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SC Court of Appeals

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

Respondent,

v.

Harold Means

Appellant.

FINAL BRIEF OF RESPONDENT

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COUNTER STATEMENT OF THE CASE

Respondent filed its Complaint on February 15, 2019 against Appellant, bringing claims for public and private nuisance based on illegal activities at 18 Monroe Street, Greenville, South Carolina, a property of which Appellant was the record owner. Appellant was personally served on February 19, 2019. (*See* Affidavit of Service, Pl.'s Exhibit). Appellant did not answer, so Respondent moved for default judgment as to liability. On April 1, 2019, the circuit court granted Respondent's motion and set a hearing on damages for May 20, 2019.

On May 17, 2019, Respondent submitted a supplement to its original motion, including affidavits of two witnesses that would be attending the hearing. Both witnesses were former property managers of Respondent's apartment buildings. Appellant was served by mail with a copy of the motion and the supporting affidavits.

A hearing was held on May 20, 2019, which Appellant attended, as did the property managers who submitted affidavits. (*See* Affidavits of Ronald Mogard and Melinda Springer, Pl.'s Exhibits). The court declined to take live testimony, but Appellant did not object to the affidavits. Based on Appellant's submissions, Respondent's counsel's oral argument, and Judge

Gravely's dialogue with the Appellant, the circuit court entered final default judgment in the amount of $144,180.00 on June 3, 2019. (*See,* June 3, 2019 Order).

On June 4, 2020, Respondent mailed a copy of the judgment to Appellant at 102 Singing Pines Drive, Greenville SC, 29611, the address Appellant confirmed was his correct address during the May 20, 2019 hearing. (Testimony of Harold Means, May 20, 2019 Hearing Transcript p.15, line 15). Respondent did not receive delivery confirmation, so, as a precaution, Respondent sent a second courtesy copy on June 12, 2019. (Proofs of Service, Pl.'s Exhibit).

Appellant's brief states that "there is no record of service of the Order on the Appellant by the Respondent." (Appellant's Initial Brief, p. 3). Appellant is mistaken. The record contains proof of both the June 4, 2020 and June 12, 2019 mailings. (Proofs of Service, Pl.'s Exhibit). The record also contains evidence from USPS records of the unclaimed mail. *Id*.

Appellant did not move for reconsideration. Respondent proceeded with executing upon the judgment. The Greenville County Sheriff's Office returned the execution nulla bona on October 17, 2019, so Respondent began preparing foreclosure proceedings on 18 Monroe Street for purposes of satisfying the judgment.

On January 13, 2020, Appellant, through counsel, moved to set aside the default judgment. Prior to the hearing, Appellant submitted a brief and affidavits in support of his motion. Appellant's motion only asked that the court completely set aside the default judgment. It did not request, in the alternative, that the court order a new damages hearing. *Id*.

A hearing was held on February 26, 2020 before the Honorable Edward W. Miller. The circuit court declined to grant the relief Appellant requested, denying Appellant's motion to set aside the default judgment as to liability but ordering a new damages hearing. A formal order

was entered on February 27, 2020. Neither Appellant nor Appellant's counsel filed a motion for reconsideration of this order.

A damages hearing was held on June 29, 2020 before the Honorable Perry Gravely. Based on the parties' submissions, oral argument, and testimony presented at the hearing, Judge Gravely ordered final default judgment in the amount of $109,840.00. A formal order was entered on July 7, 2020.

On July 17, 2020, Appellant filed a motion for reconsideration through new counsel—the counsel who is now representing him on appeal. While the motion requests reconsideration of issues decided in the July 7, 2020 order, it also purports to request reconsideration of issues that were the subject of Appellant's Rule 60(b)(1) motion and the February 26, 2020 hearing.

Appellant's motion to reconsider was denied on July 24, 2020. Appellant then filed this appeal on August 21, 2020.

ARGUMENT

I. The Circuit Court Did Not Err In Denying Appellant's Rule 60(B)(1) Motion.

A. Standard of Review

The decision of whether to set aside a default judgment lies solely within the sound discretion of the trial judge. *Harbor Island Owners' Ass'n v. Preferred Island Props., Inc*., 369 S.C. 540, 544, 633 S.E.2d 497, 499 (2006). The trial court's decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion. *Mitchell Supply Co., Inc. v. Gaffney*, 297 S.C. 160, 162-63, 375 S.E.2d 321, 322-23 (Ct.App. 1988). An abuse of discretion 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. *In re Estate of Weeks*, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct.App. 1997).

B. <u>The Circuit Court Properly Exercised Its Discretion In Finding That Appellant Failed To Seek Relief Within A Reasonable Time</u>

Rule 60(b)(1) of the South Carolina Rules of Civil Procedure provides: "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for . . . mistake, inadvertence, surprise, or excusable neglect." "In determining whether to grant relief under Rule 60(b)(1), the court must consider the following factors: '(1) the promptness with which relief is sought; (2) the reasons for the failure to act promptly; (3) the existence of a meritorious defense; and (4) the prejudice to the other party.'" *Oulla v. Velazques*, 831 S.E.2d 450, 454 (S.C. App. 2019).

As to the timing of the motion for relief, a party is required to make the motion "within a reasonable time, and . . . not more than one year after the judgment . . . was entered. . . ." Rule 60(b), SCRCP.

"The movant in a Rule 60(b) motion has the burden of presenting evidence proving the facts essential to entitle her to relief." *BB & T v. Taylor*, 369 S.C. 548, 552, 633 S.E.2d 501, 503 (2006) (*citing Bowers v. Bowers*, 304 S.C. 65, 67, 403 S.E.2d 127, 129 (Ct.App. 1991)). A defendant's failure to meet his burden of proof on even just one factor can justify denial of a Rule 60(b) motion. *Hill v. Dotts*, 547 S.E.2d 894, 897 (S.C. App. 2001) (affirming trial court's denial of motion to set aside default judgment because his failure to understand the legal process was not a valid reason for failing to act promptly; no findings made on other factors).

The maximum time allowed for a motion is one year, but such a motion must be filed "within a reasonable time." "The one-year limit is non-discretionary, whereas **<u>the 'reasonable</u>**

time' limit is discretionary and should be determined under the facts and circumstance of each case." *S.E. Hous. Found. v. Smith*, 670 S.E.2d 680, 690 (S.C. App. 2008) (emphasis added). In other words, a defendant's delay cannot be reasonable if it exceeds one year, but the fact that a defendant's delay is less than one year does not make it reasonable.

Here, the circuit court had discretion to determine that Appellant's motion, filed seven months after final judgment, was not filed within a reasonable time. Because the circuit court properly exercised that discretion, its order denying Appellant's Rule 60(b)(1) motion can only be disturbed if it is "without evidentiary support." *Hill v. Dotts*, 345 S.C. 304, 547 S.E.2d 894 (Ct. App. 2001). However, the record supports the circuit court's finding that Appellant did not act within a reasonable time.

First, the record shows that Respondent properly served the final judgment upon Appellant. Rule 5(b)(1) of the South Carolina Rules of Civil Procedure provides for service of final judgments by U.S. Mail at the recipient's last-known address. Respondent served its complaint upon Appellant at that address. (Affidavits of Service, Pl.'s Exhibit). At the first hearing, Appellant confirmed that was still his correct address. (Testimony of Harold Means, May 20, 2019 Hearing Transcript p.15, line 15). Respondent sent the final judgment to Appellant at 102 Singing Pines Drive, Greenville South Carolina 29611 via U.S. Mail. (See, Proofs of Service, Pl.'s Exhibit). When the mailing was returned to Respondent as unclaimed, Respondent sent a copy of the judgment to Appellant to the same address via U.S. Mail a second time. *Id*. USPS records indicate that Appellant purposefully placed his mail on hold. *Id*. "Our courts have long held that in order to establish that service has been properly effected, the plaintiff need only show compliance with the civil rules on service of process." *McClurg v. Deaton*, 671 S.E.2d 87, 96 (S.C. App. 2008), *aff'd*, 716 S.E.2d 887 (S.C. 2011). Respondent complied with the rules by

mailing the final order, twice, to Appellant's address. Appellant's self-serving argument that he did not place a hold on his mail is insufficient to meet Appellant's burden of proof.

Second, even assuming *arguendo* that Appellant did not receive the order and did not place a hold on his mail, Appellant should have been monitoring for a final order. Judge Gravely advised Appellant that Respondent was seeking "a very substantial judgment against [him], some very serious relief" and that the court would be entering judgment. (May 19, 2019 Hearing Transcript p.11, lines 8-10). Thus, Respondent should have known an order was forthcoming. Additionally, a litigant, including a *pro se* litigant, "has the duty to monitor progress of his case. Lack of familiarity with the proceedings is unacceptable and the Court will not hold a layman to any lesser standard than is applied to an attorney." *Hill v. Dotts*, 1999 WL 35115055 (S.C.Com.Pl.), *aff'd*, 547 S.E.2d 894, 895 (S.C. App. 2001) (holding *pro se* litigant failed to act promptly, for purposes of Rule 60(b), by waiting 100 days to file motion to reconsider).

Third, the circuit court could have properly found, based on the timing of Appellant's motion, that Appellant never intended to seek relief from the judgment until it was holding up his $920,000 commercial transaction. Indeed, during the hearing that followed Appellant's motion, Judge Miller noted "[w]ell, as soon as he had his money held up he took swift action." (February 26, 2020 Hearing Transcript p.18, lines 5-6).

The job of the reviewing court is not to "weigh[] the evidence," but to "determin[e] whether it was sufficient to warrant the discretion exercised under the facts of this case." *Coleman v. Dunlap*, 402 S.E.2d 181, 183–84 (S.C. App. 1991), *aff'd*, 413 S.E.2d 15 (S.C. 1992). Because there is evidence in the record to support the circuit court's decision, this Court should affirm the circuit court's finding, namely, that Appellant failed to act within a reasonable time.

As noted above, a defendant's failure to satisfy the "reasonable time" requirement of Rule 60 is fatal to a Rule 60(b)(1) motion. Accordingly, the circuit court properly denied Appellant's Rule 60(b)(1) motion on these grounds.

C. As A Matter Of Law, Appellant Failed To Present A Particularized Showing Of Mistake, Inadvertence, Excusable Neglect Or Surprise Which Would Entitle Him To Avoid The Judgment.

Unlike Rule 55's "good cause" standard for relief from entry of default, "Rule 60(b) requires a more particularized showing of mistake, inadvertence, excusable neglect, [or] surprise[.]" *Sundown Operating Co., Inc. v. Intedge Industries, Inc.*, 681 S.E.2d 885, 888–89 (S.C. 2009). This more stringent standard "underscore[s] the clear intent to make it more difficult for a party to avoid a default once the court has entered a judgment," *id.*, given "South Carolina's strong policy towards finality of judgments," *Bowman v. Bowman*, 357 S.C. 146, 152, 591 S.E.2d 654, 657 (Ct. App. 2004).

Therefore, a defendant must make this particularized showing of excusable neglect to obtain relief under Rule 60(b), **even if** he has made a prima facie showing of a meritorious defense. *E.g.*, *Stearns Bank Nat. Ass'n v. Glenwood Falls, LP*, 644 S.E.2d 793, 798 (S.C. App. 2007) ("Relief from judgment is available upon a showing of excusable neglect **and** a meritorious defense[.]") (emphasis added).

Appellant argued that he should be allowed to avoid the judgment because:

- He is unsophisticated;
- He misunderstood the legal process;
- He mistakenly believed Mr. Irby would handle the litigation;
- He mistakenly believed he no longer owned the property.

None of these are valid reasons for relief from a judgment under Rule 60(b)(1).

1. "Unsophistication" Is Not Grounds For Rule 60(B)(1) Relief, As A Matter Of Law.

Generalized "unsophistication" is not a valid reason to avoid a judgment. S.C.R.C.P. 60(b)(1); *see Regions Bank v. Owens*, 741 S.E.2d 51, 54 (S.C. App. 2013) (denying motion to set aside default under Rule 55's more lenient standard, where defendant was 79–year–old man with a limited education); *Gainey v. Gainey*, 675 S.E.2d 792, 801 (S.C. App. 2009) ("[L]ack of fairness is not a ground for relief under Rule 60(b), SCRCP."). And, even if it were, it would not be an excuse for Appellant, who closed a $920,000 commercial transaction while in his eighties, has been a landlord on numerous properties since the 1990s, taught auto mechanics for three decades, and ran an auto shop business for two decades.

2. Misunderstanding Of The Litigation Process Is Not Grounds For Rule 60(B)(1) Relief.

"[F]ailure to understand the legal process is not excusable neglect under Rule 60(b)." *Hill v. Dotts*, 547 S.E.2d 894, 897 (S.C. App. 2001) (denying Rule 60(b) motion, noting that "[l]ack of familiarity with legal proceedings is unacceptable and the court will not hold a layman to any lesser standard than is applied to an attorney"); *Goodson v. Am. Bankers Ins. Co. of Fla.*, 368 S.E.2d 687, 689 (S.C. App. 1988) (same). Aside from this, the evidence suggests Appellant does understand the legal process. Appellant has been party to numerous lawsuits, including lawsuits he filed *pro se* (three of which he filed within the last two years). Appellant has also been party to lawsuits in the Court of Common Pleas. (*See,* Exhibit to Pl.'s Opposition to Motion to Dismiss).

Additionally, as apparent from the transcript of the May 20, 2019 hearing, Judge Gravely was careful to ensure that Appellant appreciated the significance of Respondent's motion for default judgment and the relief being sought. (May 20, 2019 Hearing Transcript p.11 lines 3,8-11,18). Specifically, he made sure Appellant understood that this was "[his] day in court," that this was a "very serious matter," and that the Respondent was seeking "a very substantial judgment against [him], some very serious relief." *Id*. Yet, Appellant did not ask the Court for more time to consult with a lawyer or prepare a response. Instead, three days after the court entered its final order, Appellant filed a bond for title in the real property records that appears to be fabricated and fraudulent, as it was purportedly notarized in 2014 by a notary whose commission expired 11 years later. (*See,* Exhibit to Pl.'s Brief in Support of Motion for Damages).

And, contrary to Appellant's assertions, Respondent did attempt proper service, but the mail was unclaimed. *Id*. There was ample evidence for Judge Miller to conclude that Appellant was avoiding service and had no interest in avoiding the judgment until it was holding up his large commercial transaction. (*See*, February 26, 2020 Hearing Transcript p.18, lines 5-6) ("[w]ell, as soon as he had his money held up he took swift action.").

3. Mistakenly Believing Mr. Irby Would Handle The Litigation Is Not Grounds For Rule 60(B)(1) Relief.

Appellant argues that he was "mistaken" as to whether Mr. Irby would be handling the lawsuit for him. Just as a defendant's confusion about the legal process is not grounds for Rule 60(b) relief, neither is a defendant's confusion about whether someone else will answer on his behalf. *Regions Bank v. Owens*, 741 S.E.2d 51, 55 (S.C. App. 2013).

Owens was a foreclosure action against three mortgage loan borrowers: Paddy, Hostetler, and Owens. Owens and Hostetler failed to answer and were held in default. Owens moved to

set aside the default, arguing that Paddy said he would file an answer on his behalf. Owens contended his belief was reasonable because he had previously given Paddy a power of attorney to act on his behalf regarding the property. Owens also noted that he was 79 years old, with a limited education.

The master-in-equity held that Owens failed to demonstrate good cause under Rule 55, noting that Owens "failed to take steps to protect himself and should not be rewarded for his "own negligence and intentional ignorance." *Id.* at 54. The appellate court agreed, noting that Owens should have "contact[ed] either Paddy or Paddy's attorney to confirm an answer would be filed on his behalf." *Id.* 54–55. Notably, the court did not excuse the defendant's default on the basis of his advanced age or limited education. *Id.*

Much like *Owens*, Appellant evidently relied on the assumption that someone else would be handling the lawsuit; unlike *Owens*, Mr. Irby was not even a party to the case, so it was patently unreasonable for Appellant to assume that Mr. Irby would be filing anything. This is especially the case considering that Appellant has extensive experience with the court system. If the 79-year-old *Owens* defendant could not even satisfy Rule 55's "good cause" standard by relying on a co-defendant, then Appellant certainly did not meet Rule 60(b)(1)'s more stringent standard by relying on a non-party.

4. A Mistaken Belief About Who Owned The Property Is A Mistake Of Law, And Therefore, Not A Valid Reason To Avoid A Judgment.

Appellant argued he was "mistaken" about who was the legal owner of 18 Monroe Street. At the time final judgment was entered on June 3, 2019, there was no **factual** dispute concerning the legal ownership of 18 Monroe Street. No bond for title was recorded until final judgment was entered, and, as already noted and raised before the Court, it appears that bond for title was

fabricated. (February 26, 2020 Hearing Transcript p.16, lines 2-6). Moreover, as of the time Appellant moved to set aside the default judgment, no deed had been recorded in favor of Mr. Irby (nor has Appellant argued that the bond was ever paid off). Rather, Appellant argues that he mistakenly believed that the unrecorded bond for title divested him of legal title in 2014. However, under South Carolina law, title did not pass from Appellant to Mr. Irby absent a recorded conveyance. *See* S.C. Code Ann. § 30-7-10.

Mistakes of law cannot form the basis of Rule 60(b)(1) relief. *Hillman v. Pinion*, 554 S.E.2d 427, 429 (S.C. App. 2001) ("[A] party may not generally use Rule 60(b)(1) as a vehicle for relief from a mistake of law."). Any confusion by Appellant over the status of title to 18 Monroe Street was a mistake about the legal effect of the bond for title—a mistake of law that does not permit him to avoid the judgment.

D. <u>Appellant Failed To Meet His Burden Of Showing The Existence Of A Meritorious Defense.</u>

Appellant argues he has two meritorious defenses: standing, and statute of limitations. Because Appellant did not show a valid excuse for bringing a Rule 60(b)(1) motion, and because the circuit court properly found he did not act within a reasonable time, there is no need to even consider his defenses. *E.g., Stearns Bank Nat. Ass'n v. Glenwood Falls, LP*, 644 S.E.2d 793, 798 (S.C. App. 2007) ("Relief from judgment is available upon a showing of excusable neglect **<u>and</u>** a meritorious defense[.]") (emphasis added); *Tri-County Ice and Fuel Co. v. Palmetto Ice Co.*, 399 S.E.2d 779, 783 (S.C. 1990) ("Having concluded there is an insufficient factual basis for finding excusable neglect, we need not decide whether Palmetto Ice Company has shown a meritorious defense.")

However, assuming *arguendo* that Appellant had satisfied all other requirements for a Rule 60(b)(1) motion, his motion would have still failed for failure to prove the existence of meritorious defenses.

1. <u>Appellant Did Not Preserve A Standing Defense For Appeal.</u>

Appellant did not assert a standing defense until this appeal.

- In his brief in support of his motion to set aside the judgment, Appellant argues that he has the following defenses: "the failure to name other owners of the property along Monroe Street as necessary parties, the statute of limitations, a lack of damages suffered by the plaintiff, a lack of notice to all hearings in this matter, false allegations, and improper affidavits used at the hearing on damages in this case." (Memo in Support of Motion to Set Aside, pp. 4-5). Standing is not mentioned.
- In the affidavit submitted therewith, Appellant states: "I have good defenses to this case because the plaintiff did not name necessary parties who own or control the property along Monroe Street, I did not know about complaints related to my property on Monroe Street, I did not lease the property on Monroe Street after 2014, there were no damages suffered by the plaintiff, the properties of the plaintiff did not have diminished value, the claims are for times beyond the statute of limitations, and many of the other allegations in the plaintiff's Complaint are false." (Def. Exhibit, Memo in Support of Motion to Set Aside). Standing is not mentioned.
- The defense of standing was not mentioned during oral argument on the motion. (February 4, 2020 Hearing Transcript).

In summary, Appellant—who was represented by counsel when he filed a Rule 60(b)(1) motion—did not raise a defense of standing at the trial court level. As such, the issue of whether Appellant has a standing defense was not preserved for appellate review. *E.g.*, *In re Timmerman*, 502 S.E.2d 920, 922 (S.C. App. 1998) ("South Carolina courts "have adhered to the rule that

where an issue has not been ruled upon by the trial judge nor raised in a post-trial motion, such issue may not be considered on appeal.").

2. Preservation Notwithstanding, Appellant Failed To Meet His Burden Of Proving A Meritorious Defense.

Appellant is correct that "[a] meritorious defense need not be perfect[,] nor one which can be guaranteed to prevail at trial." However, it is also the case that Appellant had the burden of persuading the circuit court that a meritorious defense exists. *Oulla v. Velazques*, 831 S.E.2d 450, 454 (S.C. App. 2019). Stated differently, it was **not** Respondent's burden to disprove these defenses, nor was it the duty of the court to search for one.

At oral argument, Appellant's then-counsel made the following argument regarding statute of limitations:

> Another meritorious defense in addition to the Plaintiff having no damages and failing to join necessary parties, the Statute of Limitations. Since 2015 my client has had nothing to do with this property; no possession, no control. No one has ever complained to him about any nuisance related to the property and yet the Plaintiff was seeking damages going back to 2010 in their affidavits, which appear to be the sole basis of the award of damages. And because my client had had nothing to do with this property since 2015, by 2019 the Statute of Limitations had already run.
>
> February 26, 2020 Transcript p.10, line 13-22.

In summary, Appellant's counsel argued that Appellant had a statute of limitation defense because Appellant did not own the property after 2015. *Id.* However, as already noted, this contradicts the record. The evidence shows Appellant was the record owner of the property when Judge Gravely entered judgment for the Respondent. Accordingly, the evidence and arguments Appellant and his counsel presented to Judge Miller were insufficient to show a meritorious statute of limitations defense.

3. Appellant's New Arguments Cannot Be Considered On Appeal Because They Were Not Presented To The Circuit Court.

Appellant now tries to raise additional arguments about why he has a statute of limitations defense. In an attempt to justify why these reasons were not timely raised to the circuit court, Appellant claims that "[a]t 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." Appellant further claims that "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."

Appellant is mistaken. At the initial hearing, Respondent presented affidavits of the former property managers, who were also in attendance. (Supplemental Affidavits; *see also*, May 19, 2019 Transcript p.5, lines 15-19 and p.7, lines 13-15). These affidavits specified the time periods for which damages were sought. *Id*. Appellant did not object to the affidavits entering the record as evidence. At the hearing on the motion to set aside the default judgment, Appellant's counsel acknowledged he was aware of the affidavits and their contents. (February 26, 2020 Transcript p.7, lines 17-18). And, contrary to Appellant's assertion, the witnesses' subsequent live testimony did not "reveal" anything new about the time periods; instead, that testimony simply confirmed what the affidavits already stated.

Appellant cannot raise arguments that were not presented to the circuit court.

II. Appellant Failed To Preserve For Appellate Review The Circuit Court's February 27, 2020 Order, Which Granted Relief Different Than What Appellant Requested.

As noted above, Appellant's Rule 60(b)(1) motion made only one request: that the Court completely set aside the default judgment entered against Appellant. Appellant did not request any relief in the alternative in his brief or in oral argument. The circuit court declined to grant the relief Appellant requested, but decided, *sua sponte*, to give Appellant a second damages

hearing. Significantly, Appellant did not move to reconsider the circuit court's order, presumably because he was satisfied with the prospect of a new damages hearing.

Because Appellant did not move for reconsideration of the circuit court's order, he failed to preserve it for appellate review. "When a party receives an order that grants certain relief not previously contemplated or presented to the trial court, the aggrieved party must move, pursuant to Rule 59(e), SCRCP, to alter or amend the judgment in order to preserve the issue for appeal." *In re Timmerman*, 502 S.E.2d 920, 922 (S.C. App. 1998) (affirming probate court's *sua sponte* determination that spouse could claim elective share, where beneficiary failed to file a motion to reconsider following the order); *S.C. Dep't of Transp. v. M & T Enter. of Mt. Pleasant, LLC*, 379 S.C. 645, 658-59, 667 S.E.2d 7, 14-15 (Ct. App. 2008) (finding the issue unpreserved when the master did not address it and the appellant did not file a Rule 59(e) motion)."

III. The Circuit Court Did Not Err In Awarding Damages Of $109,840.

A. Standard of Review

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). In reviewing the circuit court's damages award, this Court's role is not to *weigh* the evidence, but to determine if there is *any* evidence to support the damages award. *Hutson v. Cummins Carolinas, Inc.*, 280 S.C. 552, 314 S.E.2d 19 (Ct. App. 1984*); see also, McNaughton v. Charleston Charter Sch. for Math and Science, Inc.*, 411 S.C. 249, 768 S.E.2d 389 (2015).

B. The Former Property Managers' Estimates Of Lost Rent Is Competent Evidence Of Damages.

As proof of damages, Respondent presented two former property managers, who testified as to estimated lost rent. If this Court finds that this testimony is competent evidence, then deference should be given to how the trial court weighed and interpreted it. *Austin v. Specialty Trans. Services*, 358 S.C. 298 (S.C. Ct. App. 2004) ("Trial judges are afforded considerable discretion regarding the amount of damages awarded following a default judgment.").

Appellant claims this testimony was not competent evidence because it "was nothing more than conjecture, guess, and speculation." However, Appellant is conflating speculation with estimation: while *speculation* is not allowed, *estimation* can be competent evidence. *Piggy Park Enterprises, Inc. v. Schofield*, 162 S.E.2d 705, 708 (S.C. 1968) (emphasis added) ("[I]f a reasonable basis of computation is afforded, **even though the result may be only approximate**, or to adduce evidence which is the best the case is susceptible of under the circumstances and which will permit a **reasonably close estimate** of the loss.") (emphasis added). The test is whether the evidence has proper factual foundation. *See* S.C.R.E. 701(a) (providing witness may testify to "opinions or inferences which . . . are rationally based on the perception of the witness"); *Proctor v. Dept. of Health and Envtl. Control*, 628 S.E.2d 496, 516 (S.C. App. 2006) (noting evidence of damages must "consist of actual facts" to be competent).

1. Damages Estimates Based On Firsthand Knowledge Are Competent Evidence.

South Carolina courts have consistently found that, if a witness's estimate of a property's worth or rental value is based the witness's firsthand knowledge, then it is competent evidence. *See Gauld v. O'Shaugnessy Realty Co.*, 671 S.E.2d 79, 86 (S.C. App. 2008) ("[A] landowner who is familiar with her property and its value, is allowed to give her estimate as to the value of

the land and damage thereto, even though she is not an expert."); *Piggy Park Enterprises, Inc. v. Schofield*, 162 S.E.2d 705, 708 (S.C. 1968) (holding plaintiff's testimony of lost rent over a ten year period was not speculative); *Carjow, LLC v. Simmons*, 349 S.C. 514, 516 (S.C. Ct. App. 2002) (affirming damages award based on opinion testimony regarding rental value); *Conits v. Conits*, No. 2018-001468, 2019 WL 6188646, at *1 (S.C. Nov. 20, 2019) (holding husband's estimate of property value based on his knowledge of attributes was competent evidence of value); *c.f. Bowers v. Bowers*, 561 S.E.2d 610, 614 (S.C. App. 2002) (noting third party, such as property manager, may be competent to testify as to a property's value if "the source of his knowledge [is] revealed").

For instance, in *Carjow*, the plaintiff, the purchaser of a church building at a foreclosure sale, sought damages for lost rent due to the defendant's removal of pews ceiling fans. *Id.* The trial court awarded lost rent based on the testimony of plaintiff's representative as to the monthly rental value. *Id.* at 520. On appeal, the defendant argued this testimonial evidence was "speculative at best." *Id.* Affirming the trial court, the appellate court held that the property owner "was competent to give his opinion as to the property's rental value and his damages." *Id.* at 363. The court of appeals further noted that it would "give deference to the master's factual findings because he had a better vantage point from which to judge the witnesses' credibility." *Id.*

Along these same lines, courts in this state have rejected witness estimates of property value as speculative where the witness has no firsthand knowledge to support the estimate. *See Bowers v. Bowers*, 561 S.E.2d 610, 614 (S.C. App. 2002) (holding wife's valuation was conjecture because it was "premised entirely upon the unsupported and unsubstantiated advice of an unknown third party": "parroting of an unknown third party's valuation of the home" was

"pure speculation"); *Gauld v. O'Shaugnessy Realty Co.*, 671 S.E.2d 79, 87 (S.C. App. 2008) (rejecting property owner's estimate of diminution of value, where owner admitted estimate was based on noncomparable properties, and computation was based on arbitrary formula involving "manipulating the numbers and 'split[ing] it down the middle'"); *Conits*, 2019 WL 6188646, at *1.

The *Conits* case gives examples of both what does, and does not, qualify as competent testimony about estimated property value. In *Conits*, the family court had been charged with equitable division of several parcels of property owned by a divorcing couple, including a family farm that had not been professionally appraised. *Id.* At trial, the wife claimed the farm was worth $1.4 million, but admitted she had no firsthand knowledge germane to the property's value. *Id.* In contrast, the husband testified "testified the property was a three-acre orange farm and that, in his opinion, the value ranged from $35,000 to $40,000." *Id.* The family court found that the farm was worth $1.4 million, which the court of appeals ultimately affirmed. *Id.* The Supreme Court of South Carolina reversed, finding that "Husband's testimony was the only **competent evidence** of the farm's size and value in this record." *Id.* (emphasis added). In contrast, the wife's testimony as to value was not competent evidence because the wife had no firsthand knowledge of the factors driving the property's value. *See id.*

2. The Witnesses In This Case Presented Competent Testimonial Evidence Based On Their Firsthand Knowledge And Perceptions.

At the June 29, 2020 damages hearing, both witnesses laid a proper foundation and provided competent estimates of lost rent based on actual facts they observed in their property management roles.

Mr. Mogard testified:

- That he was the property manager of City View apartments from 2010-2014 and 2016-2018;
- That his responsibilities included finding tenants and collecting rent;
- That, in that capacity, he received "multiple complaints" about the house at 18 Monroe Street, which had been serving as a liquor supplier for illegal gambling in one of the apartments, and even had to hire an off-duty policeman because of the disruptive activities;
- That he could not keep the back units filled because of the nuisance activities at 18 Monroe Street;
- That the rental rate was $425 from 2010-2014;
- That the rental rate was $595 in 2016, 2017, and 2019;
- That, based on three unfilled apartments over a four year period, he estimated lost rent of $85,680 ($595 x 3 apartments x 12 months x 4 years); and
- That, prior to the hearing, he reviewed his prior affidavit and adopted it as his testimony under oath.

(Testimony of Ronald Mogard, June 29, 2020 Hearing Transcript p. 8-11). Ms. Springer testified:

- That she was property manager of Cedar Grove Apartments for sixteen months, from September 2017 to January 2019;
- That she personally observed the activities going on at 18 Monroe Street;
- That, based on those observations and her interactions with tenants, the disruptive activities at 18 Monroe Street had a "great impact" on occupancy;

- That 3-5 apartments remained vacant for the 16 months she was property manager, resulting in $1,950-$3,250 in lost rent per month;
- That, prior to the hearing, she reviewed his prior affidavit and adopted it as her testimony under oath.

(Testimony of Melinda Springer, June 29, 2020 Hearing Transcript p. 23-24). Because this testimony "consists of actual facts" from the witnesses' personal observation, it is competent evidence of damages.

3. Appellant Was Not Required To Present Multiple Forms Of Evidence.

Appellant makes much of the fact that Respondent did not offer "any testimony from an actual tenant, prospective tenant, or former tenant or any other evidence that established." This misses the point: Respondent offered competent evidence. The test is not whether Respondent offered every conceivable form of evidence possible; the test is whether Respondent proved damages by a preponderance of the evidence.

As demonstrated in *Carjow* and *Conits*, a lay witness's estimation of value may be "competent evidence," even if a more precise computation is theoretically possible. For instance, it is conceivable that the husband in *Conits* could have proven the value of the farm more precisely through a professional appraisal; that, however, does not mean his testimony was not competent evidence of the farm's value, sufficient to support a judicial determination. It is also conceivable that the property owner in *Carjow* could have presented supplemental evidence of the rental value, such as the rental rates for comparable properties; that does not mean the witness's testimony was not competent evidence of the rental value.

The court is tasked with considering the evidence that was actually presented, not the evidence that could have been presented.

C. Because The Witness Estimates Were Competent Evidence Of Damages, This Court Should Uphold The Circuit Court's Award.

The circuit court's damages award was supported by competent evidence and should not be disturbed on appeal. *Austin v. Specialty Trans. Services*, 358 S.C. 298, 311 (S.C. Ct. App. 2004) ("[b]eing mindful of the standard of review in the present case, which does not require this Court to weigh the evidence, but merely determine if there is any evidence to support the damage awards.") "We have held that where a law case is tried by a judge without a jury, his findings of fact have the force and effect of a jury verdict upon the issues, and are conclusive upon appeal when supported by competent evidence." *Beheler v. National Grange Mut. Ins. Co*., 252 S.C. 530, 167 S.E.2d 436. (S.C. 1969).

D. Appellant's Arguments Based On Standing And Proximate Cause Relate To The Merits, And Therefore Were Not Before The Circuit Court At The June 29, 2020 Damages Hearing.

Appellant also argues that damages should not have been awarded (1) because Respondent lacks standing and (2) because Respondent did not prove proximate cause.

These arguments concern *liability*, not *damages*. This is significant because, when the circuit court awarded $109,840 in damages, it was *after* Appellant had defaulted by failing to answer and *after* the circuit court declined to set aside the default. Through his default, Appellant admitted issues of liability, including affirmative defenses and proximate causation. *E.g.*, *Dixon v. Besco Engr., Inc.*, 463 S.E.2d 636, 639 (S.C. App. 1995) (holding proximate cause is admitted through default); *Ammons v. Hood*, 341 S.E.2d 816, 818 (S.C. App. 1986) ("A defendant who wishes to raise . . . a defense must do so affirmatively."); *Palmetto Constr. Group, LLC v. Restoration Specialists, LLC*, 834 S.E.2d 204, 208 (S.C. App. 2019) (holding that affirmative defense "may be waived by failing to timely assert it under the rules of civil

procedure"); *see Doe v. S.B.M.*, 488 S.E.2d 878, 882 (S.C. App. 1997) (holding trial court properly prohibited defaulted defendant from cross-examining plaintiff on any matters which were conclusively established by default).

Because Appellant had admitted proximate causation and waived affirmative defenses through his default, these issues were not before the circuit court on June 29, 2020 when it awarded damages. Accordingly, Appellant cannot attempt to attack the damages award based on issues of liability, such as causation and defenses, for an appellate court only reviews questions which were considered by the lower court. *Mason v. Gossett*, 401 S.E.2d 425, 426 (S.C. App. 1991) ("Where a question has not been decided by the lower court, this court will not consider it on appeal.").[1]

CONCLUSION

There is ample evidence in the record to support the Orders, findings and Judgment of the circuit court. Accordingly, this Court should affirm the rulings of the circuit court based upon the arguments presented herein and any evidence in the Record pursuant to Rule 220(c), SCACR.

Respectfully submitted this 16th day of April 2021.

CAMPBELL TEAGUE LLC

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[1] Additionally, as noted above, Appellant did not timely raise a standing defense in the circuit court, so that defense is waived. As to proximate cause, Respondent's witnesses both testified that the disruptive activities at 18 Monroe Street were what caused the apartments to remain vacant, resulting in lost rent.

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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 Welborn 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 Respondent's Final Brief, by placing a copy of it into the U.S. Mail, postage prepaid, to the South Carolina Court of Appeals on April 16th, 2021. I further certify that I have emailed Respondent's Final Brief to the Appellant's attorneys via e-mail as well as mailed Respondent's Final Brief by depositing a copy of it in the U.S. Mail, postage prepaid, addressed as follows:

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Respectfully submitted this 16th day of April 2021.

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