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Show Me the Money: McClurg v. Deaton and the Introduction of a Defense as to Damages Only for Default Judgments in South Carolina

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**SHOW ME THE MONEY: *MCCLURG V. DEATON* AND
THE INTRODUCTION OF A DEFENSE AS TO DAMAGES ONLY FOR
DEFAULT JUDGMENTS IN SOUTH CAROLINA**

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I. INTRODUCTION

Most automobile liability insurance policies require the insured to cooperate with the insurer by notifying the insurer of a lawsuit in a timely manner, and stipulate that a failure to do so constitutes a breach of the policy.¹ In South Carolina, while this type of breach may affect the insurer's obligation to the insured,² it will not relieve the insurer of its obligation to honor the policy with respect to third-party victims of the insured, at least in cases where a statute mandates that the insured carry the liability policy for the protection of the general public.³ Thus, even where a liability insurer does not learn about a victim's lawsuit against its insured until after a default judgment against the insured has been issued, the insurer may nevertheless be obligated to pay on the judgment in accordance with the policy.

In such a case, however, Rule 60(b) of the South Carolina Rules of Civil Procedure may allow the insurer to have the default judgment set aside so that it has a chance to defend the re-opened action on the merits.⁴ In considering motions to vacate under Rule 60(b), South Carolina courts must consider the

1. 14 LEE R. RUSS & THOMAS F. SEGALLA, *COUCH ON INSURANCE* 3D § 199:37 (3d ed. 2005).

2. The South Carolina Code provides that an insured's failure to forward pleadings to its liability insurer will not "in any way relieve the insurer of its obligations to the insured" if the insurer has "actual notice" from some other source of the service of a complaint on the insured. S.C. CODE ANN. § 38-77-142 (2002). This provision implies that an insurer who lacks actual notice may use the insured's failure to notify the insurer as a defense against the insured. *See id.*

3. *See Cowan v. Allstate Ins. Co.*, 357 S.C. 625, 627-29, 594 S.E.2d 275, 276-77 (2004) (holding that S.C. Code section 38-77-142(B) does not affect an insurer's obligation to a third-party victim, even if the insurer receives no notice of the victim's lawsuit until after a default judgment issues against the insured); *Shores v. Weaver*, 315 S.C. 347, 356, 433 S.E.2d 913, 917 (Ct. App. 1993) (holding that an automobile liability insurer whose policy provides statutory minimum coverage remains liable under its policy to a third-party victim of the insured's negligence despite the insured's failure to notify the insurer of the victim's lawsuit).

4. *See S.C. R. CIV. P.* 60(b).

following factors: (1) promptness of the motion to vacate; (2) reasons for the default judgment; and (3) prejudice to other parties if the default judgment is vacated.⁵ In addition, the movant must present evidence of a meritorious defense in order to prevail on the motion.⁶ Reasons for relief from default may include “surprise, or excusable neglect” under Rule 60(b)(1), or “fraud, misrepresentation, or other misconduct of an adverse party” under 60(b)(3).⁷ The latter grounds may apply where plaintiff’s counsel begins negotiations with the insurer, files suit against the insured without notifying the insurer, and continues communications with the insurer as if no suit has been filed.⁸

The “meritorious defense” requirement prevents courts from engaging in futile actions;⁹ it would be inefficient for a court to vacate a judgment against a defendant and allow a proceeding on the merits when the defendant has no evidence to support a defense. The South Carolina Supreme Court has held that “[a] meritorious defense need not be perfect It need be only one which is worthy of a hearing or judicial inquiry because it raises a question of law . . . or a real controversy as to real facts arising from conflicting or doubtful evidence.”¹⁰

A recent South Carolina Supreme Court case, *McClurg v. Deaton*,¹¹ raises issues under the meritorious defense requirement in the context of a liability insurer whose federally-mandated endorsement made it liable to cover an \$800,000 default judgment.¹² The judgment stemmed from an accident involving a vehicle owned by the insured trucking company and being driven by the insured’s then employee.¹³ The plaintiffs named only the driver, who by then had left the company and moved away from South Carolina, as defendant.¹⁴ Plaintiffs’ counsel had discussed the claim with insurer’s counsel, and plaintiffs’ counsel’s course of conduct suggested that he would notify insurer’s counsel if a suit were filed.¹⁵ However, after filing suit against the driver, plaintiffs’ counsel continued negotiations with insurer’s counsel as if no lawsuit had commenced.¹⁶

5. N.H. Ins. Co. v. Bey Corp., 312 S.C. 47, 50, 435 S.E.2d 377, 379 (Ct. App. 1993) (citing HARRY M. LIGHTSEY, JR. & JAMES F. FLANAGAN, SOUTH CAROLINA CIVIL PROCEDURE 82 (1985)).

6. Thompson v. Hammond, 299 S.C. 116, 119, 382 S.E.2d 900, 903 (1989) (citing LIGHTSEY & FLANAGAN, *supra* note 5, at 492).

7. See S.C. R. CIV. P. 60(b)(1), (3).

8. See McClurg v. Deaton, 380 S.C. 563, 573, 671 S.E.2d 87, 92–93 (Ct. App. 2008), *aff’d*, 395 S.C. 85, 716 S.E.2d 887 (2011).

9. See Thompson, 299 S.C. at 119–20, 382 S.E.2d at 903 (citing LIGHTSEY & FLANAGAN, *supra* note 5, at 402).

10. *Id.* at 120, 382 S.E.2d at 903 (quoting Graham v. Town of Loris, 272 S.C. 442, 453, 284 S.E.2d 594, 599 (1978)) (internal quotation marks omitted).

11. 395 S.C. 85, 716 S.E.2d 887 (2011).

12. See *id.* at 89–90, 716 S.E.2d at 889–90 (Toal, C.J., dissenting).

13. *Id.* at 89, 716 S.E.2d at 889.

14. McClurg v. Deaton, 380 S.C. 563, 567–68, 671 S.E.2d 87, 89–90 (Ct. App. 2008), *aff’d*, 395 S.C. 85, 716 S.E.2d 887 (2011).

15. See McClurg, 395 S.C. at 89–90, 716 S.E.2d at 889 (Toal, C.J., dissenting).

16. *Id.* at 90, 716 S.E.2d at 889.

When insurer's counsel finally learned of the lawsuit against the driver, a default judgment had already been issued against the driver,¹⁷ and, under a federally-mandated endorsement, the insurer was obligated to honor its policy with respect to that judgment.¹⁸ Unsurprisingly, the insurer attempted to have the default judgment set aside under Rule 60(b).¹⁹

The South Carolina Supreme Court, affirming in whole the decision of the court of appeals, held that the conduct of plaintiffs' counsel led to the type of "surprise" contemplated by Rule 60(b)(1),²⁰ but that the insurer had presented no evidence of a meritorious defense and was, thus, not entitled to have the default judgment set aside under Rule 60.²¹ An affidavit in the record indicated that the plaintiffs had, at one point, offered to settle the case for \$170,000, much less than the \$800,000 default judgment they eventually received.²² On appeal, the insurer pointed to this affidavit as evidence of a meritorious defense relating to the amount of damages at issue in the case,²³ but the court of appeals and supreme court rejected the argument, holding that the insurer did not make this argument to the trial court and had, thus, failed to preserve the issue for appeal.²⁴ As a result, neither court had occasion to consider whether a defense related only to the amount of damages, as opposed to liability, could constitute a meritorious defense for purposes of Rule 60(b).

This Note will address this question left open by the court in *McClurg*. Part II recounts the court of appeals and supreme court opinions, with an emphasis on the meritorious defense issue. Part III, then, reviews decisions from other jurisdictions, addressing whether a defense related only to damages may serve as a meritorious defense sufficient to support setting aside a default judgment under Rule 60. Part IV makes a recommendation to South Carolina courts should this issue arise squarely in the future, and identifies some germane considerations that remain open on this issue.

II. *MCCLURG V. DEATON*

Ann McClurg was injured in August of 2002 when the car she was riding in collided with a truck driven by Harrell Deaton in the course of his employment with New Prime, Inc., an interstate trucking company.²⁵ New Prime's insurer, Zurich, was notified of the accident right away and received a letter of

17. *Id.* at 90–91, 716 S.E.2d at 890.

18. *See McClurg*, 380 S.C. at 570, 671 S.E.2d at 91; *infra* text accompanying notes 35–38.

19. *McClurg*, 395 S.C. at 91, 716 S.E.2d at 890 (Toal, C.J., dissenting) (citing S.C. R. Civ. P. 60(b)).

20. *See id.* at 91, 716 S.E.2d at 890 (citing *McClurg*, 380 S.C. at 573, 671 S.E.2d at 92).

21. *See id.* at 87, 716 S.E.2d at 887–88 (majority opinion).

22. *Id.* at 95, 716 S.E.2d at 892 (Toal, C.J., dissenting).

23. *McClurg*, 380 S.C. at 575, 671 S.E.2d at 94.

24. *Id.* at 576, 671 S.E.2d at 94; *McClurg*, 395 S.C. at 87, 716 S.E.2d at 888 (majority opinion).

25. *See McClurg*, 380 S.C. at 567, 671 S.E.2d at 89.

representation from the McClurgs' counsel in September.²⁶ Settlement negotiations ensued.²⁷ Meanwhile, Deaton left his job with New Prime and moved to Texas.²⁸ In June of 2004, Zurich received a letter from the plaintiffs' counsel stating that, if he did not hear from Zurich by the end of the week regarding a \$170,000 settlement offer, he "[would] file suit and . . . send [Zurich] a courtesy copy of the pleadings."²⁹ The suit was not filed at that time, and, in October 2004, counsel again demanded settlement by letter and included a copy of a complaint that listed New Prime as a defendant.³⁰ Unbeknownst to Zurich and New Prime, the McClurgs filed suit solely against Deaton in April of 2005.³¹ Deaton never notified New Prime or Zurich of the lawsuit.³² In May of 2005, plaintiffs' counsel sent Zurich copies of new medical records, but never made any mention of the pending lawsuit.³³ Apparently, Zurich did not discover the lawsuit until it received a copy of the \$800,000 default judgment in October of 2005.³⁴

New Prime was in a unique position in this case because of "a federally mandated MCS-90 Endorsement contained in the applicable insurance policy."³⁵ The endorsement was required to be included in every liability insurance policy covering a motor carrier, and it holds the insurance company liable for "any final judgment recovered against the insured for public liability resulting from negligence in the operation, maintenance or use of motor vehicles" used in the course of the motor carrier's business.³⁶ The law further states that "no condition, provision, stipulation, or limitation contained in the policy, this endorsement, or any other endorsement thereon, or violation thereof, shall relieve the company from liability or from the payment of any final judgment."³⁷ Thus, the MCS-90 endorsement "assure[s] that injured members of the public are able to obtain judgment from negligent authorized interstate carriers" by making the insurance company primarily liable.³⁸ Because Deaton was acting in the

26. *Id.*

27. *Id.* at 567–68, 671 S.E.2d at 89–90.

28. *See id.*

29. *See id.* at 567, 671 S.E.2d at 89–90 (internal quotation marks omitted).

30. *Id.* at 567, 671 S.E.2d at 90.

31. *Id.* at 568, 671 S.E.2d at 90.

32. *See id.* at 569, 671 S.E.2d at 90.

33. *Id.*

34. *Id.*

35. *Id.* at 570, 671 S.E.2d at 91.

36. 49 C.F.R. § 387.15, at illus. I (2011).

37. *Id.*

38. *Canal Ins. Co. v. Distrib. Servs., Inc.*, 320 F.3d 488, 490 (4th Cir. 2003) (quoting *John Deere Ins. Co. v. Nueva*, 229 F.3d 853, 857 (9th Cir. 2000)) (internal quotation marks omitted). This endorsement does not alter the contract between the insured and the insurer; the insured is obligated to repay the insurer for any payment the insurer would not have been obligated to pay in the absence of the MCS-90 provision. 49 C.F.R. § 387.15, at illus. I. Further, the majority rule is that this provision has no effect on determining which insurer is primarily responsible for a judgment rendered against a common insured. *Canal*, 320 F.3d at 492 (citations omitted).

course of his employment with New Prime when he was involved in the accident, the judgment in this case fell under the scope of the endorsement.³⁹ Zurich, as New Prime's insurance carrier, was, therefore, liable for the judgment; it was irrelevant that New Prime was not a named defendant.⁴⁰

New Prime, recognizing this potential liability, moved to intervene in the McClurgs' action against Deaton in order to file a motion to set aside the default judgment and reopen the matter on the merits.⁴¹ The trial judge allowed New Prime to intervene in the action because he recognized "New Prime's large financial interest in the action," but he denied the Rule 60(b)(1) and 60(b)(3) motion on the grounds that New Prime had not been a party to the action when the McClurgs had commenced it and, therefore, had no right to receive notice of the action at that time.⁴² The court of appeals affirmed the denial of New Prime's motion, but on different grounds.⁴³ Specifically, the court of appeals held that New Prime became a party to the action when it successfully intervened⁴⁴ and noted that "the facts show 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, thereby meeting the surprise or excusable neglect requirement under Rule 60(b)(1)."⁴⁵ The court found that the plaintiffs' counsel's conduct made it reasonable for Zurich and New Prime to believe that they would be included in, or at least notified of, any lawsuit arising from Deaton's accident.⁴⁶ The court noted further that counsel's failure to mention the suit to Zurich may have even satisfied the misrepresentation and misconduct elements of Rule 60(b)(3).⁴⁷

However, the court of appeals affirmed the denial of New Prime's Rule 60 motion, holding that New Prime had failed to present any evidence of a meritorious defense and, in any case, failed to preserve the issue for review.⁴⁸ New Prime had not specifically addressed the meritorious defense requirement in its Rule 60 motion, nor had it specifically addressed the issue in a motion for

39. See *McClurg*, 380 S.C. at 567, 671 S.E.2d at 89.

40. See *id.* at 570–71, 671 S.E.2d at 91.

41. *Id.* at 569, 671 S.E.2d at 90. Deaton also made a Rule 60 motion, but his arguments are outside the scope of this Note. See *id.*

42. *Id.* at 570–71, 671 S.E.2d at 91.

43. See *id.* at 571, 576, 671 S.E.2d at 91, 94.

44. See *id.* at 571, 671 S.E.2d at 91–92.

45. *Id.* at 573, 671 S.E.2d at 92.

46. *Id.*

47. *Id.* at 573, 671 S.E.2d at 92–93. The court indicated that the attorney's conduct raised "serious concerns." *Id.* at 573, 671 S.E.2d at 93. The supreme court also declined to decide whether Rule 60(b)(3) was satisfied. *McClurg v. Deaton*, 395 S.C. 85, 87, 716 S.E.2d 887, 888 (2011). However, Justice Toal, dissenting, declared that the misconduct element of Rule 60(b)(3) was "undoubtedly met." *Id.* at 98, 716 S.E.2d at 894. Additionally, because the MCS-90 endorsement is federally mandated, plaintiffs' counsel was likely aware that Zurich would be liable for a judgment entered solely against Deaton.

48. *McClurg*, 380 S.C. at 576, 671 S.E.2d at 94.

reconsideration to the trial court.⁴⁹ In its reply brief to the supreme court, New Prime argued that the discrepancy between the McClurgs' \$170,000 settlement offer and the \$800,000 default judgment was in the record and indicated that New Prime had a meritorious defense as to damages.⁵⁰ The court of appeals did not dispute these facts, but made the distinction between simply having facts in the record and raising an argument based on these facts for the trial court to rule on, noting that "[n]owhere in the record is there any indication that New Prime raised this [discrepancy] to the [trial] court as an argument that a meritorious defense existed."⁵¹ As a result, the court of appeals held that, even if "this bare assertion regarding settlement negotiations is evidence of a defense . . .[,] the argument is not preserved for our review."⁵² New Prime argued that this distinction misapplied existing law on raising a meritorious defense.⁵³

The supreme court affirmed in whole the court of appeals's opinion.⁵⁴ Thus, the supreme court held that this issue was not preserved for appeal because it was never presented to or ruled on by the circuit court.⁵⁵ Justice Pleicones, writing for the majority, stated that "[i]t is axiomatic that an issue cannot be raised for the first time in a reply brief."⁵⁶ According to the majority, to say that the meritorious defense issue had been "fairly and properly raised"⁵⁷ to the trial court would "strain[] credulity" and burden trial courts with "discerning the issues a party should raise, and perusing the record for evidence to support those issues."⁵⁸

Justice Pleicones stated further that the burden to develop the evidentiary record was on New Prime: "[I]t is well-settled that the moving party in a Rule 60(b) motion has the burden of presenting *evidence* entitling him to relief."⁵⁹ Even if the meritorious defense issue was raised by the memorandum to the trial court, "neither petitioner could be said to have presented evidence of such a defense as it is beyond cavil that a settlement offer is not evidence."⁶⁰

49. *See id.* at 575–76, 671 S.E.2d at 94.

50. Reply Brief of Petitioner New Prime, Inc. at 10, *McClurg v. Deaton*, 395 S.C. 85, 716 S.E.2d 887 (2011) (No. 27038) [hereinafter Reply Brief]. New Prime submitted an affidavit from a Zurich employee that alleged the McClurgs made a settlement demand of \$170,000 during negotiations. *See McClurg*, 395 S.C. at 86 n.1, 716 S.E.2d at 887 n.1.

51. *McClurg*, 380 S.C. at 576, 671 S.E.2d at 94.

52. *Id.* at 576, 671 S.E.2d at 94.

53. Reply Brief, *supra* note 50, at 8–9.

54. *McClurg*, 395 S.C. at 87, 716 S.E.2d at 888.

55. *Id.* at 86–87, 716 S.E.2d at 887–88.

56. *Id.* at 87 n.2, 716 S.E.2d at 888 n.2 (citing *Chet Adams Co. v. James F. Pedersen Co.*, 307 S.C. 33, 37, 413 S.E.2d 827, 829 (1992)).

57. *Id.* at 86 n.1, 716 S.E.2d at 887 n.1 (quoting *JEAN HOEFER TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA* 65 (1999)) (internal quotation marks omitted).

58. *Id.* at 86 n.1, 716 S.E.2d at 887 n.1.

59. *Id.* (citing *BB&T v. Taylor*, 369 S.C. 548, 552, 633 S.E.2d 501, 503 (2006)).

60. *Id.* (citing *S.C. R. EVID. 408*; *Fesmire v. Digh*, 385 S.C. 296, 309, 683 S.E.2d 803, 810 (Ct. App. 2009)).

Then Chief Judge Hearn⁶¹ and Chief Justice Toal both sharply dissented from the majority opinions of their respective courts.⁶² Each of them found that the meritorious defense issue had been raised and ruled on by the trial court.⁶³ Chief Judge Hearn found that the McClurgs' counsel's settlement demand was raised as a meritorious defense in the circuit court because that court held that no meritorious defense had been shown; she therefore concluded that the "argument was raised and ruled upon, and is thus properly before this court."⁶⁴

Chief Justice Toal agreed with Judge Hearn's opinion that the novel question of whether a defense only as to damages would be recognized in South Carolina was placed "squarely before the court of appeals" by the trial judge's holding.⁶⁵ She also found that "the Court need not look beyond the pleadings to find the meritorious defense raised by Petitioners."⁶⁶ In explanation, Chief Justice Toal stated that South Carolina courts "have not required that parties specifically tag their argument as a 'meritorious defense' in a Rule 60(b) motion."⁶⁷ She cited prior cases where appellate courts found a meritorious defense based upon evidence in the record⁶⁸ and declared that "the standard for finding a party raised a meritorious defense is a low one."⁶⁹ Justice Toal concluded that "the majority is apparently expounding the view that a party must use the magic words, 'meritorious defense,' when arguing that a court may have reached a different result had it heard a case on the merits. As elaborated, our courts have never before required such explicit language."⁷⁰

61. Justice Hearn, former Chief Judge of the South Carolina Court of Appeals, recused herself from the case when it came before the supreme court, and Acting Justice John H. Waller voted with the majority in her stead. *See id.* at 88, 716 S.E.2d at 889.

62. *Id.* (Toal, C.J., dissenting); *McClurg v. Deaton*, 380 S.C. 563, 580, 671 S.E.2d 87, 96 (Ct. App. 2008) (Hearn, J., concurring in part and dissenting in part), *aff'd*, 395 S.C. 85, 716 S.E.2d 887 (2011).

63. *McClurg*, 395 S.C. at 89, 716 S.E.2d at 889 (Toal, C.J., dissenting); *McClurg*, 380 S.C. at 581–82, 671 S.E.2d at 97 (Hearn, C.J., concurring in part and dissenting in part).

64. *McClurg*, 380 S.C. at 581–82, 671 S.E.2d at 97 (Hearn, C.J., concurring in part & dissenting in part). Justice Pleicones found that the trial judge made no such holding, concluding that the trial judge's statement was just an observation. *McClurg*, 395 S.C. at 86 n.1, 716 S.E.2d at 887 n.1 (majority opinion). Justice Pleicones went on to state that even if the judge's statement had been a ruling, "the fact remains that he would have been correct." *Id.* (citing S.C. R. EVID. 408; *Fesmire*, 385 S.C. at 309, 683 S.E.2d at 810).

65. *McClurg*, 395 S.C. at 89, 716 S.E.2d at 889 (Toal, C.J., dissenting).

66. *Id.* at 93, 716 S.E.2d at 891.

67. *Id.*

68. *Id.* at 93–94, 716 S.E.2d at 891–92 (citing *Thompson v. Hammond*, 299 S.C. 116, 120, 382 S.E.2d 900, 903 (1989); *Williams v. Watkins*, 384 S.C. 319, 326–27, 681 S.E.2d 914, 917–18 (Ct. App. 2009); *Micronics, Inc. v. S.C. Dep't of Revenue*, 345 S.C. 506, 511, 548 S.E.2d 223, 226 (Ct. App. 2001); *EM-CO Metal Prods., Inc. v. Great Atl. & Pac. Tea Co.*, 280 S.C. 107, 115, 311 S.E.2d 83, 88 (Ct. App. 1984)).

69. *Id.* at 94, 716 S.E.2d at 892 (citing *Micronics*, 345 S.C. at 511, 548 S.E.2d at 226). This finding is consistent with Chief Judge Hearn's assertion that "the law favors the resolution of disputes based upon all parties having their day in court." *McClurg*, 380 S.C. at 580, 671 S.E.2d at 96 (Hearn, C.J., concurring in part and dissenting in part).

70. *McClurg*, 395 S.C. at 96, 716 S.E.2d at 893 (Toal, C.J., dissenting).

Both dissenting judges shared in the majorities' concern with the McClurgs' counsel's conduct, and Chief Judge Hearn took time to elaborate further on the severity of his actions. Chief Judge Hearn found that the failure of the plaintiffs' counsel to notify New Prime and Zurich of the pending lawsuit in these circumstances "compromise[d] the high ethical standards attaching to the practice of law."⁷¹ Chief Justice Toal agreed.⁷² Judge Hearn went on to say that "[t]he maxim that a lawyer's word is his bond is not only a time-honored tradition; it is included as a guiding principle in the South Carolina Bar's Standards of Professionalism."⁷³ She indicated that "counsel's actions in continuing to uphold the appearance of settlement negotiations while simultaneously pursuing a default judgment without notice to Zurich, when coupled with the evidence of a meritorious defense as to damages, certainly warrants the grant of New Prime[s] . . . Rule 60(b) motion."⁷⁴ Chief Justice Toal called the plaintiffs' counsel's behavior "trickery and deception,"⁷⁵ and averred, "[a]lthough prolonging settlement negotiations in hopes of surpassing the statute of limitations is a disdainful practice some insurance companies keep, this in no way justifies the type of 'gotcha' game played by McClurgs' counsel in this case."⁷⁶

Both dissents also stated that a defense only as to damages should be recognized in South Carolina as a meritorious defense for purposes of Rule 60 motions.⁷⁷ Chief Justice Toal pointed out that "it was error for the trial court to award Ann McClurg \$600,000 in damages" for loss of in-kind services because McClurg did not allege this loss in her complaint.⁷⁸ She found that this error

71. *McClurg*, 380 S.C. at 582, 671 S.E.2d at 97 (Hearn, C.J., concurring in part and dissenting in part).

72. *McClurg*, 395 S.C. at 91, 716 S.E.2d at 890 (Toal, C.J., dissenting).

73. *McClurg*, 380 S.C. at 582, 671 S.E.2d at 97 (Hearn, C.J., concurring in part and dissenting in part). The same lawyer that represented Ann McClurg and her husband at trial and in front of the court of appeals also appeared before the supreme court. *See id.* at 566, 671 S.E.2d at 89; *McClurg*, 395 S.C. at 86, 716 S.E.2d at 887. At oral argument in front of the supreme court, counsel "admitted he was trying to fly under the radar in serving Deaton because of the prolonged, and seemingly unsuccessful, settlement negotiations with Insurer." *McClurg*, 395 S.C. at 98, 716 S.E.2d at 894 (Toal, C.J., dissenting).

74. *McClurg*, 380 S.C. at 584, 671 S.E.2d at 98 (Hearn, C.J., concurring in part and dissenting in part). Judge Hearn dedicated a sizeable portion of her dissent to recounting *McGee v. Reynolds*, 618 N.E.2d 40 (Ind. Ct. App. 1993), an Indiana Court of Appeals case where the court found "that the failure to serve the insurer after negotiations were undertaken, when combined with the attorney's refusal to answer the direct inquiry by the insurance company as to the status of the claim, constituted grounds for relief." *McClurg*, 380 S.C. at 583, 671 S.E.2d at 98 (citing *McGee*, 618 N.E.2d at 41).

75. *McClurg*, 395 S.C. at 89, 716 S.E.2d at 889 (Toal, C.J., dissenting).

76. *Id.* at 98–99, 716 S.E.2d at 894.

77. *See id.* at 88–89, 716 S.E.2d at 889; *McClurg*, 380 S.C. at 581, 671 S.E.2d at 97 (Hearn, C.J., concurring in part and dissenting in part).

78. *McClurg*, 395 S.C. at 96, 716 S.E.2d at 893 (Toal, C.J., dissenting). Defendant Deaton made this argument in his motion to reconsider; the court of appeals found that it had not been

“represent[ed] a meritorious defense as it ‘raise[d] a question of law deserving of some investigation and discussion.’”⁷⁹ Justice Toal recognized that “[i]t is in the interest of judicial efficiency that our courts require a meritorious defense” because “[w]hatever doesn’t make a difference doesn’t matter’ in the law.”⁸⁰ However, she concluded that this interest did not require a high standard for showing a meritorious defense.⁸¹ In fact, a high standard for this requirement should be discouraged because “[r]estricting the scope of a meritorious defense to liability alone incentivizes a party who may otherwise concede liability to deny any wrongdoing.”⁸²

Chief Judge Hearn pointed to several other jurisdictions that had previously held that “an allegation that the amount of damages could be different from what was awarded under the default judgment, is sufficient to satisfy the meritorious defense requirement.”⁸³ Because this issue was never reached by either majority,⁸⁴ South Carolina courts will have to consider foreign jurisprudence if this issue is squarely presented in the future.

III. THE PRINCIPLES OF THE MERITORIOUS DEFENSE REQUIREMENT

Rules regarding the showing of a meritorious defense for purposes of setting aside a default judgment require some flexibility. As commentators have stated:

By its very nature, the question whether to require a showing of a meritorious defense, as well as the type of demonstration required, must be determined on a case-by-case basis and with an awareness of the policies behind default judgments and the circumstances under which they should be set aside.⁸⁵

preserved for appeal. *McClurg*, 380 S.C. at 579–80, 671 S.E.2d at 96 (Hearn, C.J., concurring in part and dissenting in part).

79. *McClurg*, 395 S.C. at 96, 716 S.E.2d at 893 (Toal, C.J., dissenting) (quoting *Thompson v. Hammond*, 299 S.C. 116, 120, 382 S.E.2d 900, 903 (1989)).

80. *Id.* at 92, 716 S.E.2d at 891 (alteration in original) (quoting *McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987)).

81. *See id.* at 92–93, 716 S.E.2d at 891 (citing *Thompson*, 299 S.C. at 120, 382 S.E.2d at 903).

82. *Id.* at 97, 716 S.E.2d at 893.

83. *McClurg*, 380 S.C. at 581, 671 S.E.2d at 97 (Hearn, C.J., concurring in part and dissenting in part).

84. *See McClurg*, 395 S.C. at 87, 716 S.E.2d at 888 (majority opinion) (“The Court of Appeals did not decide, nor do we, whether a meritorious defense as to damages alone and not as to liability is an adequate basis for the grant of Rule 60 relief.”).

85. 10A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, *FEDERAL PRACTICE AND PROCEDURE* § 2697, at 163 (1998).

In South Carolina, a defense must raise a question of law or controversy in order to be meritorious.⁸⁶ For example, in *Edwards v. Ferguson*,⁸⁷ counsel for the insurer of the defendant in an automobile accident case made a “*prima facie* showing of meritorious defenses” by claiming: “(1) that the defendant was not driving the vehicle, and (2) that even if the defendant was driving the vehicle, the plaintiff was guilty of contributory negligence and recklessness.”⁸⁸ These claims were based on written statements from the defendant taken by the insurer’s counsel,⁸⁹ and the South Carolina Supreme Court found that the trial court had abused its discretion by not allowing the insurer relief from default judgment on these bases.⁹⁰ In *Thompson v. Hammond*,⁹¹ the defendants supplemented their motion for relief from default judgment with “testimony showing that a real controversy existed” as to whether the plaintiffs’ claims were true and accurate.⁹² The South Carolina Supreme Court also found this presentation to meet the meritorious defense requirement.⁹³

A survey of the law regarding meritorious defenses reveals that “there is no universally accepted standard among courts as to what satisfies the requirement that a party show a meritorious defense.”⁹⁴ However, even though standards vary widely, the decisions regarding whether defenses only as to damages may constitute a meritorious defense for the purpose of overturning a default judgment are quite one sided.⁹⁵ The cases turn on what the defendant presents to

86. *Thompson*, 299 S.C. at 120, 382 S.E.2d at 903 (quoting *Graham v. Town of Loris*, 272 S.C. 442, 453, 248 S.E.2d 594, 599 (1978)).

87. 254 S.C. 278, 175 S.E.2d 224 (1970).

88. *Id.* at 282, 175 S.E.2d at 225.

89. *Id.* at 280–81, 175 S.E.2d at 225.

90. *Id.* at 283, 175 S.E.2d at 226.

91. 299 S.C. 116, 382 S.E.2d 900 (1989).

92. *See id.* at 120, 382 S.E.2d at 903.

93. *Id.*

94. WRIGHT, MILLER & KANE, *supra* note 85, § 2697, at 160 (quoting *Trueblood v. Grayson Shops of Tenn., Inc.*, 32 F.R.D. 190, 196 (E.D. Va. 1963)) (internal quotation marks omitted). Although judges and courts require that varying degrees of information be presented by defendants in order to succeed on this motion, “[a] majority of the courts that have considered the question have refused to accept general denials or conclusory statements that a defense exists; they have insisted upon a presentation of some factual basis for the supposedly meritorious defense.” *Id.* (citations omitted). Some courts may “accept assertions of a defense advanced by motion or affidavit,” and some judges may even “look[] for some indication of a meritorious defense, even to the extent of simply recognizing that the nature of the case was such that it suggested the possible existence of a defense.” *Id.* at 161–62 (citations omitted). In *Moldwood Corp. v. Stuts*, 410 F.2d 351 (5th Cir. 1969) (per curiam), the court required that the motion be accompanied by “a clear and specific statement showing, not by conclusion, but by definite recitation of facts, that an injustice has been probably done by the judgment.” *Id.* at 352. Under any of these standards, defenses as to damages only may stand, but what the defendant must demonstrate to the court in order to prove that he is entitled to a hearing varies greatly.

95. *See Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corp.*, 843 F.2d 808, 812 (4th Cir. 1988); *Cook v. Rowland*, 49 P.3d 262, 266 (Alaska 2002); *Hertz v. Berzanske*, 704 P.2d 767, 773 (Alaska 1985), *superseded on other grounds by statute*, Act of 1986, ch. 139, 1986 Alaska Laws 2 (amending certain Alaska Rules of Civil Procedure and providing an effective date), *as*

show his defense, not what type of defense he is presenting.⁹⁶ As noted, the analysis of determining whether a meritorious defense has been presented incorporates considerable judicial discretion and the pertinent facts of each case,⁹⁷ which lends itself to subjective considerations rather than bright line rules or strict guidelines. Still, most courts that have considered the issue have reasoned that disputes as to the appropriateness of the damages award granted by default judgment should be resolved on the merits.⁹⁸

The Arizona Court of Appeals found that, even where there is no defense as to liability, defenses disputing damages could be “substantial” and, therefore, meritorious.⁹⁹ In *Beal v. State Farm Mutual Automobile Insurance Co.*, the insurer did not raise any defense as to the negligence of the insured, but it “disput[ed] the existence of [plaintiff’s] physical injuries, which purportedly arose from his mental distress.”¹⁰⁰ The court found that this claim “adequately alleged a substantial defense” and that the trial court had abused its discretion in not allowing these issues to be litigated on the merits.¹⁰¹ The court also articulated that “the amount of [plaintiff’s] medical expenses, \$388, contrast[ed] so sharply with the actual award of State Farm’s \$100,000 policy limits that this discrepancy alone call[ed] into question the validity of the damage award.”¹⁰²

In jurisdictions where a meritorious defense is roughly defined as one that “if proved, would cause a different result upon a retrial of the case,”¹⁰³ several courts have determined that a change in the amount of the judgment constitutes a “different result.”¹⁰⁴ Under this rule, “a defense is meritorious if it will ‘reduce a plaintiff’s award, and thereby alter the outcome of the suit,’” and the defendant “need not provide a complete defense to the action” to meet his burden.¹⁰⁵

recognized in *McConkey v. Hart*, 930 P.2d 402 (Alaska 1996); *Beal v. State Farm Mut. Auto. Ins. Co.*, 729 P.2d 318, 325 (Ariz. Ct. App. 1986); *Oberkonz v. Gosha*, No. 02AP-237, 2002 WL 31320242, at *3 (Ohio Ct. App. Oct. 17, 2002); *Syphard v. Vrable*, 751 N.E.2d 564, 567 (Ohio Ct. App. 2001); *Ferguson & Co. v. Roll*, 776 S.W.2d 692, 699 (Tex. Ct. App. 1989).

96. See cases cited *supra* note 95.

97. *WRIGHT, MILLER & KANE*, *supra* note 85, § 2697, at 162–63 (citations omitted).

98. See *supra* note 95 and accompanying text.

99. *Beal*, 729 P.2d at 325.

100. *Id.* The insurer was granted relief from the default judgment, but the insured was not because of a failure to show a valid reason for failing to diligently protect their interest when served with the complaint. See *id.*

101. *Id.*

102. *Id.*

103. *Ferguson & Co. v. Roll*, 776 S.W.2d 692, 698 (Tex. Ct. App. 1989) (citing *The Moving Co. v. Whitten*, 717 S.W.2d 117, 120 (Tex. Ct. App. 1986)).

104. *Id.* (citing *Whitten*, 717 S.W.2d at 120); see also *Cook v. Rowland*, 49 P.3d 262, 266 (Alaska 2002) (describing how Cook’s amount of damages might be lower if he was allowed to present his meritorious defense); *Hertz v. Berzanske*, 704 P.2d 767, 772 (Alaska 1985) (describing how the court will look for a “different outcome” (internal quotation marks omitted)), *superseded on other grounds by statute*, Act of 1986, ch. 139, 1986 Alaska Sess. Laws 2 (amending certain Alaska Rules of Civil Procedure and providing an effective date), as *recognized in* *McConkey v. Hart*, 930 P.2d 402 (Alaska 1996).

105. *Cook*, 49 P.3d at 266 (quoting *Hertz*, 704 P.2d at 772).

In *Cook v. Rowland*, a case involving a wrongful death action, punitive damages were awarded by default judgment in an amount three times that of the actual damages, bringing the total judgment to over \$7,000,000.¹⁰⁶ The defendant showed that the “damages awarded against him might be lower if he were allowed to participate in a damages hearing,” because punitive damages may be assessed differently if he was given a chance to tell his story.¹⁰⁷ Furthermore, the court concluded that testimony about his assets could also “support a reduced . . . award.”¹⁰⁸ Finally, the court commented that “a controversy concerning damages of this magnitude should be resolved on its merits whenever possible.”¹⁰⁹

In *Hertz v. Berzanske*, the defendant met his burden of showing a meritorious defense by presenting testimony that showed he could produce evidence at trial of several acts on the part of the plaintiffs that would constitute contributory negligence.¹¹⁰ Because the case arose out of an automobile accident and there was some evidence that the plaintiff was traveling in excess of the speed limit, operating his motorcycle negligently, and driving the motorcycle with a bald tire, the court held that a fact finder could conclude that the plaintiff was “partly at fault and, therefore, not entitled to full recovery under the doctrine of comparative negligence.”¹¹¹ Similarly, the Texas Court of Appeals has found that affidavits tending to show that the amount of damages awarded by default judgment “was a completely inaccurate figure,” and required the court to set aside the default judgment and allow the case to be tried on its merits.¹¹²

In *Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corp.*,¹¹³ the defendants submitted affidavits in support of four defenses and counterclaims in a construction case.¹¹⁴ The court held that “[a]lthough these statements address[ed] the amount, rather than the propriety, of Augusta’s claim, . . . taken together they [were] a sufficient proffer of a meritorious defense.”¹¹⁵ The court reasoned that “[t]he underlying concern is . . . whether there is some possibility that the outcome . . . after a full trial will be contrary to the result achieved by the default.”¹¹⁶ Further, this rule is favored in light of the “admonition that any doubts should be resolved in the movant’s favor.”¹¹⁷

106. *Id.* at 263.

107. *Id.* at 266.

108. *Id.*

109. *Id.* (quoting *Hertz*, 704 P.2d at 773) (internal quotation marks omitted).

110. *Hertz*, 704 P.2d at 772.

111. *Id.* (citing *Kaatz v. State*, 540 P.2d 1037, 1049 (Alaska 1975)).

112. *Ferguson & Co. v. Roll*, 776 S.W.2d 692, 699 (Tex. Ct. App. 1989).

113. 843 F.2d 808 (4th Cir. 1988).

114. *Id.* at 812.

115. *Id.*

116. *Id.* (omissions in original) (quoting *WRIGHT, MILLER & KANE*, *supra* note 85) (internal quotation marks omitted).

117. *Id.* (citing *United States v. Moradi*, 673 F.2d 725, 728 (4th Cir. 1982)).

Other jurisdictions have found further justification for defenses only as to damages. The Ohio Court of Appeals found that a defense as to damages must be meritorious in the context of a Rule 60(b) motion because “a dispute concerning the proper amount owed to the plaintiff directly affects the validity of the judgment.”¹¹⁸ In *Mazepa v. Krueger*,¹¹⁹ the court explained that “[g]enerally, an independent claim, even if it arises from the same transaction, will not warrant granting relief from judgment.”¹²⁰ However, when “the counterclaim indicates that the proper amount owed to [the plaintiff] is at issue,” a counter claim can be a meritorious defense.¹²¹

In *Oberkonz v. Gosha*,¹²² the court of appeals declared that it was within the trial court’s discretion to award relief from default judgment where the defendant claimed that she had a meritorious defense as to damages, but needed to go through discovery in order to determine the extent of the plaintiffs’ damages.¹²³ The defendant showed only that she had been pursuing medical records and confirmation of lost wages since the suit was filed, and stated that the motorcyclist she hit refused treatment and transportation to the emergency room immediately following the accident.¹²⁴ The court also recognized the inconsistency between the plaintiff’s \$300 in medical bills and the claimed 170 days of missed work.¹²⁵

In each of these cases, courts have recognized the importance of the damage award being decided on the merits, whether the liability issue requires a trial or not. Even though the courts were applying different standards and following different precedents, their reasoning in these decisions has consistently embraced defenses relating only to damages because such defenses make a real difference

118. *Syphard v. Vrable*, 751 N.E.2d 564, 567 (Ohio Ct. App. 2001) (citing *Mazepa v. Krueger*, No. 70472, 1997 WL 1090422, at *2 (Ohio Ct. App. May 15, 1997)).

119. No. 70472, 1997 WL 1090422 (Ohio Ct. App. May 15, 1997).

120. *Id.* at *2 (citing *Urbana Coll. v. Conway*, 502 N.E.2d 675, 678 (Ohio Ct. App. 1985)).

121. *Id.* The Fourth Circuit has specifically stated that “a proffer of evidence which would . . . establish a valid counterclaim” is a meritorious defense. *Augusta Fiberglass*, 843 F.2d at 812 (citing *Cent. Operating Co. v. Util. Workers of Am.*, 491 F.2d 245, 252 n.8 (4th Cir. 1974); *Williams v. Blitz*, 226 F.2d 463, 464 (4th Cir. 1955) (per curiam)).

122. No. 02AP-237, 2002 WL 31320242 (Ohio Ct. App. Oct. 17, 2002).

123. *Id.* at *3.

124. *Id.* at *2–3.

125. *Id.* at *2. In *Oberkonz*, 2002 WL 31320242, at *2–*3, and *Beal v. State Farm Mutual Automobile Insurance Co.*, 729 P.2d 318, 325 (Ariz. Ct. App. 1986), the courts noted the discrepancy between the stated actual damages and the amount awarded. It seems reasonable that a great disparity should weigh heavily on the decision to grant relief from default judgment. In some cases, the court may make similar assumptions based on the type of case or the nature of the complaint. *WRIGHT, MILLER & KANE, supra* note 85, § 2697, at 162 & n.8 (“[T]he very nature of plaintiff’s complaint gives rise to the belief that cases where persons slip on the floor of a store are customarily defended with varying degrees of merit.” (quoting *Trueblood v. Grayson Shops of Tenn., Inc.*, 32 F.R.D. 190, 196 (E.D. Va. 1963) (internal quotation marks omitted))).

in the lives of the parties involved.¹²⁶ If this issue is presented to a court in South Carolina, it too should allow such a defense.

IV. RECOMMENDATION FOR SOUTH CAROLINA

South Carolina courts should hold that a dispute of a damage award is a meritorious defense in the context of a Rule 60 motion whenever a defendant raises the issue and makes an adequate showing that a damages hearing would produce a different result. This would be consistent with the state's current policy, and adopting such a rule would prevent blurry lines from forming between defenses as to damages and defenses as to liability.

In *McClurg*, both the court of appeals majority and Justice Toal's dissent cited *Thompson v. Hammond* for the definition of a meritorious defense.¹²⁷ A meritorious defense is one "worthy of a hearing" and "deserving of some investigation" because of "conflicting or doubtful evidence."¹²⁸ Although this definition does not contain the "different result" or "different outcome" language used by Alaska and Texas courts,¹²⁹ the effect is the same. In the same way that a defendant can show that he will produce evidence that could result in a different outcome, a defendant can demonstrate that there is a dispute "worthy of hearing,"¹³⁰ short of claiming that he is not liable at all. In fact, Chief Justice Toal outlined South Carolina's case law on the meritorious defense issue and came to the conclusion that "the key inquiry is merely whether the materials submitted to the trial court reflect, in any way, that a contest on the merits might render different results than the result reached by the default judgment."¹³¹

126. Courts have also allowed defenses as to damages only in cases where parties are seeking to set aside entries of default before default judgments have been entered under FED. R. CIV. P. 55(c). See *Esteppe v. Patapsco & Back Rivers R.R. Co.*, No. Civ. H-00-3040, 2001 WL 604186, at *4 (D. Md. May 31, 2001) (questioning whether "defenses to the liability issues raised by defendant . . . were meritorious," but granting relief from default based on the proper amount of damages being in doubt); *Wainwright's Vacations, LLC v. Pan Am. Airways Corp.*, 130 F. Supp. 2d 712, 719 (D. Md. 2001) (finding that defendant "proffered a meritorious defense under *Augusta Fiberglass*" where it "raised a viable dispute about the amount it owe[d]" (citing *Augusta Fiberglass*, 843 F.2d at 812)).

127. *McClurg v. Deaton*, 395 S.C. 85, 92–93, 716 S.E.2d 887, 891 (2011) (Toal, C.J., dissenting) (citing *Thompson v. Hammond*, 299 S.C. 116, 120, 382 S.E.2d 900, 903 (1989)); *McClurg v. Deaton*, 380 S.C. 563, 574, 671 S.E.2d 87, 94 (Ct. App. 2008) (citing *Thompson*, 299 S.C. at 120, 382 S.E.2d at 903), *aff'd*, 395 S.C. 85, 716 S.E.2d 887.

128. *Thompson*, 299 S.C. at 120, 382 S.E.2d at 903 (quoting *Graham v. Town of Loris*, 272 S.C. 442, 453, 248 S.E.2d 594, 599 (1978)) (internal quotation marks omitted).

129. *Cook v. Rowland*, 49 P.3d 262, 265 (Alaska 2002) (citing *Melendrez v. Bode*, 941 P.2d 1254, 1258 (Alaska 1997)); *Ferguson & Co. v. Roll*, 776 S.W.2d 692, 698 (Tex. Ct. App. 1989) (citing *The Moving Co. v. Whitten*, 717 S.W.2d 117, 120 (Tex. Ct. App. 1986)).

130. *Thompson*, 299 S.C. at 120, 382 S.E.2d at 903 (quoting *Graham*, 272 S.C. at 453, 248 S.E.2d at 599) (internal quotation marks omitted).

131. *McClurg*, 395 S.C. at 94, 716 S.E.2d at 892 (Toal, C.J., dissenting).

Damages hearings often are separated from liability hearings,¹³² thereby indicating that a discrepancy in damages is “worthy of hearing.” Therefore, where a defendant presents evidence regarding the appropriate amount of damages that conflicts with the plaintiff’s evidence or casts doubt on the validity of the remedy sought, the defendant has presented a meritorious defense.

The South Carolina Supreme Court has recognized at least three goals relating to the meritorious defense requirement. In *Edwards*, the court declared that the rule regarding relief from default judgment should be “liberally construed to see that justice is promoted and to strive for disposition of cases on their merits.”¹³³ South Carolina courts have cited these two goals as the bases for finding an abuse of discretion when trial courts have refused to grant relief from judgments in spite of defendants presenting meritorious defenses, thereby depriving those defendants of their days in court.¹³⁴ Chief Justice Toal discussed the third goal in her *McClurg* dissent, namely, judicial efficiency.¹³⁵ Because a reduction in the damage award does “make a difference”¹³⁶ to the parties involved, allowing such a defense to justify relief from a default judgment is consistent with the goals of efficiency, promotion of justice, and having controversies decided on their merits.

Finally, allowing a defense as to damages only would provide a clearer rule. Evidence of counterclaims, contributory negligence, or other claims, which may be viewed as disputes either as to liability or as to damages, will not create grey areas if damages-only defenses are recognized. The South Carolina Supreme Court found, in *Edwards*, that contributory negligence was a valid meritorious defense.¹³⁷ Since contributory negligence is only a partial disclaimer of liability, it logically flows from this recognition that the South Carolina Supreme Court would agree with the Ohio Court of Appeals’ statement that a “counterclaim [that] indicates that the proper amount owed to [the plaintiff] is at issue” would also be a meritorious defense.¹³⁸ A rule that a proper showing of any

132. See B. Finberg, Annotation, *Defaulting Defendant’s Right to Notice and Hearing as to Determination of Amount of Damages*, 15 A.L.R.3d 586, 588 (1967).

133. *Edwards v. Ferguson*, 254 S.C. 278, 283, 175 S.E.2d 224, 226 (1970) (citing *Gaskins v. Cal. Ins. Co.*, 195 S.C. 376, 379–80, 11 S.E.2d 436, 437 (1940)). *Edwards* refers to section 10-1213 of the 1962 South Carolina Code, which was the current rule regarding relief from default judgment at the time. S.C. CODE ANN. § 10-1213 (1962); see also *Rochester v. Holiday Magic, Inc.*, 253 S.C. 147, 149, 169 S.E.2d 387, 388 (1969) (“That code section permits the trial court to relieve a party from judgment taken through ‘mistake, inadvertence, surprise or excusable neglect.’” (quoting § 10-213)).

134. See e.g., *Edwards*, 254 S.C. at 283, 175 S.E.2d at 226 (citing *Gaskins*, 195 S.C. at 379–80, 11 S.E.2d at 437) (discussing these policy goals and holding that “the trial judge abused his discretion in failing to vacate the [default] judgment”).

135. *McClurg*, 395 S.C. at 92, 716 S.E.2d at 891 (Toal, C.J., dissenting).

136. *Id.* (quoting *McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987)) (internal quotation marks omitted).

137. See *Edwards*, 254 S.C. at 282, 175 S.E.2d at 225.

138. *Mazepa, Inc. v. Krueger*, No. 70472, 1997 WL 1090422, at *2 (Ohio Ct. App. May 15, 1997).

counterclaim constitutes a meritorious defense, such as the rule adopted by the Fourth Circuit Court of Appeals,¹³⁹ would be easier to apply and would still promote the goals of the meritorious defense requirement. If counterclaims and defenses of contributory negligence are recognized as meritorious, all contests primarily affecting damages should be recognized as possible meritorious defenses for the sake of promoting consistency. Furthermore, as Chief Justice Toal pointed out, recognizing defenses as to damages only would eliminate any incentive defendants might have to deny wrongdoing where they would otherwise concede liability.¹⁴⁰ Finally, while recognition of damages-only defenses as meritorious does affect the finality of the default judgment, Chief Justice Toal has rightly observed that “a meritorious defense to the amount of damages awarded must first be accompanied by a showing that the action filed meets the requirements of Rule 60(b)(1)–(5).”¹⁴¹ Because the Rule 60(b) requirement is unaffected by the meritorious defense rule,¹⁴² allowing defenses as to damages only will be inapposite to the number of judgments being set aside.

The more practical question, of course, is what a defendant must present to the court in order to successfully show a meritorious defense. In *McClurg*, the judges who heard the case disagreed as to whether the defense at issue was properly presented to the circuit court and preserved for appeal. Justice Pleicones, writing for the supreme court majority, pointed out that the only mention of the discrepancy between the damages awarded and the settlement demand was in the “Background” section of a memo supporting New Prime’s Rule 60 motion.¹⁴³ Justice Pleicones suggested that this mention did not properly raise a meritorious defense argument.¹⁴⁴ He further stated, “it is well settled [in South Carolina] that the moving party in a Rule 60(b) motion has the burden of presenting *evidence* entitling him to relief.”¹⁴⁵ It is clear from South Carolina case law that “bare assertion[s]”¹⁴⁶ and “unverified . . . allegations”¹⁴⁷ do not meet this standard. Such allegations must be substantiated by evidence such as affidavits.¹⁴⁸ Further, no

139. See *Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corp.*, 843 F.2d 808, 812 (4th Cir. 1988).

140. See *McClurg*, 395 S.C. at 97, 716 S.E.2d at 893 (Toal, C.J., dissenting).

141. *Id.* at 98, 716 S.E.2d at 894.

142. See *id.* (citing S.C. R. Civ. P. 60(b)(1)–(5)).

143. *McClurg*, 395 S.C. at 86 n.1, 716 S.E.2d at 887 n.1 (majority opinion).

144. See *id.*

145. *Id.* (citing *BB&T v. Taylor*, 369 S.C. 548, 552, 633 S.E.2d 501, 503 (2006)).

146. *McClurg v. Deaton*, 380 S.C. 563, 576, 671 S.E.2d 87, 94 (Ct. App. 2008), *aff’d*, 395 S.C. 85, 716 S.E.2d 887.

147. *Bowers v. Bowers*, 304 S.C. 65, 68, 403 S.E.2d 127, 129 (Ct. App. 1991).

148. See *Bowers*, 304 S.C. at 68, 403 S.E.2d at 129 (“A motion to open or vacate a judgment should be supported . . . by affidavits as to the facts on which the application relies.” (citing 49 C.J.S. *Judgments* § 446 (2009) (internal quotation marks omitted))).

memorandum in support of a motion,¹⁴⁹ settlement offer,¹⁵⁰ or argument made by an attorney will be considered evidence.¹⁵¹

Still, Chief Justice Toal and then-Chief Judge Hearn wrote in their dissents that New Prime had presented a meritorious defense and that, because the circuit court denied the Rule 60(b) motion, the issue was preserved for appeal.¹⁵² Chief Justice Toal found that New Prime “raised a meritorious defense to damages directly within the memoranda supporting their motions to set aside the default judgment, and supported that claim in an affidavit of a claims specialist with the Insurer.”¹⁵³ She cited *Williams v. Watkins*, among other cases, for the proposition that the court of appeals could find the presentation of a meritorious defense in the record and reverse the denial of a Rule 60(b) motion on that basis.¹⁵⁴ The majority claimed that Chief Justice Toal’s reliance on *Williams* was misplaced because in that case, “the Court of Appeals found the meritorious defense in the party’s pleading.”¹⁵⁵ However, Chief Justice Toal responded that she saw no reason to make such a distinction.¹⁵⁶

Chief Justice Toal also noted that “the majority . . . expound[ed] the view that a party must use the magic words, ‘meritorious defense,’ when arguing that a court may have reached a different result had it heard a case on the merits.”¹⁵⁷

149. *McClurg*, 395 S.C. 86 n.1, 716 S.E.2d at 887 n.1 (citing *Harris Teeter, Inc. v. Moore & Van Allen, PLLC*, 390 S.C. 275, 298, 701 S.E.2d 742, 754 (2010) (Hearn, C.J., concurring in part and dissenting in part)).

150. *Id.* (citing S.C. R. EVID. 408; *Fesmire v. Digh*, 385 S.C. 296, 309, 683 S.E.2d 803, 810 (Ct. App. 2009)). Chief Justice Toal, in response to the majority’s declaration that a settlement offer is not evidence, stated:

I do not consider the settlement offer referenced by Petitioners to represent evidence of what the damages ought to be. However, I believe that the evidence meets the low bar set for a meritorious defense in that it merely demonstrates the existence of a real controversy and the probability that a decision on the merits might render a different result.

Id. at 95 n.6, 716 S.E.2d at 892 n.6 (Toal, C.J., dissenting).

151. *Bowers*, 304 S.C. at 68, 403 S.E.2d at 129 (citing *Gilmore v. Ivey*, 290 S.C. 53, 58, 348 S.E.2d 180, 184 (Ct. App. 1986)) (“[T]he trial court properly disregarded the statements of counsel that he claimed reflected testimony appearing in depositions not otherwise entered into evidence.”).

152. *See McClurg*, 395 S.C. at 89, 716 S.E.2d at 889 (Toal, C.J., dissenting); *McClurg v. Deaton*, 380 S.C. 563, 581–82, 671 S.E.2d 87, 97 (Hearn, C.J., concurring in part and dissenting in part), *aff’d*, 395 S.C. 85, 716 S.E.2d 887. Justice Pleicones asserted that the circuit court judge’s statement that “there has been no showing of a meritorious defense” was an observation, not an appealable ruling. *McClurg*, 395 S.C. at 86 n.1, 716 S.E.2d at 887 n.1 (majority opinion) (internal quotation marks omitted) (citing S.C. R. EVID. 408; *Fesmire*, 385 S.C. at 305, 683 S.E.2d at 808).

153. *McClurg*, 395 S.C. at 95, 716 S.E.2d at 892 (Toal, C.J., dissenting). The affidavit stated that the affiant had received a \$170,000 settlement offer from the McClurgs at one point during their negotiations. *Id.*

154. *Id.* at 94, 716 S.E.2d at 892 (citing *Williams v. Watkins*, 384 S.C. 319, 326–27, 681 S.E.2d 914, 917–18 (Ct. App. 2009)).

155. *Id.* at 87 n.2, 716 S.E.2d at 888 n.2 (majority opinion) (citing *Williams*, 384 S.C. at 326–27, 681 S.E.2d at 918).

156. *See id.* at 94, 716 S.E.2d at 892 (Toal, C.J., dissenting).

157. *Id.* at 96, 716 S.E.2d at 893.

While it may be true that South Carolina courts “have never before required such explicit language,”¹⁵⁸ it is also notable that the majority was unclear as to whether that language was required.¹⁵⁹ After *McClurg*, defense attorneys would be wise to specify one or more meritorious defenses in a Rule 60 brief, and to present affidavits or other evidence specifically to support those defenses.

Once a court determines that a defendant presented evidence of a meritorious defense, it must then determine whether a meritorious defense only as to damages allows for the case to be completely reopened upon relief from default judgment or only for a damages hearing. The supreme court specifically refused to answer this question after finding that no meritorious defense had been presented at trial.¹⁶⁰ Much of the case law discussed in this Note is silent on the issue. However, the Texas Court of Appeals explained in *Ferguson & Co. v. Roll*, that “any defense to a portion of the damages awarded in the default judgment” would “requir[e] a new trial on the damage issues.”¹⁶¹ Given that the goals of the meritorious defense requirement include judicial efficiency and promotion of justice in cases where the only true contest is the amount of damages, it would be most just and efficient to try only the damages issues on the merits. In any case, this decision should be left up to the discretion of the trial judge because, as already discussed, these decisions are best made on a case-by-case basis.¹⁶²

In light of the discretionary nature of the decision to grant relief from default judgment, many other questions can be answered on a case-by-case basis. For example, the circuit court could retain discretion to decide how great a discrepancy between the judgment damages and the damages shown by the movant’s evidence would merit setting aside the judgment. Any problem that may arise because of insurance companies trying to take advantage of this development in the law similarly can be handled on a case-by-case basis at the trial level. However, there is still at least one question that will require a more defined rule: will a defendant seeking relief from default judgment be given the opportunity to engage in discovery in order to prove that a lesser amount of damages would have been appropriate? This question was not raised in *McClurg* because plaintiff’s counsel had been sending Zurich medical records throughout the negotiation process.¹⁶³ However, in a typical negligence action, the plaintiff has exclusive access to medical records and proof of damages until that information is shared with the defendant through the negotiation or discovery

158. *Id.*

159. *See generally id.* at 86 n.1, 716 S.E.2d at 887 n.1 (majority opinion) (discussing issue preservation without specifically stating that the magic words of “meritorious defense” are required).

160. *See id.* at 87, 716 S.E.2d at 888.

161. 776 S.W.2d 692, 698 (Tex. Ct. App. 1989) (citing *Folsom Invs., Inc. v. Troutz*, 632 S.W.2d 872, 875 (Tex. Ct. App. 1982)).

162. *See supra* text accompanying note 85.

163. *See McClurg v. Deaton*, 380 S.C. 563, 569, 671 S.E.2d 87, 90 (Ct. App. 2008), *aff’d*, 395 S.C. 85, 716 S.E.2d 887 (2011).

processes. If a defendant never had the opportunity to send discovery requests to the plaintiff or the plaintiff simply did not cooperate with such requests, should the defendant be given another opportunity to collect this potential evidence? If such opportunities are available, does that lessen the standard as to what must be presented in support of a meritorious defense?

It is unlikely that South Carolina courts would lessen the meritorious defense requirement in favor of granting parties more opportunity to utilize discovery, nor should they. As already noted, judicial efficiency is an important goal of the meritorious defense requirement, and granting defendants relief from default judgments so they may attempt to formulate a defense as to damages, without requiring that they show any indication of a controversy would, in most cases, directly oppose that goal. Indeed, an argument to the contrary looks to be exactly the type of “bare assertion” the court of appeals admonished.¹⁶⁴ However, in cases where the defendant can show with circumstantial evidence that the default judgment entered is likely excessive and that the defendant did not have a proper opportunity to engage in discovery before the default judgment was entered, there is no reason the court should not have the discretion to grant more time for discovery. Granting parties the right to engage in discovery before a damages hearing would further the goals of promoting justice and disposing of cases on their merits, without hindering judicial efficiency.

In sum, South Carolina courts should recognize meritorious defenses as to damages only in the context of a Rule 60 motion if the issue is squarely presented in the future. Furthermore, decisions regarding whether the case will be reopened as to issues of liability or only those related to damages, and whether parties should be allowed to engage in discovery, should be left within the discretion of the trial court. Because of the discretionary nature of this rule, there is little risk that parties will succeed in abusing it, and the rule can be used to further the goals of the meritorious defense requirement: the promotion of justice, the disposal of cases on their merits, and judicial efficiency.

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164. *See id.* at 576, 671 S.E.2d at 94.

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