

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas
Jeremy C. Hodges, Esquire, Special Referee

Case No. 2022-CP-28-00877

Appellate Case No.: 2024-000679

Joseph & Lauren Jaco.....Respondents,

vs.

J.N. Green & Associates, LLC, Big Blue Express, LLC, and Joe N. Green.....Appellants.

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STATEMENT OF ISSUES ON APPEAL

- I. WHETHER APPELLANTS' APPEAL IS UNTIMELY WHERE APPELLANTS FAILED TO FILE THEIR RULE 59(e) MOTION AND THE NOTICE OF APPEAL CAME THREE MONTHS AFTER ENTRY OF THE ORDER APPEALED?
- II. WHETHER SERVICE BY PUBLICATION WAS PROPER WHERE APPELLANTS FAILED TO ALLEGE OR SHOW FRAUD OR COLLUSION IN OBTAINING SERVICE BY PUBLICATION?
- III. WHETHER THE SPECIAL REFEREE PROPERLY EXERCISED HIS DISCRETION AND REFUSED TO SET ASIDE THE ENTRY OF DEFAULT?
- IV. WHETHER THE SPECIAL REFEREE PROPERLY ADMITTED EXPERT TESTIMONY AND SUPPORTING MATERIAL RELIED ON BY RESPONDENTS' EXPERT?
- V. WHETHER THE SPECIAL REFEREE PROPERLY AWARDED COMPENSATORY DAMAGES?
- VI. WHETHER THE SPECIAL REFEREE PROPERLY AWARDED PUNITIVE DAMAGES?

STATEMENT OF THE CASE

This case is about Appellants J.N. Green & Associates, LLC, Big Blue Express, LLC, and Joe N. Green's ("Appellants") irresponsible development of the "Tookie Doo" subdivision upstream from property and a pond owned by Respondents Joseph & Lauren Jaco and Appellants' attempts to avoid responsibility. Appellants failed to lawfully develop the "Tookie Doo" subdivision and caused significant amounts of turbid and otherwise polluted stormwater to flow into Respondents' formerly idyllic stream and pond, which had been treasured by Respondents' family for generations. Respondents made numerous pre-suit attempts at resolution for over a year, but after finding their numerous entreaties led to nothing, Respondents filed suit. With actual knowledge of the pending litigation against them, Appellants went to great lengths to evade service of process and ignored Respondents' attempts to effect personal service. Appellants ultimately were served by publication, failed to answer, and went into default.

The case was then referred to Jeremy C. Hodges, Esquire, as Special Referee, who denied a motion to set aside the entry of default. The Special Referee held a default damages hearing in September 2023.

On January 8, 2024, he entered judgment and awarded damages against Appellants and in favor of Respondents for \$2,500,000.00 due to the extent of damage to Respondents' property and pond and the admitted egregious conduct by Appellants warranting punitive damages.

On January 18, 2024, the tenth day after entry of Special Referee's Final Order, Appellants just before midnight served via email a Motion to Reconsider under Rule 59(e), SCRCP. Yet Appellants attempted e-filing was rejected the following morning, and they failed to rectify the filing by paying the filing fee or certifying a technical issue such that the motion was not filed and to this day is not shown on the public docket.

Appellants then waited over three months—until April 24, 2024—to file their Notice of Appeal.

STATEMENT OF FACTS

I. APPELLANTS DISREGARDED APPLICABLE LAW, DAMAGED RESPONDENTS’ PROPERTY THROUGH THEIR NEGLIGENT ACTS, AND ATTEMPTED TO EVADE RESPONSIBILITY.

Respondents own a home on real property approximately 25-acres in size located at 848 Tookie Doo Lane, Elgin, South Carolina, 29045, identified by Kershaw County Parcel Identification Number 305-00-00-009 (“Jaco Property”). See *Final Order Making Findings of Fact and Conclusions of Law (Jan. 8, 2024 Kershaw Comm. Pl.) (“Final Order”)*, p. 2; *Complaint*, p. 1, ¶ 1. Near the southwest corner of the Jaco Property is a small pond, just over an acre in size. The pond is fed by a stream that runs generally from the north to the south. *Final Order*, p. 2; *Complaint*, p. 2, ¶¶ 8–10.

Next to Tookie Doo Lane (State Road S-28-334) and generally to the north and west of the Jaco Property and pond sits real property that (for purposes of this action) was originally owned by Appellant J.N. Green & Associates, LLC.¹ *Final Order*, p. 2; *Complaint*, p. 2, ¶¶ 11–12. Beginning in May 2021, Appellant J.N. Green & Associates, LLC applied for approval from Kershaw County to develop a “minor subdivision” at this property—the Tookie Doo Subdivision. Topographically, the Tookie Doo Subdivision sits uphill from the stream that flows onto the Jaco Property. *Final Order*, pp. 3–4; *Complaint*, p. 3, ¶ 18. Once land clearing began for the Tookie Doo Subdivision development, the Jacos noticed that their stream and pond became cloudy and turbid in appearance after rain events. The Jacos began to suspect that land clearing/disturbing

¹ While it appears Appellant J.N. Green & Associates, LLC still owns a portion of the originally constituted parcel, the land was subdivided and homes were constructed on these subdivided lots, which have since been sold to other individuals not parties to this action.

activities at the Tookie Doo Subdivision were leading to erosion of mud, sediment, and other materials that was polluting their pond. *Final Order*, p. 4; *Complaint*, pp. 4–5, ¶¶ 24–25.

On September 23, 2021, the Jacos, through counsel, contacted Appellant Joe N. Green to express concerns and asked Mr. Green to take corrective action necessary to fix the polluted stormwater coming into their stream and pond. An email from the Jacos’ counsel to Mr. Green explained that the Jacos’ creek and pond were “receiving a great deal of turbid, muddy stormwater flow from your recently cleared construction site [i.e., the Tookie Doo Subdivision] during/after significant rain events. Their ponds [*sic*] and the stream that feeds it stay very muddy and turbid between rain events. Before the clearing of your land, the Jacos never encountered these types of issues before.” *See Final Order*, p. 4; *Complaint*, p. 8, ¶¶ 34–35, Ex. D.

In September 2022, Appellant Green, on behalf of J.N. Green and Associates, LLC, entered into a “Consent Order” with the South Carolina Department of Health and Environmental Control (“DHEC”). *See Final Order*, p. 5; *Complaint*, p. 7, ¶ 30, Ex. B. The “Findings of Fact” of the Consent Order generally described how in clearing land for the Tookie Doo Subdivision and maintaining it while it was under construction, J.N. Green & Associates, LLC failed to follow appropriate regulatory protocols. The “Conclusions of Law” section in the Consent Order memorialized the determination that “J.N. Green & Associates, LLC violated Water Pollution Control Permits, S.C. Code Ann. Regs 61-9.122.26(b)(14)(x) in that it initiated land disturbing activities prior to obtaining a permit from [DHEC].” As part of the Consent Order, J.N. Green & Associates, LLC agreed to take certain remediation action to bring the Tookie Doo Subdivision into compliance and pay to DHEC “a civil penalty in the amount of four thousand dollars (**\$4,000.00**).” *See Final Order*, p. 5 (emphasis original); *Complaint*, p. 7, ¶ 30, Ex. B.

II. APPELLANTS FAILED TO RESPOND TO RESPONDENTS' LAWSUIT.

Over a year before this suit was filed, Respondents attempted to seek relief directly from Appellants. As the Special Referee noted in denying Appellants' motion to set aside the entry of default:

Appended to the Complaint are various exhibits memorializing communications between [Respondents]' counsel and [Appellant] Joe N. Green . . . the principal and registered agent of the two corporate [Appellants] Big Blue Express, LLC and J.N. Green & Associates, LLC. . . . These communications date back to September 23, 2021 (just over a year before the Complaint was filed).

See Order Denying Defendants' Motion to Set Aside Entry of Default (Apr. 6, 2023 Kershaw Comm. Pl.) (“*Default Order*”), p. 2. Even still, litigation became necessary, and Respondents filed their Complaint on October 12, 2022. *Complaint*, p. 1.

Respondents attempted to evade service after the Complaint was filed. On October 25, 2022, following these attempts to evade service, Respondents' counsel wrote to Appellants via email requesting that they accept service. *Default Order*, p. 2. On November 14, 2022, Appellants acknowledged receipt of this email and offered to complete the acceptance of service form but never did so. *Default Order*, p. 3; *Plaintiffs' Memorandum in Opposition to Motion to Set Aside Default*, Ex. I.

On November 7, 2022, the Circuit Court authorized the service of the Complaint via publication. *Order for Service by Publication (Nov. 7, 2022 Kershaw Comm. Pl.)*; *Default Order*, p. 3. Respondents complied with the Court's publication order. *Nov. 30, 2022, Affidavit of Publication*; *Default Order*, p. 3. In response, Appellants failed to file a responsive pleading. Thereafter, the Circuit Court entered default, *Jan. 9, 2023, Order of Entry of Default*, and ordered the appointment of Jeremy C. Hodges, Esquire, as Special Referee. *Jan. 6, 2023, Order of Reference*; *Default Order*, p. 3.

Counsel for Appellants noted an appearance on January 19, 2023. Nearly a week later, on January 24, 2023, Appellants moved to set aside the entry of default. In an order dated April 3, 2023, and filed on April 6, 2023, the Special Referee denied Appellants' Motion to set aside the entry of default. *Default Order*.

On September 22, 2023, the Special Referee conducted a final hearing on Respondents' claims. *Final Order*. Respondents offered evidence from Respondents themselves and through an expert witness, Brian Taylor, on the extent of damage to the Jaco Property and on the costs of remediation. *Final Order*, p. 6, ¶10. Without objection before the Special Referee, Respondents' expert, Mr. Taylor, was recognized as an expert in the fields of "stormwater inspection and management and pond and stream management." *Final Order*, p. 6, ¶ 11; *Hearing Tr.*, p. 15, line 24 – p. 16, line 9.

In substance, Mr. Taylor first testified regarding the state of the Respondents' pond, stream, and the impact from the Appellants' upstream development. Mr. Taylor described his "desktop" review of the area—observing historical overhead images, property information, soil surveys, topography, and the like; what he observed on at least three in-person visits to the Respondents' property and nearby area. *Final Order*, p. 6, ¶ 13; *Hearing Tr.*, pp. 16–29. As for the Appellants' development, Mr. Taylor noted extensive development and a lack of implementation of best management practices on this land upstream from Respondents' property. *Final Order*, pp. 6–7, ¶ 15; *Hearing Tr.*, pp. 31–34. Mr. Taylor then went on to describe the impact of the Appellants' upstream development on Respondents' property. From tests performed on the Respondents' property, Mr. Taylor noted a high level of turbidity (i.e., muddy color) in the pond; imbalanced pH, alkalinity, and phosphorus concentration "40 percent higher than what you normally want." *Final Order*, pp. 7–8, ¶¶ 16–18; *Hearing Tr.*, p. 40, line 12 – p. 42, line 20. Mr. Taylor talked at length

about the harmful effects this could have not just on the aesthetics of the pond, but the wildlife in the pond as well. To quantify the amount of sediment runoff that had settled to the base of the pond, Mr. Taylor also described how he took samples from within the pond (through a device known as a “sludge judge”). *Final Order*, p. 7, ¶ 17, ¶ 15; *Hearing Tr.*, pp. 43–44. Throughout this portion of Mr. Taylor’s testimony, Appellants did not raise objections.

Presuming that the “sediment or the input that’s coming into the pond” could be “reduce[d] or eliminated,” Mr. Taylor opined what “would need to be done in order to restore [Respondents’] pond to a healthy ecosystem.” *Final Order*, p. 8, ¶¶ 19–20; *Hearing Tr.*, p. 48, lines 9–19. A large part of Mr. Taylor’s testimony focused on how “to remove” artificially accumulated “sand and clay sediment” that had transferred into Respondents’ stream and pond. *Final Order*, p. 8, ¶¶ 19–20; *Hearing Tr.*, p. 48, line 22 – p. 49, lines 1–2. To conduct this type of restoration, Mr. Taylor recommended one of three approaches—each of which would involve sucking artificially accumulated material out of the pond with something like a “large vacuum cleaner, which would go along the bottom of the pond and suck and pull up” accumulated material. *Final Order*, pp. 8–9, ¶¶ 19–20; *Hearing Tr.*, pp. 49–51.

According to Mr. Taylor, when this mixture of sediment and pondwater was sucked up, three things could be done: run it through a (i.) “sludge press” to squeeze sediment out; (ii.) use a “sediment or filter bag” to separate the pondwater from accumulated material; or, (iii.) transfer the accumulated material into a pit elsewhere on the Respondents’ property where it could “be allowed to settle out over time, and then the water would be returned to the pond” through a pump. *Final Order*, pp. 8–9, ¶¶ 19–20; *Hearing Tr.*, pp. 49–51.

The first option, according to Mr. Taylor, would be the most expensive, but also the most effective and least invasive to the Respondents. *Final Order*, p. 9–10, ¶¶ 23–31; *Hearing Tr.*, pp.

51–52. Going down the list, the second option would be somewhat cheaper, but somewhat more intrusive, and the third option would be quite invasive and more time-consuming, but also the cheapest option. Each of the options would involve heavy trucks to transport the accumulated sediment (approximately 8500 cubic yards) either elsewhere on the Respondents’ property or off-site. *Final Order*, p. 9, ¶ 25; *Hearing Tr.*, p. 52, line 12 – p. 53, line 11. Mr. Taylor explained that each of the three methods of remediation mentioned above are what’s known as “in water” or “wet work” – because they don’t “require really any impacts to the pond.” *Final Order*, p. 9, ¶ 25; *Hearing Tr.*, p. 66, line 16 – p. 67, line 7. According to Mr. Taylor, the first and most expensive of these three options would be approximately four million dollars, while the third and least expensive would be approximately two million dollars. *Final Order*, pp. 9–10, ¶¶ 27–28 at 9; *Hearing Tr.*, p. 65, lines 7–16.

Alternatively, traditional dredging could also be done, but that would be an even more invasive process because it “require[s] the complete dewatering of the pond” sufficient “to allow the bottom of the pond or the majority of the pond to dewater and actually become solid enough for heavy equipment to be able to get out onto the bottom” before one could “begin to remove the material and then truck that material off to a disposal site.” *Final Order*, p. 10, ¶¶ 28–30; *Hearing Tr.*, p. 66, line 16 – p. 67, line 7. Mr. Taylor noted, based on the attributes of Respondents’ property requiring trees to be cut, that “footprint in a traditional dredging scenario [would] be much bigger and more invasive than the three options” referenced above. *Final Order*, p. 10, 28–29; *Hearing Tr.*, p. 67, line 14 – p. 68, line 17. To lessen the amount of forested area cleared, he opined that one would need to use “smaller trucks and more trips because of the pond dam itself.” *Hearing Tr.*, p. 68, lines 18–25. Mr. Taylor also opined that traditional dredging would take longer than the three options listed above. *Order*, p. 10, ¶ 29; *Hearing Tr.*, p. 72, line 13 – p. 73, line 6. And while

cheaper than the other options, it would still cost “hundreds of thousands of dollars if not half a million dollars.” *Final Order*, p. 10, ¶ 28; *Hearing Tr.*, p. 69, lines 9–23. Beyond this initial effort, Mr. Taylor also recommended the introduction of additives to the pond to “improve” its “water chemistry” at a cost of five to six thousand dollars. And because the pond would be dewatered, it would require restocking of the fish—at a cost of around one to three thousand dollars. *Final Order*, p. 10, ¶ 31; *Hearing Tr.*, p. 70, line 13 – p. 71, line 9. As for the remediation of the stream, whether done in conjunction with the three “wet work” options or traditional dredging, Mr. Taylor advised that the stream remediation was best done through “a good old fashioned shovel and bucket where you literally start at the bottom of the stream and begin moving upstream and . . . hand removing the material and then taking it out of the stream system.” *Hearing Tr.*, p. 54, lines 2–11. Mr. Taylor said this would cost approximately \$75,000.00. *Hearing Tr.*, p. 65, lines 21–15.

On January 8, 2024, the Special Referee awarded Respondents \$2,500,000.00 in damages. *Order*, p. 24.

III. APPELLANTS FAILED TO TIMELY FILE THEIR RULE 59(E) MOTION OR THEIR NOTICE OF APPEAL.

On Thursday, January 18, 2024, Appellants served the Special Referee and Respondents with their “Rule 59(e) Motion for Reconsideration,” *see Defendants’ Rule 59(e) Motion for Reconsideration (Not Filed)*, in an email sent to the Special Referee and Respondents’ Counsel received at approximately 11:46 p.m. *See Respondents’ Motion to Dismiss Appeal (May 29, 2024 S.C. Ct. App.) (“Motion to Dismiss Appeal”)*, Ex. G (January 18, 2024 Email from Adrienne Turner, Esq. to Jeremy Hodges, Esq.). An automated Notice of Electronic Filing (“NEF”) was transmitted to the parties’ counsel at 11:41 p.m. on, memorializing Appellants’ attempted filing of the Rule 59(e) Motion. *See Motion to Dismiss Appeal*, Ex. H (January 18, 2024, NEF Notice).

On Friday, January 19, 2024, at 8:12 a.m., the next morning, another NEF was sent out alerting the parties' counsel that the NEF transmitted late on January 18, 2024, was "RESCINDED" and that Appellants' 59(e) Motion "was not filed." *See Motion to Dismiss Appeal*, Ex. I (January 19, 2024, NEF Retraction Notice).

On January 31, 2024, the Special Referee wrote to counsel and asked whether Respondents "plan[ned] to submit a written response to the Motion to Reconsider." *See Motion to Dismiss Appeal*, Ex. G (January 31, 2024 Email from Jeremy Hodges, Esq. to Counsel).

Later that same day, Respondents' counsel responded to the Special Referee and informed the Special Referee and Appellants' counsel that the "reject[ion] by the clerk" of Respondents' Motion needed to be "resolved as a threshold matter" and attached to his email a copy of the January 18, 2024, NEF rescinding acceptance of Appellants' 59(e) Motion. *Motion to Dismiss Appeal*, Ex. G (January 31, 2024, Email from Ian T. Duggan, Esq. to Jeremy Hodges, Esq.). Appellants' counsel responded,

I spoke with the clerk's office and learned that my office inadvertently filed and paid for duplicate motions in the same transaction. They do not have a way of partially rejecting du[p]licate filings or overpayments, so they had to reject both. **I will be resubmitting the same filing and single fee payment with them shortly.**

Id. (January 31, 2024 Email from Adrienne Turner, Esq. to Jeremy Hodges, Esq.) (emphasis added). Appellants did not "resubmit" their Motion for Reconsideration through the E-Filing system and did not pay the requisite filing fee. No other NEF regarding this Motion was transmitted by the Court. Today, the Public Index omits any reference to Appellants' Motion to Reconsider. *See Jaco, et al. v. Green, et al.*, C/A No. 2022-CP-28-00877 (Kershaw County Comm. Pl.).²

² "A court can take judicial notice of its own records, files, and proceedings for all proper purposes including facts established in its records." *See generally Wise v. Wise*, 394 S.C. 591, 601, 716 S.E.2d 117, 122 (Ct. App. 2011) (internal punctuation and citation omitted).

On April 24, 2024, Appellants filed and served their Notice of Appeal.

On May 29, 2024, Respondents moved to dismiss the appeal as untimely, which this Court denied with leave to argue in the merits briefing by Order dated September 3, 2024.

ARGUMENT³

I. APPELLANTS' APPEAL IS UNTIMELY AND SHOULD BE DISMISSED.

Appellants' appeal should be dismissed for failure to timely file a Notice of Appeal when they served but failed to file—and have still not filed—their motion to reconsider or amend under Rule 59, SCRPC.⁴ After the entry of the Special Referee's Final Order, Appellants could have sought relief through the timely filing of a Rule 59(e) Motion but failed to do so. Respondents then waited over three and a half months to file their Notice of Appeal. This notice was untimely, and the appropriate remedy is dismissal.

Rule 203(b)(1), SCACR, provides that “[a] notice of appeal shall be served on all respondents within thirty (30) days after receipt of written notice of entry of the order or judgment.” “The notice of appeal from an order or judgment issued by a . . . special referee shall be served in the same manner as provided by Rule 203(b)(1).” Rule 203(b)(4), SCACR.

In *Elam*, South Carolina's seminal Rule 59(e) case, the South Carolina Supreme Court stated:

The requirement of service of the notice of appeal is jurisdictional, i.e., if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to “rescue” the delinquent party by extending or ignoring the deadline for service of the notice.

³ In accordance with Rule 208(B)(1)(d), SCACR, “the same standard of review is not applicable to all of the issues” and “a separate section with a heading of ‘Standard of Review’ [is] included at the start of the argument on each issue with citations to relevant case law establishing this standard of review.”

⁴ This argument was initially raised by motion to dismiss the appeal before briefs were filed, which motion was denied with leave to argue in the merits briefing by this Court. *See Order Denying Motion to Dismiss (Sept. 3, 2024, S.C. Ct. App.)*.

Elam v. S.C. Dep't of Transp., 361 S.C. 9, 14–15, 602 S.E.2d 772, 775 (2004). Even so, if a party makes a “timely motion . . . to alter or amend the judgment [under Rule 59, SCRCPP] . . . the time for appeal for all parties shall be stayed and shall run from receipt of written notice of entry of the order granting or denying such motion.” Rule 203(b)(1), SCACR.

Rule 5 and Rule 59, SCRCPP, set forth the requirements for timely moving to alter or amend a judgment. “A motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of the entry of order.” Rule 59(e), SCRCPP; Rule 5(d), SCRCPP, provides that “[a]ll papers required to be served upon a party. . . shall be filed with the court within five (5) days after service thereof.” Compliance with both rules is necessary for a timely filing.⁵

Rule 5(d), SCRCPP provides the general rule that “[u]pon failure of a party to file . . . [a] motion[] . . . the court may permit filing or proceed as though the same had not been served.” But this authority is restricted in the context of a Rule 59(e) motion because a “trial court” lacks “any power to grant the moving party an extension of time in which to file a Rule 59(e) motion.” *Overland, Inc. v. Nance*, 423 S.C. 253, 256–57, 815 S.E.2d 431, 433 (2018); *see also Russell v. Wachovia Bank, N.A.*, 370 S.C. 5, 20, 633 S.E.2d 722, 730 (2006) (“Generally, a trial judge loses jurisdiction over a case when the time to file post-trial motions has elapsed.”); *Leviner v. Sonoco Prod. Co.*, 339 S.C. 492, 494, 530 S.E.2d 127, 128 (2000) (“When no timely Rule 59 motion [is]

⁵ And “[a] party filing a written motion under this rule shall provide a copy of the motion to the judge within ten (10) days after the filing of the motion.” *See* Rule 59(g), SCRCPP. In *Gallagher v. Evert*, this Court observed that “[t]he notes to Rule 59, SCRCPP, indicate that subsection (g) was added ‘to help insure the judge is promptly notified that the motion has been filed.’ There is no indication that the failure to transmit a copy of the motion to the circuit court [judge] affects the tolling provisions of Rule 203(b)(1), SCACR.” 353 S.C. 59, 63, 577 S.E.2d 217, 219 (Ct. App. 2002). It is not disputed that Appellants timely *served* their “Motion to Reconsider” under Rule 59(e). However, to trigger the stay provisions of Rule 203(b)(1), SCACR, it is not the timeliness of service, but rather the *filing* of a Rule 59(e) motion that is essential.

made nor timely sua sponte order filed under Rule 59(e)” a subsequent order by a trial judge is “a nullity because the trial judge no longer ha[s] jurisdiction over the matter.”).

In recent years, the Supreme Court has modified how documents are typically filed with the clerk of court under Rule 5(e), SCRPC. On October 28, 2015, the Supreme Court issued an Order “adopt[ing]” the “[South Carolina] Electronic Filing Policies and Guidelines” (“SCEF”) that would be “effective upon the adoption of E-Filing on a county-by-county basis as set forth in future Administrative Orders of” the Court. *In re S.C. Elec. Filing Pol'ys & Guidelines*, 415 S.C. 1, 780 S.E.2d 600 (2015). “The electronic transmission of a document to the E-Filing System in accordance with [the SCEF] constitutes the filing of that document in accordance with Rule 5(e), SCRPC.” SCEF § 4(a), 415 S.C. at 6, 780 S.E.2d at 602.⁶

The SCEF provides a straightforward mechanism for addressing technical problems with document filing that occasionally arise. “Where a Technical Failure of the Electronic Filing System or a technical difficulty prevents an Authorized E-Filer from submitting a document for Electronic Filing, and the filing of the document is required by the SCRPC, order of the court, or South Carolina law on the day of the Technical Failure or technical difficulty, the E-Filer may” elect from two options. SCEF § 9(d), 415 S.C. at 13, 780 S.E.2d at 606. First, the filer “may traditionally file the document by physically delivering the document, together with any required filing fee, to the county clerk of court’s office during normal hours of operation.” *Id.* § 9(d)(1). Second, when the “E-Filer is unable to physically deliver the document to the clerk of court

⁶ SCEF Section 2(b) provides that “[u]nless otherwise excluded by these Policies and Guidelines or by Order of the Supreme Court or the Chief Justice, all filings in all civil cases commenced or pending in any E-Filing county after the effective date of the Pilot Program shall be E-Filed if the party is represented by an attorney.” 415 S.C. at 3, 780 S.E.2d at 601. On November 27, 2017, the Court of Common Pleas in Kershaw County became an E-Filing court. Order 2017-11-27-01 *RE: Expansion of Electronic Filing Pilot Program - Court of Common Pleas*, Appellate Case No. 2015-002439.

pursuant to paragraph (d)(1), the Authorized E-Filer may preserve the time for filing by utilizing an alternative method of submission” including “a certification signed by the Authorized E-Filer” attesting to the technical problems encountered. The E-Filer “must serve the certification and the entire document on all other parties to the case.” *Id.* § 9(d)(2), 415 S.C. at 13–14, 780 S.E.2d at 606. But,

THE ALTERNATIVE METHOD OF SUBMISSION IS NOT IN ITSELF A PROPER FILING. The *submission shall be effective only to preserve the time for filing*, and the subsequent E-Filing will be deemed timely filed if E-Filing is accomplished within one (1) business day after the Technical Failure is remedied, or, in the case of an alleged technical difficulty, the *next business day*. The E-Filer *must also pay* any required filing fees at that time.⁷

Id. 415 S.C. at 14, 780 S.E.2d at 607 (2015) (bolded emphasis original; italics added).

Apparently, Appellants suffered an “inadvertent[]” technical difficulty with their attempt to file their Rule 59(e) Motion on January 18, 2024, *Motion to Dismiss Appeal*, Ex. G, and thus, under the SCEF, their Rule 59(e) Motion was not filed and “not . . . part of the court record.” *See* SCEF § 4(d)(2), 415 S.C. at 7, 780 S.E.2d at 603. When, on the morning of Friday, January 19, 2024, the clerk of court rescinded acceptance of Appellants’ attempted filing of their Rule 59(e) Motion, *see Motion to Dismiss Appeal*, Ex. I (January 19, 2024, NEF Retraction Notice), Appellants could have availed themselves of the SCEF’s savings provision permitting the “preserv[ation of] the time for filing” so long as “E-Filing is accomplished . . . the next business

⁷ Further demonstrating that Appellants never properly filed their Rule 59(e) Motion, there is no indication that Appellants paid the fee of twenty-five dollars “assessed for every motion made in the court of common pleas . . . [that] **must** accompany each motion filed” under S.C. Code Ann. § 8-21-320 (emphasis added) and Appellants neither sought nor received permission to proceed *in forma pauperis*. *See also Martin v. State*, 321 S.C. 533, 535, 471 S.E.2d 134, 134–35 (1995) (“In the absence of a statutory provision allowing the general waiver of filing fees, we conclude motions to proceed in forma pauperis may only be granted where specifically authorized by statute or required by constitutional provisions.”).

day,” or in this case by Monday, January 22, 2024. SCEF § 9(d)(2), 415 S.C. at 114, 780 S.E.2d at 608. Appellants took no such action—or *any* action to bind their Rule 59(e) Motion to a date of timely filing.

Indeed, on Wednesday, January 31, 2024, Respondents’ counsel raised this “threshold” issue in correspondence with Appellants and the Special Referee. *Motion to Dismiss Appeal*, Ex. G. As noted above, Appellants’ counsel acknowledged her office had “inadvertently” experienced problems with the filing, but she assured the Special Referee and Respondents’ counsel that Appellants would be “resubmitting the same filing . . . shortly.” *Id.* Appellants’ Rule 59(e) Motion *still* has not been filed and the filing fee has not yet been paid.⁸

By January 31, 2024, the Special Referee had already “lost jurisdiction over [the] case” because the “time to file post-trial motions” had already “elapsed.” *Russell*, 370 S.C. at 20, 633 S.E.2d at 730. As a result, the Special Referee lacked “any power to grant” Appellants “an extension of time in which to file a Rule 59(e) motion,” *Overland*, 423 S.C. at 256–57, 815 S.E.2d at 433, and any subsequent orders would constitute a “nullity because the [Special Referee] no longer had jurisdiction over the matter,” *Leviner*, 339 S.C. at 494, 530 S.E.2d at 128. Without a timely filed Rule 59(e) motion, Appellants’ notice of appeal is untimely because it was filed well over 30 days after the entry of the Final Order. Accordingly, this Court lacks jurisdiction over this appeal and should dismiss it.

To be sure, this is not excusable neglect. Appellants’ unserious approach to litigation does not warrant special treatment or sympathy. Appellants unlawfully developed their property, disregarded Respondents’ concerned communications for over a year pre-suit, and attempted to

⁸ Indeed, Appellants can no longer even make a motion under Rule 60(b)(1)-(3), SCRPC, at this time because it has been “more than one year after the judgment . . . was . . . entered.”

evade service of this “suit at law . . . a serious effort on the part of adult human beings to administer justice.” *Griffin v. Capital Cash*, 310 S.C. 288, 292, 423 S.E.2d 143, 146 (Ct. App. 1992). Appellants then failed to file an answer after a multitude of service methods before the Final Order and a money judgment was entered against them. Nothing in Appellants’ litigation conduct justifies excusing their untimely filing.⁹

In sum, Appellants failed to pay the requisite filing fee or otherwise cure the rejection of their motion, actions that were required to timely file their Rule 59(e) Motion. The period between service of their Rule 59(e) Motion on January 18, 2024, and Appellants’ filing of their Notice of Appeal on April 24, 2024, was not tolled under Rule 203(b)(1), SCACR.

Accordingly, this Court should dismiss this appeal under Rule 240, SCACR.

II. APPELLANTS WERE LAWFULLY SERVED AND FAILED TO SHOW “FRAUD OR COLLUSION” TO SET ASIDE THE ORDER OF SERVICE BY PUBLICATION.

Appellants assert they were not properly served by publication. But the trial court properly ordered service by publication, and Appellants were then properly served by publication.

A. STANDARD OF REVIEW

“When the issuing officer is satisfied by the affidavit, his decision to order service by publication is final absent fraud or collusion.” *Wachovia Bank of S.C., N.A. v. Player*, 341 S.C. 424, 429, 535 S.E.2d 128, 130 (2000).

B. ARGUMENT

Appellants were lawfully served with the Summons and Complaint. After electing not to

⁹ Indeed, Appellants’ contumacious behavior continued through the untimely filing of numerous requests to extend time and other submissions to this Court which collectively led to a nearly yearlong delay from the filing of Appellants’ Notice of Appeal on April 4, 2024, to the completion of the filing of their initial brief and designation of matters on April 1, 2025 (at 11:59 p.m.).

timely file an answer or other response to the Complaint—and despite representing in email that they would accept service after receiving a copy of the complaint—default was entered against them. In considering the Appellants’ motion to set aside the entry of default, the Special Referee correctly applied the law and exercised his discretion in finding that the setting aside of the entry of default was unwarranted.

Appellants spend much of their initial brief setting forth policy-based rationales for why service via publication is unjust. Yet such arguments cannot override clear statutory authority. As Appellants appropriately concede, South Carolina statutory law explicitly authorizes service via publication. *See* S.C. Code Ann. § 15-9-710. The statute reflects a balance between due process and the practical necessity of moving litigation forward when defendants evade or cannot be located for personal service. A court’s “decision to order service by publication is final absent fraud or collusion.” *Wachovia Bank of S.C., N.A. v. Player*, 341 S.C. 424, 429, 535 S.E.2d 128, 130 (2000). The burden is on the Appellants to prove such a claim. *Id.* at 429, n. 5, 535 S.E.2d at 130, n. 5. Mere dissatisfaction with the method of service or speculative claims about the choice of publication are insufficient. Here and before the lower courts, Appellants have neither alleged nor provided any evidence of fraud or collusion. Their argument is grounded in disagreement with the statutory framework, which is not a valid basis for relief.

Moreover, Appellants attempt to circumvent their burden by arguing that selection of a digital-only newspaper in Camden, South Carolina, was not reasonably calculated to provide notice.¹⁰ South Carolina law does not require that the publication be circulated in a location tied to the defendant’s residence or business operations. Instead, the statute mandates that publication

¹⁰ Appellants presented no evidence to the Special Referee supporting their assertion that the Camden Chronicle-Independent is an “obscure *digital-only* newspaper” but also “has *no printed circulation* outside of Camden South Carolina.” *Cf. Appellants’ Initial Brief*, p. 8.

occur in a newspaper “most likely to give notice to the person to be served.” S.C. Code Ann. § 15-9-740. To wit, the selected newspaper, while headquartered in Camden, South Carolina, actively covered news throughout all of Kershaw County, including the area where the Tookie Doo subdivision is located. At the time of service, Appellants still owned at least two unsold lots within that development, maintaining a continuing connection to the community. *Final Order*, p. 13, ¶ 41. Furthermore, contrary to Appellants’ rationale, as a digital publication, its circulation was not geographically constrained, making it readily accessible to Appellants, maintained regular internet access demonstrated through their regular email correspondence with Respondents’ counsel.

Finally, although Appellants “provide[d] no authority” to support their argument that “South Carolina’s service by publication statutes fail to meet due process requirements” such concerns are not present here because “the evidence confirms that [Appellants] received actual notice of the Summons and Complaint (and [Respondents] intention to serve [Appellants] via publication).” *Default Order*, p. 3; *Appellant’s Response in Opposition to set Aside Entry of Default*, Ex. I (email from Appellant Green stating, “Good morning please send the acceptance of service form via email.”); *see also* S.C. Const. art. 1, § 22 (requiring “due notice”); *Caldwell v. Wiquist*, 402 S.C. 565, 576, 741 S.E.2d 583, 589 (Ct. App. 2013) (recognizing the importance of ensuring a defendant receives “actual notice” of a pending action, where feasible, to ensure compliance with Constitutional requirements).

Accordingly, Appellants’ argument fails, and this Court should affirm on this issue.

III. THE SPECIAL REFEREE’S DECISION DECLINING TO SET ASIDE THE ENTRY OF DEFAULT SHOULD NOT BE DISTURBED.

Appellant asserts the entry of default should have been set aside. But the record reflects that the Special Referee properly exercised his discretion in refusing to set aside the entry of default.

A. 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. The trial court's decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion.” *Sundown Operating Co. v. Intedge Indus., Inc.*, 383 S.C. 601, 606, 681 S.E.2d 885, 888 (2009).

B. ARGUMENT

In considering whether the default entry should be set aside, the Special Referee correctly concluded that the question was analyzed under the “good cause” standard of Rule 55(c), SCRCP. The Special Referee also considered whether setting aside an entry of default “would serve the interests of justice.” *Default Order*, p. 5. He also made detailed findings of fact illustrating the great lengths to which Respondents went to personally serve the Appellants:

[Respondents] attempted to serve [Appellants] personally on October 22, 2022, and again on October 24, 2022. On October 22, 2022, a process server attempted to serve [Appellant] Big Blue Express, LLC via its registered agent [Appellant Joe N. Green], at 180 Ole Still Lane, in Elgin, South Carolina. There, the process server spoke to a woman who identified herself as [Appellant Joe N. Green]’s ex-wife who informed the process server that [Appellant Joe N. Green] “moved out of South Carolina” and that the “business is closed.” The process server was later able to contact [Appellant Joe N. Green] via telephone. [Appellant Joe N. Green] “said to look for him in Georgia but would not” provide “any other information.”

On October 24, 2022, a second process server sought to serve [Appellant] J.N. Green & Associates, LLC via its registered agent, [Appellant Joe N. Green], at 10817-B Two Notch Road in Columbia, South Carolina. When the process server arrived, he could hear “a male voice talking on the phone” behind a locked door. No one responded to the process server’s knocks and announcement of his presence. The process server took photographs of three motor vehicles in the adjacent parking lot—a semi-truck, a pick-up truck, and hatchback sedan. Public records indicate these vehicles were registered to [Appellant Joe N. Green].

The next day, October 25, 2022, [Respondents’] counsel emailed [Appellant Joe N. Green] . . . with a copy of the Summons & Complaint attached—requesting that [Appellant Joe N. Green] accept service via email.

On November 7, 2022, the Kershaw County Clerk of Court entered an “Order for Service by Publication.”

On November 8, 2022, [Respondents] sent the Summons & Complaint, the Order for service by Publication, and [Respondents’] first set of discovery to [Appellants] at the 180 Ole Still Lane and 10817-B Two Notch Road addresses listed above.

On November 14, 2022, [Appellant Joe N. Green] replied to the email from [Respondents’] counsel dated October 25, 2022. . . . In relevant part, the email stated: “Good morning, please send the acceptance of service form via email. Thank you so much!” A short time later, [Respondents’ counsel] responded to [Appellant Joe N. Green] and sent the acceptance of service form [Appellant Joe N. Green] requested.

[Appellant Joe N. Green] did not return the acceptance of service form. [Respondents’] counsel again emailed the acceptance of service form to Mr. Green on November 16, 2022. [Appellant Joe N. Green] did not respond to this email, either.

On November 15, 2022, November 22, 2022, and November 29, 2022, [Respondents] published a copy of the Summons and Notice of Filing of Complaint in the Chronicle-Independent, a newspaper of general circulation in Kershaw County, South Carolina.

Id. at 2–3.

After making these findings, the Special Referee correctly rejected Appellants’ arguments to set aside the entry of default. As noted above, the Special Referee rejected the Appellants’ arguments on the adequacy of service by publication. The Special Referee also correctly discounted Appellants’ tardy assertions that confusion was the cause of their failure to timely respond to the Complaint. Instead, the Special Referee concluded Appellants “understood their obligation to timely respond to the Summons and Complaint yet chose not to do so.” *Id.* at 6.

The Special Referee held that the Appellants failed to “put forth a satisfactory explanation for the default.” *Id.*, p. 7 (citing *Limehouse v. Hulsey*, 397 S.C. 49, 89, 723 S.E.2d 211, 233 (Ct. App. 2011)). On appeal, Appellants now argue that the entry of default should be reversed because the trial neglected to make specific findings of the factors enumerated in *Wham v. Shearson*

Lehman Bro., Inc., 298 S.C. 462, 381 S.E.2d 499 (Ct. App. 1989). *Appellants' Initial Brief*, § I. A.¹¹ But because Appellants “failed to raise this issue to the [Special Referee] in a Rule 59(e) motion” it was an “issue[] on which the [Special Referee] never ruled and which were not raised in a post-trial motion [it is] not preserved for appeal.” *See Dixon v. Besco Eng'g, Inc.*, 320 S.C. 174, 178, 463 S.E.2d 636, 638 (Ct. App. 1995). And, in any event, the Special Referee should “not be reversed for failing to make specific findings of fact on the record for each factor if there is sufficient evidentiary support on the record for the finding of the lack of good cause.” *Id.*, 320 S.C. at 179, 463 S.E.2d at 639.

Appellants have not shown that the Special Referee abused his discretion: that his “order was controlled by some error of law” or that his “order, based upon factual . . . conclusions, is without evidentiary support.” *Sundown Operating*, 383 S.C. at 607, 681 S.E.2d at 888. Accordingly, this Court should affirm the Special Referee on this issue.

IV. THE SPECIAL REFEREE’S RELIANCE ON RESPONDENTS’ EXPERT TESTIMONY WAS PROPER.

Appellants assert that the Special Referee’s reliance on the testimony of Brian Taylor— Respondents’ expert witness—was improper. Appellants are wrong. Mr. Taylor’s testimony was

¹¹ Moreover, Appellants’ argument that liability should not attach to Appellants Big Blue Express, LLC or Joe N. Green, individually, because the allegations in the Complaint were insufficient to establish “alter ego liability” are a red herring. *Appellants' Initial Brief*, p. 12. No “substantive factual allegations” of the “alter ego” nature of the Appellants is necessary to show Appellants’ liability here. By failing to timely respond to the Complaint, it is “well settled” South Carolina law that Appellants “admitted the truth of the plaintiff’s allegations and . . . conceded liability.” *Roche v. Young Bros., of Florence*, 332 S.C. 75, 81, 504 S.E.2d 311, 314 (1998). Respondents adequately pled each of their causes of action. Here, in a Complaint totaling just over 12 pages, with another 33 pages of exhibits, Respondents set forth detailed allegations, conceded by the Appellants through default, establishing that all the Appellants committed acts of trespass, negligence, and nuisance against the Respondents for multiple years.

properly admitted, and the Special Referee did not commit reversible error in relying on it in reaching his decision adjudging the damage suffered by Respondents.

A. STANDARD OF REVIEW

A “trial court’s ruling to exclude or admit expert testimony” will not be “disturb[ed]” absent “a clear abuse of discretion.” *Walker v. The Bluffs Apartments*, 324 S.C. 350, 353, 477 S.E.2d 472, 473 (Ct. App. 1996).

B. ARGUMENT

i. Appellants’ Objections to the Qualifications of Respondents’ Expert Lack Merit.

Appellants first contend that the Special Referee erred in relying on Mr. Taylor’s testimony because “[h]e does not hold certifications in hydrology.” *Appellants’ Initial Brief*, § III. This argument lacks merit.

As noted above, Mr. Taylor was recognized (without objection) as a “stormwater inspection and management and pond and stream management.” This case centered on a dispute about mismanaged stormwater from the Appellants’ development and its adverse effects on a pond and a stream on Appellants’ property. “To be competent to testify as an expert, a witness must have acquired by reason of study or experience or both such knowledge and skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony.” *Gooding v. St. Francis Xavier Hosp.*, 326 S.C. 248, 252–53, 487 S.E.2d 596, 598 (1997) (internal quotation omitted). Mr. Taylor generally testified about the harm that had befallen these wetlands and what he thought could be done to remediate them. Mr. Taylor’s qualifications, ranging from seven years as an “environmental planner” with the South Carolina Department of Transportation to nearly twenty years of private sector experience, and certifications as a “storm water inspect[or],” “Post Construction BMP [Best Management Practices] Inspector,” and “Master

Pond Manager” made him no doubt qualified to testify in the fields in which he was recognized by the Special Referee. *See Hearing Tr.*, p. 10, line 16 – p. 12, line 8, Ex. 1.

Even still, Appellants assert, without citation to any authority, that Mr. Taylor’s lack of certification as a hydrologist made it improper for the Special Referee to rely on his testimony for, among other things, “sedimentation impact and restoration needs.” But “an expert is not limited to any class of persons acting professionally.” *Gooding*, 326 S.C. at 253, 487 S.E.2d at 598 (internal quotations omitted). And “[t]he test for qualification of an expert is a relative one that is dependent on the particular witness's reference to the subject.” *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 38, 691 S.E.2d 135, 143 (2010) (internal quotation omitted). Instead, alleged “[d]efects in an expert witness’ education and experience go to the weight, rather than the admissibility, of the expert's testimony.” *Gooding*, 326 S.C. at 252–53, 487 S.E.2d at 598. Because “[t]he qualification of an expert witness and the admissibility of the expert's testimony are matters within the trial court's discretion,” *id.*, and because the “trial court’s ruling to exclude or admit expert testimony” will not be “disturb[ed]” absent “a clear abuse of discretion,” *Walker v. The Bluffs Apartments*, 324 S.C. 350, 353, 477 S.E.2d 472, 473 (Ct. App. 1996), the Special Referee’s reliance on Mr. Taylor was proper.

Accordingly, this Court should affirm the trial court on this issue.

ii. The Special Referee Properly Admitted Hearsay Testimony Informing Respondents’ Expert’s Testimony.

Appellants further contend that the Special Referee should not have admitted Mr. Taylor’s testimony regarding estimates of the cost of performing the three “wet work” options to remediate the Respondents’ property from a third-party on “hearsay” grounds. *Appellants’ Initial Brief*, § III. But Appellants’ argument lacks merit.

“Expert witness testimony is a widely-recognized exception to the rule against hearsay testimony.” *State v. Hutto*, 325 S.C. 221, 481 S.E.2d 432, 436 (1997) (internal quotation omitted). “An expert witness may state an opinion based on facts not within his firsthand knowledge.” *Hundley ex rel. Hundley v. Rite Aid of S.C., Inc.*, 339 S.C. 285, 295, 529 S.E.2d 45, 50 (Ct. App. 2000). Tracking Rule 703, SCRE, Mr. Taylor confirmed that the estimates he “relied upon” from the specialized contractor he conferred with were of the type used by “experts in this field in forming opinions.” *Hearing Tr.*, p. 62, lines 18–24. Mr. Taylor also explained that the remediation in this “particular case” requires “very specific types of equipment to perform what we’re asking to be done” *Id.*, p. 58, lines 2–19 and that Mr. Taylor reached out to this contractor because of their “specialized . . . experience.” *Id.*, p. 57, lines 11–19. And even though another contractor would be “actually performing the work” of dredging, Mr. Taylor still had experience being “involved in the . . . management or in the inspection” of the “process.” *Id.*, p. 75, line 21 – p. 76, line 3.

While Appellants cite no authority for their position beyond Rule 703, SCRE, this Court previously allowed similar evidence in *Hundley*. The expert testimony in *Hundley* testimony came from an economist who relied on “cost information contained in” a separate “Life Care Plan,” information that, like the estimates here, was “normally relied upon by experts in his field in rendering an opinion.” 339 S.C. at 295, 529 S.E.2d at 51; *see also Creed v. City of Columbia*, 310 S.C. 342, 426 S.E.2d 785 (1993) (psychiatrist’s reliance on tests and reports completed by a non-testifying neurologist). These remediation estimates are equally admissible here.

Accordingly, the Special Referee’s properly admitted as evidence this cost data, and this Court should affirm on this issue.

iii. The Admission of the Third-Party Cost Estimates Were Harmless even if the Court assumed they were erroneously admitted.

Even if the Special Referee erred in admitting information Mr. Taylor obtained from third-party estimates to inform his opinions on the cost of using specialized equipment to remediate the Respondents' pond, Appellants have not shown any resulting prejudice.

“To warrant reversal based on the admission or exclusion of evidence, the complaining party must prove both error and resulting prejudice.” *See generally Altman v. Griffith*, 372 S.C. 388, 401, 642 S.E.2d 619, 626 (Ct. App. 2007).

Mr. Taylor's testimony estimating the cost of traditional dredging was based on his own personal knowledge: “*Based on my experience in other projects that I've worked on, dredging in the traditional sense is going to run into the hundreds of thousands of dollars.*” *Hearing Tr.*, p. 66, lines 8–15 (emphasis added). And, in clarifying that “traditional dredging” was less expensive than the other “wet work” options he recommended, Mr. Taylor still opined that traditional dredging would still cost “hundreds of thousands of dollars if not half a million dollars.” *Id.* Accordingly, his opinion on traditional dredging was from his personal experience and within the scope of his expert testimony, not from the challenged “hearsay” estimates.

The special referee relied on the traditional damages opinion as the measure of damages when awarding Respondents \$500,000.00 “in compensatory damages,” or what the special referee deemed “an appropriate measure of their costs to remediate their property.” *Final Order*, p. 20 (\$500,000.00 is “a figure at the very bottom of the scale of potential remedial measures suggested by [Mr. Taylor].”). In reaching this conclusion, the Special Referee also acknowledged that this option, as Mr. Taylor generally opined, was “the most time-consuming and burdensome option as well, because it will likely necessitate additional disruption to the [Respondents'] lives in the form of completely draining the pond and deforesting or excavating other portions of their property.”

Id. Even if the Special Referee were in error to admit the testimony of Mr. Taylor conveying the outside cost estimates, the error would be harmless because the Special Referee’s judgment on damages found direct support in Mr. Taylor’s expert opinion based on his personal experience—not the calculations of a third party. *Cf. Altman*, 372 S.C. at 401, 642 S.E.2d at 626 (“the complaining party must prove both error and resulting prejudice”).

Accordingly, any admission of the other estimates was harmless where the Special Referee did not rely on the higher cost estimates provided by Mr. Taylor but based his award directly on an estimate based on Mr. Taylor’s personal knowledge. This Court should affirm on this issue.

V. THE SPECIAL REFEREE’S AWARD OF COMPENSATORY DAMAGES SHOULD NOT BE DISTURBED.

Appellants challenge the compensatory damages award by the Special Referee. However, the compensatory damages award was adequately supported by the evidence and admitted facts in the record.

A. STANDARD OF REVIEW

“A trial judge has considerable discretion in determining the amount of actual damages. Based on this discretion afforded to trial judges, review on appeal is limited to the correction of errors of law. Accordingly, this Court’s task in reviewing a damages award is not to weigh the evidence, but to decide if any evidence exists to support the damages award.” *McNaughton v. Charleston Charter Sch. for Math & Sci., Inc.*, 411 S.C. 249, 262, 768 S.E.2d 389, 396 (2015).

B. ARGUMENT

As noted above, the Special Referee’s compensatory damages award of \$500,000.00 was closely aligned with Mr. Taylor’s estimates regarding the cost to traditionally dredge their pond. The Special Referee explained that examining damages through “the cost of restoration” was appropriate here because of the Respondents’ “personal reason[s] relating to the land for restoring

the land to its original condition.” See *Final Order*, p. 18-19; *Vaught v. A.O. Hardee & Sons, Inc.*, 366 S.C. 475, 484, 623 S.E.2d 373, 378 (2005) (“When the cost of restoration exceeds the diminution in value, then the greater cost of restoration will be allowed when the landowner has a personal reason relating to the land for restoring the land to its original condition and when the cost of restoration is reasonable in relation to the damage inflicted”). To be sure, Appellants (both here and before the Special Referee) failed to assert that repair costs are an improper measure of damages—instead, Appellants assert only that the amount of such damages is unsupported by the evidence. See *State v. Hoffman*, 312 S.C. 386, 393, 440 S.E.2d 869, 873 (1994) (holding a broad and non-contemporaneous objection is not enough to properly preserve an error for appellate review).

As future damages, the cost of these prospective repairs to Respondents’ property did not “need to be proved to a mathematical certainty. Oftentimes a verdict involving future damages must be approximated. A wide latitude is allowed the jury.” *Pearson v. Bridges*, 337 S.C. 524, 529, 524 S.E.2d 108, 111 (Ct. App. 1999), *aff’d*, 344 S.C. 366, 544 S.E.2d 617 (2001); see also *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 43, 691 S.E.2d 135, 146 (2010) (“While neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation, proof with mathematical certainty of the amount of loss or damage is not required.”) (internal quotation omitted).

As a separate sustaining ground, the Special Referee also found in the alternative that “\$500,000.00” in compensatory damages was “a fair assessment of the lost rental value of [Respondents’] property for at least 935 days” because “an assessment of this rental value can in some respects be determined through an analysis of its value to [Appellants]” who “were able to avoid significant costs of installing best land clearing and stormwater management practices on

their land and instead used [Respondents'] property as their holding pond while they built a subdivision. In effect, [Appellants] used the [Respondents'] pond as a retention pond for the subdivision runoff." *Final Order*, p. 19–20. Appellants do not (either before the Special Referee or here) specifically address this alternative calculation of damages. *See generally Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 328, 730 S.E.2d 282, 284 (2012) ("Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become law of the case.").

Ample evidence supported the Special Referee's award of \$500,000.00, and the award was not an abuse of discretion. Accordingly, the compensatory damages award should not be disturbed, and this Court should affirm the trial court on this issue.

VI. THE SPECIAL REFEREE'S AWARD OF PUNITIVE DAMAGES SHOULD NOT BE DISTURBED.

Appellants assert the punitive damage award should be reversed, but the record supports the trial court's punitive damages award.

A. STANDARD OF REVIEW

This Court applies "a de novo standard for the review of trial court determinations of the constitutionality of punitive damages awards." *Hollis v. Stonington Dev., LLC*, 394 S.C. 383, 405, 714 S.E.2d 904, 915 (Ct. App. 2011) (*quoting Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 583, 686 S.E.2d 176, 182 (2009)).

B. ARGUMENT

A trial court has broad discretion in determining whether to award punitive damages and in what amount. Appellate review of such awards is limited to correcting errors of law or constitutional violations—not to reweigh facts or substitute the appellate court's judgment for that

of the factfinder. *See Mitchell*, 385 S.C. at 584, 686 S.E.2d at 183 (recognizing the role of punitive damages in punishing unlawful conduct and deterring its repetition). Accordingly, absent a showing that the award is grossly excessive or the product of legal error, the punitive damages must stand. *Id.*

The Special Referee carefully applied the constitutional and statutory framework governing punitive damages and expressly considered the three guideposts to ensure due process mandated by South Carolina precedent and the U.S. Supreme Court. *See Hollis*, 394 S.C. at 396, 714 S.E.2d at 911 (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996)). The Special Referee evaluated the reprehensibility of Appellants' conduct, noting that while not every factor pointed toward heightened culpability, Appellants engaged in reckless behavior over several years, ignoring regulatory mandates and repeated requests from Respondents to remedy ongoing harm. This pattern of disregard justified punitive damages.

The Special Referee also ensured that the punitive damages award of \$2,000,000.00 was proportionate to the \$500,000.00 in compensatory damages. A 4:1 ratio falls well within constitutional boundaries, particularly where, as here, compensatory damages alone would not reflect the severity of the misconduct or achieve deterrence. South Carolina courts have approved similar awards in comparable circumstances, including in *Hollis*, where this Court approved a \$2,000,000.00 punitive award accompanying \$400,000.00 in compensatory damages suffered by homeowners harmed by stormwater runoff from a nearby development. *Id.* at 405, 714 S.E.2d at 916.

Additionally, the Special Referee properly considered the potential civil penalties Appellants faced under both state and federal law for their environmental violations. With exposure to statutory penalties far exceeding \$5 million, the punitive damages awarded were

modest in comparison and clearly aligned with legislative determinations of appropriate deterrents for such conduct.¹² This further supports the conclusion that the award was reasonable and constitutionally sound.

The Special Referee also considered Appellants' ongoing business operations and financial capacity, recognizing that Appellants had profited from the sale of multiple properties within the subdivision and retained two unsold parcels. *Final Order*, p. 22. The Special Referee appropriately viewed punitive damages as a necessary deterrent, both to the Appellants and to others engaged in similar development practices across South Carolina.

The Special Referee demonstrated careful adherence to due process principles, explicitly acknowledging the need to avoid an excessive or arbitrary award. The record reflects that the punitive damages were based on a comprehensive evaluation of the facts, applicable law, and constitutional considerations. Appellants have failed to identify any legal error or constitutional violation because the award of punitive damages was firmly grounded in law, supported by substantial evidence, and crafted within the bounds of judicial discretion.

Accordingly, the punitive damages award should be upheld, and this Court should affirm on this issue.

CONCLUSION

This Court should dismiss this appeal as untimely because Appellants failed to timely perfect their appeal. Even if the appeal were timely and this Court reached the merits of each issue on appeal, Appellants' arguments lack merit for the reasons set forth above, and this Court should affirm on each issue presented.

¹² For example, federal law allows fines up to \$25,000.00 per day for each day where a contaminant is discharged into a body and the violation remains uncured. *See Final Order*, p. 23.

Respectfully submitted,

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