THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM MARION COUNTY
Court of Common Pleas

The Honorable W. Haigh Porter, Special Referee

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SC Court of Appeals

Case No. 2015-CP-33-280
Appellate Case No. 2016-000956

PARTNERS 95, LLC and HSGCHG Investments, LLC ..... Respondents,

v.

Riverdale Funding, LLC and Woodbridge Mortgage Investment Fund 3, LLC ..... Appellants.

FINAL BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

Appellants have appealed the Order of the Honorable W. Haigh Porter, Special Referee for Marion County, dated April 6, 2016, filed with the Clerk of Court for Marion County on April 7, 2016 (the "Final Order"). Appellants contend that the Special Referee erred in awarding Respondents actual damages in the amount of $38,184.20 and punitive damages in the amount of $35,000.00 for a total judgment of $73,184.20.

This matter was commenced by the filing of the Summons and Complaint on March 17, 2015. (Compl.) (R. pp. 30-41). Thereafter, Riverdale Funding, LLC ("Riverdale") and Woodbridge Investment Fund 3, LLC ("Woodbridge") were served via their registered agent on March 19, 2015. (Affidavits of Service and Certificate of Service) (R. pp. 42-45). After more than thirty (30) days elapsed, an Affidavit of Default was filed with the Court on May 8, 2015, which was also served on Riverdale and Woodbridge's (collectively "Appellants") registered agent. (Affidavit of Default and Certificate of Service) (R. pp. 46-51). On August 10, 2015, Respondents filed their Notice of Motion and Motion for Order of Reference and served Appellants' registered agent with this motion and accompanying proposed order. (Motion for Order of Reference and Order of Reference with certificate of service) (R. p. 1). On October 16, 2015, Respondents filed their Notice of Hearing which was also served on Appellants' registered agent.

In an apparent response to the Notice of Hearing, Appellants filed a Motion to Set Aside Default and an Affidavit of Eugene Rubenstein, which was denied by order dated December 16, 2015, filed of record on December 29, 2015 ("Default Order"). (Default Order) (R. pp. 2-6); (Affidavit of Eugene Rubenstein) (R. pp. 52-56).

On February 8, 2016, a default damages hearing was held before the Special Referee. At the Special Referee's request, Respondents submitted a summary of damages which were proven at the damages hearing. (February 10, 2016 Letter) (R. pp. 65-66). Thereafter, the parties extensively

briefed the issue of damages, including punitive damages. Appellants submitted the "Response to Plaintiffs Partners 95, LLC and HSGCHG Investments, LLC's Presentment of Damages" on February 29, 2016 and their "Response to Plaintiffs Partners 95, LLC and HSGCHG Investments, LLC's Memorandum of Law in Support of Plaintiffs' Damages" on March 4, 2016. Respondents submitted their "Memorandum in Support of Damages" on February 29, 2016. The Final Order followed on April 7, 2016.

Thereafter, Appellants filed several post-judgment motions which were ultimately denied. This appeal followed.

STATEMENT OF FACTS

On December 9, 2014[1], Riverdale issued a Loan Commitment letter ("Commitment") to Respondents, under which Riverdale agreed to lend Respondents One Million Nine Hundred Thousand and 00/100s Dollars ($1,900,000.00) (the "Loan") for the acquisition and development of certain real property in Marion County (the "Marion County Property"). (Compl. ¶¶ 7, 8) (R. p. 34). The Commitment provided that Defendants would pay a commitment fee of $114,000.00 of which $19,000.00 was paid in advance. (Compl. ¶ 9) (R. p. 35). The Commitment further provided that if the loan did not close "as a result of the default or failure by Riverdale Funding, its successors and/or assigns, said advance commitment fee shall be returned to the Borrower in full without offset." (February 8, 2016 hearing Exhibit 13 at 2) (R. pp. 264-265). The advance commitment fee was retuned by Defendants to Plaintiffs without offset, acknowledging their default. (February 8, 2016 Transcript P. 42, L.22- P.43 L.6) (R. p. 181, line 22 - p. 182, line 6). Pursuant to the terms of the Commitment, the Loan was set to close on or before January 12, 2015;

[1] The Commitment contains a date at the top of December 9, 2014, and by defaulting and as found by the Special Referee, date of December 9, 2014 was established. It should be noted however, that Appellant Riverdale, and not Respondents issued the Commitment which contains a date of December 9, 2014.

however, the parties knew, at the time of the execution of the Commitment, that Plaintiffs had to close the Loan and purchase the Property no later than December 31, 2014 to avoid a significant price increase. (Compl. ¶ 11) (R. p. 35). Prior to Closing, Riverdale transferred and assigned the Commitment to Woodbridge who was to be the owner and holder of the promissory note, mortgage and other loan documents. (Compl. ¶ 14) (R. p. 35). Woodbridge is a related entity of Riverdale and share common ownership. (Compl. ¶ 15) (R. p. 35)(Affidavit of Eugene Rubenstein ¶ 2, 14) (R. p. 52, 54).

Throughout the month of December 2014, the parties worked together towards closing the Loan including negotiating loan documents, exchanging numerous e-mails about the Loan, and coordination of the Closing which was to take place at the offices of Fidelity National Title Insurance Company in Florida. (Compl. ¶ 12) (R. p. 35). Plaintiffs hoped to purchase the Property from the seller Wells Fargo for $1,000,000, but in order to honor this price, Wells Fargo insisted that the property be purchased by December 31, 2014. (February 8, 2016 Transcript P. 5, L. 19-21) (R. p. 144, lines 19-21). The Closing was scheduled for December 30, 2014, with recordation to occur on December 31, 2014. (Compl. ¶ 16) (R. p. 36). On the morning of December 30, 2014, Mike Tighe, the attorney who represented Respondents in the loan transaction, received over twenty closing related emails from the Appellants' counsel in Connecticut prior to 12:07 p.m. (February 8, 2016 Transcript P. 24, L. 16-19) (R. p. 163, lines 16-19). Approximately an hour prior to the hour appointed for closing, Robert Hartmann, guarantor and member of the Respondents, arrived at the Fidelity office to execute the Loan Documents to which all the parties had agreed. (Compl. ¶ 18) (R. p. 36). At 12:07 p.m. on December 30, 2014, without warning, Mr. Tighe received a copy of an email directed to a representative of Fidelity National Title from Mr. Roberts, the Defendants' counsel, instructing the title company not to allow Plaintiffs to execute

the closing documents. (February 8, 2016 Transcript P. 8, L. 17-22) (R. p. 147, lines 17-22); (February 8, 2016 hearing Exhibit 1)(R. p. 229). Mr. Tighe immediately responded to Mr. Roberts inquiring, "Is there a problem?" He received no response. (February 8, 2016 Transcript P. 9, L. 16-22; P. 10, L. 4-6) (R. p. 148, line 16 – p. 149, line 6). Mr. Tighe later emailed Mr. Roberts again stating, "Rich: I need you to call me. I called for Larry but could not get him. Does your client know my client is going to lose $300,000 if we don't close today?" (February 8, 2016 Transcript P. 10, L. 15-25; P. 11, L. 1-25) (R. p. 149, line 15 – p. 150, line 25); (February 8, 2016 hearing Exhibit 3)(R. p. 233). As Mr. Tighe testified, the purpose of this email to remind "Mr. Roberts that the purchase price from the [Marion County Property] would go up by $300,000 if we did not close the purchase transaction by the 31st." (February 8, 2016 Transcript P. 11, L. 12-16) (R. p. 150). As of the date of the hearing, Mr. Tighe had not received any response to his calls and emails to Mr. Roberts inquiring as to the reasons for Defendants' failure to close. (February 8, 2016 Transcript P. 10, L. 10-14)(R. p. 149).

While the Respondents ultimately found another source of funding from Avatar Financial Group (the "Avatar Loan"), the Respondents have suffered damages because they have incurred additional expenses that were required by Avatar and were not required by Defendants including but not limited to liability insurance premiums, brokers' price opinions, title abstract work, and additional attorney's fees. (February 8, 2016 Transcript P. 17-19)(R. pp. 156-158). As a result of the Defendants' failure and refusal to close the transaction as contemplated in the Commitment, Respondents were unable to purchase the Marion Property by December 31, 2014 as agreed in their contract with the Seller. Respondent paid $10,000 in legal fees for the legal work to prepare for the original closing to be funded by Woodbridge. (February 8, 2016 Transcript P. 15-16)(R. pp. 154-155). Also as a result of the Closing failing to occur on December 30, 2014, Respondent

suffered damages from an increase in price for a sign. (February 8, 2016 Transcript P. 49-50, L. 1-14)(R. p. 188, line 1 – p. 189, line 14). In order to take advantage of a year end promotion which was offered, Respondents must have had an executed contract with Advantage Sign Company, or suffer a significant price increase. (February 8, 2016 Transcript P. 82, L. 5-14)(R. p. 221). The sign was put up initially in May of 2015, but then the top portion had to be removed because of deflection[2]. (February 8, 2016 Transcript P. 77, L 23-25; P. 78, L. 10-13) (R. p. 216, line 23 – p. 217, line 13).

Respondents paid other fees for the loan with Appellants that were not required for the replacement loan. These include insurance required by Appellants and the cost of appraisal for the loan with Appellants. (February 8, 2016 Transcript P. 15-16) (R. pp. 154-155).

Appellants' intent in breaching the Commitment was fraudulent as evidenced by their behavior leading up to breach including but not limited to its negotiation of terms in loan documents, correspondence between counsel, and its failure to communicate with Respondents' counsel after 12:07 p.m. on the day of Closing. (Compl. ¶ 31) (R. p. 37). Appellants made false representations that they would loan Respondents funds for the acquisition and development of the Property, and that there were not outstanding contingencies for the Commitment. (Compl. ¶¶ 31, 41, and 43) (R. pp. 37-39). As Mr. Hartmann testified, it was his impression that Appellants did not have the money to close the loan, and therefore cancelled the closing. (February 8, 2016 Transcript P. 57 L. 23-25) (R. p. 196, lines 23-25).

ARGUMENTS

I. APPELLANTS HAVE FAILED TO PRESERVE FOR APPELLATE REVIEW MANY OF THEIR ARGUMENTS.

[2] Contrary to Appellant's assertions on page 7 of their Brief, "they didn't have to replace the poles." (February 8, 2016 Transcript P. 82, L. 2-3).

In their Brief, Appellants make many arguments that concern issues not preserved for appellate review. First, Appellants argue that Respondents failed to plead entitlement to actual damages (Appellants' Brief at 9-14) and Respondents failed to plead ultimate facts to support a punitive damages award (Appellants' Brief at 27-29). However, Appellants failed to object at the hearing to the introduction *any* evidence on the basis that it was outside the facts pled in the Complaint. See generally (February 8, 2016 Transcript) (R. pp. 140-228).

Appellants also argue that the punitive damage award violates the 14th Amendment for two reasons. As set forth more fully below, these arguments are also not preserved for appellate review.

An appellant may not argue one ground at trial and an alternate ground on appeal. State v. Dunbar, 356 S.C. 138, 587 S.E.2d 691 (2003). In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the lower court. Anonymous v. State Board of Medical Examiners, 323 S.C. 360, 473 S.E.2d 870, 879 (Ct. App. 1996). It is the responsibility of counsel to preserve issues for appellate review. E.g. State v. Rivers, 411 S.C. 551, 555 n.2, 769 S.E.2d 263 n2 (2015). (Reminding the bar that "our appellate courts have consistently refused to apply the plain error rule and it is the responsibility of counsel to preserve issues for appellate review"). If a party fails to object to testimony when it was initially offered, the party waives their right to argue error on appeal. Campbell v. Jordan, 382 S.C. 445, 453, 675 S.E.2d 801, 805-6 (Ct. App. 2009) (citing City of Greenville v. Bryant, 257 S.C. 448, 454, 186 S.E.2d 236, 238 (1972) (stating that failure to timely object to introduction of evidence constituted waiver of argument on appeal) and citing Parr v. Gaines, 309 S.C. 447, 481, 424 S.E.2d 515, 518 (Ct. App. 1992) (quoting "[a]lthough limited exceptions exist, objections to the admission of evidence must be made when evidence is presented at trial to preserve the error for appeal")).

The record must show that the issue was raised to the trial court, and any issue not raised to and ruled upon by the trial judge is not preserved for appeal. Zaman v. S.C. Bd. Of Med. Examrs., 305 S.C. 646, 594 S.E.2d 462 (2004); I'On v. Town of Mount Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000) (stating that parties should raise all necessary issues and arguments to trial court and attempt to obtain a ruling).

Failure to make a proper contemporaneous objection to the admission of evidence cannot be later bootstrapped to a post-trial motion. State v. Lynn, 277 S.C. 222, 226, 284 S.E.2d 786, 789 (1981) ("failure to contemporaneously object to the question [appealed from] cannot be later bootstrapped by a motion for mistrial"); Solley v. Navy Fed. Credit Union, Inc., 397 S.C. 192, 203, 723 S.E.2d 597, 602 (Ct. App. 2012) ("The [Defendant] first raised this issue in its Rule 59(e), SCRCP, or in the alternative Rule 60(b), SCRCP, motion to reconsider and to set aside judgment, after damages were awarded and the default judgment had been entered . . . [a]ccordingly, this issue is not preserved for our review.").

These preservation rules apply to appeals from special referees, see Springob v. Farrar, 334 S.C. 585, 514 S.E.2d 135 (Ct. App. 1999) (cert. denied), and to constitutional arguments made for the first time on appeal. See Durlach v. Durlach, 359 S.C. 64, 596 S.E.2d 908 (2004) (due process claim raised for the first time on appeal not preserved).

Furthermore, a general objection will not suffice. "Ordinarily, a general objection which does not specify the particular ground on which the objection is based is insufficient to preserve a question for appellate review." State v. Taylor, 333 S.C. 159, 508 S.E.2d 870 (1998);4 C.J.S. Appeal & Error § 215 (1993). An objection should be sufficiently specific to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the trial judge. See S.C. Dept. of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 641 S.E.2d 903 (2007); see

also Jean Hoefer Toal, Shahin Vafai & Robert A. Muckenfuss, Appellate Practice in South Carolina 65 (2nd ed. 2002) ("The objection must be sufficiently specific to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the trial judge").

A. Appellants Failed to Preserve their Argument that Respondent Failed to Properly Plead.

Appellants argue that the Complaint fails to state a cause of action for breach of contract accompanied by a fraudulent act. (Appellant's Brief at 9-10, 14). Appellants also argue that Respondents failed to plead ultimate facts to support a punitive damages award (Appellants' Brief at 27-29). However, Appellants failed to object, make a motion for dismissal or otherwise address these arguments at or prior to the hearing held on February 8, 2016. *See* (February 8, 2016 Hearing Transcript)(R. pp. 140-228). All that Appellants argued at the hearing is:

> Ms. Hill: I think the law is well settled that they have to prove their damages even if we were in default, and they have to prove them with specificity, and they have to prove them to a preponderance of the evidence. And in this situation I don't believe they have proven, met their threshold for punitive damages. I have arguments as to the other damages as well, but certainly punitive damages.
>
> They haven't proven that there was any fraud. They haven't proven that that was – that actually occurred. So, you know, they didn't prove that they've hit all the contingencies in the letter. You know, had they hit all the contingencies, perhaps there would have been but they haven't proved that, in order to prove their damages. So that's our position at least with regard to the punitive damages.

(February 8, 2016 Hearing Transcript P. 84-85) (R. pp. 223-224).

Appellants simply argued that Respondents failed to *prove*, rather than *plead* their damages. While a default does not waive an objection that the complaint does not state facts sufficient to state a cause of action, Masters v. Rodgers Development Group, 283 SC 251, 254, 321 S.E.2d 194, 196 (1984), failure to timely object does waive such an objection. It was not until their post-trial briefing that Appellants, for the first time and in an attempt to boot-strap arguments not previously presented, made any sort of argument as to the adequacy of Respondents' pleading.

Appellants failed to object contemporaneously, but waited until post-trial to complain, therefore failing to preserve these issues. Campbell, 382 S.C. at 453, 675 S.E.2d at 805-06; Lynn, 277 S.C. at 226, 284 S.E.2d at 789. Now on appeal, Appellants argue that the cause of action was not properly pled and that the punitive damages were not properly pled. These arguments are not preserved for appellate review.

Additionally, at the hearing, Appellants failed to object to the admission of any evidence which they now contend is outside the pleadings in this action[3]. See (February 8, 2016 Transcript) (R. pp. 140-228). To the extent Appellants now complain to the admission of that evidence, that argument is likewise not preserved for appellate review. Therefore, Appellants waived any complaint as to the facts introduced at the hearing, without objection, being outside the facts plead in the Complaint. Campbell, *supra.* This is not a situation in which the party now appealing a lower court's order did not participate at the hearing. To the contrary, Appellants fully participated in the hearing through counsel by cross examining witnesses, and allowing evidence to be introduced without objection.

B. Appellants Failed to Preserve their Argument that the Punitive Damages Award Violates Lenders 14th Amendment Rights and Violates the South Carolina Constitution.

Appellants argue on appeal that the special referee's award of punitive damages violates the Lenders' 14th Amendment rights because Respondents failed to distinguish between the individual lenders. (Appellants' Brief at 33-38). Appellants additionally argue that the punitive damage award is excessive. (Appellants' Brief at 38-40). Appellants argue that the Special Referee's failure to apportion the punitive damages award between Respondents violated the procedural due process provided by Section 3 of the South Carolina Constitution because it did

[3] As discussed more thoroughly *supra*, a litigant must plead the ultimate facts which will be proved at trial, not the evidence which will be used to prove those facts. Clark v. Clark, 293 S.C. 415, 416, 361 S.E.2d 328, 328 (1987).

not impose punitive damages on the basis of individual culpability. (Appellants' Brief at 40). These arguments, however, were not made at the February 8, 2016, hearing, and were not included in Defendant's Response to Plaintiffs' Presentment of Damages or in Response to Plaintiffs' Memorandum of Law in Support of Plaintiff's Damages. Appellants raised these issue for the first time in their post judgment Memorandum Pursuant to SCRCP 52, 59, 60, and 62. Prior to the judgment, neither argument was ever presented to the Special Referee for a ruling. Consequently, the arguments are not preserved for appeal and should not be considered.

In their Response to Plaintiffs' Presentment of Damages dated February 25, 2016, Appellants fail to raise the issue of punitive damages at all. In their Response to Plaintiffs' Memorandum of Law in Support of Plaintiff's Damages dated March 1, 2016, Appellants argue that Respondents failed to show they are entitled to punitive damages. Although this Response raises the issue of punitive damages, it did not raise it for the same reasons argued on appeal. Here, Appellants are attempting to argue one ground at trial and another on appeal. Furthermore, at the February 8, 2016, damages hearing Appellants objected to punitive damages but they did so generally. When the court asked council for the Appellants what they had to say about punitive damages all that Appellants made the above quoted argument. These general objections to punitive damages are not sufficiently specific and do not reference the Constitution therefore Appellants failed to preserve these arguments for appeal. These arguments were also not included in Defendant's Response to Plaintiffs' Presentment of Damages or in Response to Plaintiffs' Memorandum of Law in Support of Plaintiff's Damages and were raised for the first time in their post judgment Memorandum Pursuant to SCRCP 52, 59, 60, and 62. Prior to the judgment, neither argument was ever presented to the Special Referee for a ruling. Therefore, these arguments, like

Appellants' argument regarding the sufficiency of Respondent's pleadings, are not preserved for appeal and should not be considered.

II. THE SPECIAL REFEREE COMMITTED NO ERROR IN AWARDING ACTUAL DAMAGES TO RESPONDENTS.

A. Standard of Review.

An appellate court's scope of review for a case heard by a master-in-equity or special referee who enters a final judgment is the same as that for review of a case heard by a circuit court without a jury. See Tiger, Inc. v. Fisher Agro, Inc., 301 S.C. 229, 237, 391 S.E.2d 538, 543 (1990). In an action at law referred to a master or special referee for final judgment, appellate courts will correct errors of law, but must affirm the master's or referee's factual findings unless **no evidence** reasonably supports those findings. Townes Associates, Ltd. v. Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976) (stating the rule for actions at law tried by a judge is the same "whether the judge's findings are made with or without[] a reference") (emphasis added). On review of an action at law tried without jury, the appellate court must look at the evidence in the light most favorable to the respondents and eliminate from consideration all evidence to the contrary. Solley v. Navy Fed. Credit Union, Inc., 397 S.C. 192, 202, 723 S.E.2d 597, 602 (Ct. App. 2012). Furthermore, the appellant is not relieved of the burden of convincing this court the special referee committed legal error in his findings. Pinckney v. Warren, 344 S.C. 382, 388, 544 S.E.2d 620, 623 (2001).

A trial judge has considerable discretion regarding the amount of damages, both actual and punitive. See Solley, 397 S.C. at 203, 723 S.E.2d at 602. Because of this discretion, the review on appeal is limited to the correction of errors of law. Id. An appellate court's task in reviewing a damages award is not to weigh the evidence, but to determine if there is any evidence to support the damages award. Id.

The power to set aside a default judgment lies within the sole discretion of the trial court and will not be disrupted on appeal absent a clear showing of an abuse of discretion. Richardson v. P.V., Inc., 383 S.C. 610, 682 S.E.2d 263, 265 (2009). "An abuse of discretion in setting aside a default judgment occurs when the judge 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." Hill v. Dotts, 345 S.C. 304, 307, 547 S.E.2d 894, 896 (Ct. App. 2001). As long as the Special Referee's decision was not based on an error of law and there is some evidentiary basis for his factual conclusions, the Special Referee did not abuse his discretion, and this Court should affirm the award of actual damages.

B. Respondents Correctly Pled Entitlement to Actual Damages[4].

Appellants argue that default does not preclude a defendant from challenging the sufficiency of the complaint allegations as a basis for the judgment entered in this case, because an objection that the complaint does not state facts sufficient to constitute a cause of action is not waived by default. (Appellants' Brief at 9, 10). However, Appellants' reliance on this rule is misguided because Appellants never, prior to or at the hearing, made a motion to challenge the sufficiency of the allegations in the pleadings. Appellants failed to take the requisite step of filing a motion to dismiss for failure to state facts sufficient to constitute a cause of action pursuant to South Carolina Rules of Civil Procedure, Rule 12(b)(6), or otherwise argue to the trial court at or prior to the hearing that the Complaint failed to state sufficient facts.

i. Respondents Correctly Pled Their Breach of Contract Accompanied by a Fraudulent Act Cause of Action and Properly Alleged a Breach of Contract.

[4] Although this argument is not preserved for appellate review, Respondents address this argument for the Court's convenience

Respondents' Complaint properly alleges a breach of contract claim and a breach of contract accompanied by fraudulent act cause of action. To support a cognizable claim for a breach of contract accompanied by a fraudulent act a plaintiff must allege: (1) a breach of contract, (2) fraudulent intent relating to the breaching of the contract and not merely its making, and (3) a fraudulent act accompanying the breach. Floyd v. Country Squire Mobile Homes, Inc., 287 S.C. 51, 53-54, 336 S.E.2d 502, 503-504. (Ct. App. 1985). In their Brief to this court, Appellants first assert no binding contract existed because "the Complaint clearly admits that the only alleged binding contract between the parties, the commitment, was not executed." However, Appellants fail to acknowledge that the Complaint clearly asserts that the commitment was executed by Riverdale. In their Complaint, Respondents allege, "Pursuant to the terms of the Commitment, the Loan was set to close on or before January 12, 2015; however, the parties knew, at the time of the execution of the commitment, that Plaintiffs had to close the Loan and purchase the Property no later than December 31, 2014" (Compl. ¶ 11) (R. p. 35) (emphasis added). Respondents correctly pled their breach of contract accompanied by fraudulent act cause of action to support the Special Referee's award of actual damages. In the Complaint, Respondents first alleged that "Defendants breached the terms of the Commitment by failing to close the transaction contemplated therein on December 30, 2014." (Compl. ¶ 30) (R. p. 37). To satisfy the second element, Respondents assert: "Defendants' intent in breaching the Commitment was fraudulent as evidenced by their behavior leading up to breach including but not limited to its negotiation of terms in loan documents, correspondence between counsel, and its failure to communicate with Respondents' counsel after 12:07 p.m. on the day of Closing." (Compl. ¶ 31) (R. p. 37). To satisfy the third element the Complaint attests states that Defendants fraudulently breached the Commitment because there were no contingencies were outstanding and the Respondents were ready, willing and able to close.

(Compl. ¶ 32) (R. pp. 37-38). Finally, Respondents' prayer for relief included a request for actual, consequential, and punitive damages. (Compl. ¶ 55) (R. p. 40). Respondents sufficiently pled their breach of contract accompanied by a fraudulent act cause of action to support the relief granted by the Special Referee. See Townes Associates, Ltd., 266 S.C. at 86, 221 S.E.2d at 775 ("on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings.").

In addition to arguing that Respondents failed to properly *plead* their action for breach of contract accompanied by a fraudulent act, Appellants also argue that Respondents failed to *prove* a breach of contract accompanied by a fraudulent act. Appellants in their Brief to this court assert that "the testimony regarding the executed Commitment was unclear at best." (Appellants' Brief at 13). However, Appellants are the defaulting party and are deemed to have admitted all allegations contained in Respondents' Complaint. Roche v. Young Bros., of Florence, 332 S.C. 75, 81, 504 S.E.2d 311, 314 (1998) ("It is well settled that by suffering a default, the defaulting party is deemed to have admitted the truth of the plaintiff's allegations and to have conceded liability."). As long as Respondents have correctly *pled* a breach of contract accompanied by a fraudulent act, they are not required to *prove* a breach of contract accompanied by a fraudulent act. Respondents sufficiently pled their breach of contract accompanied by a fraudulent act cause of action to support the relief granted by the Special Referee. Thus, the Final Order awarding actual damages should be affirmed.

Appellants rely heavily on S.C. Code Ann. 37-10-107[5] which states, in pertinent part,

> No person may maintain an action for legal or equitable relief or a defense based upon a failure to perform an alleged promise, undertaking accepted offer, commitment, or agreement... to renew modify, amend, or cancel a loan of money

[5] It is well settled that by defaulting, Appellants admitted the allegation of the Complaint. Roche v. Young Bros. Inc. of Florence, 332 S.C. 75, 81, 504 S.E.2d 311,314 (1998). Therefore, Appellants attempt to assert a defense in this default case is precluded.

> or any provision with respect to a loan of money, involving in any such case a principal amount in excess of fifty thousand dollars, unless **the party seeking to maintain the action** or defense **has received a writing from the party to be charged** containing the material terms and conditions of the promise, undertaking, accepted offer, commitment, or agreement and **the party to be charged**, or its duly authorized agent, **has signed the writing**."

S.C. Code Ann. § 37-10-107 is in essence a statute of frauds which requires that the lender who is to be charged with the undertaking or commitment sign the commitment. This is exactly what happened in this case. Appellants provided a signed commitment to Respondents[6]. It matters not when the Commitment was signed by Respondents, rather all that S.C. Code Ann. § 37-10-107 requires is that Appellants signed the commitment as is pled in the Complaint. Appellants have attempted to mischaracterize the allegations of the Complaint to fit their defense. To be sure, the statute of frauds is a defense, as Appellants point out in their Brief, which must be affirmatively pled. (Appellants Brief at 13). Appellants waived this right by failing to respond to the Complaint and having a default entered against them. The Complaint alleges "[o]n December 9, 2014, Riverdale issued a Loan Commitment letter to" Respondents. (Compl. ¶ 7) (R. p. 34). It continues, "[t]he Commitment further provided various contingencies prior to funding loan, each of which **was satisfied by the Plaintiffs with the exception of the execution of the Commitment**..." (Compl. ¶ 12) (R. p. 35) (emphasis added). Therefore, the Complaint alleges that the Commitment was not signed by Respondents, not that it was not signed by Appellants. Ultimately at the hearing, a Commitment signed by both Appellants and Respondents was admitted into evidence, without objection. (February 8, 2016 Exhibit 13) (R. pp. 264-273).

[6] As Appellants admit in their statement of facts, "Riverdale agreed in a Loan Commitment Letter... to lend..." Respondents $1,900,000.00. (Appellants' Brief at 4). Appellants are bound by this admission and therefore their statute of frauds argument must fail. Rule 208 (b)(1)(C)("Any matters stated or alleged in appellants statement shall be binding on appellant.").

Unlike in Sea Cove Dev., LLC v. Harbourside Cmty. Bank, 387 S.C. 95, 691 S.E.2d 158 (2010), the Commitment states in no uncertain terms, "[t]his letter confirms the terms and conditions upon which Riverdale Funding, LLC (hereinafter referred to as the "Lender"), or its assignee(s) or affiliates, agrees to lend to Partners 95, LLC and HSGCHG Investments, LLC (hereinafter referred to as the "Borrower') the principal sum of $1,900,000.00... subject to the following terms, provisions, limitations and conditions." (February 8, 2016 Hearing Exhibit 13 at 1) (R. p. 264). In Sea Cove Dev., the alleged writing stated that the borrowers were "conditionally qualified for the mortgage loan and that this prequalification will expire on May 15, 2005 and your interest rate will float until closing documents are prepared or you contact your Loan Officer to lock your interest rate by executing a Rate Lock Agreement." Id. 387 S.C. at 98, 691 S.E.2d at 160 (emphasis added). In the present case, the Commitment states in no uncertain terms that Riverdale agrees to lend, satisfying S.C. Code Ann. § 37-10-107.

ii. Respondents Correctly Pled Their Breach of Contract Accompanied by a Fraudulent Act Cause of Action and Properly Alleged a Fraudulent Act and Intent.

In addition to the elements required for a breach of contract, a claim for breach of contract accompanied by a fraudulent act must also allege a fraudulent intent relating to the breaching of the contract and not merely its making, and a fraudulent act accompanying the breach. Floyd, 287 S.C. at 53-54, 336 S.E.2d at 503-504. Appellants argue that Respondents failed to state a claim for breach of contract accompanied by a fraudulent act because no fraudulent act or intent was alleged by Respondents. (Appellants' Brief at 13). However, Respondents in their Complaint properly alleged a fraudulent act and intent. It is not necessary to allege the elements of common law fraud and deceit. Harper v. Ethridge, 290 S.C. 112, 119, 348 S.E.2d 374, 378 (Ct. App. 1986). The fraudulent act is any act characterized by dishonesty in fact, unfair dealing, or the unlawful

appropriation of another's property by design. Id. As our Supreme Court observed in Sullivan v. Calhoun, "fraud," in this sense,

> assumes so many hues and forms, that courts are compelled to content themselves with comparatively few general rules for its discovery and defeat, and allow the facts and circumstances peculiar to each case to bear heavily upon the conscience and judgment of the court or jury in determining its presence or absence.

117 S.C. 137, 108 S.E. 189, 189 (1921)

It is not necessary to allege fraud in direct terms; it being sufficient if the facts are stated from which it is necessarily implied. Id. (Holding that a complaint of a share cropper against owners of land, alleging that they willfully violated the contract and took exclusive possession of plaintiff cropper's one-half interest in the crop, is sufficient to allege fraud on the part of defendant owners and to justify award of punitive damages to plaintiff share cropper); Ford v. Ball, 178 S.C. 111, 182 S.E. 319, 321 (1935) (Finding properly alleged fraudulent acts where complaint alleged that defendant agreed to reconvey property on certain conditions, that plaintiff performed her part of contract, that defendant fraudulently accepted such performance without intending to carry out his part of contract, and that defendant wrongfully dispossessed plaintiff of such property.). "A promise is usually without the domain of the law, unless it creates a contract, but if made when there is no intention of performance, and for the purpose of inducing action by another, it is fraudulent, and may be made the ground of relief." Ford, 178 S.C. 111, 182 S.E. at 321.

Respondents properly allege that Appellants' fraudulent intent is evidenced by Appellants' "negotiation of terms in loan documents, correspondence between counsel, and its failure to communicate with Plaintiffs' counsel after 12:07 p.m. on the day of closing" where "no contingencies were outstanding and the Plaintiffs were ready, willing and able to close." (Compl. ¶ 31-32) (R. pp. 37-38). Respondents also properly allege that Appellants committed fraudulent

acts accompanying the breach including: accepting $19,000.00 from Respondents as a portion of the commitment fee paid in advance, negotiating loan documents, exchanging numerous e-mails about the Loan, and coordinating the closing. (Compl. ¶¶ 9, 13) (R. p. 35). Like the Plaintiffs in Ford and Hill, Respondents allege that they performed their part of the contract and Appellants wrongfully accepted such performance without intending to carry out their part of the contract. These facts show that Appellants represented to Respondents that they would extend funds to the Respondents all the while Appellants either knew that the representations were false or were completely reckless in their disregard of the representations' truth or falsity. These allegations constitute a fraudulent intent and fraudulent act sufficient to support the Special Referee's Final Order awarding damages.

iii. The Special Referee Invariably Found a Breach of Contract Existed.

Alternatively, even if the lower court erred in finding a breach of contract accompanied by a fraudulent act, the actual damages awarded for the claim should be affirmed because the Special Referee, as a matter of law, necessarily found an underlying breach of contract, which would require an award of the same actual damages. Appellants assert, "Partners 95 did not challenge, request clarification regarding, nor raise objection to the Special Referee's decision to award actual damages on only this one claim, and it is the law of the case," citing to Erickson v. Jones St. Publrs., LLC, 368 S.C. 444, 629 S.E. 2d 653 (2006) and Charleston Lumber Co. v. Miller Housing Corp., 338 S.C. 171, 525 S.E.2d 869 (2000), as authority. However, as far as Appellants attempt to invoke the law of the case doctrine to the effect of barring Respondents from raising an additional sustaining ground, Appellants are misguided. See, Dreher v. S.C. Dept. of Health and Envtl. Control, 412 S.C. 244, 250, 772 S.E.2d 505, 508 (2015) ("[T]he court of appeals

misapprehended the law of the case doctrine. Specifically, the court of appeals erred in applying the doctrine as to bar the prevailing party below from raising an additional sustaining ground.").

Different rules of preservation apply to appellants and respondents. Under the law of the case doctrine, "should the appealing party fail to raise all of the grounds upon which a lower court's decision was based, those unappealed findings—whether correct or not—become the law of the case." Id.; see also, Charleston Lumber Co. at 175, 525 S.E.2d at 872 (finding that because *appellant* did not seek review of Charleston Lumber I but instead moved for summary judgment on a procedural issue on remand, appellant was bound by the directive of Charleston Lumber I "as the law of the case"). In contrast, "it is not always necessary for a *respondent*—as the winning party in the lower court—to present his issues and arguments to the lower court and obtain a ruling on them in order to preserve an issue for appellate review." I'On, LLC v. Town of Mt. Pleasant, 338 S.C. 403, 420, 526 S.E.2d 716, 723 (2000) (emphasis in original).

A respondent may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court. See, Rule 220(c), SCACR; see also, Dreher at 250, 772 S.E.2d at 508 ("Moreover, because an appellate court may affirm the lower court's decision for any reason appearing in the record, the prevailing party may—but is not required to—raise additional sustaining grounds to support the lower court's decision."); I'On, LLC at 417, 526 S.E.2d at 722 ("In raising an additional sustaining ground in an appeal, the party who prevailed in the lower court urges an appellate court to affirm the lower court's ruling for a reason other than one primarily relied on by the lower court."). The purpose of the doctrine of additional sustaining grounds is "to relieve a respondent who, in the trial court, has obtained a judgment giving him all the relief that he sought, from the necessity of appealing from adverse rulings that did not affect the result of the lower

court's decision." S.C. Pub. Serv. Auth. v. Carolina Power & Light Co., 244 S.C. 466, 479, 197 S.E.2d 307, 512 (1964).

Accordingly, this Court should consider as an additional sustaining ground, the fact that, having found breach of contract accompanied by a fraudulent act, the Special Referee as a matter of law necessarily found a breach of contract. As set forth above, the elements of breach of contract accompanied by a fraudulent act are (1) a breach of contract, (2) fraudulent intent relating to the breaching of the contract and not merely its making, and (3) a fraudulent act accompanying the breach. Floyd v. Country Squire Mobile Homes, Inc., 287 S.C. 51, 53-54, 336 S.E.2d 502, 503-504. (Ct. App. 1985). Because establishing a breach of contract is prerequisite to proving a claim for breach of contract accompanied by a fraudulent act, it is axiomatic that the Special Referee found a breach of contract, irrespective of its findings as to the fraud elements of the claim. In a breach of contract accompanied by a fraudulent act claim, the actual damages arise at least in part from the breach of contract rather than the fraudulent intent and fraudulent act. Therefore, even if the Special Referee erred in awarding actual damages for breach of contract accompanied by a fraudulent act, the actual damages awarded should be sustained since there was, as a matter of law, an underlying breach of contract. See, I'On, LLC at 420, 526 S.E.2d at 723 ("The appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment.").

C. Respondents Proved Their Damages by a Preponderance of the Evidence.

Appellants assert that Respondents failed to prove damages by a preponderance of the evidence. However, the Special Referee correctly awarded Respondents damages because Respondents demonstrated by a preponderance of the evidence that they were entitled to damages. Although a defendant has defaulted, a plaintiff must "prove by competent evidence the amount of

his damages, and such proof must be by a preponderance of the evidence." Howard v. Holiday Inns, Inc., 271 S.C. 238, 240, 246 S.E.2d 880, 881 (1978). However, it bears repeating that an appellate court's task in reviewing a damages award is not to weigh the evidence, but to determine if there is any evidence to support the damages award. See Solley, 397 S.C. at 203, 723 S.E.2d at 602.

"The general rule is that for a breach of contract the defendant is liable for whatever damages follow as a natural consequence and a proximate result of such breach." Branche Builders, Inc., v. Coggins, 386 S.C. 43, 48, 686 S.E.2d 200, 202 (Ct. App. 2009). "In a breach of contract action, damages serve to place the nonbreaching party in the position he would have enjoyed had the contract been performed." Damages are designed to give the nonbreaching party the benefit of his bargain with the breaching party. South Carolina Fed. Sav. Bank v. Thornton-Crosby Dev. Company, Inc., 303 S.C. 74, 77, 399 S.E.2d 8, 11 (Ct. App. 1990). Breach of contract damages normally consist of two distinct elements: (1) out-of-pocket costs actually incurred as a result of the contract; and (2) the gain above costs that would have been realized had the contract been performed. Collins Entertainment Inv. v. White, 363 S.C. 546, 559, 611 S.E.2d 262, 268-9 (Ct. App. 2005).

Special damages, also known as consequential damages, are actual damages. McNaughton v. Charleston Charter Sch. for Math & Sci., Inc., 411 S.C. 249, 261, 768 S.E.2d 389, 396 (2015). Unlike general damages, which must necessarily result from the wrongful act upon which liability is based and are implied by the law, special damages are damages for losses that are the natural and proximate—but not the necessary—result of the injury, and may be recovered only when sufficiently stated and claimed. Sheek v. Lee, 289 S.C. 327, 328–29, 345 S.E.2d 496, 497 (1986). Special damages are recoverable in tort actions. See Whatley v. Murrell, 32 S.C.L. 389 (S.C. App.

L. 1847). "In a tort action, special damages must be the direct consequence of the illegal act done, and flowing from it, and not upon any occurrence or circumstance, merely attending such act, but requiring additional agencies." 11 S.C. Jur. Damages § 4 (citing Whatley, 32 S. C. L. at 395).

To be entitled to special damages, a plaintiff must first plead special damages and then prove them by showing "(1) that the plaintiff realized an actual loss he would not have incurred but for the defendant's breach of contract; and (2) the loss was a natural consequence of the breach which may reasonably be supposed to have been within the contemplation of the parties at the time the contract was made." S. Carolina Fed. Sav. Bank v. Thornton-Crosby Dev. Co., 303 S.C. 74, 77–78, 399 S.E.2d 8, 11 (Ct. App. 1990), aff'd, 310 S.C. 232, 423 S.E.2d 114 (1992). The party claiming special damages must show that the defendant was warned of the probable existence of unusual circumstances *or that because of the defendant's own education, training, or information, the defendant had reason to foresee the probable existence of such circumstances.* Stern & Stern v. Timmons, 310 S.C. 250, 251, 423 S.E.2d 124, 125 (1992)(emphasis added). The defendant need not foresee the exact dollar amount of the injury, but must only know or have reason to know the special circumstances so as to be able to judge the degree of probability that damage will result from delayed performance. Id. "If the fact of damages is established, the law does not require the amount of damage to be proved with absolute mathematical certainty; damages may be recovered if there is evidence upon which a reasonable assessment of the loss can be made." Thornton-Crosby Dev., 303 S.C. at 77, 399 S.E.2d at 11. In their Brief, without explaining how, Appellants summarily conclude that Respondents "have failed to meet its burden of proof to show it was entitled to damages." (Appellants' Brief at 17).

However, Respondents presented evidence to establish every item that the Special Referee Awarded damages on:

1.	Broker's Price Opinion on Connecticut Property[7]	$500.00
2.	Appraisal on Connecticut Property[8]	$2,000.00
3.	Broker's Price Opinion on Marion County Property[9]	$750.00
4.	Appraisal on Marion County Property[10]	$2,500.00
5.	Defendants' Counsel fees (Holloren & Sage, LLP)[11]	$500.00
6.	Callison Tighe & Robinson, LLC fees related to Woodbridge/Riverdale Loan[12]	$10,000.00
7.	Loan Broker Commission increase[13]	$2,000.00
8.	Additional Title examination and abstract work[14]	$1,645.50
9.	Loan Packaging fee to Grow Financial[15]	$495.00
10.	Wire fee for Loan Packaging fee to Grow Financial[16]	$35.00
11.	Extra liability insurance required by Defendants[17]	$1,955.70
12.	Difference in Advantage Sign Contract and Tyson Sign Contract[18]	$15,803.00
	TOTAL:	**$38,184.20**

Each of the damages listed above are the natural consequence and proximate result of the Defendants' breach of contract. Respondents presented testimony at the February 8, 2016 hearing that, had the loan closed, as had been planned on December 30-31, 2014, the above listed items of damages would have been used, or have been avoided. Appellants have attempted to state that Respondents were not guaranteed to receive a loan if the above list of items were purchased or incurred. However, in order to place Respondents in the position they would have been in if the transaction had closed, all of the above referenced damages must be awarded. In light of the evidence that Respondents presented to the Special Referee, the Special Referee did not err by

[7] February 8, 2016 Hearing Exhibit 5; February 8, 2016 Transcript P. 39, L. 1-12
[8] February 8, 2016 Hearing Exhibit 6; February 8, 2016 Transcript P.40, L. 12-18
[9] February 8, 2016 Hearing Exhibit 7; February 8, 2016 Transcript P. 41, L. 16-24
[10] February 8, 2016 Hearing Exhibit 8; February 8, 2016 Transcript P. 42, L. 8-15
[11] February 8, 2016 Hearing Exhibit 12; February 8, 2016 Transcript P.
[12] February 8, 2016 Hearing Exhibit 4; February 8, 2016 Transcript P. 13, L. 19-25, P. 14.
[13] February 8, 2016 Transcript P. 54, L. 1-8
[14] February 8, 2016 Transcript P. 17, L. 15-25; P. 18 1-14
[15] February 8, 2016 Hearing Exhibit 12; February 8, 2016 Transcript P. 55, L. 8-15
[16] February 8, 2016 Transcript P. 55, L. 13-15.
[17] February 8, 2016 Hearing Exhibit 9; February 8, 2016 Transcript P. 47, L. 3-20
[18] February 8, 2016 Hearing Exhibits 10 and 11; February 8, 2016 Transcript P. 51, L. 19-25; P. 52, L. 1-7.

awarding damages to Respondents because Respondents demonstrated by a preponderance of the evidence that they were entitled to the awarded damages.

At page 24 of their Brief to this Court, Appellants argue that Respondents presented no evidence that the special damages arising from the sign contract were foreseeable. However, Respondents presented evidence that Appellants are part of a larger organization with many affiliated companies involved in the mortgage lending business. See generally, (Affidavit of Eugene Rubinstein) (R. pp. 52-56). Therefore, the Special Referee properly found that, "because of Defendants' education, training and experience, Defendants had reason to foresee the probable existence of the expenses incurred by Plaintiffs as a result of Defendants' breach, including but not limited to the sign." (Final Order at 8) (R. p. 16).

D. Appellants' Arguments Relating to Substitute Financing are Barred by the Collateral Source Rule.

Appellants argue that because the substitute loan obtained by Respondents had more favorable terms, Respondents cannot show that they have been damaged in any way. (Appellants' Brief at 17-19). However, under the collateral source rule, Appellants have no right to reduce or offset the damages for which they are liable by attempting to prove Respondents will receive or have received compensation from a collateral source. The collateral source rule provides that compensation received by an injured party from a source wholly independent of a wrongdoer will not reduce amount of damages owed by the wrongdoer. In re W.B. Easton Const. Co., Inc., 320 S.C. 90, 92, 463 S.E.2d 317, 318 (1995). This rule is liberally applied in South Carolina to preclude reduction of damages, and the only requirement for qualification as collateral source is that source be wholly independent of wrongdoer. Id. South Carolina jurisprudence makes it clear that the collateral source rule only applies to a "wrongdoer" or "tortfeasor." Bardsley v. Gov't Employees Ins. Co., 405 S.C. 68, 79, 747 S.E.2d 436, 442 (2013). The purpose of the rule is to prevent a

benefit that is directed to the injured party from being shifted to result in a windfall for the tortfeasor. Dixon v. Besco Eng'g, Inc., 320 S.C. 174, 182, 463 S.E.2d 636, 640 (Ct. App. 1995). "A tortfeasor cannot take advantage of a contract between an injured party and a third person, no matter whether the source of the funds received is "an insurance company, an employer, a family member, or other source." Pustaver v. Gooden, 350 S.C. 409, 413, 566 S.E.2d 199, 201 (Ct. App. 2002).

Appellants argue that the Respondents "ultimately benefited from the circumstances" because "[t]he difference between the interest rates alone equals a saving to [Respondents] of $38,200. Coincidentally, this benefit almost exactly cancels out the $38,184.20 in actual damages that that [Respondents] sought and were award by the Special Referee." (Appellants' Brief at 19). However, the collateral source rule completely bars this argument. First, the Special Referee correctly found that the Appellants are wrongdoers. As discussed above, Respondents sufficiently pled their cause of action so to support the finding by the Special Referee that "Plaintiffs have met their burden of proving breach of contract accompanied by a fraudulent act and are entitled to an award of punitive damages." (Final Order at 12-13) (R. pp. 20-21). Therefore, Respondents' breach of contract and fraudulent behavior makes them wrongdoers. Second, the replacement loan is a source wholly independent of Appellants. Mr. Tighe testified that Respondents obtained the replacement loan from Avatar Capital Finance, which is an entity completely separate from Appellants. (February 8, 2016 Transcript P. 14, L. 18-24) (R. p. 153). Therefore, the collateral source rule applies and Appellants are barred from making arguments that the terms of the substitute financing should operate so to offset the damages Appellants are liable for.

III. THE SPECIAL REFEREE COMMITTED NO ERROR IN AWARDING PUNITIVE DAMAGES TO RESPONDENTS UNDER *MITCHELL V. FORTIS.*

Appellants argue that Respondents failed to plead or prove punitive damages and the Special Referee failed to require the proof requirements mandated under Mitchell, Jr. v. Fortis Insurance Company. However, as discussed in more detail below, Respondents correctly pled and proved punitive damages and the Special Referee committed no error.

A. Standard of Review.

A trial court's award of punitive damages must be affirmed if the appellate court finds *any* evidence to support the award. Austin v. Specialty Transp. Servs., Inc., 358 S.C. 298, 314, 594 S.E.2d 867, 875 (Ct. App. 2004) (emphasis added). To receive an award of punitive damages, the plaintiff has the burden of proving by clear and convincing evidence the defendant's misconduct was willful, wanton, or in reckless disregard of the plaintiff's rights. Lister v. NationsBank of Delaware, N.A., 329 S.C. 133, 149, 494 S.E.2d 449, 458 (Ct. App. 1997). "Clear and convincing evidence is that degree of proof which will produce in the mind of the trier of facts a firm belief as to the allegations sought to be established." Duncan v. Ford Motor Co., 385 S.C. 119, 138, 682 S.E.2d 877, 886 (Ct. App. 2009). The amount of punitive damages, remains largely within the discretion of the finder of fact and the trial judge is vested with considerable discretion of the amount of a punitive damages award. Id. Because of this discretion, an appellate court's review on appeal is limited to the correction of errors of law. Austin, 358 S.C. at 310, 594 S.E.2d at 873. This Court must affirm the trial court's punitive damages finding for the Respondents if any evidence reasonably supports the judge's factual findings. Id. at 314, 594 S.E.2d 875.

An appellate court must review a trial court's determination of the constitutionality of punitive damages de novo. Mitchell, Jr. v. Fortis Ins. Co., 385 S.C. 570, 583, 686 S.E.2d 176, 182 (2009) (citing Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 121 S. Ct.

1678 (2001)). An appellate court applies a de novo standard when conducting a review of the trial court's post judgment due process review. Id. at 582, 686 S.E.2s at 182.

B. Respondents Correctly Pled Entitlement to Punitive Damages.

Appellants argue that Respondents failed to *plead* ultimate facts to support a punitive damages award. As discussed above, this argument, like many other arguments made by Appellants, is not preserved for appellate review. But even assuming *arguendo* that this argument was preserved, it still must fail.

The South Carolina Rules of Civil Procedure require "[a] pleading which sets forth a cause of action . . . [to] contain . . . a short and plain statement of the facts showing that the pleader is entitled to relief." Rule 8(a)(2), SCRCP. This rules requires a litigant to plead the ultimate facts which will be proved at trial, not the evidence which will be used to prove those facts. Clark, 293 S.C. at 416, 361 S.E.2d at 328.

Respondents correctly pled their entitlement to punitive damages and supported their claim with ultimate facts. Accordingly, the Special Referee awarded punitive damages because he found Appellants' misconduct was willful, wanton or in reckless disregard of Respondents' rights. (Final Order ¶ R) (R. p. 23). The Special Referee arrived at this conclusion because: "Defendants actions in continuing to negotiate the loan documents and communicate with counsel leading up to the closing demonstrate Defendants knew their responsibilities." Id. Also, "Defendants breached the terms of the Commitment by failing to close the transaction, all while knowing the repercussions for Plaintiffs if the loan failed to close on December 30, 2014." Id. The Special Referee's award is sufficiently supported by the ultimate facts plead in Respondent's Complaint. Respondents' allegation of Appellants' "negotiation of terms in loan documents, correspondence between counsel, and its failure to communicate with Plaintiffs' counsel after

12:07 p.m. on the day of closing" where "no contingencies were outstanding and the Plaintiffs were ready, willing and able to close" is an alleged fact showing Appellants' willful, wanton or reckless behavior. (Compl. ¶ 31-32) (R. pp. 37-38). Respondents also allege that Appellants committed further willful, wanton or reckless acts including: accepting $19,000.00 from Respondents as a portion of the commitment fee paid in advance, negotiating loan documents, exchanging numerous e-mails about the Loan, and coordinating the closing. (Compl. ¶¶ 9, 13) (R. p. 35).

Appellants also argue that because some of Respondents' allegations were made based "upon information and belief" these allegations "can neither rise to the level of 'clear and convincing' nor constitute pleading of the requisite ultimate facts of 'willful, wanton, or reckless.'" Appellants' reliance on this argument is misguided. Facts plead "upon information and belief" may still constitute ultimate facts because Rule 8 only requires that the ultimate facts be *plead* in the complaint, not *proven* in the complaint. See Clark, 293 S.C. at 416, 361 S.E.2d at 328 ("[t]his rule requires a litigant to plead the ultimate facts which will be proved at trial, not the evidence which will be used to prove those facts"). Furthermore, by suffering a default, Appellants are deemed to have admitted all allegations contained in Respondents' Complaint whether pled based on information and belief or not. Roche, 332 S.C. at 81, 504 S.E.2d at 314. ("It is well settled that by suffering a default, the defaulting party is deemed to have admitted the truth of the plaintiff's allegations and to have conceded liability"). Respondents correctly pled their entitlement to punitive damages and supported their claim with ultimate facts alleging Appellants' misconduct was willful, wanton and in reckless disregard of Respondents' rights.

C. Respondents Proved their Entitlement to Punitive Damages and the Special Referee Committed No Error in Awarding Punitive Damages to Respondents.

Appellants argue further that Respondents failed to *prove* that Appellants' behavior was willful, wanton, or reckless, so as to justify the Special Referee's award of punitive damages[19]. Contrary to Appellants arguments however, Respondents properly proved their entitlement to punitive damages and the Special Referee committed no error in awarding punitive damages to respondents.

"The purposes of punitive damages are to punish the wrongdoer and deter the wrongdoer and others from engaging in similar reckless, willful, wanton, or malicious conduct in the future, as well as to vindicate a private right of the injured party by requiring the wrongdoer to pay money to the injured party." Solley, 397 S.C. at 211, 723 S.E.2d at 607 (citing Clark v. Cantrell, 339 S.C. 369, 378–79, 529 S.E.2d 528, 533 (2000)) (internal citation omitted). "Recklessness implies the doing of a negligent act knowingly; it is a conscious failure to exercise due care" Id. (citing Berberich v. Jack, 392 S.C. 278, 287, 709 S.E.2d 607, 612 (2011). "If a person of ordinary reason and prudence would have been conscious of the probability of resulting injury, the law says the person is reckless or willful and wanton, all of which have the same meaning—the conscious failure to exercise due care." Id.

Circumstantial evidence carries the same probative weight as direct evidence. State v. Logan, 405 S.C. 83, 97, 747 S.E.2d 444, 451 (2013). In fact, circumstantial evidence can be used to satisfy the highest burden of proof known to the American legal system—beyond a reasonable doubt—unquestionably it can also be used to satisfy a lower standard of clear and convincing. Id. 405 S.C. at 99, 747 S.E.2d 452.

[19] Appellants have failed to appeal or argue the findings of the Special Referee relative to the "(1) Ratio between the actual or potential harm suffered by the plaintiff and the amount of punitive damages award and (2) comparative penalty awards." *Mitchell*, 385 S.C. at 584, 686 S.E.2d at 183. Therefore, any arguments relative to these findings are abandoned by Appellants and are not addressed herein.

Respondents proved their entitlement to punitive damages based on all the circumstances surrounding the breach of contract accompanied by a fraudulent act. Accordingly, the Special Referee awarded punitive damages based on his finding of Appellants' willful and wanton misconduct in reckless disregard of Respondents' rights. (Final Order ¶ R) (R. p. 23). The Special Referee arrived at this conclusion because: "[Appellants'] actions in continuing to negotiate the loan documents and communicate with counsel leading up to the closing demonstrates [Appellants'] knew their responsibilities." Id. Also, "Defendants breached the terms of the Commitment by failing to close the transaction, all while knowing the repercussions for Plaintiffs if the loan failed to close on December 30, 2014". Id.

Respondents presented evidence that supports the Special Referee's findings. At the February 8, 2016 Hearing Mr. Tighe testified that on the morning of December 30, 2014, he received over twenty closing related emails from the Defendants' counsel in Connecticut prior to 12:07 p.m. (February 8, 2016 Transcript P. 24, L. 16-19) (R. p. 163). At 12:07 p.m. on December 30, 2014, Mr. Tighe received a copy of an email directed to a representative of Fidelity National Title from Mr. Roberts, the Defendants' counsel, instructing the title company not to allow Plaintiffs to execute the closing documents. (February 8, 2016 Transcript P. 8, L. 17-22) (R. p. 147). Mr. Tighe immediately responded to Mr. Roberts inquiring, "Is there a problem?" He received no response. (February 8, 2016 Transcript P. 9, L. 16-22; P. 10, L. 4-6) (R. p. 148, line 16 – p. 149, line 6). Mr. Tighe later emailed Mr. Roberts again stating, "Rich: I need you to call me. I called for Larry but could not get him. Does your client know my client is going to lose $300,000 if we don't close today?" in order to remind Mr. Roberts of the pending increase in price. (February 8, 2016 Transcript P. 10, L. 15-25; P. 11, L. 1-25) (R. p. 149, line 15 – p. 150, line 25). Without question, Appellants were aware of the pending increase in price, making

Respondents financially vulnerable. As of the date of the hearing, Mr. Tighe had not received any response to his calls and emails to Mr. Roberts inquiring as to the reasons for Defendants' failure to close. (February 8, 2016 Transcript P. 10, L. 10-14) (R. p. 149).

Based on the circumstances surrounding the hours and minutes leading up to the Defendants' failure to close the transaction, the Special Referee correctly found Appellants' misconduct to be willful, wanton or in reckless disregard of Respondents' rights. Respondents proved their entitlement to punitive damages and the Special Referee committed no error in awarding punitive damages to respondents.

Appellants take issue with Respondents not requesting Appellants to revise the Commitment to reflect the closing deadline of December 30, 2014. It is important to remember, however, that this loan did not close at any time, not even by the deadline set in the Commitment. (February 8, 2016 Transcript P. 23, L 19-20) (R. p. 162). Appellants continue, "there did not appear to be consideration of the possibility that [Appellants] may have declined to close because other contingencies as set forth in the Commitment had not been satisfied by [Respondents]." (Appellant's Brief at 30). Appellants again fail to recognize that by defaulting they admitted that there were no outstanding contingencies, as set forth in the Complaint.

Despite this, Appellants continue to argue that the Special Referee failed to follow the mandate of Mitchell. There are three "guideposts" a trial court must follow when conducting a post-judgment review of punitive damages awards: (1) reprehensibility, (2) ratio between the actual or potential harm suffered by the plaintiff and the amount of the punitive damages award and (3) comparative penalty awards. Mitchell, 385 S.C. at 584, 686 S.E.2d at 183. In regard to the reprehensibility "guidepost," the South Carolina Supreme Court has stated:

> First, any court reviewing a punitive damages award should consider the degree of reprehensibility of the defendant's conduct. Reprehensibility is perhaps the most

> important indicium of the reasonableness of a punitive damages award. This principle reflects the view that some wrongs are more blameworthy than others. In considering the reprehensibility, a court should consider whether (i) the harm caused was physical as opposed to economic; (ii) the tortious conduct evinced an indifference to or reckless disregard for the health or safety of others; (iii) the target of the conduct had financial vulnerability; (iv) the conduct involved repeated actions or was an isolated incident; and (v) the harm was the result of intentional malice, trickery, or deceit, rather than mere accident.

Mitchell, 385 S.C. at 587, 686 S.E.2d at 185 (internal citations and quotations omitted). Appellants take issue with the Special Referee's finding on the reprehensibility factor and argue that "[Respondents] failed to plead and prove the existence of reprehensible conduct." (Appellants' Brief at 32).

As has been set forth in more detail above, Respondents have met their burden of showing Appellants behaved reprehensibly. While the harm caused was economic, Defendants knew that Plaintiffs were financially vulnerable and would incur large additional expenses if the loan did not close on December 31, 2014. (Complaint ¶ 11) (R. p. 35). If the loan did not close as planned the purchase price of the property would increase by $300,000. (February 8, 2016 Transcript P. 5, L. 19-21) (R. p. 144). Mr. Tighe testified, "all the parties at hand knew that we either had to close it by then or we had to have another $300,000." (February 8, 2016 Transcript P. 22, L. 13-15) (R. p. 161). Fortunately, the Plaintiffs and their counsel were able to negotiate such that Plaintiffs did not incur $300,000.00 in additional purchase price. Moreover, the evidence leads to the conclusion that the harm was the result of intentional malice, trickery or deceit as Defendants apparently did not have the funds to close the loan.

IV. THE PUNITIVE DAMAGES AWARD OF THE DEFAULT JUDGMENT DOES NOT VIOLATE LENDER'S 14TH AMENDMENT RIGHTS.

Appellants next argue, without any recitation of authority, that the punitive damages award of the Final Order violates Appellants' 14th Amendment rights because the Special Referee erred

in awarding punitive damages against Appellants where Respondents failed to distinguish between the individual Appellants. (Appellants' Brief 34-38). Appellants also argue that award of punitive damages violates the 14th Amendment because the award is excessive. As discussed above, these arguments, like many other arguments made by Appellants, is not preserved for appellate review. But even assuming *arguendo* that these arguments were preserved, they still fail as more fully set forth below.

A. The Special Referee Did Not Err in Awarding Punitive Damages Against Riverdale and Woodbridge Where Respondents Failed to Distinguish Between the Individual Appellants.

The strict constitutional safeguards afforded to criminal defendants are not applicable to civil cases, but the basic protection against "judgments without notice" afforded by the Due Process Clause, Shaffer v. Heitner, 433 U.S. 186, 217, 97 S. Ct. 2569, 2587, 53 L.Ed.2d 683 (1977) (STEVENS, J., concurring in judgment), is implicated by civil *penalties.* Id. at 575, 116 S. Ct. at 1599 n.22.

In this case, differentiation between the Appellants is not necessary in the Complaint because Respondents' Complaint makes it clear that each allegation is against *both* Appellants. Although Respondents did not differentiate between Appellants, Appellants still received fair notice as to the claims against them. Respondents' Complaint was clear that each cause of action was against Appellants *jointly*, therefore there was no need to name each Appellant individually for each cause of action. As Appellants noted, Respondents' First Cause of Action asserted a Breach of Contract claim against "Defendants" *jointly.* (Complaint ¶¶ 25-28) (R. p. 37). Respondents' Second Cause of Action, which sought punitive damages, again charged both "Lenders" *jointly* with breach of contract. (Complaint ¶¶ 30-33) (R. pp. 37-38). Respondents' Third, Fourth, and Fifth Cause of Action respectively charged both "Defendants" *jointly* with

breach of contract, breach of contract accompanied by a fraudulent act, and violation of the South Carolina Unfair Trade Practices Act. Appellants cannot argue that they did not receive fair notice of the claims against them, because the complaint is clear that each claim applies to both Appellants.

B. The Special Referee's Award of Punitive Damages is Not Excessive under Campbell.

Appellants argue that the Special Referee's award of punitive damages is not excessive under State Farm Mutual Automobile Insurance Company v. Campbell. Campbell cites the BMW of North America v. Gore factors which determine a defendant's reprehensibility. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 409, 123 S. Ct. 1513, 1515–16, 155 L. Ed. 2d 585 (2003) (citing Gore, 517 U.S., at 576–577, 116 S. Ct. 1589). In order to determine the reprehensibility of a defendant's conduct, a court must consider whether: the harm was physical rather than economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the conduct involved repeated actions or was an isolated incident; and the harm resulted from intentional malice, trickery, or deceit, or mere accident. Id.

Appellants' actions were reprehensible.[20] While the harm caused was economic, Defendants knew that Plaintiffs were financially vulnerable and would incur large additional expenses if the loan did not close on December 31, 2014. Mr. Tighe testified, "all the parties at hand knew that we either had to close it by then or we had to have another $300,000." (February 8, 2016 Transcript P. 22, L. 13-15) (R. p. 161). Moreover, the evidence leads to the conclusion that the harm caused by Defendants was the result of intentional malice, trickery or deceit rather than mere accident;

[20] The analysis of the reprehensibility of Appellants' conduct under Campbell is the same as that under Mitchell. See the Mitchell analysis above for a more in depth analysis of the reprehensibility of Appellants' conduct.

they knew their lack of funds to close the transaction and continued to negotiate the loan documents in the face of this fact. These facts evidence the reprehensibility to Appellants' conduct.

V. THE SPECIAL REFEREE'S FAILURE TO APPORTION THE PUNITIVE DAMAGES AWARD BETWEEN RIVERDALE AND WOODBRIDGE DOES NOT VIOLATE SECTION 3 OF THE CONSTITUTION OF THE STATE OF SOUTH CAROLINA.

Appellants argue that the Special Referee's failure to apportion the punitive damages award between Respondents violated the procedural due process provided by Section 3 of the South Carolina Constitution because it did not impose punitive damages on the basis of individual culpability. S.C. Code Ann. § 15-32-520(G) sets forth that, "[i]n an action with multiple defendants, a punitive dames award must be specific to each defendant, and each defendant is liable only for the amount of the award made against that defendant." However, Respondents Riverdale and Woodbridge are related companies with common ownership and are amalgamated to an extent that justifies the imposition of joint liability. (Affidavit of Eugene Rubenstien ¶ 2, 14, 17, 21) (R. pp. 52, 54, 55). A sibling company may be jointly liable for the obligation of another sibling due to evidence revealing "an amalgamation of corporate interests, entities, and activities so as to blur the legal distinction between the corporations and their activities." Kincaid v. Landing Dev. Corp., 289 S.C. 89, 96, 344 S.E.2d 869, 874 (Ct. App. 1986). In Kincaid, three related corporations, a development corporation, a management corporation, and a construction corporation, were sued for breach of warranty. Id. The management corporation argued that because it was merely a sales and marking company it should have had a directed verdict in its favor. Id. However, the court relied on the amalgamation theory and upheld an award of damages for breach of warranty against a property management company. Id. The court considered the following factors: 1) whether the corporations share the same officers or shareholders; 2) whether the corporations share a physical location; and 3) assertions contained on the company's letterhead

indicating overlap between entities. Id. In a similar case this Court relied on the same indicia articulated in Kincaid, but also noted that a company distributing a warranty manual with a title containing the name of the developer corporation considered is also indicative of amalgamation. Magnolia North Prop. Owners' Ass'n v. Heritage Cmtys., Inc., 397 S.C. 348, 359-60, 725 S.E.2d 112, 118 (Ct. App. 2012).

Woodbridge and Riverdale should be held jointly liable because they are amalgamated companies. As Associate Counsel at Woodbridge Structured Funding testified, Woodbridge is a related entity of Riverdale and the companies share common ownership. (Affidavit of Eugene Rubinstein ¶ 2) (R. p. 52). Furthermore, Appellant companies are part of a larger organization with many affiliated companies involved in the mortgage lending business. See generally, (Affidavit of Eugene Rubinstein). The two entities share a registered agent. (Affidavit of Eugene Rubinstein ¶ 2) (R. p. 52). The Appellant companies also share a legal department and they share General Counsel. (Affidavit of Eugene Rubinstein ¶¶ 4; 17) (R. pp. 52-53; 55). ("The usual procedure when Defendants' Registered Agent received documents on behalf of Defendants is that it scans the documents into its system and then sends an email to Diana Balayan in our Woodbridge California office that it had received documents on behalf of the Defendants"). The legal distinction between Woodbridge and Riverdale is blurred to such an extent that joint liability is justified and the apportionment punitive damages between the Appellants' is not necessary.

However, if the Court determines that apportionment is required under these circumstances, the Court should remand the case to the Special Referee to make such findings. It should not vacate the award of punitive damages as Appellants have argued.

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests that this Court affirm the Special Referee's rulings.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that this Final Brief of Respondents complies with Rule 211(b), SCACR.

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(5)

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM MARION COUNTY
Court of Common Pleas

The Honorable W. Haigh Porter, Special Referee

Case No. 2015-CP-33-280
Appellate Case No. 2016-000956

PARTNERS 95, LLC and HSGCHG Investments, LLC ..... Respondents,

v.

Riverdale Funding, LLC and Woodbridge Mortgage Investment Fund 3, LLC ..... Appellants.

PROOF OF SERVICE

I certify that I have served a copy of the following as indicated hereinbelow, by mailing a copy of same on the date below by First Class United States Mail, postage prepaid, addressed to the following:

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