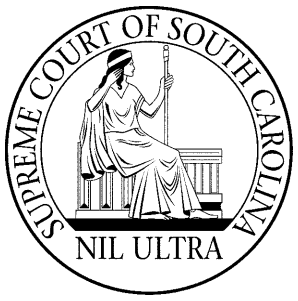

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 44
November 25, 2008
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

None

UNPUBLISHED OPINIONS

None

PETITIONS – UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

The South Carolina Court of Appeals

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

2008-UP-618-The State v. James Grindle
(Cherokee, Judge J. Mark Hayes, II)

2008-UP-619-J. Scott Kunst v. Susan B. Covington
(Greenville, Judge G. Edward Welmaker)

2008-UP-620-The State v. David B. Richards
(Lexington, Judge James W. Johnson, Jr.)

2008-UP-621-Alphonso Scott v. Roland Windham, Charleston County Administrator, Christine O. Durant, Director of Operation, Charleston Center, Samuel B. Glover, Director, State of South Carolina Department of Probation, Parole and Pardon Services
(Charleston, Judge J. Michelle Childs)

2008-UP-622-The State v. Billy Shane Tucker
(Anderson, Judge Alexander S. Macaulay)

2008-UP-623-The State v. Antonio Moore
(Lexington, Judge William P. Keesley)

2008-UP-624-The State v. Remus Lewis Hudgensbey
(Laurens, Judge Brooks P. Goldsmith)

2008-UP-625-The State v. James Edward Locke
(York, Judge Lee S. Alford)

2008-UP-626-The State v. Thomas Wayne Earley, Jr.
(Spartanburg, Judge Edward W. Miller)

2008-UP-627-The State v. Leon V. Bellman
(Charleston, Judge John C. Few)

2008-UP-628-Nancy R. Beach v. Gresham Communications of Walterboro, Inc., a/k/a Gresham Communications, Inc.; Gresham Broadcasting, Inc., and Rudi H. Gresham
(Colleton, Special Referee Harris Beach)

2008-UP-629-The State v. Lawrence Reyes Waller
(Greenville, Judge G. Edward Welmaker)

2008-UP-630-Teresa Hampton, Employee v. Hunt Assisted Living, LLC d/b/a Greenville Place Assisted Living, Employer, and Key Risk Insurance Co., Carrier
(Greenville, Judge Doyet A. Early, III)

2008-UP-631-Wayne S. Tippett v. South Carolina Department of Corrections
(Richland, Administrative Law Judge John D. Geathers)

2008-UP-632-The State v. Heriberto E. Clarke
(Charleston, Judge Edward B. Cottingham)

2008-UP-633-The State v. Kevin Maurice Jenkins
(Charleston, Judge R. Knox McMahon)

2008-UP-634-The State v. James Randolph Frady
(Oconee, Judge Perry M. Buckner)

2008-UP-635-The State v. Tarren Hughey
(Richland, Judge Reginald I. Lloyd)

2008-UP-636-The State v. Nathaniel Jones
(Clarendon, Judge Howard P. King)

2008-UP-637-In the matter of the care and treatment of Ricky H. Pitts
(Pickens, Judge Edward W. Miller)

2008-UP-638-In the matter of the care and treatment of Jerry F. Powell
(Anderson, Judge Lee S. Alford)

PETITIONS FOR REHEARING

4423-State v. D. Nelson	Pending
4436-State v. Whitner	Pending
4437-Youmans v. SCDOT	Pending
4438-State v. Martucci	Pending
4439-Bickerstaff v. Prevost	Pending
4440-Corbett v. Weaver	Pending

4441-Ardis v. Combined Ins.	Pending
4444-Enos v. Doe	Pending
4446-Vista Antiques v. Noaha LLC	Pending
4448-State v. Mattison	Pending
4449-Sloan v. Greenville County	Pending
4450-SC Coastal v. SCDHEC	Pending
4451-State v. Dickey	Pending
4454-Paschal v. Price	Pending
2008-UP-214-State v. James Bowers	Pending
2008-UP-283-Gravelle v. Roberts	Pending
2008-UP-285-Biel v. Clark	Pending
2008-UP-507-State v. R. Hill	Pending
2008-UP-531-State v. Collier	Pending
2008-UP-534-State v. Woody	Pending
2008-UP-536-State v. A. Woods	Pending
2008-UP-539-Pendergrass v. SCDPP&P	Pending
2008-UP-543-O'Berry v. Carthens	Pending
2008-UP-546-State v. R. Niles	Pending
2008-UP-552-Theron Bartell v. Francis Marion University	Pending
2008-UP-554-State v. James Prather	Pending
2008-UP-556-State v. C. Grate	Pending
2008-UP-559-SCDSS v. Katrina P.	Pending

2008-UP-565-State v. Matthew W. Gilliard, III	Pending
2008-UP-591-Mungin v. REA Construction	Pending
2008-UP-595-Eugene Stauch v. Deborah Pearce	Pending
2008-UP-596-Doe (C. Collie) v. Duncan	Pending
2008-UP-598-Causey v. SCB&CB	Pending
2008-UP-609-State v. Thompson	Pending
2008-UP-613-State v. Bradley	Pending

PETITIONS – SOUTH CAROLINA SUPREME COURT

4096-Auto-Owners Insurance Company v. Hamin	Dismissed 11/18/08
4279-Linda Mc Co. Inc. v. Shore	Pending
4285-State v. Danny Whitten	Pending
4300-State v. Carmen Rice	Pending
4304-State v. Arrowood	Pending
4307-State v. Marshall Miller	Denied 11/07/08
4310-State v. John Boyd Frazier	Pending
4312-State v. Vernon Tumbleston	Denied 11/07/08
4314-McGriff v. Worsley	Pending
4316-Lubya Lynch v. Toys “R” Us, Inc	Pending
4318-State v. D. Swafford	Pending
4319-State v. Anthony Woods (2)	Denied 10/23/08
4320-State v. D. Paige	Pending

4325-Dixie Belle v. Redd	Pending	
4335-State v. Lawrence Tucker	Granted	11/20/08
4338-Friends of McLeod v. City of Charleston	Pending	
4339-Thompson v. Cisson Construction	Pending	
4342-State v. N. Ferguson	Pending	
4344-Green Tree v. Williams	Pending	
4350-Hooper v. Ebenezer Senior Services	Granted	11/20/08
4353-Turner v. SCDHEC	Pending	
4354-Mellen v. Lane	Pending	
4355-Grinnell Corp. v. Wood	Pending	
4369-Mr. T. v. Ms. T.	Pending	
4370-Spence v. Wingate	Pending	
4371-State v. K. Sims	Pending	
4372-Robinson v. Est. of Harris	Pending	
4373-Partain v. Upstate Automotive	Pending	
4374-Wieters v. Bon-Secours	Pending	
4375-RRR, Inc. v. Toggas	Pending	
4376-Wells Fargo v. Turner	Pending	
4377-Hoard v. Roper Hospital	Pending	
4382-Zurich American v. Tolbert	Pending	
4383-Camp v. Camp	Pending	
4384-Murrells Inlet v. Ward	Pending	

4385-Collins v. Frasier	Pending
4386-State v. R. Anderson	Pending
4387-Blanding v. Long Beach	Pending
4388-Horry County v. Parbel	Pending
4389-Charles Ward v. West Oil Co.	Pending
4391-State v. L. Evans	Pending
4392-State v. W. Caldwell	Pending
4394-Platt v. SCDOT	Pending
4395-State v. H. Mitchell	Pending
4396-Jones (Est. of C. Jones) v. L. Lott	Pending
4397-T. Brown v. G. Brown	Pending
4401-Doe v. Roe	Pending
4402-State v. Tindall	Pending
4403-Wiesart v. Stewart	Pending
4405-Swicegood v. Lott	Pending
4406-State v. L. Lyles	Pending
4407-Quail Hill, LLC v Cnty of Richland	Pending
4409-State v. Sweat & Bryant	Pending
4411-Tobia v. Rice	Pending
4412-State v. C. Williams	Pending
4413-Snavely v. AMISUB	Pending

4414-Johnson v. Beauty Unlimited	Pending
4417-Power Products v. Kozma	Pending
4419-Sanders v. SCDC	Pending
4420-Mauricio v. The State	Pending
4426-Mozingo & Wallace v. Patricia Grand	Pending
4428-The State v. Ricky Brannon	Pending
2007-UP-151-Lamar Florida v. Li'l Cricket	Pending
2007-UP-272-Mortgage Electronic v. Suite	Pending
2007-UP-364-Alexander Land Co. v. M&M&K	Pending
2007-UP-498-Gore v. Beneficial Mortgage	Pending
2007-UP-544-State v. C. Pride	Pending
2007-UP-554-R. Harris v. Penn Warranty (2)	Denied 10/23/08
2007-UP-556-RV Resort & Yacht v. BillyBob's	Granted 11/20/08
2008-UP-047-State v. Dozier	Pending
2008-UP-060-BP Staff, Inc. v. Capital City Ins.	Pending
2008-UP-070-Burriss Elec. v. Office of Occ. Safety	Pending
2008-UP-081-State v. R. Hill	Pending
2008-UP-082-White Hat v. Town of Hilton Head	Pending
2008-UP-084-First Bank v. Wright	Pending
2008-UP-104-State v. Damon Jackson	Pending
2008-UP-126-Massey v. Werner Enterprises	Pending

2008-UP-131-State v. Jimmy Owens	Pending
2008-UP-132-Campagna v. Flowers	Denied 11/19/08
2008-UP-135-State v. Dominique Donte Moore	Granted 11/07/08
2008-UP-140-Palmetto Bay Club v. Brissie	Granted 11/20/08
2008-UP-151-Wright v. Hiester Constr.	Pending
2008-UP-173-Professional Wiring v. Sims	Pending
2008-UP-187-State v. Rivera	Pending
2008-UP-192-City of Columbia v. Jackson	Pending
2008-UP-194-State v. D. Smith	Pending
2008-UP-200-City of Newberry v. Newberry Electric	Pending
2008-UP-204-White's Mill Colony v. Williams	Pending
2008-UP-205-MBNA America v. Baumie	Pending
2008-UP-207-Plowden Const. v. Richland-Lexington	Pending
2008-UP-209-Hoard v. Roper Hospital	Pending
2008-UP-223-State v. C. Lyles	Pending
2008-UP-240-Weston v. Margaret Weston Medical	Pending
2008-UP-244-Magaha v. Greenwood Mills	Pending
2008-UP-247-Babb v. Est. Of Watson	Pending
2008-UP-251-Pye v. Holmes	Pending
2008-UP-252-Historic Charleston v. City of Charleston	Pending
2008-UP-256-State v. T. Hatcher	Pending

2008-UP-261-In the matter of McCoy	Pending
2008-UP-271-Hunt v. State	Pending
2008-UP-277-Holland v. Holland	Pending
2008-UP-278-State v. C. Grove	Pending
2008-UP-279-Davideit v. Scansource	Pending
2008-UP-289-Mortgage Electronic v. Fordham	Pending
2008-UP-296-Osborne Electric v. KCC Contr.	Pending
2008-UP-297-Sinkler v. County of Charleston	Pending
2008-UP-310-Ex parte:SCBCB (Sheffield v. State)	Pending
2008-UP-320-Estate of India Hendricks (3)	Pending
2008-UP-330-Hospital Land Partners v. SCDHEC	Pending
2008-UP-331-Holt v. Holloway	Pending
2008-UP-332-BillBob's Marina v. Blakeslee	Pending
2008-UP-335-D.R. Horton v. Campus Housing	Pending
2008-UP-336-Premier Holdings v. Barefoot Resort	Pending
2008-UP-340-SCDSS v. R. Jones	Pending
2008-UP-418-L.A. Barrier v. SCDOT	Pending
2008-UP-431-Silver Bay v. Mann	Pending
2008-UP-432-Jeffrey R. Hart v. SCDOT	Pending

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Ricky C. Pelzer, Respondent,

v.

State of South Carolina, Petitioner.

Appeal From Richland County
Alison Renee Lee, Circuit Court Judge

Opinion No. 4457
Heard October 22, 2008 – Filed November 18, 2008

AFFIRMED

Assistant Attorney General Brian T. Petrano, of Columbia, for Petitioner.

Deputy Chief Appellate Defender Wanda H. Carter, of Columbia, for Respondent.

CURETON, A.J.: Following a grant of post-conviction relief (PCR), the State petitioned for and received a writ of certiorari. The State now

argues the PCR court erred in finding Ricky C. Pelzer's plea counsel was ineffective and in granting Pelzer relief from one part of a negotiated guilty plea but leaving the rest of the plea intact. We affirm.

FACTS

In March 2001, after six years of cohabitation resulting in the birth of two children, Diana Gibbs made Ricky Pelzer leave their home. On April 20, 2001, Gibbs obtained a restraining order against Pelzer. In the early hours of May 6, 2001, Pelzer, carrying a can of gasoline, went to the home where Gibbs and two of her children were sleeping. When Gibbs refused to let him in, Pelzer forced the door open. Gibbs and the children ran out the back door. Pelzer followed them into the front yard, where he attacked Gibbs. After Gibbs's son pulled Pelzer off Gibbs, Pelzer returned to the house. Threatening to burn the house, Pelzer doused the inside of the home with gasoline and began ingesting gasoline himself. Gibbs called the police from a neighbor's house. The police eventually took Pelzer into custody and drove him to a hospital, where he was successfully treated for gasoline ingestion.

Pelzer was charged with first-degree burglary, attempted second-degree arson, criminal domestic violence of a high and aggravated nature (CDVHAN), and violation of a family court restraining order. Attorney Melora Bentz was appointed to represent him. After extensive negotiations between Bentz and the State, Pelzer pled guilty to the lesser included charge of second-degree burglary and the original charges of attempted second-degree arson and violation of a family court restraining order. The State nolle-prossed the CDVHAN charge. In accordance with the negotiated deal, the circuit court sentenced Pelzer to a total of fifteen years' imprisonment.[1]

Pelzer later learned of an offense similar to the charged offense of attempted arson, but that carried shorter sentences. He filed an application for post-conviction relief. Pelzer argued his trial counsel was ineffective

[1] This sentence included fifteen years each for the burglary and arson charges and thirty days for violating the family court's restraining order, all to be served concurrently.

because she failed to apprise him of the attempt-to-burn statute, which carried only a five-year sentence. Bentz testified she did not recall discussing that statute with Pelzer. The PCR court granted Pelzer's application. The State petitioned for a writ of certiorari, which was granted.

STANDARD OF REVIEW

In reviewing the PCR court's decision, an appellate court is concerned only with whether any evidence of probative value exists to support that decision. Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006). Thus, an appellate court gives great deference to the PCR court's findings of fact and conclusions of law. Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006).

LAW/ANALYSIS

I. Ineffective Assistance of Counsel

The State argues the PCR court erred in finding Pelzer's plea counsel was ineffective for failing to advise him of the attempt-to-burn statute. We disagree.

Trial counsel must provide "reasonably effective assistance" under "prevailing professional norms." Strickland v. Washington, 466 U.S. 668, 687-88 (1984). Reviewing courts presume counsel was effective. Id. at 690. Therefore, to receive relief, the applicant must show (1) counsel departed from professional norms resulting in (2) prejudice. Id. at 690, 693. Trial counsel's failure to apprise the accused of a lesser included offense constitutes deficient performance when, under the facts of the case, he could be convicted of the lesser offense. Kerrigan v. State, 304 S.C. 561, 563, 406 S.E.2d 160, 162 (1991). "Where there has been a guilty plea, the applicant must prove prejudice by showing that, but for counsel's errors, there is a reasonable probability he would not have pleaded guilty and instead would have insisted on going to trial." Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). A reasonable probability is a probability sufficient to undermine confidence in the outcome. Strickland, 466 U.S. at 694.

"Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." Id. at 700.

First-degree burglary is punishable by imprisonment from fifteen years to life. S.C. Code Ann. § 16-11-311 (2003). Second-degree arson is punishable by imprisonment from five to twenty-five years.[2] S.C. Code Ann. § 16-11-110(B) (Supp. 2007). To prove second-degree arson, the State must show the accused willfully and maliciously caused an explosion, set fire to, burned, or caused to be burned, or aided, counseled, or procured the burning that resulted in damage to any structure designed for human occupancy. Id. An attempt to burn is punishable by imprisonment up to five years or a fine of not more than $10,000. S.C. Code Ann. § 16-11-190 (2003). To prove attempt to burn, the State must show the accused willfully and maliciously attempted "to set fire to, burn, or aid, counsel, or procure the burning of any of the buildings or property mentioned in sections 16-11-110 to 16-11-140," or that the accused committed an act in furtherance of burning these buildings. Id.

First-degree burglary and second-degree arson are classified as most serious offenses in South Carolina, and second-degree burglary is classified as a serious offense. S.C. Code Ann. § 17-25-45 (2003). If a person has been convicted of two serious or most serious offenses, he must be sentenced to life imprisonment without parole upon conviction of a third such offense. Id.

"The trial court lacks subject matter jurisdiction to convict the defendant of a crime that is not a lesser included of the offense charged in the indictment." State v. McFadden, 342 S.C. 629, 632, 539 S.E.2d 387, 389 (2000), overruled on other grounds by State v. Gentry, 363 S.C. 93, 106, 610 S.E.2d 494, 501 (2005). For one offense to be a lesser included offense of another, the greater offense must include all the elements of the lesser offense. Id.; accord Blockburger v. U.S., 284 U.S. 299, 304 (1932). "If the lesser offense includes an element not included in the greater offense, then

[2] "A person who commits the common law offense of attempt, upon conviction, must be punished as for the principal offense." S.C. Code Ann. § 16-1-80 (2003).

the lesser offense is not included in the greater." Hope v. State, 328 S.C. 78, 81, 492 S.E.2d 76, 78 (1997).

We affirm the order of the PCR court on this issue because the evidence before us supports the PCR court's conclusion Bentz's performance failed the Strickland test for effective assistance of counsel. Bentz's assistance fell below prevailing professional norms for criminal defense counsel when she failed to advise Pelzer he could be sentenced for attempt to burn, a much less serious offense. Although the PCR court did not determine whether attempt to burn was a lesser included offense of attempted second-degree arson, we hold it is. Upon review of the elements of each offense, we find attempted second-degree arson contains all the elements of attempt to burn.[3] Therefore, attempt to burn is a lesser included offense of attempted second-degree arson. Given the facts of this case, Attorney Bentz's failure to advise Pelzer of this offense fell below prevailing professional norms and was deficient under Strickland.

Moreover, we find the PCR court correctly held Pelzer suffered prejudice as a result of this deficient performance. Had Pelzer proceeded to trial, the circuit court would have had subject matter jurisdiction to convict him of attempt to burn under the indictment for attempted second-degree arson. A conviction of attempt to burn would have mandated a far shorter sentence. More importantly, unlike second-degree arson, attempt-to-burn is not classified as a most serious offense. Although not argued by the parties in their briefs,[4] Pelzer's plea of guilty to attempted second-degree arson results in a "strike" that may later render him eligible for a sentence of life imprisonment without parole under section 17-25-45. By pleading guilty to a most serious offense when a jury might have convicted him of a non-serious

[3] In addition to the elements found in the attempt-to-burn statute, the second-degree arson statute requires property damage and allows culpability for causing an explosion, apparently as an alternative to burning. § 16-11-110(B).

[4] "The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal." Rule 220(c), SCACR.

offense instead, Pelzer suffered prejudice. Consequently, the PCR court correctly found Pelzer received ineffective assistance of counsel.

II. Severability of Negotiated Guilty Plea Package

The State argues the PCR court erred in granting Pelzer relief as to the arson charge, only, without vacating the entire plea. We do not reach this issue because the State failed to preserve it for our review.

Issues are not properly before the appellate court unless they were raised to and ruled on by the PCR court. Plyler v. State, 309 S.C. 408, 409, 424 S.E.2d 477, 478 (1992). Furthermore, an issue is not preserved for appellate review if not raised by the appellant at trial, regardless of whether the trial court addressed the issue. Mize v. Blue Ridge Ry. Co., 219 S.C. 119, 129-130, 64 S.E.2d 253, 258 (1951). An appellant cannot raise an issue on appeal that was raised by another party at trial, but on which appellant advanced no arguments to the trial court. Thomasko v. Poole, 349 S.C. 7, 10, 561 S.E.2d 597, 598 (2002). The argument must have been raised by appellant in order for appellant to raise it on appeal. Id.

Here, Pelzer raised the issue of relief from the arson count, only, to the PCR court in the initial hearing on his application, and the PCR court specifically granted that relief. However, the Appendix does not indicate the State argued Pelzer's guilty plea was an indivisible negotiated package deal. Consequently, the PCR court did not consider or rule on the merits of the State's argument on appeal, and this issue is not preserved.

CONCLUSION

We find the PCR court did not err in finding Pelzer's plea counsel ineffective for failing to advise him of the attempt-to-burn statute because attempt-to-burn is a lesser included offense of arson. Had Pelzer sought trial, he might have been convicted of an attempt to burn and received a shorter sentence and no second strike. Therefore, we affirm the order of the PCR court on this issue.

We do not reach the issue of whether the PCR court erred in granting Pelzer relief as to the arson charge, only, without vacating the entire plea, because the State failed to preserve it for our review. Accordingly, the order of the PCR court is

AFFIRMED.

HUFF, J., concurs.

HEARN, C.J. (dissenting):

Respectfully, I dissent. I would hold that the PCR court's finding that Pelzer was prejudiced by his plea counsel's defective performance is not supported in the record, and would therefore reverse the grant of post-conviction relief.

A two-prong test exists to evaluate claims of ineffective assistance of counsel. First, a defendant must show that his counsel's performance was deficient such that it falls below an objective standard of reasonableness. Bennett v. State, 371 S.C. 198, 203, 638 S.E.2d 673, 675 (2006) (citing Strickland v. Washington, 466 U.S. 668 (1984)). Secondly, a defendant must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Bennett, 371 S.C. at 203, 638 S.E.2d at 675. "Where there has been a guilty plea, the applicant must prove prejudice by showing that, but for counsel's errors, there is a reasonable probability he would not have pleaded guilty and instead would have insisted on going to trial." Id. at 203-04, 638 S.E.2d at 675. In resolving PCR issues relating to guilty pleas, it is proper to consider the guilty plea transcript as well as the evidence at the PCR hearing. Id.

Because the State is responsible for initially selecting the charges to lodge against a defendant, I have some concern about whether counsel's failure, particularly at the guilty plea stage, to advise Pelzer that he could arguably more properly be charged under the Attempt to Burn statute rendered her performance deficient. However, assuming the PCR court

correctly found that Pelzer's counsel's performance fell below an objective standard of reasonableness and was deficient, I do not believe it correctly analyzed the second prong of the test, because Pelzer failed to show that he would not have pled guilty and would have insisted on going to trial but for counsel's error.

During the guilty plea colloquy, the plea judge thoroughly discussed with Pelzer his decision to plead guilty and the terms of the negotiated plea. Moreover, at the PCR hearing, Pelzer never testified that he would not have pled guilty except for his plea counsel's error. In fact, he specifically testified that he did not wish to set aside his guilty plea. (emphasis added). The following colloquy between Pelzer and his PCR attorney is instructive:

> Q.. You don't want to try to go back to the beginning and start completely over.
> A. No.
> Q. Okay.
> A. I just want to argue 190.
> Q. All you want to argue is that your lawyer was ineffective in allowing you to be sentenced under 110(B) as opposed to arguing that on the facts of this case that you were properly—should have properly been sentenced under 190.
> A. That's correct.

Thus Pelzer failed to satisfy the second prong of the test for evaluating claims of ineffective assistance of counsel. I would hold that the PCR court's finding that there is a reasonable probability that, but for counsel's error, Pelzer would not have pled guilty, is not supported in the evidence. See Bright v. State, 365 S.C. 355, 358, 618 S.E.2d 296, 298 (2005) (stating appellate courts will reverse the PCR judge's ruling where no probative evidence exists to support the decision).

Accordingly, I dissent, and would reverse the PCR court's decision to grant post-conviction relief.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Ann F. McClurg and Steve McClurg, Respondents,

v.

Harrell Wayne Deaton, and New Prime, Inc., Appellants.

Appeal From Greenville County
Edward W. Miller, Circuit Court Judge

Opinion No. 4458
Heard October 8, 2008 – Filed November 20, 2008

AFFIRMED

Samuel W. Outten, William J. Watkins, Jr., C. Stuart Mauney, Phillip E. Reeves and Jennifer D. Eubanks, all of Greenville, for Appellants.

Donald R. Moorehead, of Greenville, and Cynthia B. Patterson, of Columbia, for Respondents.

HUFF, J.: Harrell Wayne Deaton and New Prime, Inc. appeal from an order of the trial court denying their motions to set aside a default judgment

in favor of Ann F. and Steve McClurg in the amount of $800,000. We affirm.

FACTUAL/PROCEDURAL HISTORY

Ann McClurg, along with her husband Steve, instituted this action for injuries Ann received as a passenger in a car involved in an August 5, 2002 motor vehicle accident with a truck owned by New Prime and driven by New Prime's employee, Deaton. New Prime was insured by Zurich North America under a commercial trucker's general liability policy containing a $2,000,000 deductible endorsement for liability claims for each accident. Zurich was notified of the accident almost immediately and began investigating the matter shortly thereafter.

In the following month of September 2002, Zurich received a letter of representation from the McClurgs' counsel, beginning a course of contact between Zurich and counsel regarding injuries, medical treatment and settlement negotiations. Deaton left the employment of New Prime in October 2002, a little over two months following the accident, and there was no record of any communication between Deaton and New Prime during this time of negotiation subsequent to Deaton's separation from employment. On April 23, 2004, Zurich received a proposed settlement package from counsel. On June 28, 2004, counsel sent Zurich a letter regarding "Ann D. McClurg and Steve McClurg v. New Prime and Harrell Wayne Deaton." The letter requested settlement within the next week and stated, "If I haven't heard from you by that time, I will file suit and serve the Defendant and send you a courtesy copy of the pleadings." On October 6, 2004, counsel sent Zurich another letter, enclosing a copy of a complaint he prepared in the matter and indicating his intent to "proceed to litigation" if the matter was not soon settled. The draft complaint named only Ann McClurg as a plaintiff and New Prime as a defendant, and alleged New Prime was vicariously liable for Deaton's actions and was also liable for its negligent hiring, retention, and training of Deaton. On October 18, 2004, Zurich contacted counsel, who agreed to delay filing suit while Zurich reviewed the settlement demand. Between November 2004 and June 2005, Zurich and counsel exchanged telephone messages in regard to settlement, but did not reach a final agreement on the matter.

Unbeknownst to Zurich and New Prime, counsel filed a summons and complaint on April 27, 2005, naming only Deaton as a defendant. The complaint was filed on behalf of Ann McClurg, for injuries sustained in the accident, and her husband Steve, for loss of consortium. On May 3, 2005, the South Carolina Department of Motor Vehicles (the Department) received a copy of the summons and complaint pursuant to South Carolina Code Ann. § 15-9-350 and, on that same date, sent a copy of the summons and complaint by certified mail to Deaton at the Texas address listed on the accident report, but it was later returned as "Insufficient Address." On June 27, 2005, the Department again received the summons and complaint and sent the summons and complaint to Deaton via certified mail, this time to a different address in Texas, found through the efforts of a private investigator hired by counsel. This time the return receipt indicated it was received by Deaton, as evidenced by signature. Deaton did not answer or otherwise appear, and an order of default was filed on August 1, 2005. Notice of a damages hearing was sent to Deaton at both Texas addresses, but Deaton again failed to respond or appear. In September 2005, judgment was entered against Deaton in favor of Ann McClurg in the amount of $750,000 and in favor of Steve McClurg in the amount of $50,000 for a total judgment of $800,000.

On October 5, 2005, Zurich contacted counsel's office to determine the status of the settlement negotiations. After counsel's staff would not divulge any information, Zurich contacted New Prime to confirm New Prime had not been served with a summons and complaint in the matter. On October 7, 2005, Zurich received by certified mail a copy of the default judgment entered against Deaton. After the services of several private investigators were engaged, Deaton was finally located on January 23, 2006. On that date, Deaton executed an affidavit denying he was served with a copy of the summons and complaint, or received notice of the entry of default or the default judgment hearing, and stating he did not notify New Prime or Zurich of the above because he never received notice. Thus, it appears undisputed that neither Zurich nor New Prime was aware a complaint had been filed in the matter until October 7, 2005 when Zurich received a copy of the default judgment entered against Deaton. Notably, on May 11, 2005, after the summons and complaint were already filed by counsel and sent by the

Department to Deaton at the first address, counsel continued the path of negotiation with Zurich, sending Zurich an additional medical report concerning the underlying cause of action.

Deaton moved to set aside the default judgment pursuant to Rules 60(b)(1) and 60(b)(3) of the South Carolina Rules of Civil Procedure. New Prime filed a motion to intervene and likewise moved to set aside the judgment pursuant to Rules 60(b)(1) and 60(b)(3). The trial court granted New Prime's motion to intervene, but denied both New Prime's and Deaton's motions to set aside the default judgment. Both New Prime and Deaton made motions for reconsideration pursuant to Rule 59(e), SCRCP, which the trial judge denied with the exception of deleting some language from the order not at issue in this appeal. This appeal followed.

ISSUES

A. New Prime's Appeal

1. Did the trial court err in failing to recognize New Prime's status as a party and afford New Prime due process rights?

2. Did the trial court commit an abuse of discretion in denying New Prime relief from judgment based on surprise?

3. Did the trial court commit an abuse of discretion in denying New Prime relief from judgment based on misrepresentation and misconduct by Respondents' attorney?

B. Deaton's Appeal

1. Did the trial court err in failing to set aside the default judgment when it was procured based on fraud, misrepresentation, or other misconduct inasmuch as Respondents' counsel actively concealed the lawsuit so no defense would be entered?

2. Did the trial court err in failing to set aside the default judgment under Rule 60, SCRCP, when Deaton demonstrated that he was not properly served with the summons and complaint and that he did not receive notice of the hearing on unliquidated damages?

3. Should the default judgment be set aside because the actual judgment entered was incongruent with the damages alleged in the pleadings?

STANDARD OF REVIEW

The decision to grant or deny a motion for relief from judgment lies within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. BB & T v. Taylor, 369 S.C. 548, 551, 633 S.E.2d 501, 502-03 (2006). Thus, our standard of review limits this court to determining whether the trial court abused its discretion. Id. "An abuse of discretion arises where the judge issuing the order was controlled by an error of law or where the order is based on factual conclusions that are without evidentiary support." Id. at 551, 633 S.E.2d at 503

LAW/ANALYSIS

A. New Prime's Appeal

New Prime contends the trial court erred in failing to recognize its status as a party to the action after the court granted its motion to intervene, and denying New Prime relief on this basis. We agree. Nonetheless, we find the order denying New Prime's motion to set aside judgment must be affirmed on other grounds.

New Prime presented evidence that, based upon a federally mandated MCS-90 Endorsement contained in the applicable insurance policy, any noncooperation/late notice defense which might have been available due to Deaton's failure to notify New Prime of the lawsuit could be completely eliminated, thereby leaving New Prime vulnerable to being responsible for

the entire judgment. The trial court granted New Prime's motion to intervene, recognizing New Prime's large financial interest in the action and possible responsibility for paying the judgment. Despite this determination by the trial court, it partially denied New Prime's motion to set aside the default judgment finding, in regard to New Prime's Rule 60(b)(1) motion that New Prime was not a party to the action, and therefore the McClurgs had no legal duty to serve New Prime with the action against Deaton or notify New Prime of the default proceedings against Deaton. The court therefore determined the evidence did not support the relief from judgment based on mistake, inadvertence, surprise or excusable neglect. In regard to New Prime's Rule 60(b)(3) motion, the court found New Prime was not a party to the action and consequently had no legal duty to notify New Prime or Zurich of the lawsuit, and therefore New Prime could not make a Rule 60(b)(3) motion to be relieved from judgment based on fraud, misrepresentation, or other misconduct of an adverse party. We find the trial court erred in holding New Prime was not a party to the action and, because it was not legally entitled to notice or service, could not show entitlement to relief under Rules 60(b)(1) or (3).

Rule 60(b), SCRCP provides in pertinent part as follows:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> > (1) mistake, inadvertence, surprise, or excusable neglect;
> > . . .
> > (3) fraud, misrepresentation, or other misconduct of an adverse party.

New Prime was clearly made a party to the action based upon the court's decision to grant its motion to intervene. Therefore, as a party, it was within the trial court's discretion to grant New Prime relief from the final judgment entered if the relief was warranted. Further, the case of Edwards v. Ferguson, 254 S.C. 278, 175 S.E.2d 224 (1970) indicates an insurer may, under the proper circumstances, be entitled to an order setting aside a default

judgment where the insurer is involved in ongoing negotiations with a claimant but is not informed that the defendant has been served with a summons and complaint.

In Edwards, Ferguson and his liability insurer, State Farm Mutual Automobile Insurance Company, moved to set aside a personal injury default judgment on the ground that the same was taken through mistake, inadvertence, surprise, or excusable neglect. The case involved an August 6, 1967 single-car motor vehicle accident wherein there was a dispute as to whether Ferguson or Edwards was driving the car. Fourteen months after the accident, State Farm received a letter from Edwards' attorney advising of Edwards' claim and requesting negotiation of a settlement. A settlement of the case did not develop, and on December 2, 1968, a copy of the summons and complaint was served on Ferguson's father who, according to Ferguson, was illiterate. The trial court found, however, that service was made on the father and, subsequently, Ferguson acknowledged he found a copy of the summons and complaint in his dresser drawer. On June 12, 1969, the trial court entered judgment against Ferguson and a little over one month later, Ferguson and State Farm moved to set aside the judgment. The trial court denied the motion. On appeal, the supreme court found State Farm "stands in the shoes of [its insured] so far as liability is concerned," and that Ferguson's failure to cooperate prejudiced State Farm. Id. at 282, 175 S.E.2d at 226. The court reversed the trial court, finding the trial court abused its discretion in failing to set aside the default judgment on the grounds of mistake, inadvertence, surprise, or excusable neglect. Id. at 283, 175 S.E.2d at 226. However, the supreme court further determined there was a prima facie showing of a meritorious defense made by Ferguson.[1]

[1] In Edwards, evidence was presented that Ferguson was intoxicated, that Edwards was aware of his intoxication, and Edwards, not Ferguson, was the person driving the car at the time of the accident. Edwards, 254 S.C. at 281, 175 S.E.2d at 225. Accordingly, the supreme court determined a prima facie showing of meritorious defenses was presented to the court: (1) that Ferguson was not driving the vehicle, and (2) that even if the Ferguson was driving the vehicle, Edwards was guilty of contributory negligence and recklessness. Id. at 282, 175 S.E.2d at 225.

Here, it is undisputed Zurich, as New Prime's insurer, entered into settlement negotiations with the McClurgs' attorney. In June 2004, counsel sent Zurich a letter in regard to "Ann D. McClurg and Steve McClurg v. New Prime and Harrell Wayne Deaton," thus indicating an intention to file suit against both Deaton and New Prime. The letter further requested settlement within the next week and stated counsel would file suit and serve the Defendant and send Zurich a courtesy copy of the pleadings. In October 2004, counsel sent Zurich another letter, enclosing a copy of a draft complaint naming only New Prime as a defendant and raising allegations solely against New Prime of vicarious liability for Deaton's actions as well as liability for New Prime's negligent hiring, retention, and training of Deaton.

Based on counsel's conduct and actions, it was reasonable for Zurich and New Prime to believe that any suit filed would include New Prime as a defendant or, at the very least, that counsel would provide Zurich a copy of any pleadings in the matter when filed. Thus, at a minimum, 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). Additionally, given this history of contact and negotiations between counsel and Zurich, most notably the representations made by counsel to Zurich, the conduct of the McClurgs' counsel in failing to simply notify Zurich of the complaint filed against Deaton raises serious concerns for this court and quite possibly satisfies the misrepresentation and misconduct envisioned by Rule 60(b)(3). Accordingly, we believe the trial court committed error in finding the evidence did not, at least, support relief based on mistake, inadvertence, surprise or excusable neglect. Further, we find the trial court erred in its implicit finding that because New Prime was not a party to the initial lawsuit it could not make a Rule 60(b) motion. The Edwards case makes clear that a Rule 60(b) motion is properly made by an insurer under such circumstances. Nonetheless, this court is compelled to affirm based on the trial court's determination that New Prime failed to make a showing of a meritorious defense.

Our courts have noted, in determining whether to set aside a default judgment under Rule 60(b), the trial judge should consider the following relevant factors: (1) the promptness with which relief is sought, (2) the reasons for the failure to act promptly, (3) the existence of a meritorious defense, and (4) the prejudice to the other parties. Tobias v. Rice, 379 S.C. 357, 366, 665 S.E.2d 216, 221 (Ct. App. 2008); Mictronics, Inc. v. S.C. Dep't of Revenue, 345 S.C. 506, 510-11, 548 S.E.2d 223, 226 (Ct. App. 2001); Hill v. Dotts, 345 S.C. 304, 309, 547 S.E.2d 894, 897 (Ct. App. 2001); New Hampshire Ins. Co. v. Bey Corp., 312 S.C. 47, 50, 435 S.E.2d 377, 378 (Ct. App. 1993). It is clear, however, that a meritorious defense is more than merely a factor to consider under certain 60(b) grounds for setting aside default judgments. In particular, our courts have held that in order to obtain relief from a default judgment under Rule 60(b)(1) or 60(b)(3), not only must the movant make a proper showing he is entitled to relief based upon one of the specified grounds, he must also make a prima facie showing of a meritorious defense. See Stearns Bank Nat'l Ass'n v. Glenwood Falls, LP, 373 S.C. 331, 341, 644 S.E.2d 793, 798 (Ct. App. 2007) (noting relief from a default judgment under Rule 60(b)(1) is available "upon a showing of excusable neglect and a meritorious defense; case law also directs the trial court to consider the presence or absence of prejudice to the party opposing the motion"); Schultz v. Butcher, 24 F.3d 626, 630 (4th Cir. 1994) (noting the counterpart Federal Rule of Civil Procedure 60(b)(3) allows the court to relieve a party from a final judgment if an adverse party engages in fraud, misrepresentation, or other misconduct, but the moving party must establish, among other things, that it has a meritorious defense); Bowers v. Bowers, 304 S.C. 65, 67, 403 S.E.2d 127, 129 (Ct. App. 1991) (affirming the denial of a motion to set aside a portion of an order pursuant to Rule 60(b)(3) based solely on the movant's failure to present a meritorious defense); Tri-County Ice & Fuel Co. v. Palmetto Ice Co., 303 S.C. 237, 242, 399 S.E.2d 779, 782 (1990) (holding, to obtain relief from a default judgment pursuant to Rule 60(b)(1), the movant must also show a meritorious defense); Thompson v. Hammond, 299 S.C. 116, 119, 382 S.E.2d 900, 903 (1989) (holding, to justify relief under Rule 60(b)(1), SCRCP, a party must establish that he has a meritorious defense and that the judgment was taken against him by mistake, inadvertence, surprise or excusable neglect); Mitchell Supply Co. v. Gaffney, 297 S.C. 160, 163, 375 S.E.2d 321, 323 (Ct. App. 1988) (noting that the

existence of a meritorious defense was a requirement under S.C. Code Ann. § 15-27-130, the precursor to Rule 60(b)(1), SCRCP, that Federal cases interpreting Federal Rule 60(b)(1) require a meritorious defense, and that the South Carolina Rules of Civil Procedure have not changed this requirement); Lowe's of Ga., Inc., v. Costantino, 288 S.C. 106, 108, 341 S.E.2d 382, 383 (Ct. App. 1986) (noting movant seeking to vacate judgment under S.C. Code Ann. § 15-27-130 was required to make a prima facie showing of a meritorious defense in order to prevail on a motion to vacate); Edwards v. Ferguson, 254 S.C. 278, 283, 175 S.E.2d 224, 226 (1970) (noting, if requirements to vacate a judgment are met the judgment should be opened, and, in order to vacate a judgment, there must be a showing (1) that the judgment was taken against the defendant through his mistake, inadvertence, surprise or excusable neglect, and (2) that there is a showing of a prima facie meritorious defense).

To establish that he has a meritorious defense, a complainant need not show that he would prevail on the merits, but only that his defense is meritorious. Thompson v. Hammond, 299 S.C. 116, 120, 382 S.E.2d 900, 903 (1989).

> [A] meritorious defense need not be perfect nor one which can be guaranteed to prevail at a trial. It need be only one which is worthy of a hearing or judicial inquiry because it raises a question of law deserving of some investigation and discussion or a real controversy as to real facts arising from conflicting or doubtful evidence.

Id. (quoting Graham v. Town of Loris, 272 S.C. 442, 248 S.E.2d 594 (1978)). A party making a motion under Rule 60(b) has the burden of presenting evidence proving the facts essential to entitle him to relief. Bowers v. Bowers, 304 S.C. 65, 67, 403 S.E.2d 127, 129 (Ct. App. 1991).

Here, as noted by the trial court, New Prime has failed to make any showing of a meritorious defense. There is no evidence of record, by affidavit or otherwise, to suggest that the accident was the result of anything other than Deaton's negligence. In fact, a review of the record shows New

Prime never even raised the issue of a meritorious defense before the trial court. New Prime argues on appeal that it presented compelling evidence of a meritorious defense as to damages based on a judgment award of $800,000 and the fact that the McClurgs had earlier offered to settle the matter for a total of $170,000. A review of the record shows merely an allegation in a Zurich employee affidavit regarding a $170,000 settlement demand by the McClurgs made in April 2004 and a counteroffer of $35,000 made by Zurich in October 2004. This allegation in the affidavit appears to have been addressed in conjunction with the contention that settlement negotiations were ongoing. Nowhere in the record is there any indication that New Prime raised this to the court as an argument that a meritorious defense existed. Thus, even assuming for the sake of argument that this bare assertion regarding settlement negotiations is evidence of a defense to the amount of damages, the argument is not preserved for our review as it was neither raised to nor ruled upon by the trial court. See Doe v. Doe, 370 S.C. 206, 217, 634 S.E.2d 51, 57 (Ct. App. 2006) (holding when an appellant neither raises an issue at trial nor through a Rule 59(e), SCRCP, motion to amend, the issue is not presented properly to an appellate court for review).

Because New Prime failed to make the necessary prima facie showing of a meritorious defense required to set aside a judgment under Rules 60(b)(1) and 60(b)(3), the trial court did not commit reversible error in refusing to set aside the default judgment.

B. Deaton's Appeal

Deaton first contends the trial court erred in failing to set aside the default judgment pursuant to Rule 60(b)(3) when it was procured through fraud, misrepresentation, or other misconduct. He maintains that counsel for the McClurgs agreed to notify Zurich of a lawsuit, but breached that agreement, ensuring Zurich would have no reason to hire counsel for him. He also points to counsel's negotiations and communications with Zurich, and the settlement demands made to Zurich over the course of time. Deaton asserts the tactics employed by the McClurgs' attorney were undertaken for the purpose of evading full and fair litigation of the case on the merits. However, Deaton fails to show how counsel's actions and inactions toward

Zurich would equate to fraud, misrepresentation, or other misconduct toward Deaton. As noted by the trial court, there is simply no evidence the McClurgs' counsel committed any kind of fraud that deprived Deaton of the opportunity to be present or heard in the matter, or that counsel made any misrepresentations to Deaton or engaged in any misconduct toward Deaton. At any rate, Deaton's argument fails for the same reason that New Prime's fails on this issue. Deaton failed to present any evidence of a meritorious defense.

Deaton next maintains the trial court erred in failing to set aside the default judgment under Rule 60, SCRCP, as he "unequivocally demonstrated he was not properly served with the summons and complaint," and did not receive notice of the damages hearing. He asserts, while the McClurgs claim he was properly served pursuant to South Carolina Code Ann. §§ 15-9-350 and 370, Deaton presented evidence by way of his affidavit that he never received the summons and complaint or notice of the damages hearing. He maintains the trial court failed to liberally apply Rule 60(b)(1), SCRCP and ignored Deaton's affidavit because there was not "conclusive proof" that the signature on the return receipt was that of Deaton's. We disagree.

In ruling on Deaton's motion to vacate pursuant to Rule 60(b)(1), the trial court found "Deaton received the Summons and Complaint on June 27, 2005 as evidenced by the signed return-receipt." The trial court noted the return receipt has both the signature and the printed name of "Wayne Deaton." Although Deaton's affidavit states he had not been served with the summons and complaint, implying the signature was not his, the trial court noted Deaton's affidavit failed to indicate that he resided at a different address than that used for service at the time of service. The court determined Deaton had failed to provide the court with "conclusive proof" that the signature on the return receipt was not his. Accordingly, the court held Deaton's reason for his failure to answer the summons and complaint, in light of the evidence produced, did not amount to excusable neglect under Rule 60(b)(1), SCRCP.

Section 15-9-350 of the South Carolina Code provides as follows:

> The acceptance by a nonresident of the rights and privileges conferred by the laws in force in this State permitting the operation of motor vehicles, as evidenced by the operation of a motor vehicle by such nonresident on the public highways, the streets of any incorporated municipality or the public roads of this State or anywhere within this State, or the operation by such nonresident of a motor vehicle on any such public highways, streets or public roads or anywhere within the State other than as so permitted or regulated shall be deemed equivalent to the appointment by such nonresident of the Director of the Department of Motor Vehicles or of his successor in office to be his true and lawful attorney upon whom may be served all summons or other lawful process in any action or proceeding against him growing out of any accident or collision in which such nonresident may be involved by reason of the operation by him, for him or under his control or direction, express or implied, of a motor vehicle on such public highways, streets or public roads or anywhere within this State. Such acceptance or operation shall be a signification of his agreement that any such process against him shall be of the same legal force and validity as if served on him personally.

S.C. Code Ann. § 15-9-350 (2005). Section 15-9-370 of the code provides in pertinent part:

> Service of process upon the Director of the Department of Motor Vehicles, as agent of a: (a) nonresident driver under the provisions of Section 15-9-350 . . . shall be made by leaving a copy thereof, with an appropriate fee, in the hands of the Director of the Department of Motor Vehicles or his office and such service shall be sufficient service upon the nonresident if notice of the service and a copy of the process are forthwith sent by certified mail by the plaintiff or the Director of the Department of Motor Vehicles to the defendant and the defendant's return

> receipt and the plaintiff's affidavit of compliance herewith are appended to the summons or other process and filed with the summons, complaint, and other papers in the cause.

S.C. Code Ann. § 15-9-370 (2005).

The record in this matter shows compliance with the requirements of §§ 15-9-350 and 370. The summons and complaint in this matter was served upon the Department which in turn, as an agent of Deaton, sent notice of the service and a copy of the summons and complaint to Deaton by certified mail. The return receipt from this certified delivery included the signature and hand-printed name of "Wayne Deaton." Deaton's affidavit states that he was not served with the summons and complaint and that he did not receive notice of the entry of default and default judgment hearing in this case, and indicates what his address was at the time of the accident. It does not, however, indicate the address used for service was incorrect.

Our courts have long held that in order to establish that service has been properly effected, the plaintiff need only show compliance with the civil rules on service of process. McCall v. IKON, 363 S.C. 646, 652, 611 S.E.2d 315, 317 (Ct. App. 2005); Moore v. Simpson, 322 S.C. 518, 523, 473 S.E.2d 64, 67 (Ct. App. 1996). When these rules are followed, there is a presumption of proper service. Roche v. Young Bros., Inc. of Florence, 318 S.C. 207, 211, 456 S.E.2d 897, 900 (1995). The McClurgs showed compliance with the rules, and therefore service was presumptively proper. As previously noted, a party making a motion under Rule 60(b) has the burden of presenting evidence proving the facts essential to entitle him to relief. Bowers v. Bowers, 304 S.C. 65, 67, 403 S.E.2d 127, 129 (Ct. App. 1991). The trial court made a factual determination, one clearly supported by the evidence, that Deaton did in fact receive the summons and complaint, and his simple denial of the same was insufficient to show mistake, surprise, inadvertence, or excusable neglect. Cf. Fassett v. Evans, 364 S.C. 42, 47, 610 S.E.2d 841, 844 (Ct. App. 2005) (noting that an officer's return of process creates the legal presumption of proper service that cannot be impeached by the mere denial of service by the defendant). Accordingly, we

find no abuse of discretion in the trial court's refusal to set aside the default judgment as to Deaton pursuant to Rule 60(b)(1), SCRCP.

Deaton lastly argues the default judgment should be set aside because the actual judgment entered was incongruent with the damages alleged in the pleadings. He contends that included within the court's award for Ann McClurg were damages for "in kind services," and while Steve McClurg requested "in kind services" damages in his loss of consortium claim, Ann McClurg failed to allege such a loss in her complaint.

The first time Deaton raised this argument was in his motion to reconsider. Deaton clearly could have raised the matter in his motion to set aside the default judgment but failed to do so. Accordingly, this issue is not preserved for review. See Kiawah Prop. Owners Group v. Pub. Serv. Comm'n, 359 S.C. 105, 113, 597 S.E.2d 145, 149 (2004) (a party may not raise an issue in a motion to reconsider, alter or amend a judgment that could have been presented prior to the judgment).

CONCLUSION

For the foregoing reasons, the trial court's order denying New Prime's and Deaton's motions to set aside the default judgment is

AFFIRMED.

GEATHERS, J., concurs. HEARN, C.J., concurrs in part and dissents in part.

HEARN, C.J. (concurring in part and dissenting in part):

I respectfully concur in part, and dissent in part. I would reverse the circuit court's denial of Deaton and New Prime's Rule 60(b), SCRCP motion, and remand for a full trial on the merits.

I agree with the majority that the circuit court erred in denying New Prime relief on the basis that it was not a party, after previously granting its motion to intervene. However, I part company with the majority in holding that neither party satisfied the requirement of a meritorious defense under Rule 60(b).

"In determining whether to grant a motion under Rule 60(b), the trial judge should consider: (1) the promptness with which relief is sought, (2) the reasons for the failure to act promptly, (3) the existence of a meritorious defense, and (4) the prejudice to the other party." Mictronics, Inc. v. S.C. Dep't of Revenue, 345 S.C. 506, 510-11, 548 S.E.2d 223, 226 (Ct. App. 2001). Here, there is no question that New Prime acted promptly in seeking relief under Rule 60(b) as soon as it learned that default judgment had been taken against Deaton. The McClurgs made no showing of how they would be prejudiced if the default judgment were to be set aside, and the law favors the resolution of disputes based upon all parties having their day in court. Thus, the trial court hinged its denial of relief upon the Appellants' failure to establish a meritorious defense. I would hold this was error.

Under the majority's view, Appellants had to establish a meritorious defense as to liability in order to prevail on their Rule 60(b) motion. I agree there was no showing by Appellants concerning Deaton's lack of responsibility for causing the accident, but I would hold there was evidence of a meritorious defense, provided by the McClurgs' own attorney, which related to the amount of damages. In negotiations with New Prime's carrier, Zurich, which were ongoing prior to and beyond the filing of suit, McClurgs' counsel made a settlement demand of $170,000. I would hold this course of conduct by McClurgs' attorney is sufficient to satisfy Rule 60(b)'s meritorious defense requirement. Although not previously recognized in South Carolina, courts in other jurisdictions have held that in the context of a Rule 60(b) motion, 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. See e.g. Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corp., 843 F.2d 808 (4th Cir. 1988); Wainright's Vacations, L.L.C. v. Pan American Airways Corp., 130

F.Supp.2d 712 (D. Md. 2001) (applying Augusta Fiberglass); Esteppe v. Patapsco & Back Rivers Railroad, 2001 WL 604186 (D. Md. 2001); Miller v. Susa Partnership, L.P., 2008 WL 660563 (Ohio App. 10th 2008); Oberkonz v. Gosha, 2002 WL 31320242 (Ohio App. 10th 2002); Cook v. Rowland, 49 P.3d 262 (Alaska 2002); Syphard v. Vrable, 751 N.E.2d 564 (Ohio Ct. App. 2001); Ferguson & Co. v. Roll, 776 S.W.2d 692 (Tex. App.- Dallas 1989, no writ); The Moving Co. v. Whitten, 717 S.W.2d 117 (Tex. App. – Houston 1986, writ ref'd n.r.e.) (overruled on other grounds); Beal v. State Farm Mut. Auto. Ins. Co., 729 P.2d 318 (Ariz. Ct. App. 1986); Hertz v. Berzanske, 704 P.2d 767 (Alaska 1985).

I also disagree with the majority's holding that Appellants did not preserve this issue for appellate review. Our preservation rules exist to ensure that issues argued on appeal were fairly presented and ruled upon at the trial level. McClurgs' counsel's settlement demand was clearly argued to the circuit court and referenced in memoranda and affidavits submitted at the motion hearing. The circuit court held that New Prime and Deaton failed to make any showing of a meritorious defense. Therefore, I would find this argument was raised and ruled upon, and is thus properly before this court.

I join the majority's serious concern with the conduct of the McClurgs' counsel in the manner in which he pursued this case. While no duty technically existed to notify New Prime or Zurich of the filing of suit against Deaton, the failure to do so under the circumstances of this case compromises the high ethical standards attaching to the practice of law. As the majority points out, the McClurgs indicated in correspondence to Zurich that New Prime would be served as a defendant in the event a settlement could not be reached, stating emphatically: "If I haven't heard from [Zurich] by that time, I will file suit and serve the Defendant and send you a courtesy copy of the pleadings." The 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.

Moreover, during negotiations, the McClurgs' counsel sent a copy of his proposed complaint to New Prime which showed both New Prime and Deaton as defendants. However, the complaint ultimately served on Deaton

made no mention of New Prime as a defendant. Inexplicably, less than a month after filing the complaint against Deaton, McClurgs' counsel appeared to be continuing settlement negotiations with New Prime by sending it an additional medical report.

While the facts presented here – the failure to serve an insurance company where there is a clear and established prior course of dealings between the carrier and the plaintiff – appear to present a novel situation in South Carolina,[2] the Indiana Court of Appeals addressed a similar situation in McGee v. Reynolds, 618 N.E.2d 40 (Ind. Ct. App. 1993). There, two parties were involved in an automobile accident and negotiations ensued between the injured party and the at-fault driver's insurance company. When those negotiations reached an impasse, the injured party filed suit against the at-fault party without notifying the insurance company. Similar problems of service arose, and in the meantime, the insurance company made an inquiry as to the claim's status, only to receive no response. Finally, a default judgment was obtained, and after notice of the judgment, the at-fault driver and insurer moved to set aside the according to Rule 60(B)(3).

The McGee court affirmed the trial court's decision to grant the at-fault driver's motion to set aside the default judgment where the plaintiff's attorney failed to give notice of the lawsuit to defendant's insurer. Id. at 41. The court described the plaintiff attorney's behavior as bad faith and "smack[ing] of chicanery and unfair advantage" which could not be tolerated. Id. Further, in reaching its decision, the McGee court referenced Boles v. Wiedner, 449 N.E.2d 288, 290 (Ind. 1983) and stated:

[2] Neither New Prime nor Deaton has requested this court adopt a rule requiring service on an insurance company under these circumstances; therefore, it is not within our province as an appellate court to do so. See Langley v. Boyter, 284 S.C. 162, 181, 325 S.E.2d 550, 561 (Ct. App. 1984) rev'd on other grounds, 286 S.C. 85, 332 S.E.2d 100 (1985) ("[A]ppellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked.").

> While there is no general duty to inform the defendant's insurer of a lawsuit, in Boles, the supreme court concluded the plaintiff's failure to notify the defendant's insurer of the existence of the lawsuit after negotiations had occurred was a valid consideration in determining whether to set aside a default judgment.

Id. The Boles court had determined that failure to notify the insurer, standing alone, was not enough to justify setting aside the default judgment. However, in McGee, the court held 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. Id.

The case before us is factually very similar to McGee. Here, McClurgs' counsel continued to negotiate with Zurich while filing a complaint against the at-fault driver without notice to New Prime or its carrier, despite his prior written assurance that he would send Zurich a courtesy copy. Additionally, the actual complaint served on Deaton was markedly different from the copy counsel had sent to Zurich, in that New Prime was no longer named as a defendant.

I fully recognize that this court has not been asked to adopt a bright-line rule with respect to service of complaints on carriers where settlement negotiations have been ongoing; nevertheless, 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 and Deaton's Rule 60(b) motion.

Accordingly, I concur in part and dissent in part.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Elizabeth N. Timmons,
Individually and through her
Attorney-in-Fact, Charles T.
Timmons, Respondent,

v.

Jane T. Starkey and UBS
Financial Services, Inc.,
Defendants,

of whom:

UBS Financial Services, Inc. is
the Appellant.

Appeal From Greenville County
Larry R. Patterson, Circuit Court Judge

Opinion No. 4459
Submitted October 1, 2008 – Filed November 20, 2008

REVERSED and REMANDED

George C. Covington, of Charlotte, North Carolina, for Appellant.

Jan L. Warner, Matthew E. Steinmetz, of Columbia, for Respondent.

GEATHERS, J.: This action involves several tort and contract claims arising from the alleged conversion of account funds by Jane Starkey (Starkey), a securities broker employed with Appellant UBS Financial Services, Inc. (UBS). Starkey is also the daughter of Respondent Elizabeth Timmons (Timmons), who filed this action against Starkey and UBS.

UBS appeals the circuit court's denial of its motion to compel arbitration.[1] UBS challenges the circuit court's ruling that arbitration is inappropriate because Timmons' claims are independent of the parties' contract. We reverse.

FACTS/PROCEDURAL HISTORY

In June 1995, Timmons executed a durable power of attorney naming her daughter, Starkey, as her attorney-in-fact. This instrument was not recorded with the Greenville County Register of Deeds until June 3, 2004.[2] Article III of the Power of Attorney includes the following language:

> No person who may act in reliance upon the representations of Attorney for the scope of authority granted to Attorney shall incur any liability to me or to my estate as a result of permitting Attorney to exercise any power, nor shall any person dealing with

[1] Starkey has not appealed the circuit court's denial of her motion to compel arbitration.

[2] S.C. Code Ann. § 62-5-501(C) (Supp. 2007) requires a durable power of attorney to be recorded to be effective, unless the authority of the attorney-in-fact relates solely to the person of the principal.

> Attorney be responsible to determine or insure the proper application of funds or property.

(emphasis added).

In April 1996, Timmons entered into a contract with J.C. Bradford & Co. (J.C. Bradford) for investment services. The contract form included a broadly-worded arbitration clause:

> I agree . . . that all controversies which may arise between us concerning any transaction or the construction, performance or breach of this or any other agreement between us . . . shall be determined by arbitration.

(emphasis added).

As UBS became the successor-in-interest to J.C. Bradford, Timmons' account with J.C. Bradford was converted to an account with UBS. In November 2004, Timmons executed an investment services contract with UBS. That contract also contained a broadly-worded arbitration clause. The UBS contract states, in part,

> BY SIGNING BELOW, I UNDERSTAND, ACKNOWLEDGE AND AGREE . . . that in accordance with the last paragraph of the Master Account Agreement entitled 'Arbitration[,]' I am agreeing in advance to arbitrate any controversies which may arise with . . . UBS Financial Services in accordance with the terms outlined therein[.]

(emphasis in original).

The arbitration clause of the Master Account Agreement states, in part,

> Client agrees . . . that any and all controversies which may arise between UBS Financial Services, any of UBS Financial Services' employees or agents and Client concerning any account, transaction, dispute or the construction, performance or breach of this Agreement or any other agreement . . . shall be determined by arbitration.

(emphasis added).[3]

According to the allegations of Timmons' complaint, Starkey removed over $129,000 from Timmons' accounts at UBS and Branch Banking & Trust and used those funds for Starkey's personal benefit. Timmons then filed an action against Starkey and UBS, seeking damages for Starkey's alleged conversion of funds from Timmons' accounts. Timmons asserted causes of action against Starkey and UBS for breach of fiduciary duty, negligence, conversion, influenced transactions, intentional infliction of emotional distress, and violation of the Omnibus Adult Protection Act.[4] Timmons' complaint also included the following causes of action against Starkey alone: breach of contract, breach of contract accompanied by a fraudulent act, and constructive trust.

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[3]Timmons argues that UBS'S Master Account Agreement should not have been included in the Record on Appeal because UBS failed to present it to the circuit court. We disagree. While the Master Account Agreement was not included with UBS'S pleadings, it was incorporated into the UBS contract by direct reference, and the UBS contract was included in UBS'S Motion to Compel Arbitration. In any event, the circuit court's order sets forth the pertinent language of the arbitration clause in the J.C. Bradford contract and includes a finding that Timmons signed a similar contract with UBS. Timmons did not appeal this finding, and as such, it is the law of the case. See Charleston Lumber Co., Inc. v. Miller Hous. Corp., 338 S.C. 171, 175, 525 S.E.2d 869, 871-72 (2000) (holding that an unappealed ruling is the law of the case).

[4] S.C. Code Ann. §§ 43-35-5 to -595 (Supp. 2007).

Both UBS and Starkey filed separate motions to compel arbitration of Timmons' claims. The circuit court concluded that the allegations of the complaint fell outside the scope of the arbitration clause in the investment services contract and that the claims asserted by Timmons were completely independent of the contract. Therefore, the circuit court denied both motions to compel arbitration. This appeal follows.

STANDARD OF REVIEW

The determination of whether a claim is subject to arbitration is subject to de novo review. Chassereau v. Global-Sun Pools, Inc., 373 S.C. 168, 171, 644 S.E.2d 718, 720 (2007). However, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports those findings. Id.

LAW/ANALYSIS

UBS argues that the circuit court erred in denying its motion to compel arbitration because Timmons' claims against UBS fell within the scope of the arbitration clause in the parties' contract. In the alternative, UBS argues that there was a significant relationship between Timmons' claims and the parties' contract and that, therefore, arbitration was required. We agree.

Both South Carolina and federal policy favor the arbitration of legal disputes. Zabinski v. Bright Acres Assoc(s)., 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). Arbitration is required when (1) an arbitration clause specifically encompasses the asserted claims; or (2) there exists a significant relationship between the asserted claims and the parties' contract. Id. at 596-598, 553 S.E.2d at 118-119 (internal citations omitted).

A. Scope of Arbitration Clause

To decide whether an arbitration agreement encompasses a dispute, a court must determine whether the factual allegations underlying the claim are within the scope of the broad arbitration clause, regardless of the label assigned to the claim. Id. at 597, 553 S.E.2d at 118. Any doubts concerning

the scope of arbitrable issues should be resolved in favor of arbitration. Id. Unless the court can say with "positive assurance" that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should be ordered. Id.

UBS asserts that all of Timmons' claims are based on the underlying allegation that UBS failed to prevent Starkey from removing funds from Timmons' account and that such an allegation is within the scope of the arbitration clause. UBS argues that Starkey's removal of the funds was a "transaction" contemplated by the arbitration clause in both the J.C. Bradford contract and the UBS contract. We agree.

The respective arbitration clauses in the J.C. Bradford and UBS contracts provide that all controversies which may arise between UBS and Timmons concerning any transaction or the performance or breach of any contract between the parties shall be determined by arbitration. Additionally, the arbitration clause in the UBS agreement expands the scope of arbitrable controversies to include those concerning any account or dispute.

Unquestionably, Starkey's removal of funds from Timmons' account constituted a "transaction" within the scope of the respective arbitration clauses in the J.C. Bradford contract and the UBS contract. Further, Starkey's removal of funds concerned an "account" within the scope of the arbitration clause in the UBS contract. Moreover, all of Timmons' claims depend on the allegation that UBS failed to prevent Starkey from removing funds from Timmons' account.[5] Any duty that UBS owed toward Timmons arose solely from their contractual relationship. Therefore, the respective arbitration clauses in the J.C. Bradford contract and the UBS contract encompass Timmons' claims.

[5]None of Timmons' claims include any allegations of improper management of her account, such as churning or making improper investments, prior to Starkey's removal of funds from the account.

B. Significant Relationship

UBS alternatively argues that a significant relationship exists between Timmons' claims and the parties' contract because the underlying allegations involve alleged duties created solely by the parties' contractual relationship. We agree.

Even if a dispute does not arise under the parties' contract, a broadly-worded arbitration clause in the contract applies to that dispute when a "significant relationship" exists between the asserted claims and the contract. See Zabinski, 346 S.C. at 598, 553 S.E.2d at 119. An instructive discussion of the "significant relationship" test is set forth in Aiken v. World Fin. Corp. of S.C., 373 S.C. 144, 151, 644 S.E.2d 705, 709 (2007). In Aiken, a borrower's claims against a lender were based on an allegation that the lender's employees conspired to use the borrower's personal information to obtain sham loans and to embezzle the proceeds. Aiken, 373 S.C. at 147, 644 S.E.2d at 707. The South Carolina Supreme Court declined to find a significant relationship between the borrower's claims and his loan contract with the lender. Id. at 151, 644 S.E.2d at 709. The Court stated that it would refuse to interpret any arbitration agreement as applying to outrageous torts that are unforeseeable to a reasonable consumer in the context of normal business dealings. Id.

The Court also emphasized that a determination of foreseeability is to be made from the standpoint of the injured party, i.e., the expectations of a reasonable man, rather than from the standpoint of the reviewing court. Id. at 151 n. 6, 644 S.E.2d at 709 n.6. The Court made it clear that it did not seek to exclude all intentional torts from the group of claims subject to arbitration, but that it sought only to distinguish those outrageous torts that are legally distinct from the contractual relationship between the parties. Aiken, 373 S.C. at 152, 644 S.E.2d at 709.

Here, Timmons' claims depend on the underlying assertion that UBS failed to prevent Starkey from removing Timmons' funds from her account. Any duty to prevent the removal of funds from Timmons' account arises

solely from the parties' contractual relationship. Further, we agree with UBS's argument that the exception for outrageous and unforeseeable conduct does not apply to Timmons' claims, so as to preclude arbitration of those claims. In light of Timmons' execution of the power of attorney, it was foreseeable that UBS could determine that Starkey had the authority to withdraw funds from Timmons' account.

Starkey's alleged misappropriation of the funds after she withdrew them from Timmons' account may have been unforeseeable and certainly outrageous. However, the relevant inquiry does not focus on the foreseeability of Starkey's betrayal of Timmons' trust, but rather on the foreseeability of UBS's inaction prior to and during Starkey's withdrawal of the funds from the UBS account.

Further, foreseeability must be examined from the standpoint of the injured party, i.e., the expectations of a reasonable person in Timmons' position at the time she entered into the contract with UBS. See Aiken, 373 S.C. at 151 n. 6, 644 S.E.2d at 709 n. 6. In applying the reasonable person standard to the facts of Timmons' case, it is impossible to ignore her execution of the power of attorney. That instrument gave Starkey clear legal authority to withdraw funds from Timmons' accounts and expressly held harmless anyone who might rely on the power of attorney while doing business with Starkey. By the time Timmons signed the investment services contract with UBS in November 2004, the power of attorney had been recorded.[6] Therefore, it was foreseeable to a reasonable person in the context of normal business dealings that UBS would allow Starkey to withdraw funds from Timmons' account.

[6] Even when Timmons signed the J.C. Bradford contract, she should have been aware that the hold-harmless language in the existing power of attorney, once recorded, could induce those doing business with Starkey to honor her full control over the account funds.

CONCLUSION

Arbitration is required when either (1) an arbitration clause specifically encompasses the asserted claims; or (2) there exists a significant relationship between the asserted claims and the parties' contract. The respective arbitration clauses in the J.C. Bradford contract and the UBS contract specifically encompass Timmons' claims against UBS because they all concern a transaction involving her UBS account.

Further, there is a significant relationship between the parties' contract and Timmons' claims. Those claims depend on the allegation that UBS breached a duty to prevent Starkey from transferring Timmons' funds from her UBS account. That alleged duty was created solely by the contractual relationship between the parties. Moreover, the exception for outrageous and unforeseeable conduct that would preclude arbitration does not apply to UBS because the possibility that UBS could rely on the power of attorney was foreseeable to Timmons when she signed the J.C. Bradford and UBS contracts. Based on the foregoing, the circuit court must compel arbitration of Timmons' claims against UBS.

Accordingly, the circuit court's order is

REVERSED and REMANDED.[7]

HEARN, C.J., and HUFF, J., concur.

[7] Pursuant to Rule 215, SCACR, we decide this appeal without oral arguments.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

George B. and Ann M. Pocisk, Respondents,

v.

Sea Coast Construction of Beaufort and Johnny A. Payne, d/b/a Sea Coast Construction, Appellants.

and/Carolina Shores Constructions Co., Inc., Third-Party Plaintiff,

v.

Sea Coast Construction of Beaufort and Johnny A. Payne, d/b/a Sea Coast Construction, Third Party Defendants.

Appeal From Beaufort County
Roger M. Young, Circuit Court Judge

Opinion No. 4460
Heard October 7, 2008 – Filed November 20, 2008

APPEAL DISMISSED

Robert T. Lyles, Jr., of Charleston, for Appellants.

Drew A. Laughlin, of Hilton Head Island, and Edwin Russell Jeter, Jr., of Columbia, for Respondents.

HUFF, J.: Johnny Payne, d/b/a Sea Coast Construction, (Payne) appeals the trial court's order granting relief from judgment pursuant to Rule 60(b), SCRCP, to George B. Pocisk and Ann M. Pocisk. We find the order is not immediately appealable and dismiss the appeal.

FACTS

The Pocisks brought an action against Payne and others alleging their house had been defectively constructed. Although Payne's insurer, St. Paul Travelers, denied coverage for the claim, it provided Payne with a defense, pursuant to a full reservation of rights. After the other defendants settled with the Pocisks, Payne and the Pocisks entered into a settlement agreement in which Payne confessed judgment in the amount of $250,000 and the Pocisks agreed not to seek satisfaction of the judgment from Payne. Payne assigned to the Pocisks his rights in any claim involving insurance coverage and bad faith issues arising out the St. Paul Travelers insurance policy. A judgment was entered against Payne in the Beaufort County Court of Common Pleas in the amount of $250,000. The judgment does not mention the condition that the Pocisks would not seek satisfaction against Payne.

After the parties entered into the settlement agreement, St. Paul Travelers brought a declaratory judgment action in the United States District Court seeking a declaration that it was not obligated to defend or indemnify Payne for the Pocisks' claim. The district court allowed the Pocisks to intervene. Their attorney also represented Payne in the declaratory judgment action. Relying on opinions from the Fourth Circuit Court of Appeals,[1] the district court held the settlement agreement was presumptively unreasonable and therefore invalid. St. Paul Travelers v. Payne, 444 F. Supp. 519, 522 (D.S.C. 2006). The court concluded that because the settlement agreement was invalid, St. Paul Travelers was not obligated to indemnify Payne for the $250,000 confession of judgment. Id. In its order on the Pocisks and Payne's motion to alter or amend, the court clarified that if the judgment entered on the underlying suit was vacated, it would then have

[1] Stonehenge Eng'g Corp. v. Employers Ins. of Wausau, 201 F.3d 296 (4th Cir. 2000) (applying South Carolina law); Hitt v. Cox, 737 F.2d 421 (4th Cir. 1984) (Virginia case).

jurisdiction to consider the issue of whether St. Paul Travelers' denial of the claim was appropriate.

The Pocisks then filed a motion in the Beaufort County Court of Common Pleas to vacate the $250,000 consent judgment pursuant to Rule 60(b), SCRCP, and restore the action to the trial roster. The court initially denied the Pocisks the relief requested. The Pocisks filed a motion to alter or amend asserting the court's ruling violated the doctrines of res judicata and collateral estoppel. Payne did not file a return to this motion. The trial court granted the motion to alter or amend, finding the district court decision was binding on all parties to this action. It vacated the consent judgment and restored the case to the trial docket. Payne filed a motion to reconsider, which the trial court denied. This appeal followed.

LAW/ANALYIS

The Pocisks assert the order granting Rule 60(b) relief is not immediately appealable. We agree.

The determination of whether a party may immediately appeal an order issued before or during trial is governed primarily by statute. S.C. Code Ann. § 14-3-330 (1976 & Supp. 2007); Hagood v. Sommerville, 362 S.C. 191, 195, 607 S.E.2d 707, 708 (2005). "An order generally must fall into one of several categories set forth in that statute in order to be immediately appealable." Hagood, 362 S.C. at 195, 607 S.E.2d at 708. Payne asserts the order is immediately appealable under section 14-3-330(2), which provides for the immediate appeal of an interlocutory order

> affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action.

Payne could seek review of the order granting Rule 60(b) relief following final judgment in the case. See Peterkin v. Brigman, 319 S.C. 367, 368, 461 S.E.2d 809, 810 (1995) (holding an order refusing to enforce a settlement agreement is not immediately appealable because it does not prevent a judgment from being rendered in the action, and appellant can seek review of the current

order in any appeal from final judgment). In addition, the order does not strike out any part of a pleading in the action. Therefore, neither subsections (a) nor (c) apply to this order.

Payne asserts the order has the effect of granting a new trial and thus falls under section 14-3-330(2)(b). However, in holding an order granting Rule 60(b) relief to set aside a default judgment is not immediately appealable, this court explained such orders "are neither final orders nor orders granting a new trial, the reasoning being that they are interlocutory in nature and since there has never been a trial in the first instance they cannot be considered orders granting a 'new' trial or 'rehearing.'" Pioneer Assocs. v. Ticor Title Ins. Co., 300 S.C. 346, 348, 387 S.E.2d 711, 712 (Ct. App. 1989). The order here, as with the order in Pioneer Associates, does not grant a "new" trial because there has not been a trial yet in the case.

In addition, the order granting Rule 60(b) relief does not affect a substantial right. Our supreme court has recognized: "Avoidance of trial is not a 'substantial right' entitling a party to immediate appeal of an interlocutory order." Shields v. Martin Marietta Corp., 303 S.C. 469, 470, 402 S.E.2d 482, 483 (1991) (holding decision on a motion to restore the case to the active docket is not immediately appealable). Similarly, in holding the grant of Rule 60(b) relief was not immediately appealable, the North Carolina Court of Appeals explained: "The right to avoid one trial on the disputed issues is not normally a substantial right that would allow an interlocutory appeal." Metcalf v. Palmer, 265 S.E.2d 484, 485 (N.C. Ct. App. 1980). In applying their statute similar to our section 14-3-330(b),[2]

[2] The North Carolina statute allows for immediate appeal from an interlocutory order that:

> (1) Affects a substantial right, or
>
> (2) In effect determines the action and prevents a judgment from which appeal might be taken, or
>
> (3) Discontinues the action, or
>
> (4) Grants or refuses a new trial . . . .

the North Carolina courts have consistently held an order granting Rule 60(b) relief is not immediately appealable. See Waters v. Qualified Personnel, Inc., 240 S.E.2d 338 (N.C. 1978) (holding order setting aside summary judgment for procedural irregularity was not immediately appealable); Bailey v. Gooding, 270 S.E.2d 431 (N.C. 1980) (holding an order allowing a motion under Rule 60(b) is not immediately appealable because it is interlocutory and does not affect a substantial right); Anglin Stone v. Curtis, 553 S.E.2d 244 (N.C. Ct. App. 2001) (holding order granting Rule 60(b) relief from dismissal due to defects with service of process is not immediately appealable).

We find the order granting the Pocisks' motion for relief from judgment neither affects a substantial right nor grants a new trial. As the order does not meet the requirements of section 14-3-330(2) and does not fall within any of the other categories set forth in section 14-3-330, the order is not immediately appealable.[3]

DISMISSED.

HEARN, C.J., and GEATHERS, J., concur.

N.C. Gen. Stat. Ann. § 7A-27 (Lexis-Nexis 2005).

[3] Although appellate courts have considered appeals from the granting of Rule 60(b) relief, the issue of appealability was not addressed. See e.g. Johnson v. Johnson, 310 S.C. 44, 425 S.E.2d 46 (Ct. App. 1992); Mitchell Supply Co., Inc. v. Gaffney, 297 S.C. 160, 375 S.E.2d 321 (Ct. App.1988). "The fact that an appellate court may have decided an appeal of a particular type of order on the merits is not dispositive of whether the order is appealable when the issue of appealability was not raised." Breland v. Love Chevrolet Olds, Inc., 339 S.C. 89, 95, 529 S.E.2d 11, 14 (2000).