

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM SALUDA COUNTY  
In The Circuit Court

The Honorable Alison Renee Lee, Circuit Court Judge  
The Honorable Jocelyn Newman, Circuit Court Judge

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C.A. 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.

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**BRIEF OF APPELLANTS**

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**I. ISSUES ON APPEAL**

- A. DID THE COURT ERR IN FINDING DEFENDANTS IN DEFAULT AND STRIKING THEIR ANSWER BECAUSE THE COURT PROCEEDED TO HEAR THE MOTION TO DISMISS AND THEN DENIED THE SAME PURPORTEDLY ON ITS MERITS, RATHER THAN MOOTING IT OR DISMISSING IT FOR FAILING TO BE FILED ON TIME, WHICH WOULD HAVE AFFORDED APPELLANTS AN ADDITIONAL FIFTEEN (15) DAYS TO ANSWER?
- B. DID THE COURT ERR IN FAILING TO GRANT DEFENDANT'S AMENDED MOTION TO DISMISS?
- C. DID THE COURT ERR IN GRANTING PLAINTIFF'S MOTION TO STRIKE DEFENDANTS' ANSWER AND IN ENTERING DEFAULT IN PLAINTIFF'S FAVOR DESPITE THE FACT THAT MAILING WAS COMPLETE UPON DEPOSIT AT THE POST OFFICE AND THE POSTAL WORKER'S AFFIDAVIT CORRECTING THE COURT'S ERRONEOUS CONCLUSION REGARDING THE GREENVILLE POSTMARK BEING DISPOSITIVE?
- D. DID THE COURT ERR IN QUALIFYING MARY FEASTER AS AN "EXPERT" IN "COUNSELING [AS IT] IS RELATED TO GRIEF AND LOSS[,] BOTH AS IT RELATES TO GRIEF AND LOSS RELATED TO PETS AND AS TO OTHER COUNSELING" WHEN SHE WAS ONLY A GENERICALLY LICENSED PROFESSIONAL COUNSELOR (LPC), WHO COULDN'T RECALL WHEN SHE WAS ACTUALLY FIRST LICENSED (1989 OR A DECADE LATER IN 1999 AS SC LLR RECORDS SHOWED), COULD NOT EVEN RECALL THE DATES SHE WORKED IN PSYCHIATRIC CARE AT PALMETTO BAPTIST HOSPITAL/PRISMA, WHOSE MASTER'S DEGREE WAS IN EDUCATION AND REHABILITATION COUNSELING, WAS NOT RESPONDENT'S TREATING COUNSELOR, ONLY FIRST MET RESPONDENT A FEW WEEKS BEFORE THE DAMAGES HEARING, ONLY REVIEWED RESPONDENT'S COUNSELING NOTES FOR THE PERIOD OF TIME AFTER THE INCIDENT (FROM 2015-2017), HAD MEETINGS WITH RESPONDENT FOR THE PURPOSE OF HER "EXPERT" OPINION, AND HEARD RESPONDENT'S TESTIMONY AT THE DEFAULT DAMAGES HEARING - ALL WHILE FEASTER WAS SO ILL/DISABLED SHE COULDN'T EVEN CONDUCT HER REGULAR, (UNPAID/VOLUNTEER) ONCE A WEEK, HOUR AND A HALF GROUP COUNSELING SESSIONS FOR FOUR MONTHS PRIOR TO HER TESTIMONY AND IN LIGHT OF THE FACT THAT FEASTER HAD NO CV, NO PUBLISHED PEER REVIEWED PUBLICATIONS (BOOKS OR ARTICLES), AND NO OTHER SPECIFIC EDUCATION OR CERTIFICATIONS IN THE AREA OF GRIEF OR LOSS (ESPECIALLY PET GRIEF OR LOSS) AND THEN CONSIDERING HER TESTIMONY IN WEIGHING THE VERDICT?
- E. DID THE COURT ERR, DESPITE DEFENDANTS BEING HELD IN DEFAULT, AND FAIL TO MAKE ITS OWN, INDEPENDENT JUDICIAL DETERMINATION

OF THE AMOUNT RECOVERABLE BY PLAINTIFF BASED ON THE STANDARD OF PROOF AS REQUIRED BY LAW AND TO CLOSELY SCRUTINIZE THE DEFAULT JUDGMENT TO PREVENT HARSH RESULTS AND DRASTIC ACTION AS REQUIRED BY RENNEY V. DOBBS HOUSE, INC., 275 S.C. 562, 567, 274 S.E.2D 290, 293 (1981)?

## II. STATEMENT OF THE CASE

### A. Factual Background

The facts as recited here are primarily taken from the damages hearing where, notably, as discussed below in part II.B, Defendants only had the opportunity to question and cross examine Plaintiff's witnesses, but put up no independent evidence of their own.

Appellants John McCarty and Audrey live in Saluda County and own a small vehicle and trucking escort company known as McCarty Enterprises, LLC. Appellants McCarty's home and their trucking company are on contiguous property in Saluda County. (R.pp. 31-32) Respondent and her husband are neighbors of Appellants.

This action arises out of the destruction of the Respondent's six plus year old Australian Shepherd ("Australian Shepherd") dog named "Ruby" by Appellant John McCarty while the animal was trespassing on Appellants' property on March 25, 2015, and trying to get into the enclosure where Appellants' animals were secured, only two days after two of Appellants McCarty's emus were destroyed by another trespassing animal that was running in a pack with the Australian Shepherd on the day in question. (R.pp. 42-43; 82-86; and 235, lines 6-10) At that time, the livestock the McCartys maintained (inside fences on their own property, mind you) included "donkeys, Emus, chickens, rabbits, and other various animals." (R.p. 325, line 25)

Respondent testified that she obtained the Australian Shepherd at issue in 2008 at three (3) months of age from a breeder in North Carolina (R.pp. 224, line 22 – 225, line 3).

Respondent testified from that day forward, "she just followed me. She was so loyal. If I was outside, she was outside. If I was in the house, she was in the house. If I was back in my office working, she was laying right there by my door. If I went on the boat, she went on the boat" (R.p. 226, lines 7-12). However, contrary to this testimony, on the day in question, and many many others, the Australian Shepherd was inexplicably put out in Respondent's yard, unattended, where she repeatedly escaped the Respondent's "underground fencing" between June of 2012 and the final date in question on March 25, 2015. (R.p. 231, lines 12-13)

Plaintiff claims that Appellants held a grudge against her since she accidentally ran over their dog, Allie, almost three years earlier, in June of 2012. (R.p. 228, lines 1-12) Problems with the Australian Shepherd actually dated all the way back to the Fall of 2010, when there was a report by Appellant Audrey McCarty to the Saluda County Sheriff's Office that the Respondent's Australian Shepherd was aggressive toward her. (R.p. 332, lines 2-5). As early as December of 2012, Appellant Audrey McCarty reached out to Respondent and advised her they were going to be getting rabbits and chickens and warned Plaintiff to please keep her Australian Shepherd off of the McCartys' property and away from their livestock or they would have to destroy her if she continued to come into their yard. (R.p. 230, lines 7-14)

Initially, Respondent testified that she "respected [the McCartys'] right. I mean, I didn't want Ruby in their yard either and **I agreed they had the right to not have her there** and we put that fence in and it was great for three years and so that's why it was so long before there was, you know, I mean, it was great. I thought everybody was happy, you know. And then, and I don't remember the date, but it was in mid-February [2015.] I was out packing my van to go to Tennessee and when I was out front, Audrey and a lady that I didn't know but I since know was someone who was working for her came by on her golf cart and she said, I just have to tell you,

**if Ruby comes in our yard one more time, my husband's gonna shoot her.** And I wasn't surprised. Well, I was surprised.” (R.pp. 230, line 19 – 231, line 6) (Emphases added) It shouldn't have been a surprise because Respondent admitted she also knew as early as February of 2015, that her Australian Shepherd was escaping the “underground fence” because she “started finding [her] outside of our barrier and I couldn't figure out” how. (R.p. 23, lines 12-13). Also, several years prior, the Respondent's same shepherd attacked one of Appellants' family pets on Appellants' property, causing great injury to the Appellants' pet. At that time, the Saluda County Sheriff's Office warned BOTH Respondent and Appellants that “they needed to keep their dogs on their property and leashed at all times.” They further advised both parties that “they had the right to protect their person and property against attacks on their property.” (R.p. 83, ¶6)(Emphasis added)

Further, Respondent is married to a lawyer (Respondent's Counsel, Frank S. Potts, Esq.) (R.pp. 243, line 3; 258, lines 1-22; 338, line 17), her son is a tax lawyer (Respondent's Counsel, Evan Lacke, Esq.) (R.p. 226, line 9), and her daughter (Anna Lacke) (R.p. 321, lines 23-24) is a paralegal to the managing attorney of Nexsen Pruet in Columbia (Leighton Lord, Esq.) (R.p. 322, lines 4-10) – all of whom could have advised her – in addition to the Saluda County Deputy who did - that unleashed dogs roaming about a neighborhood and onto others' property was a clear violation of state law and county ordinance and, further, if said animal threatened a person or another animal that the property owner “had the right to protect their person and property against attacks on their property” by any means necessary. (R.p. 83, ¶6) (Emphasis added)

Later in her testimony, Respondent claimed the date she and Mrs. McCarty had the conversation above was actually March 4<sup>th</sup> or 5<sup>th</sup> in 2015 (R.p. 275, lines 14-25) Regardless, the conversation occurred after Respondent independently knew that her Australian Shepherd was

off leash, leaving her property, and acting in violation of State Law (S.C. Code Ann. § 47-3-50) and Saluda County Ordinances. Respondent testified that conversation with Audrey McCarty on whatever day it actually was (February or early March 2015), was a “civil conversation,” not malevolent or malicious. **(R.pp. 190, line 24 - 191, line 1)**

At that point, the McCarty’s had previously warned Plaintiff of the consequences of their Australian Shepherd coming onto their land repeatedly for the past three (3) years – first in December 2012, and again in February (or the first week of March 2015), when Respondent admittedly knew the Australian Shepherd was escaping her enclosure whenever she left her unattended outside, **(R.p. 231, lines 4-5 and 12-13)**, and, again, the day after the emus were killed, but the day before Appellant John McCarty ultimately destroyed the Australian Shepherd on his own property after she attempted to get into his chickens’ enclosure. However, somehow Respondent’s perspective on the McCarty’s’ “right” not to have her dog in the McCarty’s yard, terrorizing/killing their livestock, had changed and she testified that “Let me say this right first that I am really taken aback by anybody who would shoot a dog. It’s not that I think that threatening to shoot a dog is, I think that is horrible.” **(Id. at lines 7-9)**. Despite this, Respondent testified that “my impression was that the McCarty’s are animal lovers. That was always my impression.” **(R.p. 281, lines 7-9)**

Respondent then left town for Tennessee with the Australian Shepherd on March 4, 2015 and didn’t return until March 19<sup>th</sup>, 2015. **(R.p. 275, lines 2-25)**. Thereafter, two of the McCarty’s emus were killed by dogs on March 23, 2015, and Audrey McCarty and her employee went to see Respondent on March 24, 2015, and advised her about the emu incident the day before. **(R.p. 277, lines 11-22)**. Appellant Audrey McCarty also allegedly told a neighbor, “the next dog that trespassed on Defendants’ property would be killed.” **(R.p. 43, ¶11)** Ultimately,

on the morning of March 25, 2015, Mr. McCarty shot the Australian Shepherd on his property (**Id.**; **R.p. 273, lines 18-20**) - both shots clearly occurring on the McCarty's property - the last one being on the McCarty's property "on the part of their property closest to [the Potts'] property." (**R.pp. 235, lines 24-25; 334, lines 11-25**). After hearing the first shot, Respondent even saw other dogs from the destructive pack running away (including the German Shepherd who had been identified destroying the McCarty's emus two days before). (**R.p. 235, lines 6-10**)

Respondent said when she heard the second shot, she began getting dressed and she got a phone call from another neighbor who told her that the Australian Shepherd has been shot by Appellant John McCarty on his property. Respondent then walked up there to the McCartys' property. (**R.p. 235, lines 15-25**). After ascertaining her the Australian Shepherd was no longer alive, Respondent called her husband and the Saluda County Sheriff's Office. (**R.p. 236, lines 1-6**). Respondent first admitted that she told the police to have the McCartys bury the Australian Shepherd (**R.p. 269, lines 1-6**), then said "I don't remember instructing them to bury the dog, just that we were not, you know, we didn't instruct them to bury the dog. Just that it was up to them." (**R.p. 269, lines 23-25**). She then said, "I do know that we declined to go get her to bury her. This may be what was implicit in our doing that, but we did not ... ." (**R.p. 271, lines 6-8**). Finally, she settled on, "He [the Sheriff's deputy] asked me before Frank got there. He said, what do you want them to do with the dog to me and I said let them, they shot her, let them deal with it and I think I was in kind of the same mind set because I bitterly regretted that later." (**R.p. 279, lines. 20-23**) In any case, Appellants buried the dog on their property and despite this conflict and the litigation, the McCarty's have never denied the Potts or Lackes access to visiting where the Australian Shepherd is buried on the McCartys' property and have even had their

grandson escort them out there when they have wanted to visit the gravesite. **(R.p. 335, lines 11-15).**

Later that evening, Respondent and her daughter went over to the McCartys, burst into the McCartys' business on the property, and began a "tense" confrontation with Appellant Audrey McCarty wherein Anna Lacke cursed at McCarty and she and Respondent both yelled at McCarty **(R.pp. 271, lines 25 – 272, line 1; 333, lines 12-17)**. Despite this, Appellant Audrey McCarty was not confrontational in response **(R.p. 333, lines 18-20)** and tried to explain that Appellants had relied upon Saluda County Sheriff's Office deputy's advice who said they were within their rights to destroy the Australian Shepherd who was repeatedly on their property and endangering their livestock "and that they had every right to do that." **(R.p. 329, lines 5-8)**. As the intensity of the verbal attacks of Respondent and her daughter increased, Appellant Audrey McCarty told them she was going to call the police, but, ultimately, did not do so while Lacke and Respondent were there. In response, Respondent quipped they "would be gone before the police arrived." Despite these behaviors, McCarty never pressed any charges against Lacke or Respondent. **(R.pp. 333, line 18 - 334, line 7)**

Previously, Respondent lost a son to diabetes in 2002 and had begun counseling for the same in 2006 **(R.p. 254, lines 2-9)**. Respondent sought more counseling in 2014 relating to family strife over another son's wedding. **(R.pp. 255, line 21 – 256, line 15)** Then, after the Australian Shepherd was shot, Respondent then restarted counseling again from April 2015-June 2017. **(R.pp. 240, lines 4-9; 256, lines 22-23)** Respondent admitted not all her counseling sessions were related to the grief over the Australian Shepherd. **(R.pp. 240, line 22 – 241, line 8)** There were other family strife issues also relating to her sisters in 2015 during the same time she sought counseling allegedly for her grief over the Australian Shepherd's destruction. **(R.p. 257,**

**lines 2-22)** Respondent ultimately alleged that \$2,915 in counseling charges were specifically related to counseling for the death of the Australian Shepherd. **(R.p. 241, lines 21-24)**

Respondent also claimed that she suffered “business losses” as a result of her inability to run her specialty Christmas ornament business that actually was listed on her joint tax returns as a business solely in her *husband’s name*, not hers. Respondent blamed this on the way that TurboTax “worked” despite her son (Mr. Potts’ co-counsel in this matter) being a tax lawyer. **(R.pp. 258, lines 4-22; 266, lines 9-11)** Respondent also admitted, “I know at the time this happened I had already been thinking about retiring and I think that this precipitated that and I thought about it and I discussed this a lot with my counselor.” **(R.p. 246, lines 16-19)**

Thereafter, Respondent admitted that the actual net profit for the ornament business in 2013 was only \$459 and only decreased to \$274 in 2015 **(R.p. 259, lines. 1-19)** Then, Respondent sold the business in 2017 for \$48,000.00 **(R.pp. 260, lines. 11 – p. 261, line 5)**, though Respondent doesn’t think she and her husband, Mr. Potts, claimed a capital gains that year, but they did consult her tax attorney son (Evan Lacke, Esq.) and stated they “followed his advice about everything to fill up and whatever, fill out. I did it correctly.” **(R.p. 266, lines 3-11)**

It appears that the Court did not award any lost profits from the ornament business in its award of \$7,500.00 in “compensatory damages,” though such award is otherwise uncategorized in the Order other than the blanket statement on page 6 of the Order stating, “Plaintiff is entitled to recover a total award of \$7,500 for compensatory damages which include the costs of counseling, the emotional distress and the nominal amount for the dog, Ruby [\$5.00].” **(R.p. 23)**. (The \$7,500.00 award was apparently also inclusive of counseling costs of \$2,915.00.)

Respondent stated she underwent treatment/counseling until June 2017, but there has been none since, and she was fully released from the Counseling at that time. **(R.p. 314, lines 14-**

19) Further, Respondent takes no medications for any permanent or residual mental health issues. (R.p. 315, lines. 1-16) Finally, none of Plaintiff's records entered into evidence denoted any long-term, permanent emotional damage from the shooting incident involving the Australian Shepherd (R.p. 317, lines. 16-24).

As such, presumably, the remaining compensatory damages awarded by the Circuit Court were based upon the "expert" testimony of Mary Feaster, LPC, who Respondent offered as an "expert in grief counseling." (R.p. 298, lines 14-15). During the *voir dire* of Ms. Feaster, it was discovered she was only a generically Licensed Professional Counselor (LPC), with her Master's Degree actually in Education and Rehabilitation Counseling (R.p. 299, lines 9-11). She couldn't remember if she actually became an LPC in 1989, as she first testified, or ten years later (in 1999) as her credentialing from LLR reflected. (R.pp. 298, lines 20 – 299 line 6) She also could not recall the actual time frame she worked in the psychiatric unit at Palmetto Baptist/Prisma other than "several years" and admittedly never worked exclusively in "grief and loss." (R.pp. 303, lines 3 - 304, line 10). Similarly, Feaster had no curriculum vitae (CV) (R.p. 303, lines 6-9), no peer reviewed publications (books or articles), and no other specific education or certifications in the area of pet grief or loss. (R.pp. 307, lines 21 – p. 308, line 4).

Feaster was also not Plaintiff's treating counselor. Rather, Feaster only met Respondent a mere "few weeks" before trial in the Spring of 2019 (R.p. 314, lines 5-7), purportedly for a total of ten (10) hours during those "few" weeks, and all while Feaster was so purportedly ill/disabled she couldn't even conduct her regular, unpaid, once a week, hour and a half (1½ hr weekly) group counseling sessions for the *four months* prior to her testimony, due to a wound on her leg subsequent to surgery. (R.pp. 304, lines 19 – p. 305, line 8). Feaster also purportedly

reviewed Respondent's counseling notes (**R.p. 314, lines 8-9**), but only from April 2015 forward to June 2017 and **not** before (**R.p. 320, lines 19-25**).

Despite the numerous deficiencies in her qualifications to be an expert in this matter, her lack of review of Respondent's counseling/medical records regarding her 2006 counseling regarding her son (Ross) and the 2014 counseling regarding her other son, the Circuit Court allowed Feaster to provide expert testimony as an "expert in counseling" and that the "counseling she does includes and is related to grief and loss both as it relates to grief and loss related to pets and as to other counseling so ... she's qualified to provide expert testimony as a counselor as it relates to those areas." (**R.p. 308, lines 13-19**)

Despite NEVER having even reviewed Respondent's prior counseling records, Feaster proceeded to testify that Respondent was still struggling with the death of her son from 2002, her family strife in 2014, and other family strife in 2015 (not related to the loss of her dog). When asked on cross-examination, she could not allocate "within a reasonable degree of medical certainty ... some percentage that is related to Ruby versus related to the death of Ross in 2002, the family strife she had in 2014, and the other family strife she had in 2015" because it "doesn't really work that way." (**R.p. 317, lines 2-10**) However, Feaster begrudgingly finally admitted after insinuating that Respondent had some lasting low grade depression (dysthemia) because of the Australian Shepherd's death, that she couldn't even tell if there had been the same/pre-existing depression diagnosis before the incident with the Australian Shepherd as it may have related to the 2002 death of Respondent's son, the 2014 family strife with Respondent's new daughter-in-law or prior 2015 issues, because she **only** reviewed the Respondent's counseling records from the Australian Shepherd incident (April 2015) forward through Respondent's last and final counseling session in June 2017. (**R.p. 320, lines 19-25**). As such, Feaster's testimony

about “cumulative effect” of these “traumas” should not have even been considered because in addition to the fact that she shouldn’t have been qualified regarding the same, her testimony was not supported by reliable evidence as required by SCRE 702 (R.p. 312, lines 8-23).

### **B. Procedural History**

Respondent’s husband, Frank Potts, Esq., initially filed suit on Respondent’s behalf on June 8, 2015. (R.pp. 28-35). In the first Complaint, Respondent only alleged conspiracy. Specifically, on June 14, 2015, Respondent served Appellants by personally serving Audrey McCarty as a “defendant; spouse of defendant; and person who also represented herself as the authorized agent for defendant John McCarty.” (R.p. 36). Appellant John McCarty is the registered agent for Appellant McCarty Enterprises, LLC. (R.p. 162). Appellants responded to the initial complaint by filing a Motion to Dismiss twelve days later, on June 26, 2015. The same was processed and clocked in by the Saluda County Clerk of Court on July 1, 2015. (R.p. 38).

Thereafter, things became difficult. Respondent’s husband, Mr. Potts, filed an Amended Complaint on July 13, 2015, alleging the same conspiracy claim, but adding a two paragraph emotional distress claim. (R.pp. 41-45) However, Appellant’s counsel never received a copy of the same nor any other letters Potts said he sent regarding the alleged default. (R.pp. 78-79). The technical posturing to try to obfuscate the meritorious issues with technical deficiencies began with the April 28, 2016, Motion for Default hearing requested by Respondent’s husband. Quite simply, from that point forward, Respondent took every opportunity to try to have this case decided by default on technicalities (and an erroneous ones at that) rather than have the matter heard on its merits, which is disfavored by this Court. Micronics, Inc. v. S.C. Dept. of Rev., 345 S.C. 506 (Ct. App. 2001). For instance, at the April 28, 2016, Motion for Default hearing, when

the undersigned tendered her affidavit to the Court setting forth that she had **not** received the Amended Complaint filing or the letters from Mr. Potts, Mr. Potts claimed the undersigned's affidavit was "not received, not filed." To clarify, the undersigned turned to Mr. Potts and said, "To be clear, you haven't received this?" to which Potts quipped, "If she wants to interrogate me, I'll go on the witness stand" (an offer which, in hindsight, might have been wise to have accepted.) In any case, after the undersigned detailed the numerous efforts she undertook to **ensure** Mr. Potts **actually** received the affidavit (sending it by U.S. Mail, email AND fax so it was received at least two business days before the hearing pursuant SCRPC 6) Mr. Potts then backpedaled and stated, "I do not deny I received it, but I was not served." (R.p. 150).

Mr. Potts then engaged in the same linguistic gamesmanship when he claimed at the same hearing, while seated at counsel table with **only** his wife/Respondent:

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

(R.p. 147) Then, at the subsequent hearing in front of Judge Newman, when Appellant's Counsel asserted Respondent was postal employee, Respondent's counsel denied Respondent worked at the Post Office at all and that Appellant's counsel "got it wrong":

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.

**(R.p. 180)**

On May 10, 2016, Judge Keesley ruled that given the mailing problems between counsel that Appellants had "15 days from the date this Order is mailed to the defense attorney to file and serve their responsive pleading." **(R.pp. 1-7)**. The order was manually postmarked by the Clerk of Court in Saluda on May 10, 2016, and postmarked at the Regional/SCF mailing facility in Columbia on May 11, 2016. **(R.pp. 1-8)**. In his Order, Judge Keesley encouraged the parties to send items certified mail, but did not require the same. **(R.p. 6)**. However, even with sending certified mail, Respondent's counsel continued to challenge the dates and times of the postal center receipts, alleging "fraud" in Appellant's certificates of service and at one point

inexplicably alleging that Appellant's Counsel's staff placed the item in the mail at 10:16 p.m. on April 27, 2016, two days after they actually mailed it on April 25, 2016, because that is when the post office *processed it* and entered into the electronic certified mailing tracking system (as if counsel could control when the Post Office processed her mail). (**R.p. 92**).

In accordance with Judge Keesley's Order, Appellant's Counsel sent the Amended Motion to Dismiss and an Answer on May 25, 2016 and, thereafter, the discovery responses (with appropriate objections made as allowed by Judge Keesley's Order) on May 31, 2016. Monday, May 30, 2016, was Memorial Day. When the filing hadn't arrived at Saluda County by the morning of May 31, 2016, Appellant's counsel began trying to track down the mailing with the U.S Postal Service. She also sent a runner to Saluda with an original filing to hand deliver. Though Appellant's counsel didn't get a response from her local post office about what actually happened to the mail item, it eventually arrived in Saluda County and to Respondent's counsel several days later and then was returned by the Saluda Clerk to Appellants' counsel because another original had already been couriered to them (**R.pp. 107-109**). Despite this, Judge Newman asserted that while she generally she agrees with SCRCP 5 and understands that a filing is complete upon mailing, "because of this tight time frame. Usually I agree that the rule says service is complete upon mailing but typically the evidence of the date of that mailing is the postmark on the envelope" despite the Rules and case law to the contrary. (**R.p. 184**) Appellants' counsel and the Court then had the following dialogue:

what do you want me to do with a May 31st postmark on this envelope?

MS. KERN-FULLER: The May 31st postmark, Your Honor, is in Greenville.

THE COURT: I see that.

MS. KERN-FULLER: That's what's important is because we mailed it in Easley. We didn't mail it in Greenville. And so what happened and our certificate of service, our sworn certificate of service -- and what happened is we put it in the Easley Post Office. Whenever it went from Easley and -- to Greenville to the regional mailing facility is when that postmark got put on it.

(Id.)

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

MS. KERN-FULLER: I understand.

MR. POTTS: May I address the Court?

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

THE COURT: Let her respond.

MS. KERN-FULLER: -- to explain to the Court that I did go to the post office and try to get them to give me something and they refused.

THE COURT: I'm sure. But the point is for whatever reason I don't have it.

MS. KERN-FULLER: I understand that, Your Honor.

If we had it to do over again, certainly we would have done it that way. In hindsight I probably would have sent it Fed-Ex. But, all I have is my word as an attorney and, you know, my standing as a bar member to say I watch my paralegal every day put that mail in the post office because I follow her home. And I know when she says, I put it in the post office box on this day, because she leaves at five o'clock and she goes right past that post office and puts it in the outside post office. I know that she does.

**(R.pp. 186, line 1 - 187, line 2)**

The Court then asked if the Motion to Dismiss and Answer filed were the same as previous.

Appellant's counsel responded that the motion was the same, **but that she had taken the time to add an Answer:**

THE COURT: -- is the same as the answer and motion to dismiss that you had previously filed that --

MS. KERN-FULLER: It was previously filed, a motion to dismiss. And this time I just went ahead and filed an answer, too. Even though I don't feel like I needed to, I did. But it is -- I have it. It is exactly the same as the previous motion to dismiss I had filed.

THE COURT: Okay. Which in my mind makes the delay in mailing it even more egregious because you could have hit print again and signed it and mailed it the same day.

**(R.p. 187, lines 9-21)**

As such, the Court seemingly ignored what the undersigned said about additionally filing of an Answer and simply mistakenly presumed all counsel had to do was “hit print again.” (**Id.**)

Respondent’s counsel focused during his argument on the fact that Appellant had no affidavit from the Postal Service to explain the delay or the difference between the Greenville postmark when the item was mailed from the Easley Post Office. (**R.p. 188**). As such, the Court erroneously found, “the only competent evidence I have before me is that it was in fact mailed on May 31st which is beyond the deadline prescribed by Judge Keesley. So I’m going to grant the Plaintiff’s motion for default.” (**R.p. 204**). Judge Newman issued her Form 4 Order finding the same, which was mailed to Appellants’ counsel on October 4, 2016 and was received on October 6, 2016. Subsequent to the hearing, Appellant’s counsel finally located and met with a customer service representative from the Greenville Sectional Center postal Facility (SCF) who was a postal clerk of over twenty (20) years and the person who regularly receives customer complaints. (**R.pp. 122-123; 128-131**) Ms. Chester ultimately provided her affidavit detailing *why* the Greenville SCF postmark of May 31, 2016, would **not** have been the mailing date on a piece of mail placed in the box *at the Easley post office*. Appellants then filed a Motion for Reconsideration on October 17, 2016 (a Monday) with Chester’s affidavit attached. In her affidavit, she detailed the Post Office processes:

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;

**(R.p. 130)**

Despite this additional information that had seemingly been craved by the Court and opposing counsel previously, Judge Newman denied the Motion for Reconsideration without further hearing. **(R.pp. 12-13)**. A prior appeal followed (Appeal #2017-000198).

Initially, Opposing Counsel filed a Motion to Dismiss claiming Respondents had filed an Interlocutory Appeal. This Court denied the same **(R.p. 13)**, and, thereafter, the parties fully briefed the case. Subsequently, after the briefing of both parties, the Court then Dismissed the Appeal as Interlocutory in a February 6, 2019, Unpublished Opinion. **(R.pp. 14-16)**. Thereafter, upon Remittur, the Circuit Court held a damages hearing on April 5, 2019 in Lexington County.<sup>1</sup>

At the damages hearing, Appellants' Counsel was only permitted to ask questions and cross-examine witnesses, but was not permitted to put forth additional witnesses by Defendants or additional evidence to dispute the underlying substantive issues in the case, due to the imposed "default" upon Defendants. The hearing concluded on April 5, 2019, and the Court took the matter under advisement. On July 1, 2019, the Court issued its Order on damages in this matter "against Defendants McCarty Enterprises LLC, John McCarty and Audrey McCarty,

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<sup>1</sup> All parties waived venue for the hearing, which was held at the Lexington County Courthouse on April 5, 2019.

jointly and severally, in the amount of \$7,500 for actual damages, \$10,000 for punitive damages, and appellate court costs of this action in the amount of \$2,968.96, for a total of \$20,468.96.”

**(R.p. 24).**

This appeal followed.

### **III. ARGUMENT**

#### **A. THE COURT ERRED IN FINDING DEFENDANTS IN DEFAULT AND STRIKING THEIR ANSWER BECAUSE THE COURT PROCEEDED TO HEAR THE MOTION TO DISMISS AND THEN DENIED THE SAME ON THE MERITS, RATHER THAN MOOTING IT OR DISMISSING IT FOR FAILING TO BE FILED ON TIME.**

Despite Plaintiff’s pending Motion to Strike Defendant’s Amended Motion for Dismiss and Answer and Enter for Default Judgment for Plaintiff, at Plaintiff/Respondent’s counsel’s own suggestion (**R.p. 166, lines 20-24**), the Court **first** heard the merits of Defendant’s Motion to Dismiss Plaintiff’s claims (**R.pp. 167, lines 15 - 177, line 6**) and then ruled on the merits of the same, finding “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. pp. 177, lines 2-6**)

As such, under SCRCP Rule 12, Defendants should **not** have been held in default, because they would have had an additional fifteen (15) days from the notice of the Court’s action in denying their Motion to Dismiss to file a responsive pleading and their Amended Answer had been previously filed either May 25, 2017 (the date of mailing) or, no later than May 31, 2017, (the date of physical receipt and filing by the Saluda County Clerk of Court). (**SCRCP 12(a)(1); R.pp. 80-87**)

**B. THE COURT ERRED IN FAILING TO GRANT APPELLANTS' MOTION TO DISMISS.**

As set forth in Capital City Ins. Co. v. BP Staff, Inc., 382 S.C. 92, 99, 674 S.E.2d 524, 528 (Ct. App. 2009):

An appellate court applies the same standard of review as the trial court when reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP. Doe v. Marion, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint. Id. The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief. Plyler v. Burns, 373 S.C. 637, 645, 647 S.E.2d 188, 192 (2007). Dismissal under Rule 12(b)(6) is improper if the facts alleged and inferences reasonably deducible from them, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory. Doe, 373 S.C. at 395, 645 S.E.2d at 247. Moreover, the complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action. Id. at 395, 645 S.E.2d at 0248. The trial court's grant of a motion to dismiss will be sustained only if the facts alleged in the complaint do not support relief under any theory of law. Ashley River Props. I, LLC v. Ashley River Props. II, LLC, 374 S.C. 271, 278; 648 S.E.2d 295, 298 (Ct. App. 2007).

“An action for civil conspiracy is an action at law, and the trial court's findings will be upheld on appeal unless they are without evidentiary support. Gynecology Clinic, Inc. v. Cloer, 334 S.C. 555, 556, 514 S.E.2d 592, 592-93 (1999). However, in this matter, the only evidence for the

Motion to Dismiss was from the Amended Complaint, taken in a light most favorable to the Plaintiff/Respondent.

As stated *supra*, in the Amended Complaint, Respondent makes two claims – one for civil conspiracy and the second for Intentional Infliction of Emotional Distress. (R.pp. 41-45).

**1. The Defendants, all of whom were alleged to be employees or principals of McCarty Enterprises, LLC, cannot conspire with themselves.**

In her Amended Complaint, Respondent makes the following allegations as it pertains to the alleged “conspiracy” between the Appellants:

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.”

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.

(R.pp 43, ¶¶13, 14, 15; 45, ¶23)

Further, a civil conspiracy cannot exist when the alleged acts arise in the context of a principal-agent relationship because by virtue of the relationship such acts do not involve separate entities. Perk v. Vector Resources Group, Ltd., 253 Va. 310, 485 S.E.2d 140, 144 (1997). John and Audrey McCarty are the agents of McCarty Enterprises, LLC as exhibited by Respondent's own certificate of service. John McCarty is the registered agent for the corporation and Audrey McCarty stated (also in the affidavit of service) that she was an authorized agent for McCarty Enterprises, LLC. (R.pp. 36-37). The sole factual allegations about Jane Doe were that:

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.

(R.p. 43, ¶¶ 11)

All the individual parties named are either principals or employees of Defendant McCarty Enterprises, LLC, and, according to Respondent's allegations in paragraph 23 of the Amended Complaint, the corporation acted "through the other individually named Defendants." (R.p. 45) As such, the Civil Conspiracy claim should have been dismissed as 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. The Appellants allege no additional special damages as a result of the alleged "Civil Conspiracy."**

As the Court held in Cricket Cove Ventures, LLC v. Gilland, 390 S.C. 312, 324–25, 701 S.E.2d 39, 46 (Ct. App. 2010):

"A civil conspiracy is a combination of two or more persons joining for the purpose of injuring and causing special damage to the plaintiff." McMillan v. Oconee Mem'l Hosp., Inc., 367 S.C. 559, 564, 626 S.E.2d 884, 886 (2006); *See also* Todd v. S.C. Farm Bureau Mut. Ins. Co., 276 S.C. 284, 292, 278 S.E.2d 607, 611 (1981) ("Conspiracy is the conspiring or combining together to do an unlawful act to the detriment of another or the doing of a lawful act in an unlawful way to the detriment of another."); Vaught v. Waites, 300 S.C. 201, 208, 387 S.E.2d 91, 95 (Ct. App. 1989) ("Civil conspiracy consists of three elements: (1) a combination of two or more persons, (2) for the purpose of injuring the plaintiff, (3) which causes him special damage."). The gravamen of the tort of civil conspiracy is the damage resulting to the plaintiff from an overt act done pursuant to a common design. Vaught, 300 S.C. at 208, 387 S.E.2d at 95.

In a civil conspiracy claim, one must plead acts in furtherance of the conspiracy that are separate and independent from other wrongful acts alleged in the complaint, and the failure to properly plead such acts will merit the dismissal of the claim. *See* Todd, 276 S.C. at 293, 278 S.E.2d at 611 (dismissing plaintiff's civil conspiracy cause of action because it did no more than incorporate the complaint's allegations in the previous causes of action and because the only alleged wrongful acts pled were those for which damages had already been sought). Further, the damages alleged must go beyond the damages alleged in other causes of action. *See* Vaught, 300 S.C. at 209, 387 S.E.2d at 95 (holding that Todd barred a conspiracy cause of action because no special damages were alleged aside from the damages already alleged for the plaintiff's breach of contract cause of action in that case)."

A civil conspiracy is a combination of two or more persons joining for the purpose of injuring and causing special damage to the plaintiff. Lawson v. S.C. Dept. of Corrections, 340 S.C. 346, 352, 532 S.E.2d 259, 261 (2000). Civil conspiracy involves acts that are by their very nature covert and clandestine and usually not susceptible of proof by direct evidence. Robertson v. First Union Nat'l Bank, 350 S.C. 339, 349, 565 S.E.2d 309, 314 (Ct. App. 2002).

Respondent alleged the following in her Amended Complaint as the sum total of damages as a result of the Civil Conspiracy claim:

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, 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.

**(R.p. 44, ¶¶16-21)**

Here, as in Todd, the Supreme Court indicated that a demurrer should have been sustained because the questioned cause of action “does no more than incorporate the prior allegations and then allege the existence of a civil conspiracy.” Id. at 293, 278 S.E.2d at 611.

As far as the Emotional Distress cause of Action, besides incorporating the Conspiracy allegations, Plaintiff merely alleged:

(R.p. 45, ¶¶23-24)

“Severe emotional distress” was, likewise, named as the sole damage from the alleged conspiracy (R.p. 44, ¶¶20-21) and is the same as the alleged damage from the Intentional Infliction of Emotional Distress claim. (R.p. 45, ¶¶23-24) Thus, there are no separate, special damages for the alleged Civil Conspiracy and, as such, the Civil Conspiracy claim cannot stand.

**3. The destruction of the Australian Shepherd while solely on Defendants’ property and being a threat to Defendants’ livestock was legal under S.C. Code Ann. §47-3-530.**

First, in order to allege a claim for civil conspiracy Respondent must allege facts sufficient to show that Appellant’s actions were *unlawful*. See Todd v. S.C. Farm Bureau Mut. Ins. Co., 276 S.C. 284, 292, 278 S.E.2d 607, 611 (1981) (“Conspiracy is the conspiring or combining together to do an **unlawful** act to the detriment of another or the doing of a lawful act in an unlawful way to the detriment of another.”)(Emphasis added) During oral argument and in Appellants’ Amended Motion to Dismiss, Appellant cited S.C. Code Ann. §47-3-530, which lawfully permits the killing of a dog that is threatening to cause or causes personal injury or property damage. (R.p. 173, lines 15-22). In paragraph 11 of the Amended Complaint, Respondent admits that Appellants had two emus killed on their property on March 23, 2015 and told Respondent of the same on March 24, 2015. (R.p. 43, ¶11) Despite this, on March 25, 2015, Appellant failed to secure her Australian Shepherd and left her outside, unattended, despite knowing the Australian Shepherd was escaping through the underground fence. As a result, the Australian Shepherd was killed the “following morning, March 25, 2015, at approximately 8:40 a.m., [when] the Defendant John McCarty fired two shots from a shotgun, killing “Ruby” on or adjacent to the property of his residence at 103 Kalyn Way.” (R.p. 43, ¶12). Based on S.C.

Code Ann. §47-3-530, Appellants committed NO *illegal* acts and, thus, could not have committed conspiracy.

**4. Respondent failed to alleged facts to adequately support that Appellants' action, as alleged in the Amended Complaint, met all the elements of the tort of "intentional infliction of emotional distress."**

As recounted in Hansson v. Scalise Builders of S.C., 374 S.C. 352, 356–57, 650 S.E.2d 68, 70–71 (2007):

“[I]n order to recover for intentional infliction of emotional distress, the complaining party must establish that:

- (1) the defendant intentionally or recklessly inflicted severe emotional distress, or was certain, or substantially certain, that such distress would result from his conduct;
- (2) the conduct was so “extreme and outrageous” so as to exceed “all possible bounds of decency” and must be regarded as “atrocious, and utterly intolerable in a civilized community;”
- (3) the actions of the defendant caused plaintiff's emotional distress; and
- (4) the emotional distress suffered by the plaintiff was “severe” such that “no reasonable man could be expected to endure it.”

\* \* \*

In *Ford*, the Court emphasized the heightened burden of proof articulated in the second and fourth elements of the tort, insisting that in order to prevail in a tort action alleging damages for purely mental anguish, the plaintiff must show both that the conduct on the part of the defendant was “extreme and outrageous,” and that the conduct caused distress of an “extreme or severe nature.” Chief Justice Littlejohn, writing for the Court, further reasoned that “where physical harm is lacking, the courts should look initially for more in the way of extreme outrage as an assurance that the mental disturbance claimed is not fictitious.” In this vein, our courts have since noted “the widespread reluctance of courts to permit the tort of outrage to become a panacea for wounded feelings rather than reprehensible conduct.” *Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 283 S.C. 155, 171, 321 S.E.2d 602, 611 (Ct.App.1984), *rev'd on other grounds*, 287 S.C. 190, 336 S.E.2d 472 (1985).” (Internal Citations omitted)

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*. However,

Appellants argued the Plaintiff/Respondent failed to allege specific facts that Defendants/ Appellants targeted Plaintiff/Respondent to be harmed or somehow enticed her animal onto their property in any way to cause such harm. Rather, the Appellants warned Respondent the day before of the livestock damage they had suffered at the paws and mouth of Respondent's animal in combination with others and warned them they would destroy any further trespassing animals. There are NO allegations that Appellants lured the animal onto their property to destroy it. Rather, Respondent's animal admittedly returned to Appellant's property and was destroyed by Appellant John McCarty there. The Court tried to assist Respondent's Counsel during its argument by stating:

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

**(R.p. 176, lines 1-5)**

The Respondent then pointed to paragraphs 15, 16 & 19 of her Amended Complaint, but again there were no specific allegations about how Appellants made Respondent's dog magically appear on their property, threatening their livestock so they could kill it for the sole reason to cause Respondent emotional distress. Respondent specifically alleged no facts of *how* the Defendants specifically targeted Respondent. **(R.p. 176, lines 19-23)**

The Court then stated, "it's right there in paragraph 15" (**Id.** at 15-16) which only alleged:

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)

Conversely, Appellant, by Respondent's own pleading, had a legitimate and legal reason for destroying the animal that was trespassing on Appellants' property after killing two emus only 2 days prior - S.C. Code Ann. §47-3-530. (R.p. 43, ¶11)

For these reasons, the lower court should have granted Appellants' Motion to Dismiss and failing to grant such was error.

**C. THE COURT ERRED IN GRANTING RESPONDENT'S MOTION TO STRIKE APPELLANTS' ANSWER AND IN ENTERING DEFAULT IN RESPONDENT'S FAVOR DESPITE THE FACT THAT MAILING WAS COMPLETE UPON DEPOSIT AT THE POST OFFICE AND THE POSTAL WORKER'S AFFIDAVIT EXPLAINED THE COURT'S ERROR IN ITS POSTMARK ASSUMPTION REGARDING THE GREENVILLE POSTMARK**

Respondent's counsel focused on the fact, during his Motion to Strike Appellant's Amended Motion to Dismiss and Answer and for Default argument, that Appellant had no affidavit from the Postal Service to explain the delay or the difference between the May 31<sup>st</sup> Greenville postmark when the item was mailed from the Easley Post Office on May 25th. (R.p. 188). The Court stated, "Usually I agree that the rule says service is complete upon mailing but typically the evidence of the date of that mailing is the postmark on the envelope. And what do you want me to do with a May 31st postmark on this envelope?" (R.pp. 183-184) Appellants' counsel clarified again, "The May 31st postmark, Your Honor, is in Greenville. ... what's important is because **we mailed it in Easley. We didn't mail it in Greenville.** And so what

happened and our certificate of service, our sworn certificate of service -- and what happened is we put it in the Easley Post Office. Whenever it went from Easley and -- to Greenville to the regional mailing facility is when that postmark got put on it.” (**Id.**)(Emphasis Added).

In Green v. Green, 320 S.C. 347, 350–51, 465 S.E.2d 130, 132 (Ct. App. 1995), the Court set forth the requirements for the date of service under SCRPC 5:

“Rule 5(b)(1), SCRPC; provides that “service by mail is complete upon mailing of all pleadings and papers subsequent to service of the original summons and complaint.” Mailing ordinarily occurs when a document is deposited with the U.S. Postal Service properly addressed with sufficient postage affixed. Southbridge Prop., Inc. v. Jones, 292 S.C. 198, 355 S.E.2d 535 (1987). Any designated mail depository box, whether in a building or along a mail route, constitutes a depository authorized for the receipt and delivery of mail. Rosen v. United States, 245 U.S. 467, 38 S.Ct. 148, 62 L.Ed. 406 (1918). Although the postmark date on an envelope is compelling evidence in cases where timely service through the mail is at issue, we are unaware of any authority, and the wife cites none, indicating the postmark date is dispositive. *See William B. Johnson, Annot., Proof of Mailing by Evidence of Business or Office Custom*, 45 A.L.R. 4th 476 (1986). Such would assume the infallibility of the U.S. Postal Service, an illogical assumption given the volume of letters and packages constantly being processed and the number of human hands any one envelope may pass through. We find no abuse of discretion in the trial court's finding that the motion was timely served by mail. *Cf. Beckham v. Durant*, 300 S.C. 329, 332, 387 S.E.2d 701, 703 (Ct.App.1989) (failure to make proof of service does not affect the validity of service).”

Contrary to the settled body of caselaw, the Court erroneously found, “the only competent evidence I have before me is that it was in fact mailed on May 31st which is beyond the deadline prescribed by Judge Keesley. So I'm going to grant the Plaintiff's motion for default.” (**R.p. 204**).

Subsequent to the hearing, Appellant's counsel met with a representative from the Greenville sectional center postal facility, who had been a postal clerk of over twenty years and the person who regularly receives customer complaints. (**R.pp. 129-131**) Ms. Chester ultimately detailed why the Greenville postmark of May 31, 2016 would *not* be the mailing date on a piece of mail placed in the box at the Easley post office and the same was then provided to the Court

and opposing counsel in Appellants' timely Motion for Reconsideration. In her affidavit, Ms. Chester stated:

- 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;

(R.p. 130, ¶7)

Despite this additional information that had seemingly been craved by the Court previously, Judge Newman denied the Motion for Reconsideration without further hearing. (R.p. 12). As such, the Court's wrong assumption that the Greenville postmark of May 31, 2016, was dispositive of the date of mailing, was clear error and an abuse of discretion. As such, the lower court's ruling holding Defendants in Default should be REVERSED and this matter REMANDED for further proceedings.

**D. THE COURT ERRED IN QUALIFYING MARY FEASTER AS AN "EXPERT" IN "COUNSELING [AS IT] IS RELATED TO GRIEF AND LOSS[,] BOTH AS IT RELATES TO GRIEF AND LOSS RELATED TO PETS AND AS TO OTHER COUNSELING" WHEN SHE WAS ONLY A GENERICALLY LICENSED PROFESSIONAL COUNSELOR (LPC), WHO COULDN'T RECALL WHEN SHE WAS ACTUALLY FIRST LICENSED (1989 OR A DECADE LATER IN 1999 AS SC LLR RECORDS SHOWED), COULD NOT EVEN RECALL THE DATES SHE WORKED IN PSYCHIATRIC CARE AT PALMETTO BAPTIST HOSPITAL/PRISMA, WHOSE MASTER'S DEGREE WAS IN EDUCATION AND REHABILITATION COUNSELING, WAS NOT RESPONDENT'S TREATING COUNSELOR, ONLY FIRST MET RESPONDENT A FEW WEEKS BEFORE THE DAMAGES HEARING, ONLY REVIEWED RESPONDENT'S COUNSELING NOTES FOR THE PERIOD OF TIME AFTER THE INCIDENT (FROM 2015-2017), HAD MEETINGS WITH RESPONDENT FOR THE PURPOSE OF HER "EXPERT" OPINION, HEARD RESPONDENT'S**

**TESTIMONY AT THE DEFAULT DAMAGES HEARING - ALL WHILE FEASTER WAS SO ILL/DISABLED SHE COULDN'T EVEN CONDUCT HER REGULAR, (UNPAID/VOLUNTEER) ONCE A WEEK, HOUR AND A HALF GROUP COUNSELING SESSIONS FOR FOUR MONTHS PRIOR TO HER TESTIMONY AND IN LIGHT OF THE FACT THAT FEASTER HAD NO CV, NO PUBLISHED PEER REVIEWED PUBLICATIONS (BOOKS OR ARTICLES), AND NO OTHER SPECIFIC EDUCATION OR CERTIFICATIONS IN THE AREA OF GRIEF OR LOSS (ESPECIALLY PET GRIEF OR LOSS)**

During the *voir dire* of Ms. Feaster, it was discovered she was only a generically Licensed Professional Counselor (LPC), with her Master's Degree actually in Education and Rehabilitation Counseling (**R.p. 299, lines 9-11**). She couldn't remember if she actually became an LPC in 1989, as she first testified, or ten years later (in 1999) as her credentialing from LLR reflected. (**R.pp. 298, line 20 – 299, line 6**) She also could not recall the actual time frame she worked in the psychiatric unit at Palmetto Baptist/Prisma other than "several years" and admittedly never worked exclusively in "grief and loss." (**R.pp. 303, line 3 - 304, line 10**). Similarly, Feaster had no curriculum vitae (CV) (**R.p. 303, lines 6-9**), no peer reviewed publications (books or articles), and no other specific education or certifications in the area of pet grief or loss. (**R.pp. 307, line 21 – 308, line 4**)

Feaster was also not Plaintiff's treating counselor. Rather, Feaster only met Respondent a mere "few weeks" before trial in the Spring of 2019 (**R.p. 314, lines 5-7**), purportedly for a total of ten (10) hours during those "few" weeks, and all while Feaster was so purportedly ill/disabled she couldn't even conduct her regular, unpaid, once a week, hour and a half (1½ hr weekly) group counseling sessions for the *four months* prior to her testimony, due to a wound on her leg subsequent to surgery. (**R.pp. 304, line 19 – 305, line 8**). Feaster also purportedly reviewed Respondent's counseling notes (**R.p. 314, lines 8-9**), but only from April 2015 forward to June 2017 and not before (**R.p. 320, lines 19-25**).

Despite the numerous deficiencies in her qualifications to be an expert in this matter, her lack of review of Respondent's counseling/medical records regarding her 2006 counseling regarding her son (Ross) and the 2014 counseling regarding her other son, the Circuit Court allowed Feaster to provide expert testimony as an "expert in counseling" and that the "counseling she does includes and is related to grief and loss both as it relates to grief and loss related to pets and as to other counseling so ... she's qualified to provide expert testimony as a counselor as it relates to those areas." (R.p. 308, lines 13-19)

Despite NEVER having even reviewed Respondent's prior counseling records, Feaster proceeded to testify that Respondent was still struggling with the death of her son from 2002, her family strife in 2014, and other family strife in 2015 (not related to the loss of her dog). When asked on cross-examination, she could not allocate "within a reasonable degree of medical certainty ... some percentage that is related to Ruby versus related to the death of Ross in 2002, the family strife she had in 2014, and the other family strife she had in 2015" because it "doesn't really work that way." (R.p. 317, lines 2-10) However, Feaster begrudgingly finally admitted after insinuating that Respondent had some lasting low grade depression (dysthemia) because of the Australian Shepherd's death, that she couldn't even tell if there had been the same/pre-existing depression diagnosis before the incident with the Australian Shepherd as it may have related to the 2002 death of Respondent's son, the 2014 family strife with Respondent's new daughter-in-law or prior 2015 issues, because she *only* reviewed the Respondent's counseling records from the Australian Shepherd incident (April 2015) forward through Respondent's last and final counseling session in June 2017. (R.p. 320, lines 19-25). As such, Feaster's testimony about "cumulative effect" of these "traumas" should not have even been considered. Further,

Feaster should never have been qualified regarding the same issues because her testimony was not supported by reliable evidence as required by SCRE 702 (R.p. 312, lines 8-23).

In Maybank v. BB&T Corp., 416 S.C. 541, 567, 787 S.E.2d 498, 511 (2016) the Court set forth that:

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.

“In qualifying an expert, the Circuit Court must make three key preliminary findings which are fundamental to Rule 702... First, the Circuit court must find that the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury.

Next, while the expert need not be a specialist in the particular branch of the field, the [circuit] court must find that the proffered expert has indeed acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter. Finally, the Circuit court must evaluate the substance of the testimony and determine whether it is reliable.” Lord v. D & J Enterprises, Inc., No. 2015-002361, 2018 WL 1410732, at \*1 (S.C. Ct. App. Mar. 21, 2018).

Despite Appellants' objection to Feaster's admission as an “expert,” the Court abused its discretion in qualifying Feaster as “expert in counseling” and that the “counseling she does includes and is related to grief and loss both as it relates to grief and loss related to pets and as to other counseling so ... she[] [was] qualified to provide expert testimony as a counselor as it relates to those areas.” (R.p. 308, lines 13-19) Further, the Court erred in accepting Feaster's opinion about Respondent's “cumulative” grief and loss when Feaster hadn't even *ever* reviewed Respondent's counseling records prior to the Australian Shepherd's death in 2015.

As such, the Court committed clear error and an abuse of discretion. As such, the lower court's admission of Feaster was clear error and an abuse of discretion and the Court's ultimate compensatory damage award and punitive damage award, though not explained or described as to what facts it was based upon, evinces prejudice based upon Feaster's "opinions."

As a result, the Court's qualification of Feaster should be REVERSED and this matter REMANDED for further proceedings.

**E. THE COURT ERRED, DESPITE DEFENDANTS BEING HELD IN DEFAULT, AND FAIL TO MAKE ITS OWN, INDEPENDENT JUDICIAL DETERMINATION OF THE AMOUNT RECOVERABLE BY PLAINTIFF BASED ON THE STANDARD OF PROOF AS REQUIRED BY LAW AND TO CLOSELY SCRUTINIZE THE DEFAULT JUDGMENT TO PREVENT HARSH RESULTS AND DRASTIC ACTION AS REQUIRED BY RENNEY V. DOBBS HOUSE, INC., 275 S.C. 562, 567, 274 S.E.2D 290, 293 (1981)**

After the damages hearing in this matter, the Circuit Court awarded an uncategorized verdict for Respondent in the amount of \$7,500.00 for compensatory damages, \$10,000.00 in punitive damages and the appellate costs previously awarded in the amount of 2968.96 for a total of for a total of \$20,468.96. (R.p. 23). The "award of \$7,500 for compensatory damages [] includes the costs of counseling, the emotional distress and the nominal amount for the dog, Ruby [\$5.00]." (Id.) The \$7,500.00 award was apparently also inclusive of counseling costs of \$2,915.00.

1. **The Court erred by unilaterally and inexplicably assigning a value of \$7,500.00 of alleged "emotional distress" damages without any explanation of how those damages were calculated or the facts relied upon in arriving at such and in light of Respondent's sole relatable medical costs of \$2,915.00 over a two year period.**

As set forth in Austin v. Specialty Transp. Servs., Inc., 358 S.C. 298, 311, 594 S.E.2d 867, 874 (Ct. App. 2004):

Actual damages are properly called compensatory damages, meaning to compensate, to make the injured party whole, to put him in the same position he was in prior to the damages received insofar as this is monetarily possible. See Clark v. Cantrell, 339 S.C.

369, 529 S.E.2d 528 (2000). Actual damages are awarded to a litigant in compensation for his actual loss or injury. Laird v. Nationwide Ins. Co., 243 S.C. 388, 134 S.E.2d 206 (1964). Actual damages are such as will compensate the party for injuries suffered or losses sustained. Id. They are such damages as will simply make good or replace the loss caused by the wrong or injury. Actual damages are damages in satisfaction of, or in recompense for, loss or injury sustained. Barnwell v. Barber-Colman Co., 301 S.C. 534, 393 S.E.2d 162 (1989). The goal is to restore the injured party, as nearly as possible through the payment of money, to the same position he was in before the wrongful injury occurred. Clark, 339 S.C. at 378, 529 S.E.2d at 533.

As further set forth in Wells Fargo Bank, N.A. v. Marion Amphitheatre, LLC, 408 S.C. 87, 90, 757 S.E.2d 557, 558–59 (Ct. App. 2014):

It is common knowledge ... that in a tort action the amount stated in the prayer for relief often bears little relation to the amount which the plaintiff is entitled to recover. The prayer in an action may not serve as a substitute for proof.” 271 S.C. at 240, 246 S.E.2d at 881. In Renney, the supreme court stated, “This case is one more in a series of cases which has given the court great concern. They involve large awards in default claims involving unliquidated damages.” 275 S.C. at 566, 274 S.E.2d at 292. In Solley, we reversed part of an award of special damages, not because the trial court awarded the amount demanded in the prayer, but because the plaintiff failed to prove the amount of the alleged loss. 397 S.C. at 210, 723 S.E.2d at 606. **As Solley demonstrates, therefore, the principle that a plaintiff must prove his damages even when the defendant is in default applies to all damages claims in default cases.**

(Emphasis added)

However, nowhere does the Court provide an explanation for how it arrived at the \$7,500.00 or what facts it relied upon in determining such award. While Respondent stated she underwent treatment/counseling until June 2017, she also admitted there had been none since, and she was fully released from the Counseling at that time. **(R.p. 314, lines 14-19)** Further, Respondent takes no medications for *any* permanent or residual mental health issues. **(R.p. 315, lines 1-16)** Finally, none of Plaintiff’s records entered into evidence denoted any long-term, permanent emotional damage from the shooting incident involving the Australian Shepherd **(R.p. 317, lines 16-24)**.

As such, Respondent failed to meet its burden by preponderance of the evidence that she was entitled to compensatory damages of \$7,500,00 when her counseling costs were only

\$2,915.00. Further, the Circuit Court failed to fulfill its burden under Renney v. Dobbs House, Inc., 275 S.C. 562, 567, 274 S.E.2d. 290, 292 (1981) to “closely scrutinize default judgments to prevent harsh results and drastic action.”

As such, the judgment should be REVERSED and REMANDED with instructions to provide such.

2. **The Court erred in inexplicably assigning punitive damages of \$10,000.00 without discussing a single one of the *Gamble* factors or relating the same to the facts of the case, as developed by a preponderance of evidence at the damages hearing, other than making a perfunctory list of the *Gamble* factors in a footnote on pages 6 and 7 of the order**

In Limehouse v. Hulsey, 404 S.C. 93, 115, 744 S.E.2d 566, 578 (2013), the Court held that:

[W]e note there are due process safeguards for cases involving punitive damages. It is well established that the relief granted in a default judgment is limited to that supported by the allegations in the Complaint and the proof submitted at the damages hearing. Jackson v. Midlands Human Res. Ctr., 296 S.C. 526, 529, 374 S.E.2d 505, 506 (Ct.App.1988) (“In a default case, the plaintiff must prove by competent evidence the amount of his damages, and such proof must be by a preponderance of the evidence. Although the defendant is in default as to liability, the award of damages must be in keeping not only with the allegations of the complaint and the prayer for relief, but also with the proof that has been submitted. A judgment for money damages must be warranted by the proof of the party in whose favor it is rendered.” (citations omitted)). Moreover, trial judges and appellate courts conduct a review of the award to ensure the verdict is not excessive and is supported by the evidence. See Mitchell v. Fortis Ins. Co., 385 S.C. 570, 686 S.E.2d 176 (2009) (discussing the history of due process limitations on punitive damages awards and identifying guideposts for post-judgment review of punitive damages awards).

As set forth in Austin v. Specialty Transp. Servs., Inc., 358 S.C. 298, 313–14, 594 S.E.2d 867, 875 (Ct. App. 2004):

On the issue of punitive damages, the highest burden of proof known to the civil law is applicable. Section 15–33–135 of the South Carolina Code provides: In any civil action where punitive damages are claimed, the plaintiff has the burden of proving such damages by clear and convincing evidence. S.C. Code Ann. § 15–33–135 (Supp. 2003).

Punitive damages can only be awarded where the plaintiff proves by clear and convincing evidence the defendant's misconduct was willful, wanton, or in reckless disregard of the plaintiff's rights. Taylor v. Medenica, 324 S.C. 200, 479 S.E.2d 35 (1996); Lister v. NationsBank of Delaware, 329 S.C. 133, 494 S.E.2d 449 (Ct. App. 1997).

There is no formula or standard that can be used as a measure for assessing punitive damages. However, factors relevant to consideration of punitive damages are:

- (1) the character of the defendant's acts;
- (2) the nature and extent of the harm to plaintiff which defendant caused or intended to cause;
- (3) defendant's degree of culpability;
- (4) the punishment that should be imposed;
- (5) duration of the conduct;
- (6) defendant's awareness or concealment;
- (7) the existence of similar past conduct;
- (8) likelihood the award will deter the defendant or others from like conduct;
- (9) whether the award is reasonably related to the harm likely to result from such conduct; and
- (10) defendant's wealth or ability to pay.

See Gamble v. Stevenson, 305 S.C. 104, 406 S.E.2d 350 (1991);

“Under Gamble, the trial court is not required to make findings of fact for each factor to uphold a punitive damage award.” Welch v. Epstein, 342 S.C. 279, 306, 536 S.E.2d 408, 422 (Ct. App. 2000). “This Court must affirm the trial court's punitive damages finding for the Respondents if any evidence reasonably supports the judge's factual findings.” See Carjow, LLC v. Simmons, 349 S.C. 514, 563 S.E.2d 359 (Ct. App. 2002). However, in the case at bar, the Judge made ***absolutely NO factual findings on a single one*** of the ten Gamble factors to support the award of punitive damages against the Appellants.

As such, the judgment for punitive damages should be REVERSED and REMANDED.

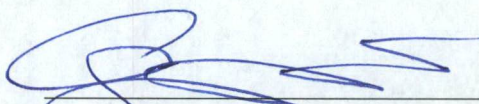
#### IV. CONCLUSION

For the reasons set forth above, the Court erred:

- 1) in holding Appellants' in default after hearing their Amended Motion to Dismiss *at Respondent's Counsel's suggestion*;
- 2) in denying Appellants' Amended Motion to Dismiss;

- 3) in further striking Appellants' Answer and entering default against Appellants despite the service being complete upon mailing on May 25, 2016
- 4) in qualifying Mary Feaster LPC as an expert in grief and loss both as it relates to grief and loss related to pets and as to other counseling when her testimony was not reliable and then considering her testimony when weighing the verdict;
- 5) in awarding \$7,500.00 in compensatory damages and \$10,000.00 in punitive damages without a single factual finding to support said verdict, including a discussion of *a single one* of the Gamble factors;

For these reasons the lower court's ruling should be REVERSED and REMANDED.



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April 8, 2020

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM SALUDA COUNTY  
In The Circuit Court

The Honorable Alison Renee Lee, Circuit Court Judge  
The Honorable Jocelyn Newman, Circuit Court Judge

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C.A. No.: 2019-001279

Amy Potts.....Respondent.

v.

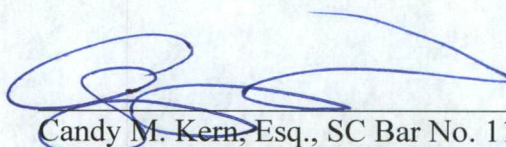
McCarty Enterprises, LLC, John Miles McCarty, Audrey S. McCarty, a/k/a Audrey J.  
McCarty and Jane Doe .....Appellants.

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**CERTIFICATION OF FINAL BRIEF**

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



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APR 13 2020

SC Court of Appeals

Easley, South Carolina

**ATTORNEY FOR APPELLANTS**

April 8, 2020