THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHEROKEE COUNTY
Court of Common Pleas

R. Keith Kelly, Circuit Court Judge

Trial Court Case No. 2017-CP-11-330
Appellate Case No. 2019-001414

Shanna Rene Ingle, as Personal Representative of the Estate of Gladys B. Potter, Respondent.

v.

Donald Moody and Shayan Investments Gaffney, LLC, Defendants,
Of Which Shayan Investments Gaffney, LLC is the, _____, Appellant

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FINAL BRIEF OF RESPONDENT

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COUNTER STATEMENT OF THE CASE

The Respondent commenced an action against Respondent Shayan Investments Gaffney, LLC and Donald Moody on April 30, 2017 in the Court of Common Pleas for Cherokee County. The Respondent sought damages against both Appellant Shayan Investments Gaffney, LLC and Donald Moody, actual and punitive. Respondent alleged two (2) causes of action against both Appellant Shayan Investments Gaffney, LLC and Donald Moody. The first cause of action was based upon strict liability and the second cause of action was based upon negligence. (R. pp. 9-13) Neither Defendant filed an Answer. Appellant was served with the Summons and Complaint by Statutory service on August 7, 2017. (R. p. 90). Respondent filed an affidavit of default on October 17, 2017. (R. p. 88) Respondent filed a motion for judgment by default on January 2, 2018 and also sought a damages hearing. (R. p. 14). The Motion was served on Appellant by sending to Appellant's Registered Agent. A hearing was scheduled and Appellant was sent Notice of Hearing.

A damages hearing was held on February 20, 2018 before the Honorable R. Keith Kelly setting without a jury. The Appellant did not attend the hearing. The Court issued its Order dated February 27, 2018. (R. pp. 1-5) The Court granted judgment to Respondent against Appellant and co-Defendant Donald Moody jointly and severally for actual and punitive damages. The Order and Judgment was served upon Appellant by mail on March 1, 2018. (R. p. 6) The Appellant filed Notice of Appeal on August 21, 2019.

STANDARD OF REVIEW

The Respondent brought this action against Appellant upon two (2) causes of action. The first cause of action was premised upon S.C. Code Ann. 47-3-110 (2017). This code section is commonly referred to as the dog bite statute. Under the conditions set forth in this statute, the law imposes strict liability for injuries suffered for a dog bite. Respondent's second cause of action was based upon negligence. Both of these causes of action are actions at law.

On appeal of an action at law tried without a jury, the appellate court will not disturb the trial court's findings of fact unless no evidence reasonably supports the findings. *Townes Assocs., Ltd. v. City of Greenville*, 266 SC 81, 221 S.E. 2d 773 (1976). In an action at law on appeal of a case tried without a jury, the appellate court's standard of review extends only to the correction of errors of law. *Consignment Sales LLC v. Tucker Oil Co.*, 391 SC 266, 705 S.E. 2d 73 (Ct. App. 2011).

Further, in a default action, the default judgment settles the issues of liability. *Ammons v. Hood*, 288 SC 278, 341 S.E. 2d 816 (Ct. App. 1986). However, while a defaulting Defendant has conceded liability, he does not concede the amount of liability. *Solley v. Navy Fed. Credit Union, Inc.* 397 S.C. 192, 723 S.E. 2d 597 (Ct. App. 2012).

Therefore, assuming, *arguando,* this appeal is properly before the Court, the only issue to be considered would be the amount of damages using the standard of review as set forth above.

ARGUMENT

I. This appeal is not properly before the Court.

A. No Right to Appeal Default Judgment

The question arises as to whether the Appellant has the right to appeal a default judgment. In the case of *Belue v. Belue*, 276 SC 120, 276 S.E. 2d 295 (1981) our Supreme Court dismissed an appeal of a default judgment. The Supreme Court stated, "Since no appeal lies from a default judgment in the absence of statutory provisions or radical defect in the judgment… a Defendant is estopped from thereafter challenging the judgment and is not entitled to take further steps in the cause affecting the Plaintiff's cause of action, except to attempt to set aside this judgment…. Appellant's proper remedy would therefore be to attempt to have the judgment set aside pursuant to Section 15-27-130, S.C. Code (1976)…" (citing. *Gadsden v. Home Fertilizer and Chemical Co.*, 89 SC 483, 72 S.E. 15 (1911), also Rule 60, SCRCP is now the equivalent of Section 15-27-130, which was repealed). Although the Order and Judgment in this case was sent to the address of Appellant's registered agent, arguably that was not even required. Rule 77 (d), SCRCP controls the notice of Orders or Judgments. Rule 77(d) provides as follows, "Immediately upon the entry of an Order or Judgment the Clerk shall serve a notice of the entry by first class mail upon every party affected thereby who is not in default for failure to appear." As stated in *Belue*, the Appellant is estopped from challenging the judgment. Otherwise, Rule 77(d) SCRCP which does not require service of the judgment on a defaulting Defendant, would not make any sense. Finally, as this Court pointed out in *Rosen, Rosen and Hagood v. Hiller*, 307 SC 331, 415 S.E. 2d 117 (Ct. App. 1992), "Ordinarily, unless mandated by statute or rule of court, a party is not entitled to notice of the entry of judgment against him." Since Rule 77(d) SCRCP

specifically excludes a party in default, the Appellant herein was not entitled to notice of the judgment. Nevertheless, Respondent **did** afford Appellant notice by sending the Order and Judgment to Appellant by way of U.S. Mail to Appellant's Registered Agent.

B. Appeal is not timely

Assuming, *arguando*, that Appellant has a right to appeal, the appeal is not timely. An Appellant must serve the Notice of Appeal in a case appealed from the Court of Common Pleas on all Respondents within thirty (30) days after receipt of written notice of entry of the Order of Judgment. Rule 203(b)(1), SCACR.

In the present case, the Circuit Court rendered judgment against the Appellant on February 27, 2018. The Appellant did not serve his Notice of Appeal until August 21, 2019, almost one (1) year and six (6) months later. The Appellant in his Statement of the Case alleges, without any elaboration, that he did not receive notice of the entry of the Order and Judgment in this case until July 22, 2019.

Rule 5(a), SCRCP provides, "Unless otherwise ordered by the Court because of numerous Defendants or other reasons, all (1) written orders….., shall by served upon each of the parties of record….". Rule 5(b)(1), SCRCP provides, "Service upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address…, Service by mail is complete upon mailing of all pleadings and papers subsequent to service of the original Summons and Complaint." In the present case, the Order and Judgment was mailed to Appellant on March 1, 2018. Therefore, pursuant to Rule 5(b), SCRCP, service upon the Appellant was complete on March 1, 2018. Therefore, based upon the record, Appellant's Notice of Appeal is untimely.

Appellant is a limited liability company (LLC). At the time the underlying action was filed and up through the date of this appeal, Shahram Lalianpour at 172 Ruth

Drive, Gaffney, South Carolina 29341 is listed as the Registered Agent for this Appellant. S.C. Code Ann. 33-44-108 (2006), requires a limited liability company to designate and continuously maintain in this State an agent and street address of the agent for service of process on the company. In this appeal, the Appellant has not challenged the method of service of the Summons and Complaint upon the Appellant, therefore the Circuit Court had proper jurisdiction over the Appellant and this is now the law of this case. The Appellant has not challenged the method of service of the Order and Judgment on the Appellant. Therefore, service of the Order and Judgment pursuant to Rule 5, SCRCP is the law of the case. (See Certificate of Service by Mail dated March 1, 2018, R. p. 6).

In summary, it is uncontested that Appellant was properly served with the Summons and Complaint and failed to file any responsive pleadings. It is uncontested that Appellant was given proper notice of the damages hearing, but failed to appear or participate. It is uncontested that the Order and Judgment was properly sent to Appellant pursuant to Rule 5, SCRCP.

Appellant had a duty to maintain an agent for the service of process pursuant to S.C. Code Ann. 33-44-108 (2006). Respondent had a right to rely upon the statutes of this State requiring the Appellant to maintain an agent for the service of process. Respondent had a right to send the final Order and Judgment to the address of the agent. Appellant's bare assertion in his notice of appeal and in his brief that he did not get notice of the Order and Judgment until July 22, 2019 is completely without support in the record. Therefore, the appeal is untimely, not by days, not by weeks, but by months. Under Rule 5, SCRCP, service was complete upon mailing. Additionally, Rule 77(d), SCRCP provides "such mailing… is sufficient notice for all purposes for which notice of entry of an Order or Judgment is required by these rules." Therefore, even if

Appellant had a right to appeal, its notice of the Judgment was complete under Rule 77(d), SCRCP when the Judgment was sent to Appellant's Registered Agent on March 1, 2018.

II. No issues are preserved for Appellate review.

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. *Pye v. Estate of Fox*, 369 S.C. 555, 633 S.E. 2d 505 (2006) *citing Holy Lock Distribs., Inc. v. Hitchock*, 340 S.C. 20, 531 S.E. 2d 282 (2000); *Staures v. City of Folly Beach*, 339 SC 406, 529 S.E. 2d 543 (2000).

Assuming, *arguando*, that appellant did not get notice of the Order and Judgment until July 22, 2019 and assuming, *arguando*, appellant has a right to appeal, the Appellant did not file any motion pursuant to Rule 59(e), SCRCP. A party must file a Rule 59(e), SCRCP motion to preserve an issue the trial court fails to rule on. *Elam v. SC Dep't of Transp.*, 361 S.C.9, 602 S.E. 2d 772 (2004). An issue not properly preserved cannot be raised for the first time on appeal. *State v. Hoffman*, 3212 S.C. 386, 440 S.E. 2d 869 (1994).

Since no issues are preserved for appellate review, this appeal should be dismissed.

III. Action not barred against Appellant.

In section IV of Appellant's argument, the appellant asserts that Respondent's recovery is barred by the "law of landlord and/or property owner liability for animals."

The Appellant never appeared in this action and was found to be in default. Appellant did not challenge this finding. In a default action, the default judgment settles

the issue of liability. The hearing is held solely to determine what damages should be awarded. *Ammons v. Hood*, 288 SC 278, 341 S.E. 2d 816 (Ct. App. 1986). The issue appellant attempts to raise in this argument is not before the Court. This argument is one of liability and not damages. Further, for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. *S.C. Dept. of Transportation v. First Carolina Corp. of S.C.*, 372 SC 295, 641 S.E. 2d 903 (2007).

In any event, the argument is without merit.

IV. The trial Court properly awarded actual and punitive damages.

In Section III of Appellants arguments, Appellant argues the trial court erred in awarding actual damages. Once again, Respondent asserts this matter is not properly before the Court. In any event, this argument has no merit.

The trial judge has considerable discretion regarding the amount of damages, both actual and punitive. *Austin v. Specialty Transport Servs. Inc.*, 358 SC 298. 594 S.E. 2d 867 (Ct. App. 2004). This court's review is limited to a determination as to whether there is any evidence to support the trial court's findings. *Townes Assoc. Ltd. v. City of Greenville*, 266 SC 81, 221 S.E. 2d 773 (1976). The appellate court's task in reviewing a damages award is not to weigh the evidence, but to determine if there is any evidence to support the damages award. *Id*.

The record contains ample evidence to support the award of damages. The Appellant focuses on the medical bills. Although Respondent's medical bills were only approximately $1,000.00, her damages were considerable. The dogs attacked the Respondent at her own home while she was out in the yard. Respondent was 88 years of age at the time of the attack. Respondent was bitten on the right side of her leg and left cheek of her buttocks. (R. p. 22 ll. 6 – 9). Respondent was terrified during and after

the attack. (R. p. 22 ll. 18 – 25; p. 23 ll. 10-23). In spite of her age, Respondent had a fairly independent life before the attack. (R. p. 28 l. 9 – p. 29 l. 12) After the attack, she was never the same and was so fearful, she would not even go out into her own yard. The quality of Respondent's life was forever changed. (R. p. 29 l. 13 – p. 31 l. 11) It can certainly be argued that the dog attack robbed Respondent of the enjoyment of the remainder of her golden years. Appellant egregiously down plays this aspect of Respondent's damages. Contrary to the assertion of the Appellant, the Respondent was not going out into alone at the time of trial. The testimony is clear that the Respondent would only venture onto her porch to get her mail and even when she did so, she was so fearful she would take a broom or something with her. (R. p. 29 l. 25 – p. 31 l. 2).

It is clear that there is evidence in the record to support the Court's award of damages. Therefore, the argument is without merit.

In Section II of Appellant's arguments, he argues the trial court erred in awarding punitive damages. Once again, this issue is not properly before the Court. For the reasons set forth above, this argument has no merit. In addition, if the Appellant asserts that the trial judge did not properly analyze the elements for punitive damages, it was incumbent upon the Appellant to file a Rule 59(e) SCRCP motion so that the trial court could address the issue. Since Appellant did not raise this issue in a Rule 59(e) motion, then it cannot be raised now.

CONCLUSION

The appeal filed by the Appellant should be dismissed and/or the decisions of the trial court should be affirmed.

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August 10, 2020

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Brief of Respondent complies with Rule 211(b), SCACR.

Dated this 10th day of August, 2020.

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