**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI**

**WILLIAM CHRISTOPHER TUCKER** **APPELLANT**

**VS.** **CASE NO. 2013-CA-02100**

**GAY ST. MARY WILLIAMS AND LARRY WILLIAMS** **APPELLEES**

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# BRIEF OF APPELLEES

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***ORAL ARGUMENT REQUESTED***

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## CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Gay St. Mary Williams, Appellee;
2. Larry Williams, Appellee;
3. Chuck McRae, Esq., Seth Little, Esq., and McRae Law Firm, PLLC, Counsel for the Appellees;
4. William Christopher Tucker, Appellant;
5. Toby J. Gammill, Esq., Andrew Rueff, Esq., and Gammill Montgomery, PLLC, Counsel for Appellant;
6. Maryland Casualty Company, Trial Defendant;
7. Shelter Mutual Insurance Company, Trial Defendant; and
8. Honorable Winston Kidd, Hinds County Circuit Court Judge.

/s/ Seth C. Little
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## STATEMENT OF THE ISSUES

I. This Appeal should be dismissed as the Appellant is procedurally barred from seeking review of the Clerk's Entry of Default as well as the Default Judgment;

II. Even if this Court were to consider the Clerk's Entry of Default, the Appellant's position still fails as no good cause was shown under Miss. R. Civ. P. 55(c);

III. The three prong balancing test under Rule 60(b) weighs in favor of not disturbing the default judgment; and

IV. The substantial evidence presented to the trial court at the damages hearing was proper and the damages awarded to the Appellees were reasonable.

## STATEMENT REQUESTING ORAL ARGUMENT

Pursuant to M.R.A.P. 34(b), the Appellees request that oral arguments be heard in this matter. Due to their complex nature, the Court's consideration of the issues presented by this appeal may be assisted or advanced by the presence of the parties before the Court to comment upon the issues and respond to any inquiries.

## STATEMENT OF THE CASE/OPERATIVE FACTS

Appellees wish to initially assert that the instant appeal is restricted to the Default Judgment against Appellant Tucker and does not concern the underlying Defendant Insurance Companies, Shelter and Mutual. It arose out of an automobile collision between Appellee Gay St. Mary Williams and Appellant William Christopher Tucker. R. at 13. The collision occurred on the morning of February 9, 2007 in Jackson, Mississippi. *Id*. The Appellee was traveling north in her vehicle along State Street and stopped at the red light at the intersection of State Street and Beasley Road. *Id*. Upon the traffic light signal changing to green specifically for those vehicles turning left onto Beasley Road, the Appellee began to turn her vehicle onto

Beasley Road. *Id*. However, at the same time, the Appellant was traveling in excess of the speed limit in a southbound direction on State Street. *Id*. Due to the Appellant's negligence, he struck the Appellee's vehicle and caused severe damage to her vehicle and to her person. *Id*.

Prior to the collision, the Appellee was employed as Workforce Development Director of the Gulf Coast Training Initiative for the National Center for Construction Education and Research. R. at 255. Prior to that employment, she held various other high-level positions, which included Chief Executive Officer of Compass Educational Holdings. R. at 255-56. In relying on the appropriate evidence presented, the trial court found that, at the time of the collision, the Appellee was earning $125,000 per year as salary. R. at 346. Since the collision, the Appellee has been deemed fully disabled and has since relied on worker's compensation as her source of income since she is no longer able to work. R. at 255.

Regarding the serious injuries suffered by the Appellee, the collision immediately caused: multiple back fractures (C5, C6, and the lumbar region), multiple facial fractures, arm fractures, facial lacerations, and other severe head injuries. R. at 343, 345. The Appellee was also surgically treated for injuries to her brain. R. at 345. The collision further caused permanent ongoing injuries and pain and suffering. For example, the Appellee suffers from cognitive and memory difficulties, PTSD depression, diminished mental capacity ($6^{th}$ grade reading level and short/long term memory loss – the Appellee attained a master's degree prior to the collision), ataxia and vertigo, neurological disorders (significant tremors of her right upper extremity requiring insertion of pain pumps), diplopia, etc. *Id*. As a result thereof, the Appellee is on a daily regimen of serious medication, requires constant care by her husband (co-Appellee) and others, and has required numerous visits to the hospital emergency room. *Id*.

Prior to the filing of the underlying action in Hinds County Circuit Court, the Appellant William Tucker filed a lawsuit in the United States District Court for the Southern District of Mississippi against Appellee Gay St. Mary Williams alleging that the accident that occurred in 2007 was due to Williams's negligence. R. at 365-68. Appellee Gay Williams was represented by her insurance company Zurich North America the federal action and, after a limited amount of discovery, the insurer entered into a settlement agreement with Appellant in which the insurer, Zurich, was released from litigation in exchange for $400,000 paid to Appellant. R. at 294- 300. Within the settlement agreement, the signatories agreed that the issue of liability was not resolved by the agreement and that all claims concerning the underlying accident able to be brought by Appellees were reserved and not waived by the settlement. *Id*. Appellant was a signatory to the settlement agreement and in exchange for waiving all possible claims against Appellee and insurer Zurich he received a check for $400,000. R. at 299, 307. In light of the fact that the parties had reached a settlement, the district court judge entered a Judgment of Dismissal with Prejudice on January 12, 2009, acknowledging that the parties had compromised and settled amongst themselves. R. at 65.

The underlying action was commenced on February 4, 2010. R. at 12. Appellant Tucker was served with process on February 12, 2010. R. at 2. No Answer to Appellees' Complaint was filed within the required time period nor was any extension sought. Thereafter, on June 15, 2010, the Appellees filed their Application for Entry of Default and their Motion for Default Judgment in the underlying matter as a result of the Appellant's noncompliance. *Id*. The Clerk entered default. *Id*. Based on the Appellant's continued lack of response or acknowledgement of the Complaint or regarding the entry of default, the Appellees, on October 22, 2010, sought the trial court's assistance in obtaining a judgment of default. R. at 3. A hearing was scheduled for

January 24, 2011 with the trial court hearing both the Motion for Default Judgment as well as the Motion to Set Aside the Clerk's Entry of Default. R. at 3, Supp. R. at 1-2. At said hearing, Counsel for the Appellant admitted that the Appellant did not timely answer the Appellees' Complaint and that she was "not sure who dropped the ball on getting the Complaint to the insurer." *See* Jan. 24, 2011 Tr. at 2. When pressed by the Court for a showing of good cause as to why an answer was not timely filed or why no indication of intent to respond was given to Counsel for the Appellees which could preclude default judgment, Appellant's Counsel, for a second time, emphasized the absence of good cause and the Appellant's lack of compliance by stating: "[w]ell, Your Honor, again, I don't have information about why the Complaint was not given to the insurer." *Id*. at 5. Thereafter, on July 1, 2011, the trial court entered its Order denying the Appellant's Motion to Set Aside the Clerk's Entry of Default. R. at 229.

The Appellant filed his Motion to Reconsider on July 26, 2011, arguing that Miss. R. Civ. Pro. 55 and 60(b) operated to mandate the trial court's reversal of the order refusing to set aside the entry of default. R. at 271-73. The Motion improperly declined to address good cause required for reversal of default and included as exhibits documentation which was not included in the Appellant's initial Motion to Set Aside – the basis of the Motion for Reconsideration. *Id*. The Appellant's documentation came from a separate case that was filed by the Appellant in federal court in 2007 and involved the subject collision. *Id*. The Appellant argued, with the use of the untimely exhibits, that Miss. R. Civ. P. 60(b) dictated the dismissal of this underlying action. *Id*. Therefore, the Appellees filed the appropriate Motion to Strike, seeking to remove from the Court's consideration the documents which were never brought up in the initial Motion to Set Aside. R. at 326-28. The Appellees also filed their Response in Opposition to the Motion for Reconsideration on the bases that Miss. R. Civ. P. 60(b) is reserved for exceptional situations

and that the Appellant never even attempted to show good cause to excuse the Court's entry of default. R. at 330-35.

The trial court held a hearing on October 24, 2011 on the issues of the Appellees' Motion to Strike as well as the Appellant's Motion to Reconsider. *See* October 24, 2011 Tr. at 1. At said hearing, the Appellees' Counsel noted that any and all claims by the Appellee Gay St. Mary Williams have been specifically reserved, rather than waived, in the settlement agreement from the previous suit propelled by the parties' respective insurance companies. *Id*. at 8. Further, Counsel for the Appellant once again stated that she could not "state [the Appellant's] reasons for not providing the Complaint to his defense counsel." *Id*. at 10. On November 10, 2011, the trial court entered its written order denying the Appellant's Motion for Reconsideration for lack of good cause to overturn the entry of default. R. at 342. On June 14, 2013, the trial court held a hearing on damages wherein the Appellees laid out testimony and entered medical bills and other evidence to support their claim for damages; at that trial, the Court again denied the Appellant's Motion for Reconsideration. *See* June 14, 2013 Tr. at 8. The Appellant failed to appeal the Court's decision to uphold the Clerk's Entry of Default after reconsideration on November 10, 2011. On November 22, 2013, Judge Kidd entered his Memorandum Opinion and Order setting forth the court's proper and appropriate reasoning for granting the Appellees' Motion for Default Judgment which relied on the severe injuries suffered by the Appellee, her permanent inability to work, the lack of basis for the Appellant's delay in participating in the lawsuit, and the past and ongoing treatment required to sustain the Appellee. R. at 343-49. An award of $2,962,984.60 was entered for Appellee Gay St. Mary Williams and $300,000 was entered for Appellee Larry Williams. R. at 349. The Appellant filed his Notice of Appeal on December 12, 2013. R. at 388.

## SUMMARY OF THE ARGUMENT

The instant appeal involves several issues related to a clerk's entry of default and default judgment, all of which have been improperly brought to this Court on appeal.

First, the appeal based upon the Clerk's Entry of Default should be dismissed because it is procedurally barred from review. Rule 28 of the Mississippi Rules of Appellate Procedure dictates that an appellant list all issues that he wishes to address in his brief in his statement of issues and failure to list an issue in the statement of issues bars the court's consideration of that omitted issue. The Appellant lists in his statement of issues that he is appealing the lower court's denial to overturn the Clerk's Entry of Default. However, the time to appeal this particular issue has passed and therefore it is procedurally barred from this Court's review. Also, for the first time on appeal, the Appellant attempts to assert his "good cause" for not answering the Complaint against him. This Court has consistently held that failure to raise an issue at the trial court bars the introduction of this issue for the first time on appeal. *Cole v. State*, 525 So. 2d 365, 369 (Miss. 1987).

When the Appellant first objected to the entry of default, he attached the unfiled and untimely answer; an answer which contained no attached exhibits. Thereafter, the Appellant attached exhibits to his Motion for Reconsideration of the trial court's denial of the Motion to Set Aside the Clerk's Entry of Default; said documents were not previously disclosed to the Court and were used in support of rehashing the Appellant's prior argument. Further, the Appellant did not timely appeal the denial of his Motion to Set Aside the Entry as the Order Denying said Motion was entered on November 10, 2011 and the Appellant's Notice of Appeal was filed on December 12, 2013 – two (2) years after the entry of the Order Denying the Motion to Set Aside

the Entry of Default. As the instant appeal is devoted to overturning the Clerk's Entry of Default, the Appellees request the instant appeal be dismissed as it is procedurally barred.

Also related to the procedural bar that should be enforced is the fact that the Appellant seems to confuse the issue that he is appealing. In his statement of the issues he compels this Court to review the lower court's denial to set aside the clerk's entry of default, but, in making his argument, he begins to argue not only the standard to set aside the entry of default under Rule 55(c), but also makes an argument under the standard to reverse the default judgment under 60(b). Although both standards are interrelated, they are two very separate issues and the Appellant's confusion of these issues has failed to properly put Appellee on notice of what is being asserted as to the actual error committed by the lower court. However, in the event this Court decides to address an issue in the Appellant's brief, the Appellee will address what the Appellant has attempted to assert as error.

Second, pursuant to Miss. R. Civ. P. 55(c), in order to overturn a clerk's entry of default, one must show good cause for not filing any answer to a Complaint lodged against him. At the lower court level, Appellant was given numerous opportunities by the trial court judge to give good cause for his failure to file an answer but to no avail. The only "answer" the trial court received from Appellant's counsel was that they had no answer to why the Complaint went unanswered, which the lower court judge rightly found insufficient to qualify as a showing of good cause. The Appellees contend that the Appellant's argument must fail as he has repeatedly refused to provide the trial court with the requisite "good cause" to explain the lack of compliance with the rules of civil procedure. The import of Miss. R. Civ. P. 55 is that a party that fails to defend itself runs the risk of an entry of default and such entry may not be set aside absent some showing of good cause. Here, despite the leniency of Rule 55 when compared to

the more stringent Rule 60(b), the Appellant repeatedly failed to give any explanation for his nonexistent response to the Appellees' Complaint in the underlying matter. As a result thereof, the Appellees were properly entitled to an entry of default by the Clerk.

Appellant has asserted that the trial court erred in not considering the factors set out in Rule 60(b) when considering whether to set aside the clerk's entry of default. The trial court did, in fact, apply the correct standard in his consideration of whether to set aside the entry of default, which is set out in Rule 55(c) which requires the moving party to show good cause for the not answering the Complaint. However, for the sake of argument, the Appellee asserts that even if the incorrect standard of 60(b) is applied, the lower court's entry of default was not in error. Appellee, however, would be remiss to point out that this standard was not utilized by the lower court judge because the issue to set aside the default judgment was not before the court. Rather, the issue before the trial court was whether the entry of the clerk's default should be set aside and the trial court properly analyzed that issue under Rule 55(c).

The Appellant asserts that because the initial trial was brought in federal court, that Appellee was required to bring her state claim against Appellant as a compulsory counterclaim. Should this Court find it necessary to address this claim, the Appellee asserts that the federal court claim was settled after a brief discovery period by the insurance companies representing both parties. The settlement agreement that resulted from the federal case explicitly reserved the right for Appellee to bring suit against any other party, besides the insurance companies, including the Appellant. The settlement agreement also explicitly sets out that the issue of liability is not decided by the agreement and no parties stipulate that they were liable for the underlying collision. Therefore, all parties entering into the settlement agreement, including the Appellant, were on notice that the question of liability between the Appellee and Appellant were

explicitly preserved for future litigation. This also precludes the Appellant from claiming that he did not understand the summons served upon him. Should this Court decide to address this issue as well, it is nonetheless insufficient to show good cause. As stated above, the federal court case was settled and within the settlement agreement Appellee's right to sue was explicitly reserved and all parties were signatories to that agreement. Further, the summons served upon the Appellant is clear and explicit that a suit has been filed upon him and that his immediate action is needed to protect his rights. Given that the Appellant was on notice that the Appellee's rights to sue were preserved by the settlement agreement that he is a signatory to and the fact that the summons served upon him in the underlying state case explicitly set out what was required of him, his supposed confusion over the matter is not understandable nor is it sufficient to qualify as good cause under Rule 55(c).

Third, under Miss. R. Civ. P. 60(b) and having argued good cause throughout his brief, the Appellant asserts his colorable defense argument which is an argument for setting aside a default judgment under Rule 60(b) and not Rule 55(c). However, the Appellee relies upon the scant evidence -- their expert accident reconstructionist's report produced by the short period of discovery that occurred in the federal case to support their argument that a colorable defense exists. As stated above, the federal court case was settled and the issue of liability was not decided and instead was preserved in the settlement agreement for future litigation. No colorable defense exists; a factor which this Court has traditionally given considerable weight. *Flagstar Bank, FSB v. Danos*, 46 So. 3d 298, 307 (Miss. 2010). Additionally, as shown below, setting aside the default judgment will certainly cause prejudice to the Appellee as the injuries suffered by the Appellee continue to go unredressed considering the automobile collision occurred in 2007.

Lastly, the Appellant's claim that there was no admissible evidence to support the trial court's findings of damages is unfounded given the substantial amount of evidence introduced at the damages hearing, as discussed below. Also, it must be pointed out, that the Appellant has failed to support his claims that the evidence was inadmissible by any authority whatsoever, therefore, his claims must fail. Consequently, the Appellant's appeal must fail and the decision of the trial court should not be reversed in any way.

## STANDARD OF REVIEW

"The standard of review for setting aside a default judgment is whether the trial court committed an abuse of discretion." *Stanford v. Parker*, 822 So. 2d 886, 887-88 (Miss. 2002) (quoting *McCain v. Dauzat*, 791 So. 2d 839, 842 (Miss. 2001)). "The question whether a trial court ought vacate a judgment entered by default is addressed to the sound discretion of the trial court." *Bailey v. Georgia Cotton Goods Co.*, 543 So. 2d 180, 181 (Miss. 1989). "Although 'default judgments are not favored in the law, it does not follow that a party seeking relief from a default judgment is entitled to that relief as a matter of right.'" *Am. States Ins. Co. v. Rogillio*, 10 So. 3d 463, 467 (Miss. 2009) (quoting *Pointer v. Huffman*, 509 So. 2d 870, 875 (Miss. 1987)). This Court holds that it "will not reverse [a default judgment] unless convinced that the Circuit Court has abused its discretion in the premises." *H & W Transfer & Cartage Serv., Inc. v. Griffin*, 511 So. 2d 895, 899 (Miss. 1987). "The existence of trial court discretion, as a matter of law and logic, necessarily implies that there are at least two differing actions, neither of which if taken by the trial judge will result in reversal." *Bailey v. Georgia Cotton Goods Co.*, 543 So. 2d at 182.

## ARGUMENT

### I. This Appeal should be dismissed as the Appellant is procedurally barred from seeking review of the Clerk's Entry of Default as well as the Default Judgment

**a. This Appeal is barred from review as the Appellant did not timely appeal the Clerk's Entry of Default pursuant to Rule 4(a)**

As stated above, this Court should not entertain the instant appeal as the Appellant is primarily seeking review of both the Clerk's Entry of Default and the Default Judgment and he is barred from arguing both positions. First, the most vital procedural bar which exists to deny the Appellant the ability to contest the entry of the clerk's default in addition to the inability to contest the default judgment is found in the Appellant's actions surrounding his Motion for Reconsideration. The Appellant relied on the requirements of Miss. R. Civ. P. 60 in attempting to gain relief from the judgment on July 1, 2011. R. at 271. The comments to Rule 60 state that "motions filed more than ten days after entry of judgment do not toll the time period in which an appeal may be taken" and this is echoed in Miss. R. App. P 4(d). (emphasis added). The Appellant filed said Motion on July 26, 2011, 25 days after the entry of the initial Order denying his Motion to Set Aside. R. at 271. Alongside this rule is this Court's position on the effect of a denial of a motion for reconsideration. "The order denying a motion to reconsider is a final judgment for purposes of appeal." *Pruett v. Malone,* 767 So. 2d 983, 985 (Miss. 2000) (citing *Belhaven Improvement Ass'n, Inc. v. City of Jackson,* 507 So. 2d 41, 45 (Miss. 1987)). The filing of appeal therefore must be completed within thirty (30) days after the entry of the order denying a motion for reconsideration. Miss. R. App. P. 4(a). It follows that an appeal not taken on an order denying reconsideration results in the Order becoming "final thirty days thereafter" and "bars any further reconsideration of the case." *Id*. "Rule 4(a) is a 'hard-edged, mandatory' rule which this Court 'strictly enforces'" and "[a]ppeals not perfected within 30 days will be dismissed, period." *Id*. (citations omitted).

On October 24, 2011, the trial court held a hearing on the Appellant's Motion wherein the Appellant declined to state any good cause for failure to answer the Complaint or otherwise participate in the underlying suit (as discussed below). The hearing resulted in an Order entered by the trial court on November 10, 2011 which denied the Appellant's Motion for Reconsideration for lack of good cause to overturn the entry of default. R. at 342. The instant appeal was filed on December 12, 2013 (over two years later); an appeal listing as its primary issue, the trial court's erroneous decision to not set aside the Clerk's Entry of Default. *See* Appellant's Brief at 1. Adhering to the "hard-edged, mandatory" rule of thirty days to appeal a judgment on a Motion to Reconsider, the Appellee hereby requests this Court dismiss the Appellant's appeal as it was not brought within the requisite amount of time (the appeal was taken over two years later). *Ivy v. General Motors Acceptance Corp.*, 612 So. 2d 1108, 1116 (Miss. 1992).

**b. Additional procedural defects exist which also serve to bar the instant appeal**

Additonally, the Appellant fails to adhere to Rule 28 of the Mississippi Rules of Appellate Procedure. Miss. R. App. P. 28(a)(3) states:

> [a] statement shall identify the issues presented for review. No separate assignment of errors shall be filed. **Each issue presented for review shall be separately numbered in the statement**. **No issue not distinctly identified shall be argued by counsel**, except upon request of the court, but the court may, at its option, notice a plain error not identified or distinctly specified.

(emphasis added). In his brief, the Appellant lists two distinct issues which explicitly set out the arguments to be heard by this Court on appeal. They are: 1. "THE TRIAL COURT ERRED IN FAILING TO SET ASIDE THE CLERK'S ENTRY OF DEFAULT ENTERED AGAINST TUCKER" and 2. "THE TRIAL COURT ERRED IN CONSIDERING THE EVIDENCE AND TESTIMONY IN THE DAMAGES HEARING." *See* Appellant's Brief at 1 (emphasis added).

It is clear, and the Appellee argues as much below, that the Appellant has waived any argument against the Clerk's Entry of Default. Further, the Appellant has waived, by not including it in his Statement of Issues, any assignment of error regarding the Default Judgment. Although this Court does possess the ability to look further into the record for error on the part of the trial court, the Appellee contends that such inquiry should not be taken in the instant matter. The Appellant's arguments in the brief have been unconvincing and confusing. In fact, the Appellant appears to have completely disregarded the requirements of Miss. R. App. P. 28 in favor of slipping in as many arguments (some not even pursued at the trial court level) as possible which effectively confuse the genuine issues on appeal. As provided by the Court of Appeals in *Reed*, "these 'issues' are procedurally barred because [the Appellant] failed to list them in his original statement of issues." *Reed v. State*, 987 So. 2d 1054, 1056 (Miss. Ct. App. 2008).

Moreover, even if this Court were to consider the Appellant's arguments seeking to overturn the Clerk's Entry of Default, the Appellant is still barred from utilizing Rule 60(b)(6) as an avenue for relief. R. at 272. In *Pruett*, this Court held that "[r]elief pursuant to Rule 60(b)(6) is reserved for 'exceptional and compelling circumstances.'" *Pruett v. Malone*, 767 So. 2d 983, 986 (Miss. 2000) (quoting *Page v. Siemens Energy & Automation, Inc.*, 728 So. 2d 1075 (Miss. 1998)). As the Appellee will address below, one of the Appellant's main contentions is that there happened to be prior litigation between himself and the Appellee. The prior litigation resulted in a settlement between the parties which determined no liability and explicitly reserved the right for the Appellee to pursue further legal action against the Appellant. R. at 294-300. This Court has previously stated that a trial court did not err in overruling plaintiff's Rule 60(b) motion for relief from an order "based upon counsel's omissions and mistakes where such did not rise to the level of 'exceptional circumstances.'" *Pruett v. Malone*, 767 So. 2d at 986. This is

applicable here, as the Appellant, through counsel, failed to adequately state good cause at the trial court level and in the Motion to Set Aside the Clerk's Entry of Default and only now raises the issue in depth. Supp. R. at 1-13.

Further, "[a] trial court's denial of a motion for reconsideration is reviewed for abuse of discretion. *Point S. Land Trust v. Gutierrez*, 997 So. 2d 967, 975 (Miss. Ct. App. 2008) (quoting *LeClerc v. Webb*, 419 F.3d 405, 412 n. 13 (5th Cir. 2005)). "Reconsideration of a judgment after its entry is an extraordinary remedy that should be used sparingly." Id. (quoting *LeClerc v. Webb*, 419 F.3d at 412 n. 13). The *Gutierrez* Court also held:

> [i]n order to prevail on a motion for reconsideration, "the movant must show: (i) an intervening change in controlling law, (ii) availability of new evidence not previously available, or (iii)[the] need to correct a clear error of law or to prevent manifest injustice." Regarding the propriety of reconsidering a judgment, the United States Court of Appeals for the Fifth Circuit has stated that "'reconsideration of a judgment after its entry is an extraordinary remedy that should be used sparingly.' A motion for reconsideration may not be used to rehash rejected arguments or introduce new arguments." Nor may it be used "to resolve issues which could have been raised during the prior proceedings."

*Id*. at 976 (internal citations omitted).

Therefore, the Appellant's decision to decline to include any of the evidence or further arguments in support of his initial Motion to Set Aside the Clerk's Entry of Default (none of which supported actual good cause) and thereafter include those documents in the Motion for Reconsideration, for the first time, resulted in the trial court correctly determining that there was not a basis for reversal of its prior ruling and may subsequently not be relied upon by the Appellant for the purposes of this appeal, thereby condemning all arguments derived from the position and evidence in the Motion for Reconsideration and the Supplement thereto. R. at 271-313, 337-41. Additionally, the Appellee contends that any arguments made for the first time by the Appellant, such as that of his reasons supporting good cause, should be barred on appeal. *See*

*InTown Lessee Associates, LLC v. Howard*, 67 So. 3d 711, 718 (Miss. 2011) (quoting *Ill. Cent. R.R. Co. v. Byrd,* 44 So. 3d 943, 948 (Miss. 2010) ("issues not presented to the trial judge are procedurally barred from being raised for the first time on appeal"). Further, the fact that the Appellant waited over two (2) years to file his appeal from the denial of his Motion for Reconsideration lends support to the Appellee's contention that yet another procedural bar exists. *See* R. at 271.

Taking into account the actions of the Appellant both at the trial court level in addition to the failure to adhere to the procedural requirements on appeal, the Appellee requests this Court decline to utilize its power to dismiss the instant appeal for the reasons listed above.

## II. Even if this Court were to consider the Clerk's Entry of Default, the Appellant's position still fails as no good cause was shown under Miss. R. Civ. P. 55(c)

Notwithstanding the procedural defects explained above, the Appellant fails as a matter of both fact and law considering he has repeatedly refused to give good cause for his inability to answer or otherwise participate in the underlying suit prior to the entry of default. As this appeal is limited, by the Appellant's own statement, to the clerk's entry of default, Miss. R. Civ. P. 55(a) states "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default." The court may set aside an entry of default "[f]or good cause shown." Miss. R. Civ. P. 55(c). Further, the comments to Miss. R. Civ. P. 55 state that:

> [a]fter entry of default by the clerk, defendant has no further standing to contest the actual factual allegations of the plaintiff's claim for relief. If a defendant wishes an opportunity to challenge plaintiff's right to recover, a defendant's only recourse is to show good cause for setting aside the default under Rule 55(c) and, failing that, to contest the amount of recovery.

(emphasis added). "An entry of default may be made by the clerk only with regard to a claim for affirmative relief against a party who has failed to plead or otherwise defend." *Chassaniol v. Bank of Kilmichael*, 626 So. 2d 127, 131 (Miss. 1993). Therefore, "this places an affirmative duty on the clerk to examine the affidavits filed and see if the requirements of Rule 55(a) have been met." *Id*. In *Windmon*, this Court solidified the definition of "good cause" for the overturning of the entry of default. *Windmon v. Marshall*, 926 So. 2d 867, 871 (Miss. 2006) (quoting *Allstate Ins. Co. v. Green*, 794 So. 2d 170, 179 (Miss. 2001) (Waller, J., concurring)). *Windmon* explained, through reliance on a concurring opinion written by Justice Waller, that "'[g]ood cause shown' . . . requires the moving party to provide an explanation for the default or give reasons why vacation of the default entry would serve the interests of justice." *Id*.

The Appellant has made no argument against the clerk's action in entering default but, instead, has argued that he is entitled to application of good cause for his failure to respond to the Complaint served upon him. The Appellant, in his October 27, 2011 affidavit attached to his Supplement to his Motion for Reconsideration, claims that he received the summons and Complaint from the Plaintiff on February 12, 2011. R. at 340-41. The Appellee avers that the date set forth in the affidavit is incorrect and should have been attested to as February 12, 2010. R. at 1, Supp. R. at 4-5. The Appellee, through Counsel, applied for an entry of default on June 15, 2010 (roughly 4 months subsequent to the perfected service of process). R. at 1, Supp. R. at 4-6. Thereafter, after the Appellant filed his Motion to Set Aside the Clerk's Entry of Default, the trial court held a hearing to determine whether good cause existed to support a grant of the Appellant's Motion. R. at 229, Jan. 24, 2011 Tr. at 1. At said hearing, Counsel for the Appellant admitted that the Appellant did not timely answer the Appellees' Complaint and that she was "not sure who dropped the ball on getting the Complaint to the insurer." *See* Jan. 24, 2011 Tr. at

2. When pressed by the Court for a showing of good cause as to why an answer was not timely filed or why no indication of intent to respond was given to Counsel for the Appellees which could preclude default, Appellant's Counsel, for a second time, emphasized the absence of good cause and the Appellant's lack of compliance by stating: "[w]ell, Your Honor, again, I don't have information about why the Complaint was not given to the insurer." *Id*. at 5. This is echoed in the Appellant's own affidavit wherein he attested to the fact that he "did not send the paperwork" to the necessary party. R. at 340. He further claimed that he "was not aware that [he] was a defendant in the [underlying] lawsuit." R. at 341.

Utilizing the standard for good cause that this Court has set out, the Appellee avers that no such good cause has been met by the Appellant to warrant reversal of the entry of default or the subsequent default judgment (even though the Appellee maintains that such action is procedurally barred as explained above). The Appellant, through counsel, was repeatedly asked by the trial court why no action was taken in response to the Complaint. *See* Jan. 24, 2011 Tr. at 2, 5. No answer was provided to the court even with several opportunities given. *Id*. Even with the more liberal allowance given to reversing such an entry under Rule 55(c), it is apparent that neither of the two interests under good cause was met, nor can they be. *King v. Sigrest*, 641 So. 2d 1158, 1162 (Miss. 1994).

First, the Appellant was required to "provide an explanation for the default." *Windmon v. Marshall*, 926 So. 2d at 871. Here, the Appellant fails completely as the answers provided by counsel (not knowing "who dropped the ball" or not having "information about why the Complaint was not given to the insurer") provide absolutely no explanation whatsoever. Merely claiming, through affidavit, that he was not aware of his involvement in a lawsuit when the record clearly indicates that the proper paperwork (summons and Complaint) were timely served

upon him does not excuse the Appellant from his requirement under the law. The Appellant was properly served with a summons on February 12, 2010, which clearly and explicitly stated that he was a named party in the lawsuit and further set out what was required of him to answer the complaint to protect his rights. Similar to the defendant in *Rogillio*, Appellant does not deny that he received the summons sent to him in 2010. *American States Ins., Co. v. Rogillio*, 10 So. 3d 463 (Miss. 2009).

Appellant claims he was confused by the summons but admits that he was a party to the federal lawsuit wherein he caused a summons to be sent to Appellee and he bases almost the entirety of this appeal on the argument that this action is precluded based on that previous lawsuit in which he stood as a plaintiff. Clearly, the Appellant has at least a basic knowledge of the inner workings of the system by which lawsuits are effected. Simply put, the Appellant cannot now claim ignorance due to the roles being reversed. Surely, a summons which explicitly and clearly states that he was a party to a lawsuit and laid out the steps he must take to protect his rights is not confusing. Even if it was confusing to Appellant, he had nine (9) months to do as a reasonable person would and take some sort of action or make an inquiry about the summons. *Id*. at 463.

Appellant additionally claims that his confusion stemmed from the fact that the Complaint filed on February 8, 2010, failed to specifically include him as a Defendant in the introductory paragraph of the Complaint (the "COMES NOW" opening paragraph). *See* Appellant's Brief at 19. This argument is unpersuasive since the Appellant was clearly listed as a defendant in the heading of the Complaint and is also listed by name as a defendant under the "Parties" section of the Complaint filed on February 8, 2010. R. at 12-13. Also, throughout the facts section of the Complaint, Appellant is referred to as a defendant and, furthermore, the facts

as put forth in the Complaint clearly state: "[a]s a direct proximate result of the careless, reckless and negligent acts of **Defendant, Mr. Tucker**, the plaintiff has suffered serious, permanent, and disfiguring injuries." R. at 13-14. Appellant is also listed by name as a defendant in the "Damages" section of the Complaint. R. at 15. Appellant also claims that he is listed as a plaintiff after the "WHEREFORE PREMISES CONSIDERED" paragraph on the final page of the Complaint; however, this is incorrect. *See* Appellant's Brief at 19, R. at 16. Even if the Appellee was not barred from using this excuse as "good cause" because he failed to assert this cause at the trial court level, his "confusion" is unfounded, illegitimate, and unjustifiable for the reasons stated above.

As for the second possible method to obtain good cause, the Appellant has similarly failed. He has given no reasons why vacating the entry "would serve the interests of justice." *Windmon v. Marshall*, 926 So. 2d at 871. As stated above, the Appellant's arguments are procedurally barred as either not timely brought or were brought for the first time on appeal. Assuming, arguendo, this Court will examine the second possible factor of good cause, she will address this factor as well. The Appellant claims that prior litigation between the Appellant and the Appellee causes the underlying action to be barred however; such is not the case. No interests of justice would be served by allowing the Appellant to succeed on appeal. It appears that the Appellant attempts to argue for good cause (presumably under the "interests of justice" prong) using Miss. R. Civ. P. 13(a) as well as Fed. R. Civ. P. 13(a). *See* Appellant's Brief at 11-16. He also relies on the prior lawsuit, which was settled, to claim that the Appellee is precluded from bringing claims. However, as shown herein, the prior action and its resolution via settlement agreement have no effect on the underlying action and, indeed no error occurred at the trial court level in finding no good cause was shown by the defaulting Appellant.

The Appellant asserts that Appellee was required to bring her claim against Tucker as a compulsory counterclaim under Rule 13 in the federal lawsuit *Tucker v. Williams*. *See* Appellant's Brief at 11. The Appellant asserts that because the initial trial was brought in federal court, that Appellee was required to bring her state claim against Appellant as a compulsory counterclaim. Should this Court find it necessary to address this claim, the Appellee asserts that the federal court claim was settled after a brief discovery period by the insurance companies representing both parties. The settlement agreement, dated October 31, 2008, which resulted from the federal case explicitly reserved the right for Appellee to bring suit against any other party including the Appellant:

> IT IS EXPRESLY UNDERSTOOD, PROMISED, AGREED AND COVENATED by the undersigned that **the payment aforesaid made by Gay St. Mary Williams' insurance carrier on her behalf is not intended to be and should not be construed as an admission of any liability for the matters claimed**, but that the said payment is made by way of compromise and settlement only of certain Claims mentioned above, for which **liability is expressly denied** by the aforementioned Payors and released parties and that this release is intended only to operate as a release of whatever Claims the undersigned may have against Payors. **Any claims or causes of action by Gay St. Mary Williams are specifically reserved and not waived.**

R. at 297 (emphasis added).

The settlement agreement also explicitly sets out that the issue of liability is not decided by the agreement and no parties stipulate that they were liable for the underlying collision. *Id.* Therefore, all parties entering into the settlement agreement, including the Appellant, were on notice that the question of liability between the Appellee and Appellant were explicitly preserved for future litigation. Moreover, the Order to which the Appellant refers in his brief has incorporated the settlement between the parties by reference and is simply an acknowledgement of the agreement between the parties that has settled the matter, never once mentioning any of

the substantive matters and clearly does adjudicate the merits of the matter regarding liability on any of the parties involved in the litigation. *See* Appellant's Brief at 11; R. at 371.

The Order in the present case is comparable to the agreed order discussed by the court in *Stinson*. *Gulf Coast Bank & Trust Co. v. Stinson*, No. 2:11-cv-88-KS-MTP, 2012 WL 38713 (S.D. Miss. Jan. 9, 2012). The *Stinson* court found that the agreed order between the parties had no res judicata effect because the order was "final only in name" and only meant to formalize the settlement agreement finalized between the parties and was not meant to adjudicate the merits of the claim at the heart of the matter. *Id*. at *4. Furthermore, the Fifth Circuit has held that there are, of course, situations in which a settlement agreement incorporated into a final judgment is entitled to full res judicata effect where the parties to the agreement have objectively manifested an intent to "cement their agreement with claim preclusion." *Liberto v. D.F. Stauffer Biscuit Co*., 441 F.3d 318, 326 (5th Cir. 2006).

Clearly, in the case at bar, the signatories to the settlement agreement in *Tucker v. Williams* explicitly laid out in the agreement that Appellee reserved her rights to pursue claims against Appellant. R. at 297. Appellant, as a signatory to the agreement and having received his settlement proceeds, cannot simply deny the fact that he acknowledged and agreed to the provisions of the settlement agreement. Appellant was surely willing to accept the $400,000 of settlement proceeds <u>from the insurance company</u> and by accepting those proceeds he also accepted the provisions of the agreement that released Appellee's insurance company from further litigation <u>but</u> explicitly reserving Appellee's rights to initiate proceedings to adjudicate the issue of liability that lies at the heart of the matter. *See* R. at 307 (reflecting Appellant's acceptance of Zurich Ins. Co.'s check for $400,000). Appellant glosses over the provisions he agreed to in the settlement agreement that specifically sets out Appellee's right to sue and

acknowledges that acceptance of the agreement does not amount to admittance of liability. Instead, he tries to muddy the waters by now asserting that Appellee was compelled to bring her claims in the federal action. Not only did Appellant fail to submit this assertion to the trial court judge, but he should be estopped from taking such a contradictory position after receiving his $400,000 as a signatory to the settlement agreement.

Further, the Appellant's reliance upon the holding in *Tyler Marine* case is in error as that case is easily differentiated from the case at hand. *See* Appellant's Brief at 13-14; *Tyler Marine Services, Inc. v. Aqua Yacht Harbor Corp*., 920 So.2d 493. (Miss. Ct. App. 2006). In the *Tyler Marine* case, Tyler Marine and Aqua Yacht were co-defendants in a negligence lawsuit filed by a customer of Tyler Marine in the United States District Court for the Northern District of Mississippi. *Id*. at 494. While that case was still pending in the district court, Tyler Marine then filed suit against Aqua Yacht in state court alleging negligence under the same facts as the ones involved in the case still pending in the district court. *Id*. The analysis undertaken in the *Tyler Marine* case is not at all similar to the one required in the case at hand as the Appellant claims in his brief. *See* Appellant's Brief at 13. The *Tyler Marine* Court was not faced with a settlement agreement in which the parties agreed to reserve the right to litigate liability in the future. Appellant cites no law which is on point or comparable to the facts in the instant case. Appellant asserts in his brief that Appellee took advantage of his misunderstanding of the new lawsuit and secured a Clerk's Entry of Default against him. *See* Appellant's Brief at 15. Appellant's claim is unfounded in light of the fact that he was a signatory to the settlement agreement that reserved Appellees' right to pursue a lawsuit concerning liability for the 2007 collision. R. at 297. This is a confusing position for Appellant to take considering, again, he acknowledges filing suit against the Appellee and the agreement, to which he is a signatory, explicitly provides:

> IN EXECUTING THIS INSTRUMENT, it is warranted that this agreement has been fully explained to the undersigned, and that the undersigned understand all of the implications thereof, that these presents have been reviewed and expressly approved by the attorney(s) of record for the undersigned and that this release constitutes the sole agreement between the named and implied Payors and the undersigned.

R. at 297-98. The language above, coupled with the language in the agreement reserving the right of the Appellee to seek redress for her injuries in future litigation, undeniably placed the Appellant on notice that such a suit could be brought in the future.

Even if the settlement agreement did not reserve the Appellees' right to litigate her matter at a later date, she was free to bring her lawsuit in State court pursuant to the insurance exception found in Miss. R. Civ. P. 13 governing compulsory counter-claims which states in relevant part:

> (a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties over whom the court cannot acquire jurisdiction. But the pleader need not state the claim if:
>
> . . . .
>
> (3) the opposing party's claim is one which an insurer is defending.
>
> In the event an otherwise compulsory counterclaim is not asserted in reliance upon any exception stated in paragraph (a), relitigation of the claim may nevertheless be barred by the doctrines of res judicata or collateral estoppel by judgment in the event certain issues are determined adversely to the party electing not to assert the claim.

Miss. R. Civ. P. 13. In the settled case, Appellees were represented by their insurer Zurich. The case was never decided on its merits and the issue of liability was never decided by the court, in fact, only a modicum of discovery had gone forward before the insurer made its decision to enter into settlement with the Appellant. Therefore, the policy behind the compulsory counter claim rule would still be upheld considering that there would be no re-adjudication of the case seeing as the merits were never reached by the court and liability was never addressed. Appellees' claim would still be allowed to go forward and would not be barred as the Appellant has claimed.

In light of the above and foregoing, the Appellee avers that good cause has not been met by the Appellant to justify reversal of the Clerk's Entry of Default or for the first prong of Rule 60(b), should this Court decide to avoid the procedural defects and inquire further into the substance of the Appellant's appeal. Therefore, as this matter has been set forth solely as an appeal of the Entry of Default, and since a showing of good cause has not been made pursuant to Miss. R. Civ. P. 55(c), the Appellee respectfully requests this Court affirm the trial court's decision allowing the entry of default, the default judgment, and the award of damages.

## III. The three prong balancing test under Rule 60(b) weighs in favor of not disturbing the default judgment

In determining whether the trial court has abused its discretion in granting a default judgment, this Court considers three factors:

> whether the defendant has good cause for default . . . whether the defendant in fact has a colorable defense to the merits of the claim, and . . . the nature and extent of prejudice which may be suffered by the plaintiff if the default is set aside.

*Williams v. Kilgore*, 618 So. 2d 51, 55 (Miss. 1992). "While a court reviewing the validity of the default a defendant, upon default, is held to admit a plaintiff's well-pleaded allegations of fact[,] and [the] defendant is barred from contesting such facts on appeal." *Leach v. Shelter Ins. Co.*, 909 So. 2d 1283, 1287-88 (Miss. Ct. App. 2005). (citation omitted). Mere conclusions, unsubstantiated allegations, and general denials are not sufficient to set aside a default judgment. *Id.* at 1288. Despite the general preference that litigants have a trial on the merits, a defendant must still "set forth[,] in affidavit form[,] the nature and substance of [his] defense." *Olive v. Malouf*, 94 So. 3d 1254, 1258 (Miss. Ct. App. 2012). As asserted above, the Appellant has appealed to this Court the issue of whether the lower court erred in not in failing to set aside the

clerk's entry of default. The Appellant has not asserted that the trial court erred by entering a default judgment, therefore, his argument relating to setting aside judgments of default pursuant to the factors set out in Rule 60(b) should not even been considered by this Court. This Court, instead, should focus only on the issue presented and find that the lower court judge was not in error when, after Appellant continually failed to give good cause as to the reason for the some nine (9) month delay in answering the Appellee's complaint. However, erring on the side of caution, Appellee will proceed to answer the Appellant's 60(b) argument in case this Court should find it necessary to consider the Appellee's argument as to that issue.

Appellee, having satisfied the "good cause" prong (as set forth above under Issue No. 2) moves onto the second prong of the 60(b) analysis which requires a court to analyze whether the party seeking to set-aside a default judgment had a colorable defense. Appellee, in support of his claim that he has a colorable defense relies almost solely upon his accident reconstructionist's report. *See* Appellee's Brief at 20. The Mississippi Supreme Court has stated that, to show a colorable defense, it is necessary for a party to show that it has a defense on the merits. *Greater Custom Ford Mercury, Inc. v. Lane*, 997 So. 2d 198, 204 (Miss. 2008). A party must submit facts and not just conclusory statements that there is a meritorious defense to the allegations lodged against them in the form of affidavits or other sworn evidence. *American Cable Corp. v. Trilogy Communications, Inc.*, 754 So. 2d 545, 554 (Miss. Ct. App. 2000). Unsubstantiated allegations that a meritorious defense exists is insufficient as a matter of law to sustain the burden of Rule 60(b). *Id*. The Appellant asserts the fact that this cause was litigated before in federal court as a "colorable defense" but as stated above, the settlement agreement specifically and explicitly stated that the matter of liability for the underlying collision was not adjudicated and that Appellee reserved her right to sue at a later date. The merits of the case were not

addressed in the federal matter and the right to seek adjudication of liability in the case was reserved, therefore that is not a colorable defense under Rule 60(b).

Furthermore, the accident reconstructionist's report, the main piece of evidence relied upon by the Appellant as proof of a "colorable defense," does not constitute sworn testimony and therefore is not evidence of any kind, leaving only his unsubstantiated, generic denials to which the law does not afford relief. A general denial is not sufficient to set aside a default; a meritorious defense is one that is demonstrated through an affidavit or sworn form of testimony. *Leach*, 909 So. 2d at 1288. In this case, as in the *Leach* case, the Appellant shows nothing on the issue of liability being in dispute that indicates that he has a meritorious defense as it only rises to the level of a general denial. *Id*. Even if this Court found that the report does show that perhaps there may be a defense to the claim, that possibility alone is not a reason to set aside the default judgment. *See Stanford v. Parker*, 822 So.2d 886, 888. (Miss. 2002) (finding that the resolution of a factual issue in favor of one party over another, which would negate liability, insufficient to disturb a lower court's decision in ordering a default judgment). Appellees are well aware of this Court's overruling of the requirement that affidavits or other sworn testimony is required to show a colorable defense in *BB Buggies, Inc. v. Leon*, 150 So. 3d 90 (Miss. 2014) (overruling *Capital One Servs., Inc. v. Rawls*, 904 So. 2d 1010 (Miss. 2004) and *Rush v. North Am. Van Lines, Inc.*, 608 So. 2d 1205 (Miss. 1992)). However, this Court is tasked with the issue of whether the trial court judge erred in failing to set aside the clerk's entry of default. When the trial court judge passed down his order denying to set aside the entry of default, the law overruled by the *Leon* court was still good law, therefore it cannot be said that the trial court judge erred in interpreting what was then still good law.

As for the factor of prejudice to the non-defaulting party, this Court holds that the key inquiry in determining whether a party has suffered prejudice by the setting aside of a default judgment is the passage of time. *Guaranty Nat'l Ins. Co. v. Pittman*, 501 So. 2d 377, 388 (Miss. 1987). It "requires no great insight to know that a year's postponement of a trial which will turn on witnesses' memories regarding a split-second event- a motor vehicle accident – will often substantially prejudice one or both parties in terms of the fact that the injured plaintiff is without resolution to her claim for that period of time." *Id*. In addition, the passage of time is relevant in cases involving car accidents or other similar incidents that hinge on "witnesses' memories regarding a split second event," which fade over time. *Id*.

The instant case does involve a vehicle accident and seeing as the issue of liability was never litigated in the previous federal case, the parties will be forced to start from scratch if the default judgment is set aside. As the *Pittman* court found, memories fade and evidence may be lost over time, especially in cases involving a vehicular accident. *Id*. It has been almost eight (8) years since the underlying accident occurred in 2007. The Appellee will also suffer prejudice because of her ongoing financial and emotional distress related to her severe injuries. Appellant points to the fact that Appellee received worker's compensation as a result of the underlying collision and asserts, therefore, that Appellee cannot in good faith argue she will suffer economic prejudice if the default is set aside. *See* Appellant's Brief at 22. As the lower court found below, and as the medical records indicate, the Appellee suffered severe and permanent physical and emotional damage resulting from the underlying collision that will require medical treatment for the rest of her life. R. at 346.

The Appellee has suffered not only extensive and permanent physical injuries, she has also suffered severe and permanent brain damage that has left a master's educated woman who

once earned a six figure income reading at a 6th grade level. R. at 345. The Appellant's frivolous and inexcusable nine (9) month delay in providing an answer to the Appellee's complaint has now metastasized into almost 5 years of litigation and now an appeal on the matter. Surely this cannot be called harmless delay seeing as the Appellee has now suffered almost 5 years of substantial prejudice. This Court has previously commented on the importance of a timely answer to a complaint stating that "[i]t may be that people will miss fewer trains if they know the engineer will leave without them rather than delay even a few seconds." *Pittman*, 501 So. 2d at 388. Even though the issue properly before this Court is whether the lower court erred in failing to set aside the clerk's entry of default, the Appellee has failed to show "good cause" and has failed to satisfy any of the prongs necessary to set aside a default judgment pursuant to Rule 60(b).

This Court has stated that the appellate court's job in determining whether the trial court erred in refusing to set aside a default judgment is:

> [s]imply put . . . not the duty of the members of this Court to determine what decision we would have made had we been the trial judges in this case. Instead, as already noted, our solemn responsibility is to review the trial judge's refusal to set aside the default judgment in this case by considering the record before us and applying the abuse-of-discretion standard of review.

*Flagstar Bank, FSB v. Danos*, 46 So. 3d at 310. Even though the trial judge did not refuse to set aside the default judgment because the Appellant only filed a motion to set aside the clerk's entry of default and a subsequent motion to reconsider setting aside the clerk's entry of default, it is clear that after weighing the 60(b) factors this Court should find that they weigh in favor of affirming the default judgment.

## IV. No Error Was Committed in Considering All Relevant Evidence at the Hearing.

This Court consistently has held that an unsupported assignment of error will not be considered. *Ellis v. Ellis,* 651 So. 2d 1068, 1072 (Miss. 1995). This Court does not have to consider alleged error when no authority is cited for the error in the brief. *Armstrong v. Armstrong,* 618 So. 2d 1278, 1282 (Miss. 1993). The Appellant spends the majority of the section of his brief assigning error to the lower court judge's damages findings. However, never once does he cite any relevant evidence rule or case law to support his assignments of alleged error. Appellant begins by pointing out that Appellee Gay St. Mary Williams was not present at the damages hearing because she had a doctor's appointment at the time the hearing was scheduled. *See* Appellant's Brief at 23. Appellant claims that Larry Williams's statement at trial that his wife was at a doctor's appointment is hearsay. *Id.* Appellant does not say why he contends this is hearsay and fails to cite in relevant law or authority to support his claim. Mississippi Rule of Evidence 801(c) sets out the definition of hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Larry Williams' statement that his wife was at a doctor's appointment is not reporting his wife's statement that she was at the doctor's office, he was merely stating a fact that he, himself, had knowledge of and knew to be true.

Appellant contends that because Gay was not present at the hearing, anything her husband testified to regarding her pain and suffering was hearsay. Appellant cites no authority whatsoever to support this contention. Appellant goes on to assert that there was no admissible testimony regarding Appellant's pain and suffering, however, again Appellant does not cite to the record nor to any authority to show what evidence he contends is inadmissible nor does he say what made the evidence inadmissible. *See* Appellant's Brief at 23. Appellant continues that there was no evidence to support a finding that Appellee's condition requires ongoing medical

treatment. R. at 23-24. In the Memorandum Opinion and Order assessing damages against the Appellant, the lower court judge states that in addition to Gay Williams's husband's, Larry's, testimony that the Appellee had submitted deposition testimony of three treating physicians (which are attached to the Appellant's Brief) as well as the certified medical bills and records of all of the treatment received by Gay. R. at 344-45. The judge further stated in his opinion that he concluded that Appellee had sustained "severe and permanent injuries, including brain injuries, which required surgery and hospitalization" basing his opinion regarding the severity and extent of her injuries upon "the testimony of her doctors." R. at 345. The judge goes on to set out the extent of her injuries in the Memorandum and Opinion:

> **As detailed in the testimony of her doctors**, Gay has sustained severe and permanent injuries, including brain injuries, which required surgery and hospitalization. Gay has suffered serious, permanent, and disfiguring injuries. She suffered head injuries including multiple facial and back fractures, several facial lacerations, and experiences constant pain and suffering that is permanent. She sustained a left humeral fracture, C5-C6 fractures, as well as, fractures through the lumbar region.

*Id*. (emphasis added).

Further, after setting out more of Appellee's medical conditions including her neurological disorders resulting from the collision the judge relied upon the doctor's report that she has both long and short term memory loss. *Id*. Based upon the medical records the judge made a finding that Appellee was on a "daily prescription of heavy medication and has been since the accident" and that her husband has had to take her to the emergency room numerous times and continues to care for her with the aid of a nurse's attendant. *Id*. He relied not only on the testimony of the treating physicians, but also on the testimony of her husband and the medical records and bills provided to the court that she will be treated for the rest of her life even taking into account that the doctors could not predict exactly how many times she would be seen,

but made an approximation that it would be half of what has occurred thus far. R. at 346. Finally, the judge found that all of the medical physicians' testimony states that she will continue to require medical treatment on a permanent basis. *Id*. Appellant claims that there was no mention of the words "pain" or "suffering" in the testimony of Larry Williams at the damages hearing held on June 14, 2013, therefore concluding that there is no admissible evidence regarding pain and suffering. However, Larry Williams testified that he had to abandon his truck driving business after Appellee's accident and became her full time primary care giver alongside a nurse's assistant. *See* Damages Hearing Transcript at 22. He also testified that after the accident Appellee was no longer the happy person she had been before and was now "pretty miserable" being confined to the home with poor vision and vertigo that makes her unable to walk down the hallway alone or get out of a chair without help. *Id*. at 21.

He further testified that she had been in the hospital for major injuries approximately fourteen (14) times since the accident. *Id*. He explained to the judge that he had to quit his trucking career to take care of Appellee because she was experiencing seizures and passing out on the floor at home. *Id*. at 22. He explained that her vision and vertigo is so bad that she runs into walls and doorways and misses the toilet if she is not guided onto it. *Id*. at 24-25. Based upon all of the evidence presented at the damages hearing which included all relevant medical records of Appellee, the depositions of three (3) treating physicians, and the testimony of her husband who is her primary caregiver, the judge made his findings and assessed damages accordingly. Perhaps Larry Williams did not express the precise terms of "pain" or "suffering" but the testimony as to what Appellee's life had been before the accident and how her life is "pretty miserable" afterwards leads to an obvious conclusion that there is continuing suffering and pain. The judge was well within his discretion to take all evidence submitted including

Larry Williams's testimony and the substantial amount of medical records, bills, and the treating physicians' testimony to conclude that life after the collision was painful for Appellee who was now partially blind and suffering from a myriad of medical and psychological conditions. The trial judge was also well within his discretion to take the evidence that was submitted to the court and determine that with the extent of Appellee's injuries that she will need future treatment.

The Appellant's claim that there was no admissible evidence to support the trial court's findings of damages is unfounded given the plethora of evidence cited above. Also, it must be pointed out, that the Appellant has failed to support his claims that the evidence was inadmissible by any authority whatsoever, therefore, his claims must fail. Pursuant to Rule 55(b) of the Mississippi Rules of Civil Procedure, the trial court may hold a hearing "to determine the amount of damages" to award in a default judgment. Miss. R. Civ. P. 55(b). If the damages are unliquidated, the court must hold a hearing on the record. *Capital One Servs., Inc. v. Rawls,* 904 So. 2d at 1018 (holding the trial court must conduct an on-the-record hearing regarding unliquidated damages where the trial court failed to hold any hearing on damages); *Journey v. Long,* 585 So. 2d 1268, 1272 (Miss. 1991) (holding the trial court must conduct a hearing on the record where the trial court held a hearing that was not on the record).

This Court has previously warned plaintiffs in default-judgment cases "that damages awards *must* be supported by evidence, and such evidence *must* be reflected in the record if it is to be affirmed on appeal." *Rich ex rel. Brown v. Nevels,* 578 So. 2d 609, 617 (Miss. 1991) (holding the trial court must conduct a hearing on the record where the trial court held a hearing that was not on the record). In the context of default-judgment cases, this Court has held that the record must also "reflect how [the] damages are calculated." *Bailey v. Beard,* 813 So. 2d 682, 686-87 (Miss. 2002) (remanding for a "proper damages hearing" so the record would reflect how

the trial court calculated actual and punitive damages). As stated above, the trial court had substantial evidence on record when the judge made his findings and assessed his damages award.

When faced with the assertion that a damages award is against the overwhelming weight of the evidence, this Court must accept as true that evidence which supports the verdict and will reverse only when convinced that the lower court abused its discretion. *Wal-Mart Stores, Inc. v. Frierson,* 818 So. 2d 1135 (Miss. 2002) (citations omitted). Only when the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice will this Court disturb the verdict on appeal. *Id.* The damages award has substantial evidentiary support and should be affirmed. This Court in *Nevels* found that an award of damages by a trial court judge was unsupported by evidence because the judge's written opinion contained a mere conclusory statement that the plaintiff "should be and hereby is awarded judgment … in the sum of $180,000." *Rich By & Through Brown v. Nevels*, 578 So. 2d 609, 616-17. (Miss. 1991). The only evidence the *Nevels* Court found in the record to support the trial court judge's findings were two one-page bills: (1) one in the amount of $120.00 for "forensic consultation" and a "telephone conference," and (2) a bill from another doctor in the amount of $1045.00 presumably for psychiatric care. *Id.* Obviously the Court found that these bills did not add up to $180,000 and so this Court found that it could not "blind" itself and permit an award which is virtually devoid of substantiation. *See Hooten v. State,* 492 So. 2d 948, 950-51 (Miss. 1986) (Writing for the Court, Justice Patterson declared: "[W]e are ... authorized to reverse for an abuse of discretion [if] we find [that the trial judge's decision] was 'arbitrary'").

Clearly, the instant case is distinguishable from that in *Nevels* in the fact that the judge's opinion does not merely conclude without any form of evidentiary support the amount of

damages to be awarded. In the instant case, the award amount was not arbitrarily rendered; rather, the trial judge heard testimony and looked through the myriad of medical bills and records in order to come to an amount that he saw fit in his discretion.

In light of the substantial amount of evidence submitted to the trial court judge and the Appellant's lack of any good cause, colorable defenses, and the amount of prejudice a reversal would cause to the Appellee, this Court should affirm the trial judge's default judgment and damages award.

## CONCLUSION

As shown above, the trial court did not err in its decision to deny Appellant's motion to reconsider setting aside the clerk's entry of default. The Appellant failed time and again to show good cause pursuant to Rule 55(c) for setting aside the entry of default and based upon this failure the trial court was well within its discretion to deny their motion to reconsider and uphold the entry as it stood. In accordance with the law set forth above and given that there the trial court did not abuse its discretion, the clerk's entry and the damages awarded should be affirmed.

**THIS** the 25th day of September, 2015.

Respectfully submitted,
**Gay St. Mary Williams and Larry Williams**,
Appellees
BY: __/s/ Seth C. Little_____
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**CERTIFICATE OF SERVICE**

I, Seth C. Little, do hereby certify that I have filed a true and correct copy of the above and foregoing with the Court's electronic filing system which automatically sends notification to all Counsel of Record and the following:

Honorable Winston Kidd
Circuit Court of Hinds County
First Judicial District
407 East Pascagoula Street
Jackson, Mississippi 39205
*Via United States mail, postage pre-paid*

THIS the 25th day of September, 2015.

/s/ Seth C. Little
Seth C. Little (MSB #102890)

Chuck R. McRae (MSB# 2804)
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