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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

FINAL REPLY BRIEF OF APPELLANT

Kyle B. Parker
POPE PARKER JENKINS, P.A.
1508 College Street
P.O. Box 190
Newberry, South Carolina 29108
(803) 276-2532 (p)
(803) 276-8684 (f)
kyle@ppjlaw.com

Attorneys for Appellant

Newberry, South Carolina
August 20, 2026

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I. The Brief of Respondents and the Orders of the Trial Court Overlook That the Record Below is Devoid of Any Evidence That Appellant Received Notice of the Default Damages Hearing.

On pages 11-12 of the Brief of Respondents, it is asserted that "Appellant has put forth no evidence whatsoever that she did in fact not receive all notices and other correspondence issued from the office of Respondents' counsel."[1] Respondents misapprehend that Appellant does not bear the burden of establishing the notice required by Rule 55(b)(2), South Carolina Rules of Civil Procedure ("SCRCP"). It is instead Respondents' burden to show that Appellant received such notice. See McCall v. IKON, 363 S.C. 646, 611 S.E.2d 315 (Ct. App. 2005).

Rule 55(b)(2), SCRCP, requires a plaintiff to provide notice of any damages hearing in a default case to the defendant at the defendant's last known address. Here, Respondent's counsel "stipulated" on the record that he failed to provide notice to Appellant's correct address. (Transcript of Hearing, September 15, 2025, p. 26). This admission is fatal to the judgment. Dymon, Inc. v. Hyman, 305 S.C. 170, 406 S.E.2d 388 (Ct. App. 1991) (holding that default judgment without the required notice is void).

Service of a notice of hearing is effected "when a document is deposited with the U.S. Postal Service ***properly addressed*** with sufficient postage affixed." (emphasis added). Southbridge Prop., Inc. v. Jones, 292 S.C. 198, 355 S.E.2d 535 (1987). The record below clearly indicates that Respondents failed to establish that service of notice of the damages hearing was ever effected. In fact, Respondents' counsel admitted, on the record at the hearing, that the notice was addressed to an address which is ***"not a correct address."*** (emphasis added). (R., p. 139).

[1] This assertion is generally without merit as, apart from affirmatively stating under oath, as Appellant did in this case, that one has not received something, there can be no evidence presented to prove a negative.

When service is challenged, the record must affirmatively show that service of process was correctly made. Bakala v. Bakala, 352 S.C. 612, 629, 576 S.E.2d 156, 165 (2003). Obviously, that did not happen in this case. The proper action of the lower court upon receiving counsel's admission would have been to halt the hearing and require Respondents to again attempt to serve Appellant with notice of the hearing. Its failure to do so is reversable error. See Dymon, *supra*.

The Brief of Respondents further misapprehends that the purported evidence which they assert shows Appellant did receive notice of the damages hearing is no evidence at all, and even if it were, these items were never admitted in evidence or otherwise made a part of the record at the damages hearing. Respondents point to a copy of an alleged return receipt attached to a memorandum in opposition to Appellant's motion to set the judgment aside. An exhibit to a memorandum of counsel in opposition is not evidence of any kind. McManus v. Bank of Greenwood, 171 S.C. 84, 171 S.E.473 (1933) (noting that courts repeatedly have held "that statements of fact appearing only in arguments of counsel ***will not be considered***") (emphasis added); See also, *e.g.*, Gilmore v. Ivey, 290 S.C. 53, 348 S.E.2d 180 (Ct. App. 1986) (holding that "[f]actual statements of counsel, whether made during oral argument or in written briefs or memoranda, ordinarily may not be considered"). This is particularly true where the counsel's memorandum is in relation to a subsequent motion. Moreover, the alleged return receipt exhibited to the memorandum is in connection with the Respondents' service of notice of a previous and entirely different hearing (i.e., not the subject damages hearing)[2].

[2] Respondents, on pages 14-15 of their brief, arguing that the return receipt attached to the memorandum in opposition to Appellant's motion to vacate or set aside the judgment can be considered; however, Respondents overlook that the return receipt does not relate to notice of the damages hearing. Counsel represented to the trial court that it pertained to notice of a hearing held nearly a year before on Respondent's

Because counsel "stipulated" on the record that the notice of the damages hearing was mailed to an incorrect address and in light of the fact that there is no actual evidence in the record that Appellant received notice of the hearing, it was reversible error for the lower court to refuse to set the default judgment aside. Dymon, *supra*.

By asserting matters which do not appear in the record and surmising as to how the Respondents came to repeatedly incorrectly address correspondence to Appellant, Respondents go on to impermissibly argue that the post office surely knew who the letter containing the notice of the damages hearing was intended for despite the incorrect address. In so doing, Respondents ask this Court to simply assume Appellant received the notice, affirm the lower court, and allow them to execute on the resulting judgment by selling Appellant's home, all based entirely on this conjecture. Of course, this Court may not assume facts not in the record on appeal. Rule 210(h), South Carolina Appellate Court Rules ("SCACR"); See also, Johnson v. Pratt, 200 S.C. 315, 20 S.E.2d 865 (1942) (noting that "[i]t is not the province of this court, under this proceeding, to look beyond the evidence in this particular case and venture into fields of speculation as to what might occur under states of fact which are not in evidence.").

Following along the lines of this argument, Respondents' Brief cites to State v. Langston, 275 S.C. 439, 272 S.E.2d 436 (1980) and Calder v. Commercial Gas Co., 182 S.C. 241, 188 S.E. 864 (1936), for the proposition that Appellant's receipt of the notice of the damages hearing should be presumed. While neither case arises from or refers to any rule of civil procedure, both note that where the evidence is that a letter is "***properly*** stamped, ***addressed***, and deposited in the post office", a rebuttable presumption of receipt

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motion for a temporary injunction. Respondents fail to elucidate what any alleged receipt of one notice has to do with the other.

arises. Calder, *supra*. Clearly, where Respondents' counsel admitted on the record that the notice was incorrectly addressed, no such presumption is applicable in this case.

Nevertheless, Respondents assert that Appellant received notice of the damages hearing and then in just as conclusory of a fashion argue the underlying default judgment cannot be void because she received due process. They further conflate the fact that Appellant received an opportunity to be heard on her motion to vacate or set aside the judgment before Judge Coble with the lack of notice and opportunity to be heard at the damages hearing which gave rise to the judgment in the first place. Respondents cite no authority or make reference to the record in doing so, and for good reason: no such authority or portion of the record exists.

Instead, the law is clear. Entry of a default judgment without the required notice constitutes a depravation of due process rendering the judgment void. Dymon, *supra*. This Court should reverse the lower court, vacate the judgment and set aside the default.

II. The Brief of Respondents Misapprehends That Appellant Was Not Served With the Default Judgment.

On page 15 of their Brief, Respondents assert that Appellant cannot attack the measure of damages through a Rule 60, SCRCP, motion because she did not file an appeal. This is incorrect. Respondents overlook the fact that they never served Appellant with the default judgment. They did not incorrectly address a mailing enclosing a copy of it. They just never did it at all. Respondents do not even claim that they did. It is axiomatic that one cannot file an appeal of a judgment one has no notice of.

This Court, in the case of Smith Companies of Greenville, Inc. v. Hayes, 311 S.C. 358, 428 S.E.2d 900 (1993), held that relief under Rule 60, SCRCP, should not be considered a substitute for an appeal, "particularly when it is clear the party seeking the

relief could have litigated at trial and on appeal the claims made in the motion." The rule cited by Respondents is inapplicable to this case due to the fact that Appellant did not have notice of the damages hearing and was not served with the default judgment. She, therefore, had no opportunity to litigate any of the claims made in her Rule 60 motion, and as is evident from the authorities cited by Appellant in her brief, the decisions of our appellate courts are replete with cases in which a defendant is relieved from a default judgment for reasons relating to the amount and measure of damages.

Moreover, the Supreme Court in Renney v. Dobbs House, Inc., 275 S.C. 562, 566-567, 274 S.E.2d 290, 292 (1981), explicitly held that a defendant may challenge the award of damages in a default judgment where those "damages have been assessed improperly."

Respondents then inadvertently upend the previous argument by correctly noting that Appellant is entitled to relief from the judgment where she has shown one of the grounds for relief in Rule 60(b)(1), SCRCP. Paul Davis Sys. v. Deepwater of Hilton Head, LLC, 362 S.C. 220, 607 S.E.2d 358 (Ct. App. 2004). Here, in addition to the lack of notice and the other grounds recounted in her brief, Appellant has shown that the judgment rendered in this case outstrips the damages prayed for in the complaint and is based on facts that are beyond those alleged therein. By definition, the judgment is therefore the result of surprise and should be set aside.

This Court should reverse the trial court, vacate the judgment, and set the default aside.

III. The Brief of Respondents and the Lower Court Overlook the Fact That the "Summary of Damages" and "Packet" Referenced by Respondents' Counsel at the Damages Hearing Were Never Properly Made a Part of the Record Below.

Respondents claim on page 16 of their Brief that the lower court had a "summary of damages" and "packet" properly before it upon which it could base its judgment. That

this is without merit is exemplified by the fact that neither of these documents is in the record. The record and the transcript of the damages hearing show that Respondents never filed or submitted either of these mysterious documents into evidence. These documents, whatever they were, consequently, were not properly before the lower court and could not form the basis of the judgment entered in this case. After all, the rules of evidence apply even to a default damages hearing. See, Renney, *supra*.

The Renney Court made clear that notwithstanding a litigant's default, the trial and reviewing courts must scrutinize default judgments to ensure that they are based on a preponderance of the competent evidence provided at the damages hearing. Renney, *supra*, at 292. In this case, there was next to no testimony taken at the damages hearing concerning an amount of damages. There was likewise no testimony taken concerning what documents were contained in the "packet" or how the amounts of the various alleged damages were calculated or even what the specific elements of damages awarded were. A judgment based on a record like that simply cannot be sustained.

CONCLUSION

The Brief of Respondents and the lower court's orders overlook and misapprehend that the record does not support the entry or amount of the underlying default judgment in this case for the reasons identified in Appellant's brief and those stated herein. The Court should reverse the lower court, set the judgment aside, allow Appellant to answer, and remand the case for trial.

(Signature of Counsel Appears on the Following Page)

Respectfully submitted,

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
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