

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM SALUDA COUNTY  
Court of Common Pleas

Jocelyn Newman, Circuit Court Judge

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Appellate Case No. 2017-000198

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RECEIVED

FEB 21 2017

SC Court of Appeals

Amy Potts ..... Respondent

v.

McCarty Enterprises, LLC, John Miles McCarty,  
Audrey S. McCarty, a/k/a/ Audrey J. McCarty and Jane Doe...Appellants

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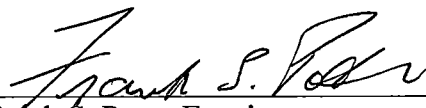
**MOTION TO DISMISS**

**To the Honorable Judges of the Court of Appeals:**

The Respondent in the matter herein would show that the Appellants' appeal is premature, interlocutory and not of a final judgment and would move that the appeal be dismissed with fees and costs assessed against Appellants.

In support of this motion the Respondent would reference the Order being appealed and in further support thereof would provide her memorandum of authorities in support of the motion.

Wherefore, the Respondent respectfully moves that this Honorable Court dismiss the appeal of the Appellants.



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Frank S. Potts, Esquire  
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(803) 622-6000  
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Attorney for Respondent

## Memorandum in Support of Motion

The appealed order of the Circuit Court is not a final judgment. Both the September 28, 2016 Order and the Order denying the Motion for Reconsideration of the September Order specifically note that, “This order... does not end the case.”<sup>1</sup> This is supported by the statement made by the Circuit Court at the time of the hearing.<sup>2</sup>

Generally, an appeal to this Court will be allowed only if there has been a final judgment. *See Hagood v. Summerville*, 362 S.C. 191, 194, 607 S.E.2d 707, 708 (2005). For the purposes of determining whether an order is appealable, “final judgment” refers to the disposition of all the issues in the case. *See Doe v. Howe*, 362 S.C. 212, 216, 607 S.E.2d 354, 356 (Ct. App. 2004).

This appeal is essentially an appeal prior to judgment from an order of the Circuit Court refusing to grant relief from the entry of default. It is an interlocutory appeal. *See Ateyeh v. United of Omaha Life Insurance*, 293 S.C. 436, 361 S.E.2d 340 (Ct. App. 1987). Since this appeal does not involve the merits of the case, but only the denial of a court to excuse the defendants from the entry of default, the appeal should be dismissed. *See Thynes v. Lloyd*, 294 S.C. 152, 363 S.E.2d 122 (1987) and *Jefferson by Johnson v. Gene’s Used Cars, Inc.*, 295 S.C. 317, 368 S.E.2d 456 (1988) (in the latter case noting the Court of Appeals reached the correct result in both *Thynes* and *Ateyeh*, *supra*, but improperly relied on Rule 72, *SCRPC*).

Since this appeal is interlocutory and no appeal can be taken until final judgment is entered – in this case a damages hearing – the rights of the parties have yet to be determined, the matter should not be heard pursuant to the *S.C. Code Ann.* § 14-3-30 (stating “no appeal [may] be taken until final judgment is entered”), the appeal should be dismissed. *See also, Ex Parte Wilson*, 367 S.C. 7, 12, 625 S.E.2d 205, 208 (2005) (“As a

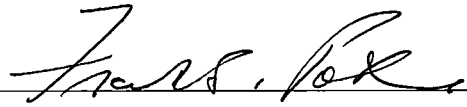
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<sup>1</sup> Order of Default and Order Denying Reconsideration. Exhibit A.

<sup>2</sup> Transcript of Hearing 40:17-21 (September 7, 2016). Exhibit B.

general rule, only final judgments are appealable... Any judgment or decree, leaving some further act to be done by the Court before the rights of the parties are determined, is interlocutory and not final.”).

The Respondent respectfully prays her Motion to Dismiss be granted.



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(843)327-1523  
evanlacke@lackelawfirm.com

February 16, 2017  
Leesville, SC

# EXHIBIT

# A

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

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2015 CP-41-0139

AMY POTTS

McCARTY ENTERPRISES, LLC; JOHN MILES

2016 SEP 28 PM 12:04

McCARTY; AUDREY S. McCARTY A/K/A AUDREY J.

McCARTY; AND JANE DOE

PLAINTIFF(S)

DEFENDANT(S)

CLERK OF COURT  
 SALUDA CO. S.C.

Submitted by:	Attorney for : <input type="checkbox"/> Plaintiff	<input type="checkbox"/> Defendant
	or	
	<input type="checkbox"/> Self-Represented Litigant	

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.  See Page 2 for additional information.
- 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
- 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: Plaintiff's Motion to Strike Amended Motion to Dismiss and Answer to Amended Complaint is GRANTED. Plaintiff's Motion for Entry of Default is GRANTED. Defendants are held in default pursuant to Rule 55(a), SCRPC. Plaintiff is ordered to provide notice to Defendants of any damages hearing that is scheduled, in compliance with Rule 55(b)(2), SCRPC.

ORDER INFORMATION

This order  ends  does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.





# EXHIBIT

# B

1 STATE OF SOUTH CAROLINA

2 COUNTY OF SALUDA

CIRCUIT COURT  
2015-CP-41-00139

3

4 AMY POTTS,  
Plaintiff,

5

-vs-

TRANSCRIPT OF RECORD

6

7 McCARTY ENTERPRISES, LLC,  
JOHN MILES McCARTY, AUDREY S.  
McCARTY a/k/a AUDREY J.  
8 McCARTY, and JANE DOE,  
Defendant.

9

10

11 Heard on Wednesday, September 7, 2016

12 Lexington, South Carolina

13

14 BEFORE:

15 THE HONORABLE JOCELYN NEWMAN

16

17 APPEARANCES:

18 Counsel on Behalf of the Plaintiff:  
Frank S. Potts, Esq.

19

20 Counsel on Behalf of the Defendant:  
Candy Kern-Fuller, Esq.

21

22

23 Cheri L. Young, RPR  
Circuit Court Reporter  
24 P O Box 5232  
Aiken, SC 29804

25

1 any number of things.

2 But the only competent evidence I have before  
3 me is that it was in fact mailed on May 31st which  
4 is beyond the deadline prescribed by Judge  
5 Keesley.

6 So I'm going to grant the Plaintiff's motion  
7 for default.

8 And to -- I guess I've already disposed of  
9 the motion to dismiss, but to strike the answer  
10 because the Defendants are in fact in default which  
11 then brings us to the discovery issue, the motion  
12 to compel, which I can rule on.

13 I don't know that it matters now because  
14 they're in default

15 MR. POTTS: I don't think it does, Your  
16 Honor.

17 THE COURT: Right. So, there will then be a  
18 damages hearing at some point in the future. The  
19 Defendant should receive notice of that hearing,  
20 date and time, so that they have the opportunity to  
21 show up and challenge the damages alleged.

22 But, but I just think the ball was dropped on  
23 this one for the second time.

24 Motion for default is granted.

25 Is there anything else on this case?

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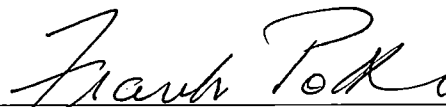
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Audrey S. McCarty, a/k/a/ Audrey J. McCarty and Jane Doe...Appellants

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**CERTIFICATE OF SERVICE**

I, Frank S. Potts, hereby affirm that on February 16, 2017, I deposited the Respondent's Motion to Dismiss with the United States Postal Service, first class postage prepaid, to the attorney for Appellants, Candy Kern-Fuller, Esq., at 200 East Main Street, Easley, SC 29640.



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Leesville, SC  
2/16/2017

# FRANK S. POTTS

ATTORNEY AT LAW

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February 16, 2017

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FEB 21 2017

SC Court of Appeals

Honorable Jenny A. Kitchings  
South Carolina Court of Appeals  
PO Box 11629  
Columbia, SC 29211

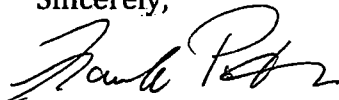
Re: Amy Potts v. McCarty Enterprises  
Appellate Case No. 2017-000198

Dear Ms. Kitchings:

Enclosed is the original and six copies of a Motion to Dismiss the above referenced appeal. Also enclosed is a Certificate of Service upon all counsel of record and a check for the filing of the motion in the amount of \$25.

If you have any questions about the enclosed, please don't hesitate to call me.

Sincerely,



Frank S. Potts

cc. Candy Kern-Fuller, Esq.  
Evan Lacke, Esq.

FROM:

AMY POTTS  
137 STONE RIDGE RD  
LEESVILLE SC 29070

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South Carolina Court of Appeals  
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