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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM UNION COUNTY
Court of Common Pleas

Daniel Coble, Circuit Court Judge

Appellate Case No. 2025-002219

Michael J. Osten and Shawntell L. Osten...Respondents

v.

Sandra Malikowski..Appellant

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Did the lower court err in failing to vacate the subject default judgment?

II. Did the lower court err in failing to set aside the entry of default?

STATEMENT OF THE CASE

The complaint in this action was filed on March 6, 2024. (Complaint). An affidavit of service indicating personal service on the Appellant at "202 Gilbert Street" (sic) on April 29, 2024 was filed on May 9, 2024. (Affidavit of Service). This address does not exist in Union, South Carolina. Appellant's proper address is 202 Gibert Street.

The complaint asserts three causes of action: nuisance, negligence and trespass purportedly based on Respondents' problems with Appellant's dogs. (Complaint).

The case was called for trial on December 16, 2024. According to an order of continuance signed by Judge Grace Knie, the date was set pursuant to Respondents' request. (Order of Continuance of December 16, 2024). Judge Knie granted Respondents' request of a continuance based on the unavailability of a witness. The record below contains no indication that Appellant was given any notice of the trial.

On January 6, 2025, Respondents filed their affidavit of default, together with a motion for default judgment and damages. (Affidavit of Default; Motion for Default and Damages). A hearing on this motion was set for February 24, 2025. (Notice of Hearing). The Certificate of Service shows Respondents improperly addressed the notice of this hearing they contend was mailed to Appellant. (Certificate of Service – Notice of Damages Hearing). The certificate of service and copy of counsel's letter filed on January 28, 2025, both are addressed to "202 Gilbert Street". (Certificate of Service – Notice of Damages Hearing).

The damages hearing went forward on February 24, 2025, be for Judge Charles J. McCutchen. (Transcript of Damages Hearing, February 24, 2025). Appellant was not present. At the damages hearing, Respondents gave testimony contrary to the factual

allegations and the measure of damages stated the complaint. They testified that they no longer owned the home next door to Appellant's. (Transcript of Damages Hearing, February 24, 2025, pp. 14-15). Respondents also testified that they were forced to sell their home because of Appellant's dogs. (Transcript of Damages Hearing, February 24, 2025, pp. 14-15). They further gave testimony for the notion that they could not sell their home for a particular price and were, again, forced to sell it for less than what they indicated it was worth. There was further testimony that the Appellant's dogs caused Respondents to purchase a smaller, more expensive home in Spartanburg which required them to take out a "multi-hundred-thousand-dollar mortgage". (Transcript of Damages Hearing, February 24, 2025, pp. 14-15). None of these assertions are alleged in the complaint as the complaint instead repeatedly alleges Respondents' and Appellant are "next-door-neighbors" and requests damages "to include but not be limited to, disturbing the Plaintiff's (sic) peaceful enjoyment of their home, causing mental anguish and emotional distress, and directly affecting the value of their home". (Complaint).

Following the receipt of testimony, Respondents' counsel referenced having provided the Court with a "summary of damages" several times during the hearing and indicated that the asserted damages included Respondents' mortgage on their new home in Spartanburg, their attorney's fees, and moving costs. (Transcript of Damages Hearing, February 24, 2025, pp. 16-17). Their complaint makes no allegations or prayers for damages related to these items[1]. (Complaint). In any event, this "summary of damages" was not entered into the record, nor was the "bunch of paperwork" referenced by

[1] Judge McCutchen granted leave for Respondents to amend their pleadings to add court costs to conform to the record; though, it was unclear what pleading was being amended. In any case, Appellant asserts in this appeal that the granting of leave to amend to conform to the record was improper in the circumstance of this case to the extent the pleading being amended was the complaint.

Respondents' counsel as having been sent to Judge McCutchen's "admin and law clerk". (Transcript of Damages Hearing, February 24, 2025, pp. 5-6, 15-17).

Following the hearing, Judge McCutchen entered a default judgment against Appellant in the total amount of $280,862.58 by his order dated March 5, 2025. This order recites that Respondents mailed notice of the hearing to Appellant at the same improper address. (Order Granting Default Judgment and Damages of March 5, 2025). Judge McCutchen later amended his order on March 11, 2025[2]. The order was amended to recite that the Respondents had mailed the notice to Appellant's correct address. As noted above, this amendment is contrary to Respondents' Certificate of Service. (Certificate of Service – Notice of Damages Hearing).

Neither of Judge McCutchen's orders were served on Appellant. Appellant was unaware of the judgment until May 3, 2025, when she was personally served with the complaint in civil action no. 2025-CP-44-00187, an action wherein Respondents seek the sale of Appellant and her children's home in their effort to collect on the default judgment. (Affidavit of Sandra Malikowski, paragraph 18, p. 3).

Appellant filed her motion for relief from the default and the default judgment under Rule 60, South Carolina Rules of Civil Procedure ("SCRCP") was filed on July 16, 2025. A hearing on Appellant's motion was held before the Judge Daniel Coble on September 15, 2025. (Transcript of Hearing September 15, 2025). Judge Coble denied the motion by Form 4 Order dated September 19, 2025. (Order of September 19, 2025). Appellant filed her motion to alter or amend the September 19, 2025 order on September 29, 2025. (Motion to Alter or Amend September 29, 2025).

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[2] The record below does not indicate how the amendment to Judge McCutchen's order came to be as no motion under Rule 59, SCRCP, was filed by Respondents.

Judge Coble then entered a more formal order denying Appellant's Motion to Vacate or Set Aside Default Judgment by his order dated October 1, 2025. (Order of October 1, 2025). Appellant moved for Judge Coble to alter or amend this order on October 10, 2025. Both of Appellant's motions to alter or amend were denied by Judge Coble without a hearing by his orders dated October 3, 2025 and October 20, 2025, respectively. (Order of October 3, 2025; Order of October 20, 2025). The Notice of Appeal of the aforementioned orders of Judge Coble was filed on October 31, 2025.

STATEMENT OF FACTS

Appellant is a 27 year old single working mother of two boys ages 5 and 8 months. (Affidavit of Sandra Malikowski, paragraph 2, p. 1). She and her boys live at 202 Gibert Street, Union, South Carolina. (Affidavit of Sandra Malikowski, paragraph 2, p. 1). Appellant was born and lived in Poland for the first 8 years of her life. (Affidavit of Sandra Malikowski, paragraph 12, p. 2). She was then adopted by her parents and moved to the United States. (Affidavit of Sandra Malikowski, paragraph 12, p. 2). Appellant is able to speak and understand the English language; however, she has considerable trouble reading and comprehending the written language. (Affidavit of Sandra Malikowski, paragraph 12, p. 2).

Appellant purchased her home on February 24, 2023, and then moved to Union from the State of Kentucky. (Affidavit of Sandra Malikowski, paragraph 3, p. 1) Almost immediately upon moving in, Appellant began having trouble with her then next door neighbors, the Respondents. (Affidavit of Sandra Malikowski, paragraph 4, p. 1).

Respondent Michael J. Osten ("Mr. Osten") was constantly confronting her any time she would step outside of her home. (Affidavit of Sandra Malikowski, paragraph 5, p.

1). Appellant described how Mr. Osten, who had a number of cameras on his home, was apparently constantly watching her home because he would reference in these confrontations when and where her dogs were let out, when and how long she kept her dogs in her garage, and generally when she came and went from her home. (Affidavit of Sandra Malikowski, paragraph 6, p. 1).

Shortly after moving in, Mr. Osten began repeatedly calling Animal Control with complaints about Appellant's dogs being off leash even though the dogs were in her yard. He would also make complaints about her dogs barking and other similar matters. (Affidavit of Sandra Malikowski, paragraph 8, pp. 1-2). Mr. Osten literally called Animal Control every other day for a period of months beginning in March of 2023. (Affidavit of Sandra Malikowski, paragraph 8, pp. 1-2). Travis Smith, the Animal Control officer responsible for responding to these calls, testified in his affidavit that he spent hours outside of Appellant's home, yet never observed anything to substantiate Mr. Osten's complaints. (Affidavit of Travis Smith, pp. 1-2). He described Mr. Osten's hundreds of complaints as "in very large measure false." (Affidavit of Travis Smith, p. 3). When Animal Control would not do his bidding, Mr. Osten went so far as to make multiple false reports to DSS alleging child abuse against Appellant related to her dogs. (Affidavit of Sandra Malikowski, paragraph 9, p. 2).

During this time, Appellant was being served with something resulting from the Respondents' complaints on a regular basis. Respondents also brought a civil proceeding against her in the Union County Magistrate's Court in May of 2023 asking for damages based on the very same allegations asserted in this action; said action being dismissed. (Affidavit of Sandra Malikowski, paragraph 10, p. 2). This was Appellant's first

experience with the civil court system. (Affidavit of Sandra Malikowski, paragraph 13, p. 2).

Given her difficulty reading and comprehending written English, she did not understand that the summons and complaint served on her in this action required a response. (Affidavit of Sandra Malikowski, paragraph 14, p. 2).

Appellant had no knowledge of the default judgment rendered in this case until she was served with the summons and complaint in civil action no. 2025-CP-44-00187. (Affidavit of Sandra Malikowski, paragraph 18, p. 3). Appellant denies receiving a mailing enclosing any notice of the damages hearing preceding the default judgment. (Affidavit of Sandra Malikowski, paragraph 15, p. 2).

After a conversation with her neighbor, Appellant immediately sought counsel; however, it took her a couple of months to save enough money to pay a retainer to her attorneys. (Affidavit of Sandra Malikowski, paragraph 18, p. 3).

Appellant now understands that Respondents have again claimed that her dogs barking have somehow caused them damages. (Affidavit of Sandra Malikowski, paragraph 17, p. 3). Appellant acknowledges that while they are dogs and do, therefore, bark at times, she denies that her dogs bark incessantly as Respondents assert[3].(Affidavit of Sandra Malikowski, paragraph 17, p. 3). Appellant's other neighbors have never mentioned a problem with her dogs. (Affidavit of Sandra Malikowski, paragraph 18, p. 3). In fact, both of her closest neighbors, including the neighbor who purchased Respondents' former home five months before the damages hearing, categorically deny Respondents' claims and state

[3] Respondents admit as much in paragraph 7 of their complaint where they state that they tried to prove these claims previously with other agencies and courts but were unable to do so

that the dogs are no problem at all, describing them as friendly. (Affidavit of Katherine Blankenship; Affidavit of Megan Jarrett).

STANDARD OF REVIEW

Whether to grant or deny a motion under Rule 60(b) lies within the sound discretion of the judge. BB & T v. Taylor, 369 S.C. 548, 551, 633 S.E.2d 501, 502–03 (2006). An appellate court's standard of review, therefore, is limited to determining whether there was an abuse of discretion. Id. An abuse of discretion arises where the judge issuing the order was controlled by an error of law or where the order is based on factual conclusions that are without are without evidentiary support. Id.

However, courts should closely scrutinize default judgments to prevent harsh results and drastic action. *e.g.*, Ex parte Trustgard Insurance Company, 442 S.C. 485, 900 S.E.2d 448 (Ct. App. 2023), *citing*, Renny v. Dobbs House, Inc., 275 S.C. 562, 567, 274 S.E.2d 290, 292 (1981). Large default judgments are of particular concern. Renney, *supra*. Such scrutiny is required because "it is the policy of the law to favor the trial of cases on the merits" rather than on technicalities. Id.; Mictronics, Inc. v. SCDOR, 345 S.C. 506, 548 S.E.2d 223 (Ct. App. 2001). The rules regarding granting relief from default are consequently to be liberally construed to promote justice between the parties and dispose of the case on its merits. Dixon v. Besco Engineering, Inc., 320 S.C. 174, 463 S.E.2d 636 (Ct. App. 1995).

ARGUMENT

The here concerned default judgment should be vacated for a handful of different specific legally significant reasons, but the same is true generally because it represents a huge miscarriage of justice that the Court must rectify. The irregularities patently

appearing in the record are alone reason enough to set it aside. However, the judgement should also be vacated as void, and in any event, the judgment and the entry of default should be set aside because Appellant has made the requisite showing under Rules 55 and 60, SCRCP.

I. The Lower Court Erroneously Refused to Vacate the Default Judgment.

The lower court misapprehended or overlooked the significant irregularities appearing in the record. The lower court's denial of Appellant's motion for relief from the default judgment was based on both errors of law and factual conclusions without evidentiary support. In general, the court below failed to properly scrutinize the default judgment as required in the circumstances attending this case as required by the rule set forth in Renny, *supra*.

A. The Lower Court Misapprehended That the Record Is Devoid of Evidence that Appellant Received Notice of the Damages Hearing and Therefore the Default Judgment is Void and Should Be Vacated.

The low hanging fruit in this appeal concerns Respondents' inability to show that proper notice of the damages hearing was provided to Appellant as required by Rule 55(b)(2), SCRCP. As noted above, Respondents repeatedly addressed correspondence to Appellant at an address that is not hers and does not exist. Importantly, this is true of the notice of the damages hearing according to their own Certificate of Service. (Certificate of Service – Notice of Damages Hearing). This defect in and of itself renders the default judgment void under the rules of civil procedure.

Rule 55(b)(2), SCRCP, explicitly provides, "[p]ursuant to Rule 5(a), notice of any trial or hearing on unliquidated damages shall also be given to parties in default by first class mail ***to the last known address of such party*** whether or not such party has appeared in the action." (emphasis added). "The need to properly serve each party individually does

not arise from an arcane or highly technical application of the rules. Rather, ***this requirement serves an essential function***—ensuring that notice is properly received by all entitled to it." (emphasis added). McCall v. IKON, 363 S.C. 646, 611 S.E.2d 315 (Ct. App. 2005) (holding that a single letter with notice of a default damages hearing addressed jointly to two Appellants was insufficient notice to sustain default judgment). After all, "a default judgment rendered without the required notice is a deprivation of procedural due process and is void." 47 Am. Jur.2d, *Judgements* § 1179.

Service by mail occurs "when a document is deposited with the U.S. Postal Service ***properly addressed*** with sufficient postage affixed." (emphasis added). Southbridge Prop., Inc. v. Jones, 292 S.C. 198, 355 S.E.2d 535 (1987). In light of the important consequences arising from the service of notices of hearings under Rule 5, "the courts, quite rightly, have required ***the strictest and most exacting compliance with the rule*** when service is made by mail." (emphasis added). Timmons v. United States, 194 F.2d 357, 360 (4th Cir. 1952)[4].

Respondents, being next-door-neighbors to Appellant at the commencement of the proceeding, were fully aware of Appellant's last known address and the proper spelling of the street where the parties homes are located. Yet, the records below shows Respondents mailed of the notice of the damages hearing to Appellant at an address that is not hers, nor does it exist within the City of Union. (Certificate of Service – Notice of Damages Hearing). Appellant, for her part, denies receiving the purported notice of the virtual damages hearing in this case. (Affidavit of Sandra Malikowski, paragraph 15, p. 3).

Judge Coble, in his October 1, 2025, order denying Appellant's motion for relief from the default judgment, devoted an entire page of his four page order addressing

[4] "Rule 5(b)(1) is the same as Federal Rule 5(b)". Rule 5, SCRCP, comment on section 5(b)(1).

"irregularities regarding the incorrect address", but nevertheless found that Appellant received notice of the damages hearing despite the fact that Appellant denied receiving it and Respondents admitted that notice of the hearing was incorrectly addressed. (Order of October 1, 2025, p. 3-4; Transcript of Hearing, September 15, 2025, p. 26). Respondents' counsel stated "And of course, ***we would stipulate to the confusion specific to Gilbert Street***, G-i-l-b-e-r-t, versus Gibert Street, G-i-b-e-r-t, your Honor. Gibert Street is where the [Appellant] resides. ***Gilbert Street is not a correct address***." (Transcript of Hearing, September 15, 2025, p. 26). This stipulation on the record is fatal to the validity of the default judgment in these circumstances.

The only "evidence" cited by Judge Coble to support this erroneous finding was a purported copy of a certified mail receipt attached to Respondents' memorandum in opposition to Appellant's motion relating to the mailing of notice of a prior hearing in the case which was also incorrectly addressed but was, according to Judge Coble's October 1, 2025 order, "clearly signed for by the [Appellant]." (Order of October 1, 2025, p. 3-4). This finding was itself error because there was no evidence submitted by Respondents to support that 1) the copy of the certified mail receipt was authentic; or 2) that the signature appearing on the receipt was that of Appellant.

It is well established that counsel's statements regarding the facts of a case and counsel's arguments are not admissible necessary to support a finding of the court. *e.g.*, Ex parte Morris, 367 S.C. 56, 624 S.E.2d 649 (2006); Landry v. Landry, 430 S.C. 153, 843 S.E.2d 491 (2020); McManus v. Bank of Greenwood, 171 S.C. 84, 171 S.E.473 (1933) (noting that courts repeatedly have held "that statements of fact appearing only in arguments of counsel ***will not be considered***") (emphasis added). In fact, Respondents

submitted no evidence of any kind at the September 15, 2025 hearing before Judge Coble. Respondents had every opportunity to properly enter these things in the record by way of affidavit or otherwise. They failed to do so. Had they attempted to do so, Appellant would have had the right to submit her own evidence on the question. For the lower court to base a finding on statements of counsel and an exhibit to a memorandum is, therefore, fundamentally unfair and constitutes reversible error in and of itself. See, Ex parte Morris, *supra*; Landry, *supra* (holding that a court may not base "necessary findings of fact" solely on statements or arguments of counsel).

What is more, even if the receipt and what counsel asserts to be Appellant's signature were properly authenticated by actual evidence, the same could not serve as any kind of evidence to show that Appellant received the admittedly improperly addressed mailing of the notice of the damages hearing nearly a year later. It is impermissible for the lower court to extrapolate as a determinative matter of fact that because the Postal Service delivered one incorrectly addressed mailing, it must have done so with another incorrectly addressed mailing. To do so would be to "assume the infallibility of the U.S. Postal Service, ***an illogical assumption*** given the volume of letters and packages constantly being processed and the number of human hands any one envelope may pass through." Green v. Green, 320 S.C. 347, 465 S.E.2d 130 (Ct. App. 1995). There simply is no evidence to support the lower court's finding or with which to impeach Appellant's testimony to the contrary.

The record, therefore, is devoid of any evidence that Appellant had the required notice of the hearing. A default judgment issued without the required notice constitutes a depravation of due process of law and is "void and should be set aside". See Dymon, Inc.

v. Hyman, 305 S.C. 170, 406 S.E.2d 388 (Ct. App. 1991), *citing with approval*, Wilson v. Moore and Associates, Inc., 564 F.2d 366 (9th Cir. 1977) (holding "[t]he failure to provide 55b(b)(2) notice, if required, is a serious procedural irregularity that usually justifies setting aside a default judgment or reversing a failure to do so."); Stark Truss Co. v. Superior Constr. Corp., 360 S.C. 503, 602 S.E.2d 99 (Ct. App. 2004) (finding a default judgment is void when the Appellants did not receive notice of the hearing addressing the default judgment).

As a result, the Court should reverse the lower court, vacate the default judgment, and remand the matter for a proper damages hearing so that Appellant may actually participate to ensure the award is one supported by the record and which the law actually allows.

B. The Lower Court Failed to Properly Scrutinize the Record Underlying the Default Judgment Or Otherwise Misapprehended That It Is So Greatly Out of Proportion to the Wrongs Alleged In the Complaint And Must Be Vacated.

A default does mean a plaintiff is relieved of the obligation to prove its claims by admissible evidence. The law is quite the opposite, in fact. Nor does a default mean a plaintiff is entitled to a judgment of whatever size and description as may suit his fancy. Instead, a default judgment for unliquidated damages must be supported by admissible evidence actually entered in the record and may only be in the amount requested in the complaint and of a character allowed by the law. See, Renney v. Dobbs House, Inc., 275 S.C. 562, 274 S.E.2d 290 (1981) (default does not constitute and admission of damages which a plaintiff must prove by a preponderance of evidence).

1. Neither the Record Made at the Damages Hearing Nor the Law Support the Default Judgment.

The burden of proof is on the plaintiff to establish his case. Oates v. Fountain, 113 S.C. 372, 101 S.E. 830 (1920). Respondents, in the case at bar, failed to prove their damages – and thus the amount of the default judgment – by a preponderance of the evidence. Other than Mr. Osten's mention of a "multiple-hundreds-of-thousand dollar mortgage" on their new home in Spartanburg[5], Respondents did not testify as to any purported damages at all.

As stated above, the only the referenced as to the amount and character of Respondents' alleged damages referenced in the hearing was a "summary of damages" mentioned by Respondents' counsel at the damages hearing. (Transcript of Damages Hearing, September 15, 2025). That counsel appears to have provided this "summary of damages" to the lower court does not make it evidence or a part of the record. Respondents could have testified regarding the damages they alleged. For example, while Appellant rejects that they are recoverable in the circumstances of this case, Respondents could have testified about the moving fees counsel stated were a part of this summary on page 9 of the transcript of the damages hearing. At least then, Appellant and this Court would know what portion of the default judgment is related to that item. They did not, however.

Any judgment must accord with and be warranted by the pleadings and proof of the party in whose favor it is rendered. Wingard v. Lee, 287 S.C. 57, 336 S.E2d 498 (Ct. App. 1985). This was not a matter that was either plead, filed or served on Appellant, nor was it admitted into evidence at the damages hearing. Therefore, this summary cannot be for the basis of the default judgment. Had the lower court scrutinized the record made at the damages hearing, this would have been clear. However, the court below failed altogether

[5] This, as argued below, is not a measure of damages recoverable in this case.

to dos. As a result, the lower court must be reversed and the judgment must be vacated. Ex parte Trustgard Insurance Company, *supra*.

While the lack of evidence presented to support the default judgment is an obvious error requiring reversal of the lower court, the problems with the judgment resulting from the record made at the damages hearing do not stop there. Respondents further presented evidence at the damages hearing which contradicted the factual allegations of the complaint. In fact, the evidence offered went far beyond those allegations and relate to alleged damages that are not recoverable in the causes of action asserted in the complaint.

Parties are judicially bound by their pleadings and are precluded from advancing arguments or submitting evidence contrary to those assertions unless an amendment to the pleadings is allowed. Elrod v. All, 243 S.C. 425, 134 S.E.2d 410 (1964); see also, Johnson v. Alexander, 413 S.C. 196, 202, 775 S.E.2d 697, 700 (2015). Absent such an amendment, evidence contradicting the pleadings is inadmissible. Id. This rule extends to default damages hearings. Amendments to the complaint to conform to the evidence are not allowed in the course of a default damages hearing where the defaulting party has made no appearance or did not otherwise participate in the damages hearing. See Mauro v. Clabaugh, 299 S.C. 184, 383 S.E.2d 244 (Ct. App. 1989)[6]. Therefore, a default judgment may not be sustained where it rests on evidence which varied from the facts alleged in the complaint. White v. Benedict College, 288 S.C. 572, 344 S.E.2d 147 (1986) (an amendment of a complaint during a default damages hearing to conform to the proof submitted in variance of the pleadings is reversable error and any judgment rendered should be vacated).

[6] On pages 17-18 of the transcript of the damages hearing, Respondents requested and impermissibly received leave to amend the pleadings to conform with the evidence.

Here, the Respondents testified at the damages hearing that, contrary to the allegations of the complaint, they no longer owned the property they claimed was damaged. (Transcript of Damages Hearing, February 24, 2025, pp. 14-15). To their credit, this is true. Union County records show Respondents sold their home some five months before the hearing. (Affidavit of Sandra Malikowski, paragraph 24, p. 4). In order to maintain a nuisance and trespass claim, the plaintiff must own or have some possessory interest in the property alleged to be damaged. See, *e.g.*, Brooks v. Council of Co-Owners of Stones Throw Horizontal Property Regime I, 315 S.C. 474, 445 S.E.2d 630 (1994); Gunters Island Hunting Club of Horry County, South Carolina by Shelley v. Hucks, 282 S.C. 124, 317 S.E.2d 470 (Ct. App. 1984).

Respondents also testified that they were forced to sell their home because of Appellant's dogs. (Transcript of Damages Hearing, February 24, 2025, pp. 14-15). They further testified they could not sell their home for a particular price and were, again, forced to sell it for less than they thought it was worth. (Transcript of Damages Hearing, February 24, 2025, pp. 14-15). They was further testified that the Appellant's dogs caused Respondents to purchase a smaller, more expensive home in Spartanburg which required them to take out a "multi-hundred-thousand-dollar mortgage". (Transcript of Damages Hearing, February 24, 2025, pp. 14-15). Though it is unclear from the record, it was apparently this testimony that supports the vast majority of the amount of the overall judgment. The complaint contains no allegations that would have given Appellant any notice that this testimony is the basis of their claims. Instead, the complaint states repeatedly that Respondents owned the property next door to Appellant and that this is the core of their various claims. (Complaint).

Not only was receipt of this evidence impermissible as a matter of pleading, basing the judgment on this testimony was also wrong as a matter of basic justice. This notion is embodied by the first sentence of Rule 54(c), SCRCP, which provides "[a] judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment." The theory underlying this provision of the rule is that the Appellant should be able to rely on the allegations and relief requested in the complaint in deciding whether to expend the time, effort, and money necessary to defend the claim. 10 Wright, Miller & Kane, *Federal Practice and Procedure* § 2663. It would be fundamentally unfair to have the complaint lead the Appellant to believe that only a certain type of claim or relief was being sought only then for the lower court to award a different type of relief or larger damage award. Id. It is for that reason a default judgment may not extend to matters outside the facts alleged in the complaint or beyond the scope of relief demanded. Id. Any default judgment which grants relief that goes beyond that stated in the pleadings is null and void. Id.

Again, the record does not contain any indication of how the lower court calculated the damages awarded in the default judgment; however, the transcript of the damages hearing indicates that the lower court necessarily awarded damages that far exceeded any claim of diminution of value of the Respondents' former home. The "summary of damages" referenced by Respondents' counsel at the damages hearing apparently asserted these damages included Respondents mortgage on their new home in Spartanburg,

attorneys fees, and moving costs[7]. Their complaint makes no allegations related to these items and certainly contains no request for these alleged damages.

What is more, attorneys fees are not recoverable as a measure of damages in any of the causes of action stated in the complaint. Generally, attorneys' fees and costs are not recoverable unless authorized by contract or statute. Maybank v. BB&T Corp., 416 S.C. 541, 580, 787 S.E.2d 498, 518 (2016). The complaint does not allege a contract between the parties, nor are any statutes forming the basis of any of the claims of Respondents. (Complaint). The default judgment is, therefore, void and should be vacated. Rule 54(c), SCRCP; 10 Wright, Miller & Kane, *Federal Practice and Procedure* § 2663.

The record is clear. The default judgment in this case extends to matters not raised in the pleadings and awards relief that is not recoverable and even it was, it was not requested in the complaint. The judgment is consequently void and should be vacated. Rule 54(c), SCRCP.

It is important in this appeal to note what a default is and is not. While a default affects an admission of the facts actually alleged in the complaint, a default does not affect an admission that those facts are well plead and the Appellant has not, by her default, waived the right to object that the law does not contemplate a cause of action based the allegations as stated or the damages requested. Mutual Sav. and Loan Ass'n v. McKenzie, 274 S.C. 630, 266 S.E.2d 423 (1980); *citing*, Gadsen v. Home Fertilizer & Chemical Co., 89 S.C. 483, 72 S.E. 15 (1911) (a default only admits things well pleaded, and if the complaint does not state a cause of action, only a judgment by dismissal may be rendered).

[7] An award of damages finding that Appellant's dogs are the proximate cause of Respondents' specific home purchasing and financing choices is, at a minimum, a novel question. The default judgment awarding these elements of damages should be vacated on this basis alone.

In other words, a party requesting a default judgment is not entitled to such a judgment as a matter of right just because the Appellant is technically in default. In re Estate of Weeks, 329 S.C. 251, 495 S.E.2d 454 (Ct. App. 1997). Instead, a default judgment must be set aside where the complaint fails to state a cause of action because such a judgment is void as without authority of law and cannot therefore be sustained. McKenzie, *supra*. This is because a party seeking a default judgment is entitled to only such relief as may be afforded by the law pursuant to the matters alleged in his pleading, and then only to the extent requested therein. Id.

The complaint in this appeal alleges but three causes of action for nuisance, negligence and trespass. The complaint fails to state a cause of action in each respect and further requests a measure of damages not contemplated by the law.

To properly state a claim for a nuisance, a plaintiff must allege facts tending to show the Appellant unreasonably interfered with his ownership or possession of the land. O'Cain v. O'Cain, 322 S.C. 551, 473 S.E.2d 460 (1996). A nuisance claim requires a showing of damage to property interests. Babb v. Lee County Landfill SC, LLC, 405 S.C. 129, 747 S.E.2d 468 (2013). A nuisance claim cannot be maintained for annoyance and discomfort to the plaintiff's person. Id. Our courts have repeatedly held that our tort law jurisprudence does not permit any recovery for sheer annoyance and discomfort. Id, *citing*, Doole v. Richland Memorial Hosp., 283 S.C. 372, 322 S.E.2d 669 (1984). Moreover, any asserted nuisance which is abatable by the defendant or the court is a temporary nuisance for which the measure of damages is "limited to lost rental value." Babb, *supra*; see also, Conestee Mills v. City of Greenville, 160 S.C. 10, 158 S.E. 113 (1931).

Respondents' stated cause of action for nuisance is defective. First, the complaint alleges no damage to any property interest. Next, Respondents' allegations regarding the dogs, if true, are clearly abatable. Appellant could have, at any time, disposed of the dogs, enclosed her entire yard to prevent any dog from leaving her property, or placed bark-collars on the dogs or have them undergo a "de-barking" procedure. The nuisance alleged is, therefore, a temporary one; yet, the complaint contains no allegations regarding loss of rental value specifically, and, apart from conclusory statements, it is generally devoid of any allegations regarding damages. Gadsen, *supra* (a default does not admit an allegation which constitutes a mere conclusion of law). Consequently, the complaint fails to state a cause of action for nuisance and any judgment rendered under it is void. Babb, *supra;* McKenzie, *supra.*

The same is true for Respondents' negligence claim. To state a cause of action for negligence, the plaintiff must allege facts which demonstrate: (1) a duty of care owed by Appellant to plaintiff; (2) breach of that duty by a negligent act or omission; (3) resulting in damages to the plaintiff; and (4) damages proximately resulted from the breach of duty. Fettler v. Gentner, 396 S.C. 461, 722 S.E.2d 26 (Ct. App. 2012). Thus, without a duty, there can be no negligence. *e.g.*, Bishop v. SC Dept. of Mental Health, 331 S.C. 79, 502 S.E.2d 78 (1998). Ordinarily, the common law imposes no duty on a person to act; so an affirmative legal duty to act exists only if created by statute, contract, relationship, status, property interest, or some other special circumstance. Rayfield v. S.C. Dep't of Corr., 297 S.C. 95, 374 S.E.2d 910 (Ct. App. 1988). A plaintiff must allege the facts that give rise to the alleged duty. *e.g.*, Doe v. Marion, 361 S.C. 463, 605 S.E.2d 556 (Ct. App. 2004). A conclusory statement that that the Appellant owed a duty to plaintiff is insufficient. When

a plaintiff states nothing more than legal conclusions, a claim should fail. Paradis v. Charleston Cnty. Sch. Dist., 424 S.C. 603, 613, 819 S.E.2d 147, 153 (Ct. App. 2018), reversed on other grounds, 433 S.C. 562, 861 S.E.2d 774 (2021).

In this case, the complaint fails to allege facts that would give rise to a duty to Respondents on the part of Appellant. It merely contains conclusory statements that such a duty is owed. Therefore, it fails to state a claim for negligence.

The negligence claim further fails in light of the damages asserted. Generally, under South Carolina negligence law, the damages element requires a plaintiff to establish physical injury or property damage. Babb, *supra*. The complaint alleges no such damages. While the complaint does allege damages in the form of "mental anguish and emotional distress", damages for emotional distress in a negligence action are not recoverable under South Carolina law. Dooley, *supra*. As a result, the complaint fails to state a cause of action for negligence and any award based on this claim is void. McKenzie, *supra*.

Respondents have also failed to state a cause of action for trespass. Where Respondents' trespass claim relates to the alleged entry upon their property by Appellant's dogs, the claim fails. What matters that are alleged, such as experiencing fear, are not compensable under a trespass claim. Trespass damages in this case may result in either loss of rental value or nominal damages. Babb, *supra*. Respondents' complaint makes no reference to either measure of damages.

Trespass is one's interference with the right of exclusive possession of the land of another by the unlawful entry upon it. Babb, *supra*. A claim of trespass does not lie with sound or odors, but may only be occasioned by the entry on land by a physical, tangible thing. Id. Therefore, to the extent Respondents trespass claim seeks damages for the

alleged barking, it fails and any judgment based thereon is void and must be vacated. McKenzie, *supra*.

2. The Default Judgment Is Unconscionable and Should Be Vacated.

Respondents brought this action against Appellant alleging nothing more or less than annoyance – albeit great annoyance - with her dogs. However, somehow Respondents were able to obtain a judgment in excess of $280,000, an amount nearly $100,000 more than the sales price of their home. It is obscene.

In the case of Renney, *supra*, our Supreme Court, in a case exemplifying its "great concern" over large awards in default judgments on unliquidated claims, charged that "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." Id. at 292. The Renney court went on to approvingly cite 46 Am. Jur.2d *Judgments* § 807, which states:

> It has been declared that no rule can be formulated setting a definite boundary beyond which a court of equity cannot go as a matter of power, or will not go as a matter of policy, in preventing the enforcement of an unconscionable judgment. Indeed, there is authority for the rule that in a proper case, a court of equity may look behind a judgment at law in order to do justice between the parties, and that relief from a judgment may be decreed in equity where it is against conscience to execute the judgment..." Id. at 293.

The Renny court held what should be obvious: "[w]hether a Appellant is or is not in default, it is incumbent upon the judge...to make a judicial determination of the amount recoverable based on the proof", and "[w]hen the defaulting party is not given an opportunity to participate in the damages hearing, ***the trial court*** and this court ***should closely scrutinize the award to prevent harsh, unwarranted results***." (emphasis added). Id. at 293. The court finally directed that where a damages have been assessed improperly and the default judgment is so greatly out of proportion to the wrongs alleged in the

complaint, this Court, of its own accord, independent of any rule of procedure, should not allow the judgment to stand as a pure matter of equity. Id. at 292. There, the court vacated the $200,000 default judgment as unconscionable, not at any urging of the parties, but *ex mero motu*. Id. at 293.

The judgment in this case is the very kind of judgment that gave the Renney court its "great concern". The Renney court reaffirms that when it comes to the damages sought in a default judgment, the proof offered by the plaintiff must support the award. Here, there simply is no justification to be had for a $280,000 judgment for barking dogs. On its face, it is unconscionable, patently wrong. Even if Respondents were entitled to a measure of damage for their problems with the dogs based on a diminution in the value of their property (they are not as noted above), the judgement here would mean that the barking rendered the home altogether worthless, which is belied by the very evidence submitted by Respondents at the hearing.

Respondents' realtor witness, Laura Gault, testified that the home sold for $187,500. (Transcript of Damages Hearing, p. 11). What is more, the realtor Respondents called to testify about the supposed diminution of value 1) never testified that the dogs reduced the value of the home; 2) when asked by the Court what the home would have been listed for but for the dogs, she referenced only undone renovations as the basis for the listing price; and, 3) stated that the home was listed for $250,000 "because there was some work that needed to be done" and that it ultimately sold for $187,500. (Transcript of Damages Hearing, pp. 11-12). Apart from the question of whether the asserted damages were a result of the dogs or these undone renovations based on the evidence, if one assumes the dogs were the culprit here and that Respondents could recover for dimunition in value

(again, they cannot), the math only allows for damages in the amount of $62,500. Thus, the proof submitted by Respondents does not come close to supporting the judgment rendered in this case.

Instead, the amount of the judgment is so grossly out of proportion to any annoyance visited on Respondents as a result of the alleged barking as to shock the conscious. The Renney court noted there is no set rule or test to be applied in these kind of things. As Justice Stewart observed in his concurring opinion in Jacobellis v. Ohio, obscenity cannot be specifically defined, but you know it when you see it. This Court should follow the Renney court's lead, reverse the lower, dispense with this judgment, and remand the case for a new damages hearing consistent with the foregoing.

II. The Lower Court Erred in Failing to Grant Appellant Relief From the Default Pursuant to Rule 60, South Carolina Rules of Civil Procedure.

Appellant has shown right to relief from the default judgment. Rule 60(b)(1), SCRCP, states in pertinent part, "[o]n motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect ..."

Again, Appellant has shown that she did not get notice of the damages hearing when such notice is required under the rules. The record further shows that the default judgment was never served on her after it was entered. (Affidavit of Sandra Malikowski, paragraph 18, p. 3). The only reason she got notice of it at all is because she was personally served with Respondents' second action seeking the sale of Appellant's home in collection of the judgment. (Affidavit of Sandra Malikowski, paragraph 18, p. 3). Therefore, the judgment is the result of surprise and should be set aside. Rule 60, SCRCP.

Appellant has further shown mistake and excusable neglect. As is set forth in Appellant's affidavit and that of Travis Smith, Appellant was being served with any number of things resulting from Respondents incessant complaints. (Affidavit of Sandra Malikowski, paragraphs 8-10, pp. 1-2). It was virtually an everyday event. She is a 27 year old, single, working mother, who has difficulty reading and comprehending the English language such that she literally was incapable of understanding the effect of the summons in this case. (Affidavit of Sandra Malikowski, pp. 1-3). All of this culminated with Appellant failing to understand that a formal response to the complaint in this action was required. (Affidavit of Sandra Malikowski, pp. 1-2). The record does not include any evidence that the default on the part of this pro se litigant was willful. Instead, the lack of understanding in these circumstances constitutes good cause, mistake, and excusable neglect.

Justice between these parties can only be had by granting Appellant relief from the judgment and allowing her to answer. In deciding whether grant such relief, the trial court should consider the following factors: (1) the timing of the Appellant's motion for relief, (2) whether the Appellant has a meritorious defense, and (3) the degree of prejudice to the plaintiff if relief is granted. *e.g.*, Richardson v. P.V., Inc., 383 S.C. 610, 682 S.E.2d 263 (2009). The grant of relief often turns on the showing of a meritorious defense.

Appellant's affidavits in support of her Rule 60 motion clearly show that she has a meritorious defense. While Respondents allege incessant barking, not only does the Appellant deny this (Affidavit of Sandra Malikowski, paragraph 17, p. 3), but so do her neighbors and Respondents' own witness. Kathryn Blankenship is Appellant's neighbor across the street. (Affidavit of Kathryn Blankenship, p. 1). She denies the dogs are a

problem at all, describes them as friendly, and states that her children regularly play with them. (Affidavit of Kathryn Blankenship, p. 1).

Megan Jarrett bought Respondents home. (Affidavit of Megan Jarrett, p. 1). Accordingly, Ms. Jarrett's testimony is clearly important. She now lives in the same position relative to Appellant's dogs as Respondents did. She states that she has never had any problems with the dogs, that they do not bark incessantly, and that the dogs are not, in fact, aggressive at all. (Affidavit of Megan Jarrett, pp. 1-2). More to the point, she unequivocally states that the dogs did not factor into the negotiations with Respondents at all. (Affidavit of Megan Jarrett, p. 2). It was, instead, the condition of the home that drove those discussions. (Affidavit of Megan Jarrett, p. 2). Ms. Jarrett's testimony comports with Respondents' realtor's testimony and is, therefore, dispositive of Respondents' claims.

The same is true of Travis Smith's testimony. Mr. Smith was to be Respondents' witness. Mr. Smith is the former Animal Control officer that Respondents were in regular contact with concerning their complaints about the dogs. (Affidavit of Travis Smith, p. 1). Mr. Smith provides some details that support the notion that Mr. Osten, in particular, was obsessed with Appellant for whatever reason. (Affidavit of Travis Smith, p. 1). He states that despite Mr. Osten's many, many complaints, he never observed anything that would support Respondents allegations in this case even though he spent many hours at Appellant's home responding to each of Mr. Osten's complaints. (Affidavit of Travis Smith, p. 2). Mr. Smith and Ms. Jarrett's testimony make Respondents allegations in this case very difficult to believe.

As to the timeliness of her motion, Appellant applied for relief from the judgment only a couple of months after getting notice of the judgment by service of the complaint in

the second action. (Affidavit of Sandra Malikowski, paragraph 18, p. 3). As stated in her affidavit, the only reason it took her that long was because she had to save the money necessary to pay her attorneys. (Affidavit of Sandra Malikowski, paragraph 18, p. 3). The filing was therefore timely.

Finally, there can be no prejudice to Respondents in requiring them to prove their case on the merits. See Williams v. Watkins, 384 S.C. 319, 681 S.E.2d 914 (Ct. App. 2009) (holding that granting relief from a default judgment does not visit any kind of prejudice on the plaintiff by requiring him to prove his case on the merits).

The Court should reverse the lower court, set the judgment aside, allow Appellant to answer, and remand the case so that it can be resolved on the merits. The record before the Court provides every basis for such relief and more importantly, justice requires it.

CONCLUSION

The default judgment in this case is unlawful in that it 1) results from a complaint that fails to state a cause of action; 2) the record made below does not support it and is otherwise based on evidence offered which both contradicted and went beyond the allegations of the complaint; 3) granted damages in amounts and for matters which the law does not allow and that were not requested in complaint; and 4) is so out of proportion to the wrongs alleged against Appellant as to require, as a matter of equity, it be vacated. Appellant has otherwise shown that the judgement is the result of surprise, mistake and excusable neglect, and has further shown that she has a meritorious defense and that granting relief will visit no prejudice on Respondents. On this record, the default judgment cannot be sustained. The Court should reverse the lower court, set the judgment aside, allow Appellant to answer, and remand the case for trial.

(Signature of Counsel Appears on the Following Page)

Respectfully submitted,

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