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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM HORRY COUNTY
WILLIAM H. SEALS, JR., CIRCUIT COURT JUDGE

Appellate Case No. 2025-000796

Gabriel Barnhill and GSB Enterprises, LLC, ... Respondents,

v.

J. Floyd Swilley, J. Floyd Swilley Investment Advisors,
Laurel K. Swilley, SMG Partners, LLC, SMS Services, LP,
WCP Limited, LLC, 809 Holdings, LP, QC Financing, LLC
Heath Causey and Sage Financial Group, LLC, Defendants,

of which J. Floyd Swilley, Laurel Swilley and
Heath Causey are the .... Appellants.

FINAL BRIEF OF APPELLANT

Desa Ballard (S.C. Bar No. 498)
Harvey M. Watson III (S.C. Bar No. 74053)
Haley Hubbard (S.C. Bar No. 103195)

BALLARD & WATSON
226 State Street
West Columbia, South Carolina 29169
Telephone 803.796.9299
Facsimile 803.796.1066
desab@desaballard.com
harvey@desaballard.com
haley@desaballard.com

ATTORNEYS FOR APPELLANTS

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ISSUES ON APPEAL

I. Does a prior challenge as to the propriety of a specific order on appeal preclude this current appeal, which addresses application issues that arose after the first appeal concluded and which relate to application of the order following remand to the circuit court?

II. Did the trial court abuse its discretion by failing to relieve Appellants from default judgment when it misapplied a prior order imposing sanctions upon Appellants?

III. Did the trial court abuse its discretion by failing to relieve Appellants from default judgment when Appellants had sufficiently defended the action despite the imposition of sanctions upon Appellants?

IV. Did the trial court err in its award of damages in the absence of pleading or evidentiary basis for actual and/or punitive damages?

V. Did the trial court err by awarding prejudgment interest on a non-liquidated amount of damages, and by imposing punitive damages that were not supported by the record?

STATEMENT OF THE CASE

After a prior appeal concluded in December 2023, the case was remitted to the circuit court. This current appeal follows multiple ensuing orders of the circuit court that held Appellants in default and later granted judgment on behalf of Barnhill.

On August 4, 2021, the Court of Appeals issued an unpublished opinion that affirmed lower court orders and subsequently denied rehearing. (R. pp. 33-37). Appellants J. Floyd Swilley, Laurel K. Swilley, and Heath Causey (collectively referred to herein as "Appellants") then petitioned the Supreme Court for certiorari on October 26, 2021, and certiorari was granted by order dated May 17, 2023. (R. pp. 40-41). Following briefing and oral argument, however, the Supreme Court dismissed certiorari as improvidently granted by order dated December 20, 2023. (R. pp. 42-43). The remittitur was filed on December 27, 2023. (R. pp. 44-45).

On January 19, 2024, Barnhill filed an Affidavit of Default, and later a Motion for Entry of Default on January 25, 2024, both premised upon the 2016 Order that had been affirmed in the recently concluded appeal. (R. pp. 195-221; R. pp. 222-223). The Clerk of Court entered an Order of Default on January 25, 2024. (R. pp. 46-48).

On January 26, 2024, Appellants filed a Motion for Relief from Entry of Default, challenging the default based upon the scope and effect of the affirmed 2016 Order, in addition to other good cause. (R. pp. 224-229).

On January 29, 2024 Barnhill filed a Motion for Default Judgment. (R. pp. 230-231). Appellants filed a Return to the Motion for Default Judgment on February 4, 2024. (R. pp. 232-234), and an amended Motion for Relief from Entry of Default on February 9, 2024. (R. pp. 235-240).

The circuit court filed a Form 4 Order on June 18, 2024, denying Appellants' Motion for Relief from Default and granting Barnhill's Motion for Default Judgment. (R. pp. 49-51). Appellants filed a Motion to Reconsider. (R pp. 525-526). On July 15, that motion was denied. (R. pp. 52-54). A damages hearing was scheduled for September 12, 2023.

On September 3, 2024, Appellants filed a pre-trial brief. (R. pp. 530-549). On September 11, 2024, Appellants filed a Request for Judicial Notice pursuant to Rule 201(d), SCRE. (R. pp. 550-593). The damages hearing was held on September 12, 2024. Appellants and their counsel appeared and participated as permitted. The Court issued an Order of Judgment on November 6, 2024. (R. pp. 55-57).

Appellants filed a Motion to Reconsider, challenging the lack of factual basis for the award of damages or punitive damages, and failed to address the request for judicial notice that had been taken under advisement at the hearing. (R. pp. 594-597). Barnhill also filed a Rule 59(e) Motion to Alter or Amend the order, seeking prejudgment interest and other additional relief. (R. p. 598-606).

On April 2, 2025, the circuit court issued an Order Addressing the Rule 59(e) motions, denying the motion from Appellants and granting relief requested by Barnhill. (R p. 58-63). Appellants timely filed and served a Notice of Appeal on April 25, 2025. (R. pp.650-662).

STATEMENT OF FACTS

In April 2013, Appellants Gabriel Barnhill and GSB Enterprises, Inc. (collectively "Barnhill") commenced suits against numerous parties, to include Defendants J. Floyd Swilley, Laurel K. Swilley, and Heath Causey (collectively referred to herein as "Appellants"), presenting

claims arising from a failed business enterprise. The Appellants filed an Answer and later Amended Answer and Counterclaim.

The parties thereafter had numerous disputes regarding discovery and a number of orders were issued addressing the same. In December 2015, Barnhill filed a motion to compel discovery that sought sanctions against the Appellants, and a separate motion seeking judgment on the pleadings and/or summary judgment in Plaintiff's favor with respect to counterclaims presented by the Appellants against Barnhill.

Prior to the hearing on those motions, counsel for the Floyd and Laurel Swilley was relieved from his duties as counsel, with the order further providing:

> The Defendants shall obtain new legal counsel to represent them in this matter within thirty (30) days from the date of this Order. <u>The proceedings in this case will be held in abeyance for thirty (30) days from the date of this Order. . .</u>

(Order dated January 25, 2016) (emphasis added). (R. pp. 12-14). Within the period of abeyance, on February 16, 2016, a hearing was held on the multiple Barnhill motions that sought sanctions and dismissal of the Appellants' counterclaims. The Appellants were not present at that hearing. The next day, February 17, 2016, a Form 4 Order was filed, indicating the motion to strike pleadings was granted, and that Barnhill was granted summary judgment as to counterclaims against Barnhill brought by various defendants. (R p. 15).

On March 21, 2016, a formal order granting the motions was filed (hereinafter referred to as the "2016 Order"), which articulated and provided specific relief as follows:

> NOW, THEREFORE, IT IS HEREBY ORDERED THAT the Answer, Counterclaim and other pleadings of J. Floyd Swilley, Laurel K. Swilley, Heath Causey, 809 Holdings, LP and WCP Limited, LLC are hereby stricken,

> And IT IS FURTHER ORDERED that all counterclaims are dismissed with prejudice;
>
> And IT IS FURTHER ORDERED that the Affidavit of William Piner is stricken;
>
> And IT IS FURTHER ORDERED that the Plaintiffs shall serve their Motion for Attorney Fees and Affidavit for Attorney Fees upon the Defendants with the Motion for Attorney Fees to be heard by the presiding judge at the next term of court;
>
> AND IT IS SO ORDERED.

(R. pp.17-23).

In response, Appellants filed motions seeking amendment of that order pursuant to Rule 59(e), SCRCP, both because the hearing was held during the period of abeyance and lack of notice of the hearing. (R. pp. 177-178; R. pp. 179-180). While the order was being reconsidered, the Appellants filed a Motion for Summary Judgment with supporting affidavits on May 13, 2016. (R. pp. 181-192). That motion has never been considered or ruled upon by the circuit court, although it remained pending following remand from the Court of Appeals.

Those motions for reconsideration were denied by order entered May 25, 2016. (R. pp. 27-32). Appellants thereafter timely appealed to the Court of Appeals on June 16, 2016, challenging the propriety of the 2016 Order, chiefly on the basis of deficient notice of the scheduled hearing and contention that the prior order holding the case in abeyance for a period to allow for obtaining new legal counsel should have precluded the hearing on the motions that occurred on February 16, 2015, in their absence.

On August 4, 2021, after briefing by the parties but without oral argument, the Court of Appeals issued an unpublished opinion that affirmed the 2016 Order. (R. pp.33-37). The stated basis for the opinion, as set forth in the numbered paragraphs contained therein, were as follows:

(1) disagreement that adequate service had not been made,

(2) disagreement that the hearing was held during the time in which the case remained in abeyance,

(3) disagreement that genuine issues of material fact remained,

(4) disagreement that the Appellants did not have a full and fair opportunity to complete discovery,

(5) disagree that granting summary judgment as a sanction was improper, and

(6) the argument that the trial court relied upon false statements and misrepresentations by legal counsel was not preserved.

The Court of Appeals subsequently denied rehearing. (R. pp.38-39). The Appellants then petitioned the Supreme Court for writ of certiorari, which was granted on May 17, 2023. (R. pp. 40-41). After full briefing by the parties and oral argument, the Supreme Court dismissed certiorari as improvidently granted by order filed on December 20, 2023. (R. pp. 42-43). The Remittitur was filed with the trial court on December 27, 2023. (R. pp. 44-45).

Following remand, on January 19, 2024, Barnhill filed an Affidavit of Default, and later a Motion for Entry of Default on January 25, 2024, both premised upon the 2016 Order that had been affirmed in the recently concluded appeal. (R. pp. 195-221; R. pp. 222-223). The Clerk of Court entered an Order of Default on January 25, 2024. (R. pp. 46-48).

On January 26, Appellants filed a Motion for Relief from Entry of Default, seeking to have the default set aside based upon the scope and effect of the affirmed 2016 Order, in addition to other good cause. (R. pp. 224-229).

On January 29, Barnhill filed a Motion for Default Judgment. (R. pp.230-231). Appellants filed a Return to the Motion for Default Judgment on February 4. (R. pp.232-234), and an amended Motion for Relief from Entry of Default on February 9, 2026. (R. pp.235-240).

The circuit court filed a Form 4 Order on June 18, 2024, denying Appellants' Motion for Relief from Default and granting Barnhill's Motion for Default Judgment, although damages remained to be determined. (R. pp.49-51). Appellants filed a Motion to Reconsider. (R. pp. 525-526). On July 15, that motion was denied. (R. pp. 52-54).

On September 11, 2024, in anticipation of the scheduled damages hearing upcoming, Appellants filed a Request for Judicial Notice pursuant to Rule 201(d), SCRE. (R. pp. 550-593). The matters referenced in that request were related to prior litigation between relevant parties, and Plaintiff Barnhill's divorce records on file with the clerk's office. Those records indicated that Barnhill had previously, in connection with securing his divorce and attendant property division agreement, reported that his claim he was still pursuing against Appellants had no value.

A damages hearing was held on September 12, 2024, during which Barnhill could not explain large, round-numbered deposits of funds into his account during the time he was involved in the pawn shop in which he had invested. Barnhill otherwise did not provide a sufficient factual record to supplement his initial pleadings, which had been deemed admitted when Appellants were placed in default, to support his contentions of damages. At the conclusion of the damages hearing, the trial judge took matters under advisement before issues an order in favor of Barnhill.

The Court thereafter issued an Order of Judgment on November 6, 2024. (R. pp. 55-57). The order included no ruling on the Motion for Judicial Notice. Appellants filed a Motion to Reconsider, challenging the lack of factual basis for the award of damages or punitive damages, and pointing out that the trial court failed to address the request for judicial notice that had been

taken under advisement at the hearing. (R. pp.594-597). Barnhill also filed a Rule 59(e) Motion to Alter or Amend the order, seeking prejudgment interest and other additional relief. (R. pp.598-606).

On April 2, 2025, the circuit court issued an Order Addressing the Rule 59(e) motions, denying the motion from Appellants while granting relief requested by Barnhill. (R. pp. 58-63). In so doing, the Court awarded both punitive damages and pre-judgment interest. Appellants timely filed and served a Notice of Appeal on April 25, 2025. (R. pp. 650-662).

ARGUMENT

I. PRIOR CHALLENGE AS TO THE PROPRIETY OF AN ORDER DOES NOT PRECLUDE REVIEW OF NEW ISSUES ARISING FROM APPLICATION OF THE ORDER.

Appellants appealed the 2016 Order on the basis that it was the procedurally improper fruit of a hearing that never should have gone forward in their absence for reasons of lack of notice and continued period of abeyance that had stayed the matter while the Appellants were allowed to seek successor legal counsel. The Court of Appeals issued its decision, however, that affirmed the propriety of the order generally. (R. pp. 33-37). In this appeal, Appellants do not challenge the legitimacy of the 2016 Order or seek to re-litigate those issues raised previously on appeal. Nor could they. "Under the law-of-the-case doctrine, a party is precluded from relitigating, after an appeal, matters that were… raised on appeal, but expressly rejected by the appellate court." *Judy v. Martin*, 674 S.E.2d 151, 153, 381 S.C. 455, 458 (2009).

The *Judy* opinion also makes clear that any issues that "should have been" raised on appeal are likewise governed by the law-of-the-case doctrine. *Id*. However, it is noteworthy that the 2016 Order was appealed by the Appellants immediately upon its issuance, before that order had been the basis for any further action or application after the order was entered. Following remittitur,

however, the trial court necessarily had authority for, and did, conduct further proceedings in reliance thereon. That included giving effect to and applying the now-confirmed-as-binding 2016 Order.

It was only then that competing interpretations as to how the text of the 2016 Order should be interpreted and applied arose, and as such created a new legal and factual dispute. Not only had such interpretations not yet been addressed or ruled upon by any court, appellate or circuit, it could not have been raised previously on appeal, since no application had yet occurred. Merely hypothetical application or rulings could not be challenged during the prior appeal, as there would not have been a justiciable issue ripe for review. See *Waters v. S.C. Land Res. Conservation Comm'n*, 321 S.C. 219, 467 S.E.2d 913 (1996)("A justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from a contingent, hypothetical, or abstract dispute."). Whereas the prior appeal challenged the propriety of the issuance of the 2016 order, now at issue is the subsequent *application* of the order. As such, Appellants do not seek to re-litigate any issue previously addressed, or that could have been addressed, by this Court, but instead present a ripe set of new and subsequent interpretation issues that are appropriate for review, as they are not precluded by the prior appeal.

II. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO RELIEVE DEFAULT AND DEFAULT JUDGMENT PREMISED UPON THE 2016 ORDER.

"The power to set aside a default is exercised within the sound discretion of the trial court whose decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion." *Hill v. Dotts*, 547 S.E.2d 894, 345 S.C. 304 (S.C. App. 2001). "The discretion given to the trial court in deciding whether to grant relief from default makes clear the party requesting a judgment by default is not entitled to one as of right, even when the defendant is technically in

default. Courts should closely scrutinize default judgments to prevent harsh results and drastic action. It is the policy of the law to favor the trial of cases on the merits." *Ex parte Trustgard Insurance Co.,* 442 S.C. 485, 900 S.E.2d 448, 461 (Ct. App. 2023)(internal citations omitted). "An abuse of discretion in setting aside a default judgment occurs when the judge issuing the order was controlled by some error of law." *Id*.

A. The 2016 Order does not provide a legitimate basis for default or default judgment.

The first action in the matter following the December 27, 2023 remittitur was Barnhill's filing of an Affidavit of Default on January 19, 2024. (R. pp. 195-221). The content of the affidavit consisted of mere procedural history references to the 2016 Order, followed by reconsideration and then appeal thereof, eventually leading to remittitur. Attached as exhibits to the affidavit were copies of relevant orders within that procedural history. Subsequent Motion for Entry of Default filed by Barnhill expressly stated that the "Motion is based on the Order filed on Mach 21, 2016, which affirmed on appeal as indicated in the [affidavit of default] filed on January 19, 2024." (R. p. 223). Accordingly, the effort and asserted basis for placing the Appellants in default was entirely and exclusively premised upon application of the 2016 Order as interpreted. Yet the order itself lacks a basis for default or judgment thereon as part of its sanctioning effect.

1. Default judgment was considered but rejected for an alternative in the 2016 Order.

Discovery violations afford the Court with a range of possible sanctions to be employed as appropriate and desired within the trial court's discretion. *Kershaw Co. Bd. of Educ. v. U.S. Gypsum Co.*, 302 S.C. 390, 396 S.E.2d 369 (1990)). Notably, the Court was aware of the range of options and the existence of its discretion to implement its choice when the 2016 Order noted:

> If a party fails to provide or permit discovery, the trial court may impose sanctions such as striking pleadings, or rendering a default judgment. Rule 37(b)(c), SCRCP.

> *Griffin Grading v. Tire Service Equipment Manufacturing Company, Inc.*, 511 S.E.2d 716, 718 (S.C. App. 1999).

2016 Order, p. 4 (emphasis added). (R. p. 20).

In making reference to those two specific options, while separating the two options with the conjunction "or," the options were clearly referenced and recognized as discrete alternatives, not coextensive or matched sanctions. As such, they should rightly be treated as considered alternatives, with the first more limited, and the second more damning. *See Limehouse v. Hulsey*, 404 S.C. 93, 744 S.E.2d 566 (2013)(limiting a party in default's participation to cross-examination and objection to the plaintiff's evidence).

The remainder of the order makes clear the Court's election of the lesser option, which acts to simultaneously confirm the rejection of the greater sanction. *Cf. German Evangelical v. City of Charleston*, 352 S.C. 600, 607, 576 S.E.2d 150 (2003)(referencing the Latin phrases "*expressio unius est exclusio alterius*" or "*inclusio unius est exclusio alterius,*" defined in Black's Law Dictionary 602 (7th ed. 1999) as to "to express or include one thing implies the exclusion of another, or of the alternative.")(*citing Hodges v. Rainey*, 533 S.E.2d 578, 341 S.C. 79 (2000)).

In other words, while the trial court had recognized and referenced its authority to grant default judgment as a sanction, the actual effect of the order was to declined to enter default judgment. This was still accompanied by consequence, a the striking of pleadings was the sort os sanction still considered "extreme" and "harsh medicine" in the view of the Supreme Court. *Welch v. Advance Auto. Parts, Inc.*, Appellate 2023-001096, Opinion 28284 (S.C. May 21, 2025). But it was nevertheless not so broad and effective to completely neuter any ability on the part of Appellants to raise a liability defense.

2. <u>Striking of pleadings was not done with prejudice.</u>

While the 2016 Order simply elected and referenced the striking of the "Answer, Counterclaim and other pleadings" of the Appellants, the text of the order also specifically provided that "all counterclaims are dismissed *with prejudice*." (R. p. 23) (emphasis added). Disposing of certain portions of the Appellant's case expressly "with prejudice," yet otherwise striking pleadings more generally without such prejudicial language noted or stated, again indicates distinguishable treatment with a different scope and permanent effect, with the 2016 Order electing again the (comparatively) lesser sanction.[1]

B. Terms of the 2016 Order do not nullify or preclude motion for summary judgment.

"In interpreting the meaning of the South Carolina Rules of Civil Procedure, the Court applies the same rules of construction used to interpret statutes. If a statute or rule is plain, unambiguous, and conveys a clear meaning, interpretation is unnecessary and the stated meaning should be enforced." *Pee Dee Health Care, P.A. v. Estate of Thompson*, 424 S.C. 520, 531, 818 S.E.2d 758, 764 (2018)(internal citations omitted).

The practical effect of a stricken Answer would necessarily preclude a defendant from taking advantage of any affirmative defenses, as those would by necessity have to be included in any responsive pleading per Rule 8(c), SCRCP. In contrast, there is no basis, either by rule or otherwise, that confines or restricts basic defense efforts via denial of liability, or confines such effort to presentation within an Answer or other "pleading."

To wit, there was a Motion for Summary Judgment that had been filed by the Appellants on May 13, 2016. (R. pp. 181-192). That motion remained pending and was awaiting

[1] The articulated sanction did not specify that the sanction was permanent in effect, meaning, no revised Answer could be filed that omitted all issues dismissed with prejudice, but which otherwise operated within the restricted confines that resulted from the sanction.

consideration as of the issuance of the 2016 Order. As a motion, it was categorically distinct from the set of "pleadings" referenced generally by the 2016 Order, as Rule 7(a)SCRCP and 7(b) make clear by their stated applicability to "Pleadings" and "Motions and Other Papers." The pending motion for summary judgment remained valid at the time the 2016 appeal was filed, and remaining pending upon remittitur from the Court of Appeals. It remains to be heard.

Accordingly, while the 2016 Order provided for the striking of the "Answer, Counterclaim and other pleadings" and that had significant restrictive effect on the defense of the claims, that phrasing did not reach or nullify the pending motion for summary judgment that remained valid and appropriate for scheduling and consideration.

C. Prior order cannot be overruled by a judge in the same court.

As stated above, the 2016 Order elected and announced a specific, limited sanction against the Appellants of striking pleadings. That election thereafter became the law of the case in that respect, as that issue could have been raised in the prior appeal. *Judy at* 458. The post-remittitur Affidavit of Default and Motion for Default Judgment thereafter presented no new facts to the court, instead, mere procedural recitation. (R. p. 195-221; R. pp. 230-231). Accordingly, following remand the trial judge remained bound by the prior ruling of the circuit court as to the sole extent of relief/sanctions warranted against the Appellants. *Charleston Cnty. Dep't of Soc. Servs. v. Father, Stepmother, & Mother*, 317 S.C. 283, 288, 454 S.E.2d 307, 310 (1995) ("There is a long-standing rule in this State that one judge of the same court cannot overrule another."). To be clear, Barnhill asked for entry of default judgment when asking for sanctions in 2016, and the Court considered it, but it was omitted (and therefore denied) that relief in the order. That is the law of the case.

III. FAILING TO RELIEVE APPELLANTS FROM DEFAULT WHEN THEY HAD OTHERWISE DEFENDED THE ACTION WAS AN ABUSE OF DISCRETION.

A. The claims had been otherwise defended sufficiently to preclude default.

As the result of the 2016 Order, the Appellants were considered as having "failed to plead" since that order struck their prior "Answer, Counterclaim, and other pleadings." However, a failure to plead is not sufficient alone to allow for entry of default, as Rule 55 provides:

> (a) Entry. 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).

(emphasis added).

The phrasing "plead or otherwise defend" reaffirms a categorical dichotomy and distinction between pleadings and motions, as discussed above. But it likewise establishes the consequential, categorical distinction between pleadings and separate "defense" of claims and actions.

For their part, separate from their referenced pleadings that were struck by the 2016 Order, the Appellants had "otherwise defended" the case by having filed of record a motion for summary judgment against the plaintiff's claims. (R. pp. 181-192). That motion was not mere placeholder, but rather, it included two substantive exhibits. Those were contrasting profit/loss reports for an involved business, and an affidavit from Defendant Floyd Swilly. (R. pp. 184-192). Those steps provided an active defense of the merits of the action and remained to be heard after remand.

In the continuing context of such "otherwise defending" by the Appellants, the presence of which precludes applicability of provisions allowing for entry of default under the SC Rules of Civil Procedure, it was an abuse of discretion for the court to deny the motion for relief from default.

B. Good cause existed and the rejection thereof was an abuse of discretion.

Pursuant to Rule 55(c), SCRCP, the "Appellants" moved for relief from the Entry of Default after the entry of default had been completed by the Clerk of Court. (R. pp.46-48). The Appellants filed a Motion for Relief from Entry of Default, challenging the default based upon the scope and effect of the affirmed 2016 Order, in addition to other good cause. (R. pp. 224-229). The scope and effect of the 2016 Order has been addressed above, and a basis articulated for why it is inconsistent with the entry of default and refusal of the court to remedy the same upon request.

As for other "good cause" that renders any refusal to life default unreasonable, South Carolina caselaw makes clear that the "good cause" requirement pursuant to Rule 55(c) is less stringent than relief sought pursuant to Rule 60(b), as "an entry of default may be set aside for reasons that would be insufficient to relieve a party from a default judgment." *Sundown Operating Co., Inc. v. Intedge Industries, Inc.*, 383 S.C. 601, 681 S.E.2d 885, 888 (2009). Furthermore, Rule 55(c) is to be "liberally construed to promote justice and dispose of cases on the merits." *Dixon v. Besco Engineering, Inc.*, 320 S.C. 174, 463 S.E.2d 636 (Ct. App. 1995). "Once a party has put forth a satisfactory explanation for the default…" which in this matter was incorrect interpretation of the 2016 Order as requiring the same, "… the trial court must also consider: (1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted." *Sundown* at 888.

1. Timing.

For reasons articulated above, Appellants contend that entry of default was not appropriate at any time. However, Barnhill filed an Affidavit of Default on January 19, 2024, just a few weeks after remittitur was completed. (R. pp. 195-221). Barnhill soon filed a Motion for Entry of Default on January 25, 2024, with the default order being issued by the Clerk of Court that same date. (R.

pp. 222-223). The Swilly Defendants did not delay, but instead filed a Motion for Relief from Entry of Default, challenging the default the very next day. (R. pp. 224-229). Mere hours after entry, it was being challenged, which means it is certainly timely.

2. Meritorious defense.

As also articulated above, the Appellants had confidence in their denial of liability, and as an outgrowth of that, filed a motion for summary judgment with multiple exhibits that remained pending for decision following remand. (R. pp. 181-192). While never having been given its due consideration, that motion was filed with the assistance of counsel, prepared and filed by both client and counsel alike in good faith, with evidentiary support. Appellants have filed a supplemental affidavit, and the merits to that motion remain viable and available.

3. Degree of prejudice if relief is granted.

Barnhill may claim that there has been delay, and detriment as a result of such delay. However, the Appellants have experienced significant delay by the failure to ever have its substantive, potentially dispositive, motion for summary judgment hearing scheduled and decided. And the delay experienced since 2016 has exclusively been the product of the speed with legal issues can be heard, not any intentional effect on the part of Appellants.

Further, as referenced in summary fashion as part of the Rule 59(e) motion filed initially on January 26, 2024, and as amended and filed on February 9, 2024, counsel for Appellants was largely unavailable during the immediate period between remittitur and initial filing by Barnhill. (R. pp. 224-229; R. pp. 235-240). Had the two lawyers principally handling this matter not been sick (one with COVID and the other hospitalized for a period that was still ongoing as of filing

that motion), counsel could and would have done more to "otherwise defend" the matter, such as pursuit of hearing on the pending motion for summary judgment.

As stated at the time, and as is even more clear currently, the Court should have granted the motion to set aside default "to promote justice and dispose of cases on the merits." *See Dixon* at 638. In fact, to fail to do so rose to the level of abuse of discretion.

IV. DAMAGES WERE NOT PROVEN BY REQUISITE PREPONDERANCE OF EVIDENCE AS REQUIRED.

"The amount of damages in a default action must be proved by the preponderance of the evidence. By defaulting, a defendant forfeits his right to answer or otherwise plead to the complaint. In essence, the defaulting defendant has conceded liability. However, a defaulting defendant does not concede the amount of liability." *Palmetto Constr. Grp. v. Restoration Specialists*, 444 S.C. 328, 349, 907 S.E.2d 129 (Ct. App. 2024)(internal citations omitted). The plaintiff "must prove by competent evidence the amount of his damages, and such proof must be by a preponderance of the evidence. Although the defendant is in default as to liability, the award of damages must be in keeping not only with the allegations of the complaint and the prayer for relief, but also with the proof that has been submitted." *Solley v. Navy Fed. Credit Union, Inc.*, 397 S.C. 192, 204, 723 S.E.2d 597, 603 (Ct. App. 2012).

A. Judicial Notice as requested was appropriate.

As noted above, because the Appellants were in default at the time of the damages hearing, their counsel was only permitted to cross-examine and object to Barnhill's proffered evidence. *Limehouse v. Hulsey*, 404 S.C. 93, 744 S.E.2d 566 (2013). In advance of the damages hearing, the Appellants filed a Request for Judicial Notice pursuant to Rule 201(d), SCRE. (R. pp. 550-593). The rule provides for "judicial notice of adjudicative facts" under certain circumstances. As such,

counsel for the Appellants was not "attempting to introduce any evidence, but rather "asking this Court to take judicial notice of its own records." (R. p. 785, lines 18-21).

Pursuant to Rule 201(f), SCRE, notice may be taken at any stage of the proceedings, and as such it was perfectly acceptable for the request to be made to the Court when it was submitted.

The request made to the Court in this matter was regarding two relevant issues:

1) Judgment in favor of several plaintiffs (WCP Enterprises LLC, SMG Partners, LLC, 809 Holding LP) versus, inter alia, David Wilkinson, which is filed of record in the clerk of Court's office for Horry County, South Carolina, Case No. 2012-CP-26-3105. Mr. Wilkinson was a subject raised during the of cross examination of Barhill at the damages hearing, specifically evidence of Mr. Wilkinson having identified himself as a "Partner" in relation to Mr. Barnhill on an email, which was relevant regarding the manner in which Barnhill interacted with the pawn shop. (R. pp. 748-753).

2) The other matter addressed in the motion seeking judicial notice is the Financial Declaration submitted by Mr. Barnhill in connection with the resolution of his marriage. Relevance of which is discussed infra.

B. The pleadings are insufficient on their own to establish claims.

At the close of the damages hearing, counsel for the Appellants addressed the court and requested a directed verdict or summary judgment based on the failure of the Plaintiffs to show damages by a preponderance of evidence. (R. p. 791, line 22- p. 805, line 23). As part of that argument submitted at the time, counsel went through each of the causes of action that Barnhill was pursuing and articulated all the ways in which Plaintiff's complaint was full of conclusory phrases, not facts that could support an award of damages. For example, the complaint portion

related to alleged fraud merely includes a claim that "Defendants" generally made misrepresentations, in contravention of Rule 9, SCRCP that requires all averments of fraud to be drafted in such a manner as to state allegations with particularity. And as to the fifth cause of action, conversion, there was no evidence of payment made to Appellants.

C. Testimony and evidence beyond the pleadings only undermine claim to damages.

Barnhill failed to meet his burden of proof, even with the assistance of having Appellants held in default as follows:

1. Not providing any evidence that Barnhill individually, or collectively, made an investment of the claimed total of $115,000, as neither of the two checks claimed as evidence of investment by Plaintiffs were made payable to any of the Appellants. (R. p. 252). Rather, it appears a separate company named "Equity Trust," which is not a party to this action, delivered funds to defendants. (R. p. 797, line 1-p. 798, line 23). The unsubstantiated basis for that alleged investment [by whom was not noted] was clearly relied upon in the Court's order of award. (R. pp. 55-57).

2. On cross-examination, Barnhill was presented with evidence that he had previously warranted and represented to the Family Court that the value of his interest/investment in 809 Holdings was zero ($0), given its description as an "investment gone bad." (R. p. 756, lines 12-p. 764, line 12). Award in Barnhill's favor now is barred by judicial estoppel given his prior position, under oath, taken in a prior court proceeding that the investment was not only of no value, but that there was no related claim of any value, a position which provided realized benefit by sustaining his family court agreement. *Cothran v. Brown,* 357 S.C. 210, 592 S.E.2d 629 (2004).

3. Also on cross-examination, Barnhill failed to acknowledge or disclose the nature of significant deposits to his bank account during the relevant period in which he allegedly was sustaining loss related his investment. (R. p. 736, line 24 – p. 737, line 3). These large deposits undermine claimed losses from his investment, as well as questions regarding pre-tax funds.

Barnhill's testimony about damages was speculative and unconvincing at best. He fell far short of establishing damages at all, much less that he personally sustained any damages, or that his damages were in any specific amount. The award of actual damages must be vacated. Once the actual damages are vacated, the award of punitive damages necessarily falls as well.

V. THE TRIAL COURT ERRED BY AWARDING PREJUDGMENT INTEREST ON A NON-LIQUIDATED AMOUNT OF DAMAGES, AND BY IMPOSING PUNITIVE DAMAGES NOT SUPPORTED BY THE RECORD.

A. Pre-judgment interest on non-liquidated damages was improper

Barnhill is not entitled to pre-judgment interest. Caselaw in South Carolina is clear that while statutory law allows prejudgment interest in some occasions, it is not appropriate in all awards of damages. Such interests would only be available "from the time when, either by agreement of the parties or operation of law, the payment is demandable, if the sum is certain or capable of being reduced to certainty. *Freeman v. J.L.H. Investments, LP*, 414 S.C. 362, 778 S.E.2d 902 (2014). It is "allowed on a claim of liquidated damages; i.e., the sum is certain or capable of being reduced to certainty based on a mathematical calculation." *Butler Contracting v. Court Street*, 369 S.C. 121, 631 S.E.2d 252, (2006).

Every figure, once set by the court or a jury long after the initiation of the dispute, has "mathematical certainty" and definition. Yet nothing about Barnhill's claimed damages was

liquidated or certain at the time they were still being litigated. "I claimed entitlement to a recovery long ago and now I am receiving a definite amount from the court" is not a legitimate basis by which interest can be summoned and demanded to augment actual recovery. Indeed, had Barnhill's damages been liquidated, there would have been no reason for the damages hearing to take place.

In this matter, the original complaint in this matter sought damages "in an amount to be determined by the finder of fact." (R. p. 86) In the initial complaint, Barnhill pleaded seven causes of action, none of which were for rescission. (R. pp. 68-91). Yet that was what was sought at the eventual damages hearing, and the basis for the actual damages included with the judgment. Barnhill's own Motion for Default Judgment following remittitur from the Supreme Court included in its prayer for relief a request "that the Court conduct a default damages hearing." (R. pp. 230-231).

Under these facts, even subject to the deemed-admitted nature thereof by virtue of the Appellants being held in default, the amount of damages was never liquidated or certain. Working within the bounds of strict limitation to cross-examination and objection, the Appellants were still able to bring into doubt whether Barnhill received some return on investment, or indeed, whether he had enriched himself by unidentified bank deposits made during the time he had access to store inventory, *i.e.,* scrap gold. As such, damages remained neither determined nor demandable until the issuance of the Court's order on November 6, 2024. If there was already any "mathematical certainty" as to damages prior to this Court's determination thereof as Barnhill alleges, then the request for, and holding of, a damages hearing was an abusive waste of effort and resources for all parties involved in these proceedings, including the trial Court.

Instead, the Court's order following the damages hearing clearly stated the obvious, that the hearing had been necessarily held "to determine damages," not merely confirm something that

had been established long ago. (R. pp. 55-57). Moreover, the "damages" awarded seemed to be based on initial investments made by Barnhill, even though he did not plead rescission, as was pointed out at the hearing. (R. p. 811, lines 9-17). If damages were yet to be determined, and thus in need of a hearing to be established, they could not have been "demandable" or certain at an earlier date from which interest could be calculated, even if specific sums or totals sought by Plaintiff at the hearing were ultimately accepted and established as the final determination by the Court.

B. Punitive damages are not supported by the record.

The default judgment also cannot support an award of punitive damages, because the allegations of the complaint were insufficient to allege the nature and extent of misconduct necessary for which punitive damages of any amount would be appropriate. As such, the subsequent admissions by default did not support findings sufficient to impose punitive damages in favor of Plaintiffs. The allegations within the complaint, upon which default judgment was based, were conclusory in nature and did not state facts which support an award of punitive damages. Nor did the evidence introduced at trial remedy this significant omission in evidence, which contradicted relief Barnhill had earlier obtained in family court. An award of damages to Plaintiffs based on this "investment" to which Plaintiff Barnhill had already represented to a court had "no value" should be precluded by the doctrine of judicial estoppel. *Cothran v. Brown*, 357 S.C. 210, 215, 592 S.E.2d 629 (2024).

Further, the punitive damages awarded violate Appellants' rights to due process under the state and federal constitutions because the trial court did not rely upon or cite a record sufficient to allow for analysis of the factors that might support an award of punitive damages. The final order summarily stated "In part, the reprehensibility of Defendants' conduct over a sustained

period of time with other victims was more than sufficient to support and award of three times the actual damages." (R. p. 62). No explanation for the nature of the alleged whole, in contrast to "in part." *Id*.

Ultimately, the base award effectuated mere recovery of funds deemed to have been invested, without justification in the record as to why an effective rescission of a contract would justify punitive damages or constitute "reprehensible" conduct. The 2013 initial complaint, despite being 21 pages in length, only uses the word "wanton" a single time, and "reckless" twice. (R. pp. 68-91). They appear within the negligence cause of action, as part of a laundry list of potential acts on the part of the Defendants, who were alleged to have engaged in "one or more" of such acts as "failing to diversify Plaintiff's investment" or "failing to comport their conduct in accordance with industry standards." (R. pp. 86-87, ¶ 134). Such commonly negligence acts, even if deemed true because of an erroneously applied default, does not rise to the level of justification for punitive measures.

The Court's failure to address *Gamble* factors in the Order beyond mere summary statement as to compliance, is demonstrative of Barnhill's failure of allegation and supporting evidence. Such failures do not excuse deficiencies in the Court's order failure to address and apply relevant factors more rigorously.

<u>CONCLUSION</u>

This Court is being asked, and remains able, to consider the proper application and interpretation of the 2016 Order. When the text of the order is fully considered, it will be clear that default judgment should not have been entered, and the trial court's determination otherwise rose to the level of legal error and an abuse of discretion that needs and warrants correction and remand for further proceedings in accordance therewith.

Respectfully submitted,

s/ Harvey M. Watson III
Desa Ballard (S.C. Bar No. 498)
Harvey M. Watson III (S.C. Bar No. 74053)
Haley Hubbard (S.C. Bar No. 103195)

BALLARD & WATSON
226 State Street
West Columbia, SC 29169
Telephone 803.796.9299
Facsimile 803.796.1066
desab@desaballard.com
harvey@desaballard.com
haley@desaballard.com

ATTORNEYS FOR APPELLANTS

December 1, 2025

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM HORRY COUNTY
WILLIAM H. SEALS, JR., CIRCUIT COURT JUDGE

Appellate Case No. 2025-000796

Gabriel Barnhill and GSB Enterprises, LLC, ... Respondents,

v.

J. Floyd Swilley, J. Floyd Swilley Investment Advisors,
Laurel K. Swilley, SMG Partners, LLC, SMS Services, LP,
WCP Limited, LLC, 809 Holdings, LP, QC Financing, LLC
Heath Causey and Sage Financial Group, LLC, Defendants,

of which J. Floyd Swilley, Laurel Swilley and
Heath Causey are the .... Appellants.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief complies with Rule 211(b), SCACR.

Respectfully submitted,

s/ Harvey M. Watson III

Desa Ballard (S.C. Bar No. 498)
Harvey M. Watson III (S.C. Bar No. 74053)
Haley Hubbard (S.C. Bar No. 103195)

BALLARD & WATSON
226 State Street
West Columbia, South Carolina 29169
Telephone 803.796.9299
Facsimile 803.796.1066
desab@desaballard.com
harvey@desaballard.com
haley@desaballard.com

December 1, 2025

ATTORNEYS FOR APPELLANT