THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas
James W. Peterson, Jr., Special Referee

Case No. 2015-CP-21-02451

Appellate Case No. 2021-000135

Estate of Artrell Davis, by and through her Personal Representatives, Lynette Gibss and Jerome Davis,

Plaintiffs/Respondents,

v.

Elroy Jackson and Michael Laverne Marks, Jr.,

Of whom Elroy Jackson is the Appellant.

APPELLANT'S INITIAL BRIEF

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE AND FACTS 2

STANDARD OF REVIEW 10

ARGUMENT 12

I. The special referee abused his discretion in denying Appellant's motion to set aside default judgment and motion to alter/amend where notice of the default damages hearing was not properly mailed to Appellant's last known address pursuant to Rule 55(b)(2), SCRCP. 12

II. The special referee abused his discretion in finding Respondents properly mailed notice of the default damages hearing where there was no evidence in the record Respondents sent any notice letters and Respondents refused to show the notice letters to Appellant or enter them into evidence. 24

III. The special referee erred in finding Respondents were under no additional duty to attempt to notify Appellant after the letter providing notice of the default damages hearing was returned as undeliverable. 27

CONCLUSION 29

TABLE OF AUTHORITIES

PAGE

CASES

SOUTH CAROLINA

Aetna Cas. & Sur. Co. v. Jenkins,
282 S.C. 107, 317 S.E.2d 460 (Ct. App. 1984) 18

BB&T v. Taylor,
369 S.C. 548, 633 S.E.2d 501 (2006) 11

Beckmann Concrete Contractors, Inc. v. United Fire & Cas. Co.,
360 S.C. 127, 600 S.E.2d 76 (Ct. App. 2004) 14

Blanton v. Stathos,
351 S.C. 534, 570 S.E.2d 565 (Ct. App. 2002) 13

Bowman v. Richland Mem'l Hosp.,
335 S.C. 88, 515 S.E.2d 259 (Ct. App. 1999) 4

Burbage v. Jefferson Standard Life Ins. Co.,
138 S.C. 208, 136 S.E. 230 (1926) 25

Calder v. Commercial Cas. Ins. Co.,
182 S.C. 240, 188 S.E. 864 (1936) 25

Caldwell v. Wiquist,
402 S.C. 565, 741 S.E.2d 583 (Ct. App. 2013) 13, 18

Dunham v. Coffey,
No. 2005-MO-052, 2005 WL 7145303 (S.C. Oct. 17, 2005) 18

Elam v. South Carolina Dept. of Transp.,
361 S.C. 9, 602 S.E.2d 772 (2004) 10

Harper v. Bolton,
239 S.C. 541,124 S.E.2d 54 (1962) 14

Honorage Nursing Home of Florence, S.C., Inc. v. Florence Convalescent Ctr., Inc.,
367 S.C. 108, 623 S.E.2d 853 (Ct. App. 2005) 12

Hopkins v. Harrell,
352 S.C. 517, 574 S.E.2d 747 (Ct. App. 2002) 25

Ins. Co. of N. Am. v. Hyatt,
290 S.C. 159, 348 S.E.2d 532 (Ct. App. 1986) 17, 23

Kurschner v. City of Camden Planning Comm'n,
376 S.C. 165, 656 S.E.2d 346 (2008) 12

Lewis v. Cong. of Racial Equal. &/or C. O. R. E., Inc.,
275 S.C. 556, 274 S.E.2d 287 (1981) 23

Limehouse v. Hulsey,
404 S.C. 93, 744 S.E.2d 566 (2013) 22, 23

McCall v. IKON,
363 S.C. 646, 611 S.E.2d 315 (Ct. App. 2005) 13, 20, 28

McDaniel v. U.S. Fid. & Guar. Co.,
324 S.C. 639, 478 S.E.2d 868 (Ct. App. 1996) 11, 13

McManus v. City of Greenwood,
171 S.C. 84, 171 S.E.2d 473 (1933) 26

Melton v. Olenik,
379 S.C. 45, 664 S.E.2d 487 (Ct. App. 2008) 10

NCNB S.C. v. Floyd,
303 S.C. 261, 399 S.E.2d 794 (Ct. App. 1990) 15, 16, 17

Pollard v. City of Florence,
314 S.C. 397, 444 S.E.2d 534 (Ct. App. 1994) 10, 11

Regions Bank v. Owens,
402 S.C. 642, 741 S.E.2d 51 (Ct. App. 2013) 11, 12, 27

Roche v. Young Bros. of Florence,
318 S.C. 207, 456 S.E.2d 897 (1995) 26

S.C. Dep't of Soc. Servs. v. Johnson,
386 S.C. 426, 688 S.E.2d 588 (Ct. App. 2009) 16, 17, 21

S.C. Dep't of Transp. v. Thompson,
357 S.C. 101, 590 S.E.2d 511 (Ct. App. 2003) 26

Schleicher v. Schleicher,
310 S.C. 275, 423 S.E.2d 147 (Ct. App. 1992) 18, 19

State v. Langston,
275 S.C. 439, 272 S.E.2d 436 (1980) 19

Thomas & Howard Co. v. T.W. Graham and Co.,
318 S.C. 286, 457 S.E.2d 340 (1995) 11

Tryon Fed. Sav. & Loan Ass'n v. Phelps,
307 S.C. 361, 415 S.E.2d 397 (1992) 12

Universal Benefits, Inc. v. McKinney,
349 S.C. 179, 561 S.E.2d 659 (Ct. App. 2002) 12

OTHER JURISDICTIONS

Fulton v. Van Slyke,
447 N.E.2d 628 (Ind. Ct. App. 1983) 20

Mullane v. Cent. Hanover Bank & Trust Co.,
339 U.S. 306 (1950) 18

Mitsubishi Motors Credit of America v. Robinson & Stephens, Inc.,
587 S.E.2d 146 (Ga. Ct. App. 2003) 20

Moore v. Davidson,
663 S.E.2d 766 (Ga. Ct. App. 2008) 20

Pinkston v. Livingston,
554 N.E.2d 1173 (Ind. Ct. App. 1990) 20

Unifund CCR Partners v. Rodgers,
281 S.W.3d 881 (Mo. Ct. App. 2009) 20

RULES

Rule 5, SCRCP 14, 18, 23

Rule 55, SCRCP 13, 14, 18, 22, 26

Rule 59, SCRCP 10, 11

Rule 60, SCRCP 11, 13

CONSTITUTIONS

U.S. Const. amend. XIV, § 1 13

S.C. Const. art. I, § 22 13

OTHER

Black's Law Dictionary 395–97 (7th ed. 1999) 14

STATEMENT OF ISSUES ON APPEAL

1. Did the special referee abuse his discretion in denying Appellant's motion to set aside default judgment and motion to alter/amend where notice of the default damages hearing was not properly mailed to Appellant's last known address pursuant to Rule 55(b)(2), SCRCP?

2. Did the special referee abuse his discretion in finding Respondents properly mailed notice of the default damages hearing where there is no evidence in the record to determine to which addresses Respondents sent notice letters and Respondents refused to show the notice letters to Appellant or enter them into evidence?

3. Did the special referee err in finding Respondents were under no additional duty to attempt to notify Appellant after the letter providing notice of the default damages hearing was returned as undeliverable?

STATEMENT OF THE CASE AND FACTS[1]

Respondents Estate of Artrell Davis, by and through her Personal Representatives, Lynette Gibss and Jerome Davis ("Respondents") initiated this action against Appellant Elroy Jackson ("Appellant") and Defendant Michael Laverne Marks, Jr. ("Marks") on August 25, 2015. (Compl). This action arises out of a motor vehicle accident that occurred on September 6, 2014, in Florence, South Carolina. (Compl. at ¶ 6). Artrell Davis was a passenger in a vehicle operated by Marks and owned by Appellant. (Compl. at ¶¶ 4, 9). According to the affidavit of service, Appellant was personally served with the pleadings at 1001 West Turner Gate Road, Pamplico, SC 29583 by Mark Harrelson on August 28, 2015. (Aff. Serv.). However, Appellant lives at 1010 West Turner Gate Road, Pamplico, SC 29583. (Jackson Aff.).

On January 26, 2016, Respondents filed an Affidavit of Default against Appellant. (Aff. Default). Respondents filed a Motion/Application for Default Judgment and an Affidavit in Support of Entry of Default Judgment and for Damages on March 23, 2016. (Mtn. for Def. Jud.; Aff. in Support of Entry of Def.). The circuit court held a hearing on Respondents' motion on June 6, 2016. (June 2016 Tr.). At the hearing, Respondents' counsel informed the circuit court he sent a letter, return receipt requested, restricted delivery to Appellant to notify him of the hearing but did not know if the letter was ever delivered. (June 2016 Tr. 4:25–5:15). Respondents' counsel indicated his office did not receive the green card back yet. (June 2016 Tr. 5:11). A copy of the shipping label confirmed Respondents' counsel mailed the notice of the entry of default hearing to Appellant at 1001 West Turner Gate Road, Pamplico, SC 29583. (Receipt for Exhibits). Respondents' counsel entered a screenshot from the United States Postal Service ("USPS")

[1] Appellant combines the statement of the case and statement of the facts to eliminate repetition due to considerable overlap between the procedural history and the facts in this case.

website into evidence showing the letter arrived at a USPS facility in Columbia on June 1, 2016 at 8:28 p.m. and was "currently in transit to the destination." (Receipt for Exhibits). Respondents' counsel admitted whether Appellant ever received notice of the hearing was "a little bit muddy." (June 2016 Tr. 7:12).

Nevertheless, the circuit court granted Respondents' motion and entered default against Appellant on June 30, 2016. (Or. Granting Entry of Def.). The clerk of court's office mailed a copy of the circuit court's order granting Respondents' motion for entry of default judgment to Appellant at 1001 W. Turner Gate Road, Pamplico, SC 29583. (Or. Granting Entry of Def.). The case was subsequently referred to a special referee. (Mtn. Appoint Special Referee; Or. Appointing Special Referee).

On December 13, 2016, the special referee held a hearing on damages. (Dec. 2016 Tr.). At the hearing, Respondents' counsel indicated his office notified Appellant by certified mail, return receipt requested, restricted delivery, but "[t]he envelope was returned as undeliverable." (Dec. 2016 Tr. 4:11–14). Respondents' counsel informed the special referee that two notice letters were sent but both were returned.[2] (Dec. 2016 Tr. 4:15–17). The special referee then proceeded to hear testimony from Lynette Gibbs and Jerome Davis, the parents of Artrell Davis. (Dec. 2016 Tr. 14–43).

The special referee signed an order to enter a $3,000,000 judgment against Appellant on March 7, 2017, which consisted of $1,500,000 damages for wrongful death, $1,000,000 damages for survival, and $500,000 punitive damages. (Judgment). The judgment indicated written notice

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[2] At the December 13, 2016 hearing, Respondents' counsel did not know why his office sent two letters. (Dec. 2016 Tr. 4:16–17). However, at a later hearing on Appellant's Motion to Set Aside Default Judgment, Respondents' counsel indicated he remembered that one letter was addressed to "West Turner Gate Road and the other was West Turn Gate Road, just to be sure that there was no misunderstanding of the correct street address." (April 2019 Tr. 59:6–9).

of the hearing was provided to Appellant. (Judgment). The judgment was not entered by the clerk of court's office until almost two years later, on January 25, 2019.[3] Appellant did not receive a copy of this judgment, and there are no certificates of service in the record indicating either Respondents or the Clerk of Court served the judgment on Appellant. (Jackson Aff.).

Appellant filed a Motion to Set Aside Default Judgment on April 2, 2018. (Mtn. Set Aside). On May 21, 2018, Appellant filed an affidavit indicating he was not aware a $3,000,000 judgment had been entered against him until March 29, 2018, when his attorney contacted him to let him know. (Jackson Aff.). Appellant indicated he remembered being served with a Complaint, but he did not understand the Complaint or what it meant. (*Id.*). He stated he did not negligently entrust his vehicle to Marks. (*Id.*). He testified he let his daughter borrow his car on September 8, 2014, and his daughter allowed Marks to drive the vehicle. (*Id.*). Appellant testified he lives at 1010 West Turner Gate Road, not 1001 West Turner Gate Road. (*Id.*). He believed the process server who served him with the Complaint incorrectly wrote his address as 1001 West Turner Gate Road and "after that everything went to the wrong address." (*Id.*). He testified he was not notified of the damages hearing and had not been served with a judgment. (*Id.*). Appellant maintained he would have appeared at the hearing if he knew a damages hearing was scheduled. (*Id.*).

The special referee held a hearing on Appellant's Motion to Set Aside Judgment on April 25, 2019. (April 2019 Tr.). At the hearing, Respondents' counsel submitted an affidavit from the process server. (Harrelson Aff.). Harrelson testified he personally served Appellant with the Summons and Complaint on August 28, 2015. (*Id.*). After reviewing Appellant's affidavit

[3] The Judgment was signed by the special referee on March 7, 2017, but was not filed in the case until January 25, 2019. *See Bowman v. Richland Mem'l Hosp.*, 335 S.C. 88, 92, 515 S.E.2d 259, 261 (Ct. App. 1999) (holding the effective date of a trial court order is the date the order is entered by the clerk of court, not the date the order is signed).

indicating he lived at 1010 West Turner Gate Road instead of 1001 West Turner Gate Road, Harrelson drove to Appellant's residence in March 2019 to determine if he correctly served the Summons and Complaint. (*Id.*). Harrelson testified he recognized the residence and knew he was in the "correct, general location." (*Id.*). He testified he saw Appellant at the residence and recognized him as the person he served in 2015. (*Id.*). Harrelson testified Appellant informed him the address was 1010 West Turner Gate Road. (*Id.*). Harrelson concluded his affidavit by stating:

> Regardless of the error on my affidavit of service as it relates to the address, the man that I spoke to did identify himself as Elroy Jackson, I did recognize him as he recognized me, and I do know with certainty that the door of the home in which he was standing, was the same mobile home where I served him a true, certified copy of the Summons and Complaint . . . . There is no doubt in my mind that I did my job correctly, except for the address listed on my affidavit of service. I blame the accident report for that mistake, because that was the address on the police report and the one that I had been given and there were no numbers on the home or anywhere else to confirm the exact address of his home.

(*Id.*).

At the hearing, Appellant argued the special referee should set aside the judgment and order a new damages hearing because Appellant was not given notice of the damages hearing and was never served with the judgment. (April 2019 Tr. at 4:12–14; 26:13–25). Appellant argued he believed Respondents attempted to send notice to 1001 West Turner Gate Road instead of 1010 West Turner Gate Road, but, as Respondents' counsel told the special referee at the hearing on damages, the notice letter was returned as undeliverable. (April 2019 Tr. at 4:16–25). Appellant also argued the affidavit of Harrelson admitted there was a mistake on his original affidavit of service as to Appellant's address. (April 2019 Tr. at 5:8–17). Therefore, Appellant requested the special referee hold a new damages hearing because notice was not properly provided to Appellant in accordance with Rules 55(b)(2) and 5(a) of the South Carolina Rules of Civil Procedure. (April 2019 Tr. at 5:22–6:5).

Respondents argued Appellant's motion to set aside the judgment was untimely because it

was filed more than one year after the special referee signed the judgment. (April 2019 Tr. at 12:7–21). Respondents argued there was no evidence to show Appellant did not receive the notice, but, even if there was, it would not have mattered because Appellant "would have assumed the insurance company was handling it or not known what it meant." (April 2019 Tr. at 34:4–8). Respondents stated any mistake in Appellant's address was "unimportant" because Appellant's residence was in a rural area. (April 2019 Tr. 18:20–24; 20:3; 43:21–25). Respondents also argued the notice was proper because the rule requires a party to mail notice to the last known address, not "the correct address[,] the person's residence[, or] where the person lives." (April 2019 Tr. at 42:1–4). When asked by the Court whether the regular mailing of notice of the damages hearing was returned, Respondents' counsel stated, "Not as far as I know." (April 2019 Tr. 7:2–4).

Both Appellant's counsel and the special referee asked Respondents' counsel numerous times to specify the address they used to send notice of the hearing. (April 2018 Tr. 8:11–14, 44:21–45:14, 50:14–23, 52:4–6, 53:1–10, 54:4–25). Respondents' counsel responded at various times throughout the hearing by refusing to state the address. For example, Respondents' counsel stated: "it's not our burden to prove that," "[i]t went to the last known address" without specifying what address, and "it doesn't matter." (April 2019 Tr. 8:15–16, 45:15–16, 51:14). Respondents' counsel stated at one point: "[T]he last address we knew about probably was 1001 West Turner Gate Road in Pamplico." (April 2019 Tr. 42:19–21). Toward the end of the hearing, Respondents' counsel responded affirmatively when asked by the special referee if the last known address counsel referred to was 1001 West Turner Gate Road. (April 2019 Tr. 57:17–21).

When asked by Appellant's counsel whether they had a copy of the letter that was mailed or a certificate of mailing, Respondents' counsel responded, "Well it's not required. We're not gonna build your record for you." (April 2019 Tr. 57:24–58:19). Appellant's counsel then

requested the notice letters be produced because he could not "determine from the record what was presented to" the special referee at the default damages hearing as no notice letters were entered into the record or submitted as evidence. (April 2019 Tr. 59:15–20). Respondents' counsel refused to produce the letters, stating "we're not doing discovery in the middle of a hearing." (April 2019 Tr. 60:24–25). Respondents' counsel indicated one notice letter was sent to "West Turner Gate Road and the other was [sent to] West Turn Gate Road." (April 2019 Tr. 59:5–11, 60:1–7).

At the end of the hearing, Plaintiff entered the following exhibits into the record: a March 29, 2018 affidavit of service filed by Appellant's counsel showing service on Appellant of the Motion to Set Aside Default Judgment and Harrelson's affidavit. (Exs. to April 2019 Tr.). Appellant entered the following exhibits into the record as further evidence that Appellant's correct address was 1010 West Turner Gate Road: a subpoena Appellant's counsel sent to Appellant to appear at the April 25, 2019 hearing, Appellant's earnings statement, and Appellant's medical records. (Exs. to April 2019 Tr.). Respondents objected to Appellant's exhibits. (April 2019 Tr. 60:22–61:7). The special referee allowed Appellant to introduce the exhibits and indicated he would rule on their admissibility in the subsequent order. (April 2019 Tr. 61:14–20).

On October 14, 2019, the special referee denied Appellant's Motion to Set Aside Judgment. (Or. Denying Mtn. Set Aside). In the Order, the special referee found Respondents attempted to send two letters to Appellant addressed to 1001 West Turner Gate Road, but Appellant actually lived at 1010 West Turner Gate Road. (Or. Denying Mtn. Set Aside at 3). However, the special referee found Respondents mailed the notice(s) to 1001 West Turner Gate Road "based upon all of the information available to them at the time," including the traffic collision report, Harrelson's affidavit of service of the Summons and Complaint, and the fact that Appellant's residence "has no visible indication of his address." (Or. Denying Mtn. Set Aside at 4). The special referee

further found "[t]here has been no evidence presented which indicates that [Respondents] knew or should have known that 1001 West Turner Gate Road was not the correct address." (Or. Denying Mtn. Set Aside at 4). Finally, the special referee found Appellant's Motion to Set Aside the Judgment was timely because it was filed "within less than a week from the date [Appellant] became aware of the judgment executed . . . on March 7, 2017." (Or. Denying Mtn. Set Aside at 4).

On October 21, 2019, Appellant filed an Amended Motion and Memorandum in Support of Amended Motion to Alter/Amend and Motion for New Trial.[4] (Am. Mtn. Alter/Amend). In the Amended Motion, Appellant argued the special referee erred in failing to consider that Appellant did not receive notice of the damages hearing, the notice letter was returned as undeliverable to Respondents' counsel, and the process server admitted he made a mistake in the affidavit of service. Appellant further argued the special referee erred in considering the accident report and other irrelevant information concerning Appellant's insurance carrier and finding the accident report contained the last known address of Appellant. (*Id.*). Appellant also argued the special referee erred in refusing to require Respondents' counsel to submit evidence to show the address they used to attempt to notify Appellant of the hearing. (*Id.*).

Respondents filed a Memorandum in Opposition to Appellant's amended motion on October 27, 2020. (Memo. in Opp.). In the Memorandum, Respondents argued Appellant's Amended Motion was moot because "the only thing [Appellant] says he would have done differently is the one thing a defaulting defendant is forbidden to do – offer evidence to contest

[4] Appellant filed the original Motion to Alter/Amend and Motion for New Trial on October 11, 2019, because the special referee signed the Order denying Appellant's motion to set aside the judgment on October 7, 2019. (Mtn. Alter/Amend). After the clerk's office entered the special referee's order on October 14, 2020, Appellant filed an amended Motion to Alter/Amend to protect the record. (Am. Mtn. Alter/Amend).

liability." (Memo. in Opp. at 1). In support of this argument, Respondents cited to the sentence in Appellant's affidavit that stated: "Had I known there were going to be hearings about this I would have come and told them I wasn't involved and that I didn't negligently entrust anyone with my car." (*Id.*). Respondents further argued the special referee should deny Appellant's motion because Appellant did not meet his burden to show notice was not mailed to him at his last known address. (Memo. in Opp. at 2).

Respondents stated there was no evidence the notice letter was returned or that Respondents knew the address was incorrect, and it would have been immaterial if the envelope was returned because Rule 55(b)(2) does not require actual service. (Memo. in Opp. at 7, 11). Respondents argued there was no authority requiring "that if a letter to the last known address is returned, the Plaintiff must now go on a scavenger hunt to find a new address." (Memo. in Opp. at 14). Finally, Respondents argued "[i]t ma[de] no sense to drag the grieving survivors through another damages hearing" when all Appellant was entitled to do was "cross examine and object to [Respondents'] evidence." (Memo. in Opp. at 16–17).

The special referee held a hearing on Appellant's amended motion on November 17, 2020. (Nov. 2020 Tr.). At the hearing, Appellant argued the special referee failed to consider that Respondents were on notice the letters were not mailed to the correct address because "the mailings were returned back to them as undeliverable," not unclaimed. (Nov. 2020 Tr. at 9:2–12). Respondents argued that a new damages hearing would be pointless because the damages would be the same as the first time and it would be "unthinkable" to put the family "through another damages hearing." (Nov. 2020 Tr. at 13:18–23). Respondents argued even if the letters were returned as undeliverable, the last known address of Appellant was 1001 West Turner Gate Road until Appellant himself told Respondents a different address. (Nov. 2020 Tr. at 18:1–11).

Respondents indicated Appellant should have informed the Clerk of Court of his address, hired an attorney, or called his insurance company to avoid this situation. (Nov. 2020 Tr. at 19:1–8). Respondents also argued the special referee did not err in refusing to require Respondents to produce evidence of the letters because Appellant had the burden. (Nov. 2020 Tr. at 19:11–18).

The special referee denied Appellant's motion on January 18, 2021, finding Appellant was properly served with notice of the default damages hearing. (Or. Denying Mtn. Alter/Amend). Specifically, the special referee found (1) Respondents were not required to "undertake a scavenger hunt based on a returned letter" because actual receipt was not required by Rule 55; (2) Respondents were not required to produce evidence of the mailed letter because "it is the [Appellant's] burden to come forward with evidence, not the [Respondents' burden];" (3) Appellant failed to prove the letter was returned or that Respondents knew of "a more up-to-date address"; (4) Appellant failed to show he updated his address with the clerk of court or monitor the progress of the case "between the time he was first served and the time that [Respondents] moved for a default judgment;" and (5) "return of the notice letter, even if it had been supported by the evidence, shows nothing at all that is legally relevant." (*Id.*).

Appellant timely filed a Notice of Appeal on February 8, 2021. (Notice of Appeal).

STANDARD OF REVIEW

"The power to set aside a default judgment is addressed to the sound discretion of the trial court and will not be disturbed on appeal absent a clear showing of an abuse of discretion." *Melton v. Olenik*, 379 S.C. 45, 50, 664 S.E.2d 487, 489–90 (Ct. App. 2008).

Pursuant to Rule 59(e), a party may move to alter, amend, or seek reconsideration of a judgment or order. *See Elam v. South Carolina Dept. of Transp.*, 361 S.C. 9, 21, 602 S.E.2d 772, 778 (2004). The decision of whether to grant or deny a Rule 59(e) motion lies within the sound

discretion of the trial court. *Pollard v. City of Florence*, 314 S.C. 397, 402, 444 S.E.2d 534, 536 (Ct. App. 1994). "An abuse of discretion occurs when the judgment is controlled by some error of law or when the order, based upon factual, as distinguished from legal[,] conclusions[] is without evidentiary support." *Regions Bank v. Owens*, 402 S.C. 642, 647, 741 S.E.2d 51, 54 (Ct. App. 2013).

Pursuant to Rule 60(b) of the South Carolina Rules of Civil Procedure, a party may move the Court for an order relieving them from a "final judgment, order, or proceeding" due to:

> (1) mistake, inadvertence, surprise, or excusable neglect;
> (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
> (3) fraud, misrepresentation, or other misconduct of an adverse party;
> (4) the judgment is void; [or]
> (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application.

Rule 60(b), SCRCP. A judgment may be set aside more than one year after its entry pursuant to Rule 60(b)(4). *Thomas & Howard Co. v. T.W. Graham and Co.*, 318 S.C. 286, 291, 457 S.E.2d 340, 343 (1995). "Whether to grant or deny a motion under Rule 60(b) lies within the sound discretion of the [trial court]." *BB&T v. Taylor*, 369 S.C. 548, 551, 633 S.E.2d 501, 502 (2006). "A void judgment is one that, from its inception, is a complete nullity and is without legal effect." *Id.* "The definition of 'void' under the rule only encompasses judgments from courts which failed to provide proper due process, or judgments from courts which lacked subject matter jurisdiction or personal jurisdiction." *McDaniel v. U.S. Fid. & Guar. Co.*, 324 S.C. 639, 644, 478 S.E.2d 868, 871 (Ct. App. 1996).

"Procedural due process imposes constraints on governmental decisions which deprive

individuals of liberty or property interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment of the United States Constitution." *Kurschner v. City of Camden Planning Comm'n*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008). "It is fundamental that no judgment or order affecting the rights of a party to the cause shall be made or rendered without notice to the party whose rights are to be affected." *Universal Benefits, Inc. v. McKinney*, 349 S.C. 179, 183, 561 S.E.2d 659, 661 (Ct. App. 2002) (quoting *Tryon Fed. Sav. & Loan Ass'n v. Phelps*, 307 S.C. 361, 362, 415 S.E.2d 397, 398 (1992)). "The requirements of due process not only include notice, but also include an opportunity to be heard in a meaningful way, and judicial review." *Id.*

ARGUMENT

I. The special referee abused his discretion in denying Appellant's motion to set aside default judgment and motion to alter/amend where notice of the default damages hearing was not properly mailed to Appellant's last known address pursuant to Rule 55(b)(2), SCRCP.

The judgment in this case is void pursuant to Rule 60(b)(4) because Respondents failed to give proper notice of the default damages hearing to Appellant in accordance with Rule 55(b)(2). The special referee abused its discretion in refusing to set aside the default judgment. *See Regions Bank*, 402 S.C. at 647, 741 S.E.2d at 54 ("An abuse of discretion occurs when the judgment is controlled by some error of law or when the order, based upon factual, as distinguished from legal[,] conclusions[] is without evidentiary support."). Therefore, this Court should vacate the default judgment and remand for a new default damages hearing to ensure Appellant's fundamental rights to due process are honored.

"A suit at law is not a children's game, but a serious effort on the part of adult human beings to administer justice; and the purpose of process is to bring parties into court." *Honorage Nursing Home of Florence, S.C., Inc. v. Florence Convalescent Ctr., Inc.*, 367 S.C. 108, 113, 623

S.E.2d 853, 856 (Ct. App. 2005) (quoting *McCall v. IKON*, 363 S.C. 646, 651, 611 S.E.2d 315, 317 (Ct. App. 2005)). Thus, the "Due Process Clause[[5]] demands notice reasonably calculated under all circumstances to apprise interested parties of the pendency of [an] action and afford them and opportunity to present their objections." *Blanton v. Stathos*, 351 S.C. 534, 542, 570 S.E.2d 565, 569 (Ct. App. 2002). "It is a fundamental doctrine of law that a party whose personal rights are to be affected by a personal judgment must have a day in court, or opportunity to be heard, and that without due notice and opportunity to be heard a court has no jurisdiction to adjudicate such personal rights." *Id.* "A judgment by a court without jurisdiction of both the parties and the subject matter is a nullity and must be so treated by the courts whenever and for whatever purpose it is presented and relied on." *Id.* Thus, procedural due process requires (1) notice, (2) the opportunity to be heard in a meaningful way, and (3) judicial review. *Id.* Pursuant to Rule 60(b)(4), courts should relieve parties from orders or judgments that are void for failing to provide proper procedural due process. *See McDaniel*, 324 S.C. at 644, 478 S.E.2d at 871 ("The definition of 'void' under the rule only encompasses judgments from courts which failed to provide proper due process, or judgments from courts which lacked subject matter jurisdiction or personal jurisdiction.").

Pursuant to Rule 55(b), SCRCP, the clerk of court may enter a default judgment if a case involves liquidated damages, but a party must apply to the circuit court for a default judgment if a

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5 The United States Constitution provides, in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The South Carolina Constitution provides that "[n]o person shall be finally bound by a judicial or quasi judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard." S.C. Const. art. I, § 22.

Caldwell v. Wiquist, 402 S.C. 565, 575, 741 S.E.2d 583, 589 (Ct. App. 2013).

case involves unliquidated damages. Unliquidated damages are those that "cannot be determined by a fixed formula, so they are left to the discretion of the [circuit court] or jury." *Beckmann Concrete Contractors, Inc. v. United Fire & Cas. Co.*, 360 S.C. 127, 131, 600 S.E.2d 76, 78 (Ct. App. 2004) (quoting *Black's Law Dictionary* 395–97 (7th ed. 1999)). The circuit court should conduct a default damages hearing "[i]f, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or make an investigation of any other matter." Rule 55(b)(2), SCRCP.

"Pursuant to Rule 5(a), [SCRCP,] notice of any trial or hearing on unliquidated damages shall . . . be given to parties in default by first class mail to the last known address of such party whether or not such party has appeared in the action." *Id.* The requirements of service do "not arise from an arcane or highly technical application of the rules. Rather, [the service requirements] serve[] an essential function—ensuring that notice is properly received by all entitled to it." *McCall*, 363 S.C. at 655, 611 S.E.2d at 319.

In the instant case, Respondents failed to provide proper notice of the default damages hearing to Appellant in accordance with Rule 55(b)(2). This deficiency resulted in a direct violation of Appellant's due process rights making the resulting default judgment void. The special referee found Respondents mailed two notice letters to Appellant at 1001 West Turner Gate Road Pamplico, South Carolina 29583.[6] (Or. Denying Mtn. Set Aside at 3). This finding is fatal

[6] As discussed in section II below, Respondents did not enter any notice letters or proofs of service into the record and refused to show any to Appellant's counsel. (April 2019 Tr. 57:24–60:25). Instead, Respondents relied solely on statements made by their counsel during the hearing that they mailed notice letters. *See Harper v. Bolton*, 239 S.C. 541, 562, 124 S.E.2d 54, 64 (1962) ("Every trial judge knows, as every trial lawyer knows, and every appellate court judge should know, that the statements of counsel in an argument are not evidence."). Thus, the finding that Respondents sent notice letters to 1001 West Turner Gate Road is not supported by any evidence

to the validity of the judgment. Importantly, Appellant did not receive notice of the hearing and could not have received notice of the hearing because 1001 West Turner Gate Road is not his address and has never been his address. As found by the special referee, Appellant resides at 1010 West Turner Gate Road Pamplico, South Carolina 29583. (Jackson Aff.; Or. Denying Mtn. Set Aside at 3; April 2019 Tr. at 49:6–8). Despite the fact that the notice of the default damages hearing allegedly sent by Respondents was not reasonably calculated to provide any notice to Appellant, the special referee refused to vacate the default judgment and hold a new damages hearing with proper due process protections.

In the Order Denying the Motion to Alter/Amend, the special referee cited to *NCNB S.C. v. Floyd*, 303 S.C. 261, 399 S.E.2d 794 (Ct. App. 1990) for the proposition that there is a difference between a defendant's last known address, as used in the applicable rules, and a defendant's current address. (Or. Denying Mtn. Alter/Amend at 11). However, the *NCNB* case is inapposite to the instant factual scenario before this Court. In *NCNB*, the plaintiff mailed a letter to the defendant notifying him of a foreclosure hearing at the address in Joanna, South Carolina that he gave the plaintiff at the time he closed the loan. *Id.* at 262, 399 S.E.2d at 795. The defendant later filed a motion to vacate and set aside the foreclosure decree, arguing the notice was ineffective because he did not live at that address anymore. *Id.* at 264, 399 S.E.2d at 795. This Court noted that although the defendant stated he was living in Myrtle Beach at the time, "there [was] nothing in the record (not even in his lengthy affidavit in support of the motion to vacate) that gives a specific address in Myrtle Beach." *Id.* at 264, 399 S.E.2d at 795–96. The Court then found notice was

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in the record. Further, this finding is also not supported by sufficient evidence in the record because Respondents' counsel admitted at the April 2019 hearing that one letter was sent to "West Turner Gate Road and the other was [sent to] West *Turn* Gate Road." (April 2019 Tr. 59:5–11, 60:1–7 (emphasis added)).

proper because (1) the notice was mailed to the last known address to the plaintiff, (2) the defendant "fail[ed] to give any specific address at which he could have been located;" and (3) "[t]he record indicate[d the defendant] had no specific address but was moving from place to place around Myrtle Beach." *Id.* at 265, 399 S.E.2d at 796.

However, in the instant case, Appellant testified he lived at 1010 West Turner Gate Road instead of 1001 West Turner Gate Road and believed the error in his address came from the process server incorrectly transcribing the numbers in his address in the service affidavit. Thus, unlike the plaintiff in *NCNB*, Appellant gave a specific address where he could have been located and provided notice of the default damages hearing. Further, unlike the plaintiff in *NCNB* who moved around from place to place, Appellant has not moved since this action began. Instead, he has been located at 1010 West Turner Gate since the inception of this action and was personally served with the Summons and Complaint at that address. (Jackson Aff.; Harrelson Aff.). Appellant's address has not changed. The failure of Respondents to notify Appellant of the default damages hearing comes from a fundamental mistake in Appellant's address that has existed since the beginning of this action due entirely to circumstances outside of Appellant's control.

The special referee further found that "[a]ll [defendants] have to do to make sure their 'last known address' reflects their 'current address' is to update their address with the clerk of court." (Or. Denying Mtn. Alter/Amend at 12). However, Appellant was personally served with the Summons and Complaint at his residence at 1010 West Turner Gate Road. (Harrelson Aff.; Jackson Aff.). Because Respondents served him at his residence, Appellant did not realize there was any discrepancy in what Respondents believed to be his last known address and his actual last known address. To be sure, this is not the situation in which a party is subjected to the consequences of failing to necessarily update his address. *Cf. S.C. Dep't of Soc. Servs. v. Johnson*,

386 S.C. 426, 432, 688 S.E.2d 588, 591 (Ct. App. 2009) (finding notice proper because the defendant was "statutorily required to notify SCDSS of any change in his address" and was also "required [by a North Carolina child support order] to keep NCDSS informed of his current residence and mailing address").

Appellant was also unaware of the entry of default against him because the Clerk of Court's office mailed it to 1001 West Turner Gate Road. (Or. Granting Entry of Def.). *See Ins. Co. of N. Am. v. Hyatt*, 290 S.C. 159, 162, 348 S.E.2d 532, 535 (Ct. App. 1986) ("A person against whom a judgment or order is taken without notice may rightly ignore it and may assume that no court will enforce it against his person or property."). Unlike the defendant in *NCNB*, at no point did Appellant inform Respondents that his address was 1001 West Turner Gate Road.

The special referee further held the failure of Respondents to provide proper notice to Appellant was due, in part, to Appellant's failure to monitor the progress of his case. (Or. Denying Mtn. Alter/Amend at 13). This is erroneous and is antithetical to the bedrock guarantee of due process. If all that was required was for parties to monitor the progress of cases, then service of notice of the default damages hearing would not be required in the first place. Instead, both the federal and state constitutions require litigants to be afforded due process rights, and South Carolina has determined that the best way to ensure due process rights are provided to defaulting defendants is to require plaintiffs to send the appropriate notices of hearing to determine unliquidated damages. In the instant case, notice was not proper, and Appellant's due process rights were violated because of it.

Although the special referee correctly noted Rule 55(b)(2) does not require a defaulting defendant to actually receive the notice, the special referee failed to realize the South Carolina Rules of Civil Procedure require notice that is *reasonably calculated to be received* by the

defaulting defendant. (Or. Denying Mtn. Alter/Amend at 12–13). Rule 55(b)(2) requires notice to be sent "by first class mail to the last known address of" the defaulting party. However, even though the notice is effective upon mailing, the mailing still must be addressed such that it is reasonably calculated to reach its intended recipient. *See Aetna Cas. & Sur. Co. v. Jenkins*, 282 S.C. 107, 113, 317 S.E.2d 460, 464 (Ct. App. 1984) ("The only due process consideration as to manner of service is that the statutory method of service must be 'reasonably calculated to reach interested parties.'" (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)); *Dunham v. Coffey*, No. 2005-MO-052, 2005 WL 7145303, at *3 (S.C. Oct. 17, 2005) (considering, under a due process analysis, whether three days' notice was "reasonably calculated to apprise petitioner of the hearing and provide him with the opportunity to be heard"). This best effectuates this state's public policy to liberally construe rules relating to default judgments in favor of resolving cases on the merits. *See Caldwell*, 402 S.C. at 575, 741 S.E.2d at 589 (noting a decision to reverse a refusal to set aside a default judgment was "consistent with the policy of our state to resolve cases on the merits").

In fact, in cases distinguishing between the act of mailing and actual receipt under Rule 5, the operative fact has been that the recipient has had an opportunity to receive the notice or pleading. For example, in *Schleicher v. Schleicher*—which was cited by the special referee for the proposition that Rule 5 does not require actual receipt of notice—the plaintiff mailed notice to the defendant on August 27, 1990, informing him of a hearing scheduled for September 10, 1990. 310 S.C. 275, 276, 423 S.E.2d 147, 148 (Ct. App. 1992). The defendant filed a motion to reconsider the family court's order granting the divorce with an affidavit averring he did not receive notice of the hearing until September 16, 1990, when he checked his mailbox after returning from a trip to Boston. *Id.* However, because the notice was correctly addressed and mailed with enough time

for him to have the opportunity to receive the notice, this Court upheld the family court's denial of the defendant's motion to reconsider. *See id.* at 277, 423 S.E.2d at 148–49 (noting service occurs upon mailing of a "properly addressed" mailing).

Similarly, in *State v. Langston*, our Supreme Court noted,

> Apart from counsel's bare assertion that appellant had no actual notice, the record is silent regarding appellant's receipt of notice of the trial date. There is evidence, however, that a notice was mailed to appellant by the solicitor's office and not returned by the post office. In civil matters, the mailing of a properly stamped and addressed letter which is not returned by the postal authorities gives rise to a rebuttable presumption that the letter was received by the addressee in the due course of mail.[[7]]

275 S.C. 439, 441, 272 S.E.2d 436, 437 (1980). Thus, again, even though our rules do not require actual receipt, the rules do require notice that is reasonably calculated to reach its intended recipient. In the instant case, the evidence before the special referee showed Appellant did not receive, *and could not have received*, notice of the default damages hearing because the notice letter was sent to 1001 West Turner Gate Road instead of Appellant's address of 1010 West Turner Gate Road. The process server corroborated Appellant's testimony when he admitted in his affidavit there was an "error on [his] affidavit of service as it relates to the address" and he did not do his "job correctly" as it relates to "the address listed on [his] affidavit of service." (Harrelson Aff.). In this case, notice sent to 1001 West Turner Gate Road was not reasonably calculated to be received by Appellant because Appellant has never resided at 1001 West Turner Gate Road. Therefore, the instant case is different than either *Schleicher* or *Langston* because Appellant

[7] As discussed in section III below, at the default damages hearing, Respondents' counsel told the special referee that the notice letters were returned as undeliverable by the United States Postal Service. (Dec. 2016 Tr. 4:11–17). Specifically, Respondents' counsel stated the certified mail, return receipt requested, restricted delivery "envelope was returned as undeliverable" and the other letter—which Respondents' counsel indicated was mailed by regular mail to West Turn Gate Road—was also returned. (Dec. 2016 Tr. 4:11–17; April 2019 Tr. 59:5–11, 60:1–7).

submitted actual evidence that he did not receive the notice as well as a reason as to why he never even had a chance of receiving the notice. In fact, other jurisdictions have similarly held that mailing notice to the wrong address does not satisfy the requirement of providing notice. *See, e.g.*, *Moore v. Davidson*, 663 S.E.2d 766, 769 (Ga. Ct. App. 2008) ("Mailing a legal notice to the wrong address provides no notice and may violate due process." (quoting *Mitsubishi Motors Credit of America v. Robinson & Stephens, Inc.*, 587 S.E.2d 146, 149 (Ga. Ct. App. 2003)); *Unifund CCR Partners v. Rodgers*, 281 S.W.3d 881, 885 (Mo. Ct. App. 2009) (setting aside a default judgment where notice of the hearing "was sent to the wrong address"); *Pinkston v. Livingston*, 554 N.E.2d 1173, 1176 (Ind. Ct. App. 1990) (reversing a default judgment where notice of the hearing on damages was sent to the wrong address and noting "the opportunity to be heard is a litigant's most precious right and should be sparingly denied" (quoting *Fulton v. Van Slyke*, 447 N.E.2d 628, 635 (Ind. Ct. App. 1983))).

In *McCall*, this Court made it clear that sending notice of default damages hearings is not simply some technicality to check off. There, the plaintiff attempted to provide notice of the damages hearing to the defendants "by way of a single letter addressed jointly to" the two defendants at one address. *Id.* at 651, 611 S.E.2d at 319. The address used was the office address of one of the defendants; however, it was not the address of the other defendant. *Id.* This Court stated,

> The need to properly serve each party individually does not arise from an arcane or highly technical application of the rules. Rather, this requirement serves an essential function—ensuring that notice is properly received by all entitled to it. Addressing a single notice to two distinct parties as [the plaintiff] did in the present case, sharply diminishes the likelihood that both will actually receive notice, as such method necessarily depends upon one of the parties' 'passing along' the notification to the other. The rules of service are designed to eliminate the need for such contingencies.

Id. at 654, 611 S.E.2d at 319. Although the facts of *McCall* are not entirely analogous to the

situation before the Court in the instant case, *McCall* does make it clear that notice of the default damages hearing must be likely to be actually received by the intended recipient. Any notice letter that is not likely to be received by the intended recipient is in violation of Rule 55(b)(2) and a litigant's due process rights. As Appellant resides at and received mail at 1010 West Turner Gate Road, any notice letter sent to 1001 West Turner Gate Road was not likely to be received by Appellant and violative of due process.

Further, Respondents did not act with due diligence to locate Appellant's last known address. Instead of relying on sources which purported to give Appellant's last known address through second-hand information, Respondents could have requested information directly from the United States Postal Service in order to verify Appellant's last known address. *See, e.g.*, *S.C. Dep't of Soc. Servs.*, 386 S.C. at 429, 688 S.E.2d at 589 (explaining how the plaintiff "requested verification of [the defendant's] last known address from the United States Postal Service" and then sent notice to the verified address). Further, although Harrelson states in his affidavit that he could not locate "numbers on the home or anywhere else to confirm the exact address of [Appellant's] home," he did not attempt to verify the address with Appellant when he served him or take any steps to verify the address.[8] (Harrelson Aff.). For example, most, if not all, roads have even-numbered addresses on one side of the road and odd-numbered addresses on the other side of the road. Harrelson's affidavit does not indicate he took any steps to try to determine Appellant's address from looking at the house numbers surrounding Appellant's residence. If he

[8] The special referee found "the residence at which [Appellant] resides has no visible indication of his address." (Or. Denying Mtn. Set Aside at 4). However, whether Appellant's home had easily visible numbers does not excuse the process server's failure to properly verify the address of service or Respondents' failure to give Appellant proper notice of the default damages hearing. Further, the special referee failed to consider there were many other reasonable ways (requiring minimal effort) the process server and Respondents could have verified Appellants' address to ensure they were not mistaken as to his last known address.

had, he could have possibly determined that Appellant's address could not be 1001 because the houses adjacent to Appellant's residence were even-numbered addresses. Regardless of all the possible steps he could have taken to determine the correct address, the process server knew he needed to include the address at which he served Appellant in his affidavit of service, knew it was important that the information he included in his affidavit was correct, and still took no steps whatsoever to verify the address when he could not easily locate numbers at Appellant's residence.

Although due process requirements are somewhat relaxed in the cases where a party is in default, our rules still provide for certain due process protections for defaulting parties. *See, e.g.*, Rule 55, SCRCP; *see also Limehouse v. Hulsey*, 404 S.C. 93, 116, 744 S.E.2d 566, 579 (2013) (discussing the "due process safeguards" provided to defaulting defendants and noting "[a]lthough 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"). Those protections should be strictly adhered to in order to ensure defaulting parties get the limited due process protections that our rules still afford to them. Appellant was entitled to receive notice of the damages hearing and participate in the damages hearing. Before the special referee, Respondents argued a new default damages hearing would be useless because the case involved a death and it would not be fair to "drag the grieving survivors through another damages hearing" when all Appellant was entitled to do was "cross examine and object to [Respondents'] evidence." (Memo in Opp. at 16–17). However, Appellant is entitled to be able to participate in a default damages hearing consistent with our rules.

Further, in the instant case, the special referee awarded a judgment against Appellant for $3,000,000, which consisted of $1,500,000 damages for wrongful death, $1,000,000 damages for survival, and $500,000 punitive damages. (Judgment). As discussed in *Limehouse*, "our courts

have scrutinized default judgments involving punitive damages in order to prevent harsh results." *Id.* at 115, 744 S.E.2d at 578. Participation of the defaulting defendant in an unliquidated damages hearing is extremely important, and the defaulting defendant's due process rights should be protected at all costs. As noted in *Lewis v. Cong. of Racial Equal. &/or C. O. R. E., Inc.*, "[p]articipation by the defending party [in an unliquidated damages hearing] will give to the judge and/or jury a broader understanding of the amount which should be awarded and will tend to [e]nsure a more fair verdict and judgment." 275 S.C. 556, 561, 274 S.E.2d 287, 289–90 (1981).

Finally, the default judgment was never served on Appellant in accordance with the South Carolina Rules of Civil Procedure and is void. Rule 5(a) requires service of all orders and judgments. "A person against whom a judgment or order is taken without notice may rightly ignore it and may assume that no court will enforce it against his person or property." *Ins. Co. of N. Am.*, 290 S.C. at 162, 348 S.E.2d at 535. Appellant never received a copy of the default judgment entered against him, and he did not know of the default judgment until his attorney happened across the default judgment in connection with another action. (Jackson Aff.; Apr. 2019 Tr. at 3:19–4:11). In fact, the special referee found Appellant did not become aware of the default judgment until less than a week before he filed his Motion to Set Aside the Judgment on April 2, 2018. (Or. Denying Mtn. Set Aside at 4). Respondents have not provided any evidence they served the default judgment on Appellant.

It is against South Carolina law and public policy to deny Appellant his fundamental due process rights to have notice of and participate in the hearing that personally affects his rights because of the mistakes made by a police officer in transposing the numbers of Appellant's address in a report on an accident Appellant was not personally involved in, a process server hired by Respondents in failing to take any steps to determine the address where service occurred in the

affidavit of service, and Respondents in failing to verify Appellant's last known address. Because the notice Respondents purported to send to Appellant of the default damages hearing was not reasonably calculated to provide notice to Appellant pursuant to Rule 55(b)(2) and because Respondents failed to serve Appellant with the default judgment, this Court should vacate the default judgment as void and remand for a new hearing on default damages that will provide Appellant necessary and fundamental due process protections.

II. The special referee abused his discretion in finding Respondents properly mailed notice of the default damages hearing where there was no evidence in the record Respondents sent any notice letters and Respondents refused to show the notice letters to Appellant or enter them into evidence.

The special referee erred in shifting the burden to Appellant to prove that either Respondents did not send a notice letter to him or that Respondents used an incorrect address on the notice letter. The special referee held that it was Appellant's burden "to come forward with evidence" to, for example, prove which address Respondents used on the notice letter or prove "that the letter was actually returned." (Order Denying Mtn Alter/Amend at 5, 8–9, 13; Or. Denying Mtn. Set Aside at 3–4). Respectfully, this ruling is illogical and untenable. Indeed, it would be impossible for Appellant—who never received a notice letter and has never seen the notice letters Respondents purportedly sent because they were not entered into the record and Respondents refused to provide Appellant with a copy—to prove these facts because they are outside of his knowledge. The special referee erroneously placed Appellant in an indefensible situation.

Instead, Appellant met his burden to provide evidence he did not receive notice of the hearing. Appellant's argument that he did not receive notice was not unfounded or speculative because he submitted testimony under oath that he did not receive notice and indicated his proper address was 1010 West Turner Gate Road, not 1001 West Turner Gate Road. Therefore, the

burden then shifted to Respondents to provide evidence showing they acted in accordance with South Carolina law and properly notified Appellant.

Pursuant to South Carolina law, "[i]n civil matters, the mailing of a *properly stamped and addressed letter* which is not returned by the postal authorities gives rise to a rebuttable presumption that the letter was received by the addressee in the due course of mail." *Langston*, 275 S.C. at 441, 272 S.E.2d at 437 (emphasis added); *see also Hopkins v. Harrell*, 352 S.C. 517, 523, 574 S.E.2d 747, 750 (Ct. App. 2002); *Calder v. Commercial Cas. Ins. Co.*, 182 S.C. 240, 188 S.E. 864, 866 (1936). Here, Respondents do not reach the rebuttable presumption because the letter(s) were *not* "properly addressed" and were admittedly returned. Even assuming arguendo that the letter(s) were properly addressed, which the evidence indicates they were not, the presumption of proper service may be rebutted by evidence showing there was no actual receipt. *Id.*; *see also Foster v. Ford Motor Credit Co.*, 302 S.C. 450, 395 S.E.2d 440 (1990); *Burbage v. Jefferson Standard Life Ins. Co.*, 138 S.C. 208, 136 S.E. 230, 231 (1926). Therefore, under our rules, a defaulting party has the initial burden to come forward with evidence that he *did not* receive a notice letter that was purportedly mailed. This rebuts the presumption that service of the letter was effectuated upon mailing. Once the defaulting party provides evidence that he did not receive the mailing, the burden shifts to the noticing party to prove that (1) they sent notice and (2) the notice was properly addressed.

In the instant case, Appellant met his burden to rebut the presumption that the mailing purportedly sent by Respondents effectuated service. Appellant submitted an affidavit stating that he did not receive any notice of the default damages hearing and indicating his address in fact was 1010 West Turner Gate Road, not 1001 West Turner Gate Road as listed on the affidavit of service. (Jackson Aff.). At this point, the burden shifted to Respondents to prove that they properly sent

notice in accordance with Rule 55(b)(2). Respondents did not meet this burden or even attempt to meet this burden. Instead, Respondents relied on self-serving statements during oral argument that Respondents' counsel mailed the notice to Appellant's last known address.

In fact, Respondents' counsel flippantly refused numerous times to tell the special referee or Appellant's counsel what address was listed on the notice letters. Respondents' counsel eventually stated "[t]he last address we knew about *probably* was 1001 West Turner Gate Road in Pamplico." (April 2019 Tr. 42:19–21). Respondents' counsel also indicated one notice letter was sent to "West Turner Gate Road and the other was [sent to] West Turn Gate Road." (April 2019 Tr. 59:5–11, 60:1–7). However, even these statements are not unequivocal statements indicating which addresses Respondents' counsel used for the letters. Regardless, the special referee erred in relying on solely Respondents' counsel's statements because statements of counsel are not evidence. *See S.C. Dep't of Transp. v. Thompson*, 357 S.C. 101, 106, 590 S.E.2d 511, 513 (Ct. App. 2003) ("Arguments made by counsel are not evidence."); *McManus v. City of Greenwood*, 171 S.C. 84, 89, 171 S.E.2d 473, 475 (1933) (holding statements of fact appearing only in arguments of counsel should not be considered evidence).

There is no evidence in the record to show that Respondents sent any notice letters to Appellant, let alone any evidence to show that any notice letters were properly addressed. *See Roche v. Young Bros. of Florence*, 318 S.C. 207, 212, 456 S.E.2d 897, 901 (1995) (reversing and remanding for a new hearing on damages where the defendant "did not receive notice of the damages hearing as required by Rule 5(a), SCRCP"). Respondents' counsel refused numerous times to show the special referee or Appellant's counsel either copies of the notice letters purportedly sent or any certificates of service showing any notice letters were mailed. In fact, when Appellant's counsel requested to see the notice letters or a certificate of service,

Respondents' counsel responded by stating "Well it's not required. We're not gonna build your record for you" and "we're not doing discovery in the middle of a hearing." (April 2019 Tr. 57:24–58:19; 60:24–25). Although Respondents' counsel purportedly showed something to the special referee at the default damages hearing, there were never any exhibits entered into the record at this hearing and nothing was ever filed subsequently. (Dec. 2016 Tr. 5:9–20). Therefore, it is impossible to determine from the evidence in the record that Respondents sent any notice of the default damages hearing to Appellant.

Therefore, the special referee abused his discretion (1) in making findings of fact that Respondents properly sent notice letters to Appellant without any evidentiary support in the record and (2) in impermissibly shifting the burden to Appellant after Appellant came forward with evidence that he did not receive notice of the hearing. *See Regions Bank*, 402 S.C. at 647, 741 S.E.2d at 54 ("An abuse of discretion occurs when the judgment is controlled by some error of law or when the order, based upon factual, as distinguished from legal[,] conclusions[] is without evidentiary support."). Accordingly, the Court should reverse the special referee and remand for a new damages hearing to occur after Appellant has been given proper notice.

III. The special referee erred in finding Respondents were under no additional duty to attempt to notify Appellant after the letter providing notice of the default damages hearing was returned as undeliverable.

The special referee abused his discretion in ignoring Respondents' counsel's statement that the notice letters were returned as undeliverable and holding Respondents were under no additional duty to attempt to notify Appellant of the default damages hearing even if the notice letter was returned. In the Order Denying the Motion to Alter/Amend, the special referee held that "the return of a letter as undeliverable is not evidence that the address used is not the 'last known address of the person.'" (Or. Denying Mtn. Alter/Amend at 8). The special referee further held,

"Even if [Appellant] had offered evidence that the notice letter had been returned, that fact would not be legally relevant. Return of a letter shows, at most, two things: (1) that the addressee did not get the letter, and (2) that the address used is not the addressee's current address." (Or. Denying Mtn. Alter/Amend at 13–14).

The special referee's findings that Appellant failed to show the notice letters were returned or that Respondents were not aware the address used was incorrect are not supported by sufficient evidence in the record and are not determinative of the underlying denial of due process to Appellant. (Or. Denying Mtn. Alter/Amend at 8–9; Or. Denying Mtn. Set Aside at 4–5). Respondents' counsel informed the special referee at the default damages hearing that both letters were returned as undeliverable. (Dec. 2016 Tr. 4:11–17).

As discussed above, South Carolina law provides that "the mailing of a properly stamped and addressed letter *which is not returned by the postal authorities* gives rise to a rebuttable presumption that the letter was received by the addressee in the due course of mail." *Langston*, 275 S.C. at 441, 272 S.E.2d at 437 (emphasis added). As made clear in *McCall*, our rules of service serve "an essential function" and are there to "eliminate the need for . . . contingencies" and ensure the likelihood that "notice is properly received by all entitled to it." 363 S.C. at 654, 611 S.E.2d at 319. Allowing a party to willfully ignore the fact that a party did not receive of a default damages hearing because the letter was incorrectly addressed goes directly against the law and public policy of our state. Respondents would not have had to go on a "scavenger hunt" like the special referee discussed. (Order Denying Mtn. Alter/Amend at 5). Instead—with minimal effort—Respondents could have simply requested verification of Appellant's address from the United States Postal Service. Respondents should not be entitled to benefit from their own wilful ignorance of Appellant's address at the expense of Appellant's fundamental rights to due process. Accordingly,

Appellant respectfully requests the Court reverse the special referee's refusal to set aside the default judgment and remand for a new damages hearing.

CONCLUSION

This case arises out of an error carried forward. An error which was unknown to Appellant and for which Appellant was not responsible. Where or not this was a simple or innocent mistake, this is no justification for Appellant's bedrock constitution guarantee to due process to be case aside. Accordingly, for the reasons discussed above, Appellant respectfully requests the Court vacate the default judgment pursuant to Rule 60(b)(4) and remand for a new damages hearing.

RESPECTFULLY SUBMITTED,

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