THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

APPEAL FROM GREENVILLE COUNTY
COURT OF COMMON PLEAS

The Honorable Perry H. Gravely, Circuit Court Judge
The Honorable Edward W. Miller, Circuit Court Judge

Appellate Case No.: 2020-001164

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159 Wellborn Street, LLC, on behalf of itself and the State of South Carolina

Respondent,

v.

Harold Means

Appellant

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This is an appeal of the circuit court's orders dated April 1, 2019, June 3, 2019, February 26, 2020, and July 6, 2020.

This action was initiated by the Respondent by the filing of a Summons and Complaint on February 15, 2019, alleging causes of action for public and private nuisance and seeking injunctive relief bearing case number 2019-CP-23-00775. The Respondent alleged that Harold Means was the owner of a house where allegedly illegal activities were taking place located at 18 Monroe Street, which was adjacent to apartments owned by the Respondent. The Respondent served the Appellant with its Summons and Complaint on February 19, 2019, and the Appellant failed to file responsive pleadings. The Respondent filed an affidavit of default and subsequently filed a motion for default judgment. Respondent ultimately obtained an Order entered April 1, 2019 by the Honorable Perry H. Gravely holding the Appellant in default and ordering a hearing on the issue of damages to be held at a later date.

A hearing was held on May 20, 2019. The Appellant appeared *pro se* at the hearing. The court did not take any testimony as to damages; however, the Respondent did submit affidavits and a supplemental memorandum in support of default judgment prior to the hearing. Based upon the information contained in the Respondent's submissions, the court entered an Order on June 3, 2019 granting the Respondent a judgment for monetary damages in the amount of $144,180.00 as well as injunctive relief.

The circuit court docketing information indicates that the Order was served on counsel for the Respondent by way of the electronic filing system. Despite the fact that the Appellant had previously appeared on his own behalf at the hearing on May 20, 2019, court records do not indicate that the Order was ever served on the Appellant by the court. Moreover, there is no record of service of the Order on the Appellant by the Respondent. Appellant retained an attorney to seek relief from the judgment and to reopen the case for a trial on the merits on January 13, 2020. In his motion, Appellant averred that he only learned of the default judgment in December 2019.

Appellant's motion to set aside the default judgment was heard on February 26, 2020 before the Honorable Edward W. Miller. The court denied Appellant's motion to set aside the default judgment, but ordered a new hearing to be held as to damages. A damages hearing was held on June 29, 2020 before the Honorable Perry Gravely. Based upon the testimony presented at that hearing and the evidence submitted by Respondent, Judge Gravely ruled that Respondent had proven damages in the amount of $109,840.00 and ordered that final default judgment be entered in the amount of $109,840.00.

Appellant subsequently filed a motion for reconsideration on July 17, 2020 which was summarily denied by Order of the Court on July 24, 2020. The Appellant timely appealed this decision to the Court on August 21, 2020.

STANDARD OF REVIEW

The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the trial judge. *Thompson v. Hammond*, 299 S.C. 116, 119, 382 S.E.2d 900, 902-903 (1989); *Wham v. Shearson Lehman Bros., Inc.*, 298 S.C. 462, 465, 381 S.E.2d 499, 502 (Ct. App. 1989). This decision will not be reversed absent an abuse of that discretion. *Thompson*, 299 S.C. at 119, 382 S.E.2d at 902-903; *In Re Estate of Weeks*, 329 S.C. 251, 259, 495 S.E.2d 454,

459 (Ct. App. 1997). "An abuse of discretion in setting aside a default judgment occurs when the judge issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support." *Estate of Weeks*, 329 S.C. at 259, 495 S.E.2d at 459.

With regard to the circuit court's award of damages, the trial judge has considerable discretion regarding the amount of damages, both actual or punitive. *Collins Entm't Corp. v. Coats & Coats Rental Amusement*, 355 S.C. 125, 584 S.E.2d 120 (Ct. App. 2003); *Kuznik v. Bees Ferry Assocs.*, 342 S.C. 579, 538 S.E.2d 15 (Ct. App. 2000). Because of this discretion, review on appeal is limited to the correction of errors of law. *Kuznik*, 342 S.C. at 611, 538 S.E.2d at 32; *Welch v. Epstein*, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000). 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. *See Hutson v. Cummins Carolinas, Inc.*, 280 S.C. 552, 314 S.E.2d 19 (Ct. App. 1984).

ARGUMENT

I. The Circuit Court Erred When It Declined To Set Aside The Default Judgment.

The circuit court erred when it declined to grant Appellant's motion to set aside the June 3, 2019 default judgment. A "court may relieve a party or his legal representative from a final judgment, order, or proceeding for . . . mistake, inadvertence, surprise, or excusable neglect . . . ." Rule 60(b)(1), SCRCP. "The power conferred upon Courts to relieve parties from judgments taken against them by reason of their mistake, inadvertence, surprise, or excusable neglect should be exercised by them in the same liberal spirit in which the Code section was designed, -- in furtherance of justice and in order that cases may be tried and disposed of upon their merits." *Ex parte Union Mfg. & Power Co.*, 81 S.C. 265, 62 S.E. 259 (1908). In determining whether a default

judgment should be set aside under Rule 60(b)(1), "the promptness with which relief is sought, the reasons for the failure to act promptly, the existence of a meritorious defense, and the prejudice to the other parties are relevant." *New Hampshire Ins. Co. v. Bey Corp*., 312 S.C. 47, 50, 435 S.E.2d 377, 379 (Ct. App. 1993) (quoting Harry M. Lightsey & James F. Flanagan, South Carolina Civil Procedure 82 (1985)).

In the case at bar, the award of a default judgment in the amount of $109,840.00 would result in an extreme inequity if allowed to stand. The Respondent obtained a default judgment in this case due to the mistake and excusable neglect of the Appellant. As soon as Appellant was apprised of the default judgment and learned that he was mistaken in his understanding that the matter had been handled, he moved promptly to have the judgment set aside. Appellant moved to set aside the default judgment, in part, due to the existence of a meritorious defense. Moreover, because the judgment entered constitutes an unjust windfall for the Respondent, who was seeking damages and an injunctive relief on a claim of nuisance relating to real property that it no longer owned and did not actually own for a significant portion of the period for which Respondent was claiming damages, setting aside the default judgment would not prejudice the Respondent. As such, the circuit court abused its discretion when it failed to grant Appellant's motion to set aside the June 3, 2019 default judgment.

A. Appellant's Default Was Due To Mistake, Inadvertence, And Excusable Neglect.

A "court may relieve a party or his legal representative from a final judgment, order, or proceeding for . . . mistake, inadvertence, surprise, or excusable neglect . . . ." Rule 60(b)(1), SCRCP. A review of the record reveals that the default judgment was entered due to Appellant's mistake and excusable neglect. At the time of the entry of the default judgment on June 3, 2019, Appellant was an eighty-one-year-old, retired auto mechanic who had never before appeared in

circuit court. Appellant and his wife were the owners of a piece of real property located at 18 Monroe Street in Greenville, South Carolina that was the subject of Respondent's nuisance action. Appellant and his wife had purchased this piece of property in 1968.[1]

An unsophisticated *pro se* litigant, Appellant appeared for the first time at the first hearing on Respondent's motion for damages after entry of a default judgment as to liability. At that hearing on May 20, 2019, only three months after Appellant had been served with the summons and complaint, Appellant attempted to explain his mistaken belief that he no longer owned the subject property located at 18 Monroe Street. Specifically, as the Appellant's later-submitted affidavit details, the Appellant believed he had sold the subject property to another individual, Leon Irby, through a bond for title five years prior to the filing of the action by the Respondent. Mr. Irby had been paying Appellant for the property since that time and Appellant no longer possessed, controlled, or collected rent from the property at 18 Monroe Street. As a result, the Appellant mistakenly believed that he no longer had an ownership or possessory interest in the property and, as such, did not need to respond to the summons and complaint.

Appellant explained the actions he had taken upon receiving the complaint, which included contacting Mr. Irby, whom he believed was the person who should respond to the notice based upon Appellant's mistaken belief that he no longer owned the subject property. Shortly thereafter, Mr. Irby arranged a meeting at an office on South Pleasantburg Drive in Greenville, South Carolina with a man whom the Appellant believed was an attorney. Appellant explained that both Mr. Irby and this unknown gentleman who claimed to be an attorney informed Appellant that Mr. Irby would handle the claim filed by the Respondent. As a result, Means was not as concerned about the lawsuit as he should have been because he mistakenly believed that Mr. Irby was taking care

[1] The property at issue is owned by both Appellant and his wife; however, for reasons that are not clear, Respondent only brought its nuisance claim against the Appellant.

of the matter as the owner of the property.

At the May 20, 2019 damages hearing, the court asked the Appellant a number of questions about his belief that Mr. Irby possessed a bond for title for the subject property. The Respondent represented that it was not aware of this alleged bond for title and the court requested that the Respondent investigate the matter and submit to the court the appropriate real estate records to confirm the Respondent's statement that there was no record of such a bond for title. The court then indicated that it was going to grant Respondent's motion for damages and requested the Respondent submit damages information at the same time that it submitted the information concerning the alleged bond for title. The court indicated that a judgment would be forthcoming upon receipt of this information. The court asked the Respondent to prepare the proposed order and further directed the Respondent's counsel to serve a copy of the proposed order and accompanying information concerning the bond for title and damages on the Appellant at the same time he submitted the proposed order to the court. There is nothing in the record to indicate that the Respondent did, in fact, send a copy of the proposed order or the other requested information to the Appellant.

On June 3, 2019, the court entered an Order awarding Respondent $144,180.00 in damages. The court's Form 4 judgment that accompanied the filed order indicated that a copy of the order was served via the e-filing system only on the counsel of record for the Respondent. The form noted that the "clerk will mail a copy of the judgment to parties who are not E-filers or who are appearing pro se. See Rule 77(d), SCRCP." Unfortunately, however, the form does not list the Appellant as a *pro se* litigant on whom the order was served. It appears the court did not send a copy of the June 3, 2019 default judgment to the Appellant. And, in his affidavit in support of his motion to set aside the default judgment, the Appellant attested under oath that he never received

a copy of the order. Moreover, a review of the record reveals that the Respondent did not file a certificate of service, affidavit of service, or any other evidence showing that it had served a copy of the order on the Appellant.

The record does not indicate that Appellant was served with a copy of the proposed order, the requested bond for title information, or any damages calculations as directed by the court. Then, to make matters worse, the Appellant apparently was never served with a copy of the court's Order, either by the court or the Respondent. As a result of this failure to serve the Appellant with a copy of the proposed order or the June 3, 2019 default judgment, Appellant never received a copy of the Order nor any of the other information correcting his mistaken belief that he was not the owner of the subject property, and, as an unsophisticated *pro se* litigant, did not take steps to ascertain why he had not received the Order.

Appellant cannot be faulted for failing to act to set aside the default judgment when he was never served with a copy of the judgment. To do so would result in an inequity toward the Appellant due to the error, oversight, mistake, inadvertence, or neglect of either the court or the Respondent in failing to serve Appellant with the Order. As such, the Appellant's failure to immediately set aside the June 3, 2019 default judgment – a judgment that was never served on Appellant – is certainly the result of mistake and excusable neglect.

B. Appellant Acted Promptly Upon Discovering The Entry Of A Default Judgment.

Unaware that the court had entered a default judgment and still under the mistaken belief that Mr. Irby was the owner of the property and the responsible party, the Appellant understandably did not act to set aside the default judgment that he was not aware existed. Then, in December 2019, the Appellant attempted to sell the property on which his automobile repair shop was located. The closing attorney for the transaction, W. Dale McKinney, performed a title search and

discovered the judgment in this action. Mr. McKinney informed the Appellant who was surprised and confused about the judgment. The affidavits of Mr. McKinney and the Appellant reveal that the Appellant then moved swiftly to retain counsel who promptly filed a motion to set aside the default judgment. Appellant's newly retained counsel filed such a motion to set aside the default judgment on January 13, 2020.

C. Appellant Has A Meritorious Defense.

1. Respondent Lacks Standing To Assert A Claim For Damages Or Injunctive Relief.

Respondent lacks standing to assert a claim for damages or prospective injunctive relief. The South Carolina courts have made it clear that South Carolina courts will not address the merits of any case unless it presents a justiciable controversy. *Byrd v. Irmo High Sch*., 321 S.C. 426, 430-31, 468 S.E.2d 861, 864 (1996). In *Byrd*, the South Carolina Supreme Court stated: "[b]efore any action can be maintained, there must exist a justiciable controversy," and, "[t]his Court will not . . . make an adjudication where there remains no actual controversy." *Id.; see also Peoples Fed. Sav. & Loan Ass'n v. Res. Planning Corp.*, 358 S.C. 460, 477, 596 S.E.2d 51, 60 (2004) ("A threshold inquiry for any court is a determination of justiciability, i.e., whether the litigation presents an active case or controversy."). "Justiciability encompasses . . . standing." *James v. Anne's Inc*., 390 S.C. 188, 193, 701 S.E.2d 730, 732 (2010).

A plaintiff must have standing to institute an action. *Joytime Distribs. & Amusement Co. v. State*, 338 S.C. 634, 528 S.E.2d 647 (1999); *Sloan v. Greenville County*, 356 S.C. 531, 590 S.E.2d 338 (Ct. App. 2003). To have standing, one must have a personal stake in the subject matter of the lawsuit. *Sea Pines Ass'n for the Prot. of Wildlife, Inc. v. South Carolina Dep't of Natural Res.*, 345 S.C. 594, 550 S.E.2d 287 (2001); *Evins v. Richland County Historic Pres. Comm'n*, 341 S.C. 15, 532 S.E.2d 876 (2000); *Newman v. Richland County Historic Pres. Comm'n*, 325 S.C. 79,

480 S.E.2d 72 (1997); *Townsend v. Townsend*, 323 S.C. 309, 474 S.E.2d 424 (1996). One must be a real party in interest. *Charleston County Sch. Dist. v. Charleston County Election Comm'n,* 336 S.C. 174, 519 S.E.2d 567 (1999); see also *Henry v. Horry County*, 334 S.C. 461, 463 n.1, 514 S.E.2d 122, 123 n.1 (1999) ("To have standing, one must be a real party in interest."). A real party in interest is one who has a real, material, or substantial interest in the subject matter of the action, as opposed to one who has only a nominal or technical interest in the action. *Charleston County Sch. Dist.*, 336 S.C. at 181, 519 S.E.2d at 571; *see also Anchor Point, Inc. v. Shoals Sewer Co.*, 308 S.C. 422, 428, 418 S.E.2d 546, 549 (1992) (holding a party has standing to sue if the party has "a real, material, or substantial interest in the subject matter of the action, as opposed to . . . only a nominal or technical interest in the action"); *Huff v. Jennings*, 319 S.C. 142, 148, 459 S.E.2d 886, 890 (Ct. App. 1995).

Respondent did not have standing to assert its nuisance claims because it was not the owner either for the relevant time period for which it sought damages or at the time it filed suit. The traditional concept of a nuisance requires a landowner to demonstrate that the defendant unreasonably interfered with his ownership or possession of the land. *See Ravan v. Greenville County*, 315 S.C. 447, 464, 434 S.E.2d 296, 306 (Ct. App. 1993)(emphasis added). In its complaint, Respondent alleges that it "has been the owner of 114 apartments on Monroe Street in Greenville, South Carolina and continues to own 20 of these apartments." Respondent did not specify the name, address, or exact location of these apartments. Respondent did not specify if these apartments are part of an apartment complex. Respondent did not state how long it owned these apartments, which apartments it no longer owned, when it sold those apartments, or which apartments it still owns. Nonetheless, prior to the initial damages hearing, Respondent submitted a Supplement to Motion to Default Judgment wherein it specified, for the first time, that it was

seeking damages for lost rent at two properties: (1) City View Apartments; and (2) Cedar Grove Apartments. Appellant will address each of these properties in turn.

i. City View Apartments

The Respondent lacked standing to assert a claim for damages or injunctive relief for the City View Apartment complex located at 105 Lee Street. The Respondent, 159 Wellborn Street, did not have a personal stake in the subject matter of the lawsuit. The Respondent did not have a real, material, or substantial interest in the subject matter of the action. Specifically, the Respondent did not own the real property for which it sought damages, including lost rental income and diminishment of value, during the time period for which it claimed damage. The Respondent did not own the real property as of the day it filed suit seeking prospective injunctive relief, including the abatement of future nuisance. To allow the Respondent to collect "lost rent" for a property it did not own would result in the unjust enrichment of the Respondent to the prejudice of the Appellant. As such, because the Respondent lacked standing to assert its claims as to the City View Apartments property located at 105 Lee Street, the Appellant had a meritorious defense that would justify setting aside the default judgment to the extent it pertains to City View Apartments.

With regard to City View Apartments, Respondent sought four years of lost rent for the years of 2010–2014 in the amount of $85,680.00. In support of this claim, Respondent initially submitted the affidavit of Ronald Mogard, a property manager employed by Property Management of Greenville, LLC. Mr. Mogard attested that he managed the City View Apartments from 2010 to 2014 and from 2016 to 2018. Mr. Mogard did not attest as to the entity that actually owned the City View Apartments during these time periods. Mr. Mogard did not testify that Respondent was the owner of the City View Apartments.

At the damages hearing after the court set aside the damages portion of the default judgment, Respondent again provided testimony from Ronald Mogard. Mr. Mogard again testified that he managed City View Apartments from 2010 until 2014 and from 2016 until 2018. Mr. Mogard explained that City View Apartments were located at 105 Lee Street and not on Monroe Street as the apartments alleged to have been owned by the Respondent in Respondent's complaint. Mr. Mogard provided no testimony as to who currently owned the City View Apartments nor who owned the apartment complex during the 2010-2014 time period for which the Respondent was seeking damages. The Respondent did not submit any evidence to prove that it was the owner of City View Apartments.

The Respondent did not allege in its complaint, and Mr. Mogard did not testify, that Respondent was the owner of City View Apartments from 2010 until 2014. This was likely because Respondent was not, in fact, the owner of the City View Apartments. As the real property records submitted by the Appellant in support of its motion to set aside the default judgment reveal, 159 Wellborn Street did not own the City View Apartments in 2010, 2011, 2012, 2014, 2015, or much of 2016. These property records reveal that, although the Respondent provided sworn testimony that it had lost rent for the year 2010, it did not even own the City View Apartment complex. In fact, for much of 2010, the property was owned by an entity by the name of Global J&M Real Estate Investors, LLC. Global J&M Real Estate Investors, LLC is not a party to this action. Then, on November 29, 2010, Galbreath Properties, LLC purchased the City View Apartment complex located at 105 Lee Street from Global J&M Real Estate Investors, LLC. Galbreath Properties, LLC is not a party to this action. Galbreath Properties appears to be owned and managed by Nathan Galbreath, a prominent real estate attorney and developer in Greenville, South Carolina, along with his wife, Mary Beth Galbreath. While the Galbreaths also appear to

own and manage 159 Wellborn Street, LLC, there is no evidence that Galbreath Properties is the same as, or the alter ego for, 159 Wellborn Street, LLC. The records submitted by the Appellant further reveal that, although the Respondent sought damages for lost rent and provided sworn testimony as to this alleged lost rent for the years 2010-2014, 159 Wellborn Street, LLC did not purchase the City View Apartment complex at 105 Lee Street until November 3, 2016. Thus, the Respondent did not even own the property until almost two years after the period for which the Respondent sought, and was awarded, damages for alleged lost rents. The Respondent did own the City View Apartments from November 3, 2016 until February 2019. Then, on February 15, 2019, the very same day it filed this action, 159 Wellborn Street, LLC sold the City View Apartments property to an entity by the name of 105 Lee Street, LLC. 105 Lee Street, LLC appears to be owned by the Galbreaths; however, yet again,105 Lee Street, LLC is not a party to this action.

The Respondent lacked standing to assert a nuisance claim for damages, including lost rent, to the City View Apartment Complex for the time period of 2010 until November 3, 2016. The Respondent did not own the City View Apartments from 2010 until November 2016, which includes the entire time period for which Respondent sought relief for lost rents at the City View Apartments. Because the Respondent did not own the City View Apartments during the time it claims damages, it could not have suffered an injury in fact. It would work an absurd result for a Respondent to recover alleged damages for injuries it did not suffer to a piece of real property it did not own.

To the extent the Respondent sought prospective injunctive relief based upon its ownership of the City View Apartments located at 105 Lee Street, it also lacks standing for that claim as the Respondent no longer owned the City View Apartments as of the day of the filing of this action. With regard to the City View Apartment portion of its claims, the Respondent was not the real

party in interest. The Respondent did not have a real, material, or substantial interest in the subject matter. As such, to the extent Respondent's claims were premised upon its ownership of the City View Apartments located at 105 Lee Street, Appellant had a meritorious defense that the Respondent lacked standing to assert such a claim and, as a result, but for the entry of default, the action should have been dismissed as to the City View Apartments for lack of a justiciable controversy.

ii. Cedar Grove Apartments

With regard to Cedar Grove Apartments, Respondent sought lost rent for the time period encompassing September 2017 until January 2019 in the amount of $35,100.00 to $58,500.00. In support of this claim, Respondent initially submitted the affidavit of Melinda Springer, a property manager employed by Vista Capital Management Group. Ms. Springer attested that she managed the Cedar Grove Apartments from September 2017 to the end of January 2019. Ms. Springer did not provide any testimony as to the ownership of Cedar Grove Apartments. The Respondent presented no testimony or evidence that established that it was the owner of Cedar Grove Apartments for the time period of September 2017 until the filing this action on February 15, 2019.

On February 15, 2019, the very same day that the Respondent instituted this action, Respondent sold the real property associated with the Cedar Grove Apartments. Nonetheless, despite no longer having any real property interest in Cedar Grove Apartments or City View Apartments as of the day this action was filed, Respondent still proceeded to seek, and was awarded by way of the default judgment, prospective injunctive relief relating to the alleged nuisance at 18 Monroe Street. Respondent had no standing to seek such injunctive relief. Respondent no longer owned either of the two parcels of real properties it alleges it owned as the basis of its claims for private nuisance, public nuisance, and injunctive relief. As Respondent no

longer had a real, material and substantial interest in the subject matter of the action – the allegedly ongoing nuisance activity at 18 Monroe Street, which Respondent claims was occurring in a house "adjacent to" Respondent's apartments – there was no justiciable controversy for which the court could make an adjudication. But for the entry of default, Respondent's cause of action for injunctive relief should have been dismissed for lack of a justiciable controversy. Thus, with regard to Respondent's claims for injunctive relief as to the Cedar Grove Apartments, Respondent had a meritorious defense that the Respondent lacked standing to assert such a cause of action.

2. Respondent's Damages Claims As To The City View Apartments Are Barred By The Statute Of Limitations.

Appellant also has another meritorious defense as a matter of law. All except a small amount of Respondent's claims are barred by the statute of limitations. Respondent's Complaint alleges that Respondent's property was damaged as a result of alleged nuisance activity that occurred on Appellant's property. At the second damages hearing, Respondent's witnesses testified that this alleged nuisance began to damage Respondent's property as early as 2010, approximately nine years before Respondent brought this action. In fact, as the court noted in the final order, the former property manager for Respondent testified that "during the time period of "December 2010-December 2014 … approximately three apartments remained vacant on a monthly basis as a result of the nuisance activities at 18 Monroe Street." *See* July 7, 2020 Order. As such, by the admission of Respondent's own manager, Respondent knew or reasonably should have known, by the exercise of reasonable diligence, that Respondent might have had a claim against someone for alleged damages as a result of the alleged nuisance activities occurring at Appellant's property as early as 2010. *See Hedgepath v. AT&T*, 348 S.C. 340, 358 (Ct. App. 2001). Thus, Respondent's action was barred by the statute of limitations applicable to nuisance actions.

The Respondent previously attacked Appellant's statute of limitations defense, by asserting that its property damage claims fall within the rubric of a continuing nuisance. The traditional concept of a nuisance requires a landowner to demonstrate that the defendant unreasonably interfered with his ownership or possession of the land. *See* 315 S.C. at 464, 434 S.E.2d at 306. Nuisance is a substantial and unreasonable interference with a plaintiff's use and enjoyment of his property. *Id.* A nuisance may be classified as permanent or continuing in nature. A continuing nuisance is defined as a nuisance that is intermittent or periodical and is described as one which occurs so often that it is said to be continuing although it is not necessarily constant or unceasing. 58 Am. Jur. 2d Nuisances § 28 (1989). A permanent nuisance may be expected to continue but is presumed to continue permanently, with no possibility of abatement. *Id.* § 27. As to a permanent nuisance, the injury is fixed and goes to the whole value of the land. *Id.*

When the statute of limitations begins to run hinges on whether a nuisance is classified as permanent or continuing. *Id.* § 26; *see Glenn v. School District*, 294 S.C. 530, 535-36, 366 S.E.2d 47, 50-51 (Ct. App. 1988). When the nuisance is permanent in nature and only one cause of action may be brought for damages, the applicable statute of limitations bars the action if not brought within the statutory period after the first actionable injury. 58 Am. Jur. 2d Nuisances § 307 (1989). When the nuisance is continuing and the injury is abatable, the statute of limitations does not run merely from the original intrusion on the property and cannot be a complete bar. *Id.* Rather, a new statute of limitations begins to run after each separate invasion of the property. *Id.*; *see Cutchin v. South Carolina Dep't of Highways & Pub. Transp.*, 301 S.C. 35, 37, 389 S.E.2d 646, 648 (1990) (citing *Webb v. Greenwood County*, 229 S.C. 267, 277, 92 S.E.2d 688, 692 (1956) (stating if the injury is permanent, the plaintiff has a single cause of action which cannot be split; however if the cause of the injury is abatable, each injury gives rise to a new cause of action)). A nuisance is

continuing if abatement is reasonably and practicably possible. 58 Am. Jur. 2d Nuisances § 29 (1989).

In discussing the limitations period applicable in a continuing nuisance action, our supreme court has stated:

> Since every continuance of a nuisance is a new nuisance, authorizing a fresh action, an action may be brought, for the recovery of all damages, resulting from the continuance of a nuisance, within the statutory period of the statute of limitations, for which no previous recovery has been had, even though the original cause of action is barred, unless the nuisance has been so long continued, as to raise the presumption of a grant, or in case of injury to real property, unless the plaintiff's right of entry is barred. But when the injury is of such a nature, that all the damages resulting therefrom, whether past or prospective, are recoverable in one action, the statute of limitations begins to run, from the time of the completed erection of the nuisance. This rule, however, is subject to the modification, that when the cause of action is the consequential injury, from an act of erection which is not, in itself, an actionable nuisance, the statute does not begin to run, until the injury is actually inflicted.

Sutton v. Catawba Power Co., 104 S.C. 405, 408, 89 S.E. 353, 353 (1916).

In *McCurley v. South Carolina Highway Dep't*, the court stated that if the injury to neighboring lands is caused by negligence, or if the cause is abatable, then there arises a continuing cause of action. 256 S.C. 332, 335, 182 S.E.2d 299, 300 (1971). While the statute of limitations begins to run at the occurrence of the first actual damage, the landowner may only recover for injury which occurred within the statutory period. *Id; see also Silvester v. Spring Valley Country Club*, 344 S.C. 280, 286-88, 543 S.E.2d 563, 566-67 (Ct. App. 2001).

Appellant respectfully contends that Respondent failed to establish that its claims fall within the rubric of continuing nuisance and, as such, the entirety of Respondent's claim should have been barred by the statute of limitation. Nonetheless, even if Respondent's nuisance claims are considered continuing, only those claims that fall within the three-year limitations period,

would have been allowed to proceed absent the entry of default. In fact, the entirety of Respondent's claims for the period from December 2010-December 2014 would have been barred by the statute of limitations. The only claims not barred by the statute of limitations would be any claims incurred from February 19, 2016.

At the time the court initially denied Appellant's motion to set aside the default judgment, the record as to the statute of limitations was not entirely clear. Nonetheless, the record presented at the subsequent hearing on damages readily revealed that some, if not all, of Respondent's claims are barred by the statute of limitations. The majority, if not all, of the damages awarded to the Respondent would not have been awarded had the court granted the motion to set aside the default judgment. As such, the statute of limitations is a meritorious defense. "A meritorious defense need not be perfect[,] nor one which can be guaranteed to prevail at a trial. It need be only one which is worthy of a hearing or judicial inquiry because it raises a question of law deserving of some investigation and discussion or a real controversy as to real facts arising from conflicting or doubtful evidence." *Thompson v. Hammond*, 299 S.C. 116, 120, 382 S.E.2d 900, 903 (1989) (quoting *Graham v. Town of Loris*, 272 S.C. 442, 248 S.E.2d 594 (1978)). In light of the testimony of Respondent's property manager, Mr. Mogard, that revealed that Respondent knew or should have known that it had a potential nuisance claim against Appellant as early as December 2010, Appellant's assertion that the statute of limitations would have barred Respondent claims is sufficiently meritorious to warrant setting aside the default judgment.

II. The Circuit Court's Award of Damages Is Not Supported By The Evidence And Was Based Upon Speculation And Conjecture.

The circuit court erred when it awarded Respondents damages in the amount of $109,840.00. The court's award of this amount of damages was an error of law because the Respondent did not have standing to assert a claim for damages for the City View Apartment

complex as discussed *supra*. Moreover, the evidence in the record does not support the trial court's damage award.

"A defendant in default admits liability but not the damages . . . ." *Solley v. Navy Fed. Credit Union, Inc.*, 397 S.C. 192, 203, 723 S.E.2d 597, 603 (Ct. App. 2012)(*citing Renney v. Dobbs House, Inc.*, 275 S.C. 562, 566, 274 S.E.2d 290, 292 (1981)). "[T]he defaulting defendant has conceded liability. However, a defaulting defendant does not concede the [a]mount of liability." *Solley*, 397 S.C. at 203, 723 S.E.2d at 603 (*quoting Howard v. Holiday Inns, Inc.*, 271 S.C. 238, 242, 246 S.E.2d 880, 882 (1978)). Even "[i]n a default case, [therefore,] the plaintiff must prove . . . the amount of his damages, and such proof must be by a preponderance of the evidence." *Solley*, 397 S.C. at 204, 723 S.E.2d at 603 (citation omitted).

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. *Limehouse v. Hulsey*, 404 S.C. 93, 116, 744 S.E.2d 566, 579 (2013); *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." *Jackson*, 296 S.C. at 529 (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).

The circuit court awarded the Respondent $109,840.00 in actual damages. 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.

The circuit court erred with regard to the calculation of actual damages because the Respondent did not suffer an "actual loss or injury" with respect to the City View Apartments. Specifically, as articulated above, the Respondent did not actually own the City View Apartment property during the time period for which the Respondent alleges it suffered an "actual loss" of rents as a result of the alleged nuisance activity at 18 Monroe Street. As the Respondent did not own the property and did not suffer an "actual loss", the Respondent should not have been awarded damages for a loss it did not actually suffer. This means that the portion of the circuit court's award that includes the City View Apartments was improperly included in the damages calculation and the judgment amount must be reformed in order to exclude the portion of the judgment attributable to the City View Apartments.

The circuit court further erred in its award of damages because the Respondent failed to

prove that the compensation awarded was for injuries proximately caused by the Appellant's alleged wrongful conduct. Actual or compensatory damages include compensation for all injuries which are naturally the proximate result of the alleged wrongful conduct of the defendant. *See Rogers v. Florence Printing Co.,* 233 S.C. 567, 106 S.E.2d 258 (1958). The basic measure of actual damages is the amount needed to compensate the plaintiff for the losses proximately caused by the defendant's wrong so that the plaintiff will be in the same position he would have been in if there had been no wrongful injury. *See Rogers*, 233 S.C. at 578, 106 S.E.2d at 264; *Hutchison v. Town of Summerville*, 66 S.C. 442, 45 S.E. 8 (1903).

In the case at bar, there is scant evidence that the damages claimed by the Respondent were proximately caused by the nuisance conduct at 18 Monroe Street. In fact, the causal connection between the admitted liability and the damages claimed is tenuous at best. Other than lay opinion testimony and speculation by two property managers, the Respondent provided no evidence that the Appellant was unable to rent certain apartments or that overall occupancy was down due to the nuisance activity at 18 Monroe Street. The manager for the Cedar Grove Apartments testified that it was her lay "*opinion* that 18 Monroe Street impacted [her] occupancy and [her] tenants at Cedar Grove Apartments." Other than this opinion from a lay witness, the Respondent did not provide any testimony from an actual tenant, prospective tenant, or former tenant or any other evidence that established – much less by a preponderance of the evidence – that the nuisance activities at 18 Monroe Street were the proximate cause of the lost rents claimed by the Respondent.

Finally, the court's damages award is not supported by the evidence. A judgment for money damages must be warranted by the proof of the party in whose favor it is rendered. *Wingard v. Lee*, 287 S.C. 57, 336 S.E. (2d) 498 (Ct. App. 1985). In this case, the court's judgment for $109,840.00 was not warranted by the proof provided by the Respondents. At the damages

hearing, Respondent provided testimony from the property manager of City View Apartments, Ronald Mogard, and the property Manager of Cedar Grove Apartments, Melinda Springer. Mr. Mogard managed the City View Apartments from 2010 until 2014 and then from 2016 to 2018. He testified that "[w]hen we first took over – when I first took over in 2010, *most* of the units were vacant… So we could not fill those units for at least a good year to two years…." (emphasis added). He did not state how many units constituted "most" of the units. Similarly, Mr. Mogard was unable to provide the actual occupancy rate for the apartments in 2010, stating that it was "[p]robably 40 percent". He went on to state that the occupancy rate rose to one hundred percent by 2016; however, nowhere in his testimony or calculations does he adjust for the declining number of vacancies over 2010 to 2016. In fact, his calculations of lost rent appear to be premised upon an unspecified *fixed* number of vacant units despite the fact that Mr. Mogard was unable to specify exactly how many units were vacant at any given time and despite his previous testimony that the complex was at one hundred percent occupancy within approximately two years of his arrival in 2010. In short, the Respondent never specified the number of units vacant at City View Apartments by month for the time period alleged.

Similarly, the property manager for the City View Apartments did not provide specific information as to the amount of lost rent. When asked how much rent was lost, Mr. Mogard testified "*about* $1,785 per month". When asked what the total lost rents would be for the time period, Mr. Mogard stated: "I'd have to run that … I haven't calculated that." Mr. Mogard was then asked to *estimate* as to how many months City View Apartments lost this amount of rent per month, to which he responded: "I would say for at least the four years." However, Mr. Mogard later contradicted this testimony and admitted that City View Apartments was eventually able to fill the vacant apartments within a year to two years. When asked to specify the exact rental income

for the vacant apartments in 2010, Mr. Mogard was unable to do so, responding: "Probably [$]425. I'm just guessing at that because they all varied."

Ms. Springer provided similar testimony as the property manager of the Cedar Grove Apartments from 2017 until 2019. She also failed to provide any factual evidence to support Respondent's claim that the alleged activities occurring at 18 Monroe Street actually caused the claimed lost rents at Cedar Grove Apartments. Rather, she testified as to her "opinion" that the activities impacted Cedar Grove Apartments' occupancy. She was then asked to provide "some sort of *estimation* on the dollar figure" of rents lost due to the activities at 18 Monroe Street. She responded that Cedar Grove Apartments "lost between [$] 1950 to [$] 3250 per month" for the time period of September 2017 until January 2019. She explained that she "estimated at three to five units that I was either not able to rent or lost rent on for those months. Due to people either moving out, not renting an apartment or using our rent money to purchase drugs from 18 Monroe Street." Ms. Springer did not provide any evidence in support of her statement that three to five units were actually vacant due to the activities at 18 Monroe Street. She also did not provide any rental records to support or perhaps clarify exactly how many units were vacant during this time period as opposed to her estimated range of lost rent. In fact, Ms. Springer later stated that she "was able to guesstimate that I was not able to rent three to five apartments per month."

When asked to specify the occupancy rate at Cedar Grove Apartments in September 2017, Ms. Springer stated that she could not recall. Similarly, she could not recall the occupancy rate for 2018. When asked how many vacancies there were at Cedar Grove Apartments during 2017 or 2018, Ms. Springer stated that she did not recall. Finally, when asked to provide the rental rate for the Cedar Grove Apartments in 2017, Ms. Springer stated that she could not recall.

"Generally, in order for damages to be recoverable, the evidence should be such as to

enable the court or jury to determine the amount thereof with reasonable certainty or accuracy. While neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation, proof with mathematical certainty of the amount of loss or damage is not required." *Whisenant v. James Island Corp*., 277 S.C. 10, 13, 281 S.E.2d 794, 796 (1981). In this case, the evidence provided by the Respondent to support its claim for damages was nothing more than conjecture, guess, and speculation. There was no other evidence to support Respondent's claims for damages beyond the testimony of these two witnesses. As such, the circuit court's July 7, 2020 order awarding damages in the amount of $109,840.00, is pure speculation and is not supported by the evidence.

CONCLUSION

It is generally recognized that courts should closely scrutinize default judgments to prevent harsh results and drastic action. This is exactly the sort of default judgment that should be closely scrutinized to prevent the Respondent from obtaining an unjust and ill-gotten windfall on a claim for which it lacks standing. This is especially the case when much of the delay in setting aside the default judgment is due not to the neglect of the Appellant, but to the failure to serve Appellant with the default judgment.

It is the policy of the law to favor the trial of cases on the merits. 46 Am. Jur. (2d) *Judgments* § 807 provides:

> Unfair, unjust, or unconscionable circumstances.
>
> It has been declared that no rule can be formulated setting a definite boundary beyond which a court of equity cannot go as a matter of power, or will not go as a matter of policy, in preventing the enforcement of an unconscionable judgment. Indeed, there is authority for the rule that in a proper case, a court of equity may look behind a judgment at law in order to do justice between the parties, and that relief from a judgment may be decreed in equity where it is against conscience to execute the judgment. . . .

Lewis v. Cong. of Racial Equal. &/or C. O. R. E., Inc., 275 S.C. 556, 560-61, 274 S.E.2d 287, 289 (1981). This court should look behind the default judgment to do justice and relieve the Appellant of this unconscionable judgment. It is "against conscience to execute the judgment" in this case. Moreover, whether a defendant is or is not in default, it is incumbent upon the judge and/or the jury to make a judicial determination of the amount of damages based on the proof, and such proof must be by the preponderance of the evidence. *Id.* The damages awarded in this case were not based on proof, but rather on speculation and conjecture. As such, the award of damages should be set aside.

For all of the reasons set forth above, Appellant respectfully request that this Court grant Appellant's appeal in this matter and reverse the circuit court's Order awarding Respondent default judgment.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
COURT OF COMMON PLEAS

The Honorable Perry H. Gravely, Circuit Court Judge
The Honorable Edward W. Miller, Circuit Court Judge

Appellate Case No.: 2020-001164

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159 Wellborn Street, LLC, on behalf of itself and the State of South Carolina

Respondent,

v.

Harold Means

Appellant

PROOF OF SERVICE

I certify that I have mailed for filing the Appellant's Initial Brief, by placing a copy of it into the U.S. Mail, postage prepaid, to the South Carolina Court of Appeals on December 16, 2020. I further certify that I have emailed Appellant's Initial Brief to the Respondent's attorneys via e-mail as well as mailed Appellant's Initial Brief by depositing a copy of it in the U.S. Mail, postage prepaid, addressed as follows:

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