THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SALUDA COUNTY
Court of Common Pleas

William P. Keesley, Circuit Court Judge
Jocelyn Newman, Circuit Court Judge
Alison Renee Lee, Circuit Court Judge

Case No. 2015-CP-41-139
Appellate Case No. 2019-001279

Amy Potts ....Respondent

v.

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

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE ISSUES ON APPEAL

1. Did the court err by denying Defendants' Motion to Dismiss?

2. Did the court err by placing the Defendants in default after their failing to adhere with almost all requirements contained in the order of the court which granted the Defendants a second chance to avoid default?

3. Did the court err by denying a Motion for Reconsideration that provided no new substantive evidence but contradicted earlier argument of Defendants?

4. Did the court err by permitting Mary Feaster to testify as an expert in counseling when she was a trained counselor and had a South Carolina license in counseling?

5. Did the court err in its award of actual/special and punitive damages?

STATEMENT OF THE CASE

Introduction

This case arises from the claim of respondent, Amy Potts, that the Appellants conspired to cause her severe emotional distress by killing her beloved Australian Shepherd, Ruby. Amy asserts that this was done in retribution against her because she accidentally ran over and killed Appellants' beloved pet Boston Terrier, Allie, in 2012. (R. p.43, ¶13) (R. p.158, lines 2-5)[1]

After Amy ran over Allie, the Appellants threatened to shoot Amy's dog Ruby if Ruby ever went into their yard. (R. p.42, ¶¶9-10) On March 25, 2015, Appellant John McCarty did, indeed, shoot and wound Ruby, and, while she was trying to flee to the safety of her home, McCarty shot Ruby again, killing her. (R. p.43, ¶12) (R. p.237, lines 2-7)

This case, is about the emotional damage suffered by Amy as a result of the Appellants' planned, intentional and violent killing of her beloved pet and companion, Ruby. It is also about the repeated violations of the South Carolina Rules of Civil Procedure by the Appellants and their blatant disregard for direct orders of the court that deprived the Respondent of her right to seek timely redress before a court of law.

In the almost five years since this case was filed, there have been a minimum of six critical mailings or filings that have (allegedly) been either lost in the mail or

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

delayed by poor mail service. There have also been six requests for discovery – four were received over a year after proper service with objections that were considered "not legitimate" by the Honorable Jocelyn Newman. (R. p.199, lines 10-12) The other two discovery requests were never received at all. There have been two default hearings, the first hearing resulted in Appellants being given a second chance by Judge William Keesley. His conditions did, however, give strict limits for corrective filings and service – conditions that were almost totally disregarded by counsel for Appellants. (R. pp.3-4) This failure by Appellants led to a second default hearing and to the entry of default by Judge Jocelyn Newman. (R. p.9) That default and a subsequent denial of reconsideration (R. p.12) by Judge Newman were first appealed to this court in 2017. After this court denied that appeal as interlocutory in February of 2019 (R. pp.14-16), a damages hearing was held before the Honorable Alison Renee Lee in April 2019.

In this appeal, Appellants claim error on the part of Judge Jocelyn Newman for putting them in default and for denying their subsequent motion for reconsideration. Likewise, Appellants find error on the part of Judge Alison Lee with her decision to allow Mary Feaster to give expert testimony, and in the award of actual/special damages. Appellants also claim punitive damages were awarded by Judge Lee without consideration for the *Gamble* factors.

Procedural History

Respondent's initial complaint was filed on June 8, 2015, and was personally served on the McCartys and McCarty Enterprises on June 14, 2015. Included were interrogatories and requests for production directed to each of the Appellants except Jane Doe. (R. pp.28-37)

The verified complaint set forth only one cause of action – civil conspiracy. It alleged damages in excess of $25,000. (R. p.35, ¶21) The Appellants' only response to the complaint was a motion to dismiss. (R. pp.38-39)

The motion to dismiss set forth two grounds for dismissal of the complaint. The first was that "at all times alleged Defendants [Appellants], John McCarty, Audrey McCarty and Jane Doe, were employees and/or agents of Defendant [Appellant] McCarty Enterprises and a corporation cannot conspire with itself." (R. p.38, ¶1) The second basis was that S.C. Code Ann. 47-3-530 permits the lawful killing of a dog under certain circumstances. (R. pp.38-39, ¶2)

On July 13, 2015, the Respondent filed and served her amended complaint and did not amend the first cause of action, but simply added a second cause of action – intentional infliction of emotional distress – against only the Appellant corporation, McCarty Enterprises. This second cause of action (as noted in the allegation) was supported by the fact asserted by opposing counsel in the motion to dismiss that all of the named Appellants were, "at all times," acting on behalf of the Appellant corporation. (R. p.38, ¶1) (R. p.45, ¶¶22-23) By the deadline of July 28, 2015, no response to the amended complaint had been received by Respondent or by the court.

Appellant counsel later contended she did not receive the Amended Complaint.[2] (R. p.78, ¶7)

By the discovery deadline of July 29, 2015, none had been received and no motions for protection had been served or filed by Appellants. (R. pp.343-344)

On August 3, 2015, counsel for Respondent mailed the following letter to counsel for Appellants (R. p.47):

> 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

[2] Nor was it returned to sender.

Counsel for Appellants later claimed she did not receive the letter.[3] (R. p.78, ¶ 7)

By August 18, having received no response from Appellant nor the discovery that had been due July 29th, Respondent filed a motion for default and to compel. (R. p.46)[4] Appellant counsel later claimed she did not receive the motion.[5] (R. p.46, ¶6)

The parties first met at a roster meeting at the Saluda County Courthouse on February 29, 2016. It was at this roster meeting that counsel for Appellants alleged that she had not received any of the three separate documents mailed by Mr. Potts – the amended complaint, the letter warning of default, or the motion for default and to compel. The presiding judge instructed the parties to have their motions heard by the administrative judge and suggested they speak to each other about settlement, which they did.

Appellant counsel said that on February 27, 2016, as she was preparing for the motion hearing on February 29, she discovered online that an amended complaint and a motion for default had been filed, but she had never received either of them, and "even though you can see things online, you can't get copies online…." (R. p.154, 7-8) To the contrary, the documents are (and were) in PDF form and can be both viewed and printed at any time. Also, since Appellant Counsel had discovered

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[3] Nor was it returned to sender.

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

[5] Nor was it returned to sender.

on the 27th while at the Saluda County Courthouse that she did not have the filed Amended Complaint, she could easily have gone downstairs and gotten a copy from the clerk on the 29th when she was on premises for the roster meeting. Instead, she later made erroneous claims that both Respondent counsel and co-counsel had promised her on the 29th to send her copies of the amended complaint, which claims both have denied by affidavit.[6] Thus, Appellant counsel blamed both opposing counsels for further delaying her ability to answer the amended complaint. (R. p.156, lines 5-10)

The eventual response to the amended complaint was apparently intended to be in the form of a motion to dismiss and for protection, which Appellant counsel claimed to have served on March 9, 2016. (R. p.143, lines 12-16) Not surprising in light of the previous mail problems claimed in this case, the motion was never served on Respondent's counsel or co-counsel, nor was it received by the court; therefore, when the hearing of Respondent's motion for default was held before the administrative judge, the Honorable William Keesley, on April 28, 2016, the court would not hear those motions by Appellants because they had not been filed.[7] (R. p.143 line 3 – p. 144 line 9)

[6] R. pp.104-105 and R. p.94 ¶12.

[7] That "missing in the mail" motion for protection was never filed, even though counsel had another chance after this hearing to file it. During the second default hearing before Judge Newman, counsel for the Appellants twice inferred to the court that there was an order for protection. She stated to the court that "one of the things we discussed at the last hearing was a motion for a protective order." (R. p.195, lines 21-23) In fact, the only discussion that occurred was that no motion seeking protection existed in the file. Later counsel repeated to the court, "We had a motion for a protective order." (R. p.199, 16-17) Further questioning by the court made counsel admit no order for protection had ever been issued, which the court noted, "Filing a motion is simply a request," (R. p.16, 16-25) What Judge Newman did not know is that such a motion had never been filed.

As the first default hearing began, Appellants submitted an affidavit to which Respondent objected due to having not been served more than two days prior to the hearing as required by Rule 6, SCRCP. Appellants stated to the court that the affidavit had been served at least two days prior as required. The affidavit was admitted over objection. (R. pp.149-150 and R. p.78) Yet, two days after the hearing, when Respondent counsel finally received the affidavit by mail, he checked the tracking number on the postage label and found it had not been mailed until April 27th, the day before the hearing, and in violation of the Rule. (R. pp.101-102)

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

1. Amended Complaint from Respondent to Appellant (filed and served by Respondent, but *Appellants claimed they did not receive*)
2. Letter warning of Default from Respondent to Appellant (mailed with stamp only, *Appellants claimed they did not receive*)
3. Motion for Default from Respondent to Appellants (filed and mailed by Respondents from Saluda, SC with proof of mailing, *Appellants claimed they did not receive*)
4. Motions to dismiss and for protection allegedly served by mail on March 9, 2015 (R. pp.142-143) from Appellants to Saluda Clerk. (*Appellants claimed they sent*, but never received by Saluda Clerk)
5. Motions to dismiss and for protection allegedly served by mail on March 9, 2015 (R. pp.142-143) from Appellants to Respondent counsel. (*Appellants claimed they sent*, but never received by Respondent counsel)
6. Motions to dismiss and for protection allegedly served by mail on March 9, 2015 (R. pp.142-143) from Appellants to co-counsel

for Respondent, Evan Lacke. (*Appellants claimed they sent*, but never received by Lacke)

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

The other issue before Judge Keesley was that Respondent still had not received discovery responses that were, by that time, almost ten months overdue. (R. pp.160-161) Respondent argued that Appellants had missed their opportunity to move for protection or make objections to discovery under Rule 37. (R. p.148). Nonetheless, the court allowed another opportunity for Appellants to fully respond to discovery. (R. p.7, ¶2)

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

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

[8] There four Orders involved in this case. One from Judge Keesley, two from Judge Newman and one from Judge Lee. These orders will hereafter be referred to as "Keesley Order," "Newman Order 1," "Newman Order 2," and Lee Order.

Near the end of his order, Judge Keesley added:

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

Judge Keesley's Order was mailed by the Clerk of Court to the parties no later than May 11, 2016, making the deadline for responsive pleadings May 26th. (R. pp. 184-185)[10] Respondent's counsel received an answer and a motion to dismiss the amended complaint on June 2nd, not via certified mail as requested by Judge Keesley, but via U.S. Mail that could *not* be tracked - a regular first-class stamp. (R. p.97) The envelope used for service to Respondent counsel was clearly postmarked May 31st and contained a certificate of service dated May 25th. (R pp.97-98)[11] The same documents were hand carried to the Saluda Clerk of Court and filed on May 31, *which was five days after the deadline ordered by Judge Keesley.* (R. p.108, lines 7-10)

Of the six discovery requests ordered to be returned – one set of interrogatories and one request for production to each of the three Appellants (John and Audrey

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

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

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

McCarty and McCarty Enterprises, LLC.) – only four were received. None were ever returned from McCarty Enterprises.[12] The four items that were received were mailed well within the ordered deadline but were comprised almost entirely of objections that were later characterized by Judge Newman to be "not legitimate." (R. p.199, lines 10-13)

As a result of Appellant counsel's failure to obey the order of the court, and the continued obstruction of the Respondent's ability to develop the facts necessary to have her case tried on the merits, counsel for the Respondent filed her Motion to Strike the Amended Motion to Dismiss and Answer to Amended Complaint; for Entry of Default and to Compel Responses to Discovery.[13] The motion was filed June 24, 2016, and service to counsel for Appellants was accomplished via U.S. certified mail, return receipt requested. (R. p.90 and p.106)

The pending motions of both parties came to be heard in Lexington on September 7, 2016, before the Honorable Jocelyn Newman.[14] Without objection by Appellants the first motion addressed was the Appellants' motion to dismiss the amended complaint. The motion was denied on all grounds. (R. pp. 167-177) The second was Respondent's motions to compel discovery and hold the Appellants in default for failing to file and serve their responsive pleadings in accordance with Judge Keesley's Order of April 28th. No affidavits, exhibits, witnesses, or any other

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

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

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

evidence was offered by Appellants in opposition to Respondent's motions, affidavits, or exhibits, either prior to or at the hearing before Judge Newman, even though counsel had over two months to do so. (R. p.106)

Following a lengthy hearing in which Judge Newman reviewed the evidence and heard argument, the court granted Respondent's motion for default pursuant to Rule 55(a), SCRCP. The Respondent was ordered to provide notice to Appellants of any scheduled damages hearing in compliance with Rule 55(b), SCRCP. The Court also noted that the order did not end the case. (R. p.9) On October 17, 2016, the Appellants filed a motion for reconsideration together with the affidavit of an employee of a postal facility other than the Easley Post Office and the Main Greenville Post Office – the two facilities that actually handled the mail in question. The motion to reconsider was denied by order of the court. (R. p.12) The first appeal of this case was filed January 31, 2017. Respondent filed a Motion to Dismiss the appeal as premature, interlocutory, and not a final judgement on February 16, 2017. The motion was denied by the Honorable James Lockemey, but noted he did not preclude the right to raise the issue of appealability before the Court. (R. p.13) The parties fully briefed the case.

Two years later, on February 6, 2019, the court dismissed the appeal as interlocutory in an unpublished opinion. *Potts v. McCarty*, Op.No. 2019-UP-061, 2019 WL 460023. (R. p.14)

On April 5, 2019, a damages hearing was held before the Honorable Alison Renee Lee in Lexington County. Four witnesses testified. The court took the matter

under advisement and on July 1, 2019, issued its order on damages "against Defendants' [Appellants'] McCarty Enterprises LLC, John McCarty, and Audrey McCarty, jointly and severally, in the amount of $7,500 for actual damages, $10,000 for punitive damages, and appellate court costs, [previously awarded by this court], in the total amount of $20,468.96." (R. p.24) This second appeal followed.

ARGUMENT

Appellants' Initial Brief does not Conform to the Rules

Rule 208(b)(1)(C) of the South Carolina Rules of Civil Procedure clearly states that "the statement [of the case] shall not contain contested matters...", but the Appellants' Statement of the Case in its Brief includes numerous instances of contested matter and facts not in evidence. Simply put, there are too many to individually note.

Contested Matters in Appellants' Statement of the Case

Appellants' use of contested matter in the "Factual Background" section of their Statement of the Case, is an attempt to justify the intentional and violent act Appellants committed by shooting the Australian Shepherd, Ruby. These improper assertions of contested matter are no more than a recitation of non-existent facts and

argument, including an abundance of inserted adjectives and adverbs which distort the passages that are cited.

Appellants even present unsworn statements and questions by their own counsel as fact in this case. For instance, at the damages hearing, Appellants' counsel asked witness, Anna Lacke, if she had ever known of Ruby being aggressive to Appellant Audrey McCarty, to which Anna answered "no;" yet, that very exchange becomes the basis for, "the Respondent's Australian Shepherd was aggressive to her [Mrs. McCarty]." (R. p.333, lines 3-6) Some of the more outrageous claims made are cited to the stricken Answer to the Amended Complaint, some are misrepresentations of the material in the record that *is* cited. Some citations are offered that bear no relation to the matter in the brief they supposedly support. Many of the more outrageous statements are not cited to the Record at all.

Respondent would prefer the Appellants' brief be required to conform to the rules, but barring that, will point out what is *not* in the record: There is no evidence of any injured or dead livestock. There is no record of any breached fences or holes dug under fences. There is no evidence that any neighborhood dog ever threatened or harmed or attacked any livestock or any person at any time. There is no record of the Appellants' ever voicing concern to any neighbor that they felt their livestock was at risk because of *any* neighborhood dog.

These defenses would have been subject to argument five years ago after timely responsive pleadings, but since Appellants were placed in default by Judge Newman

the allegations in the Amended Complaint are deemed admitted. Appellants are not at liberty to create facts of their choosing.

If Appellants had timely and properly established a meritorious defense, there would have been no default.

The plain fact, however, is that Appellants *have* been held in default. This means that the Appellants are deemed, as a matter of law, to have both conceded liability and to have admitted all well-plead facts in the Plaintiff's Amended Complaint. There should be no argument about well-plead facts nor liability for the Appellants' killing of Ruby. What is properly at issue is whether the Appellants were properly held in default by Judge Jocelyn Newman and whether the damages verdict by Judge Alison Lee was properly awarded according to law.

All else is a diversion from the purpose of this appeal which is: *Did any of the judges involved in this case commit error warranting reversal of their decisions?* Respondent contends and will argue that they did not, and, further, that each judge involved made careful, sound and lawful decisions. The full transcript of each proceeding before each judge is included in our record as they speak to the truth of what was said or done in this case at each of the hearings.

Other than pointing out that fallacious statements permeate Appellants' brief, Respondents will not attempt to rebut these assertions – they are out of place and not germane to this appeal.

The same reasoning applies to Judge Lee's damages hearing. What was admissible were the well-plead facts of the Amended Complaint, witness testimony,

evidence, and the cross-examination—nothing else. The Respondent will not, therefore, attempt to argue anything but the issues before this court leaving the Appellants to do what they will—as they have done before and throughout this case.

<u>The Motion to Dismiss Was Correctly Decided</u>

Standard of Review

On appeal of the grant or denial of a motion to dismiss for failure to state facts sufficient to constitute a cause of action, the appellate court applies the same standard of review as the circuit court. *Benedict College v. National Credit Systems, Inc.,* 400 S.C. 538, 735 S.E.2d 518 (Ct.App. 2012)

Applicable Law

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

Discussion

This motion was heard prior to Respondent's Motion for Default. At issue before Judge Newman was an amended motion to dismiss by the Appellants, and motions for default, to strike and to compel by Respondent.

The Appellants' Motion to Dismiss and the Appellants' Answer to the Amended Complaint were both served together—late. Although filed too late to act as a responsive pleading to prevent Appellants' default, the Clerk of Court had filed the Answer and Appellants' Motion to Dismiss (Rule 12(b)(6)) and the motion was on the court's roster to be heard prior to the filing of Respondent's motions. At the suggestion of counsel for the Respondent, and without objection by opposing counsel, the first motion heard was Appellants' amended motion to dismiss. (R. pp.166-167 and pp.133-134)

If, by chance, the Motion for Default had been heard first, the Motion to Dismiss would have been moot by virtue of the Appellants' default. (R. p.204, lines 6-12) Thus, since it was first on the schedule, the Motion to Dismiss was heard first prior to the Motion for Default and as a result, the Motion to Dismiss was heard on its merits.

Having been heard on the merits, if the Motion to Dismiss had been granted, an issue might have been raised with respect to the validity of the Amended Complaint and its ability to sustain an award of damages. However, that never happened because the Motion to Dismiss was unsound, was dealt with by the court

on the merits, and as a result, the Motion to Dismiss had no further effect or impact upon the suit.

In this appeal the Appellants reargue the three contentions heard by the lower court, and one new contention Appellants have not previously raised. Respondent will also propose an additional sustaining ground.

First Basis – Civil Conspiracy

The first ground argued by Appellants was that the Appellants were all employees of the defendant corporation. This issue was disposed of by the court in its first ruling that the individual Appellants were being sued *as* individuals, not corporate agents, in the Amended Complaint. (R. p.174, line 10 – p.175, line 21)

Second Basis - Killing of an Identifiable Dog

Appellant counsel argued that the Appellant's killing of Respondent's dog is not an actionable matter. She maintained that the Appellants cannot be held civilly liable for the killing of Plaintiff's dog because of Section 47-3-530 of the *South Carolina Code of Laws, Annotated*, which she contends lawfully permits the killing of a dog that is "threatening to cause or causing personal injury or property damage." If such were the case, the burden would have been upon the Appellants to provide evidence of the same as a defense – which they did not.

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

> THE COURT: Well, several things. And I'll start at the very last. It sounds to me and I don't -- I don't know that that's admitted and maybe I've just not seen it in the complaint but if the Plaintiff does not admit that this animal was threatening to cause or causing personal injury or property damage you would be asking me to make a finding of fact that that was in fact the case. And I'm not in a position to do that. (R. pp.173-174)

The statute is entitled "Penalties for stealing or killing identifiable dog" and states: "Any person killing any dog when owner may be identified by means of a collar bearing sufficient information or some other form of positive identification is guilty of a misdemeanor." The statute does excuse the same if the criminal defendant can establish that it was "the killing of a dog threatening to cause or causing personal injury or property damage." But, as the lower court correctly pointed out, no such cause was alleged in the Amended Complaint.

For the purposes of this action, whether or not the admitted shooter, Appellant John McCarty, violated a criminal statute is not an issue. In *Ott v. Pittman*, 320 S.C. 72, 463 S.E.2d 101 (Ct.App. 1995), Mr Pittman was charged with shooting Mr. Ott's dogs and killing one. He was criminally tried and acquitted. However, the criminal

trial and acquittal did not preclude Mr. Ott from bringing a civil action against Mr. Pittman and recovering judgment against him in the amount of $19,800. *Id.* (*See also* R. pp.173-174)

Third Basis - Intentional Infliction of Emotional Distress

The Appellants correctly argued that the law limits a claim of intentional infliction of emotional distress to egregious conduct toward a plaintiff proximately caused by a defendant. Appellants stated that it was not enough that the conduct is intentional and outrageous, but that it would have had to have been directed at the Respondent, and the Respondent would have had to allege that it had been done intentionally to cause her emotional distress. (R. p.12, lines 6-18)

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

> 15. With the participation of the three defendants named and the corporate defendant, an understanding was reached between the defendants to facilitate the killing of the plaintiff's dog at the earliest opportunity in order to intentionally inflict severe emotional distress on the plaintiff for the loss of her beloved pet "Ruby." (R. p.43, ¶15)

To which Judge Newman responded:

> THE COURT: Right. It's right there in paragraph 15. And, you know, as to whether it's egregious or not, again, I'm not in a position to make a finding of fact at this point that it was not egregious, certainly not on a motion to dismiss. So

> unfortunately, I'm going to have to deny your motion to dismiss on all grounds. (R. p.176, line 24 – p.177, line 6)

Fourth Basis – Appellants Could Not Have Committed Conspiracy

The Appellants have added a fourth basis which was not argued to the court. In their brief, the Appellants now contend that "Appellants committed NO illegal acts, and, thus, could not have committed conspiracy." (Brief of Appellants at p.27) Since this argument was not raised before the lower court, the issue should not be considered in this appeal. "Issues and arguments are preserved for appellate review only when they are raised to and ruled on by a lower court," *Elam v. S.C. Dept. of Transportation*, 361 S.C. 9,23,602 S.E. 2d 772, 779-80 (2004).

Respondents contend there was no error by the court in its ruling on the merits of the (late-filed) Motion to Dismiss.

On Hearing the Motion to Dismiss First

The Appellants contend that the fact that the court first heard the Motion to Dismiss and denied the same (on the merits), this fact precluded the subsequent default because it should have given the Appellants another 15 days to file an Answer to the Amended Complaint (the one that was found in default). Even if this argument had merit, which it does not, the defendants did not raise this issue to the

court so as to permit a ruling. Nor was this issue raised by the Appellants' motion for reconsideration. Nor was it even raised in the previous appeal of the default before this court. This is the first time this alleged error has raised its head. This issue was neither presented to nor ruled upon by the trial judge and is not preserved for the court's review. As the court has said, "It is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved." *See generally 565 Holy Loch Distribs., Inc. v. Hitchcock*, 340 S.C. 20, 531 S.E.2d 282 (2000); *Staubes v. City of Folly Beach*, 339 S.C. 406, 529 S.E.2d 543 (2000).

Additional Sustaining Ground

While the Motion to Dismiss was denied on the merits prior to the default motion being heard, based on the evidence presented that both the Answer and the Motion to Dismiss were served and filed together—the Motion to Dismiss was also in default having violated Judge Keesley's order. For that reason the Motion to Dismiss should not have been considered and even if reviewed for any merit, it should have been dismissed on both grounds—not just on the merits. As a result, the Motion to Dismiss arguments should not be heard for the reason that subsequent proof also established that the Motion to Dismiss was not filed or served in a timely manner so as to be heard on the merits—despite its lack of merit. The transcript makes clear that Judge Newman, if she had not dismissed the motion on the merits, would have dismissed it for also being in default. (R. p.204, lines 6-10)

The Motion for Default was Properly Granted

Standard of Review

The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the trial court. *Roberson v. Southern Finance of South Carolina, Inc.,* 365 S.C. 6, 9, 615 S.E.2d 112, 114 (2005). The trial court's decision will not be disturbed on appeal absent a clear showing of an abuse of discretion. *Id.*

Discussion

On April 28, 2016, Judge Keesley issued his order regarding the Respondents motion to hold the defendants in default for their failure to respond to both the Amended Complaint and to respond to discovery. The ruling was clear and unequivocal. The court decided that it would not hold the Appellants in default but would provide a second opportunity for them to timely respond to the Amended Complaint. The order of the court specifically provided that the Defendants had to do two things regarding the Amended Complaint. The Defendants had to *both* file *and* serve their responsive pleading(s) by a specific date.

The court's precise words were as follows:

> They [the Defendants] have 15 days from the day this order is mailed to the defense attorney by the Clerk of Court in which to file and serve their responsive pleading." (R. pp.3-4)

The order concluded with:

> 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." (the court's signature followed) (R. p.7)

The "Mailing"

The Deadlines

According to Judge Keesley's order and its date of mailing, the deadline for filing and serving responsive pleadings was May 26, 2016. (R. pp.3-4)

Appellants' responsive pleadings were filed, by hand, on May 31st, five days after the court's deadline had passed in violation of the explicit order of the court. (R. p.108) That the filing deadline was missed by five days is not disputed. (R. pp.90-91)

The Mailing "Problem"

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

During the first default hearing in April of 2016, Appellants, in an attempt to avoid being placed in default, told Judge Keesley:

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

> apparently there is a problem.... (R. p.155, line 22 – p. 156, line 1)[15]

Appellant, again, in a memorandum in September:

> Unfortunately, this [having to call Easley Postmaster about lost mail] is a common occurrence for our local Post Office... (R. p.108, fn. 1)

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

> As I further explained to the Court on September 7, 2016, since opening our practice in Easley, South Carolina in 2009, we have experienced numerous problems with the mail.... (R. p.133, ¶5)

The Method of Mailing

In his April 28th order, Judge Keesley strongly recommended that both parties use certified mail going forward. (R. p.6) Still, having just escaped a finding of default, Appellants allege that in the "eleventh hour" before service was due by court order, she sent her responsive pleadings to the court and to Respondent with "untrackable" regular first class stamps. (R. p.97) To understand how egregious this choice was one must first understand the mailing options available to counsel *in her own office, which do not even require a trip to the post office.*

[15] Appellant did not disclose to Judge Newman at the second default hearing that she had made this promise to Judge Keesley at the first one, nor that her very next mailing to Respondent would violate that assurance.

Counsel for the Appellant uses a Stamps.com Postage Evidencing System to prepay postage for her mail, which provides the ability to print the paid indicia either on the mailed item or on a label. (R. pp.101 and 103) Stamps.com is one of only three authorized PC Postage Providers currently authorized by the USPS.

Through this system there are two basic types of labels that can be printed – dated or undated. All forms of dated indicia contain tracking numbers. All can be printed onsite and include a complete range of USPS options including: First Class Mail, Priority Mail, Parcel Post, Registered Mail, and Certified Mail. Since they all include dated indicia, they are required by the USPS to be mailed on the same day as the date printed on the item. It is not necessary for such dated mail to be taken to the post office, it can simply be placed in the sender's mailbox for regular daily pickup. The option exists to use the following day's date if the indicia is printed after the postman has already come that day. When an item sent this way is tracked, the earliest date shown in the tracking history is *not* the date of mailing, but rather the date the postage was paid, and is described in the tracking history as "Pre-Shipment Info Sent to the USPS." The actual date of mailing is the next date shown (which is often at a time after the post office has closed for the day) and is described in the history as "Accepted at USPS Origin Facility," which is the date that indicates the actual date of mailing.[16]

The undated postage that can be printed by Stamps.com is for regular first-class stamps which are essentially like the stamps one can purchase at any post office.

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

This is the *only* type of Stamps.com indicia that cannot be tracked. The USPS advises senders who might need proof of mailing for an item to take it to the post office and purchase a Certificate of Mailing from the clerk as the item is accepted for mailing.[17] Stamps.com recommends the same to its customers who might need proof of mailing.[18]

So it was, that when Appellant counsel appeared before Judge Newman, needing to explain her certificate of service dated May 25th paired with an envelope postmarked in Greenville on May 31st and an affidavit showing Respondent counsel received the mailing on June 2nd, and an envelope suggesting the court may have received it on June 3rd, Appellant counsel was at a distinct evidentiary disadvantage – through no fault but her own.

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

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

[18] A Stamps.com customer help article entitled "Certificate of Mailing" states, "When you need to have proof that you've sent a letter or package - purchase a Certificate of Mailing.A Certificate of Mailing is a receipt that provides evidence of the date that your mail was presented to the Postal Service™ for mailing. It can only be purchased at the time of mailing. For this reason, Stamps.com does not allow customers to pay for the Certificate of Mailing using our software. Instead consider using Certified Mail as it includes a proof of mailing receipt as well as proof of delivery. "
https://stamps.custhelp.com/app/answers/detail/a_id/1063/~/certificate-of-mailing

The (unnamed) Person Who Allegedly Did a May 25th Mailing

The Appellants contended that they mailed their response to the Amended Complaint on May 25th. The only evidence offered was an affidavit attached to the mailing wherein Appellants' counsel attested that some other (never-identified) person had mailed the response on the 25th. However, in her arguments to Judge Newman, Appellants' counsel stated that the mailing had actually been made by her (still unidentified) paralegal whom she follows to the post office every day at five o'clock and, presumably, observes her depositing the mail. Despite having two months to prepare for the default hearing, no affidavit was provided by the unnamed paralegal nor was she brought to the hearing to testify. There was simply no evidence by the person who is said to have mailed the response that it was mailed on any particular date—not even on reconsideration.

> MS. KERN-FULLER: I watch my paralegal every day when she leaves. I follow her home. We both live in Anderson. She puts it in the post office. (R. p.183, lines 4-6)

and

> I watch my paralegal every day put that mail in the post office because I follow her home. And I know when she says she put it in the post office on this day, because she leaves at five o'clock and she goes right past that post office. I know that she does. (R. p.186, line 21 – p.187, line 2)

As a basis for a subsequent motion to Judge Newman for reconsideration of default, Appellants acquired an affidavit from LaTonya Chester, an employee from another area post office unrelated to any of the mailings in this case. Whereas Appellant states above that she observed her paralegal depositing mail shortly after

5pm, LaTonya Chester, states that she was told the mailing took place around 6:15pm.

> Turning to this particular customer's issue [Appellant], I understand that the customer ... that she placed three copies of the documents in her local post office (Easley) on May 25, 2016, in one of the drive-up outside boxes at or around 6:15 p.m." (R. p.130 at 9).

In fact, since Appellant counsel did not herself mail the documents, she cannot be certain *when* (or if) they were mailed. Only the person who actually did the mailing could know for sure, and counsel never even named or provided an affidavit from that person about when and where the items were actually mailed.

The Dates of Mailing

There were two mailings of responsive pleadings at issue, one to Respondent and one to the Saluda County Clerk of Court.[19] Both were represented as having been mailed on May 25th. (R. pp.107-108)

Respondent counsel produced the envelope in which he had received the documents, which bore a Greenville postmark of May 31st. (R. p100) He also produced an affidavit from an assistant at his office stating that the mailing was received at his office in downtown Columbia on June 2nd. (R. p.99) This June 2nd date of receipt is far more consistent with a May 31st mailing than a May 25th mailing.

[19] There was also a mailing to Respondent's co-counsel in Charleston, but the postmark on the envelope he received was smeared, so it was not of use as evidence. His was also received on June 2nd.

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

> "Knowing this [that the mail would take three days], and the difficulties this case has faced, out of an abundance of caution,[20] the undersigned's office contacted the Saluda Clerk's office on Tuesday, May 31, 2016, to determine if they had received the filing." (R. p.108, lines 6-8)[21]

Discovering that the pleadings claimed to have been mailed May 25th, had not arrived at the Clerk's office by May 31st, counsel sent a runner to Saluda with the documents where they were hand filed and stamped with the May 31st filing date. (R. p.108, lines 9-10) Thus, no mailing dates are at issue in regard to the filing date – the filing was effected five days late.

The errant documents with attached check did show up in Saluda, after all, and the Clerk returned them as duplicative. (R. p.110). One might consider that Appellant counsel could have procured some information to prove her May 25th mailing to the court – an affidavit from the Clerk of Court about when and how it was received, the original envelope with its May 25th postmark, the check register to compare the check number in sequence; but there was *nothing* provided to Judge Newman about when that mailing occurred, except the June 3rd envelope the clerk

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

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

used to return the materials to Ms. Kern-Fuller, which actually contraindicates the claimed mailing date of May 25th. (R. p.88) June 3rd is, in fact, far more indicative of a May 31st mailing than a May 25th mailing. This evidence, withheld and not offered by Appellants, speaks volumes by its failure to be produced given a two-month preparation time frame.

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

The Totality of the Mailing Evidence

In short, what Judge Newman had before her was a party who had already escaped default once, had completely disregarded Judge Keesley's recommendation about certified mailing[22], had violated the court-ordered deadlines, and who claimed that on May 25th she sent three separate mailings to three different addressees in three different towns, and direct evidence that none arrived until June.

With all the evidence before the court being more consistent with a May 31st mailing than a May 25th mailing, and with the "only compelling evidence" she had before her being a postmark of May 31st (R. p.204, lines 2-5), it is certainly not

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

unreasonable that the mailing evidence before Judge Newman weighed heavily in favor of default.

The Court Applied the Correct Principles of Law

In the case of *Green v. Green,* 320 S.C. 347, 465 S.E.2d 130 (Ct.App. 1995) the court noted that while not dispositive, "the postmark date on an envelope is compelling evidence in cases where timely service through the mail is at issue…." *Id.* at 350, 465 S.E.2d at 132. In a South Carolina case heard by the Fourth Circuit Court of Appeals, the court noted that in cases of mailed notice or some other legally significant paperwork, "[i]n the context of mailing, there is usually some other objective evidence, such as a copy of the paperwork mailed, receipt of mailing, or proof of postmark that accompanies mailing." *First Professional Insurance Company v. Sutton*, 607 Fed.Appx. 276, 287 (4th Cir. 2015). The court also noted a situation analogous to that of the Appellant in this case (as was also noted by Judge Newman) that "the taxpayer is in the best position with the clock running to protect himself by procuring independent evidence of postmark and/or mailing, whether by mail receipt, corroborating testimony or otherwise." *Id.* Citing to *Serrentino v. IRS*, 383 F.3d 1187, 1195 (10th Cir. 2004). *See also Texas Beef Cattle Company v. Green*, 862 S.W.2d 812, 814 (Tx.Ct.App. 1993) where the court noted that with the facts before it *both* "the attorney's affidavit and a postage meter postmark does not overcome the presumption of date of mailing established by the U.S. postmark."

It should be noted that had the Appellant used a "postage meter postmark" on the system utilized by her office (Stamps.com) there would exist tracking information

as to when the postage was printed (through the USPS), when it was accepted by the USPS and when it was received by any other USPS facility in transit (and the identity of each facility) and the date and time of actual delivery. However, in this instance the Appellant used the only means available in her system which avoided a tracking record which would have proven or disproven compliance with the court order.

Additional Sustaining Ground for the Fact of Default

Respondent contends that the Appellants (then-defendants) were also in default under the terms of Judge Keesley's Order permitting responsive pleadings, because the Appellants were required to file their response to the Amended Complaint with the Saluda Clerk of Court by May 26, 2016, but did not do so and no issue of mailing is involved. Counsel's employee hand-delivered the same on May 31, 2016.

Discussion

Judge Keesley did not issue his order declining to hold defendant-appellants in default on the day of the hearing. He did so after carefully drafting his order. Presumably, to avoid any contention about the date of receipt, he explicitly stated that the included time period(s) would start on the date the Clerk of Court in Saluda mailed the order to defendants' counsel. The only way to tell the times set forth in the

order was to look at the postmark—there was no other indication. The clerk mailed the order, at the latest, on April 11, 2016.

An explicit requirement of Judge Keesley's order was that the defendants must (both) file and serve a responsive pleading or motion within the time frame provided above." (R. p.7) The time frame referenced was "15 days from the date this order is mailed to the defense attorney by the Clerk of Court in which to file and sere their responsive pleading." (R. p.4)

The order, thus, explicitly required two separate actions by defendants regarding their response. One was to serve them on plaintiff's counsel by May 26 (fifteen days from May 11th). The second was to file them with the court in Saluda by May 26th. Neither occurred. The defendants' answer and motion were hand delivered to the Saluda Clerk's office on May 31, 2016, some five days after the court had specifically ordered it to be filed. Rule 5(e) SCRCP defines filing with the court to mean what it says (unless there are specific statutes or rules providing otherwise.) *See Gary v. State*, 347 S.C. 627, 557 S.E.2d 662 (2001) ("It is clear under South Carolina law that mailing does not constitute filing.") Thus, the defendants were in violation of their second opportunity to avoid default by five days. On the other hand, plaintiff's counsels were not served by hand and the defendants' pleadings were not received until June 2nd which was one week after the court had ordered them to be served (with postmarks of May 31st).

The Court Correctly Denied Reconsideration of Default

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

Counsel's only affidavit was submitted on reconsideration and was a repetition of what she argued at the hearing. She added an issue - a seeming complaint that the hearing was before Judge Newman at all - an issue which she had not mentioned previously and to which her own attached email exhibit showed she approved.[23] (R. pp.133-137) A party cannot use a motion to reconsider to present an issue that could have been raised prior to judgment but was not. No error of law was addressed by the Appellant counsel. *See Poch v. Bayshore Concrete Products,* 386 S.C. 13, 686 S.E.2d 689 (Ct. App. 2009), rehearing denied, certiorari granted, affirmed as modified 404 S.C. 359, 747, S.E.2d 757 (2013).

LaToya Chester, a twenty-year Post Office employee currently at the Berea SC Post Office, provided an affidavit in support of Appellants' motion for reconsideration.

[23] Because there are few terms of court in Saluda, and because this case had languished so long, Respondent counsel wrote Judge Keesley requesting a hearing in Lexington in order to help move things along. Judge Keesley assigned the hearing to Judge Newman, and as the emails provided by Appellant counsel show, all parties agreed and no objections were made. (R. pp.136-137)

It was informative, but very general in nature and offered no information that was not available prior to the September 7th hearing; thus, it should have been procured and served at least two days prior to the default hearing before Judge Newman.

The Berea, SC Post Office – unlike the Easley Post Office and the Main Greenville Post Office – had nothing to do with the tardy documents at issue, and Ms. Chester had no firsthand knowledge of the items in question. Counsel for Appellants had already told Judge Newman at the September hearing, "I did go to the [Easley] post office and try to get them to give me something, but they refused." (R. p.186, lines 10-12)

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

The Court was Correct to Permit Expert Testimony

By Mary Feaster

Standard of Review

The qualification of a witness as an expert is within the trial court's discretion, and this Court will not reverse that decision absent an abuse of discretion. *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 555, 658 S.E.2d 80, 85 (2008). An abuse of discretion occurs when the decision of the trial court is unsupported by the evidence or controlled by an error of law. *Ledford v. Pa. Life Ins. Co.*, 267 S.C. 671, 675, 230 S.E.2d 900, 902 (1976). A trial court's ruling on the admissibility of an expert's testimony constitutes an abuse of discretion when the ruling is manifestly arbitrary, unreasonable, or unfair. *Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 25–26, 609 S.E.2d 506, 509 (2005) To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error in the ruling and resulting prejudice. *Id.*

Mary Feaster

Mary Feaster is a resident of Columbia, SC, and is retired from a thirty-six year career in nursing, teaching and counseling. She maintains her certification as a Licensed Professional Counselor in South Carolina.

Mary graduated from USC in 1975 with a Bachelor of Science degree in nursing. She worked as a Registered Nurse for Palmetto Health Richland, mainly in

the NICU – Neonatal Intensive Care Unit where she often dealt with young parents suffering grief over the loss of their newborns. She continued in her profession by receiving a Masters in Education and Rehabilitation, also from USC. Mary continued counseling and the teaching of counseling as she gravitated more and more toward psychiatry. Her work with psychiatric patients was general in nature and included both inpatient and outpatient work at Baptist Hospital and Palmetto Richland. She also did occasional private counseling. (R. pp. 296-297)

Mary's patient experience runs the gamut, including depression, anxiety disorders, psychoses, bipolar and other personality disorders. From the beginning, however, Mary had a deep interest in grief and loss issues, as she found that almost every patient, regardless of diagnosis, suffered from some form of unresolved grief. Mary concentrated on classes in grief and loss in her required continuing education classes and ran many support groups for patients suffering from grief and loss issues. (R. p. 301)

After Mary's retirement from Palmetto Health (Now Prisma) in 2009, she became a volunteer at Pawmetto Lifeline, a local non-profit animal rescue center and veterinary clinic. She quickly realized that many pet owners suffer deep grief over the loss of a close companion pet, so, for the past seven years, she has led a weekly support group at Pawmetto to help individuals who are having trouble recovering from the loss of a beloved pet. (R. p.297, line 12 – p.92, line 13)

There are few grief and loss therapists who have Mary's unique expertise on the similarity of losing a pet to losing a family member. After being approved by

Judge Alison Lee to give expert testimony in the area of pet grief and loss in this case, Mary spoke to a 2014 and first-of-its-kind, empirical study done by the Massachusetts General Hospital. This study called, *Patterns of Brain Activation When Mothers View Their Own Child and Dog*, (cited in the court's order) collected empirical data measuring the neurological responses of women who are shown random pictures of dogs and children, including their own. The study determined that the network of emotion felt by a woman for her own dog and her own child are very similar, but entirely different from their responses to the children and dogs of others. This study represents the first empirical evidence of what many pet owners have articulated for centuries – losing a pet is, in some cases such as the Respondent's, like losing a member of one's family. (R. p.311, line 8 – p.312, ln. 2)

Mary's particular expertise through years of general counseling and in the area of pet grief and loss, made her uniquely qualified to speak as an expert in this case and the court committed no erroring permitting her testimony.

The Court's Damages Award was Correct and Reasonable

Actual and Special Damages

Amy testified to her damages and went into great detail of how the killing of Ruby affected her.

Though Amy had family dogs throughout her life, Ruby was the first dog she ever had who was hers alone. Amy had lost a son several years before and had struggled to regain her usual positive outlook on life. At the urging of a grief counselor, she was advised to fill her life with as many things as possible that gave her joy. Ruby was one of those things that gave Amy true pleasure and she and Ruby became almost inseparable companions. (R. p.226)

This close relationship deepened when at 18 months of age, Ruby suffered a catastrophic leg injury. She had an extensive TPLO surgery, costing $2600, which repaired her left hind leg and required Amy to do six months of daily rehabilitation with Ruby. Though her ability to run was restored, Ruby could not jump. (R. p.222, line 23 – p.223, line 16)

Knowing what it was to love a dog, Amy was devastated when she accidentally ran over Appellants' dog, Allie, in 2012. Amy tried to speak to Appellants about it, but they would not speak to her. Though Allie had obviously been off Appellants property at the time she was killed, Appellants soon threatened that if they saw Amy's dog, Ruby, in their yard, they would shoot her. Amy installed an invisible fence that confined Ruby to her property but still allowed Ruby to swim and run in her large yard. (R. p.227, line 5 – p.228, line 19)

Even the Appellant Audrey McCarty admitted that the invisible fence had worked well for over three years in keeping Ruby off their property; (R. p.42, ¶10) yet, upon the first malfunction of the invisible fence when Ruby escaped her boundary, Appellant Audrey McCarty was quick, once again, to threaten that

Appellant John McCarty would shoot Ruby if she came into their yard. Amy explained what had happened with the fence and that she would repair the problem and retrain Ruby to the barrier. After retraining Ruby to her boundary, and mistakenly believing that the training had been successful, (R. p.233, lines 3-12) on the very next occasion Ruby entered Appellants yard, Appellant John McCarty shot Ruby, wounding her, and then as she was fleeing home, he shot her again to kill her. (R. p.43, ¶12)

On top of the actual loss of Ruby herself, Amy felt betrayed by her neighbors, to whom she had always remained approachable and with whom she always tried to cooperate. None of the well-contained pets in their neighborhood remained perfectly contained 100% of the time – including the dogs of the Appellants, who regularly escape into the street. (R. p.281, lines 13-19) Despite Amy's obvious efforts to comply with Appellants' wishes that Ruby not be in their yard, they killed Ruby anyway. In light of Ruby's nature as a happy, friendly dog, Amy is convinced that Ruby was killed as an act of vengeance in retaliation for Amy's never-forgiven accidental killing of Allie.

The immediate feelings of shock, anger and disbelief that beset Amy immediately after Ruby was killed, quickly gave way to pure grief and a constant sense of loss – of just missing Ruby. Underlying that was a constant sense of unease at the malevolence that resided permanently within the view of her kitchen window. Amy obsessed over the gap of time between the first shot fired at Ruby and the second shot that killed her. If Ruby was running home, Amy reasoned, she

had to be confused, afraid, and in pain. Mary Feaster, who gave expert testimony at the damages hearing, said,

> ...you have heard the expression... you can't unring a bell. Well, I think that's true with her [Amy's] situation that she can't unhear those shots and I think that still will torment her and I think that's very severe to have to go through.. (R. p.312, lines 15-19)

What became another complicating factor for Amy was the guilt she felt over the intensity of her grief for Ruby in comparison to the grief she had experienced when she lost her son, Ross. Amy sought counseling because she was unable to function normally in her life. As she described it was mainly because of:

> ...that feeling of conflict over the guilt, I think. I thought, it's almost like I was so devastated about Ruby, I missed her so much. I mean, her absence in my life was like palpable and then it felt like I am betraying my son. I am lessening [him]. That's just – I'll tell you what. I loved Ruby, but I would lose her a thousand times over to have my son back. It's not the same, but it felt the same to me and that made me feel bad and it was hard to live with and the counseling helped me sort through all that." (R. p.239, lines 15-25)

Amy testified that it took about two years before she was able to discontinue her counselling. She still experiences emotional conflict about losing Ruby, but she has been able to assimilate the event in her life in a more normal manner.

Amy presented records detailing her visits to Crossroads Counseling from 2015 – 2017. The cost of the counseling itself totaled $2,915. Additionally, since Amy lives in a rural area, she also incurred travel expenses for a round trip of about

50 miles each time she went for treatment. (R. pp.239-240) But, it was just for the cost of the counselling or the travel for which the court awarded monetary damages – it was for the defendants' admitted liability for causing Amy such severe and unendurable emotional distress that she was not able to sustain her normal life without treatment. The Appellants' contention about the treatment costing nearly $3,000 and implying her damages should be limited to that amount is the same as contending that a tortfeasor who physically harms another should only be responsible for their hospitalization costs, not for the hurt, injury, pain. suffering, loss of enjoyment of life or the permanency of the damage caused.

The sum awarded is reasonable. If Judge Lee had decided to simply award damages of $10.00 a day for severe emotional distress suffered every day for two years, that amount alone would have exceeded the sum awarded. And, the evidence is that the emotional distress continues—just less often.

If the Defendants' thought that the award of damages were excessive, they should have moved that the amounts awarded be reconsidered or for related relief. The court stated that the award of $7,500 for compensatory damages, included the costs of counseling, the emotional distress and a nominal amount of $5 for the dog, Ruby." (R. p.23) The cost of a pure-bred Australian Shepherd like Ruby, being considered by the law as a chattel, was the expected actual damage. But Amy refused to put a monetary value on Ruby beyond the nominal amount – her life and comfort being beyond dollars to Amy.

The court was under no obligation to itemize how it arrived at the award and the plaintiff has provided no authority to require a judge or jury to do so in such a case where personal injury and its treatment constitute the actual (and special) damages.

Punitive Damages

Standard of Review

There must be clear and convincing evidence that the defendant's conduct was willful, wanton, or in reckless disregard of the rights of others to support an award of punitive damages. *Longshore v. Saber Security Services*, 365 S.C. 554, 619 S.E.2d 5 (Ct.App.2005).

The Punitive Damage Award

The defendants should be grateful that the court only assessed a punitive damage award of $10,000. They have admitted to intentionally and cruelly killing a defenseless pet, socialized to be in the company of humans, solely to hurt the plaintiff and exact revenge. Just a reading of the Appellants' Brief which argues that the killing of Ruby was "lawful" is itself an explanation of why the amount is not only warranted but could have been much higher. The court sent its desired message to the Appellants' and others like them that *violent private justice for real or imagined wrongs cannot be tolerated by a civilized society.*

The *Gamble* factors did not require discussion by the court because most of them were admitted by the defendants in default—the factors were set forth in the Amended Complaint. The factors were that the defendants were property owners who owned a home and more than one piece of property. But, more importantly they had committed a vile, malicious act of revenge by deliberately causing extreme and severe emotional distress to another person, a neighbor. In addition, it was done with forethought, malice and truly evil hearts. To accomplish their revenge they killed a loving, beautiful and intelligent animal that had no idea why a human would want to harm her. (R. pp.345-347)

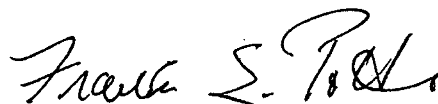
This was all before the court and was noted by the court.

CONCLUSION

There were three judges (not including previous appellate court judges) that have done their best to do justice in this case. Judge Keesley gave the defendants a second bite at the apple, probably based upon the sincerely expressed promises that the problems would be corrected and not repeated. Sadly, each and every representation to the judge made by defendants at that hearing was not kept – not even the simple act of using certified mail.

Judge Newman knew nothing of the case except what she saw in the file and Judge Keesley's carefully prepared order which the defendants had clearly violated in almost every way it could be violated. The case was one which screamed for default after trying to get the defendants to obey the rules of court and its orders after more than two years had passed.

Judge Lee patiently heard the damages testimony from the plaintiff and three witnesses, including an expert. Judge Lee's ruling was not what either party wanted but, it was fair and right. None of the three judges committed error and for that reason, judgment should be entered for Respondent together with the attorney's fees and costs in this matter.



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April 8, 2020
Leesville, SC

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SALUDA COUNTY
In the Court of Common Pleas

Jocelyn Newman, Circuit Court Judge
Alison Lee, Circuit Court Judge

Case No. 2015-CP-41-139
Appellate Case No. 2019-001279

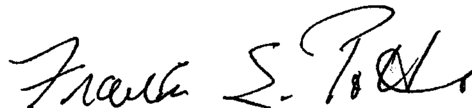
Amy Potts .... Respondent

v.

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

CERTIFICATION OF FINAL BRIEF

The undersigned hereby certifies that the Respondent's Final Brief complies with SCRAP Rule 211(b).



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Leesville, SC
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