delay alone is insufficient to establish prejudice.

5. Even if Plaintiffs’ Complaint were properly served, Defendant’s failure to answer Plaintiffs’ Complaint in a timely manner was based on excusable neglect and was not the result of willful misconduct.

6. It is the policy of the South Carolina to encourage disposition of claims on their merits.

7. The Order of Damages filed June 5, 2019 is out of proportion to the actual damages suffered in this case. Plaintiffs alleged \$12,826.00 in medical expenses, and the award of \$1,760,000.00 in total damages, including \$1,000,000.00 in personal injury claims and \$750,000.00 in punitive damages, are unreasonable under the circumstances, especially given the fact that there is a video recording of this accident, which appears to show a relatively minor accident.

8. Defendant is unsure whether this video evidence was presented to the Court for its consideration at the May 22, 2019 damages hearing.

9. In support of this Motion, Defendants may rely upon one or more affidavits, a Memorandum of Law, documents on file with the Court, the arguments of counsel, and any other material the Court may receive.

10. The undersigned hereby certifies and affirms, in accordance with Rule 11, SCRCF, that consultation with opposing counsel was attempted in order to resolve the subjects within this Motion and no agreement has been reached.

Wherefore, Defendant respectfully requests that the Court grant this Motion to Dismiss Plaintiffs’ Summons and Complaint on the ground of improper service of process. In the

alternative, Defendant requests that the Court grant their Motion to Set Aside the Entry of Default and Order of Damages and allow Defendant to responsively plead to Plaintiffs' Complaint.

HOLCOMBE BOMAR, P.A.

*s/ A. Walker Barnes*

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*Attorneys for the Defendant*

**June 17, 2019**  
Spartanburg, South Carolina

|                                   |   |                              |
|-----------------------------------|---|------------------------------|
| 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, | ) |                              |
|                                   | ) |                              |
| <i>Plaintiffs,</i>                | ) |                              |
| versus                            | ) | <b>ORDER</b>                 |
|                                   | ) |                              |
| Mervin Lee Johnson,               | ) |                              |
|                                   | ) |                              |
| <i>Defendant.</i>                 | ) |                              |

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THIS MATTER CAME BEFORE THIS COURT on October 21, 2019 as to a Motion filed on June 17, 2019 by the Defendant entitled “Defendant’s 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.” Present at the hearing were: A. Walker Barnes for the Defendant, David R. Williams for the Plaintiffs, and E. Mason West for the Plaintiffs.

**BACKGROUND**

Plaintiff filed this lawsuit on or about January 11, 2019, alleging negligence, recklessness, carelessness, willfulness, wantonness, and gross negligence. Defendant Mervin Lee Johnson was served this lawsuit by personal service, pursuant to S.C. Code Ann. Section 15-9-350, at 348 High Street, Orangeburg, SC 29115, on January 26, 2019. The court agreed service was proper and entered an order of default on or about March 8, 2019. Defendant was properly notified of the damages hearing, but did not make an appearance. 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 finally made an appearance, through counsel, by filing a motion to dismiss, or alternatively to set aside entry of default to allow Defendant to Answer. On October 17, 2019, Defendant filed two affidavits, one from insurance adjuster and one from a trucking company representative who appears to be an internal adjuster possibly because some self insured amount is in play. Defendant himself did not file an affidavit and has yet to offer any testimony or other forthcoming position in this case. Further, Defendant has offered no affidavits, or other evidence, to refute or contradict

that Plaintiff effected proper service of the Summons and Complaint and Notice of the Damages Hearing.

### **STANDARD**

The standard for setting aside an entry of default is found in Rule 55(c) of the South Carolina Rules of Civil Procedure – there must be “good cause” to set it aside. Rule 55 SCRCP. The rule squarely puts the burden of showing good cause on the moving party, in this case the Defendant Johnson. If the Defendant fails to show good cause why he was unable to answer the Complaint, the court's refusal to set aside an entry of default will be upheld as supported by the evidence. *Williams v. Vanvolkenburg*, 312 S.C. 373, 440 S.E.2d 408 (Ct. App.1994); *Wham v. Shearson Lehman Brox., Inc.*, 298 S.C. 462, 465, 381 S.E.2d 499, 501 (Ct. App.1989). The trial judge has discretion to make this determination and abuse of that discretion occurs “when the judge issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support.” *Sundown Operating Co v. Intedge Indus.*, 383 S.C. 601, 606, 681, S.E.2d 885, 888 (2009). Further explained, “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)). “The trial court need not make specific findings of fact for each factor if there is sufficient evidentiary support on the record for the finding of the lack of good cause.” *Id.* (citing *Dixon v. Besco Engineering, Inc.*, 320 S.C. 174, 179, 463 S.E. 2d 636, 639 (Ct. App. 1995)).

In addition to good cause, Rule 55 goes on to read that “if 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) SCRPC. There are additional factors to consider under Rule 60(b)(1): “(1) the promptness with which relief is sought; (2) the reasons for the failure to act promptly; (3) the existence of a meritorious defense; and (4) the prejudice to the other party.” Rouvet v. Rouvet, 388 S.C. 301, 309 (Ct. App. 2010).

### ANALYSIS

Defendant’s motion is denied because Defendant failed to establish good cause, satisfactory explanation for the default as required by Rule 55 SCRPC and the progeny case law.

As noted *supra*, Defendant produced two affidavits. One from insurance adjuster that offer an explanation as to why Defendant did not timely answer. Nikole Shields, Senior Claims Consultation for Claims Direct Access in Utah, states the following, specifically to Defendant Johnson’s involvement: “in or around November 2018, after being diagnosed with a heart condition, Defendant underwent open heart surgery, which required an extensive recovery; Defendant has not worked since the November 2018 open heart surgery; and in June 2019, Defendant was diagnosed with diabetes, for which he has been hospitalized on multiple occasions.” Aff. Nikole Shields (Oct. 17, 2019). The other, Breeann Richardson, a claims administrator for CDS Transport Inc. in Utah, makes the same affirmations as to Defendant Johnson. Aff. Breeann Richardson (Oct. 17, 2019). Indeed, it is the exact same language.

These reasons are not good cause. First, the lawsuit was filed in January of 2019 – two months after Defendant Johnson’s alleged surgery. The lawsuit was served at Defendant

Johnson's home on January 26, 2019 – again two plus months after his alleged surgery in November of 2018. Second, if we presume Richardson and Shields are correct – and to do so would be to ignore the hearsay embedded in their affidavits – Defendant Johnson was not working (i.e. he was not driving up and down the highway) and in “extensive recovery.” Plaintiff did not attempt to serve Defendant Johnson at work, or anywhere else, but rather at his home. The diabetes diagnosis, again assuming Shields and Richardson's hearsay should even be considered, was not until after the damages hearing in May 2019. While the court is sympathetic to the ailments Defendant Johnson supposedly endured, they are insufficient and unsatisfactory reasons to set aside judgment.

The remaining justifications proposed in these two affidavits are coming from insurance adjusters and administrators. As clearly defined in *McClurt v. Deaton*, 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. The affidavits speak nothing of Defendant Johnson's perspective on why the wreck happened as it did. The affidavits speak nothing of any conversations Plaintiff's counsel had with Defendant Johnson or any alleged exchange of information or assurances between Plaintiff's counsel and Defendant Johnson. The affidavits make summarily, conclusive assumptions by insurance adjusters of the impact as “minor” – an impact they did not witness nor, apparently, did not even discuss with Defendant Johnson.

While the court's analysis at this point is determinative of the issue, it is important to note that but for his failure to establish good cause, Defendant Johnson still cannot satisfy the other requirements under Rule 60 to set aside the default and the damages order. Specifically, Defendant Johnson has not set forth a meritorious defense. Defendant Johnson puts forth no explanation as to how the wreck occurred. There is nothing before the court to dispute that Defendant Johnson rear-ended Plaintiff multiple times while driving at a high rate of speed down I-26. Indeed, the *McClurg* court defines meritorious defense in terms of any evidence “to suggest that the accident was the result of anything other than Deaton's negligence.” McClurg 380 S.C.

at 575. This accident, as presented before this court, has only one cause – Defendant Johnson’s conduct. Defendant Johnson’s argument of meritorious defense thus boils down to only a dispute of the amount of damages awarded. Per *McClurg*, that is not a meritorious defense.

Finally, setting aside the judgment at this point is unduly prejudicial to Plaintiffs. Plaintiffs have now moved to Virginia. Further litigation in Orangeburg, South Carolina, would be particularly burdensome to Plaintiffs, prejudicing their ability to prosecute their claims as they would have when living in South Carolina.

**CONCLUSION**

Defendant Johnson’s motions are hereby denied. This court’s damages order stands.

**AND IT IS SO ORDERED.**

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Judge James B. Jackson, Jr.  
Master in Equity

Dated: October \_\_\_\_\_, 2019



Orangeburg Common Pleas

**Case Caption:** Kacey D Green , plaintiff, et al VS Mervin Lee Johnson

**Case Number:** 2019CP3800053

**Type:** Order/Damages

So Ordered

James B. Jackson, Jr. 3077 Master in Equity



- Rule 6(b), 55(c), and 60(b) of the South Carolina Rules of Civil Procedure (“SCRCP”), including the following language:
  - “On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect.” SCRCP 60(b)(1).
  - Rule 60(b) also states that “The motion shall be made within a reasonable time, and for reasons [that include Rule 60(b)(1)] not more than one year after the judgment, order or proceeding was entered or taken.” *Id.*
  
- The following three cases support the Defendant’s Motion to Set Aside Default:
  - *McClurg v. Deaton*, 380 S.C. 563 (Ct. App. 2008), *aff’d*, 395 S.C. 85, (2011):
    - The facts of this case constitute “mistake, inadvertence, surprise, or excusable neglect” such that this Court should set aside the Entry of Default and Order of Damages against Defendant and allow Defendant to responsively plead to Plaintiffs’ Complaint because, unlike the appellant in *McClurg*, the Defendant has put forward some evidence of a “meritorious defense,” most notably that the evidence in this case, including but not limited to the videorecording of the accident and the very minor damage to Plaintiffs’ motor vehicle, do not support the Court’s determination of proximate cause and damages.
  - *Rouvet v. Rouvet*, 388 S.C. 301, 309 (Ct. App. 2010):
    - “In determining whether to grant relief under Rule 60(b)(1), the court must consider the following factors: ‘(1) the promptness with which relief is sought; (2) the reasons for the failure to act promptly; (3) the existence of a meritorious defense; and (4) the prejudice to the other party.’ ”
      - promptness: Defendant’s counsel filed this Motion ten days after counsel learned of this lawsuit;
      - failure to act promptly: lack of actual knowledge of the lawsuit;
      - meritorious defense: the videorecording of the accident calls into question issues of proximate cause and alleged damages; and
      - no prejudice to Plaintiffs exists by allowing Defendant to have his day in court.
  - *Thompson v. Hammond*, 299 S.C. 116, 120 (1989)
    - “[A] meritorious defense need not be perfect nor one which can be guaranteed to prevail at a trial. It need be only one which is worthy of a hearing or judicial inquiry because it raises a question of law deserving of some investigation and discussion or a real controversy as to real facts arising from conflicting or doubtful evidence.” *Id.*
  
- Defendant timely produced two Affidavits, one by Breeann Richardson (Claims Administration for CDS Transport, Inc) the trucking company who worked with Defendant

in the past, including at the time of the subject accident) and one by Nikole Shields (Senior Claims Consultant for Claims Direct Access (“CDA”), CDS Transport’s professional liability insurance company).

- Ms. Richardson’s and Ms. Shields’ affidavits state, in pertinent part, that:
  - Defendant is a former independent contractor truckdriver who at one time worked with CDS Transport, Inc., an insured of CDA, as a truckdriver, including at the time of the subject accident.
  - In March 2018, CDS Transport learned of the February 28, 2018 accident and a potential claim involving the same.
  - At no point in time prior to June 7, 2019 did Defendant or Plaintiffs’ counsel inform CDS Transport, Inc. or CDA that:
    - a lawsuit had been initiated against Defendant;
    - an Order of Default was entered on or about March 8, 2019; or
    - a Damages hearing took place on May 22, 2019.
  - Neither Defendant nor any representative of CDS Transport, Inc. testified or offered any evidence at the May 22, 2019 hearing.
  - After learning on or about June 7, 2019 of this lawsuit, CDS Transport was informed that:
    - in or around November 2018, after being diagnosed with a heart condition, Defendant underwent open heart surgery, which required an extensive recovery;
    - Defendant has not worked since the November 2018 open heart surgery; and
    - in June 2019, Defendant was diagnosed with diabetes, for which he has been hospitalized on multiple occasions.
  
- Defendants further argued that pursuant to Rule 4, 12(b)(4), 12(b)(5), 12(h)(1), and 56 of the SCRCP, an Order dismissing Plaintiff’s Summons and Complaint for improper service of process, should be granted, on the following grounds:
  - Defendant, a professional truck-driver, had no attorney in this matter prior to June 10, 2019.
  - Plaintiffs’ Summons and Complaint was not properly served on Defendant in a manner prescribe by law and, as a result, this action has not been properly commenced under Rule 3, SCRCP. Defendant cannot be in default on an action not yet properly commenced.
  - Even if Plaintiff’s Complaint were properly served, Defendant has acted with reasonable promptness to have the entry of default and damages order set aside, and because Defendant alleges meritorious defenses to the claims in Plaintiffs’ Complaint, including, but not limited to the defenses of improper service and the existence of a video recording which does not support – or calls into question – Plaintiffs’ causation and damages allegations, Defendant has satisfied the requirements of good cause under Rule 55(c) of SCRCP.

- No prejudice will result to Plaintiffs as a result of the Court setting aside the entry of default and damages order since doing so will not impede the ability of Plaintiffs to present their claims, and delay alone is insufficient to establish prejudice.
- Even if Plaintiffs' Complaint were properly served, Defendant's failure to answer Plaintiffs' Complaint in a timely manner was based on excusable neglect and was not the result of willful misconduct.
- It is the policy of South Carolina to encourage disposition of claims on the merits.
- The Order of Damages filed June 5, 2019 is out of proportion to the actual damages suffered in this case. Plaintiffs alleged \$12,826.00 in medical expenses, less than \$2,000.00 in property damage, and the award of \$1,760,000.00 in total damages, including \$1,000,00.00 in personal injury claims and \$750,000 in punitive damages, are unreasonable and grossly out of proportion, especially given the fact that there is a video recording of this accident, which appears to show a relatively minor accident and relatively minor damages, if any bodily injury whatsoever.

This Motion is also supported by the pleadings, affidavits on file, exhibits on file, legal memoranda which may be served and filed, and the entire record herein.

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By: s/A. Walker Barnes  
A. Walker Barnes (S.C. Bar No. 78485)

*Attorneys for Defendant*

November 14, 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"). 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 5<sup>th</sup> 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 27<sup>th</sup> 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 Plaintiff's 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." SCRCR 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), SCRCR. The motion further sought

reconsideration of Defendant's motion to dismiss citing Rules 12 and 56, SCRCPP 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, SCRCPP. 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), SCRCPP.
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 its 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 5<sup>th</sup> 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.

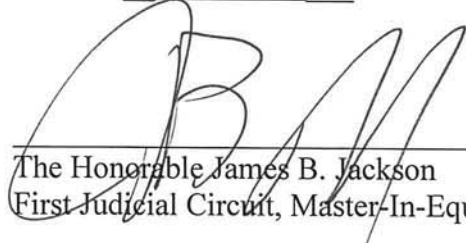
21. There is no definite standard by which standard to compensate the plaintiff for pain and suffering. The fact finder has the authority to determine the amount, if any, to be allowed for pain and suffering, using calm and reasonable judgment to ensure that the damages are just and reasonable in light 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 | \$ <u>190,000.00</u> |
| Punitive Damages                            | \$ <u>60,000.00</u>  |
| TOTAL:                                      | \$ <u>250,000.00</u> |



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

August 10, 2020

Orangeburg, South Carolina

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

PLEASE TAKE NOTICE, pursuant to Rule 59(E), SCRPC, 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, SCRPC, 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  
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P.O. Box 1084

August 24, 2020  
Moncks Corner, SC

Orangeburg, SC 29116

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**RECEIVED**

**May 17 2021**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

---

APPEAL FROM ORANGEBURG COUNTY  
Court of Common Pleas

James B. Jackson, Master-In-Equity

---

Circuit Court Case No. 2019-CP-38-00053  
Appellate Court Case No. 2020-001254

---

Kacey Green and Charinrath  
Green,

Appellant-  
Respondent,

v.

Mervin Lee Johnson,

Respondent -  
Appellant.

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PROOF OF SERVICE

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I certify that I have served the Return to Respondent-Appellant's Motion to Dismiss on opposing counsel by e-mail as permitted by this Court at the following address:

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Todd R. Flippin  
Po Box 1897  
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(864) 594-5300

*[Signature page to follow]*

RESPECTFULLY SUBMITTED,

*s/Virginia W. Williams*

David R. Williams, 77899

Virginia W. Williams, 77898

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May 17, 2021

Orangeburg, South Carolina

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MARSHALL B. WILLIAMS, (1912-1995)  
C. BRADLEY HUTTO  
CHARLIE H. WILLIAMS, III  
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J. ANDREW DELANEY

May 17, 2021

VIA E-FILING [ctappfilings@sccourts.org](mailto:ctappfilings@sccourts.org)  
The Honorable Jenny Abbott Kitchings  
South Carolina Court of Appeals  
Post Office Box 11629  
Columbia, South Carolina 29211

**RECEIVED**  
**May 17 2021**  
**SC Court of Appeals**

**Re: Green v. Johnson**  
**Appellate Case No. 2020-001254**

Dear Ms. Kitchings:

Please find enclosed for e-filing Appellants-Respondents' Return to Respondent-Appellant's Motion to Dismiss.

Yours truly,



Virginia W. Williams

VWW/csp

CC: Todd R. Flippin (via email)  
Co-counsel Mason West (via email)  
Enclosure