THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
Gordon G. Cooper, Master-in-Equity

Appellate Case No. 2020-0000454

U.S. Bank, NA, as trustee relating to the Chevy Chase Funding, LLC Mortgage Backed Certificates, Series 2004-B, ... Plaintiff,

v.

Alyce F. Otto, Individually; Alyce F. Otto, Trustee Under Declaration of Trust of Alyce F. Otto dated the 17th of November 2009; TD Bank, NA; The United States of America, acting by and through its agency, the Internal Revenue Service; Laura Kerhulas Giese, as Co-Trustee of the Theodore Ernest Kerhulas Trust Under Declaration of Trust dated May 25, 2004; Mark Warner Kerhulas, as Co-Trustee of the Theodore Ernest Kerhulas Trust Under Declaration of Trust dated May 25, 2004; Jackson L. Munsey, Jr.; Citibank, NA, ... Defendants,

and

Alyce F. Otto, Trustee Under Declaration of Trust of Alyce F. Otto dated November 17, 2009, ... Plaintiff,

v.

Jackson L. Munsey, Jr. ..... Defendant,

of whom Jackson L. Munsey, Jr., is the ..... Appellant,

and

Alyce F. Otto, Individually; Alyce F. Otto, Trustee Under Declaration of Trust of Alyce F. Otto dated the 17th of November 2009; Laura Kerhulas Giese, as Co-Trustee of the Theodore Ernest Kerhulas Trust Under Declaration of Trust dated May 25, 2004; Mark Warner Kerhulas, as Co-Trustee of the Theodore Ernest Kerhulas Trust Under Declaration of Trust dated May 25, 2004 are the ..... Respondents.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This is an appeal from an order granting a default money judgment in favor of Respondent Alyce F. Otto, Trustee Under Declaration of Trust of Alyce F. Otto dated November 17, 2009 (hereinafter "Otto") and directing the disbursement to Otto of money deposited as a bond to stay a foreclosure sale ordered in favor of U.S. Bank, NA, as trustee relating to the Chevy Chase Funding, LLC Mortgage Backed Certificates, Series 2004-B (hereinafter "U.S. Bank"), during a previous appeal, as well as an order denying the Appellant (hereinafter "Munsey")'s motion to reconsider. (R. pp. 1-17, 28-30, 43-46, 51-53.)

Munsey entered into a contract with Otto to buy land from her, with a deed to be issued to him only once his performance under the contract was complete. (R. pp. 326-45.) Under the terms of that contract, Munsey was to pay off, over time, several debts associated with Otto and the subject property, including mortgage debts to U.S. Bank and to Carolina First Bank (now known as TD Bank), both of which were secured by mortgages on the subject land. (R. pp. 326-45.)

Otto maintained that Munsey had breached his contract with her and sued him, seeking termination or foreclosure of Munsey's interest in the property. (R. pp. 67-70.) Munsey disputed this, but he defaulted Otto's complaint. (R. pp. 41-42, 346.) U.S. Bank also brought suit against Otto, Munsey, and all other parties the land records indicated held an interest in the subject property, seeking foreclosure of its first-priority mortgage. (R. pp. 71-83.) Munsey also defaulted the complaint in that foreclosure case. (R. pp. 24-25.) Both cases were referred to the master-in-equity. (R. pp. 18-19.) The cases were consolidated. (R. pp. 26-27.) Munsey sought relief from default in both cases, but the master denied those motions. (R. pp. 24-25, 41-42.)

The master-in-equity decreed foreclosure in favor of U.S. Bank. (R. pp. 31-40.) U.S. Bank waived its right to recover a deficiency judgment against Otto. (R. pp. 31, 38.) He also issued an order as to Otto's suit against Munsey, in which he ordered as follows:

> I find that, in light of the foreclosure by the first mortgage holder, Otto has waived her right to foreclose on the Contract for Deed and instead has elected to seek judgment against Munsey for amounts due under the Contract for Deed.
>
> . . .
>
> I find that, since the first mortgage holder which brought the foreclosure action has waived any deficiency judgment against Otto, the amount actually due the first mortgage holder and for which Otto should have claim against Munsey should be adjusted based on the actual foreclosure sale, the amount of the judgment against Munsey should likewise be adjusted once the foreclosure sale occurs. Therefore, the actual amount of the judgment against Munsey will be adjusted after the foreclosure sale occurs on February l. 2015. Therefore, this Court reserves the right to enter a Supplemental Order concerning the judgment amount.
>
> I find that since the actual amount of judgment will not be entered until after the foreclosure sale, Munsey's rights to the property shall not terminate until the foreclosure sale and he shall not be required to deliver possession of the property until the time specified in the Order of Foreclosure.
> NOW, THEREFORE, I CONCLUDE AND IT IS ORDERED that Otto have judgment against Munsey in the amount shown on the attached Exhibit A, subject to revision by Supplemental Order following the foreclosure sale.

(R. pp. 29-30.)

No exhibit was actually attached to that order, but one was attached to the order issued after Munsey made a motion to reconsider. (R. pp. 47-50.) The exhibit sets forth the following as the components of the debt owed by Munsey to Otto on the contract for deed subject of her suit against him:

First Mortgage	$1,183,451.00
Second Mortgage	$177,564.00
Third Mortgage	$15,008.49
Carolina First Payments	$11,052.00
Greenspace	$39,200.00
Attorney Fees	$12,600.00
Attorney Costs	$295.00
Returned Checks	($15,723.00)
Funds in Trust	($6,044.10)
TOTAL	$1,417,403.39

(R. pp. 48, 50.)

That order revised the master's decision to adjudicate the component amounts of the judgment against Munsey and deferred that to a later date, after the conclusion of the appeal Munsey had let the master know he intended to bring of the orders denying him relief from default. (R. p. 49.) It also dealt with the fact that Munsey had already posted a $243,000.00 appeal bond to stay the foreclosure sale ordered in favor of U.S. Bank. (R. pp. 48-50.) The order on Munsey's motion to reconsider ruled, materially to the instant appeal, as follows:

> [T]he Otto Order is hereby amended to include the following Conclusion of Law:
>
> The proceedings shall be stayed without the requirement of an additional *supersedeas* bond pending the disposition of Munsey's appeal in this matter. The Bond currently on deposit with the Clerk of Court shall stand as bond for the entire case, and hence secures a stay of execution of both the Otto Order and the Order of Foreclosure issued by the Court on December 22, 2015 (the "Foreclosure Order"). Further, pending the disposition of Munsey's appeal, no final judgment amount shall be established by either the Otto Order or this Order. A final judgment amount will only be determined by the Court in a separate damages hearing subsequent to the foreclosure sale of the Plaintiff's mortgage as ordered by this Court in the Foreclosure Order.
>
> All other terms and conditions of the Otto Order shall remain in full force and effect.

(R. p. 49.)

Munsey appealed the master's denial of his motions to set aside default to this court and lost. (R. pp. 51-53.)

Following the remittitur, various proceedings were held and, after some time, U.S. Bank's mortgage foreclosure sale was held. (R. p. 363.) The property was sold at the foreclosure sale to a third-party bidder for $783,000.00. (R. p. 363.) As U.S. Bank had already waived its right to a deficiency judgment, no deficiency judgment was entered.

After the sale, Otto filed a motion to recover bond and enter judgment, which the court scheduled for a damages hearing. (R. p. 91-96.) Otto testified at that hearing. (R. p. 247, 249 p. 251 ln. 11 through p. 283 ln. 6.) She stated that a reasonable rental value for the subject real property was $2,150.00 a month. (R. p. 252 ln. 11 through p. 253 ln. 3.) She presented a summary document stating that the amount owed to TD Bank on the debt that had been secured by the second mortgage on the property was $246,475.57. (R. p. 251 ln. 23-25, p. 293.) That document stated that the debt Munsey owed her that had been secured by the third mortgage on the property was $20,601.94. (R. p. 253 ln. 19-21, p. 293.) The court also admitted a document containing Otto's calculations of that third mortgage debt amount. (R. p. 274 ln. 4-21, p. 294-95.) The court sustained a hearsay objection to the proposed admission of a document relating to money Otto contended was owed to Greenspace of Fairview (the owners' association for the subject real property). (R. p. 254 ln. 17-20.) Otto testified that she had incurred substantial attorney's fees in this case but that she could not be sure of the exact amount. (R. p. 274 ln. 23 through p. 276 ln. 5.)

On both direct examination and cross-examination, Otto testified that it had been more than three years since any payment was made on the TD Bank debt that had been secured by the second mortgage and that no suit seeking to collect that debt had ever been brought. (R. p. 272 ln. 14 through p. 273 ln. 8, p. 280 ln. 16 through p. 281 ln. 7.)

No one other than Otto testified at the hearing. (R. pp. 247-92.) The only exhibits admitted into evidence were Otto's summary of what she claimed her damages to be and her calculation of what she claimed to be owed on the third mortgage debt. (R. p. 251 ln. 23-25, p. 274 ln. 4-21, pp. 293-95.)

Otto sought for the remainder of the U.S. Bank first mortgage debt that was not paid through the foreclosure sale to be made a part of her judgment against Munsey, but the master noted that, in light of U.S. Bank's waiver of deficiency judgment, no debt was owed to U.S. Bank any longer. (R. p. 262 ln. 6-12.) Otto also sought to recover everything on her summary sheet, including an amount for fair rental value of the subject property. (R. p. 283 ln. 14 through p. 284 ln. 4.)

Munsey pointed out that the second and third mortgage debts were no longer secured by a mortgage, since those mortgages were wiped out by the U.S. Bank foreclosure sale. (R. p. 284 ln. 11 through p. 286 ln. 8.) Accordingly, citing the case of Newell v. Neal, 50 S.C. 68, 27 S.E. 560, 567 (1897), Munsey argued that the three-year statute of limitations under S.C. Code Ann. § 15-3-530 applies to the second mortgage debt and that, being barred by the statute of limitations, the second mortgage debt was not appropriate for inclusion in the damages to be awarded in Otto's judgment. (R. p. 284 ln. 11 through p. 286 ln. 8.) Munsey argued that Otto had not incurred any damage with regard to the second mortgage debt. (R. p. 284 ln. 11 through p. 286 ln. 8.)

Munsey further argued that the foreclosure sale had removed any previous lien held by Greenspace of Fairview on the subject property and that it was not appropriate to include Greenspace of Fairview debt in Otto's judgment. (R. p. 285 ln. 11-12.) Munsey argued that Otto was not entitled to recover a fair rental value of the property as damages, since she would not have had possession of the property, and that Otto had no legal grounds to recover such rental value from the bond Munsey had deposited. (R. p. 285 ln. 12-25.) Munsey argued that Otto was seeking to recover items of money as damages without having adduced proof that she had actually suffered those damages. (R. p. 286 ln. 2-8.)

The master instructed Otto's counsel to provide information on whether the Greenspace of Fairview debt was Otto's debt personally or was only a lien on the subject property, and the court also instructed Otto's counsel to obtain and file affidavits from the lawyers who had represented Otto concerning the attorneys' fees she had incurred with them. (R. p. 278 ln. 17 through p. 279 ln. 7, p. 287 ln. 12-17.) Munsey's counsel advised Munsey did not object to attorneys' fee information being submitted by affidavit, as long as he had an opportunity to bring up any concerns he might have with those affidavits once they were submitted. (R. p. 279 ln. 4-7.)

Laura Kerhulas Giese and Mark Warner Kerhulas, as Co-Trustees of the Theodore Ernest Kerhulas Trust Under Declaration of Trust dated May 25, 2004 (hereinafter "the Kerhulas Trustees") noted that they have a preexisting judgment against Otto in a different case and argued that any amount of the bond that the master directed to be paid to Otto should be distributed directly to the Kerhulas Trustees instead, as judgment creditors of Otto. (R. p. 288 ln. 8 through p. 289 ln. 16.)

The master, incorrectly believing all counsel to have consented to an order proposed by Otto's counsel, signed and filed that order, which granted Otto judgment against Munsey in the amount of $340,046.85 and directed the clerk of court to pay the entire bond amount to Otto. (R. pp. 54-58.) After that order had been submitted through e-filing but before the clerk of court's office finalized its filing, Munsey's counsel and the Kerhulas Trustees' counsel both sent email messages to the court voicing concerns about the proposed order and opposing its entry. (R. pp. 104-07.) Munsey's counsel pointed out that Otto's counsel had not supplemented the record with attorneys' fee affidavits or information about the Greenspace debt, as the master had directed. (R. p. 107.) The master then drafted and signed an order vacating the order that had been submitted by Otto's counsel. (R. pp. 64-66.) Munsey's counsel submitted a proposed order to rule on the grant of judgment to Otto and the distribution of the bond money. (R. pp. 109-21.)

The master directed that a status conference be held. (R. p. 364.) Two days before the status conference, Otto filed a memorandum attaching a number of exhibits, including ones that were neither offered nor admitted at the damages hearing. (R. pp. 366-436.) Among these exhibits was an affidavit of one Madelon Wallace and its exhibit, which addressed the Greenspace debt. (R. pp. 380-83.) Munsey restated the arguments he made at the damages hearing and noted his objections to the court concerning the exhibits filed with Otto's memorandum, with the exception of the attorneys' fee affidavits. (R. p. 309 ln. 7 through p. 311 ln. 25, p. 314 ln. 13-15, p. 318 ln. 23 through p. 319 ln. 17.)

The master issued an order that awarded Otto essentially everything she sought and more. (R. pp. 1-13.) This included awards to her of $177,564.00 for the debt to TD Bank that had once been secured by a second mortgage, $57,200.00 for Greenspace debt, nearly $90,000.00 in

compound judgment-rate interest retroactively assessed from December 15, 2015, forward, and $84,085.00 of fair rental value. (R. pp. 1-13.) The master awarded Otto a total judgment of $453,143.05 and directed the clerk of court to pay the entire $243,000.00 bond Munsey had put up to the Kerhulas Trustees (as judgment creditors of Otto), less the amount of Otto's attorneys' fees. (R. pp. 9-10, 12.)

Munsey moved to reconsider. (R. pp. 97-121.) The master denied that motion, and, anticipating that Munsey would bring this appeal, ordered that the bond funds should be held by the clerk of court during this appeal's pendency. (R. pp. 14-17.)

This appeal followed.

STANDARD OF REVIEW

"An action for breach of contract seeking money damages is an action at law." McCall v. Ikon, 380 S.C. 649, 658, 670 S.E.2d 695, 700 (Ct. App. 2008) (citing Eldeco, Inc. v. Charleston County Sch. Dist., 372 S.C. 470, 476, 642 S.E.2d 726, 729 (2007)). "On appeal from an action at law that was tried without a jury, the appellate court can correct errors of law, but the findings of fact will not be disturbed unless found to be without evidence which reasonably supports the judge's findings." Blackmon v. Weaver, 366 S.C. 245, 249, 621 S.E.2d 42, 44 (Ct. App. 2005) (citing Townes Assoc. Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976)); accord Wilder v. Blue Ribbon Taxicab Corp., 396 S.C. 139, 142, 719 S.E.2d 703, 706 (Ct. App. 2011). The trial judge's findings "have the force and effect of a jury verdict upon the issues, and are conclusive on appeal when supported by competent evidence." Beheler v. Natl. Grange Mut. Ins. Co., 252 S.C. 530, 535, 167 S.E.2d 436, 438 (1969). The appellate court's scope of review is

limited to determining whether the findings of the lower court are reasonably supported by evidence and to correcting errors of law. Id.

A trial court's decision to admit or exclude evidence will not be disturbed on appeal unless that ruling was an abuse of discretion. Conner v. City of Forest Acres, 363 S.C. 460, 611 S.E.2d 905, 908 (2005). "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion without evidentiary support. To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, *i.e.*, there is a reasonable probability the [decision] was influenced by the wrongly admitted or excluded evidence." Id. (internal citations omitted).

This court reviews all questions of law *de novo* and "may decide questions of law with no particular deference to the trial court." Verenes v. Alvanos, 387 S.C. 11, 15, 690 S.E.2d 771, 772-73 (2010).

ARGUMENT

I. The record lacks proof to support a number of amounts awarded to Otto.

The long and tortured proceedings below may have made the statement of the case in this brief a long one, but what this appeal is about is simple: the master awarded amounts to Otto that are not supported by any evidence and are not damages she suffered as a result of Munsey's breach of their land sale contract. The master awarded Otto "damages" she never suffered at all. These awards are founded in errors of law.

a. Otto provided no evidence that she sustained damage with regard to the second mortgage debt.

The master's order should have reflected a zero-dollar amount under the TD Bank second mortgage category. (R. pp. 6, 7, 12, 99, p. 284 ln. 11 through p. 286 ln. 8.) The master ruled that Otto is entitled to damages that include debt that was once, but is no longer, secured by a mortgage on the real property that was subject of this case. It has been more than three years since a payment was made on that debt. Since it is no longer secured by a mortgage, the three-year statute of limitations in S.C. Code Ann. § 15-3-530(1) applies to a cause of action to collect that debt. Newell, 27 S.E. at 567. In Newell, the Supreme Court held that a debt that was once secured by a mortgage is subject to the ordinary unsecured debt statute of limitations once that mortgage ceases to exist. Id. That is the situation here. No one has sued Otto on that debt and no payment has been made on it since well over three years before the damages hearing was held. It is time-barred. S.C. Code Ann. § 15-3-530(1). Otto will never have to pay it. She has not suffered and never will suffer a loss with regard to it. She presented no evidence to the effect that she lost any money or property because Munsey did not pay it.

"In a breach of contract action, the measure of damages is the loss actually suffered by the contractee as the result of the breach." Collins Holding Corp. v. Landrum, 360 S.C. 346, 350, 601 S.E.2d 332 (2004) (internal quotation marks omitted). "The purpose of an award of damages for breach of contract is to put the plaintiff in as good a position as he would have been in if the contract had been performed. The proper measure of compensation is the loss actually suffered by the plaintiff as a result of the breach." Minter v. GOCT, Inc., 322 S.C. 525, 528, 473 S.E.2d 67, 70 (Ct. App. 1996).

If Munsey had performed his obligations under the contract, that performance would have ended Otto's liability on various debts, since Munsey would have paid them. (R. pp. 326-45.) If the contract had been performed, Otto would not have gotten the second mortgage money. (R. pp. 326-45.) TD Bank would have. (R. pp. 326-45.)

The master ordered, in contravention of the law of damages, that the second mortgage debt be part of Otto's judgment and be paid to her, even though she has a complete defense to any collection action by TD Bank and adduced no evidence to the effect that she suffered any loss in connection with that debt. (R. pp. 6, 7, 12, 99-100, p. 284 ln. 11 through p. 286 ln. 8.) The master entered an order that "compensates" Otto for a loss she has not incurred, placing her in a far better position that she would have been in had the contract been performed. (R. pp. 6, 7, 12, 99-100, p. 284 ln. 11 through p. 286 ln. 8, pp. 326-45.) The master, with neither law nor evidence to support doing so, gave Otto a windfall of hundreds of thousands of dollars more than she could have ever received had Munsey performed under his contract with her. (R. pp. 6, 7, 12, 99-100, p. 284 ln. 11 through p. 286 ln. 8, pp. 326-45.) The law of contract damages does not permit this. Collins Holding Corp., 360 S.C. at 350; Minter, 322 S.C. at 528.

Nor is the master's award of this money to Otto supported by the idea that TD Bank may sue Otto in the future. While one cannot definitively determine what would happen if TD Bank were to sue Otto on this debt, the only evidence that was before the court was to the effect that Otto would have a complete defense to such a suit under the statute of limitations. (R. pp. 6, 7, 12, 99-101, p. 272 ln. 14 through p. 273 ln. 8, p. 280 ln. 16 through p. 281 ln. 7, p. 284 ln. 11 through p. 286 ln. 8); see S.C. Code Ann. § 15-3-530(1); Newell, 27 S.E. at 567. The obligation to mitigate damages applies to breach of contract cases, and, under mitigation of damages

principles, Otto cannot recover for the second mortgage debt if she can avoid incurring any damage concerning it by taking reasonable measures. E.g., Small v. Springs Industries, Inc., 300 S.C. 481, 388 S.E.2d 808 (1990); Lyons v. Fidelity Natl. Title Ins. Co., 415 S.C. 115, 133, 781 S.E.2d 126, 136 (Ct. App. 2015). Raising a statute of limitations defense in any future collection action by TD Bank on this debt would be a reasonable measure for Otto to take. While Otto never proved the existence of any damage concerning the second mortgage debt, the only evidence before the court was that, if TD Bank ever seeks to collect from Otto, mitigation is possible and reasonable that would prevent such collection altogether. Lyons, 415 S.C. at 134.

That Munsey was in default of Otto's complaint did not provide the master with a basis to disregard these fundamental damages principles. "It is well settled that by suffering a default, the defaulting party is deemed to have admitted the truth of the plaintiff's allegations and to have conceded liability" – not the amount or even existence of damages. Roche v. Young Bros., Inc. of Florence, 332 S.C. 75, 81, 504 S.E.2d 311, 314 (1998). Rule 8(d), SCRCP, provides that "[a]verments in a pleading to which a responsive pleading is required, *other than those as to the amount of damage*, are admitted when not denied in the responsive pleading." (Emphasis added.) The failure to serve a timely responsive pleading is an admission of all of a complaint's allegations other than those as to the amount of damages. See id. Otto still had to prove, and Munsey was allowed to contest, the existence and extent of her damages. See id.

In addition, since a pertinent fact (the elimination of the second mortgage) did not develop until after the foreclosure sale occurred, it was proper for Munsey to raise these arguments after the foreclosure sale occurred. See LaRosa v. Johnston, 328 S.C. 293, 297, 493 S.E.2d 100, 102 (Ct. App. 1997) (where "Johnston acquired a statutory defense that had not previously been

available," the Court of Appeals declined "to penalize Johnston for failing to raise a defense which she could not have raised" earlier); Wagner v. Wagner, 286 S.C. 489, 491-92, 335 S.E.2d 246, 247-48 (Ct. App. 1985) (permissible for litigant to raise unpled defense where facts supporting defense were not in existence at the time she answered).

The only evidence adduced in this case shows that Otto has not "actually suffered" a loss with regard to the second mortgage debt "as a result of the breach" by Munsey and, with regard to that debt, is "in as good a position as [s]he would have been in if the contract had been performed. The proper measure of compensation is the loss[,]" which, with respect to the second mortgage debt, is nothing. Minter, 322 S.C. at 528.

The master's finding that Otto had incurred damages with regard to the second mortgage debt is not supported by competent evidence and is grounded in legal error.

b. The master was not bound to use debt components and amounts from Exhibit A to the order filed April 19, 2016.

The master seemed to think he had to use components and amounts from Exhibit A to the order that was filed on April 19, 2016 (and which, apparently, was intended to be filed with the order filed December 15, 2015) in determining Otto's judgment amount. (R. pp. 5-7, 9, 11-12, 28-30, 48, 50.) That was not correct.

The master did render judgment in favor of Otto on December 15, 2015. (R. p. 30.) That order adjudged "that Otto have judgment against Munsey in the amount shown on the attached Exhibit A, subject to revision by Supplemental Order following the foreclosure sale." (R. p. 30.) In his later order filed April 19, 2016, however, the master undid that. (R. p. 49.) On Munsey's motion to reconsider, the master retreated from his earlier decision to adjudicate the component

amounts of the judgment against Munsey and deferred that to a later date, after the conclusion of the appeal Munsey had let the master know he intended to bring of the orders denying him relief from default. (R. p. 49.) Reconsidering his previous decision, the master ruled that

> Pending the disposition of Munsey's appeal, no final judgment amount shall be established by either the Otto Order or this Order. A final judgment amount will only be determined by the Court in a separate damages hearing subsequent to the foreclosure sale of the Plaintiff's mortgage as ordered by this Court in the Foreclosure Order.

(R. p. 49.) This undid the judgment the master had rendered in Otto's favor and provided that judgment would be rendered only once proof of damages was adduced at a later hearing, a hearing that ended up being held on October 29, 2019. (R. pp. 49, 247-92.) After the April 19, 2016, order issued, there was no order as to the controversy between Munsey and Otto that constituted a judgment, because a judgment is an order that "finally determines the rights of" the parties to the litigation. Rule 54(a), SCRCP. Once the master filed the April 19, 2016, order, he had expressly *not* determined that Otto's damages were as set forth on its Exhibit A. (R. p. 49.)

The master was by no means constrained to use the components or amounts shown on that Exhibit A. (R. pp. 49-50.) Indeed, he had already ruled that Otto's "final judgment amount will only be determined . . . in a separate damages hearing[.]" (R. p. 49.) When that hearing was held and the time came for Otto to adduce proof of her damages, she offered no evidence to support many of the amounts the master awarded her. (R. pp. 247-92.)

c. With regard to the Greenspace damages, the master relied on inadmissible evidence that was not adduced at the damages hearing.

As simply prescribed in our rules of evidence, "[h]earsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court of this State or by

statute." Rule 802, SCRE. Here, the master relied on inadmissible hearsay in reaching his conclusion to award Otto $57,200.00 for Greenspace debt. (R. pp. 7-8, 12.) We know this because the only information offered to support that conclusion was the affidavit of Madelon Wallace and its attached exhibit, which were only filed with a memorandum well after the damages hearing. (R. pp. 380-83.) This information consisted of out-of-court statements offered to prove the truth of what those statements asserted, i.e., the nature and amount of Otto's debt to Greenspace. (R. pp. 380-83); see Rule 801(c), SCRE. No hearsay exception applied to it. This evidence was inadmissible, and the master erred in allowing it and in relying on it. (R. pp. 7-8, 12, 98-99, p. 287 ln. 12-17, p. 309 ln. 7 through p. 311 ln. 25, p. 314 ln. 13-15, p. 318 ln. 23 through p. 319 ln. 17.)

The prejudice to Munsey is plain. The master's allowance and consideration of this hearsay evidence is all that supported his decision to award Otto $57,200.00 for Greenspace debt. (R. pp. 7-8, 12, 380-83.) This is not like Hoyler v. State, in which a master-in-equity held the record open to allow a party's case to be supplemented with deposition testimony to be taken later. 428 S.C. 279, 308, 833 S.E.2d 845, 861 (Ct. App. 2019). In Hoyler, the opposing party got to participate in the deposition, thus being afforded the right to cross-examine, and he could, thus, not demonstrate prejudice to him. See id. at 308-09. Munsey could not cross-examine Madelon Wallace's affidavit, and the court erred reversibly in considering it, to Munsey's prejudice. This is exactly the sort of situation that warrants reversal. See Conner, 611 S.E.2d at 908.

II. The master denied Munsey his procedural rights regarding cross-examination and objection to evidence.

At a damages hearing, the defendant in default has the right to cross-examine witnesses and the right to object to the admission of evidence, including objecting to testimony. Limehouse

v. Hulsey, 404 S.C. 93, 114, 116-17, 744 S.E.2d 566, 578, 579 (2013) (holding that "a defendant's participation in a post-default hearing [is limited] to cross-examination and objection to the plaintiff's evidence" as to "effectuate[] the purpose of default proceedings" and remain "consistent with Rule 55(b)(2)[, SCRCP]"); Howard v. Holiday Inns, Inc., 271 S.C. 238, 242, 246 S.E.2d 880, 882 (1978) (holding that "the defendant will be permitted to participate [in a damages hearing] by cross-examining witnesses and objecting to evidence"). These are rights of procedural due process. See Moore v. Moore, 376 S.C. 467, 472, 657 S.E.2d 743, 746 (2008). Munsey was denied these rights with respect to the matter Otto filed shortly before the status conference, including the Madelon Wallace affidavit and its exhibit. This was impermissible as a matter of law.

"Procedural '[d]ue process requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses.'" Id. at 473 (quoting Clear Channel Outdoor v. City of Myrtle Beach, 372 S.C. 230, 235, 642 S.E.2d 565, 567 (2007)). "The requirements in a particular case depend on the importance of the interest involved and the circumstances under which the deprivation may occur." S.C. Dept. of Soc. Servs. v. Beeks, 325 S.C. 243, 246, 481 S.E.2d 703, 705 (1997). While South Carolina's case law abrogated Munsey's right to introduce evidence within the context his default damages hearing, his right to the other procedural due process requirements remained intact. Munsey had a constitutionally protected right to confront and cross-examine witnesses, including Madelon Wallace. What the master did is unconstitutional, and, thankfully, is a correctable error of law. See Blackmon, 366 S.C. at 249, 621 S.E.2d at 44.

In another case also involving procedural due process rights, this court observed that "[t]he law recognizes two kinds of errors: trial errors and structural defects. The former are subject to

'harmless error' analysis while the latter are not. . . . [S]tructural defects in the constitution of the trial mechanism defy analysis by harmless error standards." LaSalle Bank Natl. Assn. v. Davidson, 386 S.C. 276, 280, 688 S.E.2d 121, 123 (2009) (internal quotation marks omitted). Structural defects are errors in the very way that the process of deciding the issue is set up. Id. In allowing and relying on an affidavit and its exhibit without Munsey having any opportunity to cross-examine the affiant, the master created a "structural defect in the constitution of the trial mechanism[.]" Id. When a proceeding is structurally defective, nothing but reversal can cure such a defect. See id.

III. Otto does not have any right to recover anything for rental value or otherwise for possession of the real estate.

The master also erred in awarding Otto any fair rental value for the subject property at all. The master did so under S.C. Code Ann. § 18-9-170, which provides that

> [w]hen the judgment directs the sale of land to satisfy a mortgage thereon or other lien, the undertaking shall provide that in case the judgment appealed from be affirmed and the land be finally sold for less than the judgment debt and costs then the appellant shall pay for any waste committed or suffered to be committed on the land and shall pay a reasonable rental value for the use and occupation of the land from the time of the execution of the undertaking to the time of the sale[.]

S.C. Code Ann. § 18-9-170; (R. pp. 8-9).

This statute does provide for recovery of fair rental value, in applicable circumstances, but it does so for the party in whose favor a judgment directing the sale of land has been rendered. S.C. Code Ann. § 18-9-170. Despite Munsey's counsel having repeatedly brought it to his attention, the master ignored that no judgment directing the sale of land has, at any time, been rendered in Otto's favor. (R. pp. 28-30, 47-50, p. 285 ln. 12-16, p. 310 ln. 15-17.) Such a judgment

was rendered in U.S. Bank's favor, but U.S. Bank abandoned any right it might have had to seek money from the bond, as it did not attend the hearing on Otto's motion seeking distribution of the bond. (R. pp. 31-40, 247-48.)

The purpose of the undertaking in a mortgage foreclosure appeal is to protect the foreclosure plaintiff from impairment of the full payment of the adjudged debt caused by the property lessening in value during the pendency of the appeal. See S.C. Code Ann. § 18-9-170; Gerald v. Gerald, 30 S.C. 348, 9 S.E. 274, 275 (1889). "The manifest object of the undertaking required for the purpose of staying a sale pending an appeal is to protect the respondent, [i.e., the foreclosure plaintiff] as far as practicable, from any damage which may ensue from the delay caused by the appeal, in enforcing his claim." Gerald, 9 S.E. at 275. The statute provides for recovery of "the amount of the value of the use and occupation, but only that such amount should go to aid in paying the mortgage debt in case the proceeds of the sale of the mortgaged premises should prove insufficient for that purpose." Id. at 276. Otto never obtained a foreclosure judgment in her favor. (R. pp. 28-30, 47-50, p. 285 ln. 12-16, p. 310 ln. 15-17.) She was not the party who could have recovered fair rental value under S.C. Code Ann. § 18-9-170.

Additionally, "[a] party seeking a default judgment is entitled to only such relief as is framed by his pleading, and then only to the extent requested therein." Mutual Savings & Loan Assn. v. McKenzie, 274 S.C. 630, 266 S.E.2d 423, 424 (1980); accord Rule 54(c), SCRCP. Otto sued Munsey for breach of a contract under which he was to buy real estate from Otto, not under which Otto was to *gain* possession of the real estate. (R. pp. 67-70, p. 285 ln. 19-25, pp. 326-45.) If Munsey had performed the contract, Otto would not have had the property or possession of it. (R. pp. 67-70, p. 285 ln. 19-25, pp. 326-45.) The law of contract damages does not permit Otto to

recover the fair rental value of property she was selling; rather, the measure of her damages is what would put her in the place she would have been in had Munsey performed, in which event she would not have had the right to possess the real property. The law of contract damages does not permit this. Collins Holding Corp., 360 S.C. at 350; Minter, 322 S.C. at 528.

The master's award of fair rental value to Otto was grounded in an error of law and is without evidentiary support. It requires reversal.

IV. Otto has no right to judgment interest for any period before her judgment was rendered.

The master awarded Otto interest at legal rate for judgments, not just prospectively but also retroactively to December 15, 2015, which was the date the master had rendered judgment in Otto's favor before he undid that judgment, as discussed above. (R. pp. 7, 12, 28-30, 49.) Judgment interest is prospective, not retroactive. S.C. Code Ann. § 34-31-20(B).

There is no basis in the law for the master to have awarded Otto judgment interest for a period of time before her judgment was rendered. See id. This is reversible error.

CONCLUSION

Respectfully, the master erred prejudicially, as discussed above. This court should reverse the master as to the improperly awarded amounts, removing those amounts from the judgment and letting the remainder of the judgment stand. In the alternative, this court should reverse and remand for a new decision on the basis of the evidence that was actually properly before the master or, in the further alternative, remand for a new decision after a new damages hearing.

Respectfully submitted,

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February 22, 2021

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
Gordon G. Cooper, Master-in-Equity

Appellate Case No. 2020-0000454

U.S. Bank, NA, as trustee relating to the Chevy Chase Funding, LLC Mortgage Backed Certificates, Series 2004-B, ...Plaintiff,

v.

Alyce F. Otto, Individually; Alyce F. Otto, Trustee Under Declaration of Trust of Alyce F. Otto dated the 17th of November 2009; TD Bank, NA; The United States of America, acting by and through its agency, the Internal Revenue Service; Laura Kerhulas Giese, as Co-Trustee of the Theodore Ernest Kerhulas Trust Under Declaration of Trust dated May 25, 2004; Mark Warner Kerhulas, as Co-Trustee of the Theodore Ernest Kerhulas Trust Under Declaration of Trust dated May 25, 2004; Jackson L. Munsey, Jr.; Citibank, NA, ...Defendants,

and

Alyce F. Otto, Trustee Under Declaration of Trust of Alyce F. Otto dated November 17, 2009, ...Plaintiff,

v.

Jackson L. Munsey, Jr. ..... Defendant,

of whom Jackson L. Munsey, Jr., is the ..... Appellant,

and

Alyce F. Otto, Individually; Alyce F. Otto, Trustee Under Declaration of Trust of Alyce F. Otto dated the 17th of November 2009; Laura Kerhulas Giese, as Co-Trustee of the Theodore Ernest Kerhulas Trust Under Declaration of Trust dated May 25, 2004; Mark Warner Kerhulas, as Co-Trustee of the Theodore Ernest Kerhulas Trust Under Declaration of Trust dated May 25, 2004 are the..... Respondents.

CERTIFICATE OF COUNSEL
REGARDING COMPLIANCE WITH RULE 211(b), SCACR

I certify that the foregoing final brief complies with Rule 211(b), SCACR.

Respectfully submitted,

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February 22, 2021