THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Alex Kinlaw, Jr.

APPELLATE CASE NO. 2024-000521

Everett Homes, LLC……Respondent,

v.

Jermaine LeClerc……..……Appellant,

BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. WHETHER THE CIRCUIT COURT ERRED IN ENTERING DEFAULT AND DENYING RESPONDENT RELIEF FROM DEFAULT JUDGMENT WHERE NO EVIDENCE WAS PRESENTED THAT THE AMENDED COMPLAINT WAS SERVED UPON APPELLANT.

2. WHETHER THE CIRCUIT COURT ERRED IN ENTERING DEFAULT AND DENYING DEFENDANT RELIEF FROM DEFAULT JUDGMENT WHERE APPELLANT WAS NEVER PROPERLY SERVED.

3. WHETHER THE CIRCUIT COURT ERRED IN AWARDING RESPONDENT $47,916.67 IN ACTUAL DAMAGES WHERE THE EVIDENCE PRESENTED DOES NOT SUPPORT THIS AWARD.

4. WHETHER THE CIRCUIT COURT ERRED IN AWARDING RESPONDENT $143,750.01 IN PUNITIVE DAMAGES WHERE THE EVIDENCE PRESENTED DOES NOT SUPPORT THIS AWARD.

5. WHETHER THE CIRCUIT ERRED IN AWARDING RESPONDENT'S ATTORNEY'S FEES AND COSTS IN THE AMOUNT OF $18,304.26 WHERE THE EVIDENCE PRESENTED DOES NOT SUPPORT THIS AWARD.

STATEMENT OF THE CASE

In or around February 2019, a parcel of real property on Mountainview Avenue in Greenville, South Carolina was subdivided into two tracts, Tract A and Tract B. (R. p. 51, paragraph 1; p. 52, paragraph 5). . On May 29, 2022, both Tract A and Tract B were owned by Respondent, and the parties executed a contract for the purchase and sale of Tract A, being real property located at 222 W. Mountainview Avenue in Greenville, South Carolina. (R. pp. 58-66). On or about August 4, 2022, at the closing of this transaction, Respondent executed a deed to Appellant for both Tract A and Tract B. (R. p. 52, paragraph 6; pp. 67-70). On May 2, 2023, the closing attorney notified Appellant of the error in the deed executed by Respondent. (R. pp. 71-73).

Less than one month later, on May 27, 2023, Respondent initiated this action by filing a Summons and Complaint seeking declaratory judgment and asserting causes of action to quiet title to

Tract B (referred to herein as "the Property") and for slander of title. (R. pp. 25-49). On June 5, 2023, Respondent attempted to serve the Summons and Complaint upon Appellant by delivering it to FedEx with instructions to deliver the package to Dr. James Leclere (sic) at 275 Southwest Lost River Road in Stuart Florida. (R. p. 222). On June 7, 2023, the package was signed for by Appellant's mother, Betty LeClerc. (R. p. 223).

Prior to the attempted service, on May 30, 2023, Respondent filed an Amended Summons & Complaint asserting an additional cause of action for unjust enrichment. (R. pp. 51-57). There is no record that service of the Amended Summons and Complaint was ever attempted on Appellant.

On July 17, 2023, Respondent filed an Affidavit of Default, (R. p. 227), and Motion for Default Judgment. (R. pp. 76-77). An Order of Default Judgment was filed August 1, 2023, which granted default judgment on Respondent's causes of action for declaratory judgment, quiet title, and unjust enrichment and stated a damages hearing would be held to determine damages for Respondent's slander of title cause of action. (R. pp. 1-6).

On October 13, 2023, Respondent filed a Motion for Damages Hearing. (R. pp. 78-79). On November 21, 2023, Appellant filed a Motion for Relief from Judgment and to Dismiss. (R. pp. 80-82). A hearing on Appellant's Motion for Relief and Respondent's damages was held on November 28, 2023. This hearing resulted in two Form 4 Orders, an Order stating the court was inclined to deny Appellant's Motion for Relief, (R. pp. 7-9), and an Order requesting that each party submit a proposed order regarding Respondent's Motion for Damages, (R. pp. 10-12).

On December 4, 2023, Appellant filed a Motion to Reconsider the Order denying his Motion for Relief. (R. pp. 88-114). The trial court issued an Order granting damages on March 5, 2024. (R. pp. 13-24). The Notice of Appeal was filed on April 1, 2024. (R. pp. 247-248).

ARGUMENT

I. THE CIRCUIT COURT ERRED IN ENTERING DEFAULT AND DENYING RESPONDENT RELIEF FROM DEFAULT JUDGMENT WHERE NO EVIDENCE WAS PRESENTED THAT THE AMENDED COMPLAINT WAS SERVED UPON RESPONDENT.

Standard of Review

The power to set aside a default lies solely within the sound discretion of the trial court and will not be disturbed on appeal absent a clear showing of an abuse of discretion. *Richardson v. P.V., Inc.*, 383 S.C. 610, 682 S.E.2d 263 (2009); *Roberson v. Southern Finance of South Carolina*, 365 S.C. 6, 615 S.E.2d 112 (2005); *Frank Ulmer Lumber Co. v. Patterson*, 272 S.C. 208, 250 S.E.2d 121 (1978). An abuse of discretion in setting aside a default judgment occurs when the judge issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal, conclusions is without evidentiary support. *Hill v. Dotts*, 345 S.C. 304, 547 S.E.2d 894 (Ct. App. 2001); *In re Estate of Weeks*, 329 S.C. 251, 495 S.E.2d 454 (Ct. App. 1997).

Argument

"A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within fifteen days after service of the named amended pleading, whichever period may be the longer, unless the court otherwise orders." Rule 15 SCRCP.

Respondent filed an Amended Summons and Complaint on May 30, 2023. (R. p. 50). However, the Amended Complaint was never served upon Appellant. (R. pp. 221-226). Further, although not dispositive on the issue, the amendments to the Complaint were not just to correct clerical

or other scrivener errors that would not prejudice Appellant. Instead, the Amended Complaint added an entirely new cause of action for damages that was never served upon Appellant so he could respond.

Despite this deficiency, the trial court granted default judgment against Appellant pursuant to the Amended Complaint, (R. p. 1, ¶ 1), including granting default judgment on Respondent's cause of action for unjust enrichment – a cause of action Appellant had never been served with pleadings for nor had any opportunity to respond to.

Therefore, the Order of Default Judgment filed August 1, 2023, is based on a clear error of law and Appellant respectfully requests reversal of the Order of Default Judgment. For the same reasons, the trial court's denial of Appellant's Motion for Relief from Judgment in its March 5, 2024 Order is also based on an error of law, and, to the extent necessary, Appellant also requests reversal of the Final Order.

II. THE CIRCUIT COURT ERRED IN ENTERING DEFAULT AND DENYING RESPONDENT RELIEF FROM DEFAULT JUDGMENT WHERE RESPONDENT WAS NEVER PROPERLY SERVED.

Standard of Review

"The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the trial judge." *Roberson*, 365 at 9, 615 S.E.2d at 114 (citing *Thompson v. Hammond*, 299 S.C. 116, 119, 382 S.E.2d 900, 902-03 (1989)). "The trial court's decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion." *Id.* (citing *Mitchell Supply Co., Inc. v. Gaffney*, 297 S.C. 160, 162-63, 375 S.E.2d 321, 322-23 (Ct. App. 1988)). "An abuse of discretion in setting aside a default judgment occurs when the judge issuing the order was controlled by some error of law or when the order, based upon factual, as

distinguished from legal conclusions, is without evidentiary support." *Id.* (citing *Weeks*, 329 S.C. at 259, 495 S.E.2d at 459).

However, the abuse of discretion standard does not apply to issues regarding service of process, which implicates the personal jurisdiction of the court. *See Richardson Const. Co., Inc. v. Meek Eng'g & Const., Inc.*, 274 S.C. 307, 309, 262 S.E.2d 913, 915 (1980) (where a motion to set aside a default judgment is "grounded upon the court's lack of jurisdiction over appellant by reason of respondent's alleged failure to serve the Summons, . . . when warranted, [such relief] is not discretionary but a matter of right."); 49 C.J.S. Judgments § 535 ("[I]f a default judgment is void, the court has no discretion and must set the judgment aside.").

Argument

Personal service may be made upon an individual by "delivering a copy of the summons and complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein." Rule 4(d)(1) SCRCP. Service may be made upon a defendant via a commercial delivery service; however, service pursuant to those techniques "shall not be the basis for the entry of a default or a judgment by default unless the record contains a return receipt showing acceptance by the defendant which includes an original signature or electronic image of the signature of the person served." Rule 4(d)(9) SCRCP. "Any such default or judgment by default shall be set aside pursuant to Rule 55(c) or Rule 60(b) if the defendant demonstrates to the court that the delivery receipt was signed by an unauthorized person." *Id.* "The rules of civil procedure with respect to service of process are mandatory and the strictest and most exacting compliance with them is required when service

is by mail." *Roche v. Young Brothers*, 313 S.C. 356, 358, 437 S.E.2d 560, 561 (Ct. App. 1993) *rev'd* 318 S.C. 207, 456 S.E.2d 897 (1995).

Although the language of Rule 4(d)(9) regarding entry of default and setting aside default judgment has not been directly reviewed by the Courts, similar language in Rule 4(d)(8) has been interpreted at length. Specifically, in *Graham Law Firm, P.A. v. Makawi*, the Supreme Court stated, "an individual is as competent as any other entity to confer authority on an agent" to receive service of process. 396 S.C. 290, 297, 721 S.E.2d 430, 434 (2012). However, the Court also upheld the trial court's ruling that the plaintiff's attempt to serve the defendant by certified mail was insufficient because the return receipt was signed by an unauthorized person and the plaintiff failed to present any evidence that the signer had either actual or apparent authority to accept service. *Id.* at 298, 721 S.E.2d at 434.

It is undisputed that Appellant never signed a return receipt showing acceptance of any pleadings. Further, Respondent did not present any evidence that Appellant's mother had either actual or apparent authority to accept service on his behalf either in relation to Respondent's request for entry of default or in its response to Appellant's Motion for Relief from Judgment.

The trial court's interpretation of Rule 4(d)(9) incorrectly shifts the burden of showing authority to accept service to a defendant, who often, as here, will not even have notice the case exists. (R. p. 19). Without requiring evidence of the signer's actual or apparent authority to accept service, the Rule would allow "anyone who happens to pick up the mail" to stand in for the defendant, *see Langley v. Graham,* 322 S.C. 428, 430 n.2, 472 S.E.2d 259, 261 n.2 (Ct. App. 1996), who may never know he is in default until the resulting judgment is executed against him.

Therefore, Appellant respectfully requests reversal of the Order of Default Judgment and, to the extent necessary, the Final Order.

III. THE CIRCUIT COURT ERRED IN AWARDING RESPONDENT $47,916.67 IN ACTUAL DAMAGES WHERE THE EVIDENCE PRESENTED DOES NOT SUPPORT THIS AWARD.

Standard of Review – Sections III, IV, and V

On appeal from a case tried by a judge in an action at law, "the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings." *Townes Assocs. Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976). *Alexander's Land Co., LLC v. M & M & K Corp.*, 390 S.C. 582, 703 S.E.2d 207 (2010); *Auto Owners Ins. Co. v. Rollison*, 378 S.C. 600, 663 S.E.2d 484 (2008). However, questions of law are reviewed *de novo*. *Flexon v. PHC-Jasper, Inc.*, 413 S.C. 561, 569, 776 S.E.2d 397, 402 (Ct. App. 2015) (citing *Proctor v. Steedley*, 398 S.C. 561, 573, 730 S.E.2d 357, 363 (Ct. App. 2012)). "[A] reviewing court is free to decide questions of law with no particular deference to the trial court." *Id.*

Argument

"[T]o maintain a claim for slander of title, the plaintiff must establish (1) the publication (2) with malice (3) of a false statement (4) that is derogatory to plaintiff's title and (5) causes special damages (6) as a result of diminished value of the property in the eyes of third parties." *Huff v. Jennings*, 319 S.C. 142, 149, 459 S.E.2d 886, 891 (Ct. App. 1995). "Actual malice can mean the defendant acted recklessly or wantonly, or with conscious disregard of the plaintiff's rights." *Constant v. Spartanburg Steel Prods., Inc.*, 316 S.C. 86, 89, 447 S.E.2d 194, 196 (1994).

"A defendant in default admits liability but not the damages as set forth in the prayer for relief." *Solley v. Navy Fed. Credit Union*, 397 S.C. 192, 203, 723 S.E.2d 597, 603 (Ct. App. 2012) (citing *Renney v. Dobbs House, Inc.*, 275 S.C. 562, 566, 274 S.E.2d 290, 292 (1981)). "The amount of damages in a default action must be proved by the preponderance of the evidence." *Id.*

In *Solley,* the Court recognized the majority view that for a party to incur damages in a slander of title action, the party must actually suffer a loss, "i.e. sell the property for less than it was worth, not be able to sell the home at all, or be unable to obtain a loan." *Id.* at 210, 723 S.E.2d at 606. Where the party did not attempt to do anything that actually caused them to suffer a loss, their sole remedy in a slander of title action is to recover their reasonable attorney's fees and costs of litigation. *Id.* at 210-11, 723 S.E.2d at 606-07.

Here, the damages awarded by the trial court to Respondent are not related to any actual loss. Only one witness was called during the damages hearing, the owner of Respondent, and did not testify to any damages. The Property was unencumbered by any debt. (R. p. 202, line 24-p. 203, line 2). Respondent did not list the Property for sale until after the title issue was rectified. (R. p. 213, lines 22-24). And once the Property was listed, Respondent actually profited from the sale. (R. p. 203, lines 6-8). As such, Respondent suffered no actual damages.

Instead, the trial court awarded damages based on Respondent's attorney's calculation of pre-judgment interest on the $1 million Respondent received when it sold the Property. (R. p. 207, lines 20-p. 208, line 6). This calculation was based on five months of interest from May 2, 2023 through October 2, 2023, at the judgment rate of 11.5%. (R. p. 207, lines 20-p. 208, line 6). There is no legal support for awarding pre-judgment interest in an action for slander of title and Respondent did not request pre-judgment interest in its Complaint or Amended Complaint.

Further, such a calculation has no relationship to any actual damages suffered by Respondent. The purpose of judgment interest is to encourage judgment debtors to pay their judgments promptly. *See Casey v. Casey*, 311 S.C. 243, 245, 428 S.E.2d 714, 716 (1993). It is not intended to be a way to create actual damages where none exist.

Finally, Respondent's attorney's calculation is incorrect. The Order of Default Judgment quieted title to the Property in Respondent. (R. pp. 1-2, ¶ 5). That Order was filed on August 1, 2023. (R. p. 1). As such, even if the calculation was a proper measure of damages, the damages ended on August 1st and should be limited to three months instead of five.

Therefore, Appellant respectfully requests that this Court reverse the decision of the trial court regarding damages and find that Respondent suffered no actual damages.

IV. THE CIRCUIT COURT ERRED IN AWARDING RESPONDENT $143,750.01 IN PUNITIVE DAMAGES WHERE THE EVIDENCE PRESENTED DOES NOT SUPPORT THIS AWARD.

"Punitive damages are . . . by definition 'punishing damages' or 'private fines' levied to punish a wrongdoer for reprehensible conduct and to deter its repetition in the future." *Patterson v. I.H. Servs.*, 295 S.C. 300, 310, 368 S.E.2d 215, 221 (Ct. App. 1998) (citations omitted). "The state's interests in awarding punitive damages must remain consistent with the principle of penal theory that 'the punishment should fit the crime.'" *Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 584, 686 S.E.2d 176, 183 (2009) (citations omitted). "In any civil action where punitive damages are claimed, the plaintiff has the burden of proving such damages by clear and convincing evidence." S.C. Code Ann. § 15-33-135.

> [T]o ensure that a punitive damage award is proper, the trial court shall conduct a post-trial review and may consider the following: (1) defendant's degree of culpability; (2) duration of the conduct; (3) defendant's awareness or concealment; (4) the existence of similar

> past conduct; (5) likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) defendant's ability to pay; and finally, (8) . . . "other factors" deemed appropriate.

Gamble v. Stevenson, 305 S.C. 104, 111-12, 406 S.E.2d 350, 354 (1991). "Upon completing its review, dedicated to the postulate that no award be grossly disproportionate to the severity of the offense, the trial court shall set forth its findings on the record." *Id.*

Here, the trial court did not consider any of the *Gamble* factors. Instead, the court simply found that "Because the Defendant is in default, punitive damages are deemed proven by admission, however the award of punitive damages are at the sound discretion of the Court." (R. pp. 21-22). Specifically, no evidence was presented to the court regarding Appellant's ability or inability to pay. Further, while stating that the award is in the sound discretion of the court, the trial court did not utilize its discretion – simply accepting Respondent's request for treble damages and ordering same. (R. pp. 21-22). "When the trial judge is vested with discretion, but his ruling reveals no discretion was, in fact, exercised, an error of law has occurred." *Fontaine v. Peitz*, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987). There is no evidence, let alone clear and convincing evidence, that would allow the trial court to determine whether to award punitive damages and in what amount.

Finally, even if the Court determines that Respondent proved punitive damages by clear and convincing evidence, the issue of punitive damages should be remanded to the trial court for reconsideration in light of Respondent's failure to prove actual damages. *See Solley*, 397 S.C. at 213, 723 S.E.2d at 608 (citing *Reid v. Harbison Dev. Corp.*, 289 S.C. 319, 322, 345 S.E.2d 492, 493 (1986), overruled on other grounds by *O'Neal v. Bowles*, 314 S.C. 525, 431 S.E.2d 555 (1993) ("Generally, actual damages should not be separated from punitive damages for a retrial on

actuals alone. Punitive damages may only be awarded if actuals are recovered, and therefore, retrial only on actual damages may be improper since punitive damages may change depending on the actual damage award. In the interest of justice and fairness to all parties, both actual and punitive damages should be reconsidered together on retrial." (citations omitted))).

Therefore, Appellant respectfully requests that this Court reverse the decision of the trial court regarding punitive damages.

V. THE CIRCUIT ERRED IN AWARDING RESPONDENT ATTORNEY'S FEES AND COSTS IN THE AMOUNT OF $18,304.26 WHERE THE EVIDENCE PRESENTED DOES NOT SUPPORT THIS AWARD.

> (1) The pecuniary loss for which a publisher of injurious falsehood is subject to liability is restricted to
>
> (a) the pecuniary loss that results directly and immediately from the effect of the conduct of third persons, including impairment of vendibility or value caused by disparagement, and
>
> (b) the expense of measures reasonably necessary to counteract the publication, including litigation to remove the doubt cast upon vendibility or value by disparagement.

Solley, 397 S.C. at 206-07, 723 S.E.2d at 604 (citing Restatement (Second) of Torts § 633). "[A]ttorney fees may be recoverable as special damages if incurred 'to clear title or to undo any harm created by whatever slander of title occurred.'" *Id.* at 207, 723 S.E.2d at 604-05 (quoting *Gillmor v. Cummings*, 904 P.2d 703, 708 (Utah Ct. App. 1995)).

Here, any title issue was resolved by the Order of Default Judgment filed August 1, 2023, quieting title in the Property to Respondent. (R. pp. 1-2, ¶ 5). As such, the expense of measures reasonably necessary to remove the doubt cast upon the title were minimal. This expense included,

filing a complaint,[1] attempting to serve the complaint, and filing documents necessary to secure default judgment. While it is not clear from the record what fees and costs were related to these acts, they are far less than the $18,304.26 awarded. At least $6,177.50 of the awarded expenses were incurred between the Order of Default Judgment and the damages hearing and an additional $4,475.00 were incurred between the damages hearing and the Final Order being filed on March 5, 2024. (R. pp. 22-23).

These additional expenses are not special damages incurred to remove the title defect. They are the expenses incurred to recover those special damages, which are much lower than the total fees and costs incurred by Respondent.

Further, to the extent this Court reverses the trial court on any of the issues stated above, the Court should also reverse and remand the issue of attorney's fees and costs for consideration in light of the change in beneficial results obtained. *See Jackson v. Speed*, 326 S.C. 289, 308, 486 S.E.2d 750, 760 (1997).

Therefore, Appellant respectfully requests that this Court reverse the decision of the trial court regarding attorney's fee and costs.

[1] The Amended Complaint was filed to seek damages under a theory of unjust enrichment. As such, expenses related to the Amended Complaint were not necessary to clear title.

CONCLUSION

For the reasons stated, Appellant respectfully requests that this Court reverse the judgment of the circuit court and remand this case for further proceedings on the merits.

Respectfully submitted,

August 19, 2024

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