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**Jun 15 2021**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM ORANGEBURG COUNTY  
Court of Common Pleas

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

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Case No. 2020-001254

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

v.

Mervin Lee Johnson,.....Respondent-Appellant.

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**RETURN TO APPELLANTS-RESPONDENTS' MOTION TO DISMISS**

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Appellants-Respondents Kacey Green and Charinrath Green’s (collectively the “Greens”) motion seeks dismissal of Respondent-Appellant Mervin Lee Johnson’s (“Johnson”) cross-appeal. They also ask the Court to dismiss Johnson’s April 7, 2021 Notice of Appeal, which was timely served after the trial court issued its order denying the Greens’ Rule 59(e) motion. Because the Greens’ cannot demonstrate that their Rule 59(e) motion raised no new issues to the trial court, their motion to dismiss is without merit. Therefore their motion should be denied.

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 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, filed pursuant to S.C.R.Civ.P. 60(b), sought an order relieving Johnson from the default judgment and citing the Greens’ damages allegations (among other things) as justification for such relief. 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.<sup>1</sup> On November 4, 2019, the Master issued his order denying Johnson’s motion, but failed 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.<sup>2</sup> The Master issued the Amended Order on August 14, 2020. On August 24,

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<sup>1</sup> 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.

<sup>2</sup> 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

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.

**The Court Should Deny Plaintiff's Motion to Dismiss Johnson's Notice Cross-Appeal and Notice of Appeal**

Resolution of Plaintiff's Motion to Dismiss turns on one issue.<sup>3</sup> Whether Plaintiff's Rule 59(e) Motion stayed the deadline to appeal the Master-in-Equity's Amended Damages Order. Plaintiff's assert that Johnson's Notice of Cross-Appeal was untimely in one of two ways. First, the Greens argue that Johnson's 59(e) motion was untimely and/or an improper attempt to rehash issues raised and decided in the Master's ruling on Johnson's Rule 60(b) motion. As discussed at length in Johnson's return to the Greens' initial appellate brief, this argument is without merit. Moreover, the Greens' argument that Johnson's June 17, 2019 Rule 60(b) motion was untimely is not properly before the court because the issue was not preserved of appeal.

The Greens' penultimate argument is that their Rule 59 motion did not stay the time for Johnson to file his Notice of Cross Appeal. According to the Greens' reasoning, if new issues were raised for the first time in their August 24, 2020 Rule 59(e) motion, then the appeal deadline was stayed and this Court lacks jurisdiction over the Greens' Notice of Appeal. Because the Greens'

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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.

<sup>3</sup> One element of Plaintiffs' argument is not an issue in this action: the Greens' motive in filing the Rule 59(e) motion. In their motion to dismiss, the Greens once again argue their motion for reconsideration was filed "in an abundance of caution." *See also* Return to Motion to Hold Appeals in Abeyance, at pg. 1, describing motion as filed "out of an abundance of caution to timely and fully preserve their rights." Clearly the Greens understood that appealing directly from the Master's August 14, 2020 order was precarious.

Rule 59(e) motion undoubtedly raised new issues with the trial court, their notice of appeal was untimely.

The Greens consistently, and erroneously, assert that their Rule 59(e) motion “did not address any new matters not previously raised to the court twice before on Johnson’s Rule 60 motion and subsequent (the first) Rule 59 motion.” Appellants-Respondents’ Motion to Dismiss, at pg. 3. However, the Greens’ raise issues the Master has never been asked to decide. Instead of simply proclaiming an absence of novel issues, the Greens must demonstrate that their motion to reconsider plows no new ground. The best inventory of these issues is, of course, the Rule 59(e) motion itself. See Ex. A, Rule 59 (e) Motion.

Of the 16 issues that Plaintiffs asked the Master to reconsider, several were demonstrably raised in their motion for the first time. *Id.* The most obvious is Plaintiff’s argument “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.” Rule 59(e) Motion, at pg. 3. If Plaintiffs had concerns with the Court’s factual findings underlying its punitive damages award in the June 5, 2019 order, these were never raised. To the degree that the Amended Order was deficient in its punitive damages award, Plaintiffs were obligated to bring these to the Master’s attention prior to appealing the order.

Additionally, the Greens’ Rule 59(e) motion raised, again for the first time, their argument that some types of property damage claims were not released in their subrogation claim against their insurer. The motion argues that their claims for diminished value of the nearly new Tesla as well as loss of use of the vehicle constituted appropriate claims for property damage that were never released. In support of this novel argument, Plaintiff’s attached new evidence in the form of an affidavit regarding the Greens’ communications with their insurer. Ex. A, at Ex. A to Rule 59(e)

Motion. What cannot be contested is that these issues were never raised with the trial court. Therefore, the Greens' Rule 59(e) motion cannot be disregarded as a merely successive post-trial motion.

If, contrary to the plain text of the Rules of Civil Procedure, the Greens' Rule 59(e) motion was ineffective to stay the deadline to serve and file notices of appeal from the Master's Amended Order, then this Court may find that Johnson's appeal is untimely and not within this Court's jurisdiction. Fundamental fairness requires that Johnson not be penalized for the Greens' failure to respect the stay imposed by their timely Rule 59(e) motion.

“A notice of appeal **shall** be served on all respondents within thirty (30) days after receipt of written notice of entry of the order or judgment.” Rule 203(b)(1), SCACR. “The requirement of service of the notice of appeal is jurisdictional, i.e., if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to ‘rescue’ the delinquent party by extending or ignoring the deadline for service of the notice.” *Elam v. South Carolina Dept. of Transp.*, 361 S.C. 9, 14–15, 602 S.E.2d 772, 775 (2004) (quoting *Mears v. Mears*, 287 S.C. 168, 337 S.E.2d 206 (1985)).

In reliance on the stay on the appeal deadline imposed by the Greens' Rule 59 motion, Johnson did not serve a Notice of Appeal. Because the Greens' Rule 59(e) motion challenged issues not previously raised by the Parties, the motion did not violate the “single bite at the apple” rule. Johnson had no cause to believe that he was then subject to Rule 203(b)(1)'s 30-day time limit. Nor could Johnson predict that the Greens would simultaneously move “to convince the lower court it has ruled wrongly” and ask the appellate court to reverse the Master's amended order. *I'on, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000).

Faced with the prospect that this Court would fail to dismiss the Greens' notice of appeal, Johnson sought the trial court's guidance on the status of the outstanding Rule 59(e) motion. The Master erroneously informed Johnson that the trial court no longer had jurisdiction to consider the motion. Having relied on the stay imposed by the Greens' motion to reconsider, Johnson was now "between the proverbial rock and a hard place" predicted in *Elam*, 361 S.C. at 25, 602 S.E.2d at 781. Therefore, Johnson on September 25, 2020 served his Notice of Cross-Appeal based on the date of the Master's correspondence. See *Wells Fargo Bank, N.A. v. Fallon Properties South Carolina, LLC*, 422 S.C. 211, 219, 810 S.E.2d 856, 860 (2018) (holding that "an email sent from the court, an attorney of record, or a party that provides written notice of entry of an order or judgment triggers the time for serving a notice of appeal for purposes of Rule 203(b)(1), SCACR").

The Greens' procedurally defective Rule 59(e) motion and untimely Notice of Appeal threaten Johnson's right to appeal the Master's failure to set aside default judgment and allow the Parties to litigate these claims on the merits. The appropriate cure for this prejudice is an order dismissing the Greens' Notice of Appeal.<sup>4</sup>

Alternatively, Johnson's cross-appeal suffers from a single defect: its title. The trigger for Johnson to appeal from the trial court's Amended Damages Order was the trial court's email erroneously informing Johnson that it no longer had jurisdiction over the action. To the extent Johnson's appeal was incorrectly styled as a cross-appeal, the appropriate remedy is to grant Johnson leave to amend his cross-appeal accordingly. To the degree the title of Johnson's appeal was in error, such an error is clerical only and does not impair this Court's jurisdiction over the otherwise timely appeal.

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<sup>4</sup> As a practical matter, if the Court dismisses the Greens' untimely Notice of Appeal, and denies the Greens' motion to dismiss Johnson's timely Notice of Appeal from the Master's March 8, 2021 order, Johnson's cross-appeal would be surplusage and appropriately dismissed.

## CONCLUSION

Respondent-Appellant Johnson respectfully requests that the Court deny the Greens' Motion to Dismiss. The trial court has now issued its order dismissing the Greens' timely Rule 59(e) motion. The Court's jurisdiction over appeals timely served and filed subsequent to that final order is doubtless. Dismissing Johnson's appeal (or dismissing Johnson's cross-appeal without also dismissing the Greens' untimely appeal) will reward the Greens' procedurally defective appeal, perpetuate uncertainty regarding the effect of motions to reconsider, and penalize Johnson for his reliance on the stay on appeals imposed by such motions. For these reasons, the Court should deny the Greens' motion to dismiss Johnson's Notice of Cross-Appeal and Johnson's subsequent Notice of Appeal. The only appeal properly within the Court of Appeal's jurisdiction is Johnson's Notice of Appeal, which was filed on April 16, 2021.

HOLCOMBE BOMAR, P.A.

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By: *s/Todd R. Flippin*

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*Attorneys for Respondent-Appellant*

Spartanburg, South Carolina

June 14, 2021



THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM ORANGEBURG COUNTY  
Court of Common Pleas

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

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Case No. 2020-001254

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**Exhibit A**

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
 )  
COUNTY OF ORANGEBURG )  
 ) C/A No. 2019-CP-38-00053  
Kacey Green and Charinrath Green, )  
 )  
 )  
 ) *Plaintiffs,* )  
 )  
 ) versus )  
 )  
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 \_\_\_\_\_  
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August 24, 2020  
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*Kacey Green*

KACEY GREEN

Sworn to and subscribed before me:

This 24<sup>th</sup> day of August, 2020

Notary Public for the State of Virginia

My Commission Expires: 3/31/2024

*Nakita Mattocks*



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v.

Mervin Lee Johnson,.....Respondent-Appellant.

**PROOF OF SERVICE**

The undersigned hereby certifies that on the 14<sup>th</sup> day of June, 2021, he has served counsel for Respondents with a copy of the **RETURN TO APPELLANTS-RESPONDENTS' MOTION TO DISMISS** together with all enclosures in this matter by electronically mailing copies of the same to the following addresses:

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June 14, 2021

**VIA ELECTRONIC MAIL ONLY ctappfilings@sccourts.org**

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:

Enclosed please find for filing our Return to Appellants-Respondents' Motion to Dismiss in the above referenced matter, along with our exhibits and Proof of Service.

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

Sincerely,

*s/Todd R. Flippin*

Todd R. Flippin

Enclosures

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