

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SALUDA COUNTY
In The Circuit Court

Jocelyn Newman, Circuit Court Judge

Appeal 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.

RECORD ON APPEAL

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ATTORNEYS FOR RESPONDENT

RECEIVED
AUG 09 2017
SC Court of Appeals

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STATE OF SOUTH CAROLINA)
COUNTY OF SALUDA)

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

Amy Potts,)
Plaintiff,)
vs.)
McCarty Enterprises, LLC, et al.,)
Defendants.)

C/A No. 2015-CP-41-0013

ORDER

2016 MAY 10 AM 10:01
CLERK OF COURT
SALUDA CO. S.C.

FILED

WAL #1
Two motions were docketed for hearing today.¹ The plaintiff has filed a motion to declare the defendants to be in default regarding the amended complaint and to compel responses to discovery. The defendants seek dismissal, that motion being filed in response to the original complaint. The court denies the motion to declare the defendants to be in default, orders the defendants to respond to discovery by May 31, 2016, and denies the defendants' motion to dismiss since it relates to a prior complaint that has since been amended.

Default has not been entered by the Clerk of Court or any judge. The plaintiff's attorney filed a motion to have the court review the matter and to declare the defendants to be in default.

Defense counsel denies having received the amended summons and complaint. She submitted an affidavit, over plaintiff's objection, detailing her version of what occurred. In the affidavit, defense counsel recites that when she learned of the amended pleading, she attempted to obtain a copy of it from plaintiff's counsel, never received one,

¹ Defense counsel indicated that she had filed a motion for protective order, but it is not in the file and does not appear on CMS. Plaintiff's counsel denies having been served with such a motion. The court could not hear the motion because it had not been filed.

was assured that one would be provided, but that she eventually had to send a runner from her office in the Upstate to obtain a copy from the Clerk of Court's office. Defense counsel maintains that she filed a motion seeking to dismiss the amended complaint within two days of the time that she obtained the amended complaint. However, there is no motion to dismiss the amended complaint in the file.

WPK
#2

Plaintiff's counsel argues that he sent three separate mailings to defense counsel for various purposes and that he received no response to any of them. An affidavit from co-counsel for the plaintiff states that he never received a motion for protective order or a motion to dismiss the amended complaint. When plaintiff's counsel did not receive a response to the amended complaint, plaintiff's counsel sent a letter to defense counsel indicating that he had not received a response to the amended complaint and notified her that if she failed to respond within a deadline set in the letter, the plaintiff would be moving forward with a motion to declare the defendants to be in default. The court's understanding of the argument of plaintiff's counsel is that he filed an affidavit of service of the amended complaint.² The court has not found one in the file. There is an affidavit filed by plaintiff's counsel on August 18, 2015, seemingly in support of the motion to declare the defendants to be in default, and it mentions in paragraph 6 that the amended complaint was filed on July 13, 2015 and served on counsel for the defendants the following day, which would be July 14, obviously, but it does not detail how it was served. The letter of August 3 states that the amended complaint was served on July 13, so there is a conflict between these two documents regarding the date of service of the amended complaint and nothing indicating that an amended summons accompanied the

² There is not an amended summons. The court is aware that Rule 15 concerning amendments refers to service of the amended pleading and makes reference to the time left on the original summons, if applicable. There is no claim that an amended summons was necessary in this case under Rule 4.

amended complaint. If service of the amended pleading is properly accomplished, Rule 15(a), SCRCF would require a responsive pleading within 15 days of the date of service of the amended complaint.

Plaintiff's counsel maintains that he heard nothing in response to his letter, so he filed the motion to declare defendants to be in default on August 18, 2015. He also argues that there are so many instances of alleged failure of mail to be delivered that the claims are not credible. In addition to the three mailings from plaintiff's counsel, the defense attorney claims that she mailed a motion for protective order which has not been received for filing by the Clerk of Court.

WAL #3
The sheer number of claims that things mailed have never been delivered is suspicious. As far as actual knowledge, plaintiff's counsel points out that documents are scanned by the Saluda County Clerk of Court and placed onto the CMS website, so they are available to be viewed by the public as a PDF file. Defense counsel could have accessed at least some of the filed documents in that fashion.

There are troubling allegations being lodged about the conduct of the two attorneys in handling this case. While there are an inordinate number of claims that documents transmitted by mail have not been delivered, what the court has before it is a sworn statement by an officer of the court that she never received the amended pleading and that the defendants were never served with it. The affidavit opposing it can only state that the documents were mailed, and there is no separate certificate of service concerning the amended complaint. Because courts are supposed to allow cases to be decided on their merits and based on the averment of non-receipt of the amended summons and complaint, the court finds that the defendants are not in default. They have

15 days from the day that this order is mailed to the defense attorney by the Clerk of Court in which to file and serve their responsive pleading.

The defendants are ordered to answer the outstanding discovery requests within 30 days from the date that this order is mailed to defense 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 from raising objections to the discovery requests as permitted by the South Carolina Rules of Civil Procedure and applicable law.

Since the court has allowed the defendants to file responsive pleadings or motions, the original motion to dismiss is moot. A new complaint was subsequently filed. There is no motion to dismiss the amended complaint in the file today. If that is to be pursued, it must be done by something filed after today's hearing.

Wld
#4

The court understands that the motion before it concerning default is one filed by the plaintiff where there has been no ministerial entry of default. In *Thynes*, the court was wrestling with the nature of a motion that had been made concerning default. The following language comes from *Thynes v. Lloyd*, 294 S.C. 152, 363 S.E.2d 122, (Ct. App. 1987), which is often cited for the proposition that whether default was actually entered is of no consequence because it is purely a ministerial act. The case explains, however, the following things:

Respondent Jeanette F. Thynes commenced this action against appellant Dwayne Furman Lloyd by filing and serving a summons and complaint. More than thirty days thereafter, Mrs. Thynes filed an affidavit stating that Mr. Lloyd had failed to answer or otherwise respond to the complaint as required by the Rules. After this affidavit was filed, Mr. Lloyd filed and attempted to serve a pleading which he styled "Amended Answer." Mrs. Thynes refused to accept service. Mr. Lloyd then filed and served a motion "requesting a ruling that the appellant was not in default or in the alternative that any entry of default be set aside pursuant

to South Carolina Rules of Civil Procedure 55(c) or in the alternative that time for answering be extended pursuant to South Carolina Rules of Civil Procedure 6(b)." The Circuit Court denied the motion. Mr. Lloyd appeals. No final judgment has been entered in the case.

Rule 55(a) provides: "When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default upon the calendar (file book)." It does not appear that the clerk actually entered default in the instant case. However, whether default was actually entered is of no consequence since the entry of default is a purely ministerial [294 S.C. 154] act which the clerk was required to perform once the default was made to appear by the affidavit of Mrs. Thynes.

Rule 55(c) allows the Circuit Court to grant relief from the entry of default. In addition to seeking this relief explicitly, Mr. Lloyd sought, in the alternative, a ruling that he was not in default or a ruling extending the time for him to answer. A ruling that Mr. Lloyd was not in default would obviously be the same as granting him relief from the entry of default. A ruling extending the time for Mr. Lloyd to answer would necessarily require granting him relief from the entry of default. [Emphasis added.] Thus, it is clear that the motion of Mr. Lloyd was a motion under Rule 55(c).

WR
#5
To paraphrase the court in *Thynes* and apply the rationale to the current case, ruling that the defendants are not in default is the same as granting them relief from any entry of default that might have occurred. So, even though there is no entry of default here and no pending motion under Rule 55, SCRPC, the ruling granting additional time to file responsive pleadings or motions necessarily involves determining that the defendants are not in default.

In an abundance of caution and because of the ministerial nature of the act of entering default and the language from *Thynes* stating that it does not matter whether default was actually entered, the court has considered the standards applicable to a Rule 55 motion. There is good cause shown because of the determination related to service of

process. Once a party has put forth a satisfactory explanation for the default, the trial court must also consider: (1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted. *Wham v. Shearson Lehman Bros., Inc.*, 298 S.C. 462, 465, 381 S.E.2d 499, 501-02 (Cl.App.1989). There was a motion to dismiss filed when the original summons and complaint were served. There appear to be extreme differences in the factual assertions and the legal significance of a corporate entity being involved; so, at this stage of the litigation, there appear to be meritorious defenses. If the matter is allowed to proceed on its merits, the plaintiff will still be able to make her claims and present her issues.

Will #6
Balancing all the factors, the court finds that the defendants should not be declared to be in default. The case is in its infancy, and the court has now addressed the motion to compel discovery responses, which should move the case along. The court finds that this dispute should be resolved on its merits, as provided in *Dixon v. Besco Engineering, Inc.*, 320 S.C. 174, 463 S.E.2d 636. In Rule 55 situations, the rules are to be liberally construed to promote justice and dispose of cases on the merits.

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 thus far.

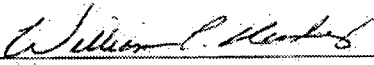
THEREFORE, IT IS ORDERED that the motion to declare the defendants to be in default is denied and the defendants must file and serve a responsive pleading or motion within the time frame provided above.

IT IS FURTHER ORDERED that the motion to compel is granted to the extent that the defendants must respond to outstanding discovery requests as set forth above.

IT IS FURTHER ORDERED that the motion of the defendants to dismiss is moot and any such defense motion to dismiss must be made after the date of the amended complaint.

AND IT IS SO ORDERED.

#7
April 28, 2016



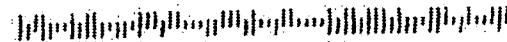
William P. Keesley
Circuit Judge

Doris B. Holmes
Saluda County Clerk of Court
Courthouse
100 East Church Street
Saluda, South Carolina 29138



CANDY M KERN-FULLER
200 E MAIN ST
EASLEY, SC 29640

29640216600



8000

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2015 CP-41-0139

AMY POTTS

McCARTY ENTERPRISES, LLC; JOHN MILES

2016 SEP 28 PM 12:04

PLAINTIFF(S)

CLERK OF COURT
SALUDA CO. S.C.McCARTY; AUDREY S. McCARTY A/K/A AUDREY J.
McCARTY; AND JANE DOE

DEFENDANT(S)

Submitted by:

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: Plaintiff's Motion to Strike Amended Motion to Dismiss and Answer to Amended Complaint is GRANTED. Plaintiff's Motion for Entry of Default is GRANTED. Defendants are held in default pursuant to Rule 55(a), SCRPC. Plaintiff is ordered to provide notice to Defendants of any damages hearing that is scheduled, in compliance with Rule 55(b)(2), SCRPC.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

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

Joelynn Farmer
Circuit Court Judge

2757

Judge Code

September 26,
2016

Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

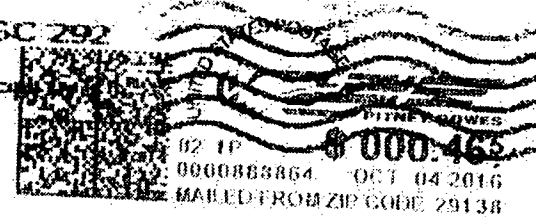
Court Reporter:

**ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON
PAGE 1.**

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

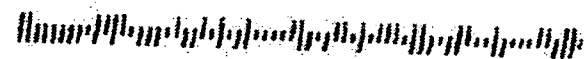
Don A. Holmes
Saluda County Clerk of Court
Courthouse
100 East Church Street
Saluda, South Carolina 29138

COLUMBIA SC 292
04 OCT 2016 PM 4:46



CANDY M KERN-FULLER
200 E MAIN ST
EASLEY, SC 29640

2964032166



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

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2015-CP-41-0139

AMY POTTS

MCCARTY ENTERPRISES, LLC; JOHN MILES MCCARTY;

2016 DEC 29 AM 9:03

AUDREY S. MCCARTY A/K/A AUDREY J. MCCARTY; AND
JANE DOE

PLAINTIFF(S)

CLERK OF COURT
SALUDA CO. S.C.

DEFENDANT(S)

Submitted by: NEWMAN, J.

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

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

Defendants' Motion for Reconsideration (dated October 17, 2016) is DENIED.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

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

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Joelyn Newman
Circuit Court Judge
SCRPC Form 4C (12/2016)

2757
Judge Code

12/20/16
Date

Page 1 of 4

0012

STATE OF SOUTH CAROLINA

COUNTY OF SALUDA

Amy Potts,

vs.

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

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE ELEVENTH CIRCUIT

FILED

2015-CP-41-139

2015 JUN -8 AM 10:28

CLERK OF COURT
SALUDA CO. S.C.

CIVIL COMPLAINT
COVERSHEET

Submitted By: Frank Potts
Address: 137 Stone Ridge Road
Leesville, SC 29070

SC Bar #: 4538
Telephone #: (803) 622-6000
E-mail: lakeccottage@pbtcomm.net...

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

☒ JURY TRIAL demanded in complaint.

☐ NON-JURY TRIAL demanded in complaint.

☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules. This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.

☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

- Contracts**
- ☐ Constructions (100)
 - ☐ Debt Collection (110)
 - ☐ Employment (120)
 - ☐ General (130)
 - ☐ Breach of Contract (140)
 - ☐ Other (199)

- Torts - Professional Malpractice**
- ☐ Dental Malpractice (200)
 - ☐ Legal Malpractice (210)
 - ☐ Medical Malpractice (220)
 - Previous Notice of Intent Case #
20 -NI-
 - ☐ Notice/ File Med Mal (230)
 - ☐ Other (299)

- Torts - Personal Injury**
- ☐ Assault/Slander/Libel (300)
 - ☐ Conversion (310)
 - ☐ Motor Vehicle Accident (320)
 - ☐ Premises Liability (330)
 - ☐ Products Liability (340)
 - ☐ Personal Injury (350)
 - ☐ Wrongful Death (360)
 - ☒ Other (399)

- Real Property**
- ☐ Claim & Delivery (400)
 - ☐ Condemnation (410)
 - ☐ Foreclosure (420)
 - ☐ Mechanic's Lien (430)
 - ☐ Partition (440)
 - ☐ Possession (450)
 - ☐ Building Code Violation (460)
 - ☐ Other (499)

- Inmate Petitions**
- ☐ PCR (500)
 - ☐ Mandamus (520)
 - ☐ Habeas Corpus (530)
 - ☐ Other (599)

- Administrative Law/Relief**
- ☐ Reinstate Drv. License (800)
 - ☐ Judicial Review (810)
 - ☐ Relief (820)
 - ☐ Permanent Injunction (830)
 - ☐ Forfeiture-Petition (840)
 - ☐ Forfeiture-Consent Order (850)
 - ☐ Other (899)

- Judgments/Settlements**
- ☐ Death Settlement (700)
 - ☐ Foreign Judgment (710)
 - ☐ Magistrate's Judgment (720)
 - ☐ Minor Settlement (730)
 - ☐ Transcript of Judgment (740)
 - ☐ Lis Pendens (750)
 - ☐ Transfer of Structured Settlement Payment Rights Application (760)
 - ☐ Confession of Judgment (770)
 - ☐ Petition for Workers Compensation Settlement Approval (780)
 - ☐ Other (799)

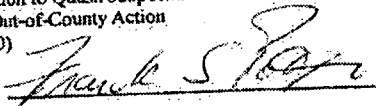
- Appeals**
- ☐ Arbitration (900)
 - ☐ Magistrate-Civil (910)
 - ☐ Magistrate-Criminal (920)
 - ☐ Municipal (930)
 - ☐ Probate Court (940)
 - ☐ SCDOT (950)
 - ☐ Worker's Comp (960)
 - ☐ Zoning Board (970)
 - ☐ Public Service Commission (990)
 - ☐ Employment Security Commission (991)
 - ☐ Other (999)

Special/Complex /Other

- ☐ Environmental (600)
- ☐ Automobile Arb. (610)
- ☐ Medical (620)
- ☐ Other (699)
- ☐ Sexual Predator (510)

- ☐ Pharmaceuticals (630)
- ☐ Unfair Trade Practices (640)
- ☐ Foreign Subpoenas (650)
- ☐ Motion to Quash Subpoena in Out-of-County Action (660)

Submitting Party Signature:



Date:

6/7/2015

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRPC, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

STATE OF SOUTH CAROLINA

COUNTY OF SALUDA

Amy Potts,

vs.

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

Defendants.

FILED THE COURT OF COMMON PLEAS
FOR THE ELEVENTH CIRCUIT

2015 JUN -8 AM 10:28

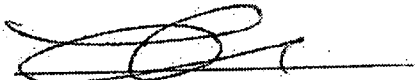
CLERK OF COURT
SALUDA CO. S.C.
Plaintiff,

2015-CP-41-139

SUMMONS

TO THE DEFENDANTS ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint herein, a copy of which is herewith served upon you, and to serve a copy of your answer to this Complaint upon the subscriber, at the following address: 137 Stone Ridge Road, Leesville, South Carolina 29070, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, or otherwise appear and defend, judgement by default will be rendered against you for the relief demanded in the Complaint.


Frank S. Potts
Attorney at Law
(SC Bar No. 4538)
137 Stone Ridge Road
Leesville, SC 29070
(803)622-6000
lakecottage@pbtcomm.net

M. Evan Lacke
Attorney at Law
(SC Bar No. 74969)
LACKE LAW FIRM
147 Wappoo Creek Drive, Ste. 204
Charleston, SC 29412
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evanlacke@lackelawfirm.com

STATE OF SOUTH CAROLINA

COUNTY OF SALUDA

Amy Potts,

vs.

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

Defendants.

FILED

IN THE COURT OF COMMON PLEAS
FOR THE ELEVENTH CIRCUIT

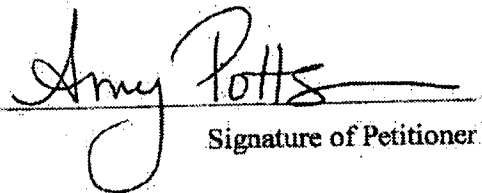
2015 JUN -8 AM 10:28

CLERK OF COURT
SALUDA CO. S.C.
Plaintiff,

2015-CP-41-139

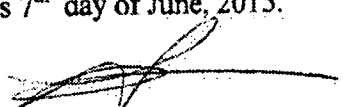
VERIFICATION

I, Amy Potts, being duly sworn, am the Plaintiff herein, and having read the forgoing Complaint and the contents thereof, affirm that the same is true of my own knowledge, except as matters therein alleged on information and belief; and as to those matters I believe them to be true.


Signature of Petitioner

SWORN to and Subscribed before me

this 7th day of June, 2015.


Frank S. Potts
Notary Public for South Carolina

My Commission expires: 8/24/2021

0015

STATE OF SOUTH CAROLINA
COUNTY OF SALUDA

FILED IN THE COURT OF COMMON PLEAS
FOR THE ELEVENTH CIRCUIT

2015 JUN -8 AM 10: 28

2015-CP-41- 139

Amy Potts,

CLERK OF COURT
SALUDA CO. S.C.
Plaintiff,

vs.

COMPLAINT

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

Defendants.

(Jury Trial Demanded)

THE PLAINTIFF FOR A CAUSE OF ACTION AGAINST THE DEFENDANTS WOULD
SHOW AS FOLLOWS:

1. The plaintiff is a citizen and resident of the County of Saluda, State of South Carolina.
2. The defendants, Audrey S. McCarty and John Miles McCarty, are residents of the County of Saluda, State of South Carolina and reside at 103 Kalyn Way, Leesville, South Carolina.
3. The defendant Audrey McCarty is the sole owner of the residential property located at 103 Kalyn Way, Leesville, South Carolina.
4. The defendant, McCarty Enterprises, LLC, is a South Carolina corporation with its principal office located in Saluda County at 105 Stone Ridge Road, Leesville, South Carolina.
5. The defendant, Jane Doe, whose true name is currently unknown, is, upon information and belief, an agent or employee of McCarty Enterprises who resides upon property at 105 Stone Ridge Road owned by said corporation which is adjacent to and

contiguous to the property upon which the defendants, Audrey and John McCarty, reside at 103 Kalyn Way.

6. This court has jurisdiction of the parties in this matter; the subject of this action; and venue in this matter is proper.

FOR A CAUSE OF ACTION

Intentional Tort – Civil Conspiracy

7. The plaintiff was the owner of an Australian Shepherd dog who lived with the plaintiff at her residence in Leesville, South Carolina for over six years.

8. The defendants knew the plaintiff, where she lived, and that the Australian Shepherd dog, known as "Ruby" was her dog, pet, and constant companion for which the plaintiff had great love, affection, and caring and treated as a member of her family.

9. The defendants Audrey McCarty and John McCarty bore the plaintiff ill will because prior to July 2012, the plaintiff had accidentally run over and killed the defendants' beloved Boston Terrier pet dog when it was chasing her van on Stone Ridge Road. Within a few months of that incident, the defendant Audrey McCarty threatened that the plaintiff's dog "Ruby" would be killed if she trespassed on the defendants' property.

10. On March 4, 2015 the defendant Audrey McCarty and defendant Jane Doe drove a golf cart to the plaintiff's residence, and in the presence and hearing of the defendant Jane Doe, the defendant Audrey McCarty again threatened that "Ruby" would be killed if she trespassed on the defendants' property. The plaintiff responded to the defendant that she loved and cared for "Ruby" as a member of her family, and had gone to the trouble and expense of purchasing and installing a wireless underground fence which the defendant

Audrey McCarty acknowledged had been effective at preventing "Ruby" from leaving the plaintiff's residential property for several years.

11. On Tuesday, March 24, 2015, defendants Audrey McCarty and Jane Doe again drove a golf cart to the plaintiff's residence to enquire whether or not the plaintiff knew the identities of the owners of a German Shepherd and a black Labrador Retriever which the defendant Jane Doe claimed to have observed killing two emus on the defendants' property the previous night. The defendant Jane Doe participated in the conversation between the defendant Audrey McCarty and the plaintiff, and took notes on a yellow legal pad. Upon information and belief, similar enquiries were made of at least two other neighbors by the defendant Audrey McCarty during the same day, and Jane Doe was observed taking notes on the yellow pad by each of the neighbors. At least one of those neighbors was told by defendant Audrey McCarty that the next dog that trespassed on the defendants' property would be killed.

12. The following morning, March 25, 2015, at approximately 8:40 a.m., the defendant John McCarty fired two shots from a shotgun, killing "Ruby" on or adjacent to the property line of his residence at 103 Kaiyn Way.

13. The defendants at various and sundry times combined together for the sole and exclusive purpose of causing damage to the plaintiff by planning to kill, seeking an excuse or fabrication to kill, and eventually killing her dog in revenge for the accidental death of the Boston Terrier of the defendant Audrey McCarty which was chasing vehicles at the time of the dog's death.

14. The McCarty defendants had published threats or participated in the publishing of threats to kill the plaintiff's dog, and the defendant Jane Doe joined with Audrey and John McCarty in the endeavor as an authorized employee or agent of her employer, defendant McCarty Enterprises.

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."

16. The killing or the wounding and killing of "Ruby" on March 25, 2015 was a planned, intentional, and an overt act of the defendants which was designed and intended to cause the plaintiff special damages in addition to the damages for the loss of her dog "Ruby."

17. The plaintiff has been damaged by the intentional killing of her dog, "Ruby," and, as a direct and proximate and intentional result thereof, has suffered severe emotional distress by the defendants who were certain their acts would result in such distress as the plaintiff endured by hearing the gunshots, seeing the body of her dog, and realizing that neighbors who lived across the street had killed a beloved family pet cruelly, maliciously, and vindictively.

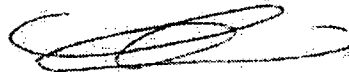
18. The actions set forth herein of the defendants which resulted in the killing of a neighbor's pet dog was extreme and outrageous and exceeded all bounds of civilized behavior and is atrocious and utterly intolerable in a civilized community.

19. The intentional actions of the defendants resulting in the killing of the plaintiff's pet, were designed intended, and did cause the plaintiff severe emotional distress that she was incapable of enduring.

20. The emotional distress suffered by the plaintiff by the loss of her beloved pet dog, as well as the knowledge of the pain, confusion, and cruelty suffered by her dog throughout its killing, was sufficiently severe that no reasonable person could be expected to endure the same, and as a result thereof, the plaintiff was required to and did seek psychological treatment for the shock, illness, and bodily harm visited upon her by the defendants.

21. The plaintiff has been damaged by the cruel, malicious, and intentional acts of the defendants, both for her actual, punitive, and special damages in excess of twenty-five thousand dollars in such amount as a jury may award.

22. Wherefore, the plaintiff prays for judgement against the defendants for actual, punitive, and special damages, jointly and severally, and for such other further relief as the court deems just and proper.



Frank S. Potts
Attorney at Law
(SC Bar No. 4538)
137 Stone Ridge Road
Leesville, SC 29070
(803)622-6000
lakecottage@pbtcmm.net

M. Evan Lacke
Attorney at Law
(SC Bar No. 74969)
LACKE LAW FIRM
147 Wappoo Creek Drive, Ste. 204
Charleston, SC 29412
(843)327-1523
evanlacke@lackelawfirm.com

STATE OF SOUTH CAROLINA,)
COUNTY OF SALUDA)

IN THE COURT OF COMMON PLEAS

Amy Potts)
Plaintiff(s))

ELEVENTH JUDICIAL CIRCUIT

vs.)

AFFIDAVIT OF SERVICE

McCarty Enterprises, LLC., John Miles)
McCarty, Audrey S. McCarty a/k/a)
Audrey J. McCarty, and Jane Doe)
Defendant(s).)

FILE NO: 2015-CP-41-139

PERSONALLY PREPARED BEFORE ME, the undersigned deponent, who being duly sworn

says that (s)he served the Civil Action Cover Sheet, Summons, Complaint, Plaintiff's in this action
First Interrogatories to defendant Audrey McCarty and
John McCarty and McCarty Enterprises; Plaintiff's First
Request for Production to Audrey McCarty, John McCarty,
McCarty Enterprises; Copy of Subpoena to Saluda County
Sheriff's Department

(Describe document(s) served)

on John Miles McCarty, Audrey S. McCarty and McCarty Enterprises, LLC, by delivery to
(Name of party served)

☒ John Miles McCarty, Audrey S. McCarty and McCarty Enterprises, LLC, personally,
(Name of party served)

defendant; spouse of
defendant; and
person who also
represented herself
as the authorized
agent for defendant

☒ Audrey S. McCarty a/k/a/ Audrey J.)
McCarty,) the John McCarty) of the party served,
(Name of person served) (Note relationship to party)

and a person of discretion residing at the residence of the party served;

☐ the of
(Name of person served) (Title) (Name of corporate party served)

and leaving with ☐ (him) ☒ (her) a copy at
105 Kayin Way
(Street address)

in Leesville Saluda County, South Carolina,
(City or Town) County

on June 14, 2015 at 7:40pm o'clock

that deponent knows the person so served, and that deponent is not a party of this action, is not less
than eighteen (18) years of age and has no interest therein or connection therewith.

☐ Unable to locate and serve the above process on the defendant after diligent efforts to do so.

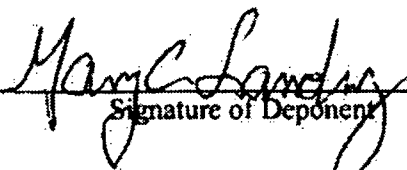
The process is returned unexecuted.

Sworn to and Subscribed before me)

this 24 day of June, 2015.)


Notary Public for South Carolina)

My Commission expires 8/24/2021)


Signature of Deponent)

Entered in the Sheriff's Service Book on

Book _____

Page _____

Number _____

STATE OF SOUTH CAROLINA

COUNTY OF SALUDA

Amy Potts,

Plaintiff(s),

vs.

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

Defendant(s).

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

Docket No. 2015-CP-41-139

Plaintiff's Attorney:

Candy Kern-Fuller, Bar No. 11392

Address:

200 East Main Street, Easley, S.C. 29640

Phone: (864)855-3114 Fax (864)855-3446

E-mail: candy@upstatelawgroup.com Other: _____

Defendant's Attorney:

Frank S. Potts, Bar No. 4538

Address:

1201 Main Street, Suite 350 Capitol Center, Columbia,
SC 29201

Phone: 803-734-1277 Fax _____

E-mail: fpotts@ogc.sc.gov Other: _____

Defendant's Attorney:

M. Evan Lacke, Bar No.: 74969

Address:

147 Wappoo Creek Dr. Suite 204, Charleston, S.C.
29412

- ☒ **MOTION HEARING REQUESTED** (attach written motion and complete SECTIONS I and III)
☐ **FORM MOTION, NO HEARING REQUESTED** (complete SECTIONS II and III)
☐ **PROPOSED ORDER/CONSENT ORDER** (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Dismiss

Estimated Time Needed: 30 minutes

Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

☐ Written motion attached

☐ Form Motion/Order

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

Signature of Attorney for ☐ Plaintiff / ☒ Defendant

Date submitted

SECTION III: Motion Fee

☒ **PAID - AMOUNT: \$**

☐ **EXEMPT:**

(check reason)

☐ Rule to Show Cause in Child or Spousal Support

☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status ☐ State Agency v. Indigent Party

☐ Sexually Violent Predator Act ☐ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

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

☐ Proposed order submitted at request of the court; or,

reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter: _____

☐ Other: _____

FILED
2015 JUL -1 PM 12:17
CLERK OF COURT
SALUDA CO. S.C.

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order.	JUDGE CODE _____
☐ Other: _____	Date: _____
CLERK'S VERIFICATION	
Collected by: <u>Margaret A. Davis</u>	Date Filed: _____
☒ MOTION FEE COLLECTED: \$ <u>25.00</u>	
☐ CONTESTED - AMOUNT DUE: \$ _____	

SCCA 233 (11/2003)

STATE OF SOUTH CAROLINA)

COUNTY OF SALUDA)

Amy Potts,)

Plaintiff,)

v.)

McCarty Enterprises, LLC, John)

Miles McCarty, Audrey S. McCarty,)

a/k/a Audrey J. McCarty and Jane)

Doe)

Defendant.)

IN THE COURT OF COMMON PLEAS

ELEVENTH JUDICIAL CIRCUIT

C.A. No. 2015-CP-41-139

**NOTICE OF MOTION AND MOTION
TO DISMISS**

FILED
2015 JUL -1 PM 12:17
CLERK OF COURT
SALUDA CO. S.

To Plaintiff, by and through her attorney Frank S. Potts, Esq. and M. Evan Lacke, Esq.:

YOU WILL PLEASE TAKE NOTICE that the Defendants., by and through their undersigned attorney, will move before the presiding Judge of the Court of Commons Pleas for the Eleventh Judicial Circuit, at the Saluda County Court, on the tenth (10th) day after service hereof, or as soon thereafter as counsel may be heard, for an Order, dismissing this action for the following reasons:

1. Plaintiff's claim for Civil Conspiracy should be dismissed because at all times alleged Defendants, John McCarty, Audrey McCarty and Jane Doe, were employees and/or agents of Defendant 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);
2. Plaintiff's allegations that Defendants killed her dog is not an actionable matter.
Defendants cannot be held civilly liable for the killing of Plaintiff's dog under Section 47-3-530 of the S.C. Code of Laws, as amended, which lawfully permits the killing of a dog that is "threatening to cause or causing personal injury or property damage."

Plaintiff has made no allegations, nor could she since she was not present, that said exemption can be overcome.

As such, this matter should be dismissed WITH PREJUDICE.

UPSTATE LAW GROUP, LLC



Candy M. Kern-Fuller, Esq., SC Bar No. 11392
200 East Main Street
Easley, South Carolina 29640
864.855.3114 telephone
864.855.3446 facsimile
Candy@upstatelawgroup.com

Easley, South Carolina

ATTORNEY FOR PLAINTIFF

June 24, 2015

STATE OF SOUTH CAROLINA)

COUNTY OF SALUDA)

Amy Potts,)

Plaintiff,)

v.)

McCarty Enterprises, LLC, John)

Miles McCarty, Audrey S. McCarty,)

a/k/a Audrey J. McCarty and Jane)

Doe)

Defendant.)

IN THE COURT OF COMMON PLEAS

ELEVENTH JUDICIAL CIRCUIT

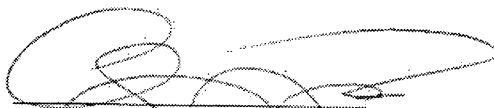
C.A. No. 2015-CP-41-139

CERTIFICATE OF SERVICE

On June 24, 2015, I served a copy of the Defendants' Motion to Dismiss on the below parties on behalf of the Plaintiff:

Mr. Frank S. Potts
State Fiscal Accountability Authority
1201 Main Street
Suite 350 (Capitol Center)
Columbia, SC 29201

Mr. Michael Evan Lacke
Lacke Law Firm, LLC
147 Wappoo Creek Dr., Ste. 204
Charleston, SC 29412


Candy M. Kern-Fuller, Esq.

SWORN TO BEFORE ME
This 24th day of June, 2015


Notary Public for South Carolina
My commission expires: 3-3-2018

STATE OF SOUTH CAROLINA

COUNTY OF SALUDA

Amy Potts;

2015 JUL 13 PM 1:50

2015-CP-41-139

FILED
CLERK OF COURT
SALUDA CO. S.C.

IN THE COURT OF COMMON PLEAS
FOR THE ELEVENTH CIRCUIT

vs.

FIRST AMENDED COMPLAINT

McCarty Enterprises, LLC, John Miles

McCarty, Audrey S. McCarty a/k/a

Audrey J. McCarty, and Jane Doe;

Defendants.

(Jury Trial Demanded)

THE PLAINTIFF FOR ITS CAUSES OF ACTION AGAINST THE DEFENDANTS WOULD
SHOW AS FOLLOWS:

1. The plaintiff is a citizen and resident of the County of Saluda, State of South Carolina.
2. The defendants, Audrey S. McCarty and John Miles McCarty, are residents of the County of Saluda, State of South Carolina and reside at 103 Kalyn Way, Leesville, South Carolina.
3. The defendant Audrey McCarty is the sole owner of the residential property located at 103 Kalyn Way, Leesville, South Carolina.
4. The defendant, McCarty Enterprises, LLC, is a South Carolina corporation with its principal office located in Saluda County at 105 Stone Ridge Road, Leesville, South Carolina.
5. The defendant, Jane Doe, whose true name is currently unknown, is, upon information and belief, an agent or employee of McCarty Enterprises who resides upon property at 105 Stone Ridge Road owned by said corporation which is adjacent to and contiguous to the property upon which the defendants, Audrey and John McCarty, reside at 103 Kalyn Way.

6. This court has jurisdiction of the parties in this matter; the subject of this action; and venue in this matter is proper.

FOR A CAUSE OF ACTION

Intentional Tort – Civil Conspiracy

7. The plaintiff was the owner of an Australian Shepherd dog who lived with the plaintiff at her residence in Leesville, South Carolina for over six years.

8. The defendants knew the plaintiff, where she lived, and that the Australian Shepherd dog, known as "Ruby" was her dog, pet, and constant companion for which the plaintiff had great love, affection, and caring and treated as a member of her family.

9. The defendants Audrey McCarty and John McCarty bore the plaintiff ill will because prior to July 2012, the plaintiff had accidentally run over and killed the defendants' beloved Boston Terrier pet dog when it was chasing her van on Stone Ridge Road. Within a few months of that incident, the defendant Audrey McCarty threatened that the plaintiff's dog "Ruby" would be killed if she trespassed on the defendants' property.

10. On March 4, 2015 the defendant Audrey McCarty and defendant Jane Doe drove a golf cart to the plaintiff's residence, and in the presence and hearing of the defendant Jane Doe, the defendant Audrey McCarty again threatened that "Ruby" would be killed if she trespassed on the defendants' property. The plaintiff responded to the defendant that she loved and cared for "Ruby" as a member of her family, and had gone to the trouble and expense of purchasing and installing a wireless underground fence which the defendant Audrey McCarty acknowledged had been effective at preventing "Ruby" from leaving the plaintiff's residential property for several years.

11. On Tuesday, March 24, 2015, defendants Audrey McCarty and Jane Doe again drove a golf cart to the plaintiff's residence to enquire whether or not the plaintiff knew the identities of the owners of a German Shepherd and a black Labrador Retriever which the defendant Jane Doe claimed to have observed killing two emus on the defendants' property the previous night. The defendant Jane Doe participated in the conversation between the defendant Audrey McCarty and the plaintiff, and took notes on a yellow legal pad. Upon information and belief, similar enquiries were made of at least two other neighbors by the defendant Audrey McCarty during the same day, and Jane Doe was observed taking notes on the yellow pad by each of the neighbors. At least one of those neighbors was told by defendant Audrey McCarty that the next dog that trespassed on the defendants' property would be killed.

12. The following morning, March 25, 2015, at approximately 8:40 a.m., the defendant John McCarty fired two shots from a shotgun, killing "Ruby" on or adjacent to the property line of his residence at 103 Kalyn Way.

13. The defendants at various and sundry times combined together for the sole and exclusive purpose of causing damage to the plaintiff by planning to kill, seeking an excuse or fabrication to kill, and eventually killing her dog in revenge for the accidental death of the Boston Terrier of the defendant Audrey McCarty which was chasing vehicles at the time of the dog's death.

14. The McCarty defendants had published threats or participated in the publishing of threats to kill the plaintiff's dog, and the defendant Jane Doe joined with Audrey and John McCarty in the endeavor as an authorized employee or agent of her employer, defendant McCarty Enterprises.

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."

16. The killing or the wounding and killing of "Ruby" on March 25, 2015 was a planned, intentional, and an overt act of the defendants which was designed and intended to cause the plaintiff special damages in addition to the damages for the loss of her dog "Ruby."

17. The plaintiff has been damaged by the intentional killing of her dog, "Ruby," and, as a direct and proximate and intentional result thereof, has suffered severe emotional distress by the defendants who were certain their acts would result in such distress as the plaintiff endured by hearing the gunshots, seeing the body of her dog, and realizing that neighbors who lived across the street had killed a beloved family pet cruelly, maliciously, and vindictively.

18. The actions set forth herein of the defendants which resulted in the killing of a neighbor's pet dog was extreme and outrageous and exceeded all bounds of civilized behavior and is atrocious and utterly intolerable in a civilized community.

19. The intentional actions of the defendants resulting in the killing of the plaintiff's pet, were designed intended, and did cause the plaintiff severe emotional distress that she was incapable of enduring.

20. The emotional distress suffered by the plaintiff by the loss of her beloved pet dog, as well as the knowledge of the pain, confusion, and cruelty suffered by her dog throughout its killing, was sufficiently severe that no reasonable person could be expected to endure the same, and as a result thereof, the plaintiff was required to and did seek psychological treatment for the shock, illness, and bodily harm visited upon her by the defendants.

21. The plaintiff has been damaged by the cruel, malicious, and intentional acts of the defendants, both for her actual, punitive, and special damages in excess of twenty-five thousand dollars in such amount as a jury may award.

SECOND CAUSE OF ACTION

Intentional Infliction of Emotional Distress

22. The allegations of the first cause of action are incorporated herein as if fully set forth.

23. As an alternative cause of action and in accordance with representations made by defendants' legal representative, plaintiff would allege, upon information and belief, that the defendant McCarty Enterprises was the employer and controlling person who, through the other individually named defendants, caused, directed and is responsible for the shooting death of the dog Ruby, and for intentionally inflicting emotional distress upon the plaintiff.

24. Whereas the plaintiff prays for judgement against each defendant, both actual and punitive and special damages for the first cause of action, jointly and severally, and for actual and punitive damages against the defendant corporation for the second cause of action, and for such further relief as the court deems just and proper.



Frank S. Potts
Attorney at Law
(SC Bar No. 4538)
137 Stone Ridge Road
Leesville, SC 29070
(803)622-6000
lakecottage@pbtcomm.net

M. Evan Lacke
Attorney at Law
(SC Bar No. 74969)
LACKE LAW FIRM
147 Wappoo Creek Drive, Ste. 204
Charleston, SC 29412
(843)327-1523
evanlacke@lackelawfirm.com

Leesville, SC
July 13, 2015

STATE OF SOUTH CAROLINA

COUNTY OF SALUDA

Amy Potts,

IN THE COURT OF COMMON PLEAS
FOR THE ELEVENTH CIRCUIT

2015-CP-41-139

2015 AUG 18 AM 11:00

vs.

CLERK OF COURT
SALUDA CO. S.C.

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

Defendants.

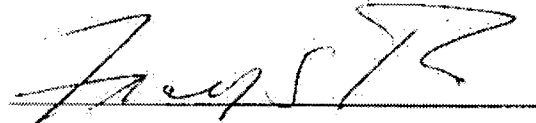
MOTION FOR DEFAULT AND TO
COMPEL RESPONSES TO DISCOVERY
AS TO DEFENDANTS, AUDREY
McCARTY AND JOHN McCARTY
AND McCARTY ENTERPRISES, LLC

To Defendants, by and through their attorney, Candy M. Kern-Fuller, Esq.:

You will please take notice that ten days after the filing of this motion, or as soon thereafter as the matter may be heard, the plaintiff will move for judgement by default against the defendant's John McCarty, Audrey McCarty, and McCarty Enterprises, LLC, for a failure to respond or otherwise plead to plaintiff's Amended Complaint as required by SCRCP Rule 15(a).

In the event the court finds good cause to excuse the default and to permit the defendants to respond to the Amended Complaint, the plaintiff prays that the court require the defendants to respond to the plaintiff's Interrogatories and Requests for Production which were due on July 28, 2015, together with the fees and costs incurred by the plaintiff as a result of the same.

This motion is based upon the South Carolina Rules of Civil Procedure, the affidavit of counsel (attached hereto) and the record before this Honorable Court.



Frank S. Potts
(SC Bar No. 4538)
137 Stone Ridge Road
Leesville, SC 29070
(803) 622-6000
lakecottage@pbicom.net

Leesville, SC
August 18, 2015

ATTORNEY FOR PLAINTIFF

FRANK S. POTTS

ATTORNEY AT LAW

137 STONE RIDGE ROAD
LEESVILLE, SOUTH CAROLINA 29070

803.622.6000
LAKECOTTAGE@COMPORIUM.NET

August 3, 2015

Candy M. Kern-Fuller, Esq.
Upstate Law Group
200 East Main Street
Easley, SC 29640

Re: Potts v. McCarty Enterprises, LLC et al
Civil Action No.: 2015-CP-41-139

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 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

STATE OF SOUTH CAROLINA

COUNTY OF SALUDA

Amy Potts,

Plaintiff,

vs.

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

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE ELEVENTH CIRCUIT

2015-CP-41-139

**PLAINTIFF'S FIRST SET OF
INTERROGATORIES
TO THE DEFENDANT
AUDREY S. McCARTY
a/k/a AUDREY J. McCARTY**

TO: THE DEFENDANT AUDREY S. McCARTY a/k/a AUDREY J. McCARTY:

Pursuant to Rule 33 of the South Carolina Rules of Civil Procedure, the Plaintiff requests that the Defendant answer in writing and under oath within forty-five (45) days after service hereof the following interrogatories. These interrogatories shall be deemed to be continuing so as to require the defendant Audrey McCarty reasonably to supplement or amend all her answers thereto in accordance with rule 26(e) of the South Carolina Rules of Civil Procedure.

DEFINITIONS

The following words or terms shall be deemed to mean the following:

1. The term "PLAINTIFF" shall refer to Amy Potts.
2. The terms "DEFENDANT," "YOU," or "YOUR," shall refer to Audrey S. McCarty a/k/a Audrey J. McCarty.

3. The terms "AND" and "OR" shall be construed conjunctively and disjunctively, as necessary, to make the document request inclusive rather than exclusive. Similarly, any use of the singular shall also mean the plural and vice versa.

4. The terms "DEFENDANTS' PROPERTY" or "DEFENDANT'S PROPERTY" shall refer to the contiguous property comprised of 103 Kalyn Way, Leesville, South Carolina, and 105 Stone Ridge Road, Leesville, South Carolina.

5. The term "ADDRESS" means residential address, US mailing address, email address, school address, and business address.

6. The terms "CONCERNING" and "RELATING TO" shall mean affecting, bearing upon, comprising, concerning, constituting, containing, dealing with, embodying, embracing, encompassing, entailing, evidencing, germane to, identifying, implicating, including, incorporating, involving, pertaining to, regarding, relating to, referring to, or reflecting in any manner.

7. The term "COMMUNICATION" shall mean any transmission, conveyance, or exchange of information, whether by written, electronic, oral, or other means. It shall include, without limitation, any meeting, discussion, contact, conference, telephone conversation, letter, e-mail transmission, Internet posting, social media posting, memorandum, document, message, telegram, telefax, mailgram, billing statement, electronic recording, or other form of written, electronic, or oral information transmission or exchange.

8. The term "IDENTIFY:" **when used with respect to a communication**, shall mean to state (a) the date of the communication; (b) the place or location where the communication occurred; (c) whether the communication was conducted in person, in writing, or by telephonic, electronic, or other means; (d) the identity of each person who participated in, was a party to, or witnessed the communication; (e) what was stated or

communicated by each person; and (f) whether any written record of the communication exists, and, if so, the custodian of any such record and its present location.

9. The term "IDENTIFY" when used with respect to a natural person shall mean to state the person's full name, present or last known business address (or, if no business address, home address), and the person's employer and position at the time in question with respect to the particular interrogatory involved.

10. The term "IDENTIFY" when used with respect to an organization or other entity that is not a natural person shall mean to state the full name of the organization or entity, the form of the organization (i.e., corporation, partnership), and the address of the principal office or place of business of the organization or entity.

11. The term "IDENTIFY" when used with respect to a record shall mean to state the title, date, author, signatories, recipients, a general description of such record sufficient to permit it to be identified with particularity in a request for the production of documents, the present or last known location of such record, and the identity of the person or persons having custody, control, or possession thereof.

12. The term "DESCRIBE" shall mean to fully and completely state, explain, illustrate, characterize, define, delineate, recount, detail, designate, expound, elucidate, or recapitulate.

13. The term "DESCRIBE" when used with respect to an interrogatory that asks for the "factual basis" of a claim, contention, belief, or opinion shall mean to state all facts that you contend gives rise to or supports the claim, contention, belief, or opinion, and not merely an ultimate fact or conclusion of law. Such a statement should include, where appropriate, the date, location, and manner of each occurrence, and the identity of each person participating or engaging therein.

14. The term "DESCRIPTION OF ANY CIVIL ACTION THE HAS BEEN A PARTY TO" shall include, for each occurrence, the name of all parties to each suit; the date of each suit; and the court in which each was brought and the disposition thereof.

15. The term "DESCRIPTION OF WRITTEN OR RECORDED STATEMENT" shall include a list of each and every written recorded statement or report given or made by or on behalf of the Plaintiff regarding the matter and things alleged in the Complaint, setting forth as to each the date and place of making said statement or report, the persons, firms, corporations or agencies to whom statements or reports were given or made, the purpose of said statements or reports and the name and address of each and every person known to have custody or control of the original or any copies of said statements or reports and if such is in the possession or control of Plaintiff or Plaintiff's counsel, please attach a copy of said statement or report to the answers of these interrogatories.

16. The term "DESCRIPTION OF BOOKS, DOCUMENTS, AND OTHER EXHIBITS" shall include a list of each and every book, document, diagram, plat, photograph, list, depiction, or other tangible thing which the Plaintiff intends to introduce as an exhibit in the trial of this case or in any deposition taken before trial, setting forth as to each item, its current location, and the name and address of the custodian thereof, and stating whether or not this defendant will be permitted to examine, and where practical, obtain copies thereof without the necessity of a motion to produce.

17. The name "RUBY" shall refer to the plaintiff's Australian Shepherd pet dog.

INTERROGATORIES:

1. If the defendant is improperly identified, give the proper identification and state whether counsel will accept service of an amended summons and pleading reflecting the correct information.
2. Identify each person known to the defendant or counsel to be witnesses concerning the facts of the case and indicate whether or not written or recorded statements have been taken from the witnesses and who has possession of such statements.
3. Set forth a list of photographs, plats, sketches or other prepared documents in possession of the defendant that relate to the claim or defense in the case.
4. Set forth the names and addresses of all insurance companies which have liability insurance coverage relating to the claim and set forth the number or numbers of the policies involved and the amount or amounts of liability coverage provided in each policy.
5. List the names and addresses of any expert witnesses whom the defendant proposes to use as a witness at the trial of the case. For each person known to the defendant or counsel to be a witness concerning the facts of the case, set forth either a summary sufficient to inform the plaintiff of the important facts known to or observed by such witness, or provide a copy of any written or recorded statements taken from such witnesses.
6. Have you ever been convicted, pled guilty, nolo contendere, or found guilty of any crime other than a minor traffic offense? If so, set forth each such crime, the court in which convicted, the sentence, the date of conviction, and the description of the facts constituting the crime, including the date and place of the criminal activity.
7. Set forth a description of any civil action you have been party to in other than the family court. Identify each such civil action, the other party or parties, the court with

jurisdiction, the case number, whether you were a plaintiff or defendant, a synopsis of the dispute, and set forth the amount of any judgement rendered in the described action.

8. Identify all banks, savings and loans, or other financial institutions where you have signatory authority for an account, and for each institution set forth the account numbers for each account, and the identities of any other persons who are signatories on the account.

9. Identify all mortgages, liens, or other security interests which exist upon property, real or personal, owned by the defendant and the amount remaining to be paid on each such lien.

10. Set forth all animals that have been housed, penned, or enclosed on the defendants' property since January 1, 2011, including (a) type of animal; (b) owner of animal; (c) from whom animal was acquired; (d) date, location, and cost of acquisition of animal; (e) current location and condition of each animal; (f) if deceased, the cause of death; and (g) if sold, the date, sales price and identity of purchaser.

11. Set forth, fully and completely, any instance in which an animal kept on defendants' property since January 1, 2011 has disappeared, been attacked, suffered injury, or been killed, including the date and all circumstances about each such disappearance, attack, injury, or death.

12. Identify the woman riding with you in a golf cart at on March 4, 2015 and March 24, 2015 when you spoke to the plaintiff at her residence and the woman's relationship to you or any other defendant.

13. Have you ever discussed shooting Ruby or any other dog with defendant John McCarty or with any other person, and, if so, describe each such instance, the date, the person with whom this subject was discussed, and the purpose of each discussion.

14. Did you give John McCarty permission to shoot Ruby on your property at 103 Kalyn Way, Leesville, South Carolina?

15. Have you issued threats to any person that their dog would be shot or killed if it trespassed on defendants' property? If so, please set forth a description of the issuance of each threat, including the name of the person to whom the threat was made, the date the threat was made, and your reason(s) for making the threat.

16. What measures have you taken to prevent the trespass of dogs onto your property? Identify the date, manner, and cost of each such preventative action.

17. What measures have you taken to remove trespassing dogs from your property? Identify the date and manner of each such measure, and the cost of same.

18. Have you or any other defendant attempted to shoot any animals on your property prior to March 25, 2015 and, if so, set forth how the attempt was made, the date of each attempt, and the result of each such attempt.

19. Fully explain your understanding of the reason Ruby was shot by the defendant John McCarty.

20. If you witnessed the shooting of Ruby, or any part thereof, fully describe everything you saw or heard.

21. Fully describe everything you related to the Saluda County Sheriff's Deputy who responded to the scene of the March 25 shooting.

22. Did you attempt to stop John McCarty from shooting Ruby? If so, fully describe those efforts and the date of each.

23. Prior to the shooting of Ruby, did you consult with anyone from the Saluda County Sheriff's Department about whether it was legal for you to do so? If so, identify the

person(s) you consulted, the date(s) of consultation and exactly what you were told by each person in that office with whom you spoke.

24. Do you own any of the animals maintained on the defendants' property? If so, list each such animal owned by you as of March 25, 2015.

25. Did you ever inform plaintiff that Ruby had threatened, attacked, harmed, or killed any livestock on your property? If so, fully describe each such conversation, including date, location, and whether or not you requested payment of damages.

26. Set forth your date and place of birth.

S. Frank S. Potts

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STATE OF SOUTH CAROLINA

COUNTY OF SALUDA

Amy Potts,

Plaintiff,

vs.

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

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE ELEVENTH CIRCUIT

2015-CP-41-139

PLAINTIFF'S FIRST REQUEST
FOR PRODUCTION
TO THE DEFENDANT
AUDREY S. McCARTY
a/k/a AUDREY J. McCARTY

TO: DEFENDANT AUDREY McCARTY:

Pursuant to Rule 34 of the South Carolina Rules of Civil Procedure, the Plaintiff requests that the Defendant respond within forty-five (45) days from date of service to the following Requests and that the Defendant produce and permit the Plaintiff to inspect and copy each of the following documents:

DEFINITIONS

The following words or terms shall be deemed to mean the following:

1. The terms "AND" and "OR" shall be construed conjunctively and disjunctively, as necessary, to make the document request inclusive rather than exclusive. Similarly, any use of the singular shall also mean the plural and vice versa.

2. The terms "DEFENDANTS' PROPERTY" or "DEFENDANT'S PROPERTY" shall refer to the contiguous property comprised of 103 Kalyn Way, Leesville, South Carolina, and 105 Stone Ridge Road, Leesville, South Carolina.

3. The terms "CONCERNING" and "RELATING TO" shall mean affecting, bearing upon, comprising, concerning, constituting, containing, dealing with, embodying, embracing, encompassing, entailing, evidencing, germane to, identifying, implicating, including, incorporating, involving, pertaining to, regarding, relating to, referring to, or reflecting in any manner.

4. The name "RUBY" shall refer to the plaintiff's Australian Shepherd pet dog.

REQUEST FOR PRODUCTION

1. Any and all photos or videos of Ruby on defendants' property.
2. All photographs or videos of animals owned by any of the defendants.
3. All photographs or videos of animals not owned by any of the defendants, but kept and maintained on property owned by any of the defendants.
4. All evidence in your possession that Ruby damaged or otherwise injured the defendants' property, real or personal.
5. Any and all diagrams, sketches, drawings, prints, negatives, and layouts that relate in any manner to the allegations of the Complaint, the defenses of the Defendant, or the scene of Ruby's shooting.
6. All correspondence, emails, posts on social media, or other transmissions by the defendant, which make reference to dogs or other animals, other than those owned by the defendant, since January 1, 2011.
7. Any and all documents and writings in the possession, custody, or control of Defendant or Defendant's counsel that Defendant contends are relevant to the case or are intended to be produced in the trial of the case.

8. A copy of the Defendant's driver's license.
9. The yellow legal pad or notepad with the notations made by Jane Doe and/or Audrey McCarty, which was in their possession on March 24, 2015, during their interviews with the plaintiff and others.
10. All correspondence or other documents, including emails and voice recordings, sent to or received by the defendant to or from the Saluda County Sheriff's Department or any person employed by the Department.

S/Frank S. Potts

Frank S. Potts
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STATE OF SOUTH CAROLINA

COUNTY OF SALUDA

Amy Potts,

Plaintiff,

vs.

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

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE ELEVENTH CIRCUIT

2015-CP-41-139

PLAINTIFF'S FIRST SET OF
INTERROGATORIES
FOR DEFENDANT
JOHN MILES McCARTY

TO: THE DEFENDANT JOHN MILES McCARTY:

Pursuant to Rule 33 of the South Carolina Rules of Civil Procedure, the Plaintiff requests that the Defendant John McCarty answer in writing and under oath within forty-five (45) days after service hereof to the following interrogatories. These interrogatories shall be deemed to be continuing so as to require the defendant John McCarty reasonably to supplement or amend all his answers thereto in accordance to rule 26(e) of the South Carolina Rules of Civil Procedure.

DEFINITIONS

The following words or terms shall be deemed to mean the following:

1. The term "PLAINTIFF" shall refer to Amy Potts.
2. The terms "DEFENDANT," "YOU," or "YOUR," shall refer to John Miles McCarty.

3. The terms "AND" and "OR" shall be construed conjunctively and disjunctively, as necessary, to make the document request inclusive rather than exclusive. Similarly, any use of the singular shall also mean the plural and vice versa.

4. The terms "DEFENDANTS' PROPERTY" or "DEFENDANT'S PROPERTY" shall refer to the contiguous property comprised of 103 Kalyn Way, Leesville, South Carolina, and 105 Stone Ridge Road, Leesville, South Carolina.

5. The term "ADDRESS" means residential address, US mailing address, email address, school address, and business address.

6. The terms "CONCERNING" and "RELATING TO" shall mean affecting, bearing upon, comprising, concerning, constituting, containing, dealing with, embodying, embracing, encompassing, entailing, evidencing, germane to, identifying, implicating, including, incorporating, involving, pertaining to, regarding, relating to, referring to, or reflecting in any manner.

7. The term "COMMUNICATION" shall mean any transmission, conveyance, or exchange of information, whether by written, electronic, oral, or other means. It shall include, without limitation, any meeting, discussion, contact, conference, telephone conversation, letter, e-mail transmission, Internet posting, social media posting, memorandum, document, message, telegram, telefax, mailgram, billing statement, electronic recording, or other form of written, electronic, or oral information transmission or exchange.

8. The term "IDENTIFY:" **when used with respect to a communication**, shall mean to state (a) the date of the communication; (b) the place or location where the communication occurred; (c) whether the communication was conducted in person, in writing, or by telephonic, electronic, or other means; (d) the identity of each person who

participated in, was a party to, or witnessed the communication; (e) what was stated or communicated by each person; and (f) whether any written record of the communication exists, and, if so, the custodian of any such record and its present location.

9. The term **"IDENTIFY" when used with respect to a natural person** shall mean to state the person's full name, present or last known business address (or, if no business address, home address), and the person's employer and position at the time in question with respect to the particular interrogatory involved.

10. The term **"IDENTIFY" when used with respect to an organization or other entity that is not a natural person** shall mean to state the full name of the organization or entity, the form of the organization (i.e., corporation, partnership), and the address of the principal office or place of business of the organization or entity.

11. The term **"IDENTIFY" when used with respect to a record** shall mean to state the title, date, author, signatories, recipients, a general description of such record sufficient to permit it to be identified with particularity in a request for the production of documents, the present or last known location of such record, and the identity of the person or persons having custody, control, or possession thereof.

12. The term **"DESCRIBE"** shall mean to fully and completely state, explain, illustrate, characterize, define, delineate, recount, detail, designate, expound, elucidate, or recapitulate.

13. The term **"DESCRIBE"** when used with respect to an interrogatory that asks for the "factual basis" of a claim, contention, belief, or opinion shall mean to state all facts that you contend gives rise to or supports the claim, contention, belief, or opinion, and not merely an ultimate fact or conclusion of law. Such a statement should include, where

appropriate, the date, location, and manner of each occurrence, and the identity of each person participating or engaging therein.

14. The term "DESCRIPTION OF ANY CIVIL ACTION THE HAS BEEN A PARTY TO" shall include, for each occurrence, the name of all parties to each suit; the date of each suit; and the court in which each was brought and the disposition thereof.

15. The term "DESCRIPTION OF WRITTEN OR RECORDED STATEMENT" shall include a list of each and every written recorded statement or report given or made by or on behalf of the Plaintiff regarding the matter and things alleged in the Complaint, setting forth as to each the date and place of making said statement or report, the persons, firms, corporations or agencies to whom statements or reports were given or made, the purpose of said statements or reports and the name and address of each and every person known to have custody or control of the original or any copies of said statements or reports and if such is in the possession or control of Plaintiff or Plaintiff's counsel, please attach a copy of said statement or report to the answers of these interrogatories.

16. The term "DESCRIPTION OF BOOKS, DOCUMENTS, AND OTHER EXHIBITS" shall include a list of each and every book, document, diagram, plat, photograph, list, depiction, or other tangible thing which the Plaintiff intends to introduce as an exhibit in the trial of this case or in any deposition taken before trial, setting forth as to each item, its current location, and the name and address of the custodian thereof, and stating whether or not this defendant will be permitted to examine, and where practical, obtain copies thereof without the necessity of a motion to produce.

17. The name "RUBY" shall refer to the plaintiff's Australian Shepherd pet dog.

INTERROGATORIES

1. Identify each person known to the defendant or counsel to be witnesses concerning the facts of the case and indicate whether or not written or recorded statements have been taken from the witnesses and indicate who has possession of such statements.
2. Set forth a list of photographs, plats, sketches or other prepared documents in possession of the defendant that relate to the claim or defense in the case.
3. Set forth the names and addresses of all insurance companies which have liability insurance coverage relating to the claim and set forth the number or numbers of the policies involved and the amount or amounts of liability coverage provided in each policy.
4. List the names and addresses of any expert witnesses whom the defendant proposes to use as a witness at the trial of the case. For each person known to the defendant or counsel to be a witness concerning the facts of the case, set forth either a summary sufficient to inform the plaintiff of the important facts known to or observed by such witness, or provide a copy of any written or recorded statements taken from such witnesses.
5. If the defendant is improperly identified, give the proper identification and state whether counsel will accept service of an amended summons and complaint reflecting the correct information.
6. Have you ever been convicted, pled guilty, nolo contendere, or found guilty of any crime other than a minor traffic offense? If so, set forth each such crime, the court in which convicted, the sentence, the date of conviction, and the description of the facts constituting the crime, including the date and place of the criminal activity.

7. Set forth a description of any civil action to which you have been a party in other than the family court. Identify each such civil action, the other party or parties, the court with jurisdiction, the case number, whether you were a plaintiff or defendant, a synopsis of the dispute, and set forth the amount of any judgment rendered in each described action.

8. Identify all banks, savings and loans, or other financial institutions where you have signatory authority for an account, and for each such institution set forth the account number for each account, and the identities of any other persons who are signatories on each.

9. Identify all mortgages, liens, or other security interests which exist upon property, real or personal, owned by the defendant and the amount remaining to be paid on each such lien.

10. Set forth all animals that have been housed, penned, or enclosed on the defendants' property since January 1, 2011, including (a) type of animal; (b) owner of animal; (c) from whom animal was acquired; (d) date, location, and cost of acquisition of each animal; (e) current location and condition of each animal; (f) if deceased, the cause of death; and (g) if sold, the date, sales price and identity of purchaser.

11. Set forth, fully and completely, any instance in which an animal kept on defendants' property since January 1, 2011 has disappeared, been attacked, suffered injury, or been killed, including date and all circumstances about each such disappearance, attack, injury, or death.

12. Have you ever discussed shooting Ruby or any other dog with defendant Audrey McCarty or with any other person, and, if so, describe each such instance, the date, the identity of the person with whom this subject was discussed, and the content of each such discussion.

13. Have you issued threats to any person that their dog would be shot or killed if it trespassed on defendants' property? If so, please set forth a description of the issuance of each threat, including the identity of the person to whom the threat was made; the date and location of each such threat; and your reason(s) for making the threat.

14. What measures have you taken to prevent the trespass of dogs onto your property? Identify the date, manner, and cost of each such preventative action.

15. What measures have you taken to remove trespassing dogs from your property? Identify the date and manner of each such measure, and the cost of same.

16. Identify the firearm used to shoot the plaintiff's dog "Ruby", including the make, model, serial number, and gauge, and identify the person or entity from whom the firearm was acquired and the date of acquisition.

17. Identify all persons from whom you sought advice, other than lawyers, about dogs trespassing at your residence, and describe the advice you were given by each such person and the date(s) on which such advice was given.

18. Describe, fully and completely, all facts existing at the time you shot Ruby which led you to decide to shoot Ruby, including all reasons for your actions.

19. Set forth, fully and completely, your basis or justification for shooting Ruby.

20. Describe, fully and completely, your reasoning that shooting Ruby was a necessity.

21. At the time you fired the first shot at Ruby on the morning of March 25, 2015, how many dogs were present on defendant's property, not including dogs owned by a defendant?

22. Did the defendant Audrey McCarty give you permission to shoot Ruby or other dogs on her property at 103 Kalyn Way? If so, fully describe the extent or scope of the permission given.

23. Fully describe everything you related to the responding Saluda County Sheriff's Deputy about the March 25, 2015 shooting.

24. Identify by make, model, and caliber all firearms owned by you that were on defendants' property, in your home, or in your possession on March 25, 2015.

25. Prior to the shooting of Ruby, did you consult with anyone at the Saluda County Sheriff's Department about whether it was legal to shoot a dog on your property? If so, identify the person(s) you consulted, the dates of consultation, and exactly what you were told by each person.

26. Have you ever spoken directly to the plaintiff Amy Potts? If so, identify each such interaction by date, location and subject of each discussion.

27. Have you ever informed the plaintiff that Ruby had threatened, attacked, harmed, or killed any livestock on your property? If so, fully describe each such conversation, including date, location, and whether or not you requested payment of damages.

s/ Frank S. Potts

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STATE OF SOUTH CAROLINA

COUNTY OF SALUDA

Amy Potts,

Plaintiff,

vs.

McCarty Enterprises, LLC, John Miles

McCarty, Audrey S. McCarty

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

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE ELEVENTH CIRCUIT

2015-CP-41-139

PLAINTIFF'S FIRST
REQUEST FOR PRODUCTION
TO THE DEFENDANT
JOHN MILES McCARTY

TO: DEFENDANT JOHN MILES McCARTY:

Pursuant to Rule 34 of the South Carolina Rules of Civil Procedure, the Plaintiff requests that the Defendant respond within forty-five (45) days from date of service to the following Requests and that the Defendant produce and permit the Plaintiff to inspect and copy each of the following documents:

DEFINITIONS

The following words or terms shall be deemed to mean the following:

1. The terms "AND" and "OR" shall be construed conjunctively and disjunctively, as necessary, to make the document request inclusive rather than exclusive. Similarly, any use of the singular shall also mean the plural and vice versa.

2. The terms "DEFENDANTS' PROPERTY" or "DEFENDANT'S PROPERTY" shall refer to the contiguous property comprised of 103 Kalyn Way, Leesville, South Carolina, and 105 Stone Ridge Road, Leesville, South Carolina.

3. The terms "CONCERNING" and "RELATING TO" shall mean affecting, bearing upon, comprising, concerning, constituting, containing, dealing with, embodying,

embracing, encompassing, entailing, evidencing, germane to, identifying, implicating, including, incorporating, involving, pertaining to, regarding, relating to, referring to, or reflecting in any manner.

4. The name "RUBY" shall refer to the plaintiff's Australian Shepherd pet dog.

REQUEST FOR PRODUCTION

1. Any and all photos or videos of Ruby.

2. All photographs or videos taken since January 1, 2011, of animals on property owned by any of the defendants.

3. All photographs or videos taken since January 1, 2011 of animals not owned by any of the defendants, but kept and maintained on property owned by any of the defendants.

4. All evidence in your possession that Ruby damaged or otherwise injured the defendants' property, real or personal.

5. Any and all diagrams, sketches, drawings, prints, negatives, and layouts that relate in any manner to the allegations of the Complaint, the defenses of the Defendant, or the scene of Ruby's shooting.

6. All correspondence, emails, posts on social media, or other transmissions by the defendant, which make reference to dogs or other animals, other than those owned by the defendant, since January 1, 2011.

7. Any and all documents and writings in the possession, custody, or control of Defendant or Defendant's counsel that Defendant contends are relevant to the case or are intended to be produced in the trial of the case.

8. A copy of the Defendant's driver's license.

9. All correspondence or other documents, including emails and voice recordings, sent to or received by the defendant to or from the Saluda County Sheriff's Department or any person employed by the Department.

S. Frank S. Potts

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(803)622-6000
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STATE OF SOUTH CAROLINA

COUNTY OF SALUDA

Amy Potts,

Plaintiff,

vs.

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

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE ELEVENTH CIRCUIT

2015-CP-41-139

PLAINTIFF'S FIRST SET OF
INTERROGATORIES
TO THE DEFENDANT
McCARTY ENTERPRISES, LLC

TO: THE DEFENDANT McCARTY ENTERPRISES, LLC:

Pursuant to Rule 33 of the South Carolina Rules of Civil Procedure, the Plaintiff requests that the Defendant answer in writing and under oath within forty-five (45) days after service hereof the following interrogatories. These interrogatories shall be deemed to be continuing so as to require the defendant McCarty Enterprises, LLC, reasonably to supplement or amend all its answers thereto in accordance with rule 26(e) of the South Carolina Rules of Civil Procedure.

DEFINITIONS

The following words or terms shall be deemed to mean the following:

1. The term "PLAINTIFF" shall refer to Amy Potts.
2. The terms "DEFENDANT," "YOU," or "YOUR," shall refer to McCarty Enterprises, LLC.
3. The terms "AND" and "OR" shall be construed conjunctively and disjunctively, as necessary, to make the document request inclusive rather than exclusive. Similarly, any use of the singular shall also mean the plural and vice versa.

4. The terms "DEFENDANTS' PROPERTY" or "DEFENDANT'S PROPERTY" shall refer to the contiguous property comprised of 103 Kalyn Way, Leesville, South Carolina, and 105 Stone Ridge Road, Leesville, South Carolina.

5. The term "ADDRESS" means residential address, US mailing address, email address, school address, and business address.

6. The terms "CONCERNING" and "RELATING TO" shall mean affecting, bearing upon, comprising, concerning, constituting, containing, dealing with, embodying, embracing, encompassing, entailing, evidencing, germane to, identifying, implicating, including, incorporating, involving, pertaining to, regarding, relating to, referring to, or reflecting in any manner.

7. The term "COMMUNICATION" shall mean any transmission, conveyance, or exchange of information, whether by written, electronic, oral, or other means. It shall include, without limitation, any meeting, discussion, contact, conference, telephone conversation, letter, e-mail transmission, Internet posting, social media posting, memorandum, document, message, telegram, telefax, mailgram, billing statement, electronic recording, or other form of written, electronic, or oral information transmission or exchange.

8. The term "IDENTIFY:" when used with respect to a communication, shall mean to state (a) the date of the communication; (b) the place or location where the communication occurred; (c) whether the communication was conducted in person, in writing, or by telephonic, electronic, or other means; (d) the identity of each person who participated in, was a party to, or witnessed the communication; (e) what was stated or communicated by each person; and (f) whether any written record of the communication exists, and, if so, the custodian of any such record and its present location.

9. The term "IDENTIFY" when used with respect to a natural person shall mean to state the person's full name, present or last known business address (or, if no business address, home address), and the person's employer and position at the time in question with respect to the particular interrogatory involved.

10. The term "IDENTIFY" when used with respect to an organization or other entity that is not a natural person shall mean to state the full name of the organization or entity, the form of the organization (i.e., corporation, partnership), and the address of the principal office or place of business of the organization or entity.

11. The term "IDENTIFY" when used with respect to a record shall mean to state the title, date, author, signatories, recipients, a general description of such record sufficient to permit it to be identified with particularity in a request for the production of documents, the present or last known location of such record, and the identity of the person or persons having custody, control, or possession thereof.

12. The term "DESCRIBE" shall mean to fully and completely state, explain, illustrate, characterize, define, delineate, recount, detail, designate, expound, elucidate, or recapitulate.

13. The term "DESCRIBE" when used with respect to an interrogatory that asks for the "factual basis" of a claim, contention, belief, or opinion shall mean to state all facts that you contend gives rise to or supports the claim, contention, belief, or opinion, and not merely an ultimate fact or conclusion of law. Such a statement should include, where appropriate, the date, location, and manner of each occurrence, and the identity of each person participating or engaging therein.

14. The term "DESCRIPTION OF ANY CIVIL ACTION THE HAS BEEN A PARTY TO" shall include, for each occurrence, the name of all parties to each suit, the date of each suit, and the court in which each was brought and the disposition thereof.

15. The term "DESCRIPTION OF WRITTEN OR RECORDED STATEMENT" shall include a list of each and every written recorded statement or report given or made by or on behalf of the Plaintiff regarding the matter and things alleged in the Complaint, setting forth as to each the date and place of making said statement or report, the persons, firms, corporations or agencies to whom statements or reports were given or made, the purpose of said statements or reports and the name and address of each and every person known to have custody or control of the original or any copies of said statements or reports and if such is in the possession or control of Plaintiff or Plaintiff's counsel, please attach a copy of said statement or report to the answers of these interrogatories.

16. The term "DESCRIPTION OF BOOKS, DOCUMENTS, AND OTHER EXHIBITS" shall include a list of each and every book, document, diagram, plat, photograph, list, depiction, or other tangible thing which the Plaintiff intends to introduce as an exhibit in the trial of this case or in any deposition taken before trial, setting forth as to each item, its current location, and the name and address of the custodian thereof, and stating whether or not this defendant will be permitted to examine, and where practical, obtain copies thereof without the necessity of a motion to produce.

17. The name "RUBY" shall refer to the plaintiff's Australian Shepherd pet dog.

INTERROGATORIES

1. Identify all former and current officers, directors, and employees of the defendant McCarty Enterprises together with their title, position, job description, dates of employment and current residence address.
2. Describe the nature and business of the defendant McCarty Enterprises and how the defendant McCarty Enterprises seeks or attempts to earn profits.
3. Set forth and describe all property, real or personal, owned or controlled by the defendant McCarty Enterprises.
4. Set forth and describe all personal property belonging to third parties, including other defendants, which is stored or maintained upon the defendant McCarty Enterprises real property.
5. Identify all persons who have resided overnight on the property of the defendant McCarty Enterprises at 105 Stone Ridge Road since January 1, 2014.
6. Identify all motor vehicles, golf carts, boats, travel trailers, trailers, and motorcycles owned or operated by the defendant McCarty Enterprises, and identify any persons or entities holding security interests on such articles.
7. Identify all persons or entities who have liens on the real property of the defendant, McCarty Enterprises and the amount of each such lien as of January 1, 2015.
8. Identify all animals owned by the defendant McCarty Enterprises together with the date of acquisition of each, the cost of each, the disposition of each, and the manner and date of disposition, if applicable.

9. Identify all shareholders of the defendant, McCarty Enterprises, LLC, the percentage of stock owned by each and the date of acquisition of the stock.

10. Set forth the EIN of the defendant corporation.

S / Frank S. Potts

Frank S. Potts
Attorney at Law
(SC Bar No. 4538)
137 Stone Ridge Road
Leesville, SC 29070
(803) 622-6000
lakecottage@pbtcomm.net

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS
FOR THE ELEVENTH CIRCUIT

COUNTY OF SALUDA)

Amy Potts,)

2015-CP-41-139

Plaintiff,)

vs.)

**PLAINTIFF'S FIRST REQUEST FOR
PRODUCTION TO THE DEFENDANT
McCARTY ENTERPRISES, LLC**

McCarty Enterprises, LLC, John Miles)

McCarty, Audrey S. McCarty)

a/k/a Audrey J. McCarty, and Jane Doe,)

Defendants.)

TO: THE DEFENDANT McCARTY ENTERPRISES, LLC:

Pursuant to Rule 34 of the South Carolina Rules of Civil Procedure, the Plaintiff requests that the Defendant respond within forty-five (45) days from date of service to the following Requests and that the Defendant produce and permit the Plaintiff to inspect and copy each of the following documents:

DEFINITIONS

The following words or terms shall be deemed to mean the following:

1. The terms "AND" and "OR" shall be construed conjunctively and disjunctively, as necessary, to make the document request inclusive rather than exclusive.

Similarly, any use of the singular shall also mean the plural and vice versa.

2. The terms "DEFENDANTS' PROPERTY" or "DEFENDANT'S PROPERTY" shall refer to the contiguous property comprised of 103 Kalyn Way, Leesville, South Carolina, and 105 Stone Ridge Road, Leesville, South Carolina.

3. The terms "CONCERNING" and "RELATING TO" shall mean affecting, bearing upon, comprising, concerning, constituting, containing, dealing with, embodying,

embracing, encompassing, entailing, evidencing, germane to, identifying, implicating, including, incorporating, involving, pertaining to, regarding, relating to, referring to, or reflecting in any manner.

4. The name "RUBY" shall refer to the plaintiff's Australian Shepherd pet dog.

REQUEST FOR PRODUCTION

1. Federal and State Income Tax Returns, including all deductions, losses, and expenses claimed for Tax Years 2011, 2012, 2013 and 2014.

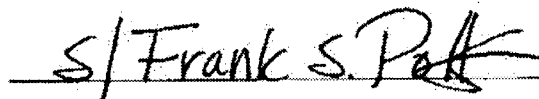
2. The yellow legal pad or notepad with the notations made by Jane Doe and/or Audrey McCarty, which was in their possession on March 24, 2015, during their interviews with the plaintiff and others.

3. All correspondence or other documents, including emails and voice recordings, sent to or received by the defendant to or from the Saluda County Sheriff's Department or any person employed by the Department.

4. Certificate of Incorporation of the defendant.

5. All Minutes of board meetings and bylaws of the defendant corporation.

6. All licenses issued by any government to the defendant.



Frank S. Potts
Attorney at Law
(SC Bar No. 4538)
137 Stone Ridge Road
Leesville, SC 29070
(803) 622-6000
lakecottage@pbtcomm.net

STATE OF SOUTH CAROLINA)

COUNTY OF SALUDA)

Amy Potts,)

Plaintiff,)

v.)

McCarty Enterprises, LLC, John)

Miles McCarty, Audrey S. McCarty,)

a/k/a Audrey J. McCarty and Jane)

Doc)

Defendant.)

FILED
IN THE COURT OF COMMON PLEAS

2016 APR 28 PM 3:16
ELEVENTH JUDICIAL CIRCUIT

CLERK OF COURT
SALUDA CO. S.C.
Case No. 2013-CP-41-139

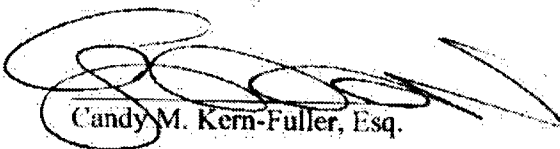
AFFIDAVIT IN OPPOSITION TO DEFAULT

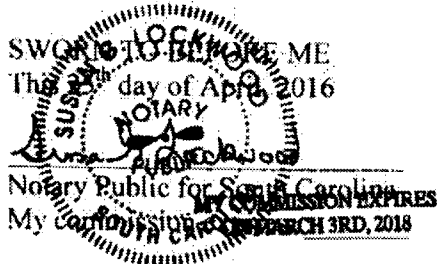
Personally appeared, **CANDY M. KERN-FULLER, ESQ.**, who first being sworn, states as follows:

- 1) I am the attorney for the Defendants and have represented the Defendants in this and other matters;
- 2) My firm was retained to represent the Defendants in this matter;
- 3) I have no personal interest in this matter and am not related by blood or marriage to the Defendants;
- 4) Upon receipt of the initial complaint, I timely replied with a Motion to Dismiss on behalf of the Defendants;
- 5) I never received a copy of the Plaintiff's Amended Complaint from the Plaintiff and to this day have not received one from Plaintiff;
- 6) On February 27, 2016, while preparing for the Motion hearing on February 29, 2016, I discovered the Motion for Default and discovered online that an Amended Complaint had been filed. However, I had never received the same;
- 7) Before and after the motion roster meeting on February 29, I tried to talk with Mr. Potts, who is representing the Plaintiff (his wife) in this matter. Mr. Potts showed me a number of unsigned letters in a notebook that he asserted he sent me. I showed him my file and told him honestly that I had not received his letters or the Amended Complaint. I asked if he could provide me a copy of the Amended Complaint, and he said he would have to make another copy and could get one to me when he returned to his office that day. I asked him specifically to fax or email it to me since if he had sent me 3 or 4 letters, they

had *not* gotten to me and I didn't want that problem to continue. I asked what method he used to send them and he stated "regular mail";

- 8) Despite my non-accusatory tone and attempts to collegially discuss the matters at hand, it became quite clear that Mr. Potts was emotional about this case and could not be reasoned with. He repeatedly said my clients (one of whom is a retired police officer who now suffers from a serious heart condition) are "scum." Though Mr. Potts agreed that I would "probably" be excused from default, he stated he was going to continue to run my clients' legal costs up as high as possible and see this matter through a trial and appeal, if necessary. I realized I could not reason with him and that this matter was too personal;
- 9) I again asked for him to provide me the Amended Complaint and I departed;
- 10) Concerned over Mr. Potts' inability to be detached and unemotional about this case, when I returned to my office on the afternoon of the 29th, I contacted his co-counsel, Mr. Lacke. I explained to Mr. Lacke what transpired at Court and expressed my concerns over my conversation with Mr. Potts. He told me Mr. Potts was "running the case" and he was "just there to assist." I asked him if he would make sure one of them would provide me the Amended Complaint and he assured me they would;
- 11) The following week when the Amended Complaint had still not arrived, we sent a runner to the Court for a copy. I prepared and served the attached Amended Motion two days later;
- 12) Despite my first motion, Mr. Potts had not removed the conspiracy action, but had simply added a claim for intentional infliction of emotional distress;
- 13) The attached Amended Motion to Dismiss was prepared and served on March 9, 2016;
- 14) To this day, I still have not received the Plaintiff's Amended Complaint from Plaintiff. I did file and serve a responsive pleading within two (2) days of gaining my own copy of the Amended Complaint;
- 15) Accordingly, I pray that the Defendants not be held in default and that the Defendants' motion to dismiss, as amended, be heard and ruled upon;


Candy M. Kern-Fuller, Esq.



STATE OF SOUTH CAROLINA)

COUNTY OF SALUDA)

Amy Potts,

Plaintiff,

v.

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

Defendant.

FILED

2016 MAY 30 PM 3:31
CLERK OF COURT
SALUDA CO. S.C.

IN THE COURT OF COMMON PLEAS

ELEVENTH JUDICIAL CIRCUIT

C.A. No. 2015-CP-41-139

DEFENDANTS' ANSWER TO COMPLAINT

COMES NOW Defendants, McCarty Enterprises, LLC, John Miles McCarty, Audrey S.

McCarty, a/k/a Audrey J. McCarty and Jane Doe (hereinafter referred to collectively as

"Defendants"), answering the Plaintiff's First Amended Complaint, alleging as follows:

FOR A FIRST DEFENSE
(GENERAL DENIAL)

- 1) Defendants deny each and every allegation of the Plaintiff's First Amended Complaint not hereinafter specifically admitted, qualified or explained;

FOR A SECOND DEFENSE
(SPECIFIC DENIAL)

- 2) Defendants incorporate each and every paragraph previously alleged as if fully set forth verbatim herein;
- 3) Upon information and belief, Defendants admit the allegations contained in paragraphs one (1), two (2), three (3), four (4), five (5), and six (6) of Plaintiff's First Amended Complaint;

- 4) Upon information and belief, Defendants admit so much of the allegations contained in Paragraph seven (7) of the Plaintiff's First Amended Complaint that plaintiff resides in Leesville, South Carolina and owned an Australian Shepherd dog that lived with her. The Defendants are without knowledge to admit or deny the remaining allegations of Paragraph seven (7) of the Plaintiff's First Amended Complaint and, therefore, deny the same with strict proof demanded thereof;
- 5) Upon information and belief, Defendants admit so much of the allegations contained in Paragraph eight (8) of the Plaintiff's First Amended Complaint that plaintiff resides in Leesville, South Carolina, that Defendants Audrey and John McCarty knew Plaintiff and where she lived and that she owned an Australian Shepherd dog that lived with her. The Defendants are without knowledge to admit or deny the remaining allegations of Paragraph eight (8) of the Plaintiff's First Amended Complaint and, therefore, deny the same with strict proof demanded thereof;
- 6) Upon information and belief, Defendants admit so much of the allegations contained in Paragraph nine (9) of the Plaintiff's First Amended Complaint that plaintiff had run over Defendants' pet in July 2012. Defendants admit that two years prior to Plaintiff killing Defendants' pet, that Plaintiff's Australian Shepherd attacked that same pet on Defendants' property, causing injury to the Terrier on or about October 29, 2010. At that time, the Saluda County Sheriff's Department told both Defendants and Plaintiff that "they needed to keep their dogs on their property or leashed at all times. Both victim and subject were advised they had the right to protect their person and property against attacks on their property." Two days prior to the incident in question (on or about March 23, 2015), Plaintiff's Australian Shepherd attacked and killed two emus that Defendants

housed on their property. Again, the Saluda County Sheriff's Office told Defendant Audrey McCarty that "they have a right to protect her animals." The Defendants deny the remaining allegations of Paragraph nine (9) of the Plaintiff's First Amended Complaint with strict proof demanded thereof;

- 7) The Defendants deny the allegations of Paragraph ten (10) of the Plaintiff's First Amended Complaint with strict proof demanded thereof;
- 8) The Defendants admit so much of Paragraph eleven (11) of the Plaintiff's First Amended Complaint that she discussed the killing of the two (2) emus on Defendants' property on March 23, 2015, with Plaintiff, as did the Saluda County Sheriff's office the day before. The Defendants deny the remaining allegations of Paragraph eleven (11) of the Plaintiff's First Amended Complaint with strict proof demanded thereof;
- 9) The Defendants admit so much of Paragraph twelve (12) of the Plaintiff's First Amended Complaint that Defendant John McCarty destroyed the Australian Shepherd known as "Ruby on or about March 25, 2015, on property owned by the Defendants, where the animal was attempting to harm his livestock. The Defendants deny the remaining allegations of Paragraph twelve (12) of the Plaintiff's First Amended Complaint with strict proof demanded thereof;
- 10) The Defendants deny the allegations of Paragraph thirteen (13) of the Plaintiff's First Amended Complaint with strict proof demanded thereof;
- 11) The Defendants deny the allegations of Paragraph fourteen (14) of the Plaintiff's First Amended Complaint with strict proof demanded thereof;
- 12) The Defendants deny the allegations of Paragraph fifteen (15) of the Plaintiff's First Amended Complaint with strict proof demanded thereof;

- 13) The Defendants deny the allegations of Paragraph sixteen (16) of the Plaintiff's First Amended Complaint with strict proof demanded thereof;
- 14) The Defendants deny the allegations of Paragraph seventeen (17) of the Plaintiff's First Amended Complaint with strict proof demanded thereof;
- 15) The Defendants deny the allegations of Paragraph eighteen (18) of the Plaintiff's First Amended Complaint with strict proof demanded thereof;
- 16) The Defendants deny the allegations of Paragraph nineteen (19) of the Plaintiff's First Amended Complaint with strict proof demanded thereof;
- 17) The Defendants deny the allegations of Paragraph twenty (20) of the Plaintiff's First Amended Complaint with strict proof demanded thereof;
- 18) The Defendants deny the allegations of Paragraph twenty-one (21) of the Plaintiff's First Amended Complaint with strict proof demanded thereof;
- 19) The Defendants incorporate their prior defenses in response to the allegations of Paragraph twenty-two (22) of the Plaintiff's First Amended Complaint. The extent that any further response is required, where not inconsistent, the allegations are denied with strict proof demanded thereof;
- 20) Defendants admit that Defendant John McCarty is a principal of McCarty Enterprises, LLC. The remaining allegations of Paragraph twenty-three (23) of the Plaintiff's First Amended Complaint are denied with strict proof demanded thereof;
- 21) The allegations of Paragraph twenty-four (24) of the Plaintiff's First Amended Complaint are denied with strict proof demanded thereof;

FOR A THIRD DEFENSE
(FAILURE TO STATE A CLAIM)

- 22) Defendants prior responses are realleged as if they were stated fully herein;
- 23) Some or all of the claims asserted in the Plaintiff's First Amended Complaint fail to state a claim upon which relief can be granted;

WHEREFORE, having fully answered the Plaintiff's Complaint, Defendants would respectfully request that an Order be entered which provides for the following relief:

- A. For the Complaint to be dismissed, with prejudice; and,
- B. For such other legal or equitable relief as the Court deems just and proper.



Candy M. Kern-Fuller, Esq..
SC Bar No. 011392
E-Mail: Candy@UpstateLawGroup.com
UPSTATE LAW GROUP, LLC
200 East Main Street
Easley, SC 29640
(864) 855-3114

Attorneys for Defendants

May 25, 2016

STATE OF SOUTH CAROLINA)
COUNTY OF SALUDA)
Amy Potts,)
Plaintiff,)
v.)
McCarty Enterprises, LLC, John)
Miles McCarty, Audrey S. McCarty,)
a/k/a Audrey J. McCarty and Jane)
Doe)
Defendant.)

IN THE COURT OF COMMON PLEAS

ELEVENTH JUDICIAL CIRCUIT

C.A. No. 2015-CP-41-139

CERTIFICATE OF SERVICE

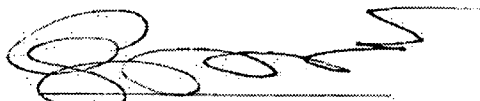
On May 25, 2016, I served a copy of the Defendants' Answer and Amended Motion to Dismiss on the below parties on behalf of the Plaintiff by United States First Class Mail, addressed to:

Mr. Frank S. Potts, Esq.
State Fiscal Accountability Authority
1201 Main Street
Suite 350 (Capitol Center)
Columbia, SC 29201

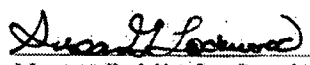
Mr. M. Evan Lacke, Esq.
Lacke Law Firm, LLC
147 Wappoo Creek Dr., Ste. 204
Charleston, SC 29412

And filed the same with the Court by mailing the originals to:

The Honorable Doris B. Holmes, Clerk of Court
100 E. Church Street
Saluda, SC 29138


Candy M. Kern-Fuller, Esq.

SWORN TO BEFORE ME
This 25th day of May, 2016


Notary Public for South Carolina
My commission expires: 3-3-18

STATE OF SOUTH CAROLINA)

COUNTY OF SALUDA)

Amy Potts,

Plaintiff,

v.

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

Defendant.

FILED
2016 MAY 31 PM 3:31
CLERK OF COURT
SALUDA CO. S.C.

IN THE COURT OF COMMON PLEAS

ELEVENTH JUDICIAL CIRCUIT

C.A. No. 2015-CP-41-139

**** AMENDED ****

**NOTICE OF MOTION AND MOTION
TO DISMISS**

PAID

Date 5/31/16

SALUDA COUNTY
CLERK OF COURT

\$ 25.00

To Plaintiff, by and through her attorney Frank S. Potts, Esq. and M. Evan Lacke, Esq.:

YOU WILL PLEASE TAKE NOTICE that the Defendants., by and through their undersigned attorney, will move before the presiding Judge of the Court of Commons Pleas for the Eleventh Judicial Circuit, at the Saluda County Court, on the tenth (10th) day after service hereof, or as soon thereafter as counsel may be heard, for an Order, dismissing this action for the following reasons:

1. Plaintiff's claim for Civil Conspiracy should be dismissed because at all times alleged Defendants, John McCarty, Audrey McCarty and Jane Doe, were employees and/or agents of Defendant 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);
2. Plaintiff's allegations that Defendants killed her dog is not an actionable matter. Defendants cannot be held civilly liable for the killing of Plaintiff's dog under Section 47-3-530 of the S.C. Code of Laws, as amended, which lawfully permits the killing of a dog that is "threatening to cause or causing personal injury or property damage."

STATE OF SOUTH CAROLINA)

COUNTY OF SALUDA)

Amy Potts,)

Plaintiff,)

v.)

McCarty Enterprises, LLC, John)

Miles McCarty, Audrey S. McCarty,)

a/k/a Audrey J. McCarty and Jane)

Doe)

Defendant.)

FILED
IN THE COURT OF COMMON PLEAS

2016 MAY 31 PM 3:31
ELEVENTH JUDICIAL CIRCUIT

CLERK OF COURT
SALUDA CO. S.C. No. 2015-CP-41-139

CERTIFICATE OF SERVICE

On May 25, 2016, I served a copy of the Defendants' Answer and Amended Motion to Dismiss on the below parties on behalf of the Plaintiff by United States First Class Mail, addressed to:

Mr. Frank S. Potts, Esq.
State Fiscal Accountability Authority
1201 Main Street
Suite 350 (Capitol Center)
Columbia, SC 29201

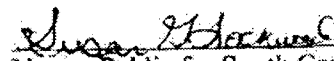
Mr. M. Evan Lacke, Esq.
Lacke Law Firm, LLC
147 Wappoo Creek Dr., Ste. 204
Charleston, SC 29412

And filed the same with the Court by mailing the originals to:

The Honorable Doris B. Holmes, Clerk of Court
100 E. Church Street
Saluda, SC 29138


Candy M. Kern-Fuller, Esq.

SWORN TO BEFORE ME
This 25th day of May, 2016


Notary Public for South Carolina
My commission expires: 3-3-2018

STATE OF SOUTH CAROLINA)

COUNTY OF SALUDA)

Amy Potts,)

Plaintiff,)

v.)

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

Defendant.)

IN THE COURT OF COMMON PLEAS

2016 MAY 31 PM 3:00 JUDICIAL CIRCUIT

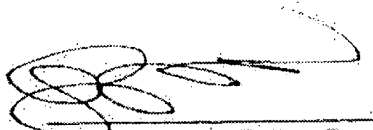
CLERK OF COURT No. 2015-CP-41-139
SALUDA CO. S.C.

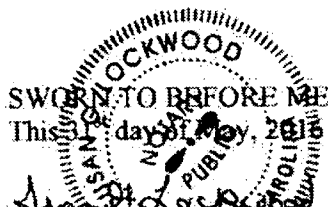
CERTIFICATE OF SERVICE

On May 31, 2016, I served a copy of the Defendant Audrey McCarty's Responses to Interrogatories and Requests for Production and Objections and the Defendant Audrey McCarty's Responses to Interrogatories and Requests for Production and Objections on the below parties on behalf of the Plaintiff by United States First Class Mail, addressed to:

Mr. Frank S. Potts, Esq.
State Fiscal Accountability Authority
1201 Main Street
Suite 350 (Capitol Center)
Columbia, SC 29201

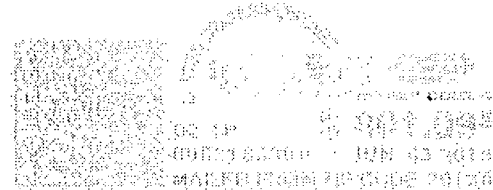
Mr. M. Evan Lacke, Esq.
Lacke Law Firm, LLC
147 Wappoo Creek Dr., Ste. 204
Charleston, SC 29412


Candy M. Kern-Fuller, Esq.



Notary Public for South Carolina
My commission expires
ON MARCH 3RD, 2018

Doris B. Holmes
Saluda County Clerk of Court
Courthouse
100 East Church Street
Saluda, South Carolina 29138



CANDY M. KERN-FULLER
200 EAST MAIN STREET
EASLEY, SC 29640

STATE OF SOUTH CAROLINA

COUNTY OF SALUDA

Amy Potts,

Plaintiff,

vs.

McCarty Enterprises, LLC, John Miles

McCarty, Audrey S. McCarty

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

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE ELEVENTH CIRCUIT

2015-CP-41-139

MOTION TO STRIKE AMENDED
MOTION TO DISMISS AND
ANSWER TO AMENDED COMPLAINT;
FOR ENTRY OF DEFAULT
AND TO COMPEL
RESPONSES TO DISCOVERY

To Defendants, by and through their attorney, Candy M. Kern-Fuller, Esq.:

You will please take notice that Frank Potts, attorney for the plaintiff, pursuant to the South Carolina Rules of Civil Procedure, Rules 11 and 37, hereby moves that the Court strike the defendants' Amended Motion to Dismiss and the defendants' Answer to Amended Complaint and that the defendants be placed in default for failure to timely serve their answer and pleading as directed by the court, and for the filing and service of a false Certificate of Service to both the plaintiff and the court.

Further, the plaintiff moves to compel good faith, complete responses to the interrogatories and requests for production served upon the defendants over one year ago as directed by the order of this Court.

Attached hereto are the interrogatories and requests for production propounded and the responses thereto. No response whatsoever was received from the defendant corporation, McCarty Enterprises, LLC.

This motion will be supported by the affidavit of counsel together with the exhibits incorporated therein, the rules of court and the laws of the State of South Carolina.

Counsel certifies that consultation with opposing counsel would serve no useful purpose.



Frank S. Potts
(SC Bar No. 4538)
137 Stone Ridge Road
Leesville, SC 29070
(803) 622-6000
lakecottage@pbtcomm.net

Leesville, SC
June 23, 2016

ATTORNEY FOR PLAINTIFF

STATE OF SOUTH CAROLINA

COUNTY OF SALUDA

Amy Potts,

Plaintiff,

vs.

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

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE ELEVENTH CIRCUIT

2015-CP-41-139

AFFIDAVIT

To Defendants, by and through their attorney, Candy M. Kern-Fuller, Esq.:

Frank S. Potts, first being duly sworn, deposes and says as follows:

1. He is an attorney for the plaintiff in the above-referenced matter.
2. He attended a hearing in this matter before this court on April 28, 2016 which resulted in this court's issuance of its Order dated April 28, 2016, which was mailed to the parties on May 11, 2016 by the Clerk of Court.
3. The court, prior to the actual issuance of its Order dated April 28, 2016, transmitted a draft of the order to the parties by email on April 28, 2016.
4. The Court's (final) Order dated April 28, 2016, gave the defendants "15 days from the day that this Order is mailed to the defense attorney by the Clerk of Court in which to file and serve their responsive pleading." Page 4 of Order of the Court of April 28, 2016.
5. Upon information and belief, the Court's Order was mailed to the attorneys for both parties by the Clerk of Court on May 11, 2016.
6. He received his client's copy of the Court's Order on May 13, 2016, by US Mail, postmarked (by certified label) on May 11, 2016. (Original envelope attached as Exhibit 1; and tracking information attached as Exhibit 1a)

7. On June 2, 2016, he received by US Mail the "Defendants' Answer to Complaint" and "Amended Motion to Dismiss" and noted the following:
 - a. The envelope was stamped as received by the USPS in Greenville, SC, on May 31, 2016; (Original envelope attached hereto as Exhibit 2) and
 - b. The defendants' attorney signed a sworn certificate stating that service was effected on May 25, 2016, by deposit of the same in the US Mail; (Copy attached and incorporated herein as Exhibit 3) and
 - c. Service of the defendants' Answer (and Amended Motion to Dismiss) was received by plaintiff's attorney 22 days after May 11, 2016, the date of mailing of the court's Order by the Clerk of Court.
8. The Plaintiff's attorney did not receive the defendants' Answer to Amended Complaint or the defendants' Amended Motion to Dismiss until June 2, 2016. (*See also* affidavit of Renee Larsen as Exhibit 4)
9. Previously, the defendants' attorney transmitted an "Affidavit in Opposition to Default," and her office certified (by Susan G. Lockwood) that the same had been mailed to plaintiff's counsel on April 25, 2016. (Envelope with mailing label attached and incorporated herein as Exhibit 5)
10. Tracking information indicates, upon information and belief, that the affidavit was not served on the 25th of April, 2016 as certified, but was served (by deposit for mailing) on April 27, 2016, less than 24 hours before this court's Hearing in which it was accepted into evidence over objection by the plaintiff's counsel. (Tracking information attached hereto and incorporated herein as Exhibit 6)
11. The defendants' attorney also transmitted her affidavit to co-counsel for the plaintiff with a substantially identical certification of mailing. The tracking of this document indicates that it was not mailed as certified on April 25, 2016, but rather two days

later on April 27, 2016. (Copy of envelope attached as Exhibit 7 and tracking document attached as Exhibit 7a)

12. Finally, plaintiff's attorneys both deny the allegations of defendants' counsel's affidavit dated April 25, 2016 (submitted into evidence over objection), in numerous respects, including her representations as to statements made by the affiant, particularly items 7, 8 and 9. Item 10 is contradicted by affidavit from co-counsel, a copy of which is attached hereto. (See also copy of affidavit of E. Lacke, Esq., attached as Exhibit 8)



Frank S. Potts
(SC Bar No. 4538)
137 Stone Ridge Road
Leesville, SC 29070
(803) 622-6000
lakecottage@pbicomm.net

ATTORNEY FOR PLAINTIFF

Subscribed to and sworn before me

this 23rd day of June, 2016

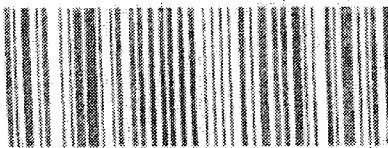


Judy W. Black, Notary Public for SC
My commission expires

7-21-2021

Doris B. Holmes
Saluda County Clerk of Court
Courthouse
100 East Church Street
Saluda, South Carolina 29138

CERTIFIED MAIL



COLUMBIA
C 290
1 MAY '16
N 2 L

7099 3400 0011 0417 2273
17 2273

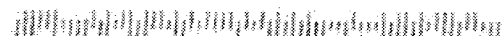


Rec'd
May 13, 2016 A.M.
SP

FRANK M POTTS
1201 MAIN ST., STE 350
COLUMBIA, SC 29201

EXHIBIT 1

29201320093



[English](#)[Customer Service](#)[USPS Mobile](#)[Register / Sign In](#)

USPS Tracking®

EXHIBIT 1a



Tracking Number: 70993400001104172273

Updated Delivery Day: Thursday, May 12, 2016

Product & Tracking Information

Available

Postal Product:

Features:

Certified Mail™

Text Update

DATE & TIME

STATUS OF ITEM

LOCATION

Email Update

May 13, 2016, 9:03 am

Delivered To Agent

COLUMBIA, SC 29201

Your item has been delivered to an agent at 9:03 am on May 13, 2016 in COLUMBIA, SC 29201.

May 12, 2016, 9:10 am

Arrived at Unit

COLUMBIA, SC 29201

May 12, 2016, 4:07 am

Departed USPS Facility

COLUMBIA, SC 29201

May 11, 2016, 7:27 pm

Arrived at USPS Facility

COLUMBIA, SC 29201

Track Another Package

Manage

Tracking (or receipt) number

Track all your packages
No tracking number

Track It

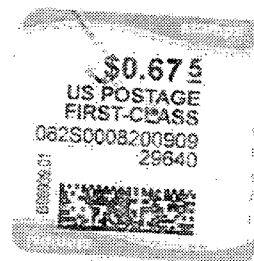
Sign up for

0084

Upstate Law Group, LLC
200 East Main Street
Easley, SC 29640

EXHIBIT 2

GREENVILLE
SC 296
31 MAY '16
PM 1 L



RECEIVED

JUN 02 2016

SFAA Office of General Counsel

Mr. Frank S. Potts, Esq.
State Fiscal Accountability Authority
1201 Main Street, Suite 350 (Capitol Center)
Columbia, SC 29201

29201-320099

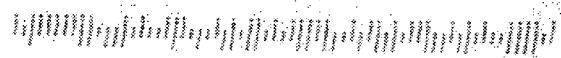


EXHIBIT 3

STATE OF SOUTH CAROLINA)
COUNTY OF SALUDA)
Amy Potts,)
Plaintiff,)
v.)
McCarty Enterprises, LLC, John)
Miles McCarty, Audrey S. McCarty,)
a/k/a Audrey J. McCarty and Jane)
Doe)
Defendant.)

IN THE COURT OF COMMON PLEAS

ELEVENTH JUDICIAL CIRCUIT

C.A. No. 2015-CP-41-139

CERTIFICATE OF SERVICE

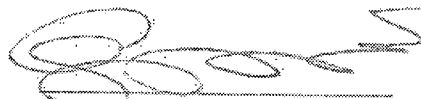
On May 25, 2016, I served a copy of the Defendants' Answer and Amended Motion to Dismiss on the below parties on behalf of the Plaintiff by United States First Class Mail, addressed to:

Mr. Frank S. Potts, Esq.
State Fiscal Accountability Authority
1201 Main Street
Suite 350 (Capitol Center)
Columbia, SC 29201

Mr. M. Evan Lacke, Esq.
Lacke Law Firm, LLC
147 Wappoo Creek Dr., Ste. 204
Charleston, SC 29412

And filed the same with the Court by mailing the originals to:

The Honorable Doris B. Holmes, Clerk of Court
100 E. Church Street
Saluda, SC 29138


Candy M. Kern-Fuller, Esq.

SWORN TO BEFORE ME
This 25th day of May, 2016


Notary Public for South Carolina
My commission expires: 3-3-18

EXHIBIT 4

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

Affidavit of Renee Larsen

Renee Larsen, first being duly sworn, deposes and says as follows:

1. I have been an employee of the State of South Carolina for 28 years. I began my employment with the Department of Education, followed by the Office of the Attorney General and subsequently with the South Carolina Budget and Control Board which last year became the State Fiscal Accountability Authority.
2. I am currently employed by the State Fiscal Accountability Authority as an Administrative Assistant in the Office of General Counsel.
3. I am the individual who, on a daily basis, receives and logs all mail addressed to Frank S. Potts and William D. Robertson at the Office of General Counsel of the State Fiscal Accountability Authority.
4. On June 2, 2016 I received and stamped the envelope, a copy of which is attached hereto and incorporated herein, and delivered the same unopened to Frank Potts having been advised by him that personal mail from opposing counsel might be received at the office.
5. At the request of Mr. Potts I also logged the receipt of the mail into the computer system together with other mail received at the same time - which record is currently maintained by the office.

FURTHER AFFIANT SAYETH NOT.



SWORN TO AND subscribed before me
this 15th day of June, 2016.



Notary Public of South Carolina

My commission expires: 11-16-2017

Upstate Law Group, LLC
200 East Main Street
Easley, SC 29640

GREENVILLE
SC 296
31 MAY '16
PM 11

\$0.676
US POSTAGE
FIRST-CLASS
08260008200509
29640

0088

RECEIVED

JUN 03 2016

SFAA Office of General Counsel

Mr. Frank S. Potts, Esq.
State Fiscal Accountability Authority
1201 Main Street, Suite 350 (Capitol Center)
Columbia, SC 29201

29201-320653



EXHIBIT 5

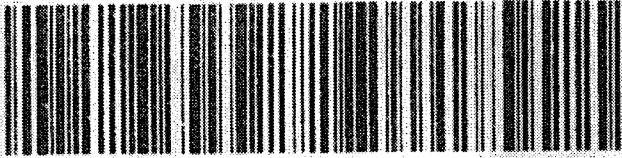
F	\$2.60 US POSTAGE - FIRST-CLASS PKG COMMERCIAL BASE PRICING	092S0008200909 FROM 29840
		stamps 04/25/2015
USPS FIRST CLASS MAIL®		
UPSTATE LAW GROUP LLC 200 E. MAIN STREET EASLEY SC 29640		0005
R002		
SHIP TO:	Frank S. Potts, 137 Stone Ridge Road Leesville SC 29070-7295 	
USPS TRACKING #		
		
9400 1118 9956 3746 4079 49		

EXHIBIT 6

Tracking Number: 9400111899563746407949

On Time

Expected Delivery Day Friday, April 29, 2016

Product & Tracking Information

Available

Postal Product:
First-Class Package ServiceFeatures:
USPS Tracking®

DATE & TIME	STATUS OF ITEM	LOCATION
April 29, 2016 , 1:40 pm	Delivered, In/At Mailbox	LEESVILLE, SC 29070

Your item was delivered in or at the mailbox at 1:40 pm on April 29, 2016 in LEESVILLE, SC 29070

April 29, 2016 , 6:47 am	Arrived at Post Office	LEESVILLE, SC 29070
April 28, 2016 , 3:20 pm	Departed USPS Destination Facility	COLUMBIA, SC 29201
April 28, 2016 , 9:10 am	Arrived at USPS Facility	COLUMBIA, SC 29201
April 28, 2016 , 6:41 am	Departed USPS Facility	GREENVILLE, SC 29607
April 27, 2016 , 11:34 pm	Arrived at USPS Facility	GREENVILLE, SC 29607
April 27, 2016 , 10:19 pm	Accepted at USPS Origin Facility	EASLEY, SC 29640
April 25, 2016	Pre-Shipment Info Sent to USPS	

Track Another Package

Tracking (or receipt) number

Manage

Track all your packages
No tracking number

Track it

Sign up for

Search or Enter a Tracking Number



0090

EXHIBIT 7

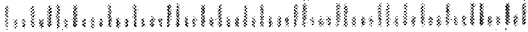
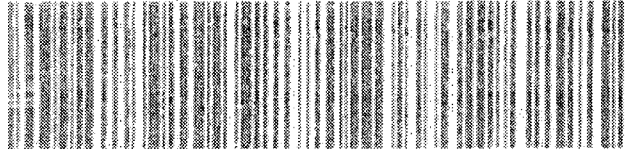
F	\$2.60 US POSTAGE FIRST CLASS PER COUNTDOWN METER PERMITS	562500062800WJD FROM 33640
		stamps 04-29-2018
USPS FIRST CLASS MAIL®		
UPSTATE LAW GROUP LLC 200 E. MAIN STREET CHARLESTON SC 29401		0005
C007		
SHIP TO:	Mr. M. Evan Lacke, Esq 147 Wappoo Creek Drive, Suite 204 Charleston SC 29412-2111 	
USPS TRACKING #		
		
9400 1118 9956 3746 4865 00		

EXHIBIT 8

STATE OF SOUTH CAROLINA

COUNTY OF SALUDA

Amy Potts,

Plaintiff,

v.

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

Defendants.

IN THE COURT OF COMMON PLEAS

ELEVENTH JUDICIAL CIRCUIT

CASE NO. 2015-CP-41-139

PERSONALLY APPEARED, before me, M. Evan Lacke, who after being duly sworn,
deposes and says:

1. I, M. Evan Lacke, am a South Carolina licensed attorney (Bar No. 74969) and am co-counsel to Amy Potts in this matter.
2. I have reviewed Defendant Counsel Candy Kern-Fuller's Affidavit in Opposition to Default in this matter. Paragraph 10 of such Affidavit states that I assured Ms. Kern-Fuller that I would provide her with a copy of the Amended Complaint. This statement is not true. The Amended Complaint was never discussed during our conversation.
3. I spoke with Ms. Kern-Fuller on February 29, 2016 in good faith and politely allowed her to vent her feelings and frustrations at my co-counsel's expense. I am troubled by Ms. Kern-Fuller's loose interpretation of the facts and false representations before this Court.

FURTHER THE AFFIANT SAYETH NOT!


M. Evan Lacke, Esq.

SUBSCRIBED AND SWORN BEFORE ME

This 3rd day of May, 2016.

Leusa D. Walker
Notary Public for South Carolina
My Commission Expires: 8/26/2024

STATE OF SOUTH CAROLINA
COUNTY OF SALUDA

Amy Potts,

Plaintiff,

vs.

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

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE ELEVENTH CIRCUIT

2015-CP-41-139

CERTIFICATE OF SERVICE

I, Frank S. Potts, hereby affirm that on June 24, 2016, I deposited the Plaintiff's **Motion to Strike Amended Motion to Dismiss and Answer to Amended Complaint; For Entry of Default and to Compel Responses to Discovery** with the United States Postal Service, **Certified Mail Return Receipt Requested**, to the following address:

Candy M. Kern-Fuller
Upstate Law Group, LLC
200 East Main Street
Easley, SC 29640



Frank S. Potts

STATE OF SOUTH CAROLINA)

COUNTY OF SALUDA)

Amy Potts,)

Plaintiff,)

McCarty Enterprises, LLC, John)

Miles McCarty, Audrey S. McCarty,)

a/k/a Audrey J. McCarty and Jane)

Doe)

Defendant.)

IN THE COURT OF COMMON PLEAS

ELEVENTH JUDICIAL CIRCUIT

C.A. No. 2015-CP-41-139

**MEMORANDUM IN OPPOSITION TO
MOTION FOR DEFAULT AND TO STRIKE**

Plaintiff has now moved to Strike the Answer and Amended Motion to Dismiss of Defendants:

BACKGROUND/FACTS

This matter was previously before the Honorable William Keesley who ordered that Defendants were not in default and that they have 15 days from the day the Order is mailed to the defense attorney by the Clerk for Saluda County to file and serve their responsive pleading.

Plaintiff's husband and counsel, Frank Potts, Esq., now asserts that Defendants' counsel filed a false certificate of service to both the Court and him and he again seeks to hold Defendants in default. (**Def. Motion, p. 1**). Further, Plaintiff's husband and counsel, Frank Potts, Esq., additionally appears to try to relitigate the issues already decided, and rejected, by Judge Keesley in his prior order (**Potts' Aff. ¶¶ 9-12**), though no motion for reconsideration of that Order was ever filed by Plaintiff.

Per Plaintiff's counsel's affidavit, the Order was mailed by the Clerk on May 11, 2016. (**Potts' Aff. ¶¶ 2, 5 & 6**). Defendants' counsel mailed the Answer and Amended Motion to the

Clerk and opposing Counsel on May 25, 2016 — within the fifteen days *out of the Easley, South Carolina post office branch, and not the Greenville, South Carolina post office branch* as asserted in Plaintiff's counsel's affidavit. However, the Greenville post office is the regional mailing facility for the area. (*This will become an important point.*) Normally, mail takes three or so days to reach small town destinations from the Easley post office (which, itself, is a small town). Knowing this, and the difficulties this case has faced, out of an abundance of caution, the undersigned's office contacted the Saluda Clerk's office on Tuesday, May 31, 2016, to determine if they had received the filing. (Monday, May 30th would've been the third business day, but it was Memorial Day). When the undersigned's office determined Saluda had not received the filing, a runner was sent for the four hour round trip to Saluda to hand carry the filing. At the same time, a phone call was made to the Easley postmaster to try to locate the lost mailing, which may have caused the item to finally arrive at the regional mail center — Greenville — that very day.¹ As you will see from Plaintiff's own filings, the previous mailing to Mr. Potts began at the Easley post office, then went to the regional mail center in Greenville, before being routed to the regional mail center in Columbia and, ultimately to the Leesville post office. (See Exhibit A). In the case of Mr. Potts' co-counsel, it appears that after it began at the Easley post office, then went to the regional mail center in Greenville, it was erroneously routed to the regional mail center in Charleston, WV, before ultimately being redirected to Charleston, South Carolina. Unfortunately, as that shows, mistakes with the mail do happen.

The mailed filing that was sent on May 25, 2016, to the Saluda Clerk was actually received by the Saluda Clerk and then returned to the undersigned by mail on June 3, 2016 with a note attached regarding the same. (See attached Exhibit A).

¹ Unfortunately, this is a common occurrence for our local post office. One winter, our local post office lost an entire bag of certified mail that had numerous IOLTA checks in it. The bag was found months later after the checks had already been cancelled and re-issued. Needless to say, it caused quite a lot of problems.

LAW AND ARGUMENT

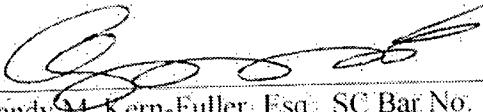
According to SCRCP 5(b)(1), "[s]ervice by mail is complete upon mailing of all pleadings and papers subsequent to service of the original summons and complaint." Defendants complied with the Order and served their Answer and their Motion as directed. Less than a week later, the undersigned served the discovery that wasn't required to be served for 30 days, and objections, but Plaintiff has still filed a motion to compel.

Defendants' counsel has represented Defendants and their small business for years. The undersigned has no personal stake in this litigation and no familial relationship to the parties. The undersigned believes strongly that the matter has become way too personal and that it is clouding the judgment of the advocate for Plaintiff and causing motives to be ascribed to Defendants' counsel that are simply not present.

CONCLUSION

Further, Defendants have strong defenses and but for a default, it is unclear how Plaintiff could prevail in this matter. For these reasons, Plaintiff's Motion for Default and to Strike Plaintiff's pleadings should be denied.

UPSTATE LAW GROUP, LLC



Candy M. Kern-Fuller, Esq., SC Bar No. 11392
200 East Main Street
Easley, South Carolina 29640
864.855.3114 telephone
864.855.3446 facsimile
Candy@upstatelawgroup.com

Easley, South Carolina

September 7, 2016

ATTORNEY FOR PLAINTIFF

UPSTATE LAW GROUP, LLC
OPERATING ACCOUNT
200 E. MAIN STREET
EASLEY, SC 29640
864-855-3114

SUNTRUST

3191

66-46/531

5/25/2016

PAY TO THE
ORDER OF

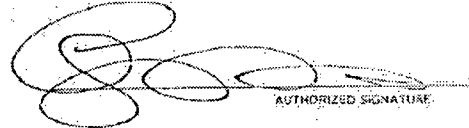
Saluda County

\$**25.00

Twenty-Five and 00/100

DOLLARS

Saluda County
100 E Church St.
Suite 6
Saluda, SC 29138-1444


AUTHORIZED SIGNATURE

MEMO:

McCarty

⑈003191⑈ ⑆053100465⑆1000135286648⑈

UPSTATE LAW GROUP, LLC • OPERATING ACCOUNT

Saluda Co
Advanced Clie

5/25/2016

3191

25.00

*I am returning these back
to you. They appear to be the
same documents filed on May 31.
I have enclosed a copy of what
was filed. Thanks*

Saluda Co. Clerk of Court

Suntrust Opera

25.00

EXHIBIT 6

Tracking Number: 9400111899563746407949

On Time

Expected Delivery Day: Friday, April 29, 2016

Product & Tracking Information

Await

Postal Product:

First-Class Package Service

Features:

USPS Tracking®

DATE & TIME	STATUS OF ITEM	LOCATION
April 29, 2016 , 1:40 pm	Delivered, In/At Mailbox	LEESVILLE, SC 29070

Your item was delivered in or at the mailbox at 1:40 pm on April 29, 2016 in LEESVILLE, SC 29070.

April 29, 2016 , 6:47 am	Arrived at Post Office	LEESVILLE, SC 29070
April 28, 2016 , 3:20 pm	Departed USPS Destination Facility	COLUMBIA, SC 29201
April 28, 2016 , 9:10 am	Arrived at USPS Facility	COLUMBIA, SC 29201
April 28, 2016 , 6:41 am	Departed USPS Facility	GREENVILLE, SC 29607
April 27, 2016 , 11:34 pm	Arrived at USPS Facility	GREENVILLE, SC 29607
April 27, 2016 , 10:19 pm	Accepted at USPS Origin Facility	EASLEY, SC 29640
April 25, 2016	Pre-Shipment Info Sent to USPS	

Track Another Package

Tracking (or receipt) number

Manage

Track all your p
No tracking nu

Sign up for

Track It

Search or Enter a Tracking Number



0099

English

Customer Service

USPS Mobile

EXHIBIT 7



USPS Tracking®



Customer Service
Have questions? We're here to help!



Get Easy Tracking Updates
Sign up for My USPS.

Tracking Number: 9400111899563746486500

On Time

Expected Delivery Day: Friday, April 29, 2016

Product & Tracking Information

Available Options

Postal Product:

First-Class Package Service

Features:

USPS Tracking®

DATE & TIME

STATUS OF ITEM

LOCATION

April 29, 2016, 1:25 pm

Delivered into Mailbox

CHARLESTON, SC 29412

Your item was delivered in or at the mailbox at 1:25 pm on April 29, 2016 in CHARLESTON, SC 29412.

April 29, 2016, 9:05 am

Out for Delivery

CHARLESTON, SC 29412

April 29, 2016, 8:55 am

Sorting Complete

CHARLESTON, SC 29412

April 29, 2016, 7:55 am

Arrived at Post Office

CHARLESTON, SC 29412

April 29, 2016, 5:52 am

Departed USPS Facility

CHARLESTON, SC 29403

April 28, 2016, 11:26 pm

Arrived at USPS Facility

CHARLESTON, SC 29423

April 28, 2016, 1:08 pm

Departed USPS Facility

SOUTH
CHARLESTON, WV 25300

April 28, 2016, 10:46 am

Arrived at USPS Facility

SOUTH
CHARLESTON, WV 25300 ←

April 28, 2016, 4:05 am

Departed USPS Facility

GREENVILLE, SC 29607

April 27, 2016, 11:31 pm

Arrived at USPS Facility

GREENVILLE, SC 29607

April 27, 2016, 10:16 pm

Accepted at USPS Origin Facility

LEASLEY, SC 29040

April 25, 2016

Pre-Shipment Info Sent to USPS

Track Another Package

Tracking (or receipt) number

Track it

Manage Incoming Packages

Track all your packages here & download the tracking numbers necessary.

Sign up for My USPS.

Search or Enter a Tracking Number

0100

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF SALUDA)

ELEVENTH JUDICIAL CIRCUIT

Amy Potts,)

C.A. No. 2015-CP-41-139

Plaintiff,)

v.)

CERTIFICATE OF SERVICE

McCarty Enterprises, LLC, John)

Miles McCarty, Audrey S. McCarty,)

a/k/a Audrey J. McCarty and Jane)

Doe)

Defendant.)

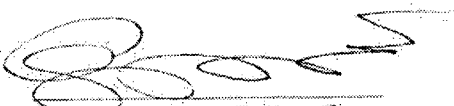
On May 25, 2016, I served a copy of the Defendants' Answer and Amended Motion to Dismiss on the below parties on behalf of the Plaintiff by United States First Class Mail, addressed to:

Mr. Frank S. Potts, Esq.
State Fiscal Accountability Authority
1201 Main Street
Suite 350 (Capitol Center)
Columbia, SC 29201

Mr. M. Evan Lacke, Esq.
Lacke Law Firm, LLC
147 Wappoo Creek Dr., Ste. 204
Charleston, SC 29412

And filed the same with the Court by mailing the originals to:

The Honorable Doris B. Holmes, Clerk of Court
100 E. Church Street
Saluda, SC 29138


Candy M. Kern-Fuller, Esq.

SWORN TO BEFORE ME
This 25th day of May, 2016


Notary Public for South Carolina
My commission expires: 3-3-18

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

11th JUDICIAL CIRCUIT

COUNTY OF SALUDA)

CASE NO.: 2015-CP-41-139

Amy Potts)

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

Plaintiff,)

vs.)

McCarty Enterprises, LLC, John Miles)

McCarty, Audrey S. McCarty aka Audrey J.)

McCarty, and Jane Doe)

Defendant.)

Plaintiff's Attorney:

Frank S. Potts, Esq., Bar No. 4538

Address:

1201 Main St, Suite 350, Cola, SC 29201

Phone: 803-734-1277 Fax

E-mail: fpotts@ogc.sc.gov Other:

Defendant's Attorney:

Candy Kern-Fuller, Bar No. 11392

Address:

200 E. Main St, Easley, SC 29640

Phone: 864-855-3114 Fax 864-855-3446

E-mail: candy@upstatelawgroup.com Other:

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

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

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

SECTION I: Hearing Information

Nature of Motion: Motion to Dismiss

Estimated Time Needed: 30 mins

Court Reporter Needed: ☒ YES ☐ NO

SECTION II: Motion/Order Type

☐ Written motion attached

☒ Form Motion/Order

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

Signature of Attorney for ☐ Plaintiff ☒ Defendant

May 25, 2016

Date submitted

SECTION III: Motion Fee

☒ **PAID - AMOUNT: \$**

☐ **EXEMPT:**

(check reason)

☐ Rule to Show Cause in Child or Spousal Support

☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status ☐ State Agency v. Indigent Party

☐ Sexually Violent Predator Act ☐ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

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

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

Name of Court Reporter: _____

☐ Other: _____

JUDGE'S SECTION

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

☐ Other:

JUDGE CODE _____

Date: _____

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____

☐ **MOTION FEE COLLECTED: \$** _____

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

STATE OF SOUTH CAROLINA)

COUNTY OF SALUDA)

Amy Potts,)

Plaintiff,)

v.)

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

Defendant.)

IN THE COURT OF COMMON PLEAS

ELEVENTH JUDICIAL CIRCUIT

C.A. No. 2015-CP-41-139

**** AMENDED ****

**NOTICE OF MOTION AND MOTION
TO DISMISS**

To Plaintiff, by and through her attorney Frank S. Potts, Esq. and M. Evan Lacke, Esq.:

YOU WILL PLEASE TAKE NOTICE that the Defendants., by and through their undersigned attorney, will move before the presiding Judge of the Court of Commons Pleas for the Eleventh Judicial Circuit, at the Saluda County Court, on the tenth (10th) day after service hereof, or as soon thereafter as counsel may be heard, for an Order, dismissing this action for the following reasons:

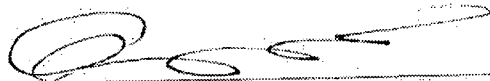
1. Plaintiff's claim for Civil Conspiracy should be dismissed because at all times alleged Defendants, John McCarty, Audrey McCarty and Jane Doe, were employees and/or agents of Defendant McCarty Enterprises and a corporation cannot conspire with itself *McMillan v. Oconee Mem'l Hosp., Inc.*, 367 S.C. 559, 564, 626 S.E.2d 884,887 (2006);
2. Plaintiff's allegations that Defendants killed her dog is not an actionable matter, Defendants cannot be held civilly liable for the killing of Plaintiff's dog under Section 47-3-530 of the S.C. Code of Laws, as amended, which lawfully permits the killing of a dog that is "threatening to cause or causing personal injury or property damage."

Plaintiff has made no allegations, nor could she since she was not present, that said exemption can be overcome.

3. The law limits claims of intentional infliction of emotional distress to egregious conduct toward a plaintiff proximately caused by a defendant. It is not enough that the conduct is intentional and outrageous. It must be conduct *directed at the plaintiff, or occur in the presence of a plaintiff of whom the defendant is aware*. Plaintiff has failed to allege specific facts that Defendants targeted Plaintiff to be harmed by their allegedly tortious acts or that she was even present when the dog was destroyed or even saw the dog after it was destroyed before it was buried.

As such, this matter should be dismissed WITH PREJUDICE.

UPSTATE LAW GROUP, LLC



Candy M. Kern-Fuller, Esq., SC Bar No. 11392
200 East Main Street
Easley, South Carolina 29640
864.855.3114 telephone
864.855.3446 facsimile
Candy@upstatelawgroup.com

Easley, South Carolina

ATTORNEY FOR PLAINTIFF

May 25, 2016

STATE OF SOUTH CAROLINA)

COUNTY OF SALUDA)

Amy Potts,

Plaintiff,

v.

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

Defendant.

FILED

2016 MAY 30 PM 3:31
CLERK OF COURT
SALUDA CO. S.C.

IN THE COURT OF COMMON PLEAS

ELEVENTH JUDICIAL CIRCUIT

C.A. No. 2015-CP-41-139

DEFENDANTS' ANSWER TO COMPLAINT

COMES NOW Defendants, McCarty Enterprises, LLC, John Miles McCarty, Audrey S. McCarty, a/k/a Audrey J. McCarty and Jane Doe (hereinafter referred to collectively as "Defendants"), answering the Plaintiff's First Amended Complaint, alleging as follows:

FOR A FIRST DEFENSE
(GENERAL DENIAL)

- 1) Defendants deny each and every allegation of the Plaintiff's First Amended Complaint not hereinafter specifically admitted, qualified or explained;

FOR A SECOND DEFENSE
(SPECIFIC DENIAL)

- 2) Defendants incorporate each and every paragraph previously alleged as if fully set forth verbatim herein;
- 3) Upon information and belief, Defendants admit the allegations contained in paragraphs one (1), two (2), three (3), four (4), five (5), and six (6) of Plaintiff's First Amended Complaint;

- 4) Upon information and belief, Defendants admit so much of the allegations contained in Paragraph seven (7) of the Plaintiff's First Amended Complaint that plaintiff resides in Leesville, South Carolina and owned an Australian Shepherd dog that lived with her. The Defendants are without knowledge to admit or deny the remaining allegations of Paragraph seven (7) of the Plaintiff's First Amended Complaint and, therefore, deny the same with strict proof demanded thereof;
- 5) Upon information and belief, Defendants admit so much of the allegations contained in Paragraph eight (8) of the Plaintiff's First Amended Complaint that plaintiff resides in Leesville, South Carolina, that Defendants Audrey and John McCarty knew Plaintiff and where she lived and that she owned an Australian Shepherd dog that lived with her. The Defendants are without knowledge to admit or deny the remaining allegations of Paragraph eight (8) of the Plaintiff's First Amended Complaint and, therefore, deny the same with strict proof demanded thereof;
- 6) Upon information and belief, Defendants admit so much of the allegations contained in Paragraph nine (9) of the Plaintiff's First Amended Complaint that plaintiff had run over Defendants' pet in July 2012. Defendants admit that two years prior to Plaintiff killing Defendants' pet, that Plaintiff's Australian Shepherd attacked that same pet on Defendants' property, causing injury to the Terrier on or about October 29, 2010. At that time, the Saluda County Sheriff's Department told both Defendants and Plaintiff that "they needed to keep their dogs on their property or leashed at all times. Both victim and subject were advised they had the right to protect their person and property against attacks on their property." Two days prior to the incident in question (on or about March 23, 2015), Plaintiff's Australian Shepherd attacked and killed two emus that Defendants

housed on their property. Again, the Saluda County Sheriff's Office told Defendant Audrey McCarty that "they have a right to protect her animals." The Defendants deny the remaining allegations of Paragraph nine (9) of the Plaintiff's First Amended Complaint with strict proof demanded thereof;

- 7) The Defendants deny the allegations of Paragraph ten (10) of the Plaintiff's First Amended Complaint with strict proof demanded thereof;
- 8) The Defendants admit so much of Paragraph eleven (11) of the Plaintiff's First Amended Complaint that she discussed the killing of the two (2) emus on Defendants' property on March 23, 2015, with Plaintiff, as did the Saluda County Sheriff's office the day before. The Defendants deny the remaining allegations of Paragraph eleven (11) of the Plaintiff's First Amended Complaint with strict proof demanded thereof;
- 9) The Defendants admit so much of Paragraph twelve (12) of the Plaintiff's First Amended Complaint that Defendant John McCarty destroyed the Australian Shepherd known as "Ruby on or about March 25, 2015, on property owned by the Defendants, where the animal was attempting to harm his livestock. The Defendants deny the remaining allegations of Paragraph twelve (12) of the Plaintiff's First Amended Complaint with strict proof demanded thereof;
- 10) The Defendants deny the allegations of Paragraph thirteen (13) of the Plaintiff's First Amended Complaint with strict proof demanded thereof;
- 11) The Defendants deny the allegations of Paragraph fourteen (14) of the Plaintiff's First Amended Complaint with strict proof demanded thereof;
- 12) The Defendants deny the allegations of Paragraph fifteen (15) of the Plaintiff's First Amended Complaint with strict proof demanded thereof;

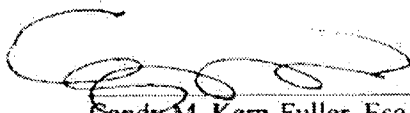
- 13) The Defendants deny the allegations of Paragraph sixteen (16) of the Plaintiff's First Amended Complaint with strict proof demanded thereof;
- 14) The Defendants deny the allegations of Paragraph seventeen (17) of the Plaintiff's First Amended Complaint with strict proof demanded thereof;
- 15) The Defendants deny the allegations of Paragraph eighteen (18) of the Plaintiff's First Amended Complaint with strict proof demanded thereof;
- 16) The Defendants deny the allegations of Paragraph nineteen (19) of the Plaintiff's First Amended Complaint with strict proof demanded thereof;
- 17) The Defendants deny the allegations of Paragraph twenty (20) of the Plaintiff's First Amended Complaint with strict proof demanded thereof;
- 18) The Defendants deny the allegations of Paragraph twenty-one (21) of the Plaintiff's First Amended Complaint with strict proof demanded thereof;
- 19) The Defendants incorporate their prior defenses in response to the allegations of Paragraph twenty-two (22) of the Plaintiff's First Amended Complaint. The extent that any further response is required, where not inconsistent, the allegations are denied with strict proof demanded thereof;
- 20) Defendants admit that Defendant John McCarty is a principal of McCarty Enterprises, LLC. The remaining allegations of Paragraph twenty-three (23) of the Plaintiff's First Amended Complaint are denied with strict proof demanded thereof;
- 21) The allegations of Paragraph twenty-four (24) of the Plaintiff's First Amended Complaint are denied with strict proof demanded thereof;

FOR A THIRD DEFENSE
(FAILURE TO STATE A CLAIM)

- 22) Defendants prior responses are realleged as if they were stated fully herein;
- 23) Some or all of the claims asserted in the Plaintiff's First Amended Complaint fail to state a claim upon which relief can be granted;

WHEREFORE, having fully answered the Plaintiff's Complaint, Defendants would respectfully request that an Order be entered which provides for the following relief:

- A. For the Complaint to be dismissed, with prejudice; and,
- B. For such other legal or equitable relief as the Court deems just and proper.



Candy M. Kern-Fuller, Esq.
SC Bar No. 011392
E-Mail: Candy@UpstateLawGroup.com
UPSTATE LAW GROUP, LLC
200 East Main Street
Easley, SC 29640
(864) 855-3114

Attorneys for Defendants

May 25, 2016

STATE OF SOUTH CAROLINA)

COUNTY OF SALUDA)

Amy Potts,)

Plaintiff,)

v.)

McCarty Enterprises, LLC, John)

Miles McCarty, Audrey S. McCarty,)

a/k/a Audrey J. McCarty and Jane)

Doe)

Defendant.)

IN THE COURT OF COMMON PLEAS

ELEVENTH JUDICIAL CIRCUIT

C.A. No. 2015-CP-41-139

MOTION FOR RECONSIDERATION

2016 OCT 24 AM 9:18
CLERK OF COURT
SALUDA CO. S.C.

Pursuant to SCRCP 59(e), Defendants move to Alter or Amend the portion of the September 28, 2016 Judgment of the Honorable Jocelyn Newman finding Defendants in default, which was mailed to Defendants' counsel on October 4, 2016 and received on October 6, 2016 (See attached Exhibit A).

The basis for this motion is that the Court erroneously interpreted a Greenville Post office postage date as the date of mailing when both the sworn Certificate of Mailing and the direct statements of Counsel to the Court reflected otherwise.

In support of this Motion, Defendants tender the affidavit of LaTonya Chester and Counsel for the Defendants, attached hereto as Exhibits B and C.

As such, Defendants request that the Court reconsider its Order finding Defendants in default and allow this matter to proceed in a normal manner.

The undersigned affirms pursuant to SCRCP 11 of the South Carolina Rules of Civil Procedure that consultation with the Plaintiff's counsel is not required because it would serve no useful purpose.

I so move.



Candy M. Kern-Fuller (S.C. Bar No. 11392)
Upstate Law Group, LLC
200 East Main Street
Easley, SC 29640
864-855-3114
864-855-3446 (Facsimile)
Candy@UpstateLawGroup.com

October 17, 2016

Attorney for Plaintiff

EXHIBIT A

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

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2015 CP-41-0139

AMY POTTS

2016 SEP 28 PM 12:04

McCARTY ENTERPRISES, LLC; JOHN MILES

PLAINTIFF(S)

CLERK OF COURT
SALUDA CO. S.C.

McCARTY; AUDREY S. McCARTY A/K/A AUDREY J.
McCARTY; AND JANE DOE

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: Plaintiff's Motion to Strike Amended Motion to Dismiss and Answer to Amended Complaint is GRANTED. Plaintiff's Motion for Entry of Default is GRANTED. Defendants are held in default pursuant to Rule 55(a), SCRCP. Plaintiff is ordered to provide notice to Defendants of any damages hearing that is scheduled, in compliance with Rule 55(b)(2), SCRCP.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk:

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

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

Paul J. Yurman
Circuit Court Judge

2757

Judge Code

September 26,
2016
Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or
placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or
to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

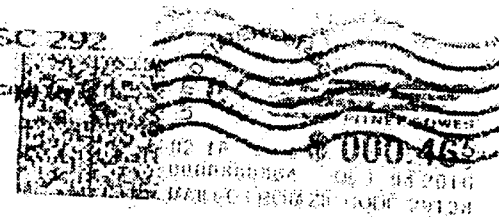
**ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON
PAGE 1.**

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

Doris B. Holmes
Saluda County Clerk of Court
Courthouse
100 East Church Street
Saluda, South Carolina 29138

COLUMBIA SC 292

04 OCT 2016 PM 4:15



CANDY M KERN-FULLER
200 E MAIN ST
EASLEY, SC 29640

2964032166

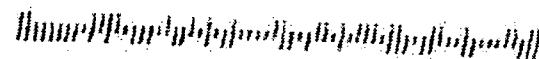


EXHIBIT B

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SALUDA

ELEVENTH JUDICIAL CIRCUIT

Amy Potts,

C.A. No. 2015-CP-41-139

Plaintiff,

v.

AFFIDAVIT OF LATONYA CHESTER

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

Defendant.

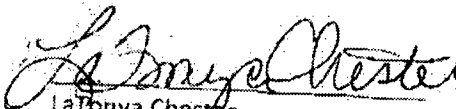
PERSONALLY APPEARED BEFORE ME, LATONYA CHESTER, who being first duly sworn, deposes and states as follows:

- 1) I make this affidavit based upon my personal knowledge of the facts contained herein;
- 2) I have worked for the U.S. Postal Service for over twenty years. I am a Postal Clerk at the Berea location on Whitehorse Road in Greenville, South Carolina;
- 3) As a postal clerk, I receive any complaints regarding mail service or delivery and initiate investigations into those customer complaints. As such, I am intimately familiar with issues that arise in postal delivery and the problems that can occur in the proper and timely routing of mail;
- 4) Single-Piece First-Class Mail volume has declined by 35 percent over the last decade. This significant decline in overall First-Class Mail volume and revenues which fund postal operations have required that the Postal Service business model be adjusted to ensure that its network of processing facilities, transportation routes, and other interconnected infrastructure operates with greater efficiency than ever before;
- 5) The Greenville Postal center serves as something known as a Sectional Center Facility (SCF). The SCFs are Processing and Distribution Centers (P&DC) of the United States Postal Service (USPS) that serve a designated geographical area defined by one or more three-digit ZIP Code prefixes. The SCFs route mail between local post offices and to and from Network Distribution Centers (NDC), which form the backbone of the mail network;
- 6) South Carolina has three SCFs -- Greenville, Columbia and Charleston. The three digit zip codes that Greenville serves are 296 and 293. What that means is that any and all local post offices in the 296 and 293 area code funnel all their mail through the Greenville SCF, as we serve as the processing center for the entire region;

- 7) For instance, if you were to walk into a local post office to drop off a letter, the letter likely would not be postmarked there unless it was "local mail." More specifically, your mail would be placed in one of two bins behind the counter for pick up that evening—the local mail bin or the SCF bin. If it were "local mail," i.e. going to someone else in the exact same area code as that post office, later that evening it would be postmarked with the local post office postmark and then routed to the carrier. If it were going to the SCF facility, it likely would not be postmarked until it was sorted at the SCF location. If mail is placed in an outside box, it is collected at the local facility around 6 p.m. and sorted in a similar manner and then non-local mail is sent to the Greenville for further processing. Mail placed in an outside box at a local post office, unless it is local mail, it is likely not to be postmarked until sorted at the Greenville SCF and will bear the Greenville SCF postmark;
- 8) The failures that can happen in this process are several fold. First, our mail containers often have a plastic container that is placed in a cloth cart. As such, mail will occasionally fall down between the plastic container and the cart and may linger there for some time until noticed. This risk is increased if an outside collection box is used because they often overfill especially later in the day. So, when an inquiry is made regarding lost mail, if the customer can isolate the box they placed the mail in, we first investigate this to determine if the mail has become lodged there. Additionally, we began automated processing of the mail years ago using a mail sorting machine. These machines place a bar code label on the bottom of the mail or package and it is further sorted from there onto the trucks that go to the next locale. Mail will sometimes get caught in the automated machines and be destroyed. We try diligently to determine the sender or intended receiver whenever possible, but sometimes the mail is so damaged that it has to be discarded. Unfortunately, using certified mail doesn't fully alleviate these problems, it simply provides better tracking as to where the problem arose;
- 9) Turning to this particular customer's issue, I understand from the customer and as further reflected in her Certificate of Mailing filed with this Court (**Attached hereto as Exhibit A**) that she placed 3 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. The posted "last pickup" for that office is at 5:00 p.m., so it would likely have missed the pickup that day regardless of whether it had been placed in the outside box or handed to a postal clerk at the counter at 4:58 p.m. Assuming it been properly collected by the Easley from the outside box the next day, it would have gone to the Greenville facility on the 26th and been processed then. However, the postmark provided to me indicates that the item was not processed through our Greenville facility until May 31, 2016. The customer advises that they called the Easley Post Office on May 31st (Monday the 30th was Memorial Day) because the mailing had not yet arrived at the Saluda County Court by that day. According to our protocol, that outside box would have been checked to see if there was mail "stuck" there. Any mail found would then have been processed and sent to Greenville that day, accounting for the May 31st postmark from Greenville on the envelope that was mailed from the outside box in Easley, South Carolina on May 25, 2016;

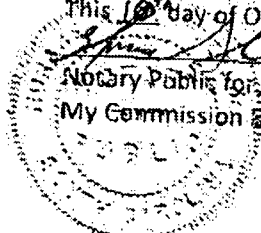
RECEIVED 10/12/2016 10:13AM

FURTHER AFFIANT SAYETH NAUGHT.


LaTonya Chester

SWORN TO BEFORE ME

This 10th day of October, 2016


Notary Public for South Carolina

My Commission Expires: 1-29-19

EXHIBIT C

STATE OF SOUTH CAROLINA)

COUNTY OF SALUDA)

Amy Potts,)

Plaintiff,)

v.)

McCarty Enterprises, LLC, John)

Miles McCarty, Audrey S. McCarty,)

a/k/a Audrey J. McCarty and Jane)

Doc)

Defendant.)

IN THE COURT OF COMMON PLEAS

ELEVENTH JUDICIAL CIRCUIT

C.A. No. 2015-CP-41-139

AFFIDAVIT OF
CANDY M. KERN-FULLER, ESQ.

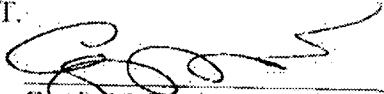
PERSONALLY APPEARED BEFORE ME, **CANDY M. KERN-FULLER, ESQ.**, who being first duly sworn, deposes and states as follows:

- 1) I make this affidavit based upon my personal knowledge of the facts contained herein;
- 2) I am the managing partner of the Upstate Law Group, LLC. I have worked in law for twenty-six years and have been an attorney since 2002;
- 3) As I explained to the Court on September 7, 2016, I have no personal interest in this case. I am not related to any of the parties and I was hired and am being paid to represent the Defendants;
- 4) This matter was scheduled in Lexington before The Honorable Jocelyn Newman at Plaintiff's counsel's urging. (See attached Exhibit 1);
- 5) 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. Problems I didn't fully understand until I received the detailed information recently from Ms. Chester at the U.S. Postal Service. One of those things that I could not understand was that it seemed almost every time I complained to our Easley Post Office about a lost article of mail, it mysteriously was found and received several days later by the intended recipient. This wasn't the case in February 2014 when they lost an entire bag of *Certified* Mail with checks from our IOLTA account. After we stopped payment on those checks, two months later the bag of mail was received by the intended recipients and they attempted to cash those checks, causing a host of banking nightmares;
- 6) When Plaintiff's counsel focused on the "Greenville" postmark date, I advised the Court that the items were mailed from the *Easley* post office, not the *Greenville* post office. I did know (and share) that Greenville is the processing facility for our post office, but of course, I did not know the detailed information that Ms. Chester later provided in her affidavit. As a result of the information we have received from Ms. Chester, we have changed our internal protocols on mail and now walk everything into the local Post Office's inside box. While we understand that this still means that we will not get a local

postmark placed on the mail, we are advised that it may alleviate the problems with the mail getting stuck in a bin in the outside receptacle;

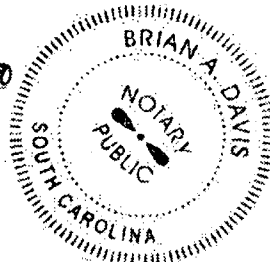
- 7) I affirmed for the Court, in accordance with SCRAP 407: RPC 3.3, that the items were mailed from the Easley Post Office on May 25, 2016, as indicated in the sworn Certificate of Mailing (**See Exhibit 2**). As such, there was no way that the items would have been served¹ as indicated by the Greenville SCF postmark of May 31, 2016. Rather, the items were served in Easley, South Carolina on May 25, 2016, as indicated in the sworn Certificate of Mailing. (**Id.**)
- 8) Finally, I do understand the Court's concern that Judge Keesley suggested that we mail all future items via certified mail. I failed to remind my assistant to do that in this case and that oversight is solely my fault. However, I will put a reminder on all future items in this case to send them certified mail as recommended by Judge Keesley and hope that these measures alleviate any further mailing issues;
- 9) For these reasons, I ask that the Court reconsider its ruling on the issue of Defendants' default.

FURTHER AFFIANT SAYETH NAUGHT.


Candy M. Kern-Fuller, Esq.

SWORN TO BEFORE ME
This 17th day of October, 2016


Notary Public for South Carolina
My Commission Expires: 3-5-2020



¹ SCRCP 5(b)(1) defines that "Service by mail is complete upon mailing of all pleadings and papers subsequent to service of the original summons and complaint."

EXHIBIT 1

Candy M. Kern-Fuller, Esq.

From: Potts, Frank <fpotts@ogc.sc.gov>
Sent: Friday, August 12, 2016 3:51 PM
To: Kohl, Kristi
Cc: candy@upstatelawgroup.com
Subject: RE: 2015-CP-41-139 (Potts v. McCarty)

Thanks. Have a good weekend. FSP

From: Kohl, Kristi
Sent: Friday, August 12, 2016 3:50 PM
To: Potts, Frank
Cc: candy@upstatelawgroup.com
Subject: RE: 2015-CP-41-139 (Potts v. McCarty)

Thank you both for your responses. I will set this during the 2:00 block on the afternoon of Wednesday, September 7. The hearing will be at the Lexington County Courthouse before the Honorable Jocelyn Newman. Because this is an out of county case, I cannot add these motions to our roster and formally send out notices, so please consider this your official notification. I look forward to seeing you then.

Kristi P. Kohl, Senior Court Assistant
Lexington County Clerk's Office
205 East Main Street
Lexington, SC 29072
(803) 785-8235
kkohl@lex-co.com

From: Potts, Frank
Sent: Friday, August 12, 2016 12:13 PM
To: Kohl, Kristi
Cc: candy@upstatelawgroup.com
Subject: 2015-CP-41-139 (Potts v. McCarty)

Kristi,

There are several motions pending in the referenced Saluda County case which are:

Defendants' Motion to Dismiss
Plaintiff's Motion to Strike the Motion to Dismiss and the Defendants Answer to the Amended Complaint
Plaintiff's Motion for Default
Plaintiff's Motion to Compel Discovery

I expect the foregoing will take an hour.

Thanks for your patience.

Candy M. Kern-Fuller, Esq.

From: Keesley, William P. Law Clerk (Anna Marsh) <wkeesleylc@sccourts.org>
Sent: Thursday, August 4, 2016 3:08 PM
To: lakecottage@comporium.net; candy@upstatelawgroup.com
Cc: 'kkohl@lex-co.com'; Holmes, Doris
Subject: Potts v. McCarty Enterprises, LLC., et. al.

Mr. Potts:

Judge Keesley is in receipt of your letter regarding the scheduling any pending motions in this case.

Please contact Kristi Kohl at the Lexington County Clerk's Office (kkohl@lex-co.com) to have these motions scheduled for the next available motions term in September before Judge J. Newman. As this is an out-of-county case, it will not appear on the actual motions roster but Kristi will send you both an emailed notice of the hearing.

Thanks,

Anna Barber Marsh
Law Clerk to the Honorable William P. Keesley
P.O. Box 10
Edgefield, South Carolina 29824
Phone: 803.785.8481
Fax: 803.785.8499

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

STATE OF SOUTH CAROLINA )

COUNTY OF SALUDA )

Amy Potts, )

Plaintiff, )

v. )

McCarty Enterprises, LLC, John )

Miles McCarty, Audrey S. McCarty, )

a/k/a Audrey J. McCarty and Jane )

Doe )

Defendant. )

IN THE COURT OF COMMON PLEAS

ELEVENTH JUDICIAL CIRCUIT

C.A. No. 2015-CP-41-139

**CERTIFICATE OF SERVICE**

On October 17, 2016, I served a copy of the Defendants' Motion for Reconsideration on the below parties on behalf of the Plaintiff:

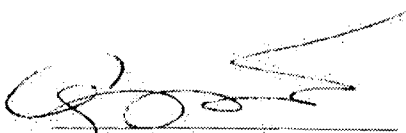
Mr. Frank S. Potts  
State Fiscal Accountability Authority  
1201 Main Street  
Suite 350 (Capitol Center)  
Columbia, SC 29201

Mr. Michael Evan Lacke  
Lacke Law Firm, LLC  
147 Wappoo Creek Dr., Ste. 204  
Charleston, SC 29412

The Honorable Jocelyn Newman  
POB 192  
Columbia, SC 29202-0192

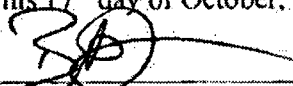
And filed the same with the Court by mailing the originals to:

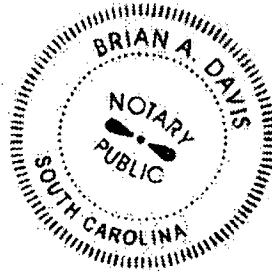
The Honorable Doris B. Holmes, Clerk of Court  
100 E. Church Street  
Saluda, SC 29138

  
Candy M. Kern-Fuller, Esq.

FILED  
OCT 24 AM 9:18  
SALUDA CO. SC.

SWORN TO BEFORE ME  
This 17<sup>th</sup> day of October, 2016

  
Notary Public for South Carolina  
My commission expires: 3-5-2020



1 State of South Carolina

Court of Common Pleas

2 County of Saluda

3  
4  
5 Amy Potts )

6 Plaintiff, )

Transcript of Record  
15-CP-41-0139

v. )

7 )  
8 McCarty Enterprises, LLC, )

John Miles McCarty, )

Audrey McCarty a/k/a )

9 Audrey J. McCarty, and )

Jane Doe )

10 )  
11 Defendants. )

12  
13 April 28, 2016

Saluda, South Carolina

14  
15 B E F O R E:

16 The Honorable William P. Keesley, Judge.

17  
18 A P P E A R A N C E S:

19 Frank S. Potts, Esquire  
Attorney for the Plaintiff

20  
21 Candy M. Kern-Fuller, Esquire  
Attorney for the Defendants

22  
23  
24  
25 Stacy L. Sheppard, RPR  
Circuit Court Reporter

1

## I N D E X

2

WITNESSESDIRECT CROSSREDIRECT RECROSS

3

4

5

(There were no witnesses.)

6

7

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## E X H I B I T S

15

NO.DESCRIPTIONID. EVD.

16

17

18

19

(There were no exhibits.)

20

21

22

23

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25

1           (The following proceedings were held on  
2           April 28, 2016.)

3           **THE COURT:** All right. I have a motion for a  
4           default to compel responses to discovery and a  
5           motion to dismiss; is that correct?

6           **MS. KERN-FULLER:** Yes, Your Honor, and a motion  
7           for a protective order also. I can hand up a copy  
8           if you want, Your Honor.

9           **THE COURT:** Is there a preference as to how we  
10          proceed?

11          **MR. POTTS:** Your Honor, I don't think we have a  
12          motion for a protective order; hasn't been served or  
13          filed.

14          **MS. KERN-FULLER:** Well, it was served. It was  
15          also provided a copy by e-mail.

16          There is an affidavit I was provided by  
17          Mr. Potts via mail saying that Mr. -- his  
18          co-counsel, Mr. Lackey, said he hadn't received it  
19          and that he was first notified about it by Mr. Potts  
20          on April 19th. So if Mr. Potts apparently notified  
21          him about it, Mr. Potts had knowledge of it at some  
22          point. But I have a copy of that, which was served,  
23          we sent to Saluda County with a motion filing fee,  
24          and I also e-mailed it to the clerk when we were  
25          setting these motions. I wasn't notified if it

1 wasn't received by anybody at that point when it was  
2 set.

3 **MR. POTTS:** Your Honor, there is no affidavit  
4 of service in the file. There is no motion in the  
5 file. The first time I ever saw this was in  
6 correspond -- the e-mailed correspondence on the  
7 19th. And, in fact, I don't think the Court will  
8 find it in the file because it has never been filed  
9 nor, in fact, has it been properly served.

10 **THE COURT:** I don't see it in the file. When  
11 did you send it to be filed?

12 **MS. KERN-FULLER:** Your Honor, it was sent on  
13 March the 9th and the affidavit of service would  
14 have been sent with it. I have the original in my  
15 file, which was previously provided to Mr. Potts in  
16 an e-mail as well.

17 **MR. POTTS:** It's never been properly served on  
18 me.

19 **THE COURT:** Hold on just a second.

20 **MR. POTTS:** No, no, that's --

21 **THE COURT:** Don't tell me no, no.

22 How would you have the original if it was  
23 filed?

24 **MS. KERN-FULLER:** Your Honor, we keep an  
25 original in our file and we file two originals. We

1 keep an original in our file and we send an original  
2 to the court. So when I -- I'm sorry -- it's an old  
3 habit of mine as a paralegal before I went to law  
4 school that I always sign two originals. So we have  
5 an original in our file and an original goes to the  
6 court.

7 **THE COURT:** Well, it's not in the file and it's  
8 not on the roster, so I can't hear it. So we'll  
9 have to reschedule it.

10 **MS. KERN-FULLER:** I understand, Your Honor. We  
11 can reschedule that, Your Honor. I have no problem  
12 rescheduling it, Your Honor.

13 **THE COURT:** Is there a preference as to how we  
14 proceed?

15 **MR. POTTS:** Your Honor, I might as well go  
16 ahead and give the Court some background on it.

17 **THE COURT:** All right, sir.

18 **MR. POTTS:** Oh, in addition, Your Honor, let me  
19 go ahead and provide you with a little memorandum.  
20 I'm now giving it to opposing counsel at the same  
21 time. If I may?

22 **THE COURT:** Yes, sir.

23 **MR. POTTS:** I'm not going to go into the facts  
24 of the case except that suit was filed in this case  
25 June 8th of last year. It was served on the 14th.

1 At the time it was served, we served a fair amount  
2 of discovery by virtue of interrogatories to all the  
3 defendants and requests for production. Those were  
4 to permit me to move forward with the case and take  
5 some depositions because I needed that kind of  
6 information before I took depositions.

7 Well, in response to it, on the 26th of June, I  
8 received a motion to dismiss which appeared to be a  
9 motion for judgment on the pleadings. There were  
10 two reasons given: The first reason assumed facts  
11 that were not in the complaint and have not been  
12 alleged, namely that this was intracorporate  
13 conspiracy, which was not alleged in any manner,  
14 shape or form.

15 **THE COURT:** Can you speak up a little bit?

16 **MR. POTTS:** I'm sorry. Does the microphone  
17 help? Was not alleged at all.

18 The second was some language out of a criminal  
19 statute saying, Therefore, what was done was okay.  
20 In response to that, I said, This person -- I don't  
21 think it's a well-founded motion. I think it's an  
22 improper motion. But based upon their  
23 representation, they're now saying that everybody  
24 who did this is presumed to be an agent or employee  
25 of a corporation; therefore, I'm going to bring an

7  
1 action against the corporation by itself for what it  
2 did. So I added the second cause of action and  
3 served by mail an amended complaint within the time  
4 provided by the rule. Of course, the amended  
5 complaint replaced the original complaint.

6 No response was forthcoming to that and the  
7 defendant was in effect in default. So I wrote the  
8 defendant a letter and said, Look, you have -- more  
9 than 45 days have gone by -- the letter's in the  
10 file with my affidavit -- more than 45 days have  
11 gone by, you haven't responded to my -- any of my  
12 discovery, you haven't moved for a protective order  
13 and you're in default. And I said, I don't want to  
14 hold you in default in case it's your fault and it's  
15 not on the advice of your clients to go into  
16 default. I said, But if I don't hear from you in  
17 another week -- I think it was about a week I gave  
18 -- I'm going to move for default.

19 Time went by, no response again. I then filed  
20 a motion for default together with my affidavit  
21 enclosing the letter and the discovery that had not  
22 been answered nor any motion filed in response to  
23 the discovery. All of these are properly filed  
24 there before you; they're in the file. Matter of  
25 fact, you'll see my letter in there and I even put

1 the letter in my affidavit.

2 And just as a "for what it's worth", the  
3 certificate of service of the mailing of the amended  
4 complaint to -- excuse me -- the certificate of  
5 service for the motion for default was signed by,  
6 and she's right here, a United States Postal Service  
7 employee who both checked for postage and the  
8 contents before it went in the mail and actually did  
9 the mailing. That was to assure that it was --  
10 there was no question that she was getting notice of  
11 it, that counsel was getting notice of it. Still  
12 nothing. No response. There had been three  
13 separate mailings to which no response was made in  
14 this case.

15 Then the matter came up for a hearing -- and by  
16 the way, Your Honor, I know you're familiar with it  
17 because you're administrative judge for the circuit,  
18 these documents are online, they're available by  
19 pushing your mouse, by looking at them. That's why  
20 to this day, I sit there and say, even documents  
21 they pass on to the Court and send up by e-mail as  
22 if they've been filed, have not been filed and  
23 counsel's in here not knowing it.

24 So, reluctantly, because I could not move  
25 forward with this case, I filed the motion for

1 default. And I said, In the event the Court decides...  
2 to permit counsel to get out of default, then I want  
3 my discovery. Because by not filing the motion for  
4 a protective order, Rule 37 says you've waived  
5 objections to the discovery. And, of course, that's  
6 been known now for close to ten months.

7 All you have to do is look at the rule, and the  
8 rule states specifically -- this is -- I'm referring  
9 specifically to Rule 37(d) -- The failure to act,  
10 which is to file a motion for a protective order, to  
11 act described in this subdivision may not be excused  
12 on the ground discovery sought is objectionable  
13 unless the party failing to act has applied for a  
14 protective order as provided by Rule 26(c).

15 So after 45 days expired which she had not  
16 filed a motion, her counsel had not filed a motion  
17 for a protective order, counsel could not raise an  
18 objection to the discovery, yet she still did not  
19 provide it. As a result, this case has gone  
20 nowhere, absolutely nowhere because I am not going  
21 to take depositions of a corporation, or  
22 potentially, and people about whom I know nothing  
23 and they have not provided me the information,  
24 particularly when I hear from counsel for the  
25 defendant that, oh, oh, oh, well, really all of this

1 was done as a corporate project. We decided to  
2 shoot and kill a dog for the benefit of a  
3 corporation, which, of course, is not alleged, but  
4 that's the basis of the motion to start with.

5 So, Your Honor, I am before you now saying if  
6 there is -- you, in essence, have nothing before you  
7 from the defendant as to why they shouldn't be held  
8 in default. It might be understandable if you had  
9 some kind of affidavit saying, We have a good system  
10 in my office, we don't misplace things, but I did  
11 have some trouble during a period of the summer of  
12 last year and some items went missing, or, I had a  
13 disgruntled employee who may have been throwing  
14 things away, some reasonable excuse for not  
15 receiving these documents that were mailed to her,  
16 but you have none. And now what you have is an  
17 example of representation to the Court that a motion  
18 has been filed, the fee from the motion paid, and  
19 nothing has been filed.

20 So, Your Honor, we are moving for a default  
21 because they are in default in the matter. All we  
22 need now is a hearing on damages. Thank you.

23 **THE COURT:** All right.

24 **MS. KERN-FULLER:** Thank you. If I may pass up  
25 the original of the affidavit that I provided to

1 Mr. Potts via e-mail and mail.

2 **MR. POTTS:** Objection; not received, not filed.  
3 That's part of her motion. I object to it.

4 **MS. KERN-FULLER:** To be clear, you haven't  
5 received this?

6 **MR. POTTS:** Your Honor, if she wants to  
7 interrogate me, I'll go on the witness stand.

8 **THE COURT:** What is it you have?

9 **MS. KERN-FULLER:** Your Honor, I have an  
10 affidavit that was served by mail and served by  
11 e-mail and I believe by fax within the two days as  
12 required under Rule 6 in opposition to the motion  
13 for a default. To make sure that it was received  
14 within the two days, I provided it electronically to  
15 Mr. Potts as well. The rule provides that I am to  
16 provide it to opposing party within the two days.

17 **MR. POTTS:** I do not deny that I received it,  
18 but I was not served.

19 **THE COURT:** All right. Hand it up. Objection  
20 is noted.

21 Yes, ma'am.

22 **MS. KERN-FULLER:** Thank you, Your Honor.

23 Your Honor, I practice law in Pickens County,  
24 South Carolina. I practice law in a small bar and  
25 our bar is very collegial. And the one thing I will

1 admit -- I did not have problems in my office in the  
2 summer of 2015, but what I will admit is that I  
3 practiced law and learned how to practice law from  
4 an older attorney who taught me that the practice of  
5 law was a courtly practice and to be collegial to my  
6 members of the bar. And unfortunately, or  
7 fortunately because I don't feel like I should ever  
8 compromise my values, that's the way I approached  
9 this case.

10 I was told by my client Mr. Potts was an  
11 attorney. I knew that when I received a copy of the  
12 extensive discovery in this case.

13 When my client was served originally with the  
14 complaint in this case, I timely filed a motion to  
15 dismiss. In that motion to dismiss, I never alleged  
16 that they purposefully killed this animal for the  
17 purposes of this corporation. What I did do was I  
18 brought the law up that a party cannot conspire with  
19 itself.

20 And in the original complaint, what Mr. Potts  
21 specifically alleged was that there was a Jane Doe  
22 defendant. And in paragraph 14 in his conspiracy  
23 cause of action, The McCarty defendants have  
24 published threats or participated in the publishing  
25 of threats to kill the plaintiff's dog. And the

1 defendant, Jane Doe, joined with Audrey and John  
2 McCarty in the endeavor as an authorized employee or  
3 agent of her employer, Defendant McCarty  
4 Enterprises. That was the allegation of the  
5 conspiracy cause of action.

6 In the original jurisdictional parts of it, in  
7 paragraph five, he identified the defendant, Jane  
8 Doe, whose true name is currently unknown, upon  
9 information and belief as an agent or employee of  
10 McCarty Enterprises who resides upon the property.  
11 And all of the allegations -- the defendants in the  
12 case at that time were McCarty Enterprises, LLC,  
13 John Miles McCarty, Audrey McCarty a/k/a Audrey J.  
14 McCarty, and Jane Doe. All of the defendants in  
15 this case were either the owners and principals of  
16 McCarty Enterprises, LLC, as alleged by them, or  
17 Jane Doe, who is an authorized employee.

18 And the argument in the motion to dismiss,  
19 which I'm assuming -- and please, Your Honor, if I  
20 may correct, the Court is hearing our motion to  
21 dismiss contiguous with the motion for default or  
22 we're just hearing the --

23 **THE COURT:** No. They're both docketed.

24 **MS. KERN-FULLER:** Okay. So in my original  
25 motion to dismiss, I cited the case that simply said

1 that a company could not conspire with itself, and  
2 that was based on Mr. Potts' own complaint in this  
3 matter and the allegations that were made at that  
4 time.

5 Now, I'm not related to any of these people,  
6 Your Honor. I'm not any relation of the McCartys.  
7 I do the McCartys' employment law work for their  
8 business. They own an escort business that escorts  
9 trucks with the yellow lights when they have  
10 oversize loads. That's what the business does. And  
11 I represent them on that. That's why I've come up  
12 here from Easley, South Carolina, now three times  
13 because I've represented their business for a number  
14 of years.

15 I would have no reason to ignore a complaint  
16 that was sent to my office. When they got their  
17 first complaint, I timely filed a motion to dismiss.  
18 When I got the discovery with it, the discovery was  
19 extensive and it was looking to get into the  
20 finances of the business and other things. And I  
21 attempted to call Mr. Potts. I didn't get a  
22 response.

23 When I came to the courthouse last time, it was  
24 quite evident to me that Mr. Potts was very  
25 emotionally involved in this case. So being the

1 collegial attorney, I called his co-counsel to try  
2 to say, Hey, I didn't get the amended complaint.  
3 I'll be happy to respond to it, but I didn't get it.  
4 Could you send it to me?

5 Because I tried to get a copy of the file  
6 before I left that day. And even though you can see  
7 things online, you can't get copies of them online  
8 and it's about an hour and a half drive for me from  
9 my office every time I come. So I asked. Mr. Potts  
10 told me he'd provide me a copy of the amended  
11 complaint when he got back to his office that day.  
12 I never got it.

13 I called Mr. Lackey, who his -- his co-counsel.  
14 Mr. Lackey assured me he would provide me a copy of  
15 it, but that he wasn't running the case, Mr. Potts  
16 was. I said, Okay, well, I need someone to provide  
17 me a copy of it. And I never got it. Finally, we  
18 sent a runner down to get it and that was when I did  
19 the amended motion, which I understand it's not in  
20 front of the Court today.

21 But as far as default, I don't know who the  
22 U.S. Postal employee would be other than Ms. Potts  
23 and I don't know what happened to the mail. I asked  
24 Mr. Potts when we were here last time, Did he send  
25 it certified mail, did he send it by fax with a

1 confirmed facsimile, was there any other thing? He  
2 said, No, he sent it regular mail. He showed me  
3 documents in his notebook of letters that were not  
4 signed. And I said, Well, I'm just telling you,  
5 Mr. Potts, I'm not saying you didn't send them to  
6 me, I'm just saying I didn't get them.

7 And I wouldn't want to and will not now cachet  
8 it on another member of the bar that way. All I am  
9 saying is I did not get them.

10 When I was able to get a copy of it, we sent  
11 our response. And, again, I don't know why it did  
12 not get here, but the first I knew was today that it  
13 did not get here. I sent an e-mail when we were  
14 docketing the motions saying you -- the clerk asked  
15 that all motions be set -- your law clerk asked that  
16 all the motions be set and I don't see this motion.  
17 Here is a copy of what I sent. At no time, did  
18 anyone say it wasn't filed. If I had been told that  
19 at that time, I would have pulled the check to see  
20 if the check had cleared, and if not, we would have  
21 corrected it.

22 I can assure the Court that from here forward,  
23 I will use a different method other than U.S. mail  
24 to make sure that these are properly delivered to  
25 both Mr. Potts and the Court because apparently

1 there is a problem, though I don't know where that  
2 problem lies, but I will find out. And I will make  
3 sure it is either couriered or another method is  
4 used before we get electronic filing.

5 In any case, Your Honor, all I can respond is  
6 my office did not receive the amended complaint.  
7 When asked of both of the plaintiffs' counsel that  
8 they provide it to me, neither provided it to me  
9 even though both promised to. I got a courier to  
10 get me a copy of it.

11 Within two days after I got the copy of it, I  
12 served our response, which was an amended motion to  
13 dismiss, because the only thing I noticed changed on  
14 the amended complaint versus the original complaint  
15 was that there was an emotional distress cause of  
16 action added. Mr. Potts and I discussed that at the  
17 hearing before last when he was here about what that  
18 would mean to this case, but I responded within two  
19 days of actually having a copy of the amended  
20 complaint. And I believe under Rule 55, that that  
21 certainly qualifies as an excusable neglect when I  
22 never received, to this day, a copy of the amended  
23 complaint from opposing counsel.

24 Your Honor, we still believe since it is  
25 appropriate for the motion to dismiss in front of

1 the Court on the conspiracy cause of action only,  
2 and I understand the other may or may not be  
3 rescheduled after this, that that cause of action  
4 should be dismissed because the allegations that are  
5 made both in the original complaint and as amended  
6 were that the defendants conspired together. And  
7 the defendants that are so named are all employees  
8 or agents or owners of McCarty Enterprises and they  
9 can't conspire amongst themselves.

10 So in so much as that is the allegation, that  
11 cause of action should be dismissed, the company  
12 should be dismissed from this case. And the company  
13 is not, therefore, a proper defendant thereafter.

14 And I'll be happy to respond to any other  
15 allegations, Your Honor.

16 I did also allege, I believe in the original  
17 motion to dismiss, that there were no facts upon  
18 which were alleged that opposed the fact that the  
19 dog was on my client's property, was threatening  
20 personal injury or property damage to my client or  
21 his livestock. They weren't present when this  
22 happened. They have no personal knowledge that the  
23 animal was not threatening my client or his  
24 property.

25 My client's a retired police officer who has

1 had open-heart surgery and he has animals of his  
2 own. He's not some animal hater. Their whole  
3 allegation of why he allegedly killed the dog was  
4 somehow in retaliation for them running over his dog  
5 three years before.

6 So I believe in our original motion to dismiss  
7 and have argued that this statute permits him to  
8 destroy a dog that is on his property threatening  
9 him or his livestock, and those are the facts as  
10 they've alleged. They've alleged that the dog was  
11 on his property. They've made no allegations that  
12 the dog wasn't threatening him. Our reply was that  
13 the dog was threatening him. And so we believe that  
14 they have failed to state a claim because they have  
15 failed to meet their burden that they can overcome  
16 this statute. Thank you, Your Honor.

17 **THE COURT:** All right. Mr. Potts, do you have  
18 any response?

19 **MR. POTTS:** Yes, Your Honor, I have a few  
20 things.

21 Your Honor, counsel, and I put it down in  
22 quotes, as to her first reason on dismissal, she  
23 cited paragraphs number 5 and paragraph 14 of the  
24 complaint and that she says establishes that it was  
25 alleged all defendants were agents and/or employees

1 of the defendant corporation.

2 Number 5 says, The defendant, Jane Doe, whose  
3 true name is currently unknown, is, upon information  
4 and belief, an agent or employee of McCarty  
5 Enterprises who resides upon property at 105 Stone  
6 Ridge Road owned by said corporation which is  
7 adjacent and contiguous to the property on which the  
8 defendants, Audrey and John McCarty reside at 103  
9 Kellum Way.

10 That says that, Upon information and belief,  
11 that Jane Doe, who has yet to be identified because  
12 we haven't had depositions or any discovery, says,  
13 we think that she was an agent or employee of  
14 McCarty Enterprises.

15 Then we go to number 14, which is the -- upon  
16 what she based her motion and it says, The McCarty  
17 defendants had published threats or participated in  
18 the publishing of threats to kill the plaintiff's  
19 dog. And the defendant, Jane Doe, joined with  
20 Audrey and John McCarty in the endeavor as an  
21 authorized employee or agent of her employer,  
22 Defendant McCarty enterprises. And that's the basis  
23 for having McCarty Enterprises as a defendant.

24 But it certainly says nowhere in the complaint,  
25 as you've just been told by counsel, that Audrey

1       McCarty and John Miles McCarty are owners, agents or  
2       employees of McCarty Enterprises nor does it allege  
3       that what they did had anything to do with McCarty  
4       Enterprises. It only alleges that the Jane Doe  
5       person was, upon information and belief, an agent or  
6       employee of McCarty Enterprises.

7               So they were -- she just told you that, Owners  
8       or principals, which were alleged by them, those  
9       were the words. There is nowhere in this complaint  
10      that it says -- that it is alleged that the  
11      McCartys, the individuals, were owners or principals  
12      of McCarty Enterprises anywhere. It doesn't exist.  
13      And that was the basis for her motion.

14             And then, of course, the other basis was the  
15      criminal statute which assumes facts that are not  
16      alleged anywhere and which has nothing to do with  
17      the case.

18             She said she has no reason to ignore what she  
19      receives. The fact of the matter was she received  
20      six separate items of discovery, interrogatories and  
21      requests for production. They were good ones. They  
22      were specifically written to find out about her  
23      clients and McCarty Enterprises, but she sat on them  
24      and ignored them, the one thing that is sitting  
25      there in her hands to which she has a duty under

1 Rule 26, if she wishes. To not answer them, she has  
2 a duty to do something.

3 And I heard her say that -- something about  
4 making a call. The last time -- the one time I  
5 talked with her, the call she told me was made in  
6 November.

7 Your Honor, what we've got is failure to  
8 respond to three separate mailings. And I went far  
9 beyond what is required in this case to send her a  
10 letter saying to her, Please give me the discovery  
11 and respond; I don't want to have to put you in  
12 default. I could not have done more except not to  
13 put her in default, but I have an obligation when  
14 you don't get answers to anything.

15 And I think this last incident simply points  
16 out that even though she wants to contend that she's  
17 even filing things and providing them to the Court,  
18 they don't even get filed. And throughout all of  
19 this, all she had to do was go on her computer and  
20 pull up the documents. They're all PDF documents.  
21 If you want to see the motion, you just pull it up.  
22 It's right there on the Internet. I believe we're  
23 entitled to the relief we requested.

24 **THE COURT:** Thank you.

25 Anything further?

1           **MS. KERN-FULLER:** Just a brief response, Your  
2 Honor. With regard to the plaintiff's knowledge  
3 about whether or not Mr. McCarty is an officer or  
4 agent, they served Mr. McCarty as the registered  
5 agent of the McCarty Enterprises, LLC. He is the  
6 registered agent of McCarty Enterprises, LLC.

7           **MR. POTTS:** Objection. That's actually totally  
8 untrue. That is false. The person who was served  
9 was Mrs. McCarty. Mrs. McCarty was at the door of  
10 her residence saying, I'm authorized to accept for  
11 anyone. That was how the service was. And the  
12 service, of course, has been filed.

13           **MS. KERN-FULLER:** And it was --

14           **MR. POTTS:** And it's untrue that Mr. McCarty  
15 has ever been personally served, so that's just flat  
16 out wrong.

17           **MS. KERN-FULLER:** Your Honor, if Mr. McCarty  
18 wasn't personally served, Your Honor, then McCarty  
19 Enterprises wasn't properly served. I think what  
20 happened was substitute service, but that's neither  
21 here nor there. I just wanted to make sure the  
22 Court understood that McCarty Enterprises'  
23 registered agent was John M. McCarty.

24           Your Honor, for the Court's knowledge, I made  
25 two phone calls. One was in July to Mr. Potts under

1 my Rule 11 duties. And the second one was not in  
2 November, it was in October, and I was told that  
3 Mr. Potts was undergoing some health issues. And it  
4 was because of that that I did not press further.

5 And, again, if I am guilty of something, Your  
6 Honor, I will admit that I am guilty of being too  
7 collegial in this case. Before the hearing in this  
8 case, I offered Ms. Potts a pen because she was  
9 looking for a pen and Mr. Potts told her not to take  
10 it from me. That's the collegiality I was raised to  
11 believe. And, unfortunately, if I am guilty of  
12 anything, it is that.

13 I did not receive any of the documents that  
14 were allegedly sent to me. I asked Mr. Potts if he  
15 would send them in a method that could be tracked,  
16 and they still come, even as of the affidavit I got  
17 from Mr. Lackey, regular mail with a stamp. No fax,  
18 no e-mail, no other method to track it. Thank you,  
19 Your Honor.

20 **THE COURT:** Anything else?

21 I'll notify you of a decision in writing.  
22 Thank you very much.

23 **MS. KERN-FULLER:** Thank you, Your Honor.

24  
25 **END OF PROCEEDINGS**

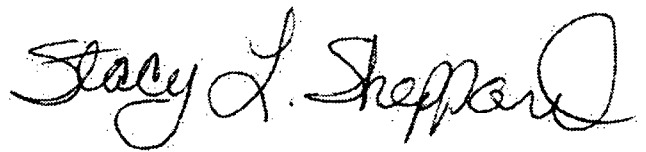
## C E R T I F I C A T E

STATE OF SOUTH CAROLINA  
COUNTY OF SALUDA

I, the undersigned, Stacy L. Sheppard, Circuit Court Reporter for the Eleventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of record of all the proceedings had and the evidence introduced in the hearing of the captioned cause, relative to appeal in the Circuit Court for Saluda County, South Carolina, on the 28th of April, 2016.

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

October 27, 2016



Stacy L. Sheppard, RPR  
Circuit Court Reporter

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STATE OF SOUTH CAROLINA  
COUNTY OF SALUDA  
CIRCUIT COURT  
2015-CP-41-00139

AMY POTTS,  
Plaintiff,

-vs- TRANSCRIPT OF RECORD

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

Heard on Wednesday, September 7, 2016  
Lexington, South Carolina

BEFORE:  
THE HONORABLE JOCELYN NEWMAN

APPEARANCES:  
Counsel on Behalf of the Plaintiff:  
Frank S. Potts, Esq.  
Counsel on Behalf of the Defendant:  
Candy Kern-Fuller, Esq.

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

1 ON WEDNESDAY, SEPTEMBER 7, 2016 AT 2:51 P.M.:

2 THE COURT: While you're handing me  
3 documents, I'd like a copy of the complaint that's  
4 at issue and any responses to pleadings that were  
5 filed.

6 MR. POTTS: The complaint, Your Honor, should  
7 be attached to that memorandum that's clocked in.

8 THE COURT: Motion for default, motion to  
9 strike and motion to compel.

10 MR. POTTS: I can provide them all to you,  
11 Your Honor. If I do, I'm not getting any --

12 THE COURT: You just have the one copy?

13 MR. POTTS: Pardon me?

14 THE COURT: You just have the one copy?

15 MR. POTTS: I just have the one copy.

16 THE CLERK: They're together. I can run down  
17 and make a copy.

18 MS. KERN-FULLER: I have it back at the  
19 office, Your Honor.

20 MR. POTTS: If you're going to -- excuse me.  
21 May I suggest, if we're going to do them, like,  
22 first the motion to dismiss, unless you want some  
23 other documents, the complaint should mostly  
24 suffice when it comes to that. I'm just --

25 THE COURT: Well, sure. I just don't have a

1 copy of the complaint.

2 MR. POTTS: I'll lend you mine.

3 THE COURT: Right. I just need a complaint  
4 and an answer.

5 MR. POTTS: You're welcome to have my whole  
6 file. It's just sitting back there. Can we do it  
7 that way in piecemeal so that we --

8 THE COURT: Absolutely.

9 MR. POTTS: Okay. Thanks.

10 THE COURT: Give me one second while copies  
11 are made.

12 (Pause.)

13 THE COURT: All right. Ms. Fuller, whenever  
14 you're ready.

15 MS. KERN-FULLER: Thank you, Your Honor.

16 Your Honor, may it please the Court.

17 My name is Candy Kern-Fuller. I'm with the  
18 Upstate Law Group in Easley, South Carolina.

19 I represent the McCartys and their small  
20 business which is McCarty Enterprises which is a  
21 small vehicle escort company. I represented them  
22 for a number of years. If you wonder why a company  
23 from Easley is representing a company from  
24 Batesburg-Leesville, that's why.

25 Your Honor, the McCartys have a home in

1 Batesburg-Leesville. And as alleged in the  
2 complaint, this involves the destruction of a  
3 six-year-old Australian Shepherd.

4 The two claims in the complaint, Your Honor,  
5 the original claims -- well, one claim and then  
6 thereafter, after the first motion to dismiss was  
7 filed there was a second claim that was added and  
8 now there are two claims. Those claims are  
9 conspiracy and emotional distress.

10 I believe that there are no facts alleged in  
11 the first amended complaint that Ms. Potts was  
12 present when the animal was destroyed. The animal  
13 was not destroyed in her presence. The animal was  
14 shot. The animal was shot not on her property.  
15 The animal was shot on the McCartys' property.

16 The allegations in the complaint -- and I'm  
17 myself trying to find the first amended complaint  
18 as I am furiously flipping through -- are that the  
19 McCartys conspired with Jane Doe and that they did  
20 so in some sort of retribution for the fact that  
21 Mrs. Potts had accidentally run over Mrs. McCarty's  
22 Boston Terrier years before and that as a result of  
23 that -- and I believe that that date was 2012 if I  
24 recall -- and as a result of that, that in 2015  
25 that she conspired with her husband, John McCarty,

1 who were the only co-owners of McCarty Enterprises,  
2 and Jane Doe, to kill their Australian Shepherd.

3 Now notably the Australian Shepherd, and she  
4 admits this in her complaint, had previously been  
5 on the property years before, in the complaint, and  
6 that they had installed an underground fence to  
7 prevent the animal from leaving their property.

8 But on the day in question the animal was on  
9 the McCarty property and that prior to this day in  
10 question, on May 24th, that Mrs. McCarty and Jane  
11 Doe came to her home to inquire about the death of  
12 two emus. So there's livestock on the McCarty  
13 property. There was livestock that was killed the  
14 day before the Australian Shepherd was killed. And  
15 on the day in question Mr. McCarty destroyed the  
16 Australian Shepherd and it was on the McCarty's  
17 property.

18 So the two claims that Mr. Potts has made on  
19 behalf of his wife are for emotional distress and  
20 conspiracy.

21 Conspiracy is an intentional tort. And the  
22 law is very clear as laid out in our motion to  
23 dismiss that the corporation cannot conspire with  
24 itself. And so you have the McCartys who are a  
25 married couple, and they own McCarty Enterprises,

1 and Jane Doe who is alleged in the complaint if I  
2 recall -- and, as I say, I can't find the first  
3 amended complaint -- right off the top of my head  
4 right now, but in the complaint, I believe it's  
5 paragraph eight, she's alleged to be an employee of  
6 McCarty Enterprises.

7 So you can't conspire with yourself. And so  
8 the civil conspiracy claim must fail. And if the  
9 civil conspiracy claim fails it must be dismissed.  
10 So our motion to dismiss was that that civil  
11 conspiracy claim should be dismissed and that has  
12 been what the basis of that claim was.

13 On the intentional infliction of emotional  
14 distress claim. The intentional infliction of  
15 emotional distress claim we have alleged that the  
16 conduct has to be directed at the Plaintiff or  
17 occur in the presence of the Plaintiff to whom, of  
18 whom the Defendant is aware.

19 In this case there are no allegations that  
20 Mrs. Potts was present nor could there be because  
21 she wasn't present when the dog was destroyed. She  
22 learned about it from a neighbor as alleged in her  
23 first amended complaint. It's not even alleged in  
24 their complaint that she saw the body of the dog  
25 afterwards per se.

1           So, there are allegations that this was  
2 retribution for the killing three years prior  
3 accidentally of Ms. Potts running over the  
4 McCarty's Boston Terrier. And that that's the  
5 reason allegedly that this was directed at the  
6 Plaintiff.

7           But the law limits claims of emotional  
8 distress to egregious conduct, egregious conduct  
9 towards a Plaintiff that is proximately caused by a  
10 Defendant. And it's not enough that the conduct be  
11 intentional or outrageous. It has to be conduct  
12 that's egregious and directed to the Plaintiff or  
13 heard in the Plaintiff's presence.

14           And the Plaintiff has failed to allege  
15 specific facts as to how the Defendant targeted the  
16 Plaintiffs to be harmed by their allegedly tortious  
17 acts when she was not even present when the dog was  
18 killed.

19           Now I have pets. I understand we love our  
20 pets. And I'm not discounting that at all. I'm  
21 not related to these folks. You know, I'm the one  
22 person in this whole litigation that's not  
23 personally involved in this. But I know this is an  
24 emotional matter.

25           But I'm looking at this as a lawyer. And I'm

1 asking the Court to look at this as a legal matter,  
2 that when we look at this as a legal matter we're  
3 looking at, unfortunately, the way our law looks at  
4 pets and animals which is personal property. They  
5 look at our animals as chattel. This is a  
6 chattel. This is a chattel that I'm not even sure  
7 my client would be negligently liable for the  
8 destruction of because under the law my client had  
9 a right to protect his livestock if the animal was  
10 on his property threatening the livestock.

11 And there's enough allegations in their  
12 complaint that there were two emus killed the  
13 previous day. The dog was on his property at the  
14 time it was killed. The Plaintiff was not present  
15 at the time the dog was killed.

16 So she can't even testify what was happening  
17 at the time the dog was killed. She can't give  
18 personal testimony about that to even overcome any  
19 testimony that the Defendants might give about that  
20 matter.

21 So, we've alleged in our motion to dismiss  
22 that the claim for civil conspiracy should be  
23 dismissed because at all times alleged John McCarty  
24 was married to Audrey McCarty. They're the owners  
25 of McCarty Enterprises. At the previous hearing in

1 the file that you don't have, there's certificates  
2 of the service of who got served on behalf of  
3 McCarty Enterprises and who got substitute service  
4 on behalf of the other in the McCarty home.

5 And the allegations in the complaint of the  
6 fact that Jane Doe was at all times an employee of  
7 the McCarty Enterprises.

8 And therefore under McMillan Versus Ocone  
9 Memorial Hospital, 367 South Carolina 559, they  
10 cannot conspire with themselves and therefore that  
11 claim must fail as a matter of law.

12 I have a copy of that case if Your Honor  
13 needs it.

14 THE COURT: Please.

15 MS. KERN-FULLER: And also that Plaintiff's  
16 allegation that Defendants killed her dog is not an  
17 actionable matter because Defendants cannot be held  
18 civilly liable for the killing of the dog under  
19 Section 47-3-530 of the law which lawfully permits  
20 the killing of a dog that is threatening to cause  
21 or causes personal injury or property damage. And  
22 the emus, like the dog, were chattel of my clients.

23 THE COURT: Well, several things. And I'll  
24 start at the very last. It sounds to me and I  
25 don't -- I don't know that that's admitted and

1 maybe I've just not seen it in the complaint but if  
2 the Plaintiff does not admit that this animal was  
3 threatening to cause or causing personal injury or  
4 property damage you would be asking me to make a  
5 finding of fact that that was in fact the case.  
6 And I'm not in a position to do that.

7 MS. KERN-FULLER: I understand.

8 THE COURT: Also, I'd love for you to hand me  
9 a copy of that McMillan case because the law that  
10 I'm seeing, and I do see the citation to McMillan  
11 but, and perhaps Mr. Potts can help educate me, but  
12 what I see is that while a corporation cannot  
13 conspire with itself, its agents as individuals are  
14 legally capable of conspiring among themselves.

15 So, it's not just the corporation that is a  
16 Defendant in this case but there are individuals  
17 named as Defendants.

18 And is it not the allegation that the  
19 individuals conspired with each other? I don't  
20 know. Maybe Mr. Potts can tell me that.

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

24 THE COURT: There has to be some -- well,  
25 I'll read through the complaint again but there has

1 to be some allegation of some individual otherwise  
2 I would guess they wouldn't be parties to the  
3 case.

4 But, Mr. Potts, let me hear from you.

5 MR. POTTS: Well, if you would -- if I may, I  
6 think I can make it a little bit shorter for you so  
7 you don't have to read the whole complaint.

8 But anyway, I'll tell you what is not there.  
9 What is not there is an allegation that  
10 Mr. McCarty, his wife were acting for or as agents  
11 or employees of the corporation. They are being  
12 sued strictly as individuals.

13 THE COURT: Right.

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

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

22 Also talk to me more about this -- I mean, I  
23 don't want to deprive you of the opportunity to  
24 argue, but I don't know that it's necessary on all  
25 these issues.

1 As to the intentional infliction of emotional  
2 distress, is it not sufficient that the act was  
3 allegedly intended, it was directed towards  
4 Ms. Potts in order to cause some distress? Does it  
5 have to be in her presence?

6 MS. KERN-FULLER: Well, Your Honor, the case  
7 that we discussed was that it's, when it is  
8 egregious conduct towards the Plaintiff proximately  
9 caused by a Defendant, and it's not enough that the  
10 conduct be intentional or outrageous but it has to  
11 be directed to the Plaintiff.

12 And so what has to be alleged is that, you  
13 know, I killed your dog intentionally to cause you  
14 emotional distress and that I knew it would cause  
15 you emotional distress. That there was not any  
16 other legitimate reason for what I did, that I did  
17 it solely to cause you emotional distress. There  
18 was no other legitimate reason.

19 MR. POTTS: I can save some time, Your  
20 Honor.

21 If you'll look at paragraphs 15, 16 and 19, I  
22 think you'll find what you might be looking for.  
23 It might take care of that.

24 THE COURT: Right. It's right there in  
25 paragraph 15.

1 And, you know, as to whether it's egregious  
2 or not, again, I'm not in a position to make a  
3 finding of fact at this point that it was not  
4 egregious, certainly not on a motion to dismiss.

5 So unfortunately I'm going to have to deny  
6 your motion to dismiss on all grounds.

7 MS. KERN-FULLER: Thank you, Your Honor.

8 THE COURT: Okay. What is the next motion?

9 MR. POTTS: They are my motions, Your Honor.

10 THE COURT: Okay.

11 MR. POTTS: Do you mind the time, Judge?

12 THE COURT: No, no. You're the last I thing  
13 I have for today. I'm happy to hear whatever.

14 MR. POTTS: I'm going to hand you things  
15 piecemeal and pull them out. I'll show counsel  
16 what I'm doing.

17 THE COURT: Okay.

18 MR. POTTS: First is the order of Judge  
19 Keesley.

20 MS. KERN-FULLER: Okay.

21 MR. POTTS: This is the motion for default.

22 MS. KERN-FULLER: Gotcha. Okay.

23 (Document handed to the Judge.)

24 THE COURT: Thank you, sir.

25 MR. POTTS: Your Honor, prior to that --

1 (Attorneys conferring.)

2 MS. KERN-FULLER: The only thing I ask, I've  
3 got my client's driver's license. I'd like it not  
4 go back in the Court record unredacted.

5 MR. POTTS: That's fine.

6 MS. KERN-FULLER: Okay. It's the last two  
7 pages in there, if you just redact those numbers.

8 (Attorneys conferring.)

9 THE COURT: I think I've read enough of it.

10 MR. POTTS: A little bit of piecemeal of it.  
11 From the last two pages of what I have in my hand  
12 were pictures of driver's licenses. I'd like to  
13 read them off. They don't have any bearing on any  
14 of this. So that is that motion. Well, there are  
15 two motions in that but we're dealing with the  
16 first one which is the default.

17 THE COURT: Okay. (Pause.)

18 We're starting with the motion for default?

19 MR. POTTS: Default. Yes, ma'am.

20 THE COURT: Okay. Yes, sir.

21 MR. POTTS: And there's not much I have to  
22 say that's not in my affidavit.

23 THE COURT: I figured that.

24 MR. POTTS: Attached to it for which there  
25 has been no counter-affidavit or any, anything in

1 opposition to that affidavit even though it's been  
2 filed for two months now.

3 THE COURT: All right. Ms. Kern-Fuller, let  
4 me hear from you.

5 MS. KERN-FULLER: Yes, Your Honor.

6 Your Honor, Mr. Potts filed his affidavit.  
7 There is something in opposition to it which is,  
8 there is an original certificate of service. And  
9 what Mr. Potts alleges in his affidavit is that  
10 it's false.

11 I've worked in law for 25 years. I've been a  
12 lawyer for 14 of those years. I've been a clerk to  
13 a federal court judge. I was the mentor of the  
14 year last year.

15 I'm the one, the only one in this case that  
16 is not personally involved in it. I filed this  
17 same motion to dismiss that I filed when I filed my  
18 original response to this case back in June.

19 And what happened in this case is Judge  
20 Keesley issued his order. By his affidavit, and  
21 I'll use his affidavit, by his affidavit the clerk  
22 mailed it on May 11th. Under Rule 6, exclusive of  
23 the date of service, 15 days would have been May  
24 27th which would have been a Friday.

25 Contrary to the allegations in Mr. Potts'

1 affidavit according to the affidavit of service,  
2 the answer was put in the Easley Post Office box on  
3 May 25th. Now that's important. And it's  
4 important because the way that our post office  
5 works, and you'll see this from his own filings  
6 which I've attached to my memorandum in opposition  
7 and motion to dismiss. Our post office is a small  
8 post office. And I understand Ms. Potts works at a  
9 post office -- and I thought you said that at the  
10 last time.

11 MR. POTTS: Your Honor, she does not, but I  
12 do not like the idea of her testifying. If she  
13 wants to submit documents let her do so.

14 THE COURT: Well --

15 MR. POTTS: I understand this is argument.

16 THE COURT: It's argument.

17 MS. KERN-FULLER: It's argument.

18 MR. POTTS: Well, that's when you run into  
19 things that she works in the post office.

20 THE COURT: Absolutely.

21 MS. KERN-FULLER: I'm sorry. I thought you  
22 said that at the last hearing.

23 MR. POTTS: No, ma'am. You've got it wrong.

24 THE COURT: And I don't know that that's  
25 relevant to my determination anyway.

1 MS. KERN-FULLER: I'm sorry. I'm sorry.  
2 That's what I thought I heard.

3 In any case, the tracking that Mr. Potts  
4 attached to his own motion, you'll see the tracking  
5 go from Easley to Greenville, from Greenville to  
6 the next regional post office which when it comes  
7 to Mr. Potts it goes to Columbia. When it goes to  
8 Mr. Potts' co-counsel it goes to Charleston. It  
9 actually in one case accidentally went to  
10 Charleston, West Virginia, first.

11 So, issues with the mail happen. And in this  
12 particular case we put it in our local post office  
13 just like our certificate of service says. And  
14 when it didn't arrive at the Saluda County  
15 Courthouse we called them on Monday the 31st.

16 Attached to our memorandum in opposition to  
17 the motion to dismiss you have the handwritten  
18 letter from the clerk where she returned our  
19 original one that got mailed to her. And I have  
20 the original with me with her handwritten note, but  
21 there's a copy attached. And it said, I'm  
22 returning these back to you.

23 MR. POTTS: Objection, Your Honor. This was  
24 not been submitted to me nor has it been submitted  
25 to the Court. This is improper. She had to give

1 me anything she wanted to two days before now.

2 This is the second time it's been done.

3 MS. KERN-FULLER: This is not an affidavit.

4 THE COURT: Yeah. Only affidavits, two days.

5 MR. POTTS: This is evidence, Your Honor,  
6 that --

7 THE COURT: It is but have you not given  
8 Mr. Potts a copy of this memorandum with its  
9 attachments?

10 MS. KERN-FULLER: I gave --

11 MR. POTTS: Just two minutes ago.

12 MS. KERN-FULLER: Yes..

13 THE COURT: That's not --

14 MS. KERN-FULLER: When I handed it to the  
15 Court.

16 THE COURT: -- that's not uncommon and I  
17 don't believe it to be improper.

18 MS. KERN-FULLER: So the clerk returned it  
19 and I had, I have all the originals and I've  
20 provided Mr. Potts copies. This is the clerk's own  
21 records. And so they sent it back to me. And this  
22 is the clerk's own records that they received it  
23 through the mail as it was sent to Mr. Potts. It  
24 was all sent out at the same time as the  
25 certificates of service say that it was.

1           The certificates of service are not false as  
2       Mr. Potts claims.

3           We have a fact in controversy. He claims  
4       they're false. I watch my paralegal every day when  
5       she leaves. I follow her home. We both live in  
6       Anderson. She puts it in the post office. As  
7       you'll see from his own filings when he claimed I  
8       filed another false affidavit of service, he  
9       claimed it was because they logged the post -- the  
10      post -- the mail in at 10:19 p.m. at the post  
11      office. The post office isn't open at 10:19 p.m.  
12      We wouldn't have been putting something in the post  
13      office then. That's when they log it in. It's  
14      their process. I can't control their records. I  
15      know when we mail things we file affidavits of  
16      service and when we physically put it in the  
17      mailbox.

18           That's what Rule 5 requires. Rule 5 says it  
19      is filed and complete as of the time of mailing.  
20      It is complete upon mailing and that's when we put  
21      it in the post office box.

22           THE COURT: The issue that I have, frankly,  
23      is because of this tight time frame. Usually I  
24      agree that the rule says service is complete upon  
25      mailing but typically the evidence of the date of

1 that mailing is the postmark on the envelope. And  
2 what do you want me to do with a May 31st postmark  
3 on this envelope?

4 MS. KERN-FULLER: The May 31st postmark, Your  
5 Honor, is in Greenville.

6 THE COURT: I see that.

7 MS. KERN-FULLER: That's what's important is  
8 because we mailed it in Easley. We didn't mail it  
9 in Greenville. And so what happened and our  
10 certificate of service, our sworn certificate of  
11 service -- and what happened is we put it in the  
12 Easley Post Office. Whenever it went from Easley  
13 and -- to Greenville to the regional mailing  
14 facility is when that postmark got put on it.

15 Now assume he's correct and assume arguendo  
16 that Mr. Potts' theory is correct that it did not  
17 go in the post office box on the 25th like I have  
18 told you it did and we have sworn that it did.  
19 Assume that.

20 On the 11th the order was mailed. Under Rule  
21 6 you don't count the date of mailing. So you  
22 start on the 12th. Fifteen days from the 12th is  
23 the 27th which is a Friday, the 27th. Monday was  
24 Memorial Day. So if it was put in the mailbox on a  
25 Friday under his theory and it got to Greenville

1 the following Tuesday on the 31st and got  
2 postmarked, then it was still timely.

3 That's not what happened.

4 THE COURT: But it should be postmarked --  
5 but it should be postmarked no later than the  
6 27th. And particularly in these circumstances when  
7 you are facing potential striking of your answer or  
8 entry of default or whatever the consequences in  
9 this case, I don't understand why you wouldn't take  
10 it inside the post office and hand it to somebody  
11 and have it postmarked.

12 I mean, my goodness. I do that when I mail  
13 my tax return on April 15th, not that it probably  
14 matters because people mail them the 16th, 17th,  
15 whatever, but I don't understand particularly given  
16 the climate in this case why that wouldn't happen.

17 Why you are relying on a certificate of  
18 service dated six days before the postmark and you  
19 don't have an affidavit from anyone at the postal  
20 service. Maybe you could have, should have gone to  
21 the Easley Post Office and they say, hey, this is  
22 our process but --

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

24 THE COURT: -- but certainly you're not an  
25 expert on the inner workings of the Easley Post

1 Office, nor am I.

2 MS. KERN-FULLER: Yes, Your Honor.

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

6 MS. KERN-FULLER: I understand.

7 MR. POTTS: May I address the Court?

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

9 THE COURT: Let her respond.

10 MS. KERN-FULLER: -- to explain to the Court  
11 that I did go to the post office and try to get  
12 them to give me something and they refused.

13 THE COURT: I'm sure. But the point is for  
14 whatever reason I don't have it.

15 MS. KERN-FULLER: I understand that, Your  
16 Honor.

17 If we had it to do over again, certainly we  
18 would have done it that way. In hindsight I  
19 probably would have sent it Fed-Ex. But, all I  
20 have is my word as an attorney and, you know, my  
21 standing as a bar member to say I watch my  
22 paralegal every day put that mail in the post  
23 office because I follow her home. And I know when  
24 she says, I put it in the post office box on this  
25 day, because she leaves at five o'clock and she

1 goes right past that post office and puts it in the  
2 outside post office. I know that she does.

3 THE COURT: Let me just ask one other  
4 question before I hear from Mr. Potts.

5 Did you tell me that the, what-is-it, a  
6 motion to dismiss that was -- answer and motion to  
7 dismiss --

8 MS. KERN-FULLER: Yes, Your Honor.

9 THE COURT: -- is the same as the answer and  
10 motion to dismiss that you had previously filed  
11 that --

12 MS. KERN-FULLER: It was previously filed, a  
13 motion to dismiss. And this time I just went ahead  
14 and filed an answer, too. Even though I don't feel  
15 like I needed to, I did. But it is -- I have it.  
16 It is exactly the same as the previous motion to  
17 dismiss I had filed.

18 THE COURT: Okay. Which in my mind makes the  
19 delay in mailing it even more egregious because you  
20 could have hit print again and signed it and mailed  
21 it the same day.

22 But, let me hear from Mr. Potts.

23 MR. POTTS: Your Honor, I have to agree with  
24 opposing counsel about one thing. Under South  
25 Carolina law, a postmark is not dispositive. It's

1 only compelling evidence.

2 THE COURT: Sure.

3 MR. POTTS: That's under 320 South Carolina  
4 347. But in this case it's undisputed. The  
5 affidavit has not been disputed by any sworn  
6 testimony. There's been no opposing affidavits and  
7 of course opposing affidavits can be served no  
8 later than two days before the hearing.

9 Your Honor, there's another minor error, I  
10 think, in what counsel has suggested to you. She  
11 suggested that and I'm just going from memory. And  
12 it's getting -- 70 years old, so I'm getting, I'm  
13 getting there.

14 She said that you don't count the date of  
15 service. But I don't think Judge Keesley -- his  
16 order was the date of mailing. And matter of fact,  
17 I want to point out one thing that I don't want to  
18 mislead the Court. I have in my affidavit that it  
19 was postmarked on the 11th. The fact of the matter  
20 is it was most probably mailed on the 10th because  
21 that's the date that their meter did it. I assume  
22 they mailed it that same day. It just didn't get  
23 postmarked until the next day.

24 So the actual date of mailing is the date  
25 earlier than we, we're even talking about. And

1 according to Judge Keesley's order, that's the date  
2 that counts is the date of mailing.

3 But be that as it may, it doesn't make any  
4 difference because it wasn't received, it wasn't  
5 served upon me until June 2nd. That is supported  
6 by the affidavit of Renee Larson which is attached.

7 So regardless of the days, now what day, it  
8 was late and it was not served within the time.  
9 And the fact of the matter is, this was -- she was  
10 allowed out of default, counsel was allowed out of  
11 default one time already. Here it is a second time  
12 and it still comes late. It is still not within  
13 the rules.

14 And, my having to sit there and have somebody  
15 tell me that they don't even get a letter from me  
16 telling them, look, you've got to answer this thing  
17 the first time around or I'm going to end up  
18 putting you in default and they say, no, we didn't  
19 get that either.

20 She's been practicing for 13. I've been  
21 practicing for over 40. I've never had that happen  
22 to me. Somebody may tell me they didn't get  
23 something and we deal with it, but I've never had  
24 three in a row.

25 And, the bottom line. If I had been -- if

1 this had been suggested, if the situations were  
2 reversed, I wouldn't have been waiting for the 25th  
3 much less taken a chance on a 31st postmark because  
4 I know there are times when I've had to go to the  
5 post office and go in and get them to give me a  
6 receipt for something actually being mailed at that  
7 time because you don't play with those deadlines.

8 And there's no good cause in this case. And  
9 it's been -- and it's been over a year since the  
10 discovery was served and we've still got, quite  
11 frankly, it's garbage. Most of it. Not all of  
12 it. There's some of it, there's some legitimate  
13 answers.

14 But even to this day I have not received  
15 answers to, I'm getting over it, I have not even  
16 received responses to interrogatories or requests  
17 for production, anything, from the corporation that  
18 they claim handles it all. And yet she's known  
19 about it for two months now.

20 No. Here they are. Omitted from the letter,  
21 omitted from whatever it is. It's just -- it's  
22 embarrassing. I have never -- I spent most of my  
23 time being a lawyer for the nasty insurance  
24 companies and providing checks to people as a green  
25 poultice.

1 THE COURT: And that's good work. I used to  
2 do it.

3 MR. POTTS: I learned though you have to  
4 follow the rules. And, life is not difficult when  
5 you do. And it's an embarrassment to be here.

6 Your Honor, I mean, I'm even being -- I'm not  
7 getting answers to interrogatories because opposing  
8 counsel has summarily decided the case isn't worth  
9 \$25,000. That is her decision even though in the  
10 complaint it specifically says damages -- as a  
11 matter of fact, damages are in excess of \$25,000.  
12 It alleges that and of course it's -- by the way,  
13 it's a verified complaint.

14 And, it's paragraph number 21. There is no  
15 proof otherwise, and the only law in this state --  
16 let me have that -- the only law in this state is a  
17 1991 decision which is Garner versus Newsome  
18 Chevrolet. And I think I can point you out to  
19 where it was in here. It will start -- it's in  
20 this area here, it's a footnote that you may want  
21 to note there, which says that the sum claim by the  
22 plaintiff controls. It must appear to a legal  
23 certainty the claim is really for less.

24 And she -- counsel is sitting there and I'm  
25 getting these things, objection, your case isn't

1 worth \$25,000, so we're not answering any of your  
2 discovery on all -- the other discovery. There's  
3 one case in South Carolina and that's it. And it's  
4 on point. It's -- nothing's been done according to  
5 the rules.

6 I'm sorry, Your Honor, I apologize for  
7 venting.

8 THE COURT: No, that's quite all right.

9 MR. POTTS: It's not the emotion of the  
10 case. It's the emotion of the -- of the fact that  
11 we wouldn't be here if we'd simply followed the  
12 rules.

13 As a matter of fact, you know, you notice the  
14 judge said, Judge Keesley suggested to the parties  
15 that they send things by certified mail. He said,  
16 I'm not ordering but I suggest you send things by  
17 certified mail. I've never been quite that  
18 insulted in my life to have a judge suggest to me  
19 that I need to send things by certified mail.

20 But we did it. We sent our materials by  
21 certified mail. And that was an insult. I know he  
22 didn't mean it that way. I know the Judge but I  
23 got it late. I wasn't served according to the  
24 rules. She gets five extra days for mailing.  
25 Those days expired. She was late.

1 THE COURT: Okay. Ms. Kern-Fuller, I'm going  
2 to allow you to respond but I must take just a  
3 two-minute break.

4 MS. KERN-FULLER: That's fine.

5 MR. POTTS: May we take a five- or 10-minute  
6 break, Judge?

7 THE COURT: Absolutely.

8 MR. POTTS: Thanks, Judge.

9 (Break taken from 3:15 until 3:26 p.m., and  
10 the hearing resumed:)

11 MR. POTTS: A couple of other matters.

12 Since we're dealing -- I venture -- I got the  
13 Court into the discovery as well so that's part of  
14 motion too.

15 So may I show the Court. Take a look at some  
16 of them, the -- just some of the answers that were  
17 served? This is the kind of thing -- let me find  
18 them in here.

19 This is the way these were served. The  
20 interrogatories and requests for production were  
21 served on the day the summons and complaint was  
22 served.

23 And now we're well over a year and this is  
24 what we get. Objection. Your case isn't worth  
25 \$25,000.

1 And we don't even get an answer. This is  
2 when they've been -- the judge has ordered that  
3 they be answered in good faith. And then we don't  
4 even get an answer from the corporation.

5 And now I'm told today that we're on the jury  
6 roster for October. And I haven't even started to  
7 take the first deposition because I am not prepared  
8 to do it. I prepare for my depositions. I can't  
9 even get what was served over a year ago.

10 And, Your Honor, last but not least. I just  
11 had a chance to read the memorandum. The second-  
12 to-the-last-paragraph over the conclusion says:  
13 Defendant's counsel has represented the Defendants  
14 in their small business for years. The  
15 undersigned, being opposing counsel, has no  
16 personal stake in this litigation and no familial  
17 relationship to the parties. The undersigned  
18 believes strongly that the matter has become way  
19 too personal and that it is clouding the judgment  
20 of the advocate for Plaintiff, me, and causing  
21 motives to be ascribed to Defendant's counsel that  
22 are simply not present. Okay.

23 I'm embarrassed. I practiced law by the  
24 rules. And I've been insulted. You can't sit  
25 there and say something like that if you've done

1 the tiniest bit of research.

2 There's only one case to find. I mean,  
3 this -- to read the complaint, you don't make a  
4 motion to dismiss and then sit on the discovery and  
5 don't even answer it until you're hauled into  
6 court.

7 Your Honor, by the corporation not even --  
8 and then the response to the motion to dismiss is,  
9 well, it's all the corporation. And they don't  
10 even respond to discovery.

11 They need to be put in default. They've  
12 ignored the Court's order. They haven't complied  
13 with the rules of court.

14 And, I'm now going to be going around begging  
15 for an extension because I haven't even taken the  
16 first deposition and somebody's going to say to me  
17 why not. Haven't you had plenty of time. And to  
18 try and explain this --

19 THE COURT: Well, I don't believe -- okay.  
20 Go ahead, Ms. Kern-Fuller, briefly.

21 MS. KERN-FULLER: Your Honor, one of the  
22 things that we discussed at the last hearing was a  
23 motion for a protective order.

24 And if you look at Judge Keesley's order, one  
25 of the things Judge Keesley said, because we talked

1 about the amount in controversy, and one the things  
2 in Judge Keesley's order about answering the  
3 discovery was that I had the opportunity to make  
4 appropriate objections.

5 Now under Rule 7 it says that motions have to  
6 be pled with particularity. He did not plead with  
7 particularity in his motion. What his motion to  
8 compel was, I was assuming, correctly or  
9 incorrectly, that it was about the amount in  
10 controversy.

11 But, I was playing the guessing game today  
12 because what his motion says is that, in the event  
13 the Court finds good cause to excuse, that he prays  
14 the Court require the Defendants to respond to the  
15 Plaintiff's interrogatories and requests for  
16 production which were due on July 28th, together  
17 with fees and costs incurred by the Plaintiffs as a  
18 result of the same.

19 He doesn't say all of them because I objected  
20 about the amount in controversy under Rule 33. He  
21 doesn't say that I responded partially on behalf of  
22 the Defendants, Mr. and Mrs. McCarty, and didn't  
23 respond on behalf of the corporation.

24 So I was playing the guessing game. But  
25 Judge Keesley specifically provided that I could

1 raise objections. Because one of the things that  
2 Mr. Potts argued at that motion was that I didn't  
3 have the opportunity to even object to the  
4 discovery.

5 THE COURT: Direct me to that portion of the  
6 order that talks about appropriate --

7 MS. KERN-FULLER: It's on page 4, Your  
8 Honor..

9 It starts: The Defendants are ordered to  
10 answer the outstanding discovery within 30 days  
11 from the date that this order is mailed.

12 Now mind you, he hasn't told you that within  
13 a week of when I mailed the motion and the answer I  
14 mailed those discovery requests.

15 THE COURT: They weren't mailed at the same  
16 time?

17 MS. KERN-FULLER: No, Your Honor. I mailed  
18 them a week later.

19 And, while a good faith effort must be made  
20 to respond to discovery, nothing in this order  
21 prevents the Defendants from raising objections to  
22 the discovery requests as permitted by the South  
23 Carolina Rules of Civil Procedure and applicable  
24 law.

25 And part of that comes from the fact that

1 we're having this discussion because when we talked  
2 about what the underlying claims were at the  
3 hearing, you know, and no disrespect to the Potts,  
4 Your Honor. This has become personal,  
5 unfortunately.

6 But I know that this was their dog that they  
7 loved. I know that. And there's no disrespect in  
8 that. Judge Keesley was a little suspect about the  
9 claim and he said, really, we're talking about  
10 \$25,000. Really.

11 THE COURT: Did he rule that the amount of  
12 controversy is less than 25,000 or --

13 MS. KERN-FULLER: No, Your Honor.

14 THE COURT: -- did you unilaterally make that  
15 decision?

16 MS. KERN-FULLER: No, Your Honor. He didn't.

17 MR. POTTS: Your Honor --

18 MS. KERN-FULLER: No, he didn't.

19 MR. POTTS: -- he did not mention that at  
20 all. And as a matter of fact, if she'll say it one  
21 more time I'll be happy to order a transcript.

22 MS. KERN-FULLER: We'll order a transcript.  
23 He was talking about the claim being about a dog.

24 THE COURT: Whether he mentioned it or didn't  
25 mention it, you agree that he didn't make any

1 determination or finding that the amount in  
2 controversy was less than \$25,000. It is pled in  
3 the complaint that it is in fact in excess of  
4 \$25,000.

5 And I don't think it is the place of any  
6 Defendant to unilaterally decide that the  
7 Plaintiffs are entitled to less. I'm sure your  
8 clients think they're not entitled to a thing. You  
9 would say it's worth zero dollars and zero cents.  
10 But that's not for the Defendant to determine. And  
11 absent some Court ruling -- and I say that because  
12 that makes the objections not legitimate  
13 objections. You can't decide on your own that it's  
14 worth less than \$25,000 and then refuse to answer  
15 because you've made that decision.

16 MS. KERN-FULLER: We had a motion for a  
17 protective order.

18 THE COURT: Do you have a protective -- did  
19 this Court or any Court --

20 MS. KERN-FULLER: No.

21 THE COURT: -- of competent jurisdiction  
22 grant a protective order?

23 MS. KERN-FULLER: No, Your Honor.

24 THE COURT: Filing a motion is simply a  
25 request.

1 MS. KERN-FULLER: Yes, Your Honor.

2 THE COURT: And whether things are emotional  
3 or not -- I'm sure it is emotional on their part.  
4 Their dog was killed.

5 MS. KERN-FULLER: Yes, Your Honor.

6 THE COURT: But emotional or not, you still  
7 have to follow the rules.

8 And I am concerned that, as I've said before,  
9 that given the climate in this case, the tenor of  
10 things here and the language used by Judge Keesley  
11 in his order, that steps weren't taken to ensure  
12 that your responsive pleading was timely served.

13 I just -- you've been let out of default once  
14 -- you, you, the Defendants, have been relieved  
15 from any default once. And once that happens  
16 you've got to be on your Ps and Qs and make sure.  
17 And the only evidence that I have before me is that  
18 no responsive pleading was timely served.

19 MS. KERN-FULLER: And, Your Honor, I want to  
20 address that because when Mr. Potts was arguing  
21 about that, there was conflicting arguments being  
22 made. And I want to make sure that I have that  
23 information correct for the record.

24 Rule 6(A) clearly says: In computing any  
25 time prescribed or allowed by these rules or by

1 order of the Court, which this was a time that was  
2 prescribed by an order of the Court, or by  
3 applicable statute, the date of the act after which  
4 the designated period of time begins to run is not  
5 to be included.

6 And the last date to be included unless  
7 Saturday or a holiday is to be included. And in  
8 this case the Monday was a holiday.

9 So one of the things that Mr. Potts said was  
10 that he was correcting himself about which day it  
11 was mailed, and then said that it wasn't served on  
12 him because he did not receive it until June the  
13 2nd.

14 THE COURT: I'm not even going on what he  
15 says.

16 MS. KERN-FULLER: Okay.

17 THE COURT: He's provided me a copy of the  
18 letter with a postmark on it. And, in fact, I'm  
19 not sure when you decided to determine that the  
20 final day was on a Saturday. I guess I need to  
21 count the days myself but you just said, 10 minutes  
22 ago, that the last day of that period was a  
23 Friday.

24 MS. KERN-FULLER: It is.

25 THE COURT: So why are we talking about

1 Saturdays, Sundays or intervening holidays?

2 MS. KERN-FULLER: I was reading the rule, Your  
3 Honor. I was reading the rule.

4 THE COURT: Well, that portion of the rule is  
5 not applicable to this case.

6 I just -- I don't have -- the only evidence  
7 before me is that the responsive pleading was not  
8 timely served.

9 And I get that the rules, or that the Court  
10 seeks to resolve cases on their merits and not on  
11 mere technicalities. I know that that is the law.

12 And I think an attempt has been made to do  
13 that, but when you simply don't follow -- the  
14 intent was made when Judge Keesley issued this  
15 order talking about the suspicious, the sheer  
16 number of claims that things have -- things mailed  
17 have never been delivered is suspicious, et cetera,  
18 et cetera.

19 He suggests though he doesn't order that  
20 things be served by certified mail. And not only  
21 was that not done, but it's an 11th-hour attempt to  
22 mail something that the only evidence of it is that  
23 it was mailed on the 31st, not --

24 MS. KERN-FULLER: The postmark.

25 THE COURT: Sure. You don't dispute that's

1 what the postmark says.

2 MS. KERN-FULLER: I don't dispute it was  
3 postmarked in Greenville, Your Honor, but the --  
4 that's not the only evidence. Because the evidence  
5 in the file is a sworn certificate of service that  
6 it was mailed in Easley, South Carolina, on the  
7 25th of May and postmarked.

8 And there is a stamp on the letter and then  
9 there is a postmark. And so there is a sworn  
10 affidavit of service. There is a stamp and then  
11 there is a postmark from Greenville on the 31st.  
12 And Greenville is the regional mailing facility.

13 It would be like if I mailed it in Greenville  
14 and it was postmarked in Columbia days later, you  
15 couldn't use that postmark because it wasn't mailed  
16 in Columbia. It was mailed in Easley.

17 THE COURT: I would deem from that that it  
18 was mailed in Columbia. And if you want evidence  
19 that it was mailed in Greenville or in Easley on  
20 whatever day, there should be a postmark to that  
21 effect.

22 Or, it could have been mailed certified  
23 return receipt requested as suggested by Judge  
24 Keesley. You could have Fed-Ex'd it. You could  
25 have gotten a receipt for it. You could have done

1 any number of things.

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

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

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

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

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

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

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

24 Motion for default is granted.

25 Is there anything else on this case?

1 MR. POTTS: Pardon me, Your Honor?

2 THE COURT: Anything else on this case?

3 MR. POTTS: No, Your Honor.

4 THE COURT: Okay. Thank you, guys.

5 MS. KERN-FULLER: Thank you, Your Honor.

6 MR. POTTS: Is there anything the Court would  
7 like from either one of us? I'm not suggesting.  
8 I'm just asking, believe me.

9 THE COURT: If you would like a detailed  
10 order, I don't know about the potential for appeal  
11 or anything like that, but I'm happy to do a Form  
12 Four granting the motion for default and denying  
13 your motion to dismiss. If you would like anything  
14 more detailed, you're welcome to send it to me.

15 And I'll return to you all of these copies of  
16 everything.

17 END OF PROCEEDINGS: 4:01 P.M.  
18  
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## CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA )

COUNTY OF AIKEN )

I, Cheri L. Young, Registered Professional Reporter and Official Court Reporter for the State of South Carolina, Second Circuit-At Large, do hereby certify that the foregoing proceedings were written stenographically by me using computer-aided translation; further, that the foregoing is a true, accurate and complete record, to the best of my skill and ability, of all the proceedings had and evidence introduced in the hearing of the captioned case, relative to appeal, in the Court of Common Pleas for Lexington County, on the 7th day of September, 2016.

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

I have hereunder set my hand this 17th day of November, 2016.

---

Cheri L. Young, RPR  
Official Court Reporter

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM SALUDA COUNTY  
In The Circuit Court

Jocelyn Newman, Circuit Court Judge

Appeal 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.

**CERTIFICATE OF COUNSEL**

The undersigned certifies that this Record on Appeal complies with Rule 210(g), SCACR and contains all material proposed to be included by any of the parties and not any other material.



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August 2, 2017

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