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**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

The Honorable Alex Kinlaw, Jr.

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APPELLATE CASE NO. 2024-000521

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Everett Homes, LLC.....Respondent,

v.

Jermaine LeClerc.....Appellant,

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REPLY BRIEF

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## ARGUMENT

### **I. THE CIRCUIT COURT ERRED IN GRANTING DEFAULT JUDGMENT WHERE THE RECORD REFLECTED AN AMENDED COMPLAINT HAD BEEN FILED AND NEVER SERVED UPON APPELLANT.**

“When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default upon the calendar (file book).” Rule 55(a) SCRCP.

Here, the record before the court entering default judgment did not show Appellant had failed to plead or otherwise defend as provided in the rules. In its order filed August 1, 2023, the trial court specifically found that an Amended Summons and Complaint was filed on May 30, 2023. (R. p. 1, ¶ 1). Respondent’s affidavit of default states that thirty days have elapsed since service of the Summons and Complaint upon Appellant but makes no mention of service of the Amended Summons and Complaint. (R. p. 227). Similarly, there is no mention of service of an Amended Summons and Complaint in the certificate of service. (R. p. 221).

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.

### **II. THE CIRCUIT COURT ERRED IN DENYING APPELLANT’S MOTION FOR RELIEF FROM DEFAULT JUDGMENT WHERE APPELLANT PRESENTED THE ISSUE AT THE HEARING THAT APPELLANT HAD NEVER BEEN SERVED WITH THE AMENDED COMPLAINT.**

Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide the appellate court with a platform for meaningful appellate review. *Herron v. Century BMW*, 409 S.C. 563, 762 S.E.2d 693 (2012). In order to preserve an issue for appellate review, the issue must have been (1) raised to and ruled upon by the lower court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the lower court with

sufficient specificity. *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 641 S.E.2d 903 (2007).

The first step in preserving an issue for appellate review is to raise it to the lower court. *Lucas v. Rawl Family Ltd. P'ship*, 359 S.C. 505, 598 S.E.2d 712 (2004); *Wilder Corp. v. Wilke*, 330 S.C. 71, 497 S.E.2d 731 (1998). As long as the judge had an opportunity to rule on an issue, and did so, it is not “incumbent upon . . . counsel to harass the judge by parading the issue before him again.” *State v. McDaniel*, 320 S.C. 33, 462 S.E.2d 882 (Ct. App. 1995) (quoting *Dunn v. Coca-Cola Bottling Co.*, 331 S.C. 43, 426 S.E.2d 756 (1993)) (internal quotation marks omitted).

In his Motion for Relief from Judgment, Appellant raised the issue that “[Respondent] did not properly serve [Appellant] with service of process.” (R. p. 81, ¶ 4(b)). Further, Appellant’s specifically raised the issue of Respondent’s failure to serve the Amended Complaint at the hearing on his Motion for Relief as one basis for Appellant’s motion:

7       Subsequently, there was an amended  
8       [complaint]. I cannot see where that was ever  
9       served at all either on my client or to his mother.  
10       We’re making a motion to reopen on Rule 4 (d) (1),  
11       4 (d) (9), and Rule 60(b).

(R. p. 191, lines 7-11). In denying Appellant’s motion, the trial court acknowledged that Appellant’s argument for his motion was based on improper service. (R. p. 15).

As such, the issue was specifically raised to the trial court in a timely manner and ruled upon. Therefore, Appellant reiterates his request for reversal of the Final Order for the reasons stated in the Brief of Appellant.

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

In order to preserve an issue for appellate review, the issue must have been (1) raised to and ruled upon by the lower court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the lower court with sufficient specificity. *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 641 S.E.2d 903 (2007).

The issue of damages is at the heart of a damages hearing. Respondent testified to his damages and Appellant contested those damages. As such, regardless of whether Appellant specifically objected to the methodology of how Respondent calculated his damages, the issue of damages was raised, contested by Appellant in a timely manner, and ruled upon by the trial court.

Further, Appellant specifically raised the defects in Respondent's damages calculation to the trial court in Appellant's cross-examination.

13       **Q**       What actual damages are you claiming? I'm  
14       having a hard time understanding how your house was  
15       prevented to be sold. You didn't have a contract  
16       that it interfered with, correct?

(R. p. 215, lines 13-16). And Appellant admitted the damages calculated by his attorney were speculative damages based on money that "could have been used" for other projects if this Property had sold more quickly as opposed to actual costs Appellant incurred.

4       **Q**       What are you actually claiming your actual  
5       damages from this are, from this clerical error?  
6       **A**       So the damages were calculated by Wendell, my  
7       lawyer, and that was just interest on the money  
8       that could have been used, and then --  
9       **Q**       Could have been used?  
10       **A**       What's that?  
11       **Q**       It wasn't prevented from being used?  
12       **A**       Well, it was tied up in the house. You know,

13 the money that was tied up in the house, I couldn't  
14 use on other projects I had, so that's what it is  
15 calculated off of. And then other things that - -  
16 and I don't know if this is in there, but  
17 maintaining it. I had to pay, you know, to keep  
18 the house running, you know, power, water.

(R. p. 216, lines 4-18). Therefore, for these reasons and the reasons stated in the Brief of Appellant, 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.**

“The written order is the trial [court]'s final order and as such constitutes the final judgment of the court.” *Corbin v. Kohler Co.*, 351 S.C. 613, 621, 571 S.E.2d 92, 97 (Ct. App. 2002) (quoting *Ford v. State Ethics Comm'n*, 344 S.C. 642, 646, 545 S.E.2d 821, 823 (2001)).

[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.*

While there is not a requirement for the trial court to consider all of the *Gamble* factors, there is no indication in the Order that the trial court considered the *Gamble* factors at all. Instead, the court simply awarded the maximum amount of punitive damages allowed pursuant to S.C.

Code Section 15-32-530. This blanket awarding of the maximum amount of punitive damages shows the trial court did not use its discretion, but failure to exercise any discretion. *See Fontaine v. Peitz*, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987).

Further, the trial court did not set forth its *Gamble* findings on the record as required.

Therefore, for these reasons and the reasons stated in the Brief of Appellant, 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 FEES WERE NOT REQUIRED TO CLEAR TITLE TO THE PROPERTY.**

“The general rule is that attorney’s fees are not recoverable unless authorized by contract or statute.” *Blumberg v. Nealco*, 310 S.C. 492, 493, 427 S.E.2d 659, 660 (1993) (citing *Baron Data Sys., Inc. v. Loter*, 297 S.C. 382, 377 S.E.2d 296 (1989); *Hegler v. Gulf Ins. Co.*, 270 S.C. 548, 243 S.E.2d 443 (1978); *Collins v. Collins*, 239 S.C. 170, 122 S.E.2d 1 (1961)). However, “attorney fees may be recoverable as special damages if incurred ‘to clear title or to undo any harm created by whatever slander of title occurred.’” *Solley v. Navy Fed. Credit Union, Inc.*, 397 S.C. 192, 207, 723 S.E.2d 597, 604-05 (Ct. App. 2012). But “[t]he pecuniary loss for which a publisher of injurious falsehood is subject to liability is restricted to . . . 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).

As such, the special damages a defendant could be liable for if he slanders title are not related to the attorney's fees for the entire case. Those fees include the costs and fees necessary to recover damages and are not "reasonably necessary to counteract the publication."

Respondent sold the Property on October 2, 2023. (R. p. 203, lines 11-13). Respondent did not have any issue with conveying title on that date. As such, Respondent's special damages are limited to fees and costs incurred as of October 2, 2023. Any fees and costs incurred after that date could not have been related to clearing the title to the Property.

Therefore, for these reasons and the reasons stated in the Brief of Appellant, Appellant respectfully requests that this Court reverse the decision of the trial court regarding reimbursement of attorney's fees and costs.

### **CONCLUSION**

For the reasons stated above as well as the arguments presented in the Brief of Appellant, 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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