THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM SALUDA COUNTY
Court of Common Pleas
Jocelyn Newman, Circuit Court Judge

Case No. 2015-CP-41-139
Appellate Case No. 2017-000198

Amy Potts .....Respondent

v.

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

INITIAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

South Carolina Code Annotated

Rules

Other Authorities

STATEMENT OF ISSUES ON APPEAL

1. Did the court err by denying Appellants' motion to dismiss?

2. Did the Appellants' failure to timely respond to the pleadings and to provide legitimate responses prejudice the Respondent?

3. Did the court abuse its discretion by placing Appellants in default for failing to timely file their responsive pleadings in accordance with an order of the court?

4. Did the court abuse its discretion by relying upon compelling evidence that the Appellants failed to timely serve responsive pleadings?

5. Did the court err by denying Appellants' motion for reconsideration?

STATEMENT OF THE CASE

Introduction

This case arises from Respondent's claim that the Appellants conspired to cause her severe emotional distress by killing her beloved pet dog, Ruby, an Australian Shepherd. Respondent asserts that this was done in retribution against her for accidentally running over and killing Appellants' beloved pet Boston Terrier, Allie, three years prior. (Complaint ¶ 13) (Tr. Keesley at 19, 2-5)[1]. Ruby was killed by respondent John McCarty on or adjacent to his wife's property on March 25, 2015. (Complaint ¶ 12) (Appellants' Initial Brief at 1)

This appeal, however, is not about the killing of Ruby and the resulting harm to the Respondent, but about the repeated violations of the South Carolina Rules of Civil Procedure by the Appellants, and their blatant disregard for direct orders of the court, that have deprived the Respondent of her right to seek timely redress before a court of law.

In the two years since this case was filed, there have been a minimum of eight critical mailings or filings that have allegedly been either lost in the mail or delayed by poor mail service. There have been six requests for discovery - four were received over a year after proper service with objections that were considered "not legitimate" by the court. (Tr. Newman at 35, 10-12) The other two were never received at all. There have been two default hearings, the first

[1] There are two transcripts of hearings in this case. For the sake of clarity they will be referred to as "Tr. Keesley," (the first default hearing), and "Tr. Newman," (the second default hearing.)

resulting in an order of the court that was almost totally disregarded by counsel for Appellants, and a second that led to the entry of default that is being appealed to this Court today.

Procedural History

Respondent's initial complaint was filed on June 8, 2015, and was served by hand on the McCartys and McCarty Enterprises on June 14, 2015. Included in that service were interrogatories and requests for production directed to each of the Appellants except Jane Doe. (Complaint) (Affidavit of Service of Gary Landry, June 14, 2015)

The verified complaint set forth only one cause of action – civil conspiracy. It alleged damages in excess of $25,000. (Complaint ¶ 21) The Appellants' sole response to the complaint was a motion to dismiss. (Motion to Dismiss dated June 24, 2015)

The motion to dismiss set forth two grounds for dismissal of the complaint. The first was that "at all times alleged Defendants [Appellants], John McCarty, Audrey McCarty and Jane Doe, were employees and/or agents of Defendant [Appellant] McCarty Enterprises and a corporation cannot conspire with itself." (*Id.* at ¶ 1) The second basis was that *S.C. Code Ann.* 473-530 permits the lawful killing of a dog under certain circumstances. (*Id.* at ¶ 2)

On July 13, 2015, the Respondent filed and served her amended complaint and did not amend the first cause of action, but simply added a second cause of action - intentional infliction of emotional distress – against only the Appellant corporation, McCarty Enterprises. This second cause of action (as noted in the allegation) was supported by the fact asserted by opposing counsel in the motion to dismiss that all of the named Appellants were, "at all times," acting on behalf of the Appellant corporation. (*Id.* ¶ 1) (Amended Complaint ¶¶ 22 and 23) By the deadline of July 28, 2015, no response to the amended complaint had been received by Respondent or by the court. Appellant counsel later said she did not receive it.[2] (Affidavit in Opposition to Default dated April 25, 2016, ¶ 7)

By the discovery deadline of July 29, 2015, none had been received and no motions for protection had been served or filed by Appellants.

On August 3, 2015, counsel for Respondent mailed the following letter to counsel for Appellants (Letter of Frank Potts to Ms. Kern-Fuller dated August 3, 2015):

> Dear Ms. Kern-Fuller:
>
> On June 14, 2015 your clients were served with a summons, complaint, interrogatories, and requests for production. You responded on their behalf with a motion to dismiss the action dated June 24, 2015. Then on July 13, 2015, an Amended Complaint was served upon you.
>
> No motion for a protective order to suspend discovery in this matter has been sought or granted. Further, no objection has

[2] Nor was it returned to sender.

been made to any interrogatory or request for production. As a result, responses to the same are overdue since July 29, 2015 (45 days from date of service). Unless the full and complete response to the pending discovery is received by me by August 11, 2015, I will file a motion to compel the same, and will seek all fees and costs.

In addition, responsive pleadings are overdue to the amended complaint served upon you July 13, 2015. Unless I receive the same by August 11, 2015, I shall seek to have your clients placed in default – something I do not wish to do without notice in the event the failure to timely respond was due to your oversight.

With kind regards,

Frank S. Potts

Counsel for Appellants later said she did not receive the letter.[3] (Affidavit in Opposition to Default dated April 25, 2016, ¶ 7)

By August 18, having received no response from Appellant nor the discovery that had been due July 29th, Respondent filed a motion for default and to compel. (1st Motion for Default)[4]. Appellant counsel later said she did not receive the motion.[5] (Affidavit in Opposition to Default, April 25, 2016, ¶ 6)

The parties first met at a roster meeting at the Saluda County Courthouse on February 29, 2016. It was at this roster meeting that counsel for Appellants alleged that she had not received any of the three separate

[3] Nor was it returned to sender.

[4] This refers to the "Respondent's Motion for Default and to Compel Responses to Discovery..." dated August 18, 2015. This was the first of two motions for default filed in this case. For the sake of clarity they will hereafter be referred to as "1st Motion for Default" and "2nd Motion for Default."

[5] Nor was it returned to sender.

documents mailed by Mr. Potts – the amended complaint, the letter warning of default, or the motion for default and to compel. The presiding judge instructed the parties to have their motions heard by the administrative judge and suggested they speak to each other about settlement, which they did. The settlement discussion became contentious and became the basis for Appellant counsel's repeated complaints that the case had become "personal" and "emotional." (*Id.* at ¶ 8). All other interactions between opposing counsels since that settlement discussion have been professional and polite. (Tr. Keesley) (Tr. Newman)

Appellant counsel said that as she was preparing for this motion hearing on February 27th, she discovered online that an amended complaint and a motion for default had been filed, but she had never received either of them, and "even though you can see things online, you can't get copies online...." (Tr. Keesley at 15, 7-8) To the contrary, the documents are in PDF form and can be both viewed and printed at any time. Nor, apparently, did counsel obtain copies from the Clerk while she was on the premises of the courthouse on the 29th for the roster meeting. Instead, she later made erroneous claims that both Respondent counsel and co-counsel had promised her on the 29th to send her copies of the amended complaint, which both have denied by affidavit.[6] Thus, Appellant counsel blamed both opposing counsels for further delaying her ability to answer the amended complaint. (*Id.* at 17, 5-10)

[6] Affidavit of Evan Lacke dated May 3, 2016 and Affidavit of Frank S. Potts dated June 23, 2016, ¶ 12.

The eventual answer to the amended complaint was intended to be in the form of motions to dismiss and protect, which Appellant counsel claimed to have served on March 9, 2016. (*Id.* at 3-4) Oddly enough, and in light of the previous mail problems claimed in this case, the motion was never served on Respondent's counsel or co-counsel, nor was it received by the court; therefore, when the hearing of Respondent's motion for default was held before the administrative judge, the Honorable William Keesley, on April 28, 2016, the court would not hear those motions by Appellants because they had not been filed.[7] (*Id.* at 3-5).

As the first default hearing began, Appellant counsel submitted an affidavit to which Respondent counsel objected due to having not been served more than two days prior to the hearing as required by Rule 6, SCRCP. Appellant counsel stated to the court that the affidavit had been served at least two days prior as required. The affidavit was admitted over objection. (*Id.* at 10-11) (Affidavit in Opposition to Default dated April 25, 2016) Yet, about two days after the hearing, when Respondent counsel finally received the affidavit, he checked the tracking number on the postage label and found it had

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[7] That "missing in the mail" motion for protection was never filed, even though counsel had another chance after this hearing to file it. During the second default hearing before Judge Newman, counsel for the Appellants twice inferred to the court that there was an order for protection. She stated to the court that "one of the things we discussed at the last hearing was a motion for a protective order." (Tr. Newman at 31, 21-23) In fact, the only discussion that occurred was that no motion seeking protection existed in the file. Later counsel repeated to the court, "We had a motion for a protective order" (Tr. Newman at 35, 16-17). Further questioning by the court made counsel admit no order for protection had ever been issued, to which the court responded, "Filing a motion is simply a request," (Tr. Newman at 35, 16-25) What Judge Newman did not know is that such a motion was never even filed.

not been mailed until April 27th, the day before the hearing, and in violation of the rule. (2nd Motion for Default, Exhibits 5-6)

Most of the first hearing on default dealt with the issue of six incidences of "lost" documents – all of which had been either sent *to* Appellant counsel or *by* Appellant counsel, none of which had been returned to sender. They were:

1. Amended Complaint from Potts to Kern-Fuller
2. Letter warning of Default from Potts to Kern-Fuller
3. Motion for Default from Potts to Kern-Fuller
4. Motions to dismiss and for protection allegedly served by mail on March 9, 2015 (Tr. Keesley at 3-4) from Kern-Fuller to court
5. Motions to dismiss and for protection allegedly served by mail on March 9, 2015 (Tr. Keesley at 3-4) from Kern-Fuller to Potts
6. Motions to dismiss and for protection allegedly served by mail on March 9, 2015 (Tr. Keesley at 3-4) from Kern-Fuller to Lacke (co-counsel for Respondent)

As Judge Keesley observed in his subsequent order on April 28, 2016, "the sheer number of claims that things mailed have never been delivered is suspicious." (Keesley Order at 3 ¶ 3.)[8]

The other issue before Judge Keesley was that Respondent still had not received discovery responses that were, by that time, almost ten months overdue. (Tr. Keesley at 21-22). Respondent counsel argued that Appellants' counsel had missed her opportunity to move for protection or make objections to discovery under Rule 37. (*Id.* at 9) Nonetheless, the court allowed another opportunity for Appellants to do so. (Keesley Order at 7, ¶ 2)

[8] There two Orders involved in this case. One from Judge Keesley and the other from Judge Newman. These orders will hereafter be referred to as "Keesley Order" and "Newman Order."

In his order dated April 28, 2016, Judge Keesley denied the Respondent's motion for default, and ordered:

> "They [Appellants] have 15 days from the day that this order is mailed to the defense [Appellant] attorney by the Clerk of Court in which to file and serve their responsive pleading.
>
> The defendants [Appellants] are ordered to answer the outstanding discovery requests within 30 days from the date that this order is mailed to defense [Appellant] counsel by the Clerk of Court. While a good faith effort must be made to respond to discovery, nothing in this order prevents the defendants [Appellants] from raising objections to the discovery requests as permitted by the South Carolina Rules of Civil Procedure and applicable law." (*Id.* at 3-4)

Near the end of his order, Judge Keesley added:

> "Because of the strong disagreement that appears to exist regarding the sending and receiving of documents by mail, *the court asks the attorneys to use certified mail, return receipt requested*, to send any documents required to be sent to opposing counsel under Rule 5(a), SCRCP. This is not an order of the court, but a request to help eliminate the issues that have arisen so far." [9] [emphasis added] (*Id.* at 6)

Judge Keesley's Order was mailed by the Clerk of Court to the parties on May 11, 2016, making the deadline for responsive pleadings May 26th. (Tr. Newman at 20-21)[10] Respondent's counsel received an answer and a motion to dismiss the amended complaint on June 2nd, not via certified mail as requested

[9] Attorney for Respondent complied with this request in every instance. Attorney for Appellants did not.

[10] At least twice in the hearing Appellant counsel stated that mailing was on May 11 which made the deadline the 27th. This is a misunderstanding of rule 6(a). With mailing on the 11th, the deadline would be the 26th, not the 27th.

by Judge Keesley, but via U.S. Mail with untrackable indicia - a regular first-class stamp. (2nd Motion for Default, Exhibit 2) The envelope used for service to Respondent counsel was postmarked May 31st and contained a certificate of service dated May 25th. (2nd Motion for Default, Exhibits 2,3)[11] The pleadings were hand carried to the Saluda Clerk of Court and filed on May 31st. (Memorandum in Opposition to Default dated September 7, 2016, at 2, 7-10)

Of the six discovery requests – one set of interrogatories and one request for production to each of the three Appellants (John and Audrey McCarty and McCarty Enterprises, LLC.) – only four were received. None were ever returned from McCarty Enterprises.[12] The four items that were received were mailed well within the ordered deadline, but were comprised almost entirely of objections that were later characterized by Judge Newman to be "not legitimate." (Tr. Newman at 35, 10-13).

As a result of Appellant counsel's failure to follow the order of the court, and the continued inability of the Respondent to develop the facts necessary to have her case decided on the merits, counsel for the Respondent filed her Motion to Strike Amended Motion to Dismiss and Answer to Amended Complaint; for Entry of Default and to Compel Responses to Discovery.[13] The motion was filed June 24, 2016, and service to counsel for Appellants was

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[11] There are two motions for default in this case. For the sake of clarity they will be cited hereafter as "1st Motion for Default" and "2nd Motion for Default."

[12] Nor have reasons ever been given by counsel for why no responses to discovery have ever been provided by McCarty Enterprises.

[13] Referred to herein as the "2nd Motion for Default."

accomplished via U.S. certified mail, return receipt requested. (2nd Motion for Default) (USPS Certified Mail Receipt dated June 24, 2016)

The pending motions of both parties came to be heard in Lexington on September 7, 2016, before the Honorable Jocelyn Newman.[14] The first motion addressed was the Appellants' motion to dismiss the amended complaint. The motion was denied on all grounds. (Tr. Newman at 3-13) The second was Respondent's motions to compel discovery and hold the Appellants in default for failing to file and serve their responsive pleadings in accordance with Judge Keesley's Order of April 28th. No affidavits, exhibits, or any other evidence was offered by Appellants in opposition to Respondent's motions, affidavits, or exhibits, either prior to or at the hearing before Judge Newman, even though counsel had over two months to do so. (Certificate of Service dated June 24, 2016)

Following a lengthy hearing in which Judge Newman reviewed the evidence and heard argument, the court granted Respondent's motion for default pursuant to Rule 55(a), SCRCP. The Respondent was ordered to provide notice to Appellants of any damages hearing that was scheduled in compliance with Rule 55(b), SCRCP. The Court also noted that the order did not end the case. (Newman Order dated September 28, 2016).

On October 17, 2016, the Appellants filed a motion for reconsideration together with the affidavit of an employee of a postal facility other than the

[14] Judge Newman was assigned to this task by Judge Keesley, the Chief Administrative Judge.

Easley Post Office and the Main Greenville Post Office – the two facilities that actually handled the tardy mail in question. The motion to reconsider was denied by order of the court. (Newman Order denying Motion for Reconsideration, December 20, 2016)

This appeal was filed January 31, 2017. Respondent filed a Motion to Dismiss the appeal as premature, interlocutory, and not a final judgement on February 16, 2017. This motion was denied by the Honorable James Lockemey, though he did not preclude the right to raise the issue of appealability before the Court. (Order of Honorable J.E. Lockemey dated March 23, 2017).

Appellants' Initial Brief was timely filed and served on April 17, 2017.

ARGUMENT

Appellants' Initial Brief does not Conform to the Rules

Rule 208(b)(1)(C) of the South Carolina Rules of Civil Procedure clearly states that "the statement [of the case] shall not contain contested matters...", but the Appellants' Statement of the Case in the Initial Brief includes several instances of contested matter.

Contested Matters in Appellants' Statement of Case by Page

Page One:

In a section entitled "Factual background", Appellants present as fact several claims in regard to the killing of Ruby that are contested - claims which they, themselves, have prevented from being litigated by their failure to follow the rules of court and allow this case to proceed in regular order.

That Ruby was identifiable to the McCartys, that John McCarty killed Ruby on or near his wife's property, and that Respondent accidentally ran over and killed the McCartys' dog, Allie, in 2012, are uncontested facts. (Appellant Initial Brief, p. 1) (Tr. Keesley at 19, 2-5)

That Ruby had anything to do with an injury to Allie in 2010 or any subsequent injury to any animal on the McCarty property, or that any interactions occurred between the Saluda County Sheriff's Department and Respondent are contested and should not have been presented to this court as uncontested fact. (Appellants' Initial Brief, p. 1)

Pages Three and Four:

Appellant excerpts a statement Respondent counsel made to Judge Keesley:

> "...the certificate of service for the motion for default was signed by, and she's right here, a United States Postal Service employee who both checked for postage and the contents before it went in the mail and actually did the mailing." (Tr. Keesley at 8, 2-14) (Appellants' Initial Brief at 4, 2-11)

Respondent counsel was referring to Keeshone Johnson, an employee of the Saluda Post Office, but opposing counsel misunderstood, as later in the hearing she said, "I don't know who the U.S. Postal employee would be other than Ms. Potts and I don't know what happened to the mail." (Tr. Keesley at 15, 21-23) When, in the second default hearing, Appellant counsel told Judge Newman that the Respondent, Mrs. Potts, worked at a post office, Respondent's counsel immediately corrected her saying, "No ma'am. You've got it wrong." (Tr. Newman at 16, line 23)

The inclusion of this matter in an appellate brief makes no sense to Respondent counsel unless its intent is to cast aspersions on the credibility of her counsel. This is a trivial issue with no bearing on this appeal, but evidently it was important enough to Appellant counsel to include it in her brief. (Tr. Newman at 6) (Appellants' Initial Brief at 4).

Pages Four and Five:

In another part of her Statement of the Case Appellant says the following:

> "However, even with sending certified mail, respondent's counsel continually challenged the dates and times of the postal center receipts, alleging fraud in certificates of service and at one point inexplicably *alleging that Appellant's* [sic] *Counsel's staff* placed the item in the mail at 10:16 p.m. on April 27, 2016, two days after they actually mailed it on April 25, 2016, because that is when the post office processed it and entered into the certified mailing tracking system (as if counsel could control when the Post Office processed her mail.) [emphasis added.]

Appellants' counsel represents these items as certified mail, but they are not. They are first-class mail with tracking numbers, printed on the Stamps.com

system in Appellant counsel's own office. (2nd Motion for Default, Exhibits 5, 6, 7, and 7a)[15] Indeed, Appellant counsel never sent any certified mail to respondent at all until after the entry of default, and counsel has found them to be completely satisfactory.

Respondent counsel never alleged, "*that Appellant's Counsel's staff placed the item in the mail at 10:16 p.m. on April 27, 2016.*" Rather, in an affidavit, counsel simply related tracking information involving those items. Those after-hours times to which Appellant counsel refers here, reflect USPS scanning times, not mailing times. (Affidavit of Frank Potts, June 23, 2016, ¶ 10) (2nd Motion for Default, Exhibits 5 and 6)

These mailings represent the first time Respondent discovered certificates of service prepared by Appellant counsel containing inconsistencies with the actual dates of mailing as recorded by the USPS - the exact circumstance of the mailing at issue before Judge Newman in the second default hearing.

Page Five:

Appellant counsel refers to the objections made in discovery as "appropriate objections." One of the determinations made by Judge Newman was that these objections were "not legitimate." (Tr. Newman at. 35, 5-13).

[15] It should be noted that prior to Judge Keesley's request that counsel use certified mail, she routinely used first class mail with tracking in this case. It was only after the escape from the default, the knowledge that mail was a problem, and the resulting request by the court, that Appellant counsel then resorted to a manner of mailing that was not able to be tracked.

Page Seven:

Appellant counsel refers to an affiant as a "representative of the Greenville postal facility." (Appellant Initial Brief at 7, last ¶). This is deceiving. According to her affidavit (submitted after default), Latonya Chester is an employee of the Berea Post Office, which had nothing to do with any mail piece at issue in this case and should not be confused with the main Greenville Post Office, the facility that processes mail from the Easley Post Office and might actually have had pertinent information about lost or tardy mail in this case. (Affidavit of Latonya Chester, October 10, 2016, ¶ 2).

Request

Based on the five instances described above, Respondent asserts that the Appellants' Statement of the Case violates Rule 208(b)(1)(C), and respectfully requests that the statement be conformed to the rules.

The Motion to Dismiss Was Correctly Denied

At issue before Judge Newman was an amended motion to dismiss by the Appellants, and motions for default, to strike and to compel by Respondent. At the suggestion of counsel for the Respondent, and without objection by opposing counsel, the first motion heard was Appellants' amended motion to dismiss. (Tr. Newman at 2, 20-25) (Affidavit of Candy Kern-Fuller,October 17, 2016, Exhibit 1).

Although not cited, the motion is governed by Rule 12(b)(6) SCRCP and "the circuit court must base its ruling solely upon allegations set forth on the face of the complaint." *Charleston County School District v. Harrell,* 393 S.C. 552, 557, 713 S.E.2d 604, 607 (2011). "The motion may not be sustained if the facts alleged in the complaint and the inferences drawn therefrom would entitle the plaintiff to relief under any theory. Pleadings in a case should be construed liberally and the court must presume all well-pled facts to be true so that substantial justice is done between the parties." *Id.*

First Basis - Civil-Conspiracy

Appellant argued that Respondent's claim for civil conspiracy should be dismissed because at all times alleged the Defendants [Appellants], John McCarty, Audrey McCarty and Jane Doe, were employees and/or agents of the Defendant [Appellant] McCarty Enterprises and a corporation cannot conspire with itself. *McMillan v. Oconee Mem'l Hosp., Inc.,* 367 S.C. 559, 564, 626 S.E.2d 884, 887 (2006).

The transcript of the hearing shows the following exchanges on this point:

> THE COURT: ... but what I see is that while a corporation cannot conspire with itself, its agents as individuals are legally capable of conspiring among themselves. So, it's not just the corporation that is a Defendant in this case but there are individuals named as Defendants. And is it not the allegation that the individuals conspired with each other?

MS. KERN-FULLER: Well, Jane Doe is listed as, at all times as acting as an employee of the corporation.

THE COURT: There has to be some -- well, I'll read through the complaint again but there has to be some allegation of some individual otherwise I would guess they wouldn't be parties to the case. But, Mr. Potts, let me hear from you.

MR. POTTS: Well, if you would -- if I may, I think I can make it a little bit shorter for you so you don't have to read the whole complaint. But anyway, I'll tell you what is not there. What is not there is an allegation that Mr. McCarty, [or] his wife were acting for or as agents or employees of the corporation. They are being sued strictly as individuals.

THE COURT: Right.

MR. POTTS: Period. And the whole idea that this is all a corporate act, that may be true but it's up to them to prove it.

THE COURT: Right. Otherwise, Ms. Kern-Fuller, they wouldn't be named as parties in the complaint. I mean, you'd be moving to dismiss them from the complaint if there were no such allegation. It doesn't make sense otherwise.

(Tr. Newman at 10, 11-25 and at 11, 1-21).

Second Basis - Killing of an Identifiable Dog

Appellant counsel argued that the Appellant's killing of Respondent's dog is not an actionable matter. She maintained that the Appellants cannot be held civilly liable for the killing of Plaintiff's dog because of Section 47-3-530 of the *South Carolina Code of Laws, Annotated*, which she contends lawfully permits the killing of a dog that is "threatening to cause or causing personal injury or property damage."

In fact, the cited code specifies that the killing of an identifiable trespassing animal is a criminal offense. That the Respondent's dog was trespassing and was also identifiable by Mr. McCarty, and that Mr. McCarty killed her are uncontested. The behavior of the dog, which Appellants allege justified her killing, is contested as was recognized by the court:

> THE COURT: Well, several things. And I'll start at the very last. It sounds to me and I don't -- I don't know that that's admitted and maybe I've just not seen it in the complaint but if the Plaintiff does not admit that this animal was threatening to cause or causing personal injury or property damage you would be asking me to make a finding of fact that that was in fact the case. And I'm not in a position to do that. (Tr. Newman at 9-10)

A criminal statute pertaining to the stealing or killing of an identifiable dog is not relevant in this case. Whether or not the Appellant, John McCarty (the admitted shooter of Ruby) violated a criminal statute is not an issue. In *Ott v. Pittman*, 320 S.C. 72, 463 S.E.2d 101 (Ct. App. 1995). Mr. Pittman was charged with shooting Mr. Ott's dogs and killing one. He was tried and acquitted; however, this fact did not preclude Mr. Ott from bringing a civil action against Mr. Pittman and recovering a judgment against him for $19,800.

Third Basis - Intentional Infliction of Emotional Distress

The Appellants argued that the law limits a claim of intentional infliction of emotional distress to egregious conduct toward a plaintiff proximately caused by a defendant. Appellant counsel stated that it was not

enough that the conduct is intentional and outrageous, but that it would have had to have been directed at the Respondent, and the Respondent would have had to allege that it had been done intentionally to cause her emotional distress. (Tr. Newman at 12, 6-18)

At this point Respondent counsel referenced paragraphs 15, 16, and 19, from the Complaint to Judge Newman, including this allegation:

> 15. With the participation of the three defendants named and the corporate defendant, an understanding was reached between the defendants to facilitate the killing of the plaintiff's dog at the earliest opportunity in order to intentionally inflict severe emotional distress on the plaintiff for the loss of her beloved pet "Ruby." (Complaint at ¶ 15)

To which Judge Newman responded:

> THE COURT: Right. It's right there in paragraph 15. And, you know, as to whether it's egregious or not, again, I'm not in a position to make a finding of fact at this point that it was not egregious, certainly not on a motion to dismiss.
>
> So unfortunately I'm going to have to deny your motion to dismiss on all grounds. (Tr. Newman at 12, 24-25 and 13, 1-6)

The Respondent asserts that the record clearly establishes Judge Newman committed no error by denying Appellants' motion to dismiss.

The Motion for Default was Properly Granted

The Respondent's motion for default, to strike and to compel was based on a violation of the court's order to file and serve responsive pleadings by May 26, 2016. A false certificate of service, failure to respond to discovery as ordered, and the failure to respond to two of the six discovery requests at all,

exemplify a total lack of regard to the Respondent's right to have her case tried on the merits.

Not only has Appellant counsel insulted the Respondent, but she has insulted the court as well.

Near the end of the her brief, [16] Appellant counsel states, "Quite simply, Respondent has from the start wanted this case decided for her on technicalities... rather than have the matter decided on its merits..."[17]

Surely, if that had been the wish of the Respondent, then Appellant counsel has been extremely cooperative by ignoring the rules of court as well as its orders.

Notice to Counsel for the Appellants

Before a discussion of the evidence that was before Judge Newman on September 7th, as well as consideration of the evidence that was *not* before her, it is important to understand that the second motions for default and to compel were served upon Appellant counsel on June 24, 2016.[18] The issues that Respondent counsel would argue at the coming hearing and every piece of evidence in the file before the judge, was known to Appellant counsel for over two months before she appeared at the hearing on September 7th; yet, she

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[16] Appellants' Initial Brief at 23)

[17] If that were true, then why would Respondents counsel send a letter to Ms. Kern-Fuller reminding her that deadlines had been passed, and warning her that he would have to move for default unless she responded to him? He could have moved for default without contacting her and offering her more time to respond.

[18] Certificate of service dated June 24, 2016

neither served nor filed any evidence in opposition to the motion during that time nor did she attempt to do so at the hearing.

The Disputed Mailings

The Deadlines:

According to Judge Keesley's order, the deadline for filing and serving responsive pleadings was calculated to be May 26, 2016. (Keesley Order at 3-4) The order could have required only the service of responsive pleadings since a failure to serve pleadings in a timely manner is what raises the issue of default. The filing of responsive pleadings by a particular date is useful if one seeks proof that the documents were not neglected, forgotten, or disregarded, but that affirmative action was taken with respect to those documents by a particular date and time.

It is not disputed that the Appellants' responsive pleadings were filed, by hand, on May 31st, five days after the court's deadline had passed in violation of the explicit order of the court. (2nd Motion to Dismiss) (Defendants' [Appellants] Answer to Amended Complaint) (Memorandum in Opposition to Default dated September 7, 2016 at 2-10)

Appellant Counsel's Awareness of (alleged) Poor Mail Service for Six Years:

Throughout this case, Appellant has repeatedly relied upon the excuse that she believes there is an overriding problem with mail flowing through the Easley Post Office.

During the first default hearing in April of 2016, she said:

> I can assure the Court that from here forward, I will use a different method other than U.S. Mail to make sure that these are properly delivered to both Mr. Potts and the Court because apparently there is a problem.... (Tr. Keesley at 16-17).[19]

In a memorandum in September:

> Unfortunately this [having to call Easley Postmaster about lost mail] is a common occurrence for our local Post Office.... (Memorandum in Opposition to Default, at 2, fn. 1)

In the affidavit attached to her motion for reconsideration of default, counsel for the Appellants further expounded that she has been aware of the problem for six years prior to her use of the mail in this matter:

> As I further explained to the Court on September 7, 2016, since opening our practice in Easley, South Carolina in 2009, we have experienced numerous problems with the mail.... (Affidavit of Candy M. Kern-Fuller, October 17, 2016, at ¶ 5)

The Method of Mailing:

In his April 28th order, Judge Keesley strongly recommended that both parties use certified mail going forward. (Keesley Order at 6) Still, having just

[19] Appellant counsel did not disclose to Judge Newman at the second default hearing that she had made this promise to Judge Keesley at the first one.

escaped a finding of default, Appellant counsel alleges that in the "eleventh hour" before service was due, she sent her responsive pleadings to the court and to Respondent's counsels with untrackable regular first class stamps. (2nd Motion for Default, Exhibit 2). To understand how egregious this choice was one must first understand the mailing options available to counsel *in her own office, and not requiring a trip to the Post Office at all.*

Counsel for the Appellant uses a Stamps.com Postage Evidencing System to prepay postage for her mail, which provides the ability to print the paid indicia either on the item or on a label. (2nd Motion for Default, Exhibits 5 and 7) Stamps.com is one of only three authorized PC Postage Providers currently authorized by the USPS.

Through this system there are two basic types of labels that can be printed – dated or undated. All forms of dated indicia contain tracking numbers. All can be printed onsite and include a complete range of USPS options including: First Class Mail, Priority Mail, Parcel Post, Registered Mail, and Certified Mail. Since they all include dated indicia, they are required by the USPS to be mailed on the same day as the date printed on the item. It is not necessary for such dated mail to be taken to the post office, it can simply be placed in the sender's mailbox for regular daily pickup. The option exists to use the following day's date if the indicia is printed after the postman has already come that day. When an item sent this way is tracked, the earliest date shown in the tracking history is *not* the date of mailing, but rather the date the

postage was paid, and is described in the tracking history as "Pre-Shipment Info Sent to the USPS." The actual date of mailing is the next date shown (which is often at a time after the post office has closed for the day) and is described in the history as "Accepted at USPS Origin Facility," which is the date that indicates the actual date of mailing.[20]

The undated postage that can be printed by Stamps.com is for regular first-class stamps which are essentially like the stamps one can purchase at any post office. This is the *only* type of Stamps.com indicia that cannot be tracked. The USPS advises senders who might need proof of mailing for an item to take it to the post office and purchase a Certificate of Mailing by the clerk as the item is accepted for mailing.[21] Stamps.com recommends the same to its customers who might need proof of mailing.[22]

So it was, that when Appellant counsel appeared before Judge Newman, needing to explain a certificate of service dated May 25th paired with an envelope postmarked in Greenville on May 31st, an affidavit showing

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[20] Mail placed in a mailbox after the day's last pickup, may be scanned the next day.

[21] The U.S. Postal Service Domestic Mail Manual § 4, "Postage Meters and PC Postage Products." Available online at: https://pe.usps.com/DMM300/Index

[22] A Stamps.com customer help article entitled "Certificate of Mailing" states,

> "When you need to have proof that you've sent a letter or package - purchase a Certificate of Mailing.
> A Certificate of Mailing is a receipt that provides evidence of the date that your mail was presented to the Postal Service™ for mailing. It can only be purchased at the time of mailing. For this reason, Stamps.com does not allow customers to pay for the Certificate of Mailing using our software. Instead consider using Certified Mail as it includes a proof of mailing receipt as well as proof of delivery. "

https://stamps.custhelp.com/app/answers/detail/a_id/1063/~/certificate-of-mailing

Respondent counsel received the mailing on June 2, and an envelope suggesting the court may have received it on June 3, Appellant counsel was at a distinct evidentiary disadvantage – and through no fault but her own.

Not once during the second default hearing did counsel offer an explanation as to why she chose untrackable, first-class mailing with a stamp rather than the method recommended by the court, or one of the many other trackable methods available to her in her own office.

The (unnamed) Person Who Actually Did the May 25th Mailing:

Appellant counsel described before Judge Newman how her paralegal drops her mail off at the Easley Post Office after work each day:

> MS. KERN-FULLER: I watch my paralegal every day when she leaves. I follow her home. We both live in Anderson. She puts it in the post office. (Tr. Newman at 19, 4-6)
>
> I watch my paralegal every day put that mail in the post office because I follow her home. And I know when she says she put it in the post office on this day, because she leaves at five o'clock and she goes right past that post office. I know that she does. (Tr. Newman at 22, 21-25 and at 23, 1-2)

By the time she acquired an affidavit from a post office employee, LaTonya Chester, to attach to her motion for reconsideration, the time of mailing had changed:

> Turning to this particular customer's issue [Kern-Fuller], I understand that the customer ... that she placed three copies of the documents in her local post office (Easley) on May 25, 2016, in one of the drive-up outside boxes at or around 6:15 p.m." (Affidavit of LaToya Chester, October 10, 2016)

In fact, unless Appellant counsel put that mail in the box herself, she cannot be certain when it was mailed. Only the person who actually did the mailing could know for sure, and counsel never named or provided an affidavit from that person about when and where the items were actually mailed.

The Dates of Mailing:

There were two mailings of responsive pleadings at issue, one to Respondent and one to the Saluda County Clerk of Court.[23] Both were represented as having been mailed on May 25th. (Memorandum in Opposition to Default, September 7, 2016, at 1-2).

Respondent counsel produced the envelope in which he had received the documents, which bore a Greenville postmark of May 31st. (Motion for Default, Exhibit 2). He also produced an affidavit from an assistant at his office stating that the mailing was received at his office in downtown Columbia on June 2nd. (Affidavit of Renee Larsen dated June 15, 2016). This June 2nd date of receipt is far more consistent with a May 31st mailing than a May 25th mailing.

As for the mailing to the Saluda Clerk of Court, as Appellant counsel was explaining how the mail normally takes three days from Easley to Saluda, she said:

[23] There was also a mailing to Respondent's co-counsel in Charleston, but the postmark on the envelope he received was smeared, so of no use as evidence. His was also received on June 2nd.

> "Knowing this [that the mail would take three days], and the difficulties this case has faced, out of an abundance of caution,[24] the undersigned's office contacted the Saluda Clerk's office on Tuesday, May 31, 2016, to determine if they had received the filing."
> (Memorandum in Opposition to Default to Default at 2, 6-8). [25]

Discovering that the pleadings claimed to have been mailed May 25th, had not arrived at the Clerk's office by May 31st, counsel sent a runner to Saluda with the documents where they were hand filed and stamped with the May 31st filing date. (*Id.* at 2, line 10). Thus, no mailing dates are at issue in regard to the filing date – the filing was effected five days late.

The errant documents with attached check did show up in Saluda, after all, and the Clerk returned them as duplicative. (*Id.* at 2) One might consider that Appellant counsel could have procured some information to prove her May 25th mailing to the court - an affidavit from the Clerk of Court about when and how it was received, the original envelope with its May 25th postmark, the check register to compare the check number in sequence; but there was nothing provided to Judge Newman about when that mailing occurred, except the June 3rd envelope the clerk used to return the materials to Ms. Kern-Fuller, which actually contraindicates the claimed mailing date of May 25th. June 3rd is, in

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[24] Respondent observes no caution in these actions, much less an abundance thereof. Certified Mail would have been cautious. Any of the available forms of mailing with tracking would have been cautious. Sending the courier on May 25th or May 26th rather than May 31st would have been cautious, but, in light of the history of this case, Appellant counsel's actions have been negligent at best, reckless at worst, but certainly cannot be construed as *cautious*.

[25] If Appellants' counsel distrusted the mail to the extent that she could not trust a letter mailed from Easley to Saluda would arrive in six days' time, the question arises why it was sent as untrackable mail and not as the court suggested? Further, why was Respondent's counsel not queried at the same time?

fact, far more indicative of a May 31st mailing than a May 25th mailing. This evidence, withheld and not offered by Appellants, speaks volumes by its failure to be produced given a two month preparation time frame.

The Easley to Greenville Problem:

Appellant Counsel went to great lengths describing how the mail goes from Easley to Greenville, and that items collected from the box in Easley are not always postmarked in Easley, but rather in the sorting center at Greenville where it is processed:

> THE COURT: The issue that I have, frankly, is because of this tight time frame. Usually I agree that the rule says service is complete upon mailing but typically the evidence of the date of that mailing is the postmark on the envelope. And what do you want me to do with a May 31st postmark on this envelope?
>
> MS. KERN-FULLER: The May 31st postmark, Your Honor, is in Greenville.
>
> THE COURT: I see that.
>
> MS. KERN-FULLER: That's what's important is because we mailed it in Easley. We didn't mail it in Greenville. And so what happened and our certificate of service, our sworn certificate of service -- and what happened is we put it in the Easley Post Office. Whenever it went from Easley and -- to Greenville to the regional mailing facility is when that postmark got put on it. Now assume he's [Mr. Potts] correct and assume arguendo that Mr. Potts' theory is correct that it did not go in the post office box on the 25th like I have told you it did and we have sworn that it did. Assume that. On the 11th the order was mailed. Under Rule 6 you don't count the date of mailing. So you start on the 12th. Fifteen days from the 12th is the 27th[26] which is a Friday, the 27th. Monday was Memorial Day. So if it was put in the mailbox on a Friday

[26] This is incorrect. Omitting the date of mailing, the deadline was Thursday, May 26th.

under his theory and it got to Greenville the following Tuesday on the 31st and got postmarked, then it was still timely.

That's not what happened.

THE COURT: But it should be postmarked -- but it should be postmarked no later than the 27th. And particularly in these circumstances when you are facing potential striking of your answer or entry of default or whatever the consequences in this case, I don't understand why you wouldn't take it inside the post office and hand it to somebody and have it postmarked. I mean, my goodness. I do that when I mail my tax return on April 15th, not that it probably matters because people mail them the 16th, 17th, whatever, but I don't understand particularly given the climate in this case why that wouldn't happen. Why you are relying on a certificate of service dated six days before the postmark and you don't have an affidavit from anyone at the postal service. Maybe you could have, should have gone to the Easley Post Office and they say, hey, this is our process but –

MS. KERN-FULLER: I tried. I tried.

THE COURT: -- but certainly you're not an expert on the inner workings of the Easley Post Office, nor am I.

MS. KERN-FULLER: Yes, Your Honor.

THE COURT: And you want me to rely on your representations which may well be your understanding of it but may or may not be accurate.

MS. KERN-FULLER: I understand.

MR. POTTS: May I address the Court?

MS. KERN-FULLER: Your Honor, I do want –

THE COURT: Let her respond.

> MS. KERN-FULLER: -- to explain to the Court that I did go to the post office and try to get them to give me something and they refused.[27] [emphasis added]
>
> THE COURT: I'm sure. But the point is for whatever reason I don't have it.
>
> (Tr. Newman at 22, 13-14)

There was generous time given by Judge Newman to discuss the Easley to Greenville postmark quandry, and the record is now replete with documents discussing the same. What is not discussed anywhere is how it can take six days after being deposited in Easley for a mailing to be postmarked in Greenville. The real issue was not only the Greenville postmark, but also the *six days.*

In retrospect, one must marvel that with the many pieces of mail that must have been dropped in that Easley mailbox on May 25th, that two pieces would go astray on the same day. Further consider that both of those unlucky mailings were from the same sender, to two different addresses in two different towns. The odds are astonishing!

The Totality of the Mailing Evidence:

In short, what Judge Newman had before her was a party who had already escaped default once, had completely disregarded Judge Keesley's

[27] Counsel did not explain what she wanted the Easley post office to give her. It is hard to imagine that the postmarking of mail between Easley and Greenville would not be a routine issue for them.

recommendation about certified mailing[28], had violated the court-ordered deadlines, and who claimed that on May 25th she sent two separate mailings to two different addressees in two different towns, and direct evidence that neither arrived until June.

With all the evidence before the court being more consistent with a May 31st mailing than a May 25th mailing, and with the "only compelling evidence" she had before her being a postmark of May 31st (Tr. Newman at 23, line 25 to 24, line 1), it is not unreasonable that the mailing evidence before Judge Newman weighed heavily in favor of default.

The Court Applied the Correct Principles of Law

In the case of *Green v. Green,* 320 S.C. 347, 465 S.E.2d 130 (Ct.App. 1995) the court noted that while not dispositive, "the postmark date on an envelope is compelling evidence in cases where timely service through the mail is at issue...." *Id.* At 350, 465 S.E.2d at 132. In a South Carolina case heard by the Fourth Circuit Court of Appeals, the court noted that in cases of mailed notice or some other legally significant paperwork, "[i]n the context of mailing, there is usually some other objective evidence, such as a copy of the paperwork mailed, receipt of mailing, or proof of postmark that accompanies mailing." *First Professional Insurance Company v. Sutton*, 607 Fed.Appx. 276, 287 (4th Cir. 2015). The court also noted a situation analgous to that of the Appellant in this case (as was also noted by Judge Newman) that "the taxpayer is in the best

[28] Though she had the ability to send tracked mail without leaving her office.

position with the clock running to protect himself by procuring independent evidence of postmark and/or mailing, whether by mail receipt, corroborating testimony or otherwise." *Id.* Citing to *Serrentino v. IRS*, 383 F.3d 1187, 1195 (10th Cir. 2004). *See also Texas Beef Cattle Company v. Green*, 862 S.W.2d 812, 814 (Tx. Ct.App. 1993) where the court noted that with the facts before it *both* "the attorney's affidavit and a postage meter postmark does not overcome the presumption of date of mailing established by the U.S. postmark."

It should be noted that had the Appellant used a "postage meter postmark" on the system utilized by her office (Stamps.com) there would exist tracking information as to when the postage was printed (through the USPS), when it was accepted by the USPS and when it was received by any other USPS facility in transit (and the identity of each facility) and the date and time of actual delivery. However, in this instance the Appellant used the only means available in her system which avoided a tracking record for compliance with a court order.

The Filing Was Five Days after Court-Ordered Deadline

The filing of the pleadings was admittedly made by hand delivery to the Clerk of Court; thus, it cannot be contested that responsive pleadings were not filed with the court within 15 days of the Clerk's mailing of Judge Keesley's order to counsel for Appellants. (Keesley Order at 3-4) The filing was five days late.

Disregard of Discovery Order and Questionable Credibility

Of the six discovery items the court ordered to be completed in "good faith," Appellants responded to only four - two each from John and Audrey McCarty. No discovery whatsoever was received from the defendant corporation McCarty Enterprises. The discovery requests had been properly served on June 14, 2015. With no discovery having been provided in this case, none of the facts of the actual killing of the dog, Ruby, had been able to be litigated.[29] Of the 53 total interrogatories, only twelve had been superficially answered. The other 41 all contained the following identical and illegitimate[30] objection:

> *OBJECTION!* As this is [sic] matter's amount in controversy is less than $25,000, and this is not an action for declaratory or injunctive relief, Plaintiff may not ask interrogatories over and above the standard interrogatories pursuant to SCRCP 33(b)(9) without leave of court.

In trying to justify her objection, Appellant counsel blatantly and falsely represented to Judge Newman that, "Judge Keesley was a little suspect about

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[29] Yet, Appellant counsel, in clear attempts to bias, included a narration of "facts" in before every court and in almost every document she had prepared for this case, (including and especially in her Brief for this appeal) that were totally contested and largely uncited, and relegated to remain so due to her refusal to follow the rules of court and engage in discovery. A wise court once noted that

> [l]itigation at times can be trying. However, it is at the intersection of frustration and demand that the wise lawyer will check two axioms: (1) collegiality can displace cost, and (2) know the rules.

Pioneer Drive, LLC v. Nissan Diesel, 262 F.R.D. 552, 553-554 (D. Mont. 2004).

[30] Judge Newman characterized the objections as "not legitimate." (Tr. Newman at 35, 10-12)

the claim and he said, really, we're talking about $25,000. Really?" (Tr. Newman at 34, 8-10).

Then the following exchange ensued:

> THE COURT: Did he rule that the amount of controversy is less than 25,000 or --
>
> MS. KERN-FULLER: No, Your Honor.
>
> THE COURT: -- did you unilaterally make that decision?
>
> MS. KERN-FULLER: No, Your Honor. He didn't.
>
> MR. POTTS: Your Honor --
>
> MS. KERN-FULLER: No, he didn't.
>
> MR. POTTS: -- he did not mention that at all. And as a matter of fact, if she'll say it one more time I'll be happy to order a transcript
>
> MS. KERN-FULLER: We'll order a transcript. *He was talking about the claim being about a dog.* [emphasis added]
>
> THE COURT: Whether he mentioned it or didn't mention it, you agree that he didn't make any determination or finding that the amount in controversy was less than $25,000. It is pled in the complaint that it is in fact in excess of $25,000. And I don't think it is the place of any Defendant to unilaterally decide that the Plaintiffs are entitled to less. I'm sure your clients think they're not entitled to a thing. You would say it's worth zero dollars and zero cents. But that's not for the Defendant to determine. And absent some Court ruling -- and I say that because, that makes the objections not legitimate objections. You can't decide on your own that it's worth less than $25,000 and then refuse to answer because you've made that decision.
>
> (Tr. Newman at 34, line 11 – p. 35 line 12).

Appellant counsel, after attempting to represent otherwise, finally admitted to Judge Newman that no finding had been made by any court with regard to the amount in controversy. Since it was not until weeks after the hearing that the transcript of the hearing before Judge Keesley was obtained, Judge Newman could not have known that the transcript verified that, not only had the amount in controversy never been mentioned in any form by Judge Keesley (or anyone else,) but the word "dog" never once passed his lips. (Tr. Keesley)[31]

Respondent believes this entire representation by Appellant counsel to Judge Newman was fabricated as an excuse for insufficient and "bad faith" responses to Judge Keesley's order for discovery that had been properly served one year, two months, and twenty-seven days prior.

While Rule 33(b)(9) limits interrogatories if the "amount in controversy" is less than $25,000, the court correctly pointed out that the opposing party does not get to unilaterally decide the claim is not worth the amount claimed and refuse to respond to discovery. This issue was raised in *Gardner v. Newsome Chevrolet-Buick, Inc.*, 304 S.C. 328, 404 S.E.2d 200 (1991), where the court noted that the phrase "amount in controversy (as found in Rule 23(a)(5), SCRCP) is not defined in the South Carolina Rules or statutes and that there was no case addressing the issue. The *Gardner* court found "persuasive the rule

[31] Respondent's counsel has received no communication from Appellants' counsel correcting her false statements to the court as required by the rules. Rule 3.3(a)(1), RPC, Rule 407.

set forth by the United States Supreme Court for determining the "amount in controversy." The essential test is set forth as follows:

> The sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal. *Id.* at 331, 404 S.E.2d at 201.

Therefore, the Appellents' 41 objections were not permitted by the "South Carolina Rules of Civil Procedure or applicable law," and are in violation of Judge Keesley's order.

The Judge's Decision Was a Proper Exercise of Discretion

Though Judge Newman acknowledged that the "Court seeks to resolve cases on their merits and not on mere technicalities" she also noted that "an attempt has been made [by Respondent] to do that..." (Tr. Newman at 38, 9-13) and as far as the motion for default was concerned she continued:

> "the only competent evidence I have before me is that it [Amended Motion to Dismiss and Answer] was in fact mailed on May 31st which is beyond the deadline prescribed by Judge Keesley. So I am going to grant the Plaintiff's motion for default.
>
> ***
>
> THE COURT: Right. So, there will then be a damages hearing at some point in the future. The Defendant [Appellant] should receive notice of that hearing, date and time, so that they have the opportunity to show up and challenge the damages alleged.

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

Motion for default is granted.

(Tr. Newman at 40)

Applicable Standard

The standard for relief from an entry of default requires a party seeking relief to provide an explanation for this default and give reasons why it is in the interests of justice for the party to be permitted to respond. *See Sundown Operating Co., Inc. v. Intedge Industries, Inc.,* 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009).

The decision whether to set aside an entry of default lies solely within the sound discretion of the trial judge. *Stark Truss Co., Inc. v. Superior Construction Corporation*, 360 S.C. 503, 508, 602 S.E.2d 99, 101 (Ct. App. 2004).

The circuit court's decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion. *See Roberson v. Southern Finance of South Carolina*, 365 S.C. 6, 9, 615 S.E.2d 112, 114 (2005). An abuse of discretion occurs when the court issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support. *In Re Estate of Weeks*, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct. App. 1997)

There was no Sound Basis for Reconsideration

The reasoning of the court in denying Appellants' motion for reconsideration cannot be known. One factor may have been that it included information that was readily available to Appellant counsel long before the day of the hearing. A party is not permitted to use a motion to alter or amend to present to a court an issue a party could have raised or evidence which could have been presented but was not. (Rule 59(e), SCRCP). *Crary v. Djebelli*, 321 S.C. 38, 467 S.E.2d 128 (Ct. App. 1995); *Hickman v. Hickman*, 301 S.C. 455, 392 S.E.2d 481 (Ct. App. 1990).

Counsel's only affidavit was submitted on reconsideration and was a repetition of what she argued at the hearing. She added an issue - a seeming complaint complaint that the hearing was before Judge Newman at all - an issue which she had not mentioned previously and to which her own attached email exhibit showed she approved.[32] (Affidavit of Candy M. Kern-Fuller, October 17, 2016, at ¶ 4) (*Id.* Exhibit C) A party cannot use a motion to reconsider to present an issue that could have been raised prior to judgment but was not. No error of law was addressed by the Appellant counsel. *See Poch v. Bayshore Concrete Products,* 386 S.C. 13, 686 S.E.2d 689 (Ct. App. 2009),

[32] Because there are few terms of court in Saluda, and because this case had languished so long, Respondent counsel wrote Judge Keesley requesting a hearing in Lexington in order to help move things along. Judge Keesley assigned the hearing to Judge Newman, and as the emails provided by Appellant counsel show, all parties agreed and no objections were made. (Appellants' Motion for Reconsideration, Exhibit 1)

rehearing denied, certiorari granted, affirmed as modified 404 S.C. 359, 747, S.E.2d 757 (2013).

LaToya Chester, a twenty-year Post Office employee currently at the Berea SC Post Office, provided an affidavit in support of Appellants' motion for reconsideration. It was informative, but very general in nature and offered no information that was not available prior to the September 7 hearing; thus, it should have been procured and served at least two days prior to the default hearing before Judge Newman.

The Berea, SC Post Office - unlike the Easley Post Office and the Main Greenville Post Office - had nothing to do with the tardy documents at issue, and Ms. Chester had no firsthand knowledge of the items in question. Counsel for Appellants had already told Judge Newman at the September hearing, "I did go to the [Easley] post office and try to get them to give me something, but they refused." (Tr. Newman at 22, 11-12)

Ms. Chester does address how the US Mail works in general, and she confirmed Appellant counsel's assertion that items mailed in Easley may sometimes be postmarked in Greenville, but the same type of information supplied by Ms. Chester was available in more detail in the form of The U.S. Postal Service Domestic Mail Manual (DMM) , which is readily available to anyone with internet access. (https://pe.usps.com/DMM300)

CONCLUSION

The primary issue in this appeal is whether the lower court abused its discretion by determining that the Appellants were in default. An analysis of the evidence shows that the Appellants not only violated the rules of court, but also violated the court's order, even in regard to the requirement that they act in "good faith" after being given a second chance.,

As the record establishes, this all took place with counsel's full knowledge of (alleged) problems with the mail – problems that were used as an excuse – as well as a reason for counsel's assurances to Judge Keesley that such problems would not reoccur in this case.

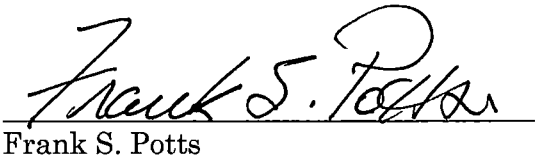
The Record overwhelmingly establishes that the Appellants showed a lack of good faith and candor before both judges, especially Judge Newman, in all aspects of this case. One's credibility is always at issue and on display, and counsel's responses throughout the hearing with regard to the issues before the court did not enhance her credibility.

The decision of the court in denying the motion to dismiss was not only correct as a matter of law, but, as the transcript clearly displays, was also well-reasoned by Judge Newman on every point. The motion to dismiss was of questionable merit, but Appellants used it as their excuse to disregard the rules of discovery and stall any forward progress of this case for almost a year.

The decision to grant the motion for default, given the status of the case, the obvious prejudice to the Respondent, and the compelling evidence of the

violations of the court's prior order, was an appropriate exercise of Judge Newman's discretion after hearing and judging the matter before her.

Judge Newman's decisions should be affirmed in all respects.



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June 19, 2017
Leesville, SC

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SALUDA COUNTY
Court of Common Pleas

Jocelyn Newman, Circuit Court Judge

Appellate Case No. 2017-000198

Amy Potts ..... Respondent

v.

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

PROOF OF SERVICE

I certify that on this day, June 19, 2017, I have served the Respondent's Initial Brief and Designation of Matter on the Appellants John McCarty, Audrey McCarty, McCarty Enterprises, LLC, and Jane Doe via USPS Express Mail, signature required, and addressed to their Attorney of Record:

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