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

Mervin Lee Johnson, Appellant-Respondent,

v.

Kacey Green and Charinrath Green, Respondents-Appellants.

RESPONSE BRIEF OF RESPONDENTS-APPELLANTS

August 27, 2021

s/ Virginia W. Williams
David R. Williams, 77899
Virginia W. Williams, 77898
WILLIAMS & WILLIAMS
1281 Russell Street
Post Office Box 1084
Orangeburg, S.C. 29116-1084
Phone: (803) 534-5218
williamsdr@williamsattys.com
williamsvw@williamsattys.com

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

Attorneys for Appellants-Respondents

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Other Authorities

TABLE OF AUTHORITIES (CONT'D)

Rules

COUNTER STATEMENT OF ISSUES ON APPEAL

1. The Master properly denied relief from default judgment because Johnson has offered no good cause for not responding to the complaint

2. The Master properly denied relief from default because Johnson did not establish meritorious defenses to the damages award

3. The Master properly denied relief from default judgment because there was neither misrepresentation by the Greens pre-suit nor conduct giving rise to surprise or excusable neglect

4. The Master properly denied relief from default because evidence the property claim had been satisfied or released was not properly before the court nor had the property claim been satisfied or released

STATEMENT OF THE CASE

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

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

On November 14, 2019, Defendant filed a second motion, styled a Motion to Alter or Amend the November 4, 2019, Order. The motion was heard on July 13, 2020. On the morning of the motion hearing, four months after initially filing the motion, Johnson filed a memorandum of law and attached an 18-page exhibit in support. Johnson Suppl. Memo. Motion Reconsider Ex. A. During the hearing, counsel for Plaintiffs challenged both the introduction of the new evidence and the attempt by Defendant to relitigate issues previously decided. Motion to Reconsider p. 41:7-18. Nevertheless, the court considered the evidence and granted Defendant's motion as to damages. Motion to Reconsider p. 37:14-20. The court denied Defendant's motion as it related to liability. Id. By an Amended Damages Order, dated August 10, 2020, Plaintiffs' award was reduced to $250,000.00. Having received written notice of the Amended Damages Order on August 14, 2020, Plaintiffs filed their notice appealing this order on September 14, 2020. In the abundance of caution, the Greens filed a Rule 59(e) motion to reconsider the Amended Damages Order. Johnson filed a notice of appeal on October 5, 2020.

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. This court ruled in favor of Johnson and held 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. After motions to dismiss by the Greens and Johnson, this court denied both and instructed the briefing schedule to resume, beginning with an initial brief from the Greens, whether amended or as originally presented on December 14, 2020. The Greens now set forth this Amended Initial Brief.

ARGUMENT

I. Standard of Review

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 Johnson. If Johnson 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) SCRCP. 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).

Our Supreme Court has held "[t]he standard for granting relief from a default judgment under Rule 60(b) is more rigorous than the 'good cause' standard established in Rule 55(c)." Sundown Operating Co., 383 S.C. 601, 608, 681 S.E.2d 885, 888 (2009). Relief from default judgment under Rule 60(b) "requires a more particularized showing of mistake, inadvertence, excusable neglect, surprise, newly discovered evidence, fraud, misrepresentation, or 'other misconduct of an adverse party.'" Id. (citing Rule 60(b) SCRCP). "This rule is an appropriate remedy for good faith mistakes of fact if all other applicable factors are met." Hillman v. Pinion, 347 S.C. 253, 256, 554 S.E.2d 427, 429 (Ct. App. 2001).

II. The Master properly denied Johnson relief from default judgment because he offered no good cause for not responding to the complaint

Johnson failed to establish good cause or a satisfactory explanation for the default as required by Rule 55 and the progeny case law.

On October 17, 2019, Johnson filed two affidavits. One is from Nikole Shields, Senior Claims Consultation for Claims Direct Access in Utah and states the following, specifically to 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. Johnson himself did not file an affidavit and has yet to offer any testimony or other forthcoming position in this case. Furthermore, there is nothing before the Court indicating improper service of the Summons and Complaint and Notice of the Damages Hearing on Johnson.

These alleged reasons stated in these affidavits are not good cause. First, the lawsuit was filed in January of 2019 – two months after Johnson's alleged surgery. The lawsuit was served at Johnson's home on January 26, 2019 – again, two plus months after his alleged surgery in November of 2018. Second, if it is presumed that Richardson and Shields are correct – and to do so would be to ignore the hearsay embedded in their affidavits – Johnson was not working (i.e. he was not driving up and down the highway) and in "extensive recovery." The Greens did not attempt to serve 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 alleged ailments Johnson proposedly endured are

unfortunate for Johnson, the Master did not abuse his discretion in denying the set aside based on these hearsay affidavits.[1]

III. The Master properly denied relief from default because Johnson did not establish meritorious defenses to the damages award

Even if Johnson can establish good cause, he has failed to establish a meritorious defense. Johnson asserts his case is like the *McClurg* case because he presented evidence of a meritorious defense to the trial court. However, Johnson did NOT present this evidence to the Master until his motion to reconsider the Master's denial to set aside the entry of default and damages order, the second motion.

As indicated above, Johnson's first appearance was on June 17, 2019, filing a Motion to Dismiss, or in the Alternative, to Set Aside Entry of Default and Order of Damages and Allow Defendant to Responsively Plead. In support of that motion, Johnson filed the two affidavits previously discussed, that of Nikole Shields and Breeann Richardson. Neither of those motions make any reference to dispute the damages awarded by the Master. That issue was not before the court until the motion to reconsider, when Johnson presented pre-suit correspondence to the Master.

Johnson filed this second motion to reconsider on November 14, 2019. The motion was heard on July 13, 2020. That morning, Johnson filed the correspondence allegedly showing a meritorious defense as to the damages awarded by the Master. Johnson Suppl. Memo. Motion

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

Reconsider Ex. A. Rule 59(e) does not permit new evidence to be considered, particularly evidence that was available to the moving party at the time the issues were initially presented to the court. Indeed, Shields and Richardson's affidavits both recognize demand correspondence pre-suit but do not raise any concerns about the damages awarded by the Master at that time. Johnson waived those arguments, and they were not proper for the Master's consideration on Johnsons' second motion to reconsider.

Even if the meritorious defense presented by Johnson was timely, it nonetheless fails under *McClurg*. In that case, the court found "[t]here is no evidence of records, by affidavit or otherwise, to suggest that the accident was the result of anything other than Deaton's negligence." McClurg v. Deaton, 380 S.C. 563, 576, 671 S.E.2d 87, 94 (2008). The *McClurg* court also discredited the meritorious defense of damages, calling it a "bare assertion regarding settlement negotiations [as] evidence of a defense to the amount of damages." Id.

Here, Johnson refers to pre-suit correspondence suggesting a settlement amount. Even under the dissent in *McClurg*, this isn't enough. Justice Hearn's dissent noted that negotiations continued "beyond the filing of suit" and that "this course of conduct by [plaintiff's] attorney is sufficient to satisfy Rule 60(b)'s meritorious defense requirement." Id. at 581, 671 S.E.2d at 97. In the case at bar, the Green's stopped negotiations before filing suit, a significant difference than the *McClurg* case, particularly considering how concerned the *McClurg* court was that the plaintiff's counsel continued negotiating with the insurer after suit had been filed but without telling the insurer suit had been filed.

IV. The Master properly denied relief from default judgment because there was neither misrepresentation by the Greens pre-suit nor conduct giving rise to surprise or excusable neglect

Johnson's arguments of misrepresentation and surprise or excusable neglect per Rule 60(b)(1) and (3) are all founded in *McClurg* and in the exhibits produced with its second motion to reconsider. The Greens submit the pre-suit correspondence presented by Johnson in support of this argument are untimely because it was not presented to the court with Johnson's first motion. However, even considering the affidavits presented at the first motion and assuming the pre-suit correspondence was timely presented, the conduct of the Greens' counsel in this case is far from the deceptive conduct in *McClurg*.

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

After initially agreeing to delay filing suit, McClurg's counsel "[u]nbeknownst to Zurich and New Prime, counsel filed a summons and complaint on April 27, 2005, naming only Deaton as a defendant." Id. at 568, 671 S.E.2d at 90. Deaton failed to respond to the complaint and Zurich received a copy of the default judgment entered against Deaton on October 7, 2005. Id. At a lost

to explain what had occurred, and unable to locate Deaton, Zurich engaged "the services of several private investigators . . . [and] Deaton was finally located on January 23, 2006." Id. Piecing together what had transpired, "New Prime filed a motion to intervene and likewise moved to set aside the judgment pursuant to Rules 60(b)(1) and 60(b)(3)." Id. at 569, 671 S.E.2d at 90. While the trial court granted the motion to intervene, it denied the motions to set aside the judgment. *Id*.

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

This conclusion, the *McClung* court explained, was consistent with prior case law holding that "a Rule 60(b) motion is properly made by an insurer under such circumstances." Id. at 573, 671 S.E.2d at 93 (referencing *Edwards v. Ferguson*, 254 S.C. 278, 175 S.E.2d 224 (1970)). In *Edwards*, the "circumstances" were equally egregious as those outlined in *McClurg*. The insured defendant, Ferguson, "never reported the accident to State Farm, and it was not until fourteen months after the wreck . . . that the company received a letter from plaintiff's attorney advising

that plaintiff asserted a claim and asking that the company's representative make contact regarding a possible settlement." Edwards, 254 S.C. at 280, 175 S.E.2d at 225. Compounding matters, State Farm had trouble locating Ferguson as he "apparently stayed at the home of his parents most of the time; he was an alcoholic, and hard to catch." Id. at 280–81, 175 S.E.2d at 225.

An examination of the affidavits and pre-suit correspondence submitted by Johnson readily distinguish the case at bar from both *McClung* and *Edwards*. Far from being caught completely unaware, as State Farm was in *Edwards*, Johnson's insurers were notified of the claim almost immediately. *See* Richardson Aff. ¶ 5 ("In March 2018, I learned of the February 28, 2018 MVA and a potential claim involving the same"); Shields Aff. ¶ 5 (same). Unlike *McClurg*, nothing presented by Johnson suggests that the Greens' counsel promised (or even suggested) that a copy of any pleading would be forwarded to Johnson's insurer. While the insurers in McClung and Edwards were forced to hire private investigators and hunt down the individuals they represented, neither affiant suggests that Johnson made attempts to elude them or prevent contact. Most importantly, in *McClurg*, "New Prime was taken by surprise when counsel filed the action solely against [a third party] and failed to inform Zurich or New Prime of this action." McClurg, 380 S.C. at 573, 671 S.E.2d at 92, while the present case was filed against Johnson alone and the "Defendant was properly served with the summons and complaint." Am. Order at 4 ¶ 8.

The case at bar is definitively distinct from *McClurg*. The Master properly denied Johnson relief from default as offered under Rule 60(b)(1) and (3).

V. The Master properly denied relief from default because evidence the property claim had been satisfied or released was not properly before the court nor had the property claim been satisfied or released

As with the pre-suit correspondence, Johnson did not present any evidence disputing the property damages award at his first motions before the court. The Greens submit it was

thus untimely and should not be considered by the court. Nonetheless, for the sake of argument, there is no evidence that the property claims were satisfied or released.

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

This information was fully available to Johnson at the time he filed his June 17, 2019, motion to set aside default and the October 21, 2019, hearing on that motion. It is highly improper to present that evidence after the denial of that motion to set aside and to solicit the court's

consideration of such evidence, particularly without availing the Greens the opportunity to respond. It is undisputed that none of this information constitutes "newly discovered evidence."

Furthermore, even if the court could consider this information, there is no evidentiary foundation for its relevance much less its admissibility. The law is clear that pre-settlement negotiations are "not admissible to prove liability for or invalidity of the claim or its amount." SCRE Rule 408. See also Hunter v. Hyder, 236 S.C. 378, 387, 114 S.E.2d 493, 497–98 (1960) ("This Court has held that compromises are favored and evidence of an offer or attempt to compromise or settle a matter in dispute *cannot be given in evidence* against the party by whom such offer or attempt was made." (emphasis added)) (citing *Robertson, et al. v. Blair & Co.*, 56 S.C. 96, 34 S.E. 11; *Holden v. Cantrell*, 88 S.C. 281, 70 S.E. 815; *Neal v. Clark*, 199 S.C. 316, 19 S.E.2d 473)). Johnson improperly invited this Court to entertain evidence of pre-suit negotiations as the basis of a damages award. This contravenes well-settled procedural and evidentiary tenets and must be disregarded. To the extent the amended damages order relies on such pre-suit negotiations, it is erroneous.

Moreover, Johnson presented documentation of a property subrogation claim indicating the Greens' insurance carrier was compensated at least partially for the property damages. Johnson then argued because a subrogation claim was paid, it was improper for the court to award property damages in the damages order. This evidence, even if it could be considered, is also incomplete and inconclusive. There is no record evidence of an executed release indicating the Greens relinquished the right to recover a full property damage award much less any testimony from witnesses suggesting the same. In fact, the property damages claims were not fully released. Without such evidence in the record, the Greens' property damage claims remain fully recoverable

here.[2] Ergo, the amended finding of fact (P.3, ¶ 6) on that point is wholly unsupported by the record and is in error.

Stripped of this improper evidence, Johnson is left only with the items submitted in support of his June 17, 2019 Motion to Dismiss: the affidavits of Nikole Shields and Breeann Richardson. These affidavits speak nothing of the property damage claim.

CONCLUSION

For the foregoing reasons, the Greens respectfully submit Johnson's arguments on appeal are without merit and he must not be relieved of default. request that this court reject vacate Amended Order of the Honorable James B. Jackson, dated August 10, 2020, and reinstate the Order of Damages dated June 5, 2019.

August 27, 2021

s/ Virginia W. Williams
David R. Williams, 77899
Virginia W. Williams, 77898
WILLIAMS & WILLIAMS
1281 Russell Street
Post Office Box 1084
Orangeburg, S.C. 29116-1084
Phone: (803) 534-5218
williamsdr@williamsattys.com
williamsvw@williamsattys.com

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

Attorneys for Appellants-Respondents

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

PROOF OF SERVICE

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

August 27, 2021

s/ Virginia W. Williams
David R. Williams, 77899
Virginia W. Williams, 77898
WILLIAMS & WILLIAMS
1281 Russell Street
Post Office Box 1084
Orangeburg, S.C. 29116-1084
Phone: (803) 534-5218
williamsdr@williamsattys.com
williamsvw@williamsattys.com

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

Attorneys for Appellants-Respondents