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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

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA)

COUNTY OF UNION)

Michael J. Osten and Shawntell L. Osten)

Plaintiff,)

vs.)

Sandra Malikowski)

Defendant.)

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

CASE NO.: 2024-CP-44-~~077~~ 097 se

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

Plaintiff's Attorney:

J. Patrick Anderson, Bar No. 75775

Address:

201 N Herndon Street, Union, SC 29379

Phone: 864-641-6431 Fax 864-641-6435

E-mail: patrick@upstatelawsc.com Other:

krystal@upstatelawsc.com

Defendant's Attorney:

Pro Se, Bar No. _____

Address:

Phone: _____ Fax _____

E-mail: _____ Other: _____

☒ **MOTION HEARING REQUESTED** (attach written motion and complete **SECTIONS I and III**)

☐ **FORM MOTION, NO HEARING REQUESTED** (complete **SECTIONS II and III**)

☐ **PROPOSED ORDER/CONSENT ORDER** (complete **SECTIONS II and III**)

SECTION I: Hearing Information

Nature of Motion: Non-Jury Hearing

Estimated Time Needed: _____

Court Reporter Needed: ☒ YES/ ☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached

☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒ Plaintiff / ☐ Defendant

12/16/2024

Date submitted

SECTION III: Motion Fee

☐ **PAID -- AMOUNT: \$**

☐ **EXEMPT:**

(check reason)

☐ Rule to Show Cause in Child or Spousal Support

☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status ☐ State Agency v. Indigent Party

☐ Sexually Violent Predator Act ☐ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)

☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter: _____

☐ Other: _____

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other: _____

JUDGE CODE _____

Date: _____

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____

☐ **MOTION FEE COLLECTED: \$** _____

☐ **CONTESTED -- AMOUNT DUE: \$** _____

STATE OF SOUTH CAROLINA)
COUNTY OF UNION)

Michael J. Osten and)
Shawntell L. Osten,)

Plaintiff,)

vs.)

Sandra Malikowski,)

Defendant.)

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

C. A. No. 2024-CP-44-079 097 60

ORDER OF CONTINUANCE

TO: DEFENDANT NAMED ABOVE:

This matter was scheduled for a Non-Jury Trial on December 16, 2024, at 9:30 a.m. pursuant to Plaintiffs' request. Plaintiff's counsel was present. The Defendant was pro se. The Court called the case at 9:30 a.m. The bailiff advised that the Defendant's name was called three times with no response. Plaintiff's counsel advised the Court that a necessary witness, Laura Gault, was not available due to the holidays. Plaintiff's counsel further advised that Nic Caracino with C&C Investigations had advised that Ms. Gault was unavailable due to the holidays, while he was serving the subpoena for her appearance.

As such, IT IS HEREBY ORDERED that this matter be continued. The Clerk of Court is ORDERED to reschedule this matter for a Non-Jury term of Court.

IT IS SO ORDERED.

December 16, 2024



Judge Grace Knie
Sixteenth Judicial Circuit
Court of Common Pleas

R002

STATE OF SOUTH CAROLINA)
COUNTY OF UNION)

Michael J. Osten and)
Shawntell L. Osten,)

Plaintiff,)

vs.)

Sandra Malikowski,)

Defendant.)

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

C. A. No. 2024-CP-44-278 097 se

ORDER OF CONTINUANCE

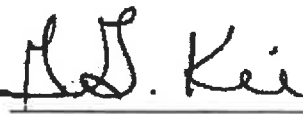
TO: DEFENDANT NAMED ABOVE:

This matter was scheduled for a Non-Jury Trial on December 16, 2024, at 9:30 a.m. pursuant to Plaintiffs' request. Plaintiff's counsel was present. The Defendant was pro se. The Court called the case at 9:30 a.m. The bailiff advised that the Defendant's name was called three times with no response. Plaintiff's counsel advised the Court that a necessary witness, Laura Gault, was not available due to the holidays. Plaintiff's counsel further advised that Nic Caracino with C&C Investigations had advised that Ms. Gault was unavailable due to the holidays, while he was serving the subpoena for her appearance.

As such, IT IS HEREBY ORDERED that this matter be continued. The Clerk of Court is ORDERED to reschedule this matter for a Non-Jury term of Court

IT IS SO ORDERED.

December 16, 2024



Judge Grace Knie
Sixteenth Judicial Circuit
Court of Common Pleas

R003

STATE OF SOUTH CAROLINA)

COUNTY OF UNION)

Michael J. Osten and Shawntell L. Osten)

Plaintiff,)

vs.)

Sandra Malikowski)

Defendant.)

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

CASE NO.: 2024-CP-44-279 SC

091

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

Plaintiff's Attorney:

J. Patrick Anderson, Bar No. 75775

Address:

201 N Herndon Street, Union, SC 29379

Phone: 864-641-6431 Fax 864-641-6435

E-mail: patrick@upstatelawsc.com Other:

krystal@upstatelawsc.com

Defendant's Attorney:

Pro Se, Bar No. _____

Address:

Phone: _____ Fax _____

E-mail: _____ Other: _____

☒ **MOTION HEARING REQUESTED** (attach written motion and complete **SECTIONS I and III**)

☐ **FORM MOTION, NO HEARING REQUESTED** (complete **SECTIONS II and III**)

☐ **PROPOSED ORDER/CONSENT ORDER** (complete **SECTIONS II and III**)

SECTION I: Hearing Information

Nature of Motion: Non-Jury Hearing

Estimated Time Needed: _____

Court Reporter Needed: ☒ **YES** / ☐ **NO**

SECTION II: Motion/Order Type

☒ Written motion attached

☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒ Plaintiff / ☐ Defendant

12/16/2024

Date submitted

SECTION III: Motion Fee

☐ **PAID – AMOUNT:** \$ _____

☐ **EXEMPT:**

(check reason)

☐ Rule to Show Cause in Child or Spousal Support

☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status ☐ State Agency v. Indigent Party

☐ Sexually Violent Predator Act ☐ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC)

☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter: _____

☐ Other: _____

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other: _____

JUDGE CODE _____

Date: _____

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____

☐ **MOTION FEE COLLECTED:** \$ _____

☒ **CONTESTED – AMOUNT DUE:** \$ _____

STATE OF SOUTH CAROLINA	)	THE COURT OF COMMON PLEAS
COUNTY OF UNION	)	SIXTEENTH JUDICIAL CIRCUIT
	)	
Michael J. Osten and	)	
Shawntell L. Osten,	)	CIVIL ACTION NO. 2024-CP-44-0097
Plaintiffs,	)	
vs.	)	
	)	<u>ORDER GRANTING DEFAULT JUDGMENT</u>
Sandra Malikowski,	)	<u>AND DAMAGES</u>
Defendant.	)	
	)	

This matter was scheduled for a Motion for Default Judgment and Damages pursuant to Plaintiffs Motion. This action commenced by the filing of a Summons and Verified Complaint on March 6, 2024. The Defendant was properly served with the Summons and Verified Complaint on April 29, 2024, as evidenced by Plaintiff's Affidavit of Service filed with the Union County Clerk of Court on May 8, 2024. Pursuant to Rule 6 of the South Carolina Rules of Civil Procedure Defendant should have appeared and answered the Plaintiffs Complaint, or otherwise pleaded, within thirty days of service of the Summons and Verified Complaint. No responsive pleadings were filed, served on or provided to the Plaintiffs or Plaintiffs counsel. Plaintiffs counsel filed an Affidavit of Default and Motion for Default Judgment and Damages on January 6, 2025. The Defendant was served with the same as well as the hearing notice for the Motion for Default Judgment and Damages and instructions for virtual hearing via a letter dated January 24, 2025 and sent via United States Mail to her residence at 202 Gilbert Street, Union, South Carolina, as evidenced by the Certificate of Service filed with the Union County Clerk of Court on January 28, 2025. The Court called the case on February 24, 2025 at 9:45 a.m. The Plaintiffs, their counsel, as well as Realtor Laura Gault were present in the virtual courtroom. The Defendant did not appear. As the Defendant was properly noticed for the hearing, the Court proceeded with Plaintiffs Motion for Default Judgment and Damages.

Plaintiffs counsel requested damages in the amount of \$280,862.58. The Plaintiffs testified regarding the background and history of the case. The Plaintiffs Realtor, Laura Gault, testified in support of Plaintiffs requested relief and damages.

Based on all evidence presented and pursuant to Rule 55 of the South Carolina Rules of Civil Procedure, the Plaintiffs are hereby entitled to a Default Judgment against the Defendant as well as Damages.

Plaintiffs are entitled to an award of damages in the amount of \$280,597.26, as well as costs in the amount of amount of One Hundred Eighty and 32/100 (\$180.32) for filing fees, and Eighty-Five and 00/100 (\$85.00) for service of process, for a total of \$280,862.58, as well as interest at the pre-judgment statutory rate through the date of judgment entered, pursuant to South Carolina Code of Laws Section 34-31-20(A), as well as post-judgment interest pursuant to South Carolina Code of Laws Section 34-31-20(B) through the date of said judgment being satisfied.

IT IS SO ORDERED this _____ day of _____, 2025 at Union, South Carolina.

Judge Charles J. McCutchen
Presiding Circuit Court Judge
Sixteenth Judicial Circuit



Union Common Pleas

Case Caption: Michael J Osten , plaintiff, et al VS Sandra Malikowski
Case Number: 2024CP4400097
Type: Order/Judgment by Default and Form 4

IT IS SO ORDERED

Charles J. McCutchen

Electronically signed on 2025-03-04 16:34:59 page 3 of 3

ELECTRONICALLY FILED - 2025 Mar 05 8:41 AM - UNION - COMMON PLEAS - CASE#2024CP4400097

R007

STATE OF SOUTH CAROLINA	)	THE COURT OF COMMON PLEAS
COUNTY OF UNION	)	SIXTEENTH JUDICIAL CIRCUIT
	)	
Michael J. Osten and	)	
Shawntell L. Osten,	)	CIVIL ACTION NO. 2024-CP-44-0097
Plaintiffs,	)	
vs.	)	
	)	<u>ORDER GRANTING DEFAULT JUDGMENT</u>
Sandra Malikowski,	)	<u>AND DAMAGES</u>
Defendant.	)	

This matter was scheduled for a Motion for Default Judgment and Damages pursuant to Plaintiffs Motion. This action commenced by the filing of a Summons and Verified Complaint on March 6, 2024. The Defendant was properly served with the Summons and Verified Complaint on April 29, 2024, as evidenced by Plaintiff's Affidavit of Service filed with the Union County Clerk of Court on May 8, 2024. Pursuant to Rule 6 of the South Carolina Rules of Civil Procedure Defendant should have appeared and answered the Plaintiffs Complaint, or otherwise pleaded, within thirty days of service of the Summons and Verified Complaint. No responsive pleadings were filed, served on or provided to the Plaintiffs or Plaintiffs counsel. Plaintiffs counsel filed an Affidavit of Default and Motion for Default Judgment and Damages on January 6, 2025. The Defendant was served with the same as well as the hearing notice for the Motion for Default Judgment and Damages and instructions for virtual hearing via a letter dated January 24, 2025 and sent via United States Mail to her residence at 202 Gibert Street, Union, South Carolina, as evidenced by the Certificate of Service filed with the Union County Clerk of Court on January 28, 2025. The Court called the case on February 24, 2025 at 9:45 a.m. The Plaintiffs, their counsel, as well as Realtor Laura Gault were present in the virtual courtroom. The Defendant did not appear. As the Defendant was properly noticed for the hearing, the Court proceeded with Plaintiffs Motion for Default Judgment and Damages.

Plaintiffs counsel requested damages in the amount of \$280,862.58. The Plaintiffs testified regarding the background and history of the case. The Plaintiffs Realtor, Laura Gault, testified in support of Plaintiffs requested relief and damages.

Based on all evidence presented and pursuant to Rule 55 of the South Carolina Rules of Civil Procedure, the Plaintiffs are hereby entitled to a Default Judgment against the Defendant as well as Damages.

Plaintiffs are entitled to an award of damages in the amount of \$280,597.26, as well as costs in the amount of amount of One Hundred Eighty and 32/100 (\$180.32) for filing fees, and Eighty-Five and 00/100 (\$85.00) for service of process, for a total of \$280,862.58, as well as interest at the pre-judgment statutory rate through the date of judgment entered, pursuant to South Carolina Code of Laws Section 34-31-20(A), as well as post-judgment interest pursuant to South Carolina Code of Laws Section 34-31-20(B) through the date of said judgment being satisfied.

IT IS SO ORDERED this _____ day of _____, 2025 at Union, South Carolina.

Judge Charles J. McCutchen
Presiding Circuit Court Judge
Sixteenth Judicial Circuit



Union Common Pleas

Case Caption: Michael J Osten , plaintiff, et al VS Sandra Malikowski
Case Number: 2024CP4400097
Type: Order/Amend

IT IS SO ORDERED

Charles J. McCutchen

Electronically signed on 2025-03-11 09:40:23 page 3 of 3

ELECTRONICALLY FILED - 2025 Mar 11 10:09 AM - UNION - COMMON PLEAS - CASE#2024CP4400097

R010

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Union
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2024CP4400097

Michael J Osten et al
PLAINTIFF(S)

Sandra Malikowski
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled);
☐ Other
- ☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*):
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

Defendant's Motion to Set Aside Default was heard via WebEx on September 15, 2025. After hearing arguments of counsel, Defendant's motion is DENIED. The prevailing party shall submit a proposed order within 10 days in accordance with Rule 5(b)(3).

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 09/19/2025 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Union Common Pleas

Case Caption: Michael J Osten , plaintiff, et al VS Sandra Malikowski
Case Number: 2024CP4400097
Type: Order/Electronic Form 4

So Ordered

s/ Daniel Coble, 2774

Electronically signed on 2025-09-19 09:52:13 page 3 of 3

R013

STATE OF SOUTH CAROLINA	)	THE COURT OF COMMON PLEAS
COUNTY OF UNION	)	SIXTEENTH JUDICIAL CIRCUIT
	)	
Michael J. Osten and	)	
Shawntell L. Osten,	)	CIVIL ACTION NO. 2024-CP-44-0097
Plaintiffs,	)	
vs.	)	
	)	ORDER DENYING DEFENDANTS
Sandra Malikowski,	)	MOTION TO VACATE OR SET
Defendant.	)	ASIDE DEFAULT JUDGMENT
	)	

This matter was before the Court for Defendant's Motion to Vacate or Set Aside Default Judgment on September 15, 2025. The hearing was held virtually via WebEx. Present for the hearing on behalf of the Defendant was attorney Kyle Parker of Pope, Parker, and Jenkins, P.A. Present for the hearing on behalf of the Plaintiff was J. Patrick Anderson of Anderson & Moore, LLC. Prior to the hearing Defendant's counsel submitted a Memorandum in Support of said Motion, as well as numerous affidavits and a transcript from the Default Judgment hearing that was heard on February 24, 2025. Prior to the hearing Plaintiff's counsel submitted a Memorandum in Opposition to the Defendant's Motion, with several attached exhibits, as well as Plaintiff's Packet in Support of Preliminary Injunction that was submitted to the Court at a previously heard Motion for Preliminary Injunction on May 28, 2024 and also submitted to the Court at the Motion for Default Judgment and Damages on February 24, 2025.

This action was commenced by the filing of a Summons and Verified Complaint on March 6, 2024. The Defendant was properly personally served with the Summons and Verified Complaint on April 29, 2024. Proper service was not disputed in the Defendant's Motion and was evident based on Plaintiff's Affidavit of Service regarding the Summons and Verified Complaint, which was filed with the Union County Clerk of Court on May 8, 2024. No responsive pleadings were filed by the Defendant. Plaintiff's counsel filed a Motion for Preliminary Injunction on March 6, 2024, said Motion being heard at the Union County Courthouse on May 28, 2024. The Motion for Preliminary Injunction was denied by Judge McKinnon. The case was scheduled for trial during the Monday December 16, 2024 term of Common Pleas Circuit Court but was continued by Judge Knie pursuant to Plaintiff's request.

Plaintiffs counsel filed an Affidavit of Default and Motion for Default Judgment and Damages on January 6, 2025. The Plaintiff's Motion for Default Judgment and Damages was scheduled

virtually via WebEx on February 24, 2025 before Judge McCutchen, who entered a Default Judgment against the Defendant in the amount of \$280,862.58.

When considering a Motion to set aside a Default Judgment, the Court must look to Rule 60(b)(1) of the South Carolina Rules of Civil Procedure. Relief from a final judgment, and in this case specifically a default judgment, is only allowed upon the narrowly and particularly defined grounds as laid out in Rule 60(b)(1). The Defendant's Motion to Vacate or Set Aside Default Judgment specifically referenced Rule 60(b)(1) regarding "mistake, inadvertence, surprise, or excusable neglect". The Defendant submitted to the Court her sworn affidavit that laid out numerous reasons for failing to answer or otherwise respond to the Plaintiff's Summons and Verified Complaint. However, none of the reasons provided to the Court can overcome the requirements under Rule 60(b)(1); specifically, "mistake, inadvertence, surprise, or excusable neglect" as referenced in the Defendant's Motion. The fact remains that the Defendant was properly personally served with the Summons and Verified Complaint on April 29, 2024. This is not disputed by the Defendant. Despite that fact, the Defendant failed to file responsive pleadings or retain counsel to do so on her behalf during the entire pendency of this action. This action was pending for almost one year before a Default Judgment was granted, which included a Motion for Preliminary Injunction during which the Defendant did retain counsel in a strictly limited capacity for that specific Motion. It is evident the Defendant knew enough about the litigation to retain an attorney for the limited purpose of a Motion for Preliminary Injunction, yet failed to file responsive pleadings on a pro se basis or retain an attorney to submit the same. Despite being properly personally served with the Summons and Verified Complaint, the Defendant took no action regarding answering the Summons and Verified Complaint or filing any responsive pleadings. Rule 60(b)(1) is not intended to protect litigants from their own inexcusable neglect and delay and the Court was presented with no evidence that would excuse the Defendant's failure to answer or otherwise plead in this matter.

To obtain relief from a default judgment under Rule 60(b)(1) the moving party must also show that they have a meritorious defense and must present factual allegations and not generalized statements or generalized denials that are conclusory in nature. While the Defendant's sworn affidavit does reference what could be construed as defenses, as submitted they are just what the Court referenced above; blanket denials that are conclusive in nature. The Defendant's sworn affidavit does not rise to the level of overcoming the requirements of Rule 60(b)(1), nor do any of the supporting sworn affidavits from other individuals. In addition, the Defendant provided no documents or exhibits that substantiated her sworn affidavit that, nor any of the others, that would in turn support a

meritorious defense. And contrary to the lack of substantiation on the Defendant's part, the Court also considered the Plaintiff's Packet in Support of Preliminary Injunction, which was previously submitted to Judge McKinnon at the Motion for Preliminary Injunction hearing on May 28, 2024, and also submitted to Judge McCutchen at the Motion for Default Judgment and Damages on February 24, 2025, as evidenced by its reference in the transcript from said hearing that was filed by Defendant's counsel on September 14, 2025. The Court also took into consideration testimony as referenced in the transcript from the Motion for Default Judgment and Damages. Lastly, the Court would point out that one hundred thirty-three days passed between the granting of the Default Judgment and the Defendant filing this Motion to Vacate or Set Aside Default Judgment. Defendant's counsel argued that the Defendant did not know anything about the Default Judgment as she did not receive notice of it, and that she retained counsel when she was ultimately served with the Plaintiff's subsequently filed foreclosure action. However, as Plaintiff's counsel argued, the Defendant had a history of simply not participating in the legal process, and at no time did she participate in this litigation after the Motion for Preliminary Injunction on May 28, 2024. As such, the Court finds that the Defendant has not presented a meritorious defense that would satisfy the requirements of Rule 60(b)(1).

The Defendant raised the issue of irregularities specific to the Defendant's correct address throughout the pendency of the action, and also regarding the notice for the Motion for Default Judgment and Damages hearing on February 24, 2025; specifically, the Defendant's correct address of 202 Gibert Street, Union, South Carolina, versus the use of 202 Gilbert Street, Union, South Carolina. Plaintiff's counsel acknowledged the irregularities regarding the incorrect address. Defense counsel submitted that the Defendant did not receive notice of the Motion for Default Judgment and Damages hearing on February 24, 2025, as the Notice of Hearing and the Certificate of Service, both filed with the Union County Clerk of Court, referenced 202 "Gilbert" Street, and not 202 "Gibert" Street. Plaintiff's counsel acknowledged the notice for the Motion for Default Judgment and Damages hearing was addressed to 202 Gilbert Street, and the record shows the same. In response, Plaintiff's counsel referenced the notice for Plaintiff's Motion for a Preliminary Injunction on May 28, 2024, which was sent via United States Mail return receipt requested to the incorrect address of 202 "Gilbert" Street. The postal service certified mail receipt, Notice of Motion Hearing, and Certificate of Service referenced Gilbert Street, and were filed with the Union County Clerk of Court on May 15, 2024, and all were attached as Exhibit 1 to Plaintiff's Memorandum in Opposition to Defendant's Motion to Vacate or Set Aside Default Judgment. Plaintiff's counsel further advised that

the United States Postal Service return receipt “green card”, which was also attached as Exhibit 1 to Plaintiff’s Memorandum in Opposition, also listed 202 “Gilbert” Street, and that despite the typographical error the Defendant received the mailed notice, as the “green card” was clearly signed for by the Defendant. Plaintiff’s counsel argued that the United States Postal Service delivered the subsequent notice for the Motion for Default Judgment and Damages to the Defendant, despite the use of 202 Gilbert Street, as they had done before, and further advised that at no point during the litigation was any mail that sent to the Defendant at 202 Gilbert Street returned by the United States Postal Service. Lastly, Plaintiff’s counsel referenced the Defendant’s sworn affidavit wherein she claimed she did not receive notice of mediation at the Law Offices of Ken Anthony. Plaintiff’s counsel provided the mediation notice as Exhibit 2 to Plaintiff’s Memorandum in Opposition and noted the Defendant’s address was correctly listed as 202 “Gibert” Street. Plaintiff’s counsel argued that the mediation notice directly contradicted the Plaintiffs sworn affidavit advising she did not receive notice of the same.

It does appear that there were irregularities regarding the Defendant’s address throughout the pendency of the action specific to the correct address of 202 Gibert Street, Union, South Carolina, versus the Plaintiff’s use of 202 Gilbert Street, Union, South Carolina. However, it does appear that the United States Postal Serviced delivered the notice for the preliminary injunction, as evidenced by Exhibit 1 to Plaintiff’s Memorandum in Opposition. Despite the inconsistencies regarding the use of Gibert versus Gilbert, the Court finds that the Defendant received notice of the Motion for Default Judgment and Damages.

Based on the aforementioned reasons, the Defendant’s Motion to Vacate or Set Aside Default is **HEREBY DENIED**.

IT IS SO ORDERED this _____ day of _____, 2025 at Union, South Carolina.

Judge Daniel Coble
Presiding Circuit Court Judge
Sixteenth Judicial Circuit



Union Common Pleas

Case Caption: Michael J Osten , plaintiff, et al VS Sandra Malikowski

Case Number: 2024CP4400097

Type: Order/Vacate Judgment

So Ordered

s/ Daniel Coble, 2774

Electronically signed on 2025-10-01 10:50:04 page 5 of 5

ELECTRONICALLY FILED - 2025 Oct 01 1:40 PM - UNION - COMMON PLEAS - CASE#2024CP4400097

R018

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Union
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2024CP4400097

Michael J Osten et al
PLAINTIFF(S)

Sandra Malikowski
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled);
☐ Other
- ☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*):
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

This matter is before the Court on Defendant's Motion for Reconsideration pursuant to Rule 59(e) SCRCP ("the Motion"), which was timely filed on September 29, 2025. The Motion asks this Court to alter, amend, or reconsider its Order denying Defendant's motion to vacate or set aside default, entered September 19, 2025. After reviewing the applicable law and considering arguments raised in the Motion, the court is unable to discover any material fact or principle of law that has either been overlooked or disregarded and further finds no error of law or fact not appropriately considered. Therefore, the Motion to Alter, Amend, or Reconsider is DENIED.
see page 2

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☒ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 10/03/2025 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Fileers or who are appearing pro se. See Rule 77(d), SCRCP.

Pursuant to the discretion afforded by Rule 59 and Pollard v. County of Florence, concludes that a hearing is not necessary to rule on Defendant's Motion for Reconsideration. See Rule 59(f), SCRCP; see also Pollard, 314 S.C. 397, 401-02, 444 S.E.2d 534, 536 (Ct. App. 1994).



Union Common Pleas

Case Caption: Michael J Osten , plaintiff, et al VS Sandra Malikowski

Case Number: 2024CP4400097

Type: Order/Electronic Form 4

So Ordered

s/ Daniel Coble, 2774

Electronically signed on 2025-10-03 14:31:05 page 3 of 3

ELECTRONICALLY FILED - 2025 Oct 03 3:01 PM - UNION - COMMON PLEAS - CASE#2024CP4400097

R021

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Union
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2024CP4400097

Michael J Osten et al
PLAINTIFF(S)

Sandra Malikowski
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other
- ☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

This matter is before the Court on Defendant's Motion for Reconsideration pursuant to Rule 59(e) SCRCP ("the Motion"), which was timely filed on October 10, 2025. The Motion asks this Court to alter, amend, or reconsider its Order denying Defendant's motion to vacate or set aside default, entered September 19, 2025. After reviewing the applicable law and considering arguments raised in the Motion, the court is unable to discover any material fact or principle of law that has either been overlooked or disregarded and further finds no error of law or fact not appropriately considered. Therefore, the Motion to Alter, Amend, or Reconsider is DENIED. see page 2

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☒ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 10/20/2025 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

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Pursuant to the discretion afforded by Rule 59 and Pollard v. County of Florence, concludes that a hearing is not necessary to rule on Defendant's Motion for Reconsideration. See Rule 59(f), SCRCP; see also Pollard, 314 S.C. 397, 401-02, 444 S.E.2d 534, 536 (Ct. App. 1994).



Union Common Pleas

Case Caption: Michael J Osten , plaintiff, et al VS Sandra Malikowski

Case Number: 2024CP4400097

Type: Order/Electronic Form 4

So Ordered

s/ Daniel Coble, 2774

Electronically signed on 2025-10-20 08:46:48 page 3 of 3

ELECTRONICALLY FILED - 2025 Oct 20 8:57 AM - UNION - COMMON PLEAS - CASE#2024CP4400097

R024

STATE OF SOUTH CAROLINA)
COUNTY OF UNION)

Michael J. Osten and)
Shawntell L. Osten,)

Plaintiff,)

vs.)

Sandra Malikowski,)

Defendant.)

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

C. A. No. 2024-CP-46-

SUMMONS

TO: DEFENDANT NAMED ABOVE:

YOU ARE HEREBY NOTIFIED that you have been sued by the Plaintiffs in the Court indicated above. You are hereby SUMMONED and required to answer the attached Verified Complaint in this action, a copy of which is hereby served upon you, and to serve a copy of your Answer upon the undersigned attorney at his office at 240 Magnolia Street, Spartanburg, South Carolina 29306, within thirty (30) days after service of this Summons upon you, and if you fail to do so, you are hereby notified that judgment by default will be rendered against you for the relief demanded in the Verified Complaint.

March 6, 2024

ANDERSON & MOORE, LLC
S / J. Patrick Anderson
240 Magnolia Street
Spartanburg, South Carolina 29306

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF UNION	)	SIXTEENTH JUDICIAL CIRCUIT
Michael J. Osten and	)	
Shawntell L. Osten,	)	C. A. No. 2024-CP-46-
	)	
Plaintiffs,	)	
	)	VERIFIED COMPLAINT
vs.	)	
	)	
Sandra Malikowski,	)	
	)	
<u>Defendant.</u>	)	

The Plaintiffs would allege as follows;

THE PARTIES

1. The Plaintiffs Michael J. Osten and Shawntell L. Osten are citizens and residents of Union County, South Carolina, residing at 206 Gilbert Street in the City of Union.
2. The Defendant Sandra Malikowski is a citizen and resident of Union County, South Carolina, residing at 202 Gibert Street in the City of Union.
3. That upon information and belief the Defendant moved adjacent to the Plaintiff's in the Spring of 2023.
4. The Court has both personal and subject matter jurisdiction over the parties hereto and venue is appropriate.
5. Plaintiffs are the "next-door-neighbors" of the Defendant and share a property line and fence line.
6. The Defendant owns a large number of dogs, some of which are aggressive, and which are continually and habitually disturbing the Plaintiff's peaceful use and enjoyment of their home, to wit;

- a. Defendant's dogs are continually and habitually off leash, unrestrained, and trespassing on the Defendant's property, thereby disturbing the Plaintiff's peaceful use and enjoyment of their home;
- b. Defendant's dogs are aggressive, and while on Plaintiff's property have in the past, and continue to aggressively threaten the Plaintiffs and their family, thereby disturbing their peaceful use and enjoyment of their home;
- c. Defendant's dogs are continually and habitually barking incessantly at all hours of the day, whether inside the Defendant's home or outside, thereby disturbing the Plaintiff's peaceful use and enjoyment of their home.
- d. Plaintiff Michael J. Osten works out of his "home-office" in the security technology sector, said job requiring regular conference calls and online video meetings; Plaintiff has made efforts to quiet his office for work his obligations, all of which have failed, due to the constant and continual barking of Defendant's dogs, as well as the decibel level from said barking.

7. The Plaintiff's have made numerous attempts to remedy the situation by directly engaging with the Defendant, by requesting the assistance of the Municipal and County government, and by filing and requesting a Magistrate's Court restraining order, all to no avail.

FOR A FIRST CAUSE OF ACTION
(Nuisance)

8. Defendant's aforementioned actions and inaction regarding her ownership of said dogs constitutes a nuisance to the Plaintiffs, as it is an unreasonable interference with the Plaintiff's peaceful use and enjoyment of their home;

9. By way of the "Restrictive and Protective Covenants" specific to the Kenwood Development, which constitutes the Plaintiff and Defendant's property and neighborhood, filed

on July 7, 1969 in Union County, South Carolina, and pursuant to paragraph five (5) which states as follows; "No noxious or offensive activity shall be carried on on any lot, nor shall anything be done thereon which may be or may become an annoyance or nuisance to the neighborhood", Defendant's aforementioned actions and inaction regarding her ownership of said dogs constitutes a nuisance to the Plaintiffs peaceful use and enjoyment of their home.

10. The Defendant's actions and inaction regarding her ownership of said dogs are the proximate cause of the Plaintiff's damages, to include but not limited to, disturbing the Plaintiff's peaceful enjoyment of their home, causing mental anguish and emotional distress, and directly affecting the value of their home.

FOR A SECOND CAUSE OF ACTION
(Negligence)

11. That the Defendant owed a duty of care to the Plaintiffs; to include but not limited to; properly securing said dogs, to keep said dogs on her property, to properly supervise said dogs, to take steps to prevent and mitigate said dogs from incessantly barking, and to prevent said dogs from aggressively approaching the Plaintiffs.

12. That the Defendant's aforementioned actions and inaction, to include but not limited to her irresponsible ownership of said dogs as described in paragraph eleven (11), is negligent, grossly negligent, careless, wanton, willful, and reckless in one or more of the following particulars;

- a. By owning such a large number of dogs in a municipal residential area;
- b. By allowing so many dogs to reside in a confined municipal residential area;
- c. In failing to keep said dogs properly secured and on Defendant's property;
- d. In failing to prevent said dogs from continually trespassing on Plaintiff's property;

- e. In failing to properly supervise said dogs;
- f. In failing to take steps to prevent and/or mitigate the dogs from incessantly barking;
- g. In failing to prevent said dogs from aggressively approaching the Plaintiffs on their property.

13. As a result of the Defendants negligence, Plaintiffs have suffered damages, to include but not limited to, mental anguish and emotional distress, loss of the peaceful use and enjoyment of their property, and loss in property value.

14. The damages sustained by the Plaintiffs were the direct and proximate result of Defendant's negligence.

FOR A THIRD CAUSE OF ACTION
(Trespass)

15. Defendant has continually and intentionally allowed her dogs to trespass onto Plaintiffs property, thereby causing Plaintiffs to suffer mental anguish and emotional distress; thereby preventing Plaintiffs from being able to enjoy their home for fear of their safety due to the aggressive nature of their dogs, and also due to said dogs incessant and continual barking.

16. As a result of the Defendants trespassing by failing to properly supervise said dogs and keep said dogs properly secured on her property, Plaintiffs have experienced the following:

- a. fear for their safety when outside their home;
- b. reluctance to use and enjoy their yard for fear of the Defendant's dogs not being properly restrained and being on Plaintiff's property;
- c. interference with Plaintiffs peaceful use and enjoyment of their home.

WHEREFORE, Plaintiffs prays that judgment be rendered against the Defendant and that Plaintiffs be awarded the following relief:

- a. Injunctive relief;
- b. Actual and compensatory damages;
- c. Punitive damages;
- d. Prejudgment interest; and
- e. Such other and further relief as the Court deems just and proper.

March 6, 2024

ANDERSON & MOORE, LLC

S / J. PATRICK ANDERSON
240 Magnolia Street
Spartanburg, South Carolina 29306

STATE OF SOUTH CAROLINA)

COUNTY OF UNION)

Michael J. Osten and
Shawntell L. Osten,

Plaintiffs,

vs.

Sandra Malikowski,

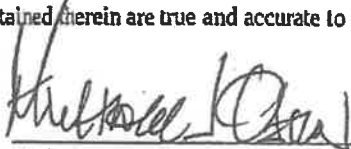
Defendant.

IN THE COURT OF COMMON PLEAS

C.A. No. 2024-CP-46-

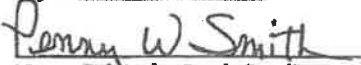
VERIFICATION

Personally appeared before me Michael J. Osten and Shawntell L. Osten, who being duly sworn, state that they are the Plaintiffs in the foregoing action; that they have read the foregoing Complaint and Motion for Temporary Injunction; that they have knowledge of the facts set forth therein and that the statements and allegations contained therein are true and accurate to the best of their knowledge.


Michael J. Osten


Shawntell L. Osten

SWORN to before me this 4th
day of March, 2024.


Notary Public for South Carolina

My commission expires: 10/23/2027

PENNY W. SMITH
Notary Public
State of South Carolina
My Commission Expires October 23, 2027

R031



ELECTRONICALLY FILED - 2024 May 08 3:47 PM - UNION - COMMON PLEAS - CASE#2024CP4400097

STATE OF SOUTH CAROLINA
COUNTY OF UNION

IN THE FAMILY COURT
SIXTEENTH JUDICIAL CIRCUIT

Michael J. Osteen and
Shawntell L. Osteen

Plaintiff,

AFFIDAVIT OF SERVICE

vs.

Sandra Malikowski

Defendant,

Case No. 2024-CP-44-00097

I, Nic Carracingo, being first duly sworn, depose and say: that I am over the age of 18 years and not a party to this action, and that within the boundaries of the state where service was effected, I was authorized by law to perform said service:

SERVED: Sandra Malikowski

WITH: Summons and Verified Complaint / Union Common Pleas Action, Notice of and Motion for Preliminary Injunction, Union Police Department Uniform Ordinance Summons x 5, Union Public Safety Dept. Trespass Notice, Plaintiff Certified Letter to Defendant dated May 3, 2023, S.C. Residential Property Condition Disclosure Statement, Letter from Plaintiff Supervisor - Jimmy Caldwell and Subpoenas for Laura Gault, Anne Alexander and Travis Smith

AT: 202 Gilbert Street, Union, SC 29379

ON: April 29, 2024 at 8:31 pm

MANNER OF SERVICE: Personally

Nic Carracingo
SIGNATURE OF PROCESS SERVER

SUBSCRIBED AND SWORN to before me this 29 day of May, 2024.

Justica De Ballenger
NOTARY PUBLIC for the state of South Carolina.

My Commission Expires: May 31, 2029

R032

STATE OF SOUTH CAROLINA
COUNTY OF UNION

Michael J. Osten and
Shawntell L. Osten,

Plaintiffs,

vs.

Sandra Malikowski,

Defendant.

THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

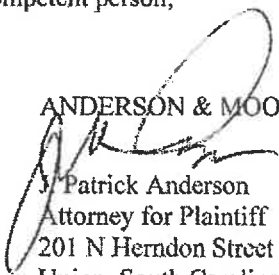
CIVIL ACTION NO. 2024-CP-44-0097

AFFIDAVIT OF DEFAULT

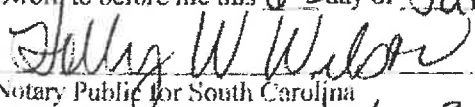
PERSONALLY appears before me J. Patrick Anderson, who being duly sworn, states that he is the Attorney for the Plaintiffs and that;

1. More than thirty (30) days have elapsed since the service of the Summons and Complaint, exclusive of the date of service, upon the Defendant **SANDRA MALIKOWSKI**;
2. No Answer or Notice of Appearance or responsive pleadings have been served upon Plaintiff's counsel as required by the Summons in this action;
3. The Defendant is not a member of the military service;
4. The Defendant is not a minor or incompetent person;
5. The Defendant is in default.

ANDERSON & MOORE, LLC


J. Patrick Anderson
Attorney for Plaintiff
201 N Herndon Street
Union, South Carolina 29379

Sworn to before me this 6th day of Jan, 2025.


Notary Public for South Carolina

My Commission Expires: 1-6-32

STATE OF SOUTH CAROLINA	)	THE COURT OF COMMON PLEAS
COUNTY OF UNION	)	SIXTEENTH JUDICIAL CIRCUIT
	)	
Michael J. Osten and	)	
Shawntell L. Osten,	)	CIVIL ACTION NO. 2024-CP-44-0097
Plaintiffs,	)	
vs.	)	
	)	<u>MOTION FOR DEFAULT JUDGMENT</u>
Sandra Malikowski,	)	<u>AND DAMAGES</u>
Defendant.	)	
	)	

YOU WILL PLEASE TAKE NOTICE that the undersigned attorney for the Plaintiff moves before the Court for an order pursuant to Rule 55 of the South Carolina Rules of Civil Procedure (hereinafter SCRCPP), entering a Default Judgment and awarding damages as to Plaintiff's Complaint against Defendant Sandra Malikowski. Plaintiff's counsel has prepared an Affidavit of Default which was filed contemporaneously with this Motion.

The Plaintiffs commenced this action by filing a Summons and Complaint on March 6, 2024. Plaintiff's Summons and Complaint were served upon Defendant on April 29, 2024. Plaintiffs filed a copy of their Affidavit of Service with the Union County Clerk of Court on May 8, 2024. Pursuant to Rule 6 of the SCRCPP, Defendant should have appeared and answered the Plaintiff's Complaint, or otherwise pleaded, within thirty days of service of the Summons and Complaint. To date, Defendant has failed to answer or otherwise plead in this case. Consequently, Defendant is now in Default and Plaintiff is entitled to the relief requested in the Complaint.

Plaintiffs are entitled to an award of damages, in an amount to be determined by the Court, as well as costs in the amount of amount of One Hundred Eighty and 32/100 (\$180.32) for filing fees, and Eighty-Five and 00/100 (\$85.00) for service of process, as well as interest at the pre-judgment statutory rate through the date of judgment entered, pursuant to South Carolina Code of Laws Section 34-31-20(A), as well as post-judgment interest pursuant to South Carolina Code of Laws Section 34-31-20(B) through the date of said judgment being satisfied.

Based on the aforementioned reasons, the Plaintiffs hereby moves for an Order entering Default Judgment against the Defendant and determining and awarding damages and costs as referenced above.

January 6, 2025.

Anderson & Moore, LLC

S / J. Patrick Anderson, Esquire
Attorney for Plaintiffs
201 N Herndon Street
Union, South Carolina 29379

ANDERSON MOORE, LLC
ATTORNEYS AT LAW

January 24, 2025

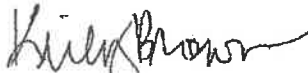
Sandra Malikowski
202 Gilbert St.
Union, SC 29379

Re: Osten v. Malikowski
Case No.: 2024-CP-44-00097

Ms. Malikowski:

Please be advised that the Motion for Default Judgment and Damages is scheduled for a virtual hearing on **February 24, 2025 at 9:30 AM**. I have enclosed instructions for the virtual courtroom for your convenience.

Sincerely,


Kirby Brown
Paralegal

240 Magnolia Street | Spartanburg, South Carolina 29306
Telephone: 864.641.6431 | Facsimile: 864.641.6435 | Toll Free: 888.234.2483
www.upstatelawsc.com

ELECTRONICALLY FILED - 2025 Jan 28 3:18 PM - UNION - COMMON PLEAS - CASE#2024CP4400097

R036

Kirby Brown

From: J. Patrick Anderson
Sent: Friday, January 24, 2025 1:54 PM
To: Kirby Brown
Subject: Fwd: Motion "MDEFJM-Motion/Default Judgment" for Case "2024CP4400097-Michael J Osten , plaintiff, et al VS Sandra Malikowski" was added to a Motions Roster for 2/24/2025 at 9:30 AM

Sent from my iPhone

Begin forwarded message:

From: Courtmail44_DoNotReply@sccourts.org
Date: January 24, 2025 at 10:57:24 AM EST
To: "J. Patrick Anderson" <patrick@upstatelawsc.com>
Cc: schambers@countyofunion.com, aheatherly@countyofunion.com
Subject: Motion "MDEFJM-Motion/Default Judgment" for Case "2024CP4400097-Michael J Osten , plaintiff, et al VS Sandra Malikowski" was added to a Motions Roster for 2/24/2025 at 9:30 AM

The Motion referenced in this e-mail is scheduled Virtually for Thursday February 24th at 9:30 a.m. The Honorable Judge McCutchen, will be presiding. He will sound the roster at 9:30 a.m. This hearing will be Virtual. You will go to sccourts.org, Select 'calendar' then 'monthly view'. Go to the date of the hearing, click on 'circuit', then choose Judge McCutchen and 'virtual courtroom'. If you have any questions, or do not have access to internet please email Stephenie Chambers at schambers@countyofunion.com or Mandy Heatherly at aheatherly@countyofunion.com or call the Clerk's Office for 864-466-3667.

~~~~ CONFIDENTIALITY NOTICE ~~~~ This message is intended only for the addressee and may contain information that is confidential. If you are not the intended recipient, do not read, copy, retain, or disseminate this message or any attachment. If you have received this message in error, please contact the sender immediately and delete all copies of the message and any attachments.

STATE OF SOUTH CAROLINA )

COUNTY OF UNION )

Michael J. Osten and  
Shawntell L. Osten,

Plaintiffs,

vs.

Sandra Malikowski,

Defendant.

IN THE COURT OF COMMON PLEAS

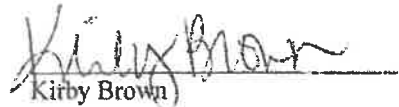
C.A. No. 2024-CP-44-00097

**CERTIFICATE OF SERVICE**

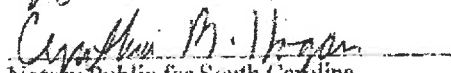
**PERSONALLY APPEARED BEFORE ME**, Kirby Brown, who being duly sworn, deposes and says that she is employed in the law office of Anderson & Moore, LLC, 240 Magnolia Street, Spartanburg, South Carolina 29306, and is a person of such age and discretion as to be competent to serve papers.

She states that on January 24, 2025 she served Notice of Motion Hearing via US mail, addressed as follows:

Sandra Malikowski  
202 Gilbert St.  
Union, SC 29379

  
Kirby Brown

**SWORN** to and subscribed before me this  
28 day of Jan, 2025

  
Notary Public for South Carolina  
My Commission Expires: 1-15-30

|                                          |   |                                  |
|------------------------------------------|---|----------------------------------|
| STATE OF SOUTH CAROLINA                  | ) | IN THE COURT OF COMMON PLEAS     |
|                                          | ) | THE SIXTEENTH JUDICIAL CIRCUIT   |
| COUNTY OF UNION                          | ) | CIVIL ACTION NO. 2024-CP-44-0097 |
|                                          |   |                                  |
| MICHAEL J. OSTEN and SHAWNTELL L. OSTEN, | ) |                                  |
| Plaintiffs,                              | ) |                                  |
|                                          | ) |                                  |
| v.                                       | ) | MOTION TO VACATE OR SET ASIDE    |
|                                          | ) | DEFAULT JUDGMENT                 |
|                                          | ) |                                  |
| SANDRA MALIKOWSKI,                       | ) |                                  |
|                                          | ) |                                  |
| Defendant.                               | ) |                                  |

YOU WILL PLEASE TAKE NOTICE that Defendant Sandra Malikowski, by and through the undersigned counsel, shall move at such time and date as the Court shall hereafter appoint for an order vacating or setting aside the default and default judgment herein entered against Defendant by order dated March 11, 2025, pursuant to Rules 55 and 60, South Carolina Rules of Civil Procedure ("SCRCP"). The motion is based on the attached affidavits which establish (1) that "good cause" exists for setting the default aside under Rule 55, SCRCP; (2) that irregularities exist with regard to the entry of the judgement in the first instance, particularly service of notice of the damages hearing; (3) that Defendant has otherwise shown that the default judgment is the result of "mistake, inadvertence, surprise or excusable neglect" for purposes of Rule 60, SCRCP; (4) that Defendant has a meritorious defense against Plaintiffs' claims. It is further based on the fact that no prejudice is visited on Plaintiffs by setting the default aside and thus requiring Plaintiffs to prove their claims on the merits, 10A Federal Practice and Procedure § 2699; and (5) the following authorities: See, Mutual Sav. and Loan Ass'n v. McKenzie, 274 S.C. 630, 266 S.E.2d 423 (1980), *citing*, Gillian v. Gillian, 65 S.C. 129, 43 S.E. 386 (1903) (holding that a default judgment must be set aside where the complaint fails to state a cause of action because it is without authority of law and cannot be sustained as a default does not affect an admission that the facts plead in the complaint are well plead but only an admission as to those facts actually plead and the defendant has not, by his default, waived the right to object that the law does not contemplate a cause of action on such allegations stated); Brooks v. Council of Co-Owners

of Stons Throw Horizontal Property Regime I, 315 S.C. 474, 445 S.E.2d 630 (1994) (holding that a cause of action for nuisance for damages to real property may only be maintained by one having an interest in the property alleged to have been damaged); Melton v. Olenik, 379 S.C. 45, 50, 664 S.E.2d 487, 489–90 (Ct.App.2008) (stating that Rule 55(c), SCRCPP, permitting the setting aside of a default, should be “liberally construed to promote justice and dispose of cases on the merits” (quotations and citations omitted)); Ex parte Trustgard Insurance Co., 442 S.C. 485, 900 S.E.2d 448 (Ct. App. 2023) (noting that “[c]ourts should closely scrutinize default judgments to prevent harsh results and drastic action.”); Renny v. Dobbs House, Inc., 275 S.C. 562, 274 S.E.2d 290 (1981) (stating that default judgments are to be closely scrutinized because “[i]t is the policy of the law to favor the trial of cases on the merits.”); Caldwell v. Wiquist, 402 S.C. 565, 741 S.E.2d 583 (noting that setting aside default judgments, where properly supported, is in furtherance of the policy of our state to resolve cases on the merits); Rochester v. Holiday Magic, Inc., 253 S.C. 147, 152, 169 S.E.2d 387, 390 (1969) (holding that the prior statute with identical language to Rule 60, SCRCPP, “should be liberally construed to see that justice is promoted and to strive for disposition of cases on their merits”); Colleton Preparatory Acad., Inc. v. Hoover Universal, Inc., 616 F.3d 413, 417 (4th Cir.2010) (analyzing the nearly identical Federal Rules from which our rules were drawn and stating “[w]e have repeatedly expressed a strong preference that, as a general matter, defaults be avoided and that claims and defenses be disposed of on their merits.”); Tazco, Inc. v. Dir., Office of Workers Comp. Programs, U.S. Dep’t of Labor, 895 F.2d 949, 950 (4th Cir.1990) (noting “[t]he law disfavors default judgments as a general matter”). The motion may additionally be based on such other and further materials or memoranda of law submitted to the Court prior to the hearing on the motion.

Pursuant to Rule 11, SCRCPP, the undersigned certifies that consultation with opposing counsel would serve no useful purpose.

(Signature of Counsel Appears on Following Page)

Respectfully submitted,

**POPE PARKER JENKINS, P.A.**

/s/Kyle B. Parker

Kyle B. Parker

1508 College Street

P.O. Box 190

Newberry, South Carolina 29108

tel: (803) 276-2532

fax: (803) 276-8684

kyle@ppjlaw.com

Newberry, South Carolina  
July 16, 2025

|                                          |   |                                  |
|------------------------------------------|---|----------------------------------|
| STATE OF SOUTH CAROLINA                  | ) | IN THE COURT OF COMMON PLEAS     |
|                                          | ) | THE SIXTEENTH JUDICIAL CIRCUIT   |
| COUNTY OF UNION                          | ) | CIVIL ACTION NO. 2024-CP-44-0097 |
|                                          |   |                                  |
| MICHAEL J. OSTEN and SHAWNTELL L. OSTEN, | ) |                                  |
| Plaintiffs,                              | ) |                                  |
|                                          | ) | AFFIDAVIT OF SANDRA MALIKOWSKI   |
| v.                                       | ) |                                  |
|                                          | ) |                                  |
| SANDRA MALIKOWSKI,                       | ) |                                  |
|                                          | ) |                                  |
| Defendant.                               | ) |                                  |

PERSONALLY APPEARED BEFORE ME the undersigned Sandra Malikowski, who being first duly sworn deposes and says:

1. I am the above named Defendant in this proceeding.
2. I am a 27 year old single working mother of two boys ages 5 and 8 months who live with me at my home located at 202 Gibert Street, Union, South Carolina.
3. I purchased my home on February 24, 2023, when I moved to Union from the State of Kentucky.
4. Almost immediately upon moving in, I began having trouble with my next door neighbors, Michael and Shawntell Osten.
5. Mr. Osten was constantly confronting me any time I would leave my home, whether to walk in the yard, to get in my car, or otherwise.
6. Based on what Mr. Osten would say to me, with the use of cameras on his home it was clear he was constantly watching my home because he would tell me when and where my dogs were let out, when and how long I kept my dogs in my garage, and when I came and went from my home.
7. It did not take long to discover that the Ostens were obsessed with attempts to control what I did and did not do with my home, and when I would not comply with their demands, a campaign of harassment began which truly beats all I have ever heard of.
8. Mr. Osten began repeatedly calling Animal Control with complaints of my dogs being off leash (even when the dogs were in my yard), barking, and other similar complaints.

Mr. Osten literally called Animal Control every other day for a period of months beginning in March of 2023.

9. When these attempts were unsuccessful, Mr. Osten took his harassment to another level and began making multiple false reports to DSS adding my children to the targets of his efforts. Upon information and belief, Mr. Osten further surreptitiously made video recordings of me in my yard without my knowledge or consent, posted the same on social media describing me as a child abuser, and then used the video in his efforts with DSS.

10. The Ostens also brought a civil proceeding against me in the Union County Magistrate's Court in May of 2023 asking for damages based on the very same matters they have asserted in this action. That action was dismissed.

11. In April or May 2024, a stranger came to my home, stayed for hours, took pictures of my home, and gave me papers that I have since discovered were related to this action.

12. I was born and lived in Poland for the first 8 years of my life. I was adopted by my parents and moved to the United States. I am able to speak and understand the English language; however, I have always had considerable trouble reading and comprehending the written language.<sup>1</sup>

13. Until I moved to Union and encountered the Ostens, I had no experience with the civil court system.

14. As a result, I did not understand that the papers served on me in this matter would work any differently than the previous Magistrate's Court proceeding. There, I was given the papers by the Sheriff and was later notified of a hearing where, again, that case was dismissed. I was not required to file any kind of response to the papers filed by the Ostens.

15. I have since been told that certain notices regarding a hearing was mailed to me; however, from what I have seen, it appears that any such notice was improperly addressed, listing my address as Gilbert Street as opposed to Gibert, which explains why I did not receive any notice.<sup>2</sup>

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<sup>1</sup> This affidavit was read to me prior to my signing it.

<sup>2</sup> In fact, this error infected this case throughout as evidenced by the fact that the Court actually had to enter an amended judgment 6 days after initially entering it to correct the address problem.

16. I have also been made aware that this Court's file in this matter contains a Proof of ADR which states that somebody notified me of a mediation; however, I was never notified of anything like that. It is also important to note that this document states that I agreed to the choice of the supposed mediator. I did not even know a mediation was to take place, much less agree to select the mediator.

17. In this matter, the Ostens have again claimed that my dogs barking have somehow caused them damages. While they are dogs and do, therefore, bark at times, my dogs have not and do not bark incessantly as the Ostens have claimed. The Ostens 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.

18. I was served with a complaint in Civil Action No. 2025-CP-44-00187, an action in which the Ostens are attempting to foreclose on the lien of the judgment rendered in this action on my and my children's home on May 3, 2025. While I immediately sought counsel, it took me a couple of months to save enough money to pay a retainer to my attorney.

19. My other neighbors have never mentioned a problem with my dogs. Surely, if the dogs behaved as the Ostens claim, other neighbors would be making these claims as well.

20. The Animal Control officer sent in response to Mr. Osten's repeated calls will state that Mr. Osten's complaints were greatly exaggerated and that it was clear that the Ostens were obsessed in their attempts to make my life difficult.

21. If the Court saw fit to set aside the default judgment, there simply is no reason to believe that the Ostens would be able to prove their claims in this Court any more than in their failed efforts with the agencies and courts which previously denied them.

22. If anybody has been deprived of the peaceful enjoyment of their property, it is me and my children.

23. I believe the interests of justice are best served by this Court setting aside the default judgment and requiring the Ostens to prove their claims. Because they are not true, they have not been able to do that before, and I do not know how they could do that now.

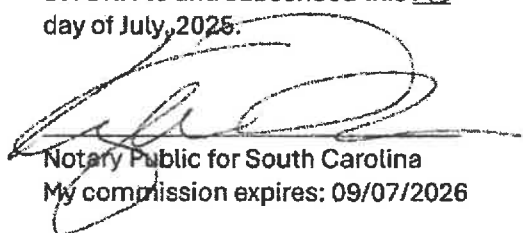
24. It is important to note as well that the Ostens sold their home and moved away some five months before the Court entered its default judgment. Once they sold their home for \$187,000 (according to Union County records), I do not believe they had standing to maintain their nuisance claim.

25. I believe that I have shown a prima facie meritorious defense, good cause that the default should be set aside, and the resulting judgment should likewise be set aside as the result of mistake, inadvertence, surprise or excusable neglect.

FURTHER THE AFFIANT SAYETH NOT.

  
Sandra Malikowski

SWORN to and subscribed this   
day of July, 2025.

  
Notary Public for South Carolina  
My commission expires: 09/07/2026

|                                          |   |                                  |
|------------------------------------------|---|----------------------------------|
| STATE OF SOUTH CAROLINA                  | ) | IN THE COURT OF COMMON PLEAS     |
|                                          | ) | THE SIXTEENTH JUDICIAL CIRCUIT   |
| COUNTY OF UNION                          | ) | CIVIL ACTION NO. 2024-CP-44-0097 |
|                                          |   |                                  |
| MICHAEL J. OSTEN and SHAWNTELL L. OSTEN, | ) |                                  |
| Plaintiffs,                              | ) |                                  |
|                                          | ) | AFFIDAVIT OF KATHRYN BLANKENSHIP |
| v.                                       | ) |                                  |
|                                          | ) |                                  |
| SANDRA MALIKOWSKI,                       | ) |                                  |
|                                          | ) |                                  |
| Defendant.                               | ) |                                  |

PERSONALLY APPEARED BEFORE ME the undersigned, who being first duly sworn deposes and says:

1. I am over the age of 18 and have personal knowledge of the facts stated herein.
2. I have resided at 207 Gibert Street, Union, South Carolina, for a little over 2 years. I moved into my home only a month or so after my neighbor, Sandra Malikowski, moved in to her home.
3. I have been made aware of the nature of the allegations made by the above named Plaintiffs against Ms. Malikowski and her dogs in this proceeding. These allegations are categorically false.
4. I have never had any problems with Ms. Malikowski nor her dogs.
5. My home is located directly across Gibert Street approximately 250 feet from Ms. Malikowski's home.
6. I have not heard her dogs bark incessantly at any time since moving into the neighborhood.
7. I have also never known Ms. Malikowski's dogs to be aggressive in any way. In fact, my kids play in Ms. Malikowski's back yard with the dogs.
8. While I have seen her dogs off of a leash in her yard at times, Ms. Malikowski was present and playing with the dogs.

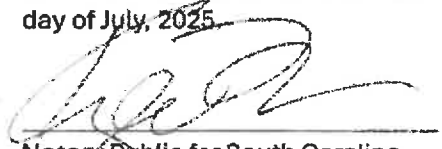
9. Because it is my home, I spend all of my otherwise unoccupied time at home and I have never witnessed any behavior on the part of Ms. Malikowski or her dogs that could remotely be considered a nuisance.

10. I am aware, however, of the Ostens', particularly Michael Osten', constant confrontations with Ms. Malikowski. The Ostens, who moved into Union from Ohio, I believe, clearly had it out for Ms. Malikowski for whatever reason and generally were difficult people. It is for that reason that I was glad to see the Ostens move out of the neighborhood.

FURTHER THE AFFIANT SAYETH NOT.

  
Kathryn Blankenship

SWORN to and subscribed this   
day of July, 2025

  
Notary Public for South Carolina  
My commission expires:

|                                          |   |                                  |
|------------------------------------------|---|----------------------------------|
| STATE OF SOUTH CAROLINA                  | ) | IN THE COURT OF COMMON PLEAS     |
|                                          | ) | THE SIXTEENTH JUDICIAL CIRCUIT   |
| COUNTY OF UNION                          | ) | CIVIL ACTION NO. 2024-CP-44-0097 |
| MICHAEL J. OSTEN and SHAWNTELL L. OSTEN, | ) |                                  |
| Plaintiffs,                              | ) |                                  |
|                                          | ) | AFFIDAVIT OF TRAVIS SMITH        |
| v.                                       | ) |                                  |
|                                          | ) |                                  |
| SANDRA MALIKOWSKI,                       | ) |                                  |
|                                          | ) |                                  |
| <u>Defendant.</u>                        | ) |                                  |

PERSONALLY APPEARED BEFORE ME the undersigned Travis Smith, who being first duly sworn, deposes and says:

1. I am over the age of 18 and have personal knowledge of the facts stated herein.
2. I was formerly employed by Union County Animal Control. I was the primary on-road responder to citizen complaints.
3. I have been made aware of the nature of the allegations made by the Plaintiffs against Defendant Sandra Malikowski and her dogs. I was with Union Count Animal Control during the relevant time period.
4. There came a time shortly after Ms. Malikowski moved to her home on Gibert Street in Union when my office began to get calls concerning the Ostens' complaints about Ms. Malikowski's dogs.
5. The Ostens, particularly Mr. Osten, was what we called a "frequent flyer". He began calling with complaints multiple times a day, every day, day and night for months on end. He would come to the office regularly and even text my work cell phone in the middle of the night sometimes about other things about Ms. Malikowski and what she was doing totally unrelated to the dogs.
6. In my numerous discussions with Mr. Osten, he informed me that even though Ms. Malikowski at one point in time put a privacy fence around her backyard, he could still see over it and would relate to me what he observed her doing. It became clear to me that Mr. Osten was obsessed with her.

7. Out of the hundreds of times Mr. Osten called making complaints about the dogs, Ms. Malikowski was written only one ticket (by another agency) and even that ticket was ultimately dismissed.

8. Because of Mr. Osten's voluminous complaints, I was forced to repeatedly visit Ms. Malikowski's home and spend a great deal of time just sitting outside of it in an attempt to observe the various matters he complained of, which was primarily barking. In an effort to get to the bottom of Mr. Osten's claims, I and another co-worker would on occasion spend hours outside of her home attempting to hear her dogs barking.

9. Despite the hours upon hours I spent listening for her dogs to bark, I never actually heard any of her dogs bark as Mr. Osten claimed.

10. I understand that the Ostens have claimed that Ms. Malikowski's dogs were aggressive. I never once observed her dogs be aggressive.

11. I also understand that the Ostens have claimed that the dogs were unleashed or unrestrained and trespassing on their property. In all of the occasions I had to visit Ms. Malikowski's home, I never once saw that.

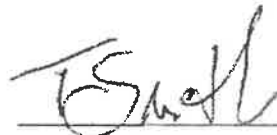
12. In fact, there were times when Mr. Osten would call in a complaint about the dogs incessantly barking apparently not knowing I or my co-worker were already sitting outside of Ms. Malikowski's home as a result of an earlier call (he would call sometimes 4 or 5 times a day), and the dogs were not, in fact, barking.

13. It was because of these kinds of false reports that some kind of hearing was had before former Municipal Judge Rollins which resulted in the court ordering neither the Ostens nor Ms. Malikowski to call any agency regarding any further non-emergent complaints about one another. Despite this order, Mr. Osten called me with a complaint about the dogs only a couple of hours later.

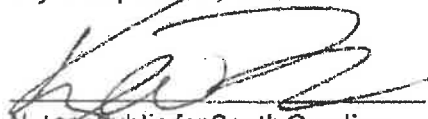
14. Near the time when I left Animal Control, I was asked to bring all of the materials my office compiled concerning Mr. Osten's complaints to the City's Police Department because I was informed that an officer was looking into a charge of stalking against Mr. Osten relating to his clear obsession with Ms. Malikowski. I do not know, however, what ever came of that.

15. Apart from what Mr. Osten had to say about the dogs in his complaints, I did not ever observe any evidence to substantiate them. If I had, I would have done my job to rectify the problem, but because I literally never observed any of those things during the numerous hours I spent outside of Ms. Malikowski's home, I am forced to believe that his claims were in very large measure false.

FURTHER THE AFFIANT SAYETH NOT.

  
Travis Smith

SWORN to and subscribed this <sup>11th</sup>  
day of September, 2025.

  
Notary Public for South Carolina  
My commission expires:

|                                          |   |                                  |
|------------------------------------------|---|----------------------------------|
| STATE OF SOUTH CAROLINA                  | ) | IN THE COURT OF COMMON PLEAS     |
|                                          | ) | THE SIXTEENTH JUDICIAL CIRCUIT   |
| COUNTY OF UNION                          | ) | CIVIL ACTION NO. 2024-CP-44-0097 |
| MICHAEL J. OSTEN and SHAWNTELL L. OSTEN, | ) |                                  |
| Plaintiffs,                              | ) |                                  |
|                                          | ) | AFFIDAVIT OF MEGAN JARRETT       |
| v.                                       | ) |                                  |
|                                          | ) |                                  |
| SANDRA MALIKOWSKI,                       | ) |                                  |
|                                          | ) |                                  |
| Defendant.                               | ) |                                  |

PERSONALLY APPEARED BEFORE ME the undersigned Megan Jarrett, who being first duly sworn deposes and says:

1. I am over the age of 18 and have personal knowledge of the facts stated herein.
2. I have resided at 206 Gibert Street, Union, South Carolina, for about 9 months. I purchased my home from the above named Plaintiffs.
3. I have been made aware of the nature of the allegations made by the Ostens against my neighbor, Sandra Malikowski, and her dogs. I live in the same house where the Ostens lived, and can, therefore, definitively say that these allegations are categorically false.
4. I have never had any problems with Ms. Malikowski nor her dogs.
5. My home is located approximately 75 feet from Ms. Malikowski's home.
6. I have not heard her dogs bark incessantly at any time.
7. I have also never known Ms. Malikowski's dogs to be aggressive in any way and they are, in fact, friendly.
8. While I have seen her dogs off of a leash in her yard only a couple of times, when I did, Ms. Malikowski was present calling the dogs back home and/or playing with the dogs.
9. I spend all of my otherwise unoccupied time at my home and I have never witnessed any behavior on the part of Ms. Malikowski or her dogs that could remotely be considered a nuisance.

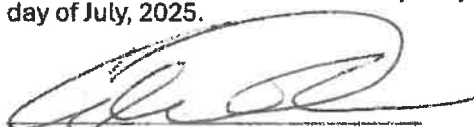
10. To put it simply: the dogs are not a problem. Ms. Malikowski is always ready to help me if I need one thing or the other. I am glad that Ms. Malikowski is my neighbor.

11. Mr. Osten, in particular, was a strange man in my interactions with him during the purchase of my home and in light of what I found when I moved in. The Ostens left the walls of each floor of my home riddled with holes of varying sizes and shapes and installed an inordinate amount of cameras around the home. There were also significant plumbing, foundational, and general maintenance issues with the home (for example, the stairs leading to the top floor were left in a dangerous condition), which were factored into the offer my husband I made on the home. Ms. Malikowski's dogs were never considered in the making or accepting of any offers to purchase my home. They simply were not a factor whatsoever.

FURTHER THE AFFIANT SAYETH NOT.

  
Megan Jarrett

SWORN to and subscribed this  
day of July, 2025.

  
Notary Public for South Carolina  
My commission expires: 29/07/2025

|                                          |   |                                  |
|------------------------------------------|---|----------------------------------|
| STATE OF SOUTH CAROLINA                  | ) | IN THE COURT OF COMMON PLEAS     |
|                                          | ) | THE SIXTEENTH JUDICIAL CIRCUIT   |
| COUNTY OF UNION                          | ) | CIVIL ACTION NO. 2024-CP-44-0097 |
|                                          |   |                                  |
| MICHAEL J. OSTEN and SHAWNTELL L. OSTEN, | ) |                                  |
| Plaintiffs,                              | ) | MEMORANDUM IN SUPPORT OF         |
|                                          | ) | MOTION TO VACATE OR SET ASIDE    |
| v.                                       | ) | DEFAULT JUDGMENT                 |
|                                          | ) |                                  |
| SANDRA MALIKOWSKI,                       | ) |                                  |
|                                          | ) |                                  |
| <u>Defendant.</u>                        | ) |                                  |

This Memorandum in Support of Motion to Vacate or Set Aside Default Judgment is submitted for the benefit of the Court in relation to the hearing upon the matter scheduled for September 15, 2025.

#### PROCEDURAL HISTORY

The complaint in this action was filed on March 6, 2024. Plaintiffs never moved to amend the complaint, which asserts three causes of action: nuisance, negligence and trespass. These claims purport to be based on Plaintiffs' problems with Defendant's dogs. Along with the complaint, Plaintiffs also filed a motion for temporary injunction. Defendant was personally served on April 29, 2024.

Thereafter, Plaintiffs filed a notice of the hearing on their motion for temporary injunction and a certificate of service by mail. The certificate indicates that Plaintiffs improperly addressed any notice they intended to mail by addressing it to "202 Gilbert Street, Union, SC 29379"<sup>1</sup>. The hearing was nonetheless held on May 28, 2025, and the motion was denied by Judge William A. McKinnon who ruled Plaintiffs' allegations failed to show irreparable harm and the lack of an adequate remedy at law.

The case was called for trial on December 16, 2024<sup>2</sup>. According to an order of continuance signed by Judge Grace Knie, the date was set pursuant to Plaintiffs' request. However, apparently

<sup>1</sup> There is no such street in all of the City of Union.

<sup>2</sup> Plaintiffs filed a Proof of ADR on February 21, 2025, which indicates that the case was mediated six months earlier on August 28, 2024. It also states that Defendant stipulated to the choice of the mediator but did not appear for the mediation. Defendant denies any knowledge of any such mediation.

Plaintiffs requested a continuance because a witness was unavailable. In any case, the record does not reflect that Defendant was given any notice of the intended trial.

On January 6, 2025, Plaintiffs filed their affidavit of default, together with a motion for default judgment and damages. A hearing on this motion was set for February 24, 2025. Again, the record reflects that Plaintiffs improperly addressed the notice of this hearing they contend was mailed to Defendant. The certificate of service and copy of counsel's letter filed on January 28, 2025, both are addressed to "Gilbert Street".

The damages hearing went forward on February 24, 2025. Defendant was not present. Judge Charles J. McCutchen entered a default judgment against Defendant in the total amount of \$280,862.58 by his order dated March 5, 2025. This order recites that Plaintiffs mailed notice of the hearing to Defendant at the same improper address. Judge McCutchen later amended his order on March 11, 2025<sup>3</sup>. The order was amended to recite that the Plaintiffs had mailed the notice to Defendant's correct address. As noted above, this amendment is contrary to the record.

As is also reflected in the record, neither of Judge McCutchen's orders were served on Defendant. Defendant was unaware of the judgment until May 3, 2025, when she was served with the complaint in civil action no. 2025-CP-44-00187, an action wherein Plaintiffs seek the sale of Defendant and her children's home in their effort to collect on the judgment. The instant motion was filed by the undersigned shortly thereafter on July 16, 2025.

#### STATEMENT OF FACTS

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

Defendant purchased her home on February 24, 2023, and then moved to Union from the State of Kentucky. Almost immediately upon moving in, Defendant began having trouble with her then next door neighbors, the Plaintiffs.

In her affidavit, Defendant states that Mr. Osten was constantly confronting her any time she would step outside of her home. She describes how Mr. Osten, who had a number of cameras

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<sup>3</sup> The record does not indicate how the amendment to Judge McCutchen's order came to be as no motion under Rule 59, SCRCP, was apparently filed.

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.

Shortly after moving in, Mr. Osten began repeatedly calling Animal Control with complaints about Defendant'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. Mr. Osten literally called Animal Control every day for a period of months beginning in March of 2023. Travis Smith, the Animal Control officer responsible for responding to these calls, states that he spent hours outside of Defendant's home, yet never observed anything to substantiate his complaints. He describes Mr. Osten's hundreds of complaints as "in very large measure false." 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 Defendant related to her dogs.

During this time, Defendant was being served with something resulting from the Plaintiffs' complaints on a regular basis. Plaintiffs 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. That action was dismissed. This was Defendant's first experience with the civil court system.

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, as she was not required to do so in the Magistrate's Court proceeding and yet that matter was resolved in her favor. Moreover, Defendant denies receiving any notices of the hearings mentioned above.

Defendant had no knowledge of the default judgment until she was served with the summons and complaint in civil action no. 2025-CP-44-00187. After a conversation with her neighbor about those papers, she immediately sought counsel. However, it took her a couple of months to save enough money to pay a retainer to her attorneys.

Defendant now understands that Plaintiffs have again claimed that her dogs barking have somehow caused them damages. Defendant acknowledges that while they are dogs and do, therefore, bark at times, she denies that her dogs bark incessantly as Plaintiffs assert<sup>4</sup>. Defendant's other neighbors have never mentioned a problem with her dogs. In fact, both of her closest

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<sup>4</sup> Plaintiffs 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

neighbors, including the neighbor who purchased Plaintiffs' former home five months before the damages hearing, categorically deny Plaintiffs' claims and state that the dogs are no problem at all, describing them as friendly.

### ARGUMENT

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.*; Micronics, Inc. v. SCDOR, 345 S.C. 506, 548 S.E.2d 223 (Ct. App. 2001). The rules regarding granting relief from default are 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).

The here concerned default judgment should be vacated for a handful of different specific legally significant reasons, but that is the case generally because it represents a huge miscarriage of justice that the Court must rectify. The irregularities blatantly 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 Defendant has made the requisite showing under Rules 55 and 60, SCRCp.

#### I. The Complaint Fails to State a Cause of Action Such that the Default Judgment is Void and Should Therefore be Vacated.

From the outset, it is important to delineate 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 defendant 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. 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). In other words, a party requesting a default judgment is not entitled to such a judgment as a matter of right just because the defendant 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.

Here, the complaint alleges but three causes of action for nuisance, negligence and trespass. The complaint fails to state a cause of action in each respect.

#### A. Nuisance

To properly state a claim for a nuisance, a plaintiff must allege facts tending to show the defendant 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).

Plaintiffs' stated cause of action for nuisance is defective for a few reasons. First, the complaint allege no damage to any property interest. Next, Plaintiffs' allegations regarding the dogs, if true, are clearly abatable. Defendant could, 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. Consequently, the complaint fails to state a cause of action for nuisance and any judgment rendered under it is void. Babb, supra; McKenzie, supra.

#### B. Negligence

The same is true for Plaintiffs' negligence claim. To state a cause of action for negligence, the plaintiff must allege facts which demonstrate: (1) a duty of care owed by defendant 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 the defendant 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 Plaintiffs on the part of Defendant. 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.

#### C. Trespass

Plaintiffs have also failed to state a cause of action for trespass. Where Plaintiffs’ trespass claim relate to the alleged entry upon their property by Defendant’s dogs, the claim still fails. What matters 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. Plaintiffs’ 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 Plaintiffs trespass claim seeks damages for the alleged barking, it fails and any judgment based thereon is void and must be vacated. McKenzie, supra.

II. The Evidence Offered at the Damages Hearing Impermissibly Contradicted the Complaint and the Default Judgment is Therefore Void and Should be Vacated.

Plaintiffs offered evidence at the damages hearing which contradicted the allegations of the complaint. In addition, 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. The judgment is for that reason void and should be vacated.

Parties are judicially concluded and 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 otherwise participated in the hearing. See Mauro v. Clabaugh, 299 S.C. 184, 383 S.E.2d 244 (Ct. App. 1989)<sup>5</sup>. Therefore, a default judgment may not be sustained where it rests on evidence received 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 reversible error and any judgment rendered should be vacated).

Here, the Plaintiffs testified at the damages hearing that contrary to the allegations of the complaint, they no longer owned the property they claimed was damaged. To their credit, this is true. Union County records show Plaintiffs sold their home some five months before the hearing. 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).

Plaintiffs also testified that they were forced to sell their home because of Defendant's dogs. They further gave evidence for the notion that they could not sell their home for a particular

<sup>5</sup> On pages 17-18 of the transcript of the damages hearing, Plaintiffs requested and impermissibly received leave to amend the pleadings to conform with the evidence.

price and were, again, forced to sell it for much less than they indicated it was otherwise worth. There was further reference that the Defendant's dogs caused Plaintiffs to purchase a more expensive home in Spartanburg which required them to take out a "multi-hundred-thousand-dollar mortgage". 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 Defendant any notice that these statements are the basis of their claims. Instead, the complaint states repeatedly that Plaintiffs owned their property and that this is the core of their various claims.

Not only was receipt of and basing the judgment on this evidence impermissible as a matter of pleading, it 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 defendant 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 defendant to believe that only a certain type of claim or relief was being sought only then for the 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, as best as the undersigned can tell, the record does not contain any indication of how the Court calculated the damages awarded in the default judgment; however, the transcript of the damages hearing indicates that the Court necessarily awarded damages that far exceeded any claim of diminution of value of the Plaintiffs' former home. Counsel referenced having provided the Court with a "summary of damages"<sup>6</sup> several times during the hearing and indicated that the asserted damages included Plaintiffs mortgage on their new home in Spartanburg, attorneys fees, and moving costs. Their complaint makes no allegations related to these items and certainly contains no request for these alleged damages. The default judgment is, therefore, void and should be vacated. Rule 54(c), SCRCP; 10 Wright, Miller & Kane, *Federal Practice and Procedure* § 2663.

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<sup>6</sup> This "summary of damages" does not appear to have been entered into the record.

What is more, attorneys fees are not recoverable as a measure of damages in any of the causes of action stated in the complaint, and an award of damages finding that Defendant's dogs are the proximate cause of Plaintiffs' 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.

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.

III. Defendant was not Provided Proper Notice of the Damages Hearing and the Default Judgment is Void as a Result.

The record reflects that a significant defect in service on Defendant was repeated throughout the proceedings generally and specifically with respect to the notice of the damages hearing. This defect renders the default judgment void under the rules of this Court. Accordingly, the judgement should be vacated.

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." "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." 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 defendants was insufficient notice to sustain default judgment).

Plaintiffs obviously were aware of Defendant's last known address and the proper spelling of the street where the parties homes are located. Yet, almost certainly by mistake, Plaintiffs filed several certificates of service indicating that the mailing of the notice of the damages hearing was addressed to Defendant at an address that is not hers, nor does it exist within the City of Union. Defendant, for her part, denies receiving the purported notice of the virtual damages hearing in this case.

The record, therefore, is devoid of any evidence that Defendant had the required notice of the hearing. A default judgment issued without the required notice constitutes a deprivation 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); Stark Truss Co. v. Superior Constr. Corp., 360 S.C. 503, 602 S.E.2d 99 (Ct. App. 2004) (finding a default judgment was void when the defendants did not receive notice of the hearing addressing the default judgment). As a result, the Court should grant the motion and vacate the default judgment.

IV. The Default Judgment is So Greatly Out of Proportion to the Wrongs Alleged and Excessive as to be Vacated as a Matter of Equity.

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

In the case of Renney v. Dobbs House, Inc., 275 S.C. 562, 274 S.E.2d 290 (1981), 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 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 court went on to state what should be obvious: “[w]hether a defendant 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 default judgment is so greatly out of proportion to the wrongs alleged in the complaint, the Court, as a matter of law, 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 on its own motion.

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 Plaintiffs 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 Plaintiffs at the hearing. What is more, the realtor Plaintiffs 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. 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, the math only allows for damages in the amount of \$62,500. Thus, the proof submitted by Plaintiffs 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 Plaintiffs 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 and dispense with this judgment.

IV. Defendant has Demonstrated a 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 ...”

Here, Defendant 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. The only reason she got notice of it at all is because she was personally served with Plaintiffs’ second action seeking the sale of Defendant’s home in collection

of the judgment. Therefore, the judgment is the result of surprise and should be set aside. Rule 60, SCRCP.

Defendant has further shown mistake and excusable neglect. As is set forth in Defendant's affidavit and that of Travis Smith, Defendant was being served with any number of things resulting from Plaintiffs incessant complaints. It was virtually an everyday event. In each of those other matters, no formal response was ever required of Defendant. 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. All of this culminated with Defendant failing to understand that a formal response to the complaint in this action was required. 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 Defendant 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 defendant's motion for relief, (2) whether the defendant 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.

Defendant's affidavits in support of her motion clearly show that she has a meritorious defense. While Plaintiffs allege incessant barking, not only does the Defendant deny this, but so do her neighbors and Plaintiffs' own witness. Kathryn Blankenship is Defendant's neighbor across the street. She denies the dogs are a problem at all, describes them as friendly, and states that her children regularly play with them.

Megan Jarrett bought Plaintiffs home. Accordingly, Ms. Jarrett's testimony is clearly important. She now lives in the same position relative to Defendant's dogs as Plaintiffs 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. More to the point, she unequivocally states that the dogs did not factor into the negotiations with Plaintiffs at all. It was, instead, the condition of the home that drove those discussions. Ms. Jarrett's testimony is dispositive of Plaintiffs' claims.

The same is true of Travis Smith's testimony. Mr. Smith was to be Plaintiffs' witness. They subpoenaed him to appear at both the aborted trial and the damages hearing. Mr. Smith is

the former Animal Control officer that Plaintiffs were in regular contact with concerning their complaints about the dogs. Mr. Smith provides some details that support the notion that Mr. Osten, in particular, was obsessed with Defendant for whatever reason. He states that despite Mr. Osten's many, many complaints, he never observed anything that would support Plaintiffs allegations in this case even though he spent many hours at Defendant's home responding to each of Mr. Osten's complaints. Mr. Smith and Ms. Jarrett's testimony make Plaintiffs allegations in this case very difficult to believe.

As to the timeliness of her motion, Defendant applied for relief from the judgment only a couple of months after getting notice of the judgment. 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. The filing was therefore timely.

Finally, there can be no prejudice to Plaintiffs 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 grant the instant motion, set the judgment aside, and allow Defendant to answer so that this case 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) is 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 Defendant as to require, as a matter of equity, it be vacated. Defendant 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 Plaintiffs. On this record, the default judgment cannot be sustained. The Court should grant the motion, set the judgment aside and allow Defendant to answer so that justice between the parties can be had on the merits.

Respectfully submitted,

**POPE PARKER JENKINS, P.A.**

/s/Kyle B. Parker

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Newberry, South Carolina  
September 14, 2025

R066

ELECTRONICALLY FILED - 2025 Sep 14 7:41 PM - UNION - COMMON PLEAS - CASE#2024CP4400097

R067

|                         |   |                                      |
|-------------------------|---|--------------------------------------|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS         |
| COUNTY OF UNION         | ) | SIXTEENTH JUDICIAL CIRCUIT           |
|                         | ) |                                      |
|                         | ) |                                      |
| Michael J. Osten and    | ) | CIVIL ACTION NO. 2024-CP-44-0097     |
| Shawntell L. Osten,     | ) |                                      |
| Plaintiffs,             | ) |                                      |
|                         | ) | PLAINTIFF'S MEMORANDUM IN OPPOSITION |
| vs.                     | ) | TO DEFENDANT'S MOTION TO VACATE AND  |
|                         | ) | SET ASIDE DEFAULT JUDGMENT           |
| Sandra Mallikowski,     | ) |                                      |
| Defendant.              | ) |                                      |
| _____                   | ) |                                      |

The Defendant moves to vacate or set aside Plaintiff's Default Judgment entered on March 11, 2025. The Plaintiffs hereby request that the Court deny Defendant's requested relief based on the following. "A Motion to set aside a default judgment is addressed to the sound discretion of the circuit court and will not be disturbed absent a clear abuse of discretion." Tobia v. Rices, 386 S.C. 306, 688 S.E.2d 552 (2010).

Plaintiffs will first address the Defendant's numbered positions as stated the Motion to Vacate or Set aside Default Judgment.

Item (1): The Defendant erroneously asserts in her Motion that "good cause" exists for setting the default aside under Rule 55 of the South Carolina Rules of Civil Procedure (hereinafter "SCRCP"). However, Rule 55(c) distinguishes between an entry of default and a default judgment. Only the former may be set aside for "good cause". Once judgment is entered, Rule 60(b) governs. As this case centers on a Default Judgment, and not an entry of default, Rule 60(b) governs.

Rule 60(b) allows relief from a final judgment only upon narrowly construed grounds – mistake, inadvertence, excusable neglect, newly discovered evidence, fraud, etc. In the present case, none of these factors under Rule 60(b) apply to or support the Defendant's Motion. And while Rule 55(c) regarding entries of default is construed liberally, Courts have consistently emphasized the stricter standard for default judgments. The bottom line is that we must have finality in judgments, and this case is no exception.

Item (2): The Defendant asserts "that irregularities exist with regard to the entry of the judgment in the first instance, particularly service of notice of the damages hearing". The Defendant is referring to her address of 202 Gibert Street, Union South Carolina, versus the use of 202 Gilbert Street, Union South Carolina. The Plaintiffs submit to the Court that despite the typographical error that was present regarding some documents and mailings, the Defendant received notice. There are two points that support Plaintiffs position. The first point is that the notice to the Defendant specific to Plaintiff's Motion for a preliminary

Injunction, which was scheduled for May 28, 2024, was sent via United States Mail return receipt requested to 202 Gilbert Street, and not Gibert Street. The postal service certified mail receipt, Notice of Motion Hearing, and Certificate of Service were filed with the Union County Clerk of Court on May 15, 2024. The postal service certified mail receipt listed Gilbert Street and not Gibert Street. The Notice of Motion Hearing, certificate of service, and the postal service return receipt "green card" for the same were filed with the Union County Clerk of Court on May 23, 2024 (the two former documents were filed twice). The postal service return receipt "green card", which listed Gilbert Street, and not Gibert Street, was signed for by the Defendant, indicating that she received notice via said mailing, despite the typographical error. Plaintiffs counsel has attached these documents to this memorandum as Exhibit 1. What is also important to note is that the Defendant appeared at the hearing, again indicating that she obviously received notice.

The second point is specific to paragraph sixteen of Defendant's affidavit wherein she claims she never received notice of the mediation at the law offices of Ken Anthony. However, Mr. Anthony's office mailed the notice of mediation, as well as mediation documents, to the Defendant's address at 202 Gibert Street, and not Gilbert Street. This directly contradicts the Plaintiffs affidavit. This notice was not filed with the Court during the pendency of the action, but Plaintiffs counsel has attached it as a supporting document to this memorandum as Exhibit 2. This again illustrates the fact that the Defendant chose not to participate in the litigation process, either by not checking her mail or simply ignoring it.

Courts do not set aside judgments based solely on uncorroborated claims of non-receipt, especially where personal service is admitted. *Roche v. Young Bros., Inc.* 318 S.C. 207.

Item (3): The Defendant asserts that the default judgment is the result of "mistake, inadvertence, surprise or excusable neglect" for purposes of Rule 60, SCRCP. The Defendant's Motion fails to meet any of the standards for relief under Rule 60(b). The Defendant offers no valid explanation for her complete inaction over the course of thirteen months of litigation. The Defendant had literally over one year to participate, and yet she repeatedly chose not to do so. This behavior is not excusable neglect, nor is it mistake, inadvertence, or surprise. It is simply a litigant choosing not to participate. Rule 60 does not and should not protect those who simply ignore legal proceedings. And if the Courts routinely set aside default judgments because litigants simply did not participate in the process, which is what we have with this case, then it is likely that most if not all default judgments would not remain final. It is also worth noting that the Defendant did not retain counsel and file her Motion until after the Plaintiffs had obtained representation for and filed a Lis Pendens and a foreclosure action. There were 133 days, or 4 months and 11 days, between the default judgment being granted, and the filing of Defendant's motion. The Defendant's delay is further evidence of the way she handled the underlying litigation.

Item (4): The Defendant has not shown that she has a meritorious defense against the Plaintiff's claims. A movant must present specific facts, not conclusory assertions. *Tobias vs. Rice*, 386 S.C. 306. The Defendant's affidavit vaguely references defenses but offers no

concrete evidence negating liability. Without sworn factual detail sufficient to change the outcome, Rule 60(b) relief must be denied. McClurg vs. Deaton, 389 S.C. 122.

The Defendant's affidavit offers the Court nothing more than excuses that do not rise to the standard demanded by Rule 60. The Defendant continues by arguing failure to state a claim, alleging the Plaintiffs lacked standing to bring a nuisance claim. The Plaintiffs owned and resided on the affected property and had an interest in said property, and as such, had every right to bring that cause of action, as well as the others in their complaint.

#### Plaintiffs Position Regarding the Default Judgment

##### I. The Defendant was properly served with the Summons and Complaint and acknowledges not Answering.

The Defendant was personally served with the Summons and Verified Complaint on April 29, 2024 at 8:31 p.m. as evidenced by the Affidavit of Service filed with the Clerk of Court on May 8, 2025. The Defendant did not file an answer, nor appear, nor did she file any responsive pleadings within the thirty-day period required by Rule 12(a), SCRCP. The Plaintiffs properly filed and Affidavit of default on January 26, 2025, as well as a Motion for Default Judgment and Damages on the same day. The Defendant was noticed regarding the Motion for Default Judgment and Damages via United States Mail as evidenced by Plaintiffs Counsel Letter advising of the same, along with a copy of the Clerk's emailed notice with instructions for the virtual hearing, as well as the companion Plaintiffs counsel Certificate of Service, all of which were filed with the Clerk of Court on January 28, 2025. This mailing was addressed to Gilbert Street and not Glibert. However, as stated above, the notice was not returned to Plaintiffs counsel as undeliverable.

The Motion for Default Judgment and Damages was scheduled before Judge McCutchen on February 24, 2025. Prior to the hearing Plaintiffs counsel submitted documents specific to damages, to include the hearing packet from the Motion for Preliminary Injunction. The Court heard testimony from the Plaintiffs as well as their realtor, Laura Gault. The Court considered all evidence presented by the Plaintiffs, which included itemized financial losses via supporting documentation. After considering all evidence presented, Judge McCutchen granted the default judgment and damages. Nothing the Defendant has presented justifies disturbing that judgment.

Throughout the pendency of this action, the Defendant never retained counsel for the overall action, nor did an attorney file a Notice of Appearance, nor were any responsive pleadings filed prior to the judgment. The Defendant had over thirteen months from the date of service of the Summons and Verified Complaint to file an answer or appear or otherwise plead and yet took no action until the Plaintiffs foreclosure action was well underway. This was after the Plaintiffs had paid for and retained the services of Crawford and Von Keller, LLC, specific to the foreclosure action. The previously mentioned 133 days between the judgment and the Defendant's motion being filed reflect a complete disregard for the timeliness component that Court's must consider regarding setting aside a default judgment.

##### II. Defendant's Position is Contrary to the Record

The Defendant references numerous reasons in her affidavit regarding not filing responsive pleadings. However, her affidavit states that she has lived in the United States since she was approximately eight years old. Based on a simple search of the public index for various South Carolina Counties, she has been a litigant in numerous legal proceedings, to include traffic court, family court, and criminal court. Even if the Court were to give credence to her claim that she has difficulty reading, that alone is not grounds for her requested relief. South Carolina Courts have consistently made clear that "mere ignorance of the legal process, or misunderstanding of rights, does not amount to excusable neglect under Rule 60(b). *Miccichi v. The South Financial Group* 376 S.C. 563. In addition, Plaintiffs counsel briefly spoke to the Defendant at one point during the pendency of the litigation, as she was pro se. The Defendant had no problems whatsoever communicating with Plaintiffs counsel.

The Defendant further claims she was confused or intimidated by the legal process, yet her own affidavit admits she attended a related Magistrate Court hearing on September 20, 2023. As referenced above, she also attended the preliminary injunction hearing. She did not appear to be intimidated by the process at any point.

Most notably, not only did the Defendant appear at Plaintiffs Motion for Preliminary Injunction on May 28, 2024; she also retained the services of the King Law Firm, in a limited capacity strictly for that hearing. Plaintiffs counsel recently spoke with Mr. Toomey regarding whether anything was filed regarding their representation. He obviously acknowledged appeared on behalf of the Defendant, although neither he nor the King Law Firm filed a Notice of Appearance, nor did Judge McKinnon's Form 4 Order reference their representation. Mr. Toomey and Plaintiffs counsel had an in-chambers discussion with Judge McCutchen prior to the hearing. Mr. Toomey argued on behalf of the Defendant during the hearing. The fact that the Defendant retained counsel, even if only for the limited purpose of the preliminary injunction hearing, clearly demonstrates her understanding of the process of litigation, the stakes involved, and the importance of participating in said litigation. Despite this obvious understanding, the Defendant chose not to file an answer or otherwise plead. Subsequent to the Motion for Preliminary Injunction, the Defendant made no effort to obtain the services of an attorney to represent her, or request any relief, until a separate foreclosure action was filed and well underway. This selective participation reflects a pattern of willful disregard for the Judicial process and is not excusable under Rule 60. Even if she did not have subsequent funds after retaining King Law to hire counsel for the underlying action, she could have done a simple Google search for a template for an Answer and counterclaim and filed the same.

### III. Defendant Delayed until after Plaintiffs Foreclosure Action was Underway

The Default Judgement was entered in March of 2025. As referenced above, the Defendant took no action until over four months later; 133 days, after Plaintiffs obtained an Amended Judgment and judicial foreclosure proceedings commenced. Defendant offers absolutely no explanation for this delay, aside from not having the funds to retain counsel. But again, if the Defendant lacked funds to retain counsel, she could have filed something on a pro se basis with the Clerk of Court, as she could have done during the 13 plus months of the pendency

of this litigation. As the Court referenced in *Miccichi vs. The South Financial Group*, 376 S.C. 563, "a Motion under Rule 60(b) must be made within a reasonable time". The delay before this Court is unreasonable and inexcusable.

IV. Plaintiffs Would be Prejudiced if Defendant's Requested Relief is Granted

The Plaintiffs have spent greater than one year pursuing their claims in good faith. They properly secured a judgment and are seeking enforcement of said judgment. The granting of the Defendant's requested relief would force this matter to be relitigated, delay the properly filed foreclosure proceedings, and reward the Defendant's deliberate inaction and disregard for the judicial process.

V. Finality in Judgments

The Defendant is requesting what South Carolina Courts have always considered to be extraordinary relief, and this has been a consistent theme regarding the requested relief and Rule 60(b). It is designed to allow relief in only limited and narrowly defined situations and is not intended to be a mechanism through which litigants should be rescued from the consequences of their own inexcusable neglect, delay, and inaction. Nothing the Defendant has presented merits the extraordinary relief that is requested, and as such the Plaintiffs request the Court deny said relief, and grant attorneys fees due to the necessity of defending this Motion.

September 14, 2025

Anderson & Moore, LLC

S / J. Patrick Anderson  
240 Magnolia Street  
Spartanburg, SC 29307

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R073

ELECTRONICALLY FILED - 2024 MAY 15 10:08 AM UNION COUNTY COMMON PLEAS CASE#2024CR000007

STATE OF SOUTH CAROLINA )  
COUNTY OF UNION )  
Michael J. Osten and )  
Shawntell L. Osten, )  
Plaintiffs, )  
vs. )  
Sandra Malikowski, )  
Defendant. )

IN THE COURT OF COMMON PLEAS

C.A. No. 2024-CP-44-00097

NOTICE OF MOTION HEARING

1

A Motion for Preliminary Injunction hearing has been set in the above-entitled action on *May 28, 2024 at 10:30 AM* at the Union County Courthouse located at 210 W. Main St., Union, SC. You are hereby notified to be present in the Union County Court of Common Pleas at that time.

Anderson & Moore, LLC

St. Patrick Anderson  
240 Magnolia Street  
Spartanburg, South Carolina 29306  
Telephone: (864) 641-6431  
Facsimile: (864) 641-6435

May 14, 2024

FILED  
UNION COUNTY SC  
2024 MAY 15 PM 1:05

R074

ELECTRONICALLY FILED: 2024 MAY 15 8:08 AM UNION COMMON PLEAS CASE#2024CD44008697

STATE OF SOUTH CAROLINA )  
COUNTY OF UNION )  
Michael J. Osten and )  
Shawntell L. Osten, )  
Plaintiffs, )  
vs. )  
Sandra Malikowski, )  
Defendant. )

IN THE COURT OF COMMON PLEAS

C.A. No. 2024-CP-44-00097

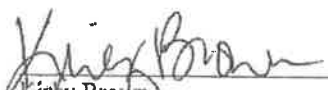
CERTIFICATE OF SERVICE

1

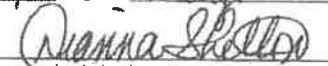
PERSONALLY APPEARED BEFORE ME, Kirby Brown, who being duly sworn, deposes and says that she is employed in the law office of Anderson & Moore, LLC, 240 Magnolia Street, Spartanburg, South Carolina 29306, and is a person of such age and discretion as to be competent to serve papers.

She states that on May 14, 2024 she served Notice of Motion Hearing via certified mail, return receipt requested, addressed as follows:

Sandra Malikowski  
202 Gilbert St.  
Union, SC 29379

  
Kirby Brown

SWORN to and subscribed before me this  
14<sup>th</sup> day of May, 2024

  
Notary Public for South Carolina  
My Commission Expires: 12/08/30

FILED  
UNION COUNTY, SC  
2024 MAY 15 PM 1:05

R075

ELECTRONICALLY FILED 2025 MAY 15 3:08 AM UNION-COMMONWEALTH AS CASE#2024040080097

1

| SENDER: COMPLETE THIS SECTION                                                                                                                                                                                                                                        |                                                                     | COMPLETE THIS SECTION ON DELIVERY                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |  |                                          |                                                 |                                                              |                                           |                                          |                                                              |                                                             |                                                  |                                              |                                                                     |                                                                  |  |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--|------------------------------------------|-------------------------------------------------|--------------------------------------------------------------|-------------------------------------------|------------------------------------------|--------------------------------------------------------------|-------------------------------------------------------------|--------------------------------------------------|----------------------------------------------|---------------------------------------------------------------------|------------------------------------------------------------------|--|
| <ul style="list-style-type: none"><li>■ Complete items 1, 2, and 3.</li><li>■ Print your name and address on the reverse so that we can return the card to you.</li><li>■ Attach this card to the back of the mailpiece, or on the front if space permits.</li></ul> |                                                                     | <p>A. Signature<br/><input checked="" type="checkbox"/> <i>Sandra</i> <input type="checkbox"/> Agent <input type="checkbox"/> Addressee</p> <p>B. Received by (Printed Name)<br/><i>Sandra Malikowski</i></p> <p>C. Date of Delivery<br/><i>MAY 20 2024</i></p> <p>D. Is delivery address different from item 1? <input type="checkbox"/> Yes <input type="checkbox"/> No<br/>If YES, enter delivery address below.</p>                                                                                                                                                                                                                                                                                                                                                                                       |  |                                          |                                                 |                                                              |                                           |                                          |                                                              |                                                             |                                                  |                                              |                                                                     |                                                                  |  |
| 1. Article Addressed to:<br><i>Sandra Malikowski<br/>202 Gilbert St.<br/>Union, SC 29379</i>                                                                                                                                                                         |                                                                     | <p>3. Service Type</p> <table border="0"><tr><td><input type="checkbox"/> Adult Signature</td><td><input type="checkbox"/> Priority Mail Express®</td></tr><tr><td><input type="checkbox"/> Adult Signature Restricted Delivery</td><td><input type="checkbox"/> Registered Mail™</td></tr><tr><td><input type="checkbox"/> Certified Mail®</td><td><input type="checkbox"/> Registered Mail Restricted Delivery</td></tr><tr><td><input type="checkbox"/> Certified Mail Restricted Delivery</td><td><input type="checkbox"/> Signature Confirmation™</td></tr><tr><td><input type="checkbox"/> Collect on Delivery</td><td><input type="checkbox"/> Signature Confirmation Restricted Delivery</td></tr><tr><td><input type="checkbox"/> Collect on Delivery Restricted Delivery</td><td></td></tr></table> |  | <input type="checkbox"/> Adult Signature | <input type="checkbox"/> Priority Mail Express® | <input type="checkbox"/> Adult Signature Restricted Delivery | <input type="checkbox"/> Registered Mail™ | <input type="checkbox"/> Certified Mail® | <input type="checkbox"/> Registered Mail Restricted Delivery | <input type="checkbox"/> Certified Mail Restricted Delivery | <input type="checkbox"/> Signature Confirmation™ | <input type="checkbox"/> Collect on Delivery | <input type="checkbox"/> Signature Confirmation Restricted Delivery | <input type="checkbox"/> Collect on Delivery Restricted Delivery |  |
| <input type="checkbox"/> Adult Signature                                                                                                                                                                                                                             | <input type="checkbox"/> Priority Mail Express®                     |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |  |                                          |                                                 |                                                              |                                           |                                          |                                                              |                                                             |                                                  |                                              |                                                                     |                                                                  |  |
| <input type="checkbox"/> Adult Signature Restricted Delivery                                                                                                                                                                                                         | <input type="checkbox"/> Registered Mail™                           |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |  |                                          |                                                 |                                                              |                                           |                                          |                                                              |                                                             |                                                  |                                              |                                                                     |                                                                  |  |
| <input type="checkbox"/> Certified Mail®                                                                                                                                                                                                                             | <input type="checkbox"/> Registered Mail Restricted Delivery        |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |  |                                          |                                                 |                                                              |                                           |                                          |                                                              |                                                             |                                                  |                                              |                                                                     |                                                                  |  |
| <input type="checkbox"/> Certified Mail Restricted Delivery                                                                                                                                                                                                          | <input type="checkbox"/> Signature Confirmation™                    |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |  |                                          |                                                 |                                                              |                                           |                                          |                                                              |                                                             |                                                  |                                              |                                                                     |                                                                  |  |
| <input type="checkbox"/> Collect on Delivery                                                                                                                                                                                                                         | <input type="checkbox"/> Signature Confirmation Restricted Delivery |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |  |                                          |                                                 |                                                              |                                           |                                          |                                                              |                                                             |                                                  |                                              |                                                                     |                                                                  |  |
| <input type="checkbox"/> Collect on Delivery Restricted Delivery                                                                                                                                                                                                     |                                                                     |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |  |                                          |                                                 |                                                              |                                           |                                          |                                                              |                                                             |                                                  |                                              |                                                                     |                                                                  |  |
| 2. Article Number (Transfer from service label)<br><i>9589 0710 5270 1247 9633 46</i>                                                                                                                                                                                |                                                                     |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |  |                                          |                                                 |                                                              |                                           |                                          |                                                              |                                                             |                                                  |                                              |                                                                     |                                                                  |  |
| PS Form 3811, July 2020 PSN 7530-02-000-9059                                                                                                                                                                                                                         |                                                                     | Domestic Return Receipt                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |  |                                          |                                                 |                                                              |                                           |                                          |                                                              |                                                             |                                                  |                                              |                                                                     |                                                                  |  |

R076

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF UNION )  
 )  
Michael J. Osten and )  
Shawntell L. Osten, )  
 )  
Plaintiffs, )  
 )  
vs. )  
 )  
Sandra Malikowski, )  
 )  
Defendant. )

IN THE COURT OF COMMON PLEAS

C.A. No. 2024-CP-44-00097

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CERTIFICATE OF SERVICE

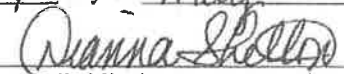
PERSONALLY APPEARED BEFORE ME, Kirby Brown, who being duly sworn, deposes and says that she is employed in the law office of Anderson & Moore, LLC, 240 Magnolia Street, Spartanburg, South Carolina 29306, and is a person of such age and discretion as to be competent to serve papers.

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Sandra Malikowski  
202 Gilbert St.  
Union, SC 29379

  
Kirby Brown

SWORN to and subscribed before me this  
14<sup>th</sup> day of May, 2024

  
Notary Public for South Carolina  
My Commission Expires: 12/08/30

STATE OF SOUTH CAROLINA )  
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IN THE COURT OF COMMON PLEAS

C.A. No. 2024-CP-44-00097

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Anderson & Moore, LLC

St. Patrick Anderson  
240 Magnolia Street  
Spartanburg, South Carolina 29306  
Telephone: (864) 641-6431  
Facsimile: (864) 641-6435

May 14, 2024

R078

2

**KENNETH C. ANTHONY  
LAW FIRM, P.A.**

July 29, 2024

Via email to [patrick@upstatelawsc.com](mailto:patrick@upstatelawsc.com)

J. Patrick Anderson  
ANDERSON & MOORE, LLC  
240 Magnolia Street  
Spartanburg, SC 29306

Sandra Malikowski  
202 Gibert St.  
Union, SC 29379

250 Magnolia Street  
Spartanburg, SC 29306  
P.O. Box 3565  
Spartanburg, SC 29304  
t 864 562 2355  
f 864 583 9773  
[www.anthonylaw.com](http://www.anthonylaw.com)

**Re: Michael Osten v. Sandra Malikowski, Case No. 2024CP440097  
Case No. 2021CP4202106**

Dear Patrick and Ms. Malikowski:

Thank you for allowing me to serve as mediator in your case. I look forward to working with you.

This will confirm that we have scheduled this mediation for August 28, 2024, beginning at 9:00 a.m. at my office located at 250 Magnolia St., Spartanburg, SC 29306. Please note that my office is located on the second floor and has no elevator access. Please let us know as soon as possible if we need to arrange for a downstairs conference room. You are welcome to attend this mediation by Zoom if you wish. If so, please let us know the day before and provide email addresses for the Zoom attendees.

Fees will be charged at the rate of Four Hundred and no/100 (\$400.00) per hour. If you desire that I review any materials prior to the mediation, please forward those to me. You may send the other side a copy or not, as you prefer. I will not share anything you send unless instructed I may do so. I would plan to spend no more than an additional hour reviewing such documents if sent.

I am enclosing a mediation agreement entitled "Our Understanding About Mediation." I will ask that you and your client sign this before the mediation.

Thank you again for allowing me to work with you.

Very truly yours,

  
Kenneth C. Anthony, Jr.

KCA/r:cmh  
Enclosure

R079

|                                          |   |                                  |
|------------------------------------------|---|----------------------------------|
| STATE OF SOUTH CAROLINA                  | ) | IN THE COURT OF COMMON PLEAS     |
|                                          | ) | THE SIXTEENTH JUDICIAL CIRCUIT   |
| COUNTY OF UNION                          | ) | CIVIL ACTION NO. 2024-CP-44-0097 |
| MICHAEL J. OSTEN and SHAWNTELL L. OSTEN, | ) |                                  |
| Plaintiffs,                              | ) |                                  |
|                                          | ) | MOTION TO ALTER OR AMEND         |
| v.                                       | ) |                                  |
|                                          | ) |                                  |
| SANDRA MALIKOWSKI,                       | ) |                                  |
|                                          | ) |                                  |
| <u>Defendant.</u>                        | ) |                                  |

YOU WILL PLEASE TAKE NOTICE that Defendant Sandra Malikowski, by and through the undersigned counsel, shall move at such time and date as the Court shall hereafter appoint for an order altering or amending the Court's order denying Defendant's motion to vacate or set aside the default and default judgment in the above captioned matter dated September 19, 2025 (the "Order"), which was received by Defendant on September 19, 2025. The motion is based on Rules 52, 59 and 60, South Carolina Rules of Civil Procedure ("SCRPC").

In addition to the arguments set forth in Defendants Memorandum in Support of Motion to Vacate or Set Aside Default and Default Judgment filed on September 14, 2025, which is incorporated herein by reference, Defendant respectfully contends that the Order was in error in the following particulars:

1. The Court misapprehended or overlooked that Defendant's motion was comprised of two requests for relief: a) vacating and setting aside the default judgment; and b) setting aside the entry of default. Defendant asserted that the default judgment is without the authority of law for various reasons including, but not limited to, the following: i) the judgment was violative of Rule 54(c), SCRPC, in that it went beyond the demand in the complaint; ii) it was based on an unlawful measure of damages; iii) it was based on evidence offered at the damages hearing that contradicted and went beyond the facts alleged in the complaint, but nonetheless such evidence does not support the award; iv) it includes damages that are not lawfully recoverable in any of the causes of action plead in the

complaint such attorney's fees, a mortgage on plaintiffs new home and moving costs; v) the judgment is so out of proportion to the wrongdoing alleged that, as a matter of law, the Court should not allow it to stand as directed by the Supreme Court in the case of Renney v. Dobbs House, Inc., 275 S.C. 562, 274 S.E.2d 290 (1981); vii) it is without the force of law because the complaint failed to state a cause of action; and vii) the judgment is void because the Defendant did not receive notice of the damages hearing, a fact clear from the record. The judgment is void for any one of the foregoing reasons, and when combined, the injustice represented by the judgment is manifest. The Court overlooked that the judgment itself is irreconcilably flawed and must be set aside even if the Court is not inclined to set aside the entry of default. In that event, Defendant could defend at the damages hearing at least as to the amount of damages and proximate cause. Green v. Johnson, Supreme Court Opinion No. 28296, filed August 13, 2025, 2025 WL 2327393 (2025). The Court should reconsider the Order and amend it to at least vacate the default judgment.

2. The Court erred in failing to find that Defendant did not receive notice of the damages hearing, and therefore the default judgment is void. Dymon, Inc. v. Hyman, 305 S.C. 170, 406 S.E.2d 388 (Ct. App. 1991); Stark Truss Co. v. Superior Constr. Corp., 360 S.C. 503, 602 S.E.2d 99 (Ct. App. 2004) (finding a default judgment was void when the defendants did not receive notice of the hearing addressing the default judgment). The record before the Court is devoid of any evidence that Defendant received notice of the damages hearing. The only positive evidence in the record is Defendant's denial of receiving any such notice. It cannot be questioned and plaintiffs' counsel admits that the certificate of mailing filed in this matter shows that plaintiffs mailed notice of the damages hearing to an address that is not Defendant's and which generally does not exist. This error with respect to Defendant's address permeates the entire record, so much so that judgment itself was amended to correct the error in its recitation of where the notice was sent<sup>1</sup>. Rule 55(b)(2), SCRCP, explicitly provides, "[p]ursuant to Rule 5(a), notice of any trial or hearing on unliquidated

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<sup>1</sup> It is not clear how this amendment came to be because no motion was filed and the amended judgment provides not indication; however, it is important to note that the amendment was specifically to correct the address where the order recites the notice of the hearing was mailed, which is contrary to plaintiffs certificate of mailing. Defendant asserts that this is evidence that plaintiffs understood that they had notice problem.

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.” “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. “ 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 defendants was insufficient notice to sustain default judgment). The only thing offered by plaintiffs’ counsel was an argument that Defendant must have gotten a similarly addressed notice sent previously in the case because she appeared at the hearing. However, counsel’s statement is not evidence. e.g., Landry v. Landry, 430 S.C. 153, 843 S.E.2d 491 (2020). Besides, whether Defendant got notice of an earlier hearing is not the question. Instead, the threshold question is whether Defendant got notice of the damages hearing. There is no such evidence. What evidence there is shows that plaintiffs failed to comply with Rules 55(b)(2) and 5(a), SCRCP, by failing to mail notice to “the last known address” of Defendant. That, coupled with Defendant’s affidavit in which she states that she did not receive any such notice, demands only one conclusion: that Defendant did not receive the required notice. As a result, the default judgment is “void and should be set aside”. Dymon, *supra*. The Court should reconsider its Order and amend it to set the default judgment aside.

3. The Court erred in failing to “closely scrutinize” the default judgment in this case “to prevent, harsh, unwarranted results”. Renny, *supra*. This requirement was most recently affirmed and extended by Green, *supra*. The Supreme Court over the past 45 years has repeatedly admonished trial courts to scrutinize default judgments entered where the defendant is not present for the damages hearing so as “to avoid the inflation of damage awards”. Id. This includes a review of the evidence offered at the damages hearing. See, e.g., Green, *supra*. The transcript of the damages hearing filed and provided to the Court clearly shows that the judgment is not supported by the evidence offered. The record made at the damages hearing is bereft of evidence supporting the award of damages, certainly in the amount awarded. That record should not support any judgment, much less a \$280,000

judgment for barking dogs. In a default case, the plaintiff must prove by “**competent evidence**” the amount of his damages, and such proof must be by a **preponderance of the evidence**.” (emphasis added). Palmetto Construction Group, LLC v. Restoration Specialist, LLC, 444 S.C. 328, 907 S.E.2d 129 (Ct. App. 2024). The award of damages in a default judgment must, therefore, 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. *Id.* Where the evidence offered at a damages hearing does not support the award of damages, the judgment should be vacated. See, Lewis v. Congress of Racial Equality and/or C.O.R.E., 275 S.C. 556, 274 S.E.2d 287 (1981). The evidence offered at the damages hearing in this case does not support the amount of the default judgment. The Court should reconsider the Order and amend it to vacate the default judgment.

4. The Court erred in failing to make a judicial determination of the amount of damages based on the proof. The Supreme Court in both Lewis, *supra*, and Renney, *supra*, and as reaffirmed in Green, *supra*, held that in deciding a motion to vacate a default judgment, “whether the defendant is or is not in default, it is incumbent upon the judge... to make a judicial determination of the amount of damages based on the proof, and such proof must be by a preponderance of evidence.” Lewis, *supra*. Here, the proof offered at the damages hearing does not support the judgment awarded. An examination of the record made at the damages hearing reveals this clearly. What evidence does appear in the record of the damages hearing shows that the judgment is so out of proportion with the wrongs alleged as to require the judgment be set aside as shocking the judicial conscious. Lewis, *supra*; Renney, *supra*. Accordingly, the Court should reconsider the Order and amend it to vacate the default judgment.

5. The Court misapprehended or overlooked that the default judgment is violative of Rule 54(c), SCRCP, in that it goes beyond the facts alleged in the complaint and beyond the scope of relief demanded in it. The complaint alleges various problems with Defendant’s dogs and asserts damages in the form of diminution in value of the plaintiff’s home; however, because the only evidence offered as to any diminution of value was from

Linda Gault, a realtor, who testified about a reduction of \$62,500<sup>2</sup>, the default judgment of \$280,862.58 necessarily has within it items of damages beyond a mere diminution of value. In fact, on page 9 of the transcript of the damages hearing, plaintiffs' counsel states that he filed a summary of damages<sup>3</sup> which additionally includes: a) a mortgage on plaintiffs' new home; b) attorney's fees; and c) moving costs. The transcript further reflects that plaintiffs' asserted that they were entitled to these additional damages because of an allegation that they were forced to sell their home in Union and purchase a smaller, more expensive home in Spartanburg as result of Defendant's dogs. Neither the additional elements of damages, nor the allegations about being forced to sell their home are set forth in the complaint. Therefore, the default judgment awarding these additional damages based on the allegations not stated in the complaint is void. Rule 54(c), SCRCP; 10 Wright, Miller & Kane, *Federal Practice and Procedure* § 2663; see also, 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 error and any judgment rendered should be vacated). Consequently, the Court should reconsider the Order and amend it to vacate the default judgment.

6. The Court misapprehended or overlooked that the default judgment which Defendant seeks to vacate is based on evidence offered at the damages hearing that was in variance to the allegations of the complaint. The complaint alleges that plaintiffs owned their home and alleged damages arising from problems with Defendant's dogs amounting to the diminution of value to this property. However, again, at the damages hearing, plaintiffs testified that they were forced to sell their home and further forced to purchase a smaller, more expensive home in Spartanburg. They went on to ask the Court for judgment including additional elements of damages relating to these new allegations. Parties are judicially concluded and 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

<sup>2</sup> A review of the transcript will reveal that Ms. Gault testified that this amount resulted not from Defendant's dogs but "because there was some work that need to be done". (Transcript, p. 11)

<sup>3</sup> Counsel has not seen where this summary of damages was actually filed.

S.C. 196, 202, 775 S.E.2d 697, 700 (2015). Again, where a defendant does not participate in the damages hearing, amendments to conform to the evidence are impermissible. See, White, supra; see also, c.f., Mauro v. Clabaugh, 299 S.C. 184, 383 S.E.2d 244 (Ct. App. 1989). Accordingly, the default judgment based on evidence in variance of the complaint is void and should be vacated. The Court should reconsider the Order and amend it to vacate the judgment.

7. The Court misapprehended or overlooked that the default judgment is void as containing elements of damage that are not recoverable under the causes of action stated in the complaint. Under the “American Rule, the parties to a lawsuit generally bear the responsibility of paying their own attorneys fees. Layman v. State, 376 S.C. 434, 658 S.E.2d 320 (2008). Generally, attorneys’ fees and costs are not recoverable unless authorized by contract or statute. Maybank v. BB&T Corporation, 416 S.C.541, 787 S.E.2d 498 (2016). Here no contract is alleged and no statute providing for an award of attorney’s fees is alleged or applies to plaintiffs’ causes of action for nuisance, trespass and negligence. In any case, a request for an award of attorney’s fees was not stated in the complaint. Nevertheless, as mentioned above, the default judgment entered in this case includes an award of attorneys fees. The default judgment, therefore, is void as without the authorization of law and is otherwise violative of Rule 54(c), SCRCP. The Court should reconsider the Order and amend it to vacate the judgment.

8. The Court misapprehended or overlooked that the “summary of damages” referred to by plaintiffs’ counsel at the damages hearing was not admitted into evidence or otherwise made a part of the record. Moreover, no foundation for this summary of damages was laid by any witness at the hearing. There is, in fact, no evidence offered at the damages hearing as to any specific numbers relating to any element of damages. Instead, plaintiffs’ counsel referred to the document several times on the record as being his summary of damages. Statements or arguments of counsel are not evidence. e.g., Landry v. Landry, 430 S.C. 153, 843 S.E.2d 491 (2020). A memorandum of counsel in support of a request for relief is not evidence upon which a judgment may be based. Brown v. Odom, 425 S.C. 420, 823 S.E.2d 183 (2019). Neither the testimony taken at the hearing nor the allegations of the

complaint provide any basis to discern the amounts allocated to the specific elements of damages upon which the amount of the default judgment is possible based on the record. It, therefore, cannot be supported by the record in this case. Again, because plaintiffs' must prove their damages with competent proof and because the record made at the damages hearing contains no such proof supporting the amount of the award, the default judgment is void. Palmetto Construction Group, supra; Lewis, supra. The Court should reconsider the Order and amend it so as to vacate the judgment.

9. The Court misapprehended or overlooked that if the complaint were capable of being amended at the damages hearing so as to embrace the testimony adduced relating to plaintiffs' sale of their home in Union and the assertion that they were forced to do so at a reduced price and further forced to purchase a smaller, more expensive home in Spartanburg, the same would not constitute an action upon which relief could be granted. While the problems alleged with Defendant's dogs may have provided plaintiffs with a reason why they would want to sell their home, it would not, in fact, be any proximate cause for any such sale. Ms. Gault, the realtor plaintiffs called to testify at the damages hearing, stated that there was "work that needed to be done" and it was for that reason that the property was listed for \$250,000. She also stated that if the work were done, they could have listed it for \$300,000 or \$325,000. Plaintiffs, however, chose to forego doing this work and sell list it instead for \$250,000. Defendants dogs can no more be held to be the proximate cause of that decision any more than the dogs can be blamed for plaintiffs decision to buy a smaller, more expensive home, much less their financing choices in doing so. The truth is plaintiffs made their own, independent decisions about these matters, and waived any nuisance claim by divesting themselves of title. 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). In any event, plaintiffs' inability to show causation for the alleged damages is further reason exemplifying the justness of the rule stating that default judgments going beyond the confines of the complaint and its prayer for relief are void where

the defendant does not participate in the damages hearing. The Court should reconsider the Order and amend it to vacate the default judgment.

10. The Court misapprehended or overlooked the default judgment is explicitly based on the incorrect measure of damages for the wrongs alleged. Any asserted nuisance or trespass which is abatable by the defendant or the court is temporary for which the measure of damages is "limited to lost rental value." Babb v. Lee County Landfill SC, LLC, 405 S.C. 129, 747 S.E.2d 468 (2013); see also, Conestee Mills v. City of Greenville, 160 S.C. 10, 158 S.E. 113 (1931). The transcript of the damages hearing reflects that plaintiffs sought and received at least some portion of the award in the form of diminution in value of the property. This is also the measure of damages plead in the complaint. However, the nuisance and trespass alleged are temporary and expressly so. The complaint prays for injunctive relief. Plaintiffs' counsel stated on the record that plaintiffs' initial thoughts in bringing the suit was to have the court order the dogs removed, which is something that the Court could have done. What is more, Defendant could have abated the alleged nuisance or trespass. She could, at any time, have disposed of the dogs, enclosed her entire yard to prevent any dog from leaving her property, placed bark-collars on the dogs or have them undergo a "de-barking" procedure. The nuisance and trespass alleged is, therefore, a temporary one, and plaintiffs are not entitled to a judgment based on a diminution in value, but only lost rental value. There was no evidence concerning rental value offered at the damages hearing. Instead, only evidence attempting to show diminution in value. Again, plaintiffs' counsel states on the record, as shown in the transcript, that diminution in value is the measure of damages sought. Therefore, the judgment necessarily is based, at least in some part, on the wrong measure of damages and, consequently, is without the authority of law. The Court should reconsider the Order and amend it to vacate the judgment.

11. The Court misapprehended or overlooked that the complaint failed to state a cause of action for negligence, and thus any award of damages for negligence is void as being without the authority of law. Without a duty owed by the defendant to the plaintiff, 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 defendant 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 Plaintiffs on the part of Defendant. 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 v. Richland Memorial Hosp., 283 S.C. 372, 322 S.E.2d 669 (1984). As a result, the complaint fails to state a cause of action for negligence and any award based on this claim is void. . 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). The Court should, therefore, reconsider the Order and amend it to vacate the judgment.

12. The Court misapprehended or overlooked that the complaint failed to state a claim for trespass and thus any award of damages for trespass is void as being without the authority of law. Because, as stated above, any trespass alleged and certainly any said to have been proved by plaintiffs at the damages hearing are temporary in nature, trespass damages in this case can only properly be either loss of rental value or nominal damages. Babb, *supra*. Plaintiffs' complaint makes no reference to either measure of damages. Moreover, 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 Plaintiffs trespass claim seeks damages for the alleged barking, it fails and any judgment based thereon is void and must be vacated. *McKenzie, supra*. The Court should reconsider its Order and amend it so as to set the judgment aside.

13. The Court misapprehended or overlooked that the damages asserted by plaintiffs at the damages hearing cannot be assessed on the proof offered because they are not the direct and natural cause of the alleged barking of Defendant's dogs. Plaintiff's chose to sell their home. They chose to forego doing the work Ms. Gault described as necessary. They chose to accept an offer \$62,500 less than the listing price rather than rejecting it in favor of other potential offers. Plaintiffs chose to purchase a smaller, more expensive home in Spartanburg and chose to finance a portion of, again, their choosing. Defendant's dogs cannot be said to be the "but for" cause of any of these choices. Moreover, even if they could, plaintiffs are not entitled to receive an award for these various elements of damages. The *Babb* court clearly states they are only entitled to loss of rental value. Where the default judgment awards any of these damages, as it most apparently does, it is void as without authority of law and should be set aside.

14. The Court erred in failing to liberally construe the rules of procedure regarding granting relief from default and default judgments so as to promote justice between the parties and dispose of the case on its merits. The Court is instructed to do so because it is the policy of this State to resolve cases on their merits and not on technicalities. *Dixon v. Besco Engineering, Inc.*, 320 S.C. 174, 463 S.E.2d 636 (Ct. App. 1995); *Renney, supra*. This case involves a calamity of irregularities from lack of notice to Defendant of the damages hearing to the evidence offered and relief sought being beyond that set out in the complaint and for which the law does not allow to the lack of any record sufficient to definitively discern just how and on what basis the damages were calculated. All of this in the face of the defense shown by Defendant as represented in not only her affidavit but those of her neighbors, including the individual purchasing plaintiffs' home, and that of the animal control officer responding to plaintiffs complaints, showing the dogs do not bark incessantly,

are not a problem, and did not factor in any way to the amount plaintiffs received for the sale of their home. In these circumstances, particularly where plaintiffs are actively trying to sell Defendant and her children's home in collection of this flawed judgment, the Court should exercise the appropriate scrutiny and liberally construe the rules of procedure to allow for this case to be properly resolved on the merits, or at the very least, vacate the judgment so that Defendant may participate in a damages hearing so that the award is one which law actually allows.

This motion shall be further based on all other applicable case and statutory law, together with any further memoranda or other information as may be submitted prior to the hearing on the matter.

Respectfully submitted,

**POPE PARKER JENKINS, P.A.**

/s/Kyle B. Parker

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Newberry, South Carolina  
September 29, 2025

|                                          |   |                                  |
|------------------------------------------|---|----------------------------------|
| STATE OF SOUTH CAROLINA                  | ) | IN THE COURT OF COMMON PLEAS     |
|                                          | ) | THE SIXTEENTH JUDICIAL CIRCUIT   |
| COUNTY OF UNION                          | ) | CIVIL ACTION NO. 2024-CP-44-0097 |
|                                          |   |                                  |
| MICHAEL J. OSTEN and SHAWNTELL L. OSTEN, | ) |                                  |
| Plaintiffs,                              | ) |                                  |
|                                          | ) |                                  |
| v.                                       | ) | MOTION TO ALTER OR AMEND         |
|                                          | ) |                                  |
| SANDRA MALIKOWSKI,                       | ) |                                  |
|                                          | ) |                                  |
| Defendant.                               | ) |                                  |

YOU WILL PLEASE TAKE NOTICE that Defendant Sandra Malikowski, by and through the undersigned counsel, shall move at such time and date as the Court shall hereafter appoint for an order altering or amending the Court's order denying Defendant's motion to vacate or set aside the default and default judgment in the above captioned matter dated October 1, 2025 (the "Order"), which was received by Defendant on October 1, 2025. The motion is based on Rules 52, 59 and 60, South Carolina Rules of Civil Procedure ("SCRCP").

In addition to the arguments set forth in Defendants Memorandum in Support of Motion to Vacate or Set Aside Default and Default Judgment filed on September 14, 2025, and Defendants Motion to Alter or Amend filed on September 29, 2025, both of which are incorporated herein by reference, Defendant respectfully contends that the Order was in error in the following particulars:

1. The Court erred in finding that Plaintiff submitted a "Plaintiff's Packet in Support of Preliminary Injunction" at any point in the proceeding, the error being that no such "packet" was ever made a part of the record before the Court. The "packet" was never filed, nor was it submitted and accepted as an exhibit of any kind at any time.

2. The Court erred in finding that the "packet" was submitted at the damages hearing on February 24, 2025, the error being that the transcript of that hearing was made a part of the record before this Court by its filing on September 14, 2025, and the transcript does not reflect that any "packet" was entered into the record made at that hearing.

3. The Court erred in concluding that relief under Rule 60(b)(1), SCRCP, “is only allowed upon the narrowly and particularly defined grounds laid out in [the rule]”, the error being that our State’s appellate court decisions explicitly instruct this Court to construe Rule 60 in an opposite fashion. The Court is not to construe the rule narrowly but rather, the Court is to “liberally” construe the rules of procedure to promote justice and dispose of cases on the merits. e.g., Dixon v. Besco Engineering, Inc., 320 S.C. 174, 463 S.E.2d 636 (Ct. App. 1995).

4. The Court erred in concluding that Defendant failed to show a meritorious defense generally and specifically that the affidavits submitted by Defendant in support of her motion constitute generalized or conclusory statements. Plaintiffs’ entire request for damages is based on their allegations that Defendant’s dogs bark incessantly and are otherwise a menace. While Defendant, of course, denies this allegation, Defendant further submitted the affidavits of her neighbors and that of the responsible animal control officer responding to Plaintiffs complaints about the dogs. The neighbors’ testimony refutes Plaintiffs’ allegations about the dogs altogether. In fact, Defendant submitted the affidavit of Megan Jarrett, the neighbor who purchased Plaintiffs’ home. Mrs. Jarrett states that she is literally in the same position as Plaintiffs were relative to Defendant’s dogs and she has never heard the dogs bark incessantly. For his part, Travis Smith, the animal control officer, states that he spent hours upon hours at Defendant’s home responding to Plaintiffs voluminous complaints and “never actually heard any of her dogs bark as Mr. Osten claimed”. (Affidavit of Travis Smith, paragraph 9). These are not “generalized” or “conclusory” statements. These are direct refutation of Plaintiffs’ allegations. Were a jury to hear this testimony, they would have sufficient evidence to find that the dogs did not bark incessantly, and in the absence of a finding that they did, Plaintiffs case fails altogether. As a result, Defendant clearly presented a meritorious defense on the facts of the case.

5. The Court erred in failing to conclude that Defendant demonstrated a meritorious defense as to the amount of damages and proximate cause. While it is the incorrect measure of damages, Plaintiffs’ complaint alleges a diminution in value to their former property on account of Defendant’s dogs. In her aforementioned affidavit, Megan

Jarrett testified that she did not consider the dogs at all when negotiating the purchase price of Plaintiffs' former home. She indicates that the condition of the home was the only factor in the negotiations. That testimony is further substantiated by that received by the Court at the damages hearing from Plaintiffs' realtor, who stated that the home was listed a reduced price "because there was some work that needed to be done". (Transcript of Damages Hearing, pp. 10-11). A party in default can satisfy the meritorious defense requirement under Rule 55(c) and Rule 60(b)(1) by showing he has a meritorious defense as to the amount of damages or proximate cause. Green v. Johnson, 446 S.C. 326 (2025). Therefore, the Court erred in failing to conclude Defendant demonstrated a meritorious defense at least as to the amount of damages and the proximate cause of them.

6. The Court erred in considering the "packet" in reaching any conclusion in the Order. The "packet" is not evidence, it was not entered into the record at any point, and cannot, therefore, form the basis of any finding or conclusion. The "packet" simply is not evidence upon which a judgment or order of this Court may be based. McClurg v. Deaton, 395 S.C. 85, 716 S.E.2d 887 (2011) (holding a memorandum in support of a motion is not evidence); Brown v. Odom, 425 S.C. 420, 823 S.E.2d 183 (Ct. App. 2019) (holding facts stated in a memorandum in support of a motion is not evidence upon which a court may base its decision).

7. The Court erred in making findings of fact in the Order for which there is nothing in the record to support apart from statements of counsel. In the Order, the Court finds as a matter of fact that Defendant retained counsel for purposes of a hearing on Plaintiffs' motion for preliminary injunction. Again, there is nothing in the record to support this finding. While Plaintiffs' counsel referenced the notion of Defendant hiring counsel at some point during argument of the motion to set aside default judgment, Plaintiffs offered no evidence for this assertion. The Court further clearly considered statements of counsel regarding certain facts made during the argument for which there was no evidentiary support such as counsel's assertion that there was never any mail sent to Defendant returned by the United States Postal Service. 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”).

8. The Court erred in failing to find that the record clearly reflects that Defendant was never served with a copy of the here concerned default judgment and only received notice of it when being served with Plaintiffs second action seeking to foreclose on Defendant’s home in collection of the judgment. Any significance, therefore, which the Court places on the time between when the judgment was entered and the motion to set it aside was filed misapprehends this simple fact.

9. The Court erred in finding that Defendant received notice of the damages hearing, the error being that there is no evidence to support the finding. The Court erroneously concludes that Defendant received notice of the damages hearing despite the fact that Plaintiffs admit that the notice was incorrectly addressed and Defendant denies receiving the notice. The only facts referenced by the Court to support the finding arises from evidence improperly before the Court and entirely irrelevant to the question. The Order references a return receipt attached as an exhibit to Plaintiffs memorandum in opposition, which Plaintiffs’ counsel asserts was signed by Defendant and relates to his noticing of a hearing on a motion for preliminary injunction. Again, neither the memorandum nor the statements of fact made by counsel are not evidence. Brown, supra; Ex parte Morris, supra. Plaintiffs had every opportunity to properly enter these things in the record by way of affidavit or otherwise. They failed to do so. The Court cannot, therefore, base its finding that Defendant received an entirely different and crucial notice on these matters.

10. The Court erred in concluding the record supports a finding that Defendant received notice of the damages hearing even if reliance on statements of counsel and Plaintiffs’ memorandum were permissible, the error being that the question is not whether Defendant got notice of the preliminary injunction hearing; rather, the question is whether she got notice of the damages hearing. There is nothing in the record to suggest that she did. In fact, the only evidence in the record specifically indicates that she did not. The Court

cannot and should not assume a fact as fundamental to the validity of the underlying default judgment. It is impermissible for the Court to extrapolate as a determinative matter of fact that because the Postal Service delivered one incorrectly addressed notice, it just must have done so with another incorrectly addressed notice. The fact is that the record is clear and to their credit, Plaintiffs admit to improperly addressing the notice of the damages hearing in violation of Rule 5, SCRCP. For her part, defendant denies receiving any such notice in the mail. The Court's findings regarding notice are only properly based on these facts.

For the foregoing reasons, together with those set out in Defendants Memorandum in Support of Motion to Vacate or Set Aside Default and Default Judgment filed on September 14, 2025, and Defendants Motion to Alter or Amend filed on September 29, 2025, the Court should reconsider and amend the Order so as to exercise the appropriate scrutiny and liberally construe the rules of procedure to allow for this case to be properly resolved on the merits, or at the very least, vacate the judgment so that Defendant may participate in a damages hearing so that the award is one which law actually allows.

This motion shall be further based on all other applicable case and statutory law, together with any further memoranda or other information as may be submitted prior to the hearing on the matter.

Respectfully submitted,  
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Newberry, South Carolina  
October 10, 2025

STATE OF SOUTH CAROLINA  
COUNTY OF UNION

SOUTH CAROLINA CIRCUIT COURT 16  
DOCKET NO. 2024-CP-44-00097

---

MICHAEL J. OSTEN,  
Plaintiff,

v.

SANDRA MALIKOWSKI,  
Defendant.

---

H E A R I N G  
BEFORE THE HONORABLE CHARLES J. MCCUTCHEN

DATE: February 24, 2025  
TIME: 29:10  
LOCATION: SOUTH CAROLINA CIRCUIT COURT 16

TRANSCRIBED BY: LYNETTE L. CHASE

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1 APPEARANCES:

2

3 FOR THE PLAINTIFF:

4 JOSEPH PATRICK ANDERSON, ESQUIRE

5 ANDERSON & MOORE, LLC

6 240 MAGNOLIA STREET

7 SPARTANBURG, SC 29306

8

9 ALSO PRESENT:

10 LAURA GAULT - REALTOR

11 MICHAEL J. OSTEN

12 SHAWNTELL OSTEN

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NO EXHIBITS

(THIS TRANSCRIPT MAY CONTAIN QUOTED MATERIAL. SUCH MATERIAL  
IS REPRODUCED AS READ OR QUITED BY THE SPEAKER.)

1 THE COURT: Sorry about that. All right. Let's  
2 see. Osten versus Malikowski.

3 MR. ANDERSON: Good morning, Your Honor.

4 THE COURT: Good morning.

5 MR. ANDERSON: Patrick Anderson here for  
6 plaintiffs.

7 THE COURT: All right. And is Ms. Malikowski  
8 here?

9 MR. ANDERSON: I do not believe she is, Your  
10 Honor. She is of course pro se and has not participated  
11 thus far with the exception of our motion for preliminary  
12 injunction back in May I believe it was.

13 THE COURT: Okay. Well, I guess just as a  
14 housekeeping matter, Mr. Anderson --

15 MR. ANDERSON: Yes.

16 THE COURT: -- in looking at the file -- I mean,  
17 is this the same thing kind of as the last one where you  
18 want the entry and the judgment, or do you want to go  
19 forward with the damages hearing today based on the fact  
20 that you may have already given her notice that today's  
21 going to be a damages hearing, or --

22 MR. ANDERSON: Yes, sir. We were prepared to  
23 move forward and having handled a number of these over the  
24 years, and I know different courts handle these differently,  
25 I wasn't certain if you wanted to hear strictly from me if

1 we do the damages portion or if you wanted to hear from my  
2 clients and the Realtor Ms. Gault. But we would certainly  
3 love to handle everything today if the Court is willing to  
4 allow us to do that.

5 THE COURT: Okay. Well, I was -- and obviously  
6 the main thing is just making sure that the defendant had  
7 notice of what was going on.

8 MR. ANDERSON: Yes, sir.

9 THE COURT: I know even though there's probably  
10 been -- or I didn't see an entry, but I can go back and  
11 look. You know, she probably is in default, but she can  
12 still be heard on damages and, you know, given proper notice  
13 and all that stuff.

14 MR. ANDERSON: Yes, sir.

15 THE COURT: But, yeah, I mean, I guess let's just  
16 go ahead and hear it --

17 MR. ANDERSON: Sure.

18 THE COURT: -- you know, since everybody's here  
19 that wants to be here.

20 MR. ANDERSON: Yes, sir. Absolutely.

21 THE COURT: All right.

22 MR. ANDERSON: Well, may it please the Court,  
23 Your Honor. Again, Patrick Anderson here for the  
24 plaintiffs.

25 Your Honor, I e-mailed your admin and your law

1 clerk a couple of things last week. And I'm going to try to  
2 be as concise as I can because there's a decent amount of  
3 facts and paperwork to go along with those facts. But last  
4 Wednesday I e-mailed a buyer's closing package as well as a  
5 seller's closing package as well as an invoice for a moving  
6 company, again, to your admin and your law clerk.

7           And then, Your Honor, long story short. We had  
8 an office fire so we are out of our office temporarily. We  
9 had some server issues. I meant to get everything to you by  
10 Wednesday, but I e-mailed you essentially a summary of  
11 damages on Friday as well as a plaintiff's packet for our  
12 motion for preliminary injunction back in May. I wasn't  
13 certain if the Court had access to that which we actually  
14 filed and handed up to the Court at the hearing back in May,  
15 but that's a fairly substantive document of 46 pages long.

16           THE COURT: Yeah. I've got it.

17           MR. ANDERSON: Okay. Thank you, Judge.

18           We filed this action, Your Honor, let me see,  
19 back on March 6th of 2024 and amongst other causes of action  
20 we pled nuisance, negligence, and trespass. Your Honor, the  
21 defendant was personally served with those pleadings, the  
22 summons and complaint, April 29th of 2024 at 8:37 p.m. at  
23 her residence. To date, no one has appeared on her behalf  
24 nor has the defendant filed anything as far as responsive  
25 pleadings.

1           As I referenced earlier, Judge, we did have a  
2 motion for preliminary injunction on May 6th of 2024. That  
3 was in the Union County Courthouse. That motion was  
4 ultimately denied, but the defendant did show up at that  
5 point and she did have an attorney, an associate from the  
6 King Law Firm, who made it very clear on the record, and  
7 subsequent to the hearing during my conversations with that  
8 attorney, that they were there strictly for purposes of the  
9 preliminary injunction. So they were never retained on the  
10 underlying action. And of course, again, we have never  
11 received anything as far as notice of appearance from anyone  
12 or responsive pleadings.

13           Your Honor, we filed for purposes of today a  
14 motion for default judgment and damages on January 6th of  
15 this year 2025. Along with that we filed an affidavit of  
16 default dated also January 6, 2025. I can get into as much  
17 detail as the Court wants or maybe doesn't want as far as  
18 the history of the case or what this case is about, but  
19 suffice it to say that my clients have lived at this home in  
20 Union for a number of years. The house was paid off.  
21 Everything was wonderful. The neighbor moves in and at any  
22 given point she had 14 dogs, sometimes 20. Multiple dog  
23 fights. We were to believe one of those resulted in several  
24 dogs being killed. Aggressive dogs on their property on  
25 their front stoop, on their front porch.

1           They went through every part of the process one  
2   could go through meaning calling the City because this was  
3   in the City of Union. Calling the County. Getting animal  
4   control out there. I believe ultimately four citations were  
5   issued by the animal control services folks, two were  
6   dismissed, and then the defendant Ms. Malikowski paid a  
7   low-dollar fine on two other counts. There was a magistrate  
8   action that was ultimately dismissed and we ultimately filed  
9   this action in common pleas based on the amount of damages  
10   we believe is accurate and just no other leaver (phonetic)  
11   that they had pulled up until that point working for them.

12           And I want, you know, just to make it clear for  
13   the Court. This isn't just dogs barking. This was  
14   essentially a nightmare that they lived through for  
15   14 months. Again, with very aggressive dogs. Dogs killing  
16   one another. This is as extreme as it gets.

17           I also e-mailed the Court something for context  
18   if the Court chooses or has chosen to listen to it. A  
19   YouTube link to video and audio that we presented at the  
20   motion for preliminary injunction where you can actually  
21   hear one of these maulings.

22           And again, this went on for over 14 months  
23   ultimately resulting in our clients having what I describe  
24   as a fire sell to get out of Dodge, sell their home at a  
25   loss considering what it probably would have sold for if the

1 defendant did not live next door, and then moving to  
2 Spartanburg where thankfully everything has been nice and  
3 quiet and they have neighbors who don't have essentially up  
4 to 14/20-some odd dogs at any given time. So that's what  
5 the case is about.

6 Your Honor, I threw in a bit of math in the  
7 summary of damages and that's just what we believe to be a  
8 fair calculation of everything to include the loss on the  
9 equity on the home. Having to take out a mortgage on a home  
10 in Spartanburg. Again, the Union home was paid for in full.  
11 Attorneys' fees. Moving costs from Union to Spartanburg.  
12 All of that is laid out in what I filed for the Court last  
13 week.

14 THE COURT: All right. Yeah. I've got the  
15 summary of damages and the packet that you sent for the  
16 preliminary injunction. Is there anything else you need to  
17 send over?

18 MR. ANDERSON: I don't believe so, Judge. And  
19 again, I know different courts handle these hearings  
20 differently. You might notice Ms. Laura Gault, hey, Laura,  
21 is also here. I did not know if you would want to hear from  
22 her. She was the Realtor who had assisted them throughout  
23 this process and then ultimately when they were at their  
24 wit's end, about to lose it mentally, they just decided to  
25 list it and get out of there.

1           The original plan was to of course do this civil  
2   action, remedy the situation, have the dogs removed, then  
3   list it for sale if they still had to go that route, but it  
4   was so bad, Judge, that they just -- they just went ahead  
5   and listed and sold it.

6           So again, if the Court wants to hear from anyone,  
7   my clients are here. Ms. Gault's here. I'll defer to the  
8   Court on that.

9           THE COURT: Yeah. Let's go ahead and hear from  
10   them. And it doesn't have to be, you know, painstaking,  
11   but, you know, while they're here, you know, let's give them  
12   their day.

13          MR. ANDERSON: Yes, sir. And I would suppose if  
14   we could ask Ms. Gault to speak first so we could cut her  
15   loose.

16          THE COURT: Yeah.

17          MS. GAULT: So, yeah, initially when I met  
18   Michael and Shawntell they loved their home and didn't have  
19   any intentions of really wanting to move other than the fact  
20   of having the animals be such a nuisance to them where they  
21   couldn't even sleep properly.

22          We had initiate -- they had a fairly large home  
23   and forgive me, but I cannot and I don't have it with me the  
24   square footage, but it was a pretty good sized home. So  
25   we -- as we proceeded there was some work that they were

1 going to do and the intentions were to purchase their new  
2 home and do the work so we could get the most out of their  
3 property, but because of all the problems and the nuisance  
4 they just kind of -- like Patrick said, they got to their  
5 wit's ends and were ready to move.

6 So we listed the house in September. We did sell  
7 it significantly less than what they had obviously wanted to  
8 sell it for had it been in the condition to sell it and  
9 where they were ready to go. And even sold it less than  
10 what we listed. We listed for 250 and sold it for 187,5 so,  
11 you know, that's kind of where we're at with that.

12 But they definitely -- I mean, as we all know,  
13 those kind of environments reflect the -- I guess the  
14 attractiveness to a home. So that -- that's -- it basically  
15 would have made a big difference if we didn't have to deal  
16 with the howling dogs during showings.

17 THE COURT: So let me ask you this. What would  
18 you have listed the house for if those dogs hadn't been  
19 beside it?

20 MS. GAULT: So we -- they had some work that they  
21 were going to do. They were in the process of doing some  
22 renovations. We had talked about initially listing upwards  
23 of 300/325 if they had done the work to it. We ended up  
24 going at 250 because there was some work that needed to be  
25 done. And again, sold it for 187,5.

1 THE COURT: Okay. All right. Anything else,  
2 Ms. Gault?

3 MS. GAULT: That's all I have unless you have  
4 some questions for me.

5 THE COURT: That's it.

6 Mr. Anderson, do you got any questions for  
7 Ms. Gault?

8 MR. ANDERSON: No, sir. I do not.

9 Thank you, Laura, for being here.

10 MS. GAULT: You're so welcome.

11 THE COURT: All right. Mr. Anderson, are both  
12 your clients here?

13 MR. ANDERSON: They are, Judge. I've briefed  
14 them on kind of giving you a concise summary of everything  
15 that's happened and why we're here.

16 THE COURT: Yeah. I'll be glad to hear from  
17 them.

18 MR. ANDERSON: Yes, sir. I'm going to get up and  
19 let them scoot over and take these chairs.

20 THE COURT: All right. Good morning.

21 MR. OSTEN: Good morning, Your Honor.

22 MRS. OSTEN: Good morning, Your Honor.

23 THE COURT: I guess just go ahead and tell me in  
24 kind of summary kind of why you brought the lawsuit/what  
25 caused you to bring the lawsuit. That sort of stuff.

1                   MR. OSTEN: Sure, Your Honor. My name is Michael  
2   Osten. Patrick -- so just that I mention -- I work from  
3   home. I do IT security for the -- for Spartanburg Regional  
4   and so, you know, I spend quite a bit of time in the home,  
5   but our elderly neighbors had listed their home for sale.  
6   It was purchased by Ms. Malikowski. We -- the first day we  
7   noticed that there was 15 to 20 dogs being moved into the  
8   house. No fencing. Just letting them roam. So that was --  
9   from pretty much the day that she moved in it was nothing  
10   but aggressive dogs barking. Just constant fear of being  
11   attacked. Not being able to sleep.

12                   We tried every method we could possibly think of  
13   to try and get it under control, you know, we spoke to her,  
14   we spoke to animal control, we spoke to the police, over the  
15   14-month period, and we went to the lower courts -- the  
16   local courts asking for something to help us with it. So  
17   that's pretty much the back story.

18                   Fast forward 14 months of living in a house where  
19   we couldn't have anyone in the house. We couldn't have  
20   people over. We couldn't have relatives. Like I mentioned,  
21   we couldn't sleep. Couldn't be outside.

22                   After 14 months of that the final issue was a  
23   mauling on an early Saturday morning where we heard a pack  
24   of dogs tearing another dog apart. This was shortly after  
25   the -- shortly before the injunction hearing. And we had

1 hoped that the injunction hearing might remove that part of  
2 the problem, but when that was denied we realized that we  
3 couldn't stay longer. It was too dangerous. It was  
4 affecting my work. I had been written up for the noise. We  
5 couldn't sleep. We couldn't -- like I mentioned previously,  
6 we couldn't be outside without fear of someone being  
7 attacked.

8           So we decided to sell the house and get out of  
9 there as quickly as we possibly could. And with that we had  
10 to move into a house that was significantly more expensive  
11 for much less square footage, roughly half of what we have.  
12 We had half of a house full of furniture that couldn't come  
13 with us. We were tapped financially from having to  
14 suddenly, you know, pay all of the expenses required to buy  
15 a new home. And basically had a fire sale with half of our  
16 house. Drained our savings. Probably pushed my retirement  
17 back five years. And because we owned the house in Union  
18 outright, now we have a multi-hundred-thousand-dollar  
19 mortgage.

20           And again, that -- and not so great is the last  
21 two years of our lives. It's just -- it's been all  
22 consuming. Constant reminder just not being able to relax,  
23 or sleep, or just enjoy our home until we were able to leave  
24 the house and move into something normal.

25           THE COURT: All right. Thank you, sir.

1 Ma'am, is there anything else you want to tell  
2 me?

3 MRS. OSTEN: Well, we also have a dog and I used  
4 to take her for walks every single day and it got to the  
5 point where I was terrified to go outside with my dog  
6 because I was afraid something would happen to her or  
7 myself. The anxiety from living next door to that was  
8 starting to take a toll on me. Moving seemed to be our only  
9 recourse at that point because no one -- no one else would  
10 help us try to remedy the situation so that we could all  
11 just be neighbors and live next to each other. We went from  
12 a 4,500 square foot house to 2,500 with a much smaller yard  
13 and all the work that we put into it just lost.

14 THE COURT: Okay. Thank you, ma'am.

15 Anything else, Mr. Anderson?

16 MR. ANDERSON: I don't believe so, Your Honor. I  
17 apologize to the Court for sending you a bunch of paperwork,  
18 but I figured it would be better to send it in case you  
19 wanted to look at it, but --

20 THE COURT: I appreciate you sending that over.

21 MR. ANDERSON: Yes.

22 THE COURT: Anything else from the plaintiffs?

23 MR. ANDERSON: No, sir.

24 THE COURT: All right. If you would, give me a  
25 proposed order.

1 MR. ANDERSON: Yes, sir.

2 THE COURT: And I guess just send it in Word and  
3 then that way if I need to make any changes to the -- to the  
4 body of it or the damages figure, anything, I can do that.

5 MR. ANDERSON: Yes, sir.

6 THE COURT: All right. Thank you, sir.

7 MR. ANDERSON: Judge, one quick question. Of  
8 course --

9 THE COURT: Yeah.

10 MR. ANDERSON: -- I had in my summary of damages  
11 thrown out a number at the bottom. In the order do you want  
12 me just to reference that number?

13 THE COURT: That's fine.

14 MR. ANDERSON: Okay.

15 THE COURT: I'll get back through and look at the  
16 numbers, check your math, and all that good stuff.

17 MR. ANDERSON: Yes, sir.

18 And one quick thing and I promise I'm going to  
19 leave you alone. I neglected to put the filing fee of  
20 \$180.32 as well as \$85 for service of pleadings in that  
21 little summary on the last page of that document entitled  
22 summary of damages.

23 THE COURT: Okay.

24 MR. ANDERSON: So I'm just going to ask leave of  
25 the Court to add those two figures as well.

1 THE COURT: Yeah. I think under Rule 15 you put  
2 it on the record and you can conform the pleadings to what  
3 you just put on the record so that's certainly appropriate.

4 MR. ANDERSON: Yes, sir.

5 Okay. All right. That's all I've got, Judge.

6 THE COURT: Thank you.

7 MR. ANDERSON: Thank you.

8 THE COURT: Take care.

9 MR. ANDERSON: You too.

10 (THERE BEING NOTHING FURTHER, THIS HEARING CONCLUDED AT  
11 47:32)

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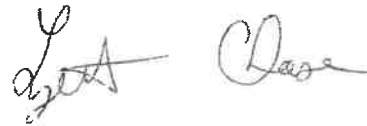
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relative to appeal, in the South Carolina Circuit Court  
of Union County, South Carolina, on the 24th Day of  
February, 2025.

I do further certify that I am neither of kin,  
counsel, nor interest to any party hereto.

September 10, 2025

A handwritten signature in dark ink, appearing to read 'Lynette L. Chase', is written over a faint, circular embossed seal.

Lynette L. Chase

Transcriber

STATE OF SOUTH CAROLINA           \*       COURT OF COMMON PLEAS  
                                           \*  
 COUNTY OF UNION                   \*       TRANSCRIPT OF RECORD

-----X  
 MICHAEL J. OSTEN,                   \*  
                                           \*  
                                           \*  
                                           \*  
                                           \*  
 vs.                                   \* Case No. 2024-CP-44-00097  
                                           \*  
 SANDRA MALIKOWSKI,                \*  
                                           \*  
                                           \*  
                                           \*  
                                           \*  
 Defendant.                         \*  
 -----X

September 15, 2025

B E F O R E:

The Honorable Daniel Coble, Presiding Judge

A P P E A R A N C E S:

Patrick Anderson, Esq.  
 Jason Hunter, Esq.  
                                           Attorney for the Plaintiff

Kyle Parker, Esq.  
                                           Attorney for the Defendant

Recorded by: WebEx Recording

Court Reporter: Bobbi Fisher, RPR  
 SC Official Court Reporter III

Osten v Malikowski (9/15/25)  
 Bobbi Fisher, RPR -- SC Official Court Reporter III

R114

## I N D E X

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## E X H I B I T S

(None.)

COURT REPORTER/TRANSCRIBER LEGEND

|                 |                                                                    |
|-----------------|--------------------------------------------------------------------|
| Dash (--)       | Indicates an interruption in speech                                |
| Ellipses (...)  | Indicates trailing off in speech                                   |
| (ph)            | Indicates phonetic word                                            |
| [sic]           | Indicates the word is written as said                              |
| (Indiscernible) | Indicates word(s) is not known due to poor audio recording quality |

## P R O C E E D I N G S

THE COURT: First up, we have No. 4, Osten versus Malikowski, 0097.

MR. PARKER: Yes, Sir, Judge Coble, Kyle Parker, on behalf of defendant.

THE COURT: Good afternoon. And --

MR. ANDERSON: Your Honor, Patrick Anderson here on behalf of the plaintiff.

THE COURT: All right. Mr. Parker, you go right ahead with your Motion to Set Aside Default.

MR. PARKER: Thank you, Your Honor. Again, Kyle Parker with Pope Parker Jenkins of Newberry for Defendant Sandra Malikowski.

I did send to -- it was late last night, but I did send to your office a memorandum in support of the motion, together with the supporting affidavits and a transcript of the subject damages hearing.

And I guess the other thing I would mention is that the -- what is and is not the record in this case is going to be pretty important, as you'll see, as I go through it.

So, Judge, this is not your run-of-the-mill Motion to Set Aside a Default Judgment, and that's because the default judgment itself is in no way a run-of-the-mill default judgment.

And, Judge, another thing that I'd like you to keep in

1 mind is the stakes are very high for my client,  
2 Ms. Malikowski. She's a 27-year-old single working mother  
3 with two small children: a five-year-old and an  
4 eight-month-old.

5 The plaintiffs have filed a separate action whereby they  
6 seek to foreclose on the lien represented by this default  
7 judgment, and so the stakes are literally, the -- my client's  
8 home where she lives with her small children.

9 I think it's also important for the Court to note that,  
10 in the context of a Motion to Set Aside a Default Judgment,  
11 the Court's role is to scrutinize the judgment. And in these  
12 circumstances, an even heightened sense of scrutiny is  
13 appropriate, as I'll explain in just a minute.

14 The defendant's position is that this judgment cannot be  
15 sustained, and even if it could, the defendant has  
16 demonstrated a right to relief under the rules.

17 Judge, there simply is a plethora of irregularities in  
18 the record that, as a matter of law, require the judgment to  
19 be vacated. And I didn't really fully understand the scope of  
20 these irregularities until I started digging into it.

21 If you had a chance to look at the memo, you'd see that  
22 it's all of 14 pages long. I started writing and just didn't  
23 stop.

24 But the -- there are a number of irregularities; however,  
25 I want to begin with what is the -- just the patent absurdity

1 of it all.

2 The Complaint alleges three causes of action, asserting,  
3 the right to damages against the defendant for pretty much  
4 barking dogs, Judge. That's it. Barking dogs.

5 Yet, we're here today to talk about a \$283,000 judgment.  
6 \$283,000 for barking dogs. In my view, that's just obscene,  
7 Judge. It's absurd, in fact. And that's particularly true  
8 based on the record in this case.

9 The primary reason I filed the transcript of the damages  
10 hearing is so the Court could, in scrutinizing this judgment,  
11 understand what exactly is the record. I ordered it because I  
12 was curious. I just had to know how did this come to be.  
13 Unfortunately, there's nothing in the transcript that really  
14 elucidates what proof there could possibly be to justify such  
15 a judgment.

16 And, again, Judge, we're talking about \$283,000 for  
17 barking dogs. That's -- that's the extent of the allegations  
18 of wrongdoing in this case.

19 In my memo, I referenced the case of Rennie vs. Dobbs  
20 House, Inc., a Supreme Court case from 1981. And this is the  
21 exact kind of judgment -- default judgment that the Rennie  
22 Court said they had growing great concern over; that is to  
23 say, large awards and default judgments on unliquidated  
24 claims. The Rennie Court said that, in those circumstances,  
25 that there is a heightened level of scrutiny. I think the

1 words are "when the defaulting party is not given an  
2 opportunity to participate in the damages hearing, the trial  
3 court should closely scrutinize the award to prevent harsh and  
4 unwarranted results."

5 And the Court went on to say, if you'll indulge me,  
6 that -- citing an AmJur second section of judgments, "It has  
7 been declared that no rule can be formulated setting a  
8 definite boundary beyond which a court of equity cannot go as  
9 a matter of power and will not go as a matter of policy in  
10 preventing the enforcement of an unconscionable judgment.  
11 Indeed, there is authority for the rule that, in a proper  
12 case, a court of equity may look behind the judgment at law in  
13 order to do justice between the parties and that relief from  
14 judgment may be decreed in equity where it is against  
15 conscience to execute the judgment."

16 After citing that, the Rennie Court went on to admonish  
17 trial courts by reminding the courts that, whether a defendant  
18 is in default or not, it is incumbent upon the trial court to  
19 make an award based on the proof -- a preponderance of  
20 evidence based on the proof.

21 The Rennie Court then directed that "where a default  
22 judgment is so out of proportion to the wrongs alleged in the  
23 Complaint that, independent of any rule of procedure, the  
24 judgment as a matter of law cannot stand."

25 So what the Rennie Court did was instructed this Court to

1 look behind the judgment to review two things in the course of  
2 its close -- closely scrutinizing the judgment. First, what  
3 does the Complaint allege in terms of wrongdoing? And second,  
4 what does the proof offered to support the damage -- what is  
5 the proof offered to support the damages awarded?

6 So can -- in this case, can the wrong alleged in any way  
7 justify the award? Here, absolutely not. There might be a  
8 world where barking dogs justify a \$280,000 judgment, but I  
9 would submit that this ain't it.

10 Next, what was the proof that was offered? Can it  
11 support such a judgment?

12 Again, here, the answer to that is no.

13 And first I would note that there -- and I'll get to this  
14 a little more later but the judgment -- based on the  
15 transcript -- the judgment -- transcript in connection with  
16 the Complaint. The judgment was sought using the wrong  
17 measure of damages. It was a diminution in value as what was  
18 of the property, which is what was sought.

19 At the hearing, the plaintiffs brought a Realtor to the  
20 hearing to testify about, presumably, the diminution in value.  
21 And were the Court to review the transcript, you would find  
22 that the Realtor really only said a few things.

23 First, she never testified that the dogs reduced the  
24 value of the home. In fact, when asked by the Court what the  
25 home would have been listed to -- listed for but for the dogs,

1 she referenced only undone renovations as the basis for the  
2 listing price, and stated that the home was listed for  
3 \$250,000, quote, "because there was some work that needed to  
4 be done," closed quote. And she ultimately -- she testified  
5 that it ultimately sold for \$187,500.

6 So, Judge, if you just look at the proof, even if you  
7 assume -- so the plaintiffs at the hearing testified that,  
8 well, the barking of the dogs forced them to sell their house,  
9 forced them to buy a more expensive house in Spartanburg, and  
10 forced them, in that process, to incur a, quote, "multi  
11 hundreds of thousands of dollars of mortgage."

12 And so you have all of that, but as far as whether those  
13 things can be properly assigned to the dogs or not is beside  
14 the point for the purposes of this argument.

15 If one just assumes that the dogs were the cause, the  
16 testimony says that a diminution of value -- again, that's the  
17 wrong measure of damages, but the diminution value was only  
18 \$62,500.

19 So not only is the judgment out of the ZIP Code when it  
20 comes to the proportion -- its proportion to the wrongs  
21 alleged in the Complaint, it is wholly unsupported by the  
22 proof.

23 Judge, as far as numbers go, that is the extent of what's  
24 in the record. And, Judge, where you have a judgment for  
25 barking dogs in such an amount, it's the defendant's position

1 that that is -- it shocks the conscience. I mean, it's just  
2 absurd.

3 And where that's true and where it's otherwise not  
4 supported by the record, the judgment just can't stand, as the  
5 Rennie Court said. And just to get out in front of anything,  
6 the Rennie decision, although a 1981 Supreme Court case, has  
7 been cited on this issue in reported cases as recently as  
8 2023. So, I mean, this is not some arcane concept. It is a  
9 basic concept that, if a judgment cannot be supported by its  
10 proof -- because the Rennie Court said that the damages have  
11 to be proven by a preponderance of evidence, and if they  
12 cannot be supported by the proof and are out of proportion to  
13 the wrongs alleged, it must be set aside as a matter of law,  
14 irrespective of any rules of procedure.

15 So that's a number one thing that we say is going on  
16 here. That's just the elephant in the room.

17 Next, I'll touch on another fundamental problem with the  
18 judgment, and this deals with Rule 54(B). As the Court  
19 knows -- and the authorities for this are cited in the memo --  
20 a party is bound by his pleadings, and that is particularly  
21 true in a default context.

22 Absent a prior amendment, the plaintiff is confined to  
23 the allegations set out in the Complaint. And where the  
24 defaulting party has not appeared or otherwise participated in  
25 the damages hearing, the rule is that the defaulting judgment

1 may not extend beyond the matters alleged outside or outside  
2 the scope of the relief set out in the Complaint.

3 This rule is embodied by Rule 54(C), which states, "A  
4 judgment by default shall not be different in kind from or  
5 exceed in the amount that is prayed for in the demand for  
6 judgment."

7 And the Wright and Miller federal practice procedure  
8 sections are cited in the memo, and they get to the point that  
9 that idea is just a basic concept of due process. In other  
10 words, it's not fair. It's fundamentally unfair for a  
11 defendant to be served with one complaint that alleges certain  
12 facts and seeks certain damages then only to, at the default  
13 hearing, the plaintiff be awarded relief based on other facts  
14 not stated and additional damages not sought in the Complaint.

15 Here, the Complaint repeats throughout the background  
16 allegations and the recitation of the three causes of action  
17 where the plaintiffs are talking about "our home, our home,  
18 our home," saying, you know, we own this place.

19 But then, at the hearing, they get there and testify that  
20 they were forced to sell the home, forced to buy a more  
21 expensive house, forced to incur multi-hundred-thousand-dollar  
22 mortgages. There was reference to awarding of attorney's fees  
23 and moving costs and all of these things.

24 I mean, first, I would say it's unclear from the record  
25 exactly how this amount of the judgment was arrived at, but in

1 any event, all of those things were referenced at the damage  
2 hearing -- damages hearing, and literally none of those  
3 allegations are in the Complaint.

4 The Complaint further fails to identify attorney's fees  
5 or new mortgages or anything such as that in terms of the  
6 scope of relief requested.

7 The -- really, the loan measure of damages that it has  
8 cited is the diminution in value to the property.

9 So the judgment in this case, where it's based on those  
10 extra Complaint allegations and extra Complaint requests for  
11 relief is void as violative of 54 -- Rule 54(c) and we've  
12 cited to authorities that that additionally confirm that  
13 connotation of the rule.

14 So, for that reason, the judgment is void.

15 The next thing that we would point out is that the --  
16 well, it's important to distinguish what a default is and what  
17 it is not. A default only affects an admission of the  
18 well-pleaded facts, and it does not affect an admission of  
19 damages. Again, the Rennie Court tells us that the damages  
20 have to be proven.

21 So based on the authorities cited in the memo, a default  
22 judgment is void where the Complaint fails to state a cause of  
23 action because, as the Courts say, it is without the authority  
24 of law.

25 And so, again, there are three causes of action. The

1 first one is nuisance. A party asserting a claim for nuisance  
2 must allege damage to a property interest. It has to be more  
3 than a mere annoyance. And, in this case, there's not any  
4 allegation as to damage to the property. There is plenty of  
5 allegations about annoyance, but -- and so it -- the Complaint  
6 fails on the nuisance calls because of that.

7 But the -- it also fails because the measure of damages  
8 sought in the nuisance calls is diminution of value to the  
9 property. That's what's pled in the Complaint.

10 That is, in this case, the wrong measure of damages. The  
11 right measure of damages was elucidated by the Supreme Court  
12 in the Babb case, which is cited several times in the memo.  
13 That Babb case was a case where there were I think it was six  
14 neighbors to a landfill, neighbors having the residence near a  
15 landfill, and they had brought suit in the Federal Court for  
16 nuisance and trespass. And the Federal Court asked the  
17 Supreme Court to answer several certified questions. One of  
18 those was, what is the measure of damages for a temporary  
19 nuisance?

20 The Babb Court answered that question by saying, "Well,  
21 first, let's talk about what is temporary." And where they  
22 landed was is that, "Well, if the nuisance alleged is abatable  
23 by the defendant or the Court, then it's temporary. And where  
24 it's temporary, the measure of damages is not diminution in  
25 value, but, instead, loss of rental value."

1        Here, the nuisance alleged is clearly abatable. In fact,  
2 the plaintiffs requested relief to abate it in the sense that  
3 they asked for an injunction. They were denied that  
4 injunction, but they still asked for it. So it is clearly, in  
5 their mind, abatable, but it's also, in real life, abatable  
6 because the defendant could, at any point in time, get rid of  
7 the dogs. There's actually a procedure that I learned about  
8 in looking into this where you can do what's called debark the  
9 dogs and she could have otherwise enclosed her whole yard to  
10 keep the dogs in and so on and so forth. So it's clearly a  
11 temporary nuisance.

12        And so the damages alleged -- and apparently awarded in  
13 this case -- are the wrong measure of damages, and therefore,  
14 is without the authority of law, meaning the judgment is void.

15        The plaintiffs also alleged the cause of action for  
16 negligence. As the Court is aware, there can be no claim for  
17 negligence without a duty on the part of the defendant. And  
18 there are no facts alleged in the Complaint as to how the  
19 defendant has a duty to the plaintiffs. So it fails in that  
20 respect.

21        The only thing it does have is conclusory statements that  
22 a duty exists. And there's a Paradise case cited in the memo  
23 that says that mere conclusory statements are insufficient to  
24 support a claim.

25        And the other problem with the negligence claim is that

1 the plaintiffs explicitly seek damages that are not  
2 recoverable. They seek damages for mental anguish and  
3 emotional distress. And the courts have repeatedly said --  
4 and the authorities are cited in the memo -- that no damages  
5 for emotional distress can be recovered in a negligence action  
6 unless that emotional distress manifests itself in some  
7 physical injury. That hasn't been alleged in the Complaint,  
8 so the negligence claim or the Complaint fails to state a  
9 cause of action for negligence.

10 Again, that cause is without authority of law; therefore,  
11 the judgment based on it is void.

12 The only other claim that is asserted is a trespass  
13 claim. This kind of circles back to the Babb case. There was  
14 another certified question asked to the Supreme Court  
15 regarding trespass. And the question boiled down to can odors  
16 wafting over from a landfill to the plaintiffs property, can  
17 that constitute a trespass?

18 The Supreme Court answered that in a negative and said  
19 that a trespass must be -- to be actionable, must be an entry  
20 by a tangible, physical thing. And so the sound of barking  
21 dogs is not that.

22 In addition to that, the plaintiffs seem to allege more  
23 mental anguish and emotional distress, because they talk about  
24 fear and this kind of stuff. Obviously, those kinds of  
25 damages under the trespass claim are not recoverable. But the

1 point is, is that barking will not lead to trespass damages  
2 because that is not a physical, tangible thing entering the  
3 property.

4 The other thing that the Babb case also dealt with, they  
5 were asked what are -- what is the measure of damages for a  
6 temporary trespass? Same answer: Loss of rental value.

7 So, again, all of those causes or at least claims fail to  
8 state a cause of action, and, therefore, any judgment based on  
9 them would be without the authority of law and void.

10 The next thing that there is to talk about is that the  
11 defendant did not get notice of the damages hearing. As the  
12 Court is well aware, Rule 55(b)(2) requires that the defendant  
13 receive notice of the damages hearing in an unliquidated claim  
14 default case.

15 The only evidence that is in this record about notice of  
16 the damages hearing is the plaintiff's Certificate of Mailing,  
17 of which, on its face, patently shows that any notice that was  
18 mailed was mailed to an address that is not the defendant's  
19 and doesn't really exist.

20 The -- that problem, the problem with the address, is  
21 repeated throughout the record, Judge. That is including the  
22 judgment itself. So the judgment -- the initial judgment has  
23 the Court reciting that notice was given to the defendant at  
24 this particular address, again, which is not the defendant's  
25 address. And then somehow -- the record is unclear as to how

1 this happened, but -- somehow the Order got amended and the  
2 judgment got amended to recite that the notice was sent to the  
3 correct address.

4 So it is a problem that has permeated the entire case.  
5 For her part, the defendant denies receiving notice of the  
6 damages hearing.

7 And I guess the point I would make, Judge, about that is  
8 that there isn't anything in the record which would show that  
9 she did get notice of the damages hearing. Instead, the only  
10 thing you have in the record, before the defendant's affidavit  
11 was filed, is Certificates of Mailing that show mailing going  
12 to some address that isn't the defendant's.

13 And then now, you do have the defendant's affidavit  
14 filed, and in it, she denies receiving that notice of the  
15 damages hearing. So, therefore, the only thing in the record  
16 about whether she did or did not get notice of the damages  
17 hearing is in the negative, that she did not.

18 And so, again, we've cited the Diamond case in the memo,  
19 which just stands for the proposition that if you've -- if  
20 you're violative of Rule 55(b)(2) and there's no notice to the  
21 defendant of a damages hearing, then the judgment resulting  
22 from it is void and should be set aside, which is precisely  
23 what we asked the Court to do.

24 Finally, the defendant has or asserts that she's shown  
25 the right to relief under the rules. In this case, Judge,

1 what's happened here is Ms. Malikowski -- again, 27 years old,  
2 single working mother with two small children -- she moved  
3 here at the age of eight years old -- when I say "here," I  
4 mean the United States -- at the age of eight years old coming  
5 from, I believe, an orphanage in Poland, when she was adopted  
6 by her parents.

7 And she -- while she can and does very well speak and  
8 understand the spoken English language, she has great  
9 difficulty, however, in reading and comprehending it. And so  
10 that is important for the Court to note because what was going  
11 on -- and this is all substantiated by both or by all of her  
12 affidavit, that of her neighbor across the street, the  
13 neighbor who actually purchased the plaintiff's home, and the  
14 Animal Control officer, that they repeatedly called.

15 So what was happening is that the defendant moves to the  
16 neighborhood in, I believe, February of 2023. Almost  
17 immediately thereafter, starting maybe in March of 2023, she  
18 begins to be constantly confronted by the plaintiffs with  
19 Complaints about dogs and other things. And that whole thing  
20 ended up turning into a real circus.

21 Mr. Travis Smith, the Animal Control officer, called the  
22 plaintiffs, particularly Mr. Osten -- what he called it, a  
23 frequent flyer. He said that he began calling with complaints  
24 multiple times a day, every day, day and night for months on  
25 end. And he would come to the office and bring things by. He

1 would also text Mr. Smith on his work cell phone in the middle  
2 of the night sometimes, about things that were -- about  
3 Ms. Malikowski but had nothing to do with the dogs.

4 But, in any event, because of the hundreds of complaints  
5 that, again, primarily Mr. Osten made, this fellow had to  
6 spend hours on many occasions out at the defendant's home to  
7 respond to the various complaints.

8 And what Mr. Smith says is that, despite all of those  
9 hours where he spent outside of Ms. Malikowski's home  
10 listening for her dogs to bark, he never actually heard any of  
11 the dogs bark, as Mr. Osten claimed.

12 He also goes on to say that there were times when  
13 Mr. Osten would call and complain about dogs incessantly  
14 barking and so on and so forth when Mr. Osten apparently did  
15 not know that Mr. Smith was already out at the property as a  
16 result of a prior complaint earlier in the day. And at the  
17 very time he's complaining about dogs barking, the man is  
18 sitting there and the dogs aren't barking.

19 And so this thing escalated between the neighbors where,  
20 eventually, Mr. Osten starts making false reports to DSS about  
21 my client. I mean, it just got strange.

22 But the point is, is that the Ostens state that the dogs  
23 are barking incessantly. The very man whose job it was to  
24 figure that out and do something about it says, no, they  
25 weren't.

1           In addition to that, Ms. Jarrett -- Megan Jarrett, who is  
2 the neighbor who purchased -- who actually purchased the  
3 plaintiff's home, says that -- I mean, she lives in the same  
4 house and is, therefore, in the same position as the  
5 plaintiffs were to understand whether the dogs are incessantly  
6 barking or not, and she says that those allegations are  
7 categorically false. That's her words. And she says she's  
8 never had a problem with Ms. Malikowski or her dogs.

9           She notes that her house is only 75 feet away, roughly,  
10 from Ms. Malikowski's house, and she's not heard the dogs bark  
11 incessantly. She's never seen them be aggressive. None of  
12 that.

13           But more importantly, to the damages award -- and the  
14 damages sought in this case, anyways -- she says that the  
15 Ostens left the home in a condition where the walls of each  
16 floor were riddled with holes of different shapes and sizes,  
17 there were significant plumbing and foundational and general  
18 maintenance issues with the home. She references the  
19 dangerous conditions of the stairs leading from the bottom  
20 floor to the top. And she says that and not the dogs were  
21 factored into the offers made in the -- or negotiations of the  
22 purchase of the home. She says the dogs simply were not a  
23 factor whatsoever.

24           And so that gets to the causation issue with the whole  
25 idea of, well, we had to sell our house for less because of

1 these dogs. Ms. Jarrett says, well, that's not true.

2 It also -- in the record is another affidavit from the  
3 neighbor across the street who also states that she's never  
4 had any problems with the dogs, doesn't hear the dogs bark  
5 incessantly, never seen them be aggressive. In fact, they  
6 play with her -- Ms. Blankenship's kids. Ms. Catherine  
7 Blankenship is the neighbor across the street.

8 And so, as to Rule 60, there's a surprise element in the  
9 sense that she didn't get notice to the -- notice of the  
10 damages hearing; therefore, the judgment itself came about due  
11 to that surprise. In fact, she didn't even know that the  
12 default judgment existed until she was served with the second  
13 case.

14 The fact that she has considerable trouble reading and  
15 understanding the English language, written language, and in  
16 the context of the voluminous things she was being served with  
17 on almost daily basis, which is laid out in both her and  
18 Mr. Smith's affidavit, and the fact that she -- one of those  
19 things -- or all of those things except for the Summons and  
20 Complaint in this case, were things that she did not have to  
21 respond to, and all of those things were ultimately resolved  
22 in her favor. And so where she can't really comprehend what  
23 the summons is saying, we would submit that that's excusable  
24 neglect and a mistake of fact.

25 But all of this turns on the defense that she's shown.

1 The defense again is that the dogs weren't incessantly  
2 barking. They just weren't. They weren't aggressive. And  
3 nobody else seemed to have a problem in the neighborhood.

4 And, you know, the Animal Control guy says, "I was there.  
5 They weren't barking."

6 And, you know, ultimately, though, Ms. Jarrett is the  
7 most important. She says that the dogs aren't a problem.  
8 But, more importantly, she says that the dogs didn't have  
9 anything to do with what she paid for the house.

10 And that is the essence of the damages sought by the  
11 plaintiffs. Again, they seek a diminution of value. It's the  
12 wrong measure of damages, but Ms. Jarrett, her statements --  
13 her testimony is dispositive of those claims.

14 And so the application for relief was timely. Again, she  
15 only found out about the judgment when she was served with the  
16 prior or the second separate action seeking to sell her house  
17 based on this judgment. And this motion was filed only a  
18 couple of months later. She states in her affidavit that the  
19 only reason that that was true is because she had to save  
20 money to pay her lawyers.

21 And as far as prejudice to the plaintiffs, if the Court  
22 were to set aside the judgment, there can be no prejudice to  
23 the plaintiffs, and all that does is require them to prove  
24 their claims on the merits, and the courts have repeatedly  
25 said that is not a prejudice that the rules are talking about.

1       So based on all of that, Judge, we would ask you to grant  
2 the Motion to Set Aside the Default Judgment, allow the  
3 defendant to answer so that this thing can be tried on its  
4 merits.

5       Thank you very much.

6       THE COURT: All right. Thank you.

7       I'm happy to hear from the plaintiff.

8       MR. ANDERSON: May it please the Court, Your Honor. I  
9 know you've got a lot to consider, and just by way of  
10 background ever so briefly, we filed our Memorandum in  
11 Opposition this morning. I noticed later this morning that it  
12 was approved by the clerk. And I believe your law clerk  
13 actually responded to my email and opposing counsel whereby we  
14 sent that to you, Judge.

15       In addition, we submitted something I think is relevant.  
16 It is essentially a packet that was in support of the  
17 plaintiff's Motion for a Preliminary Injunction. That was  
18 initially submitted to Judge McKinnon at that actual hearing  
19 in May of 2024. And I believe also the default judgment of  
20 damages hearing to Judge McCutchen.

21       But, again, I know you've got a whole lot to consider, so  
22 I'm just going to try to basically weave my way  
23 ever-so-briefly through our memorandum and then just kind of  
24 offer some final thoughts towards the end there.

25       Your Honor, by way of background, procedurally at least,

1 the parties in this matter had essentially exhausted all legal  
2 remedies prior to filing this action in Common Pleas. Those  
3 remedies included a pro se magistrate action, which was  
4 dismissed. There were five citations issued by Animal  
5 Control; I believe that was Mr. Smith as opposing counsel  
6 referred to.

7 The defendant pled guilty to two of those citations,  
8 specifically running at large and persistent barking, and paid  
9 a fine on both of those. The other three were dismissed by,  
10 according to the documents, from the clerk, a plea bargain.

11 We had initially set out to file a restraining order in  
12 the magistrate's court. We did have a hearing. The defendant  
13 did appear at that hearing. Ultimately, the magistrate  
14 presiding declined to grant the restraining order, basically  
15 believing he didn't have the authority under the statute,  
16 given the facts as alleged.

17 And this case centers on, from any point of time while my  
18 clients lived next door to the defendant, anywhere from 9 to  
19 11 dogs.

20 And, Judge, what I want the Court to understand is that  
21 this is a municipal residential neighborhood. This isn't out  
22 in the country, so to speak, where folks have a lot of acreage  
23 and animals are free to run and you got livestock and such.  
24 This is a neighborhood in the city of Union.

25 And opposing counsel characterized it as a barking-dogs

1 case. And I understand he's doing his job, but myself, having  
2 been involved for a good little while here, that is greatly  
3 oversimplifying the nature of the facts and the nature of the  
4 case overall.

5 Your Honor, again, getting back to just the number of  
6 dogs next door, at any point from 9 to 11. And I just kind of  
7 want to jump into what we submitted amongst many exhibits at  
8 that preliminary injunction hearing that sort of grabs  
9 everyone's attention. It was a fairly packed courtroom that  
10 day in Union. Again, it was a live hearing. This was in May  
11 of 2024 in front of Judge McKinnon.

12 We submitted that packet, which the Court has; opposing  
13 counsel, again, should have it. And that cover sheet has 17  
14 items listed as exhibits.

15 Item No. 17 is entitled, "Audio: Defendant's dog. Dogs  
16 attack." We had a speaker. We played that audio via  
17 Bluetooth. And what the Court heard and what everyone in the  
18 gallery heard was a very large dog, from the sound of it,  
19 mauling and attacking a very small dog, from the sound of it.  
20 It was horrendous and difficult to listen to. The mauling  
21 goes on for some time, and then the small dog just stops.  
22 Silence. You continue to hear the large dog growling,  
23 mauling, etc.

24 You know, that, in a nutshell, is what my clients dealt  
25 with on a daily, weekly, monthly basis while living next door

1 to the defendant.

2 The facts also showed at that hearing that these dogs  
3 were oftentimes on my client's property regularly. And I  
4 think there was a photograph we submitted in that very packet,  
5 a very large German shepherd on their property, clearly on  
6 their property. Another dog that appeared to be a pit bull on  
7 their front porch stoop. These dogs had menaced my clients  
8 time and time again, each of them individually, their  
9 children. They also had, I believe, a small dog at one point.

10 So this isn't as simple as dogs barking, Judge. This is  
11 a case where -- frankly, the way we looked at it, if something  
12 doesn't change, someone's going to get hurt.

13 So we filed our action, Judge. Let me see here. We  
14 served the defendant with the Summons and Verified Complaint  
15 on April 29th, 2024, at 8:31 p.m., to be exact. That  
16 Affidavit of Service was filed with the clerk on May 8th,  
17 2025. And as opposing counsel acknowledges, the defendant did  
18 not file an Answer. She did not appear. She did not file any  
19 responsive pleadings, of course, within the 30-day period or  
20 at any point during the pendency of the litigation.

21 We filed an Affidavit of Default January 26th, 2025, and  
22 then filed a Motion for Default Judgment of Damages on the  
23 same day.

24 Your Honor, that Notice of Motion for Default Judgment of  
25 Damages was sent via United States Mail, as evidenced by the

1 letter we filed advising of the same, along with a copy of the  
2 clerk's email notice with the instructions for the virtual  
3 hearing, via WebEx, of course, as well as a companion  
4 Certificate of Service. Again, all of those were filed with  
5 the clerk on January 28th, 2025.

6 Now, jumping back to the discrepancy in some mailings and  
7 documents, opposing counsel is correct. And of course, we  
8 would stipulate to the confusion specific to Gilbert Street,  
9 G-i-l-b-e-r-t, versus Gibert Street, G-i-b-e-r-t, Your Honor.  
10 Gibert Street is where the defendant resides. Gilbert Street  
11 is not a correct street address.

12 And, Your Honor, we would submit that, despite that  
13 typographical error that was present again during some of  
14 these documents and mailings, the defendant received notice  
15 specifically of the default judgment and damages hearing.

16 Two basic points to support that position, Your Honor,  
17 one of which is specific. Again, jumping back to that motion  
18 for a preliminary injunction, again, that was scheduled May  
19 28th of 2024. We noticed the defendant for that hearing via  
20 United States mail return receipt requested. But, again, it  
21 was a typographical error. The notice was addressed to  
22 202 Gilbert Street and not Gibert Street.

23 The Postal Service certified mail receipt, the notice of  
24 the motion hearing, and the Certificate of Service were filed  
25 with Union County Clerk of Court, May 15th, 2024. The actual

1 little receipt, Your Honor, the white and green receipt -- I  
2 just refer to that as a Postal Service certified mail  
3 receipt -- also listed Gilbert Street and not Gibert Street.

4 And then fast-forwarding, the Postal Service return  
5 receipt, what I call the green card, which, again, listed  
6 Gilbert Street and not Gibert Street, that was signed for by  
7 the defendant, indicating that she received notice via the  
8 mailing despite that typographical error.

9 So that's one example, Your Honor, of her having received  
10 notice previously, despite the typographical error.

11 Second point to just buffer that point, if you will,  
12 Judge, is specific to the defendant's affidavit opposing  
13 counsel submitted, she claims that she never received notice  
14 of the mediation at the law offices of Ken Anthony.  
15 Mr. Anthony is, of course, a practicing attorney in  
16 Spartanburg.

17 Mr. Anthony's office mailed the notice of the mediation  
18 as well as mediation documents to the defendant at 202 Gibert  
19 Street. That directly contradicts what the plaintiff  
20 submitted in her affidavit, stating she didn't receive notice.

21 And, of course, this notice was filed with the Court  
22 during the pendency of the action. I've attached that, Your  
23 Honor, as Exhibit 2 to our memorandum.

24 I think that's important because it illustrates the fact  
25 that the defendant chose not to participate throughout the

1 pendency of this action, either by not checking her mail or  
2 simply ignoring it.

3 Your Honor, we've incorrectly addressed mailings in the  
4 past, human error and such. I checked with my staff. We  
5 double-checked the file. At no point during the pendency of  
6 this action did we receive any mail returned from the Postal  
7 Service that was labeled as undeliverable.

8 Your Honor, there's one case that's to point on this  
9 Roche v. Young, and it basically says courts do not set aside  
10 judgments based solely on the corroborated claims of  
11 non-receipt, especially where personal service is admitted.

12 And that's kind of the overarching point from our  
13 position. She was served properly with the underlying  
14 pleadings.

15 I know opposing counsel was referencing mistaken  
16 inadvertence, etc., as laid out in Rule 60, but I would  
17 submit, Your Honor, that the defendant's motion fails to meet  
18 any of the standards under Rule 60. There's no valid  
19 explanation for the defendant's complete inaction over the  
20 course of well over one year, one calendar year of litigation.  
21 She literally had over one year, 13 months, and yet, she  
22 repeatedly did not engage by filing an Answer, counterclaim,  
23 or pleading otherwise.

24 And I would submit, Your Honor, it's not excusable  
25 neglect. It's not a mistake. It's simply her choosing not to

1 participate, and Rule 60 does not and should not protect those  
2 folks who ignore legal proceedings.

3       It extends -- the delay extends from the moment the  
4 judgment was entered to the moment the defendant retained  
5 counsel on this motion and said motion was filed. That was  
6 133 days, or four months and 11 days, if the Court likes,  
7 between the judgment being granted and the filing of the  
8 defendant's Motion to Set Aside or Vacate.

9       And, Your Honor, again, I'm kind of just jumping along in  
10 the memorandum; it's all in there for the Court to read over.

11       Jumping forward a little bit, Your Honor, participating  
12 in the legal process is, obviously, thematically what we're  
13 arguing here.

14       Getting back to that Motion for Preliminary Injunction,  
15 again, May 28th, 2024, to sort of emphasize the defendant's  
16 acknowledgement and understanding of the legal process, the  
17 Court needs to know that she did retain counsel for that  
18 preliminary injunction hearing again in May of 2024. She  
19 retained the services of the King Law Firm, and that was in a  
20 limited capacity strictly for that hearing.

21       Ian Toomey, who works for King Law, I spoke with him; I  
22 believe it was the week prior to last week. And of course, I  
23 spoke with him at the outset of the hearing and during the  
24 course of the hearing, and he made it clear then that his  
25 representation was limited very much to that restraining

1 order.

2 But I spoke with him because I did not believe King Law  
3 had filed anything by way of a Notice of Representation.  
4 Judge McKinnon was presiding, and I believe he submitted a  
5 simple Form 4 order denying our request for preliminary  
6 injunction. I don't believe that Order referenced King Law's  
7 appearance.

8 I asked Mr. Tuomey if he wouldn't mind sending me an  
9 email just saying yes, we were there for that purposes  
10 strictly. He had reached out to ethics counsel and wasn't  
11 comfortable getting me that, which I completely understand.  
12 Not faulting them for that.

13 But, Your Honor, the defendant retained counsel, and  
14 that's important because, even if she retained counsel for the  
15 limited purpose of the preliminary injunction, that clearly  
16 demonstrates her understanding of the process of the  
17 litigation of the stakes involved, the importance of  
18 participating in civil litigation, and despite all of this,  
19 she chose not to file an answer or otherwise plead.

20 Subsequent to that Motion for a Preliminary Injunction,  
21 again, the defendant made no effort to obtain the services of  
22 an attorney to represent her. She didn't request any relief  
23 on a pro se basis. She could have at any point done a simple  
24 Google search. And I've seen these, and I'm sure the Court  
25 has as well, whereby folks file something -- maybe it's not

1 sophisticated, maybe the template isn't correct, but filing  
2 something is enough to forestall default. That wasn't done  
3 either, Your Honor.

4 Moving on. The delay, which I've already briefly  
5 referenced, was excessive. I know timeliness is one of the  
6 elements the Court has to consider when deciding under Rule 60  
7 whether to set aside a judgment, but again, the course of  
8 litigation being over a year -- well over four months from the  
9 date that the judgment was entered until the day the Motion to  
10 Set Aside and Vacate was filed, Your Honor, all of these  
11 things indicate essentially a just disregard for the process  
12 and then coming back after the fact and asking the Court to  
13 reopen it for all the reasons submitted by opposing counsel.

14 We would submit, Your Honor, that it doesn't meet the  
15 standards under Rule 60. And because of that, we would  
16 obviously ask you to deny Defendant's motion.

17 Your Honor, there is a case -- and sometimes these things  
18 just land in your lap. I know opposing counsel was working  
19 over the weekend, and I was as well. Became aware of a case  
20 actually this morning. Didn't have the time to necessarily  
21 get this together, to get it to the court and didn't have time  
22 to draft a memorandum in response to Defendant's memorandum,  
23 as it was submitted last night.

24 But the case is Green v. Johnson, which is a South  
25 Carolina Supreme Court case -- and I can send this out after

1 we're done here today, Judge, and, of course, to opposing  
2 counsel as well. But it goes into a situation where the  
3 defendant in that case was in default. It was an auto wreck  
4 case. And numerous affidavits submitted to get the default  
5 set aside similar to opposing counsel and what he submitted to  
6 the Court. Excusable neglect was one of the reasons under  
7 Rule 60 that's referenced in this case, and the affidavits  
8 went on to reference this gentleman having had open heart  
9 surgery, extensive recovery periods, hasn't worked, was also  
10 diagnosed with diabetes, hospitalized on multiple occasions.

11 But despite those health issues, the Court didn't see fit  
12 to grant the requested relief based on those subsections in  
13 Rule 60. And of course, there's nothing on the record that  
14 would indicate the defendant in this case has any of those  
15 health issues or any health issues at all.

16 The Court goes on to basically say that, "To obtain  
17 relief from a default judgment under Rule 60(b)(1), the  
18 defaulting party must make a particularized showing a mistake,  
19 inadvertent surprise, or excusable neglect. The moving party  
20 must also show, as opposing counsel (indiscernible) reference  
21 to meritorious defense." This was an appeal from the Court of  
22 Appeals, Judge.

23 But the Court -- the Supreme Court agreed -- and I'll  
24 just read directly from the opinion, quote, "We agree with the  
25 Court of Appeals. Johnson failed to give a satisfactory

1 reason for not answering the Complaint."

2 They go on to reference, "His health issues don't  
3 constitute a reason under the rule." And they go on to, of  
4 course, reference mistaken, inadvertent surprise, excusable  
5 neglect.

6 They do go on to say that, "If a defendant establishes  
7 meritorious defense" -- which I know opposing counsel has  
8 argued for; we disagree with that -- it is limited to the  
9 amount of damages or proximate cause, and then the entry of  
10 default or of course in this case, we've got a default  
11 judgment, "is set aside, then the defendant can only defend on  
12 the amount of damages, the proximate cause."

13 So we, obviously, are asking you, Judge, to not grant  
14 Defendant's relief. I would ask you to take that opinion into  
15 consideration.

16 THE COURT: This is the Green v. Johnson case?

17 MR. ANDERSON: Yes, sir, I believe so.

18 THE COURT: By that -- I mean, but the flip side of that  
19 was the Supreme Court came hard -- pretty hard down on these  
20 default judges [sic] being inflated. I believe that was a  
21 million dollars -- at 1.1 million.

22 MR. ANDERSON: Correct.

23 THE COURT: And they found a way to overturn that  
24 essentially and say, no, that was a lottery ticket. And they  
25 seem to come down hard on that.

1           MR. ANDERSON: They did, Your Honor. It was like was, I  
2 think, 1.7 million. And I believe the master actually reduced  
3 it via a separate motion. And if I remember correctly, the  
4 Court said that was the right thing to do.

5           In this case, I would submit to you that the damages are  
6 not excessive, not anywhere even in the ballpark of  
7 1.7 million, obviously.

8           And if the Court looks at the packet again from the  
9 preliminary hearing injunction -- and I know we're not here to  
10 try the case -- but if the Court takes into consideration what  
11 Judge McKinnon looked at, you'll get a really good sense of  
12 what we were dealing with here, Judge. Again, it wasn't a  
13 case about dogs barking. It was -- I'm trying to think of the  
14 correct word to just emphasize what the plaintiffs went  
15 through on a daily basis.

16           And, Your Honor, as far as the affidavit submitted for  
17 the folks who moved into my client's home, I think a simple  
18 explanation can explain why they haven't had any issues with  
19 the defendant's 9 to 11 dogs that my clients experienced. I  
20 would submit that it's probably because she received notice of  
21 the foreclosure action and then decided, well, maybe it's time  
22 to participate in the legal process now, this is a  
23 foreclosure, and got rid of the dogs. Because, again, we're  
24 talking about municipal residential neighborhood, 9 to 11-plus  
25 dogs at any given point, large dogs, aggressive dogs. If this

1 new resident is not experiencing any of the problems my  
2 clients experienced, it's probably because the dogs aren't  
3 there anymore, Your Honor.

4 I know there's a lot more to it. I know the Court's got  
5 a lot to consider. Again, we've submitted the memorandum, and  
6 then that packet from the preliminary injunction hearing, Your  
7 Honor. I would just ask the Court to take all that into  
8 consideration.

9 THE COURT: All right. Thank you.

10 Any very brief response, Mr. Parker? We're almost at an  
11 hour for this motion, but I'll let you give a brief response.

12 MR. PARKER: Yes, sir. Very briefly.

13 Counsel has, on a number of occasions, referenced a  
14 package that was submitted in support of the -- I believe he  
15 said the temporary injunction hearing. And I just heard him  
16 ask you to go back and look at the package submitted at the  
17 injunction hearing.

18 I would submit to the Court that what may or may not have  
19 happened at the injunction hearing is irrelevant to the  
20 concept of whether the amount of this judgment was proved by  
21 the preponderance of evidence at the damages hearing.

22 Again, the Rennie Court and the various cases that have  
23 built upon that -- the Greely case being one of them -- say  
24 that the damages have to be proved by a preponderance of the  
25 evidence, and that happens at the damages hearing.

1           And, therefore, the record at the damages hearing is what  
2 -- is -- I mean, the judgment comes from the damages hearing.  
3 So the record there is what matters.

4           This package -- I do not see where that package was  
5 entered into evidence at the damages hearing, so I would  
6 submit that none of that is relevant to this Court's  
7 consideration.

8           The Greely case, at least as to the holding that counsel  
9 was talking about, you know, there are any number of cases  
10 that would say that the question about whether to grant relief  
11 or not is a very fact-specific thing. So each case is to be  
12 determined on its own.

13           I would also submit, Judge, that -- I mean, I looked real  
14 hard and I did not find -- that's not to say that there aren't  
15 a handful that exist out of the hundreds of these kinds of  
16 cases, but I did not find where there was ever a reversal of a  
17 grant of relief. That's a function of the fact that this is  
18 all within the sound discretion of the Court, which would not  
19 be overturned on appeal absent some abuse of discretion. And  
20 any kind of abuse of discretion would be an error of law or  
21 the lack of evidentiary support.

22           And in this case, Judge, we say that there is a lack of  
23 evidentiary support and so it would be an abuse not to grant  
24 the relief.

25           But the point is, is that that package, it ain't in

1 evidence. And, I mean, it's the plaintiff's job to make a  
2 record. And so the record is what the record is.

3 As to whether the defendant got mailings, the rules  
4 require that it be mailed to the last-known address. That  
5 clearly did not happen. And the question for the Court is not  
6 whether she got notice of an injunction hearing.

7 And as it relates to any of that stuff that happened at  
8 the injunction hearing, none of that is (A) relevant to the  
9 Court's consideration or (B) in the record.

10 And I would just say that all of the -- counsel's  
11 statements about how this happened and what happened here and,  
12 you know, who said what and what kind of recording was played  
13 and all of that, none of that is in the record. None of that  
14 is -- statements of counsel are not the record that's before  
15 the Court.

16 Last two things. Delay. It's sort of rich for the  
17 plaintiff to say, well, my client was dilatory on responding  
18 to the default judgment, when they did not serve her with it.  
19 So she did not know about it until this new case was filed.  
20 And, again, she filed this motion within a couple of months of  
21 that, and the reason for that was she had to -- she had to  
22 save money. She's a single working mother. She had to save  
23 money to pay her lawyers.

24 The Roush case, it does talk about the -- you can't  
25 complain about mailing (indiscernible) personal service. What

1 happened in that case was that the person was both personally  
2 served and there was a mailing, and he was complaining about  
3 the mailing when he admitted he was personally served. So, I  
4 mean, it's inapplicable to the case.

5 Judge, the record is what the record is, and the record  
6 requires the Court to set this thing aside and let these  
7 people have it out. You know, the dogs were either barking or  
8 they weren't. And they can either prove the correct measure  
9 of damages or they can't, but I think my client deserves that  
10 right.

11 Thank you again, Judge.

12 THE COURT: Okay. Let me take this under advisement.  
13 Review everything. Try to get something to you-all shortly.

14 And then, Mr. Parker, you have the two related motions  
15 for the foreclosure case, the Motion to Dismiss and the Motion  
16 to Amend?

17 MR. PARKER: Mm-hmm.

18 THE COURT: And that's Case No. 0187.

19 MR. PARKER: That's right, Your Honor.

20 THE COURT: You can go right ahead with it, Mr. Parker.  
21 I mean, obviously, we're familiar with -- and I've reviewed  
22 it. So, essentially, it's kind of dismiss or stay. It's kind  
23 of pending on this Motion to Set Aside; is that correct?

24 MR. PARKER: Pretty much. Two things stated in the -- in  
25 the motion. One, we asked the Court to dismiss the second

1 action on the basis of the authority cited in the motion  
2 relative to the idea that the proper way for the plaintiffs to  
3 collect on the judgment to the extent it's not set aside is by  
4 way of execution.

5 I spent some time trying to find reported cases that  
6 would -- where a judgment creditor brought a separate suit for  
7 foreclosure of the judgment lien against the judgment debtor.  
8 I did not find that.

9 What I did find is that the judgment creditor -- were  
10 cases that said a judgment creditor can bring a suit for  
11 foreclosure of a judgment lien where the judgment debtor no  
12 longer owns the property but the property is still subject to  
13 the lien.

14 The point being that the judgment itself is not in rem.  
15 You know, it's a personal judgment. It's not a judgment  
16 against the land. The execution process, you know, deals with  
17 various things, exemptions, and so forth.

18 And, again, the authorities cited in the motion stand for  
19 the proposition that the proper way of and the only way of  
20 collecting on the judgment is through the execution process.

21 At the end of the day, if the judgment is not set aside,  
22 this motion is not saying they don't get to collect. It is  
23 saying, however, that they don't get to do it through this  
24 separate action where the protections against or for the  
25 defendant aren't provided for. After all the -- you know, the

1 Court in an execution process can -- the plaintiffs could  
2 discover more about what she has and doesn't have and maybe  
3 the house doesn't get sold and maybe there's something else  
4 that happens, but that's the point of the dismissal motion.

5 Obviously, the stay part of it is self-explanatory.  
6 There's no -- I mean, what was happening at the time that the  
7 motion was filed is that the plaintiffs had already gotten the  
8 Master-in-Equity in Spartanburg somehow appointed a special  
9 referee, and it set a final hearing on the case.

10 And so the point of the stay was that, "Well, hey, let's  
11 don't sell the lady's house until the Court has the  
12 opportunity to hear her on the Motion to Set Aside the  
13 Default." I mean, you shouldn't sell a house in collection of  
14 a judgment that might ultimately get set aside. That's the  
15 point of that. I think that sort of goes without saying.

16 But that was the point of the motion there.

17 THE COURT: Okay. Thank you.

18 Yes, sir, Mr. Hunter.

19 MR. HUNTER: Thank you.

20 Judge, it's my understanding the Motion to Dismiss or  
21 Stay, you know, that was scheduled to be heard. This has been  
22 referred over to the special -- to the Master in Equity in  
23 Spartanburg acting as a special referee.

24 But, I mean, you know, Rule 53 says that independent  
25 basis that -- you know, it says, "Or an action for

1 foreclosure." That case belongs in front of the Master in  
2 Equity or, in this case, special referees for Union County, of  
3 course.

4 So I don't believe that the Motion to Dismiss is before  
5 you today, Your Honor. You know, I mean, if -- now Judge  
6 Phillips or you, Your Honor, would prefer that we go back to  
7 *nolo bono* and, you know, if the house ends up getting sold  
8 through supplemental proceedings, that's -- that's fine.

9 I've always viewed -- you know, Rule 69 says process to  
10 enforce a judgment for payment of money shall be a Writ of  
11 Execution unless the Court directs otherwise. I thought  
12 judgment of foreclosure was the Court directing otherwise.

13 But, at any rate, Your Honor, the -- you know, I think  
14 the foreclosure case -- now, of course, it's entirely  
15 dependent upon Mr. Parker's prior motion, but I think the  
16 foreclosure case is properly before Judge Phillips.

17 THE COURT: Okay.

18 Any brief response, Mr. Parker?

19 MR. PARKER: Yeah, Judge, because I think Mr. Hunter  
20 basically argued against the other motion that's pending,  
21 about the appointment of Judge Phillips, the Master in  
22 Spartanburg, as special referee for this Union County case.  
23 And so that motion is based on the idea that, you know, in  
24 this case, the defendant filed an Answer. So it is not a  
25 default matter where she does not get -- and the authority

1 cited in the motion stand for the proposition that she does  
2 get an opportunity to be heard on -- well, all right, so if  
3 we're going to refer it (A) is that something we should do and  
4 (B) if we are going to refer it, who are we going to refer it  
5 to?

6 To be frank with you, Judge, I didn't fully understand  
7 how it was that the Master-in-Equity in Spartanburg County is  
8 going to hear this Union County case. I mean, there's a  
9 statute that's cited in the motion that says that the hearing  
10 on the case must be heard in Union County because that's where  
11 the property is. I mean, what, are we going to have Judge  
12 Phillips drive from Spartanburg down here?

13 And, you know, it frankly just didn't make any sense to  
14 me where there are -- if we are going to refer it -- there are  
15 people in Union that can take the reference.

16 There's a former family court judge, Robert Guess, who is  
17 taking some of these references now. I believe the main  
18 person that takes references in Union is conflicted in this  
19 case. But, my point was, was that the people of Spartanburg  
20 County who are paying Judge Phillips, I don't -- I'm not sure  
21 how they get to be -- how it gets to be where they are  
22 subsidizing the litigants in Union County, and it just didn't  
23 make sense to me.

24 And so, it's for that reason that we objected to it. And  
25 mainly it's because, you know, the way it happened is there

1 was no notice to the defendant at all, even though she filed  
2 an Answer. Now, it'd be different if she didn't, but she did.  
3 And it just happened. And I only found out about it because I  
4 went looking. In other words, it wasn't something that was  
5 ever really served on her either.

6 And so we object to all of that and just ask the Court to  
7 set that aside and we can reconvene about whether we're going  
8 to refer it or not refer it if the Court doesn't dismiss this  
9 case because it needs to happen under -- the collection of the  
10 judgment needs to happen under supplemental proceedings or  
11 dismiss it all together because the Court ultimately sets the  
12 underlying default judgment aside.

13 THE COURT: Okay. Let me take this under advisement.  
14 I'll review everything on all these motions. And, again, I'll  
15 try to get something to you-all shortly on this one.

16 MR. PARKER: Thank you, Judge.

17 THE COURT: All right. Thank you.

18 (The above hearing concluded.)  
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20  
21  
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23  
24  
25

## Certificate of Transcriber

CASE NAME: Osten v. Malikowski

DATE OF HEARING: 9/15/25

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*Bobbi Fisher*

/s/ Bobbi Fisher

Bobbi Fisher, SC Official Court Reporter III, RPR

Transcript Prepared: 12/28/25

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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

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Appellate Case No. 2025-002219

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

v.

Sandra Malikowski.....Appellant

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CRTIFICATE OF COUNSEL

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I, the undersigned, certify that the above designation contains no matter which is irrelevant to the appeal and complies with Rule 210(g), SCACR.

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