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

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Appellate Case No. 2021-000135

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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.

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FINAL REPLY BRIEF OF APPELLANT

_____

Jonathan M. Robinson, SC Bar No. 68285
Shanon N. Peake, SC Bar No. 102723
Smith Robinson Holler DuBose
and Morgan, LLC
2530 Devine Street
Columbia, SC 29205
jon@smithrobinsonlaw.com
shanonp@smithrobinsonlaw.com
(803) 254-5445 – telephone
(803) 254-5007 – facsimile

ATTORNEYS FOR APPELLANT

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ARGUMENT

I. Neither the law of the case doctrine nor the two-judge rule is applicable to this appeal

Appellant is not barred from challenging the judgment or orders in this case because the law of the case doctrine is inapplicable here. In their brief, Respondents argue the law of the case doctrine applies because Appellant did not appeal the Order signed by the Honorable J. Cordell Maddox on June 30, 2016, which granted Respondents' Motion for Entry of Judgment by Default. (June 30, 2016 Or.; R. pp. 1–10). In the Order, Judge Maddox stated "[n]otice of this hearing, dated May 25, 2016, was mailed to Defendant Jackson at his last known address." (June 30, 2016 Or. at 3; R. p. 5). Respondents argue that because Appellant did not attach the June 30, 2016 Order to the Notice of Appeal, the law of the case doctrine bars Appellant from arguing that 1001 West Turner Gate Road is not his last known address. (Resp. Br. pp. 6–9). This is not true.

First, the law of the case doctrine does not apply because Appellant appealed the final judgment and order in this case. An entry of default or any decision on a motion to set aside an entry of default is not immediately appealable. *See Ateyeh v. United of Omaha Life Ins. Co.*, 293 S.C. 436, 437–38, 361 S.E.2d 340, 340–41 (Ct. App. 1987). Appellant did not file a motion to set aside the entry of default pursuant to Rule 55(c) of the South Carolina Rules of Civil Procedure because he does not contest the entry of default. However, Appellant did file a motion pursuant to Rule 60(b) of the South Carolina Rules of Civil Procedure to set aside the default judgment as he was not given the required notice of the default damages hearing. The denial of a Rule 60(b) motion is directly appealable. *Winesett v. Winesett*, 287 S.C. 332, 334, 338 S.E.2d 340, 341 (1985). However, instead of filing an immediate appeal from the Order denying his Motion to Set Aside the Default Judgment, Appellant filed a Motion to Reconsider. Appellant then properly appealed from the final Order denying his Motion to Reconsider. *See Elam v. S.C. Dep't of Transp.*, 361

S.C. 9, 26, 602 S.E.2d 772, 781 (2004) (explaining an appeal is timely when filed within thirty days after receipt of written notice of entry of the order denying a Rule 59(e) motion). An appeal from a final order or judgment subsumes other interlocutory orders in the case that led to the final order or judgment. *See Puniyani v. Avni Grocers*, No. 2015-UP-050, 2015 WL 409806, at *1 (S.C. Ct. App. Jan. 28, 2015) (finding appeal of one judge's final order grants the Court jurisdiction over another judge's interlocutory order in the case even though the interlocutory order was not attached to notice of appeal); 5 Am. Jur. 2d Appellate Review § 295 ("A notice of appeal which names the final judgment is sufficient to support review of all earlier orders that merge in the final judgment. . . . Consequently, a designation of the final judgment is sufficient to bring up for review all interlocutory orders merged in that judgment; it is unnecessary to specify the particular orders.").

Second, the law of the case doctrine does not apply to the above-stated sentence in Judge Maddox's June 30, 2016 Order because the sentence is dicta and not binding. "Dicta or, as it is also known, dictum 'is a statement on a matter not necessarily involved in the case, and is not binding as authority. Dictum is an opinion expressed by a court, but which, not being necessarily involved in the case, is not the court's decision.'" *Nash v. Tindall Corp.*, 375 S.C. 36, 40–41, 650 S.E.2d 81, 83 (Ct. App. 2007) (quoting 21 C.J.S. Courts § 227 (2006)). "Judicial dicta is 'not essential to the decision.'" *Id.* at 40, 650 S.E.2d at 83 (quoting *Black's Law Dictionary* 465 (7th ed. 1999)). "The doctrine of the law of the case is not applicable to a statement by the court which does not constitute a binding adjudication," such as "mere dicta, an expression or statement by the court on a matter not necessarily involved in the case nor necessary to a decision thereof." *Weil v. Weil*, 299 S.C. 84, 89, 382 S.E.2d 471, 473 (Ct. App. 1989). *See also Sloan Const. Co. v. Southco Grassing, Inc.*, 395 S.C. 164, 175, 717 S.E.2d 603, 609 (2011) (Pleicones, J. dissenting)

("I simply point out that the law of the case doctrine does not apply to mere *dicta*."). Any finding by Judge Maddox regarding notice letters sent to Appellant for the hearing on the entry of default is dicta because the South Carolina Rules of Civil Procedure do not require a defendant to receive notice of a hearing to enter default against him. In fact, Rule 55 indicates the Clerk of Court may enter default against a defendant after a party has failed to plead or otherwise defend a case. Rule 55 only requires notice to be sent to a defendant of the default damages hearing at his last known address.

Further, the law of the case doctrine does not apply to interlocutory orders, as they are not final and the issues can be raised again by the parties. *See Levi v. N. Anderson Cty. EMS*, 409 S.C. 374, 381–82, 762 S.E.2d 44, 48 (Ct. App. 2014) ("Like the denial of a motion for summary judgment, the denial of a motion to dismiss does not establish the law of the case and the issue raised by the motion can be raised again at a later stage of the proceedings."); *Weil*, 299 S.C. at 89, 382 S.E.2d at 473 ("The doctrine of law of the case applies to an order or ruling which finally determines a substantial right."); *Bone v. U.S. Food Serv.*, 404 S.C. 67, 82, 744 S.E.2d 552, 560 (2013) ("Because the orders were *not interlocutory* orders and not timely appealed, the orders became the law of the case." (emphasis original)). As the order entering default was not immediately appealable, the law of the case doctrine does not apply to it.

Respondents also incorrectly argue that the special referee was bound by Judge Maddox's finding in the June 30, 2016 Order that 1001 West Turner Gate Road was Appellant's last known address because of the two-judge rule. The two-judge rule states "one judge of the same court cannot overrules another." *Charleston Cty. Dep't of Soc. Servs. v. Father Stepmother, & Mother*, 317 S.C. 283, 288, 454 S.E.2d 307, 310 (1995). Thus, "a successor judge may not substitute his own judgment for that of the trial judge; nor may he grant a new trial . . . unless he articulates a

valid reason to grant post-trial relief based on the record before him." *Id.* As *Charleston County Department of Social Services* makes clear, a subsequent judge may have a different record before him than the first judge and may grant necessary relief based on that record.

In the instant case, Appellant was not present at the hearing on the entry of default and was not able to present any arguments or evidence that 1001 West Turner Gate Road was an incorrect address. He likewise was unable to do so at the default damages hearing because he was not given required notice of the hearing. Accordingly, Appellant filed a motion pursuant to Rule 60(b) to set aside the default judgment because his due process rights were violated. It was then that he submitted evidence to the special referee that his address was actually 1010 West Turner Gate Road, not 1001 West Turner Gate Road. This evidence was not before Judge Maddox in 2016. Instead, the only evidence before Judge Maddox was a copy of the letter that Respondents sent as to the entry of default hearing.

As discussed in Appellant's brief, there is a rebuttable presumption that the mailing of a properly stamped and addressed letter which is not returned by the postal authorities was received by the addressee. (App. Br. pp. 18–19). *See also State v. Langston*, 275 S.C. 439, 272 S.E.2d 436, 437 (1980). Therefore, as the only evidence before Judge Maddox was a copy of a letter that was still moving through the postal system, Judge Maddox found the unnecessary notice was proper. (June 6, 2016 Hrg. Tr. at 5–8; R. pp. 169–72). However, the evidence before the Special Referee was different. Respondents did not even submit any evidence to the Special Referee of the letter that they allegedly mailed, and, even if there was evidence of mailing, Appellant rebutted the presumption by submitting evidence that the address was incorrect. Because the Special Referee's ruling would have been based on the evidence in the record before him, any finding by the Special

Referee that Respondents failed to properly send notice of the default damages hearing would not have been a violation of the two-judge rule.

Accordingly, this Court should reject Respondents' erroneous suggestion that the law of the case doctrine and the two-judge rule are dispositive of this appeal. (Resp. Br. p. 6).

II. Respondents' brief is replete with improper references to documents and facts that were not before the special referee, and these references and arguments should be stricken and not considered by this Court

Respondents improperly attempt to submit new evidence to this Court that was not submitted to the lower court and is not properly in the Record on Appeal, and this Court should not consider this evidence.[1] As made clear by Rule 210(c) of the South Carolina Appellate Court Rules, the parties may only include in the Record on Appeal and cite to matter which was presented to the lower court. There are three categories of information/evidence Respondents attempt to rely on for the first time in their brief: (1) purported tax bills of Appellant, driving tickets purportedly received by Appellant, documents purportedly used by Appellant to obtain credit; (2) purported correspondence between Respondents and Greenville Casualty Insurance Company ("Greenville Casualty"); and (3) two letters purportedly sent by Respondents to Appellant at 1001 West Turner Gate Road and 1001 W. Turngate Rd. on November 10, 2016.[2] (Resp. Br. pp. 4–5, 7, 15–20, 22–24). In doing so, Respondents ask this Court to improperly serve as a court of first resort to accept new evidence in this case and weigh that evidence in order to affirm the decision of the lower

[1] Appellant is filing a Motion to Strike with the Court requesting the Court strike twenty-nine of Respondents' forty-five designations included in the Designation of Matter filed on June 14, 2021. Appellant incorporates this Motion herein and requests the Court strike these designations as well as the portions of Respondents' brief that discuss this new evidence. Respondents refer to improper evidence on at least thirteen pages of their twenty-seven-page brief.

[2] Respondents also refer to unidentified insurance documents from "related litigation" and allege that "Greenville Casualty has redacted Appellant's address from" these documents. (Resp. Br. at 20, 23). This is clearly not in the record, irrelevant to this case, and improper for this Court's consideration. These sentences and references should also be stricken from Respondents' brief.

court. However, this is improper, and this Court may only consider evidence that was presented to the lower court.

First, Respondents attempt to rely on numerous documents they say show Appellant's address is actually 1001 West Turner Gate Road, such as tax bills, tickets, and pleadings in other lawsuits. None of these documents were entered into evidence before the lower court. The only evidence Respondents relied on at the lower court were the affidavit of service for the Summons and Complaint and the traffic collision report from the accident. There is nothing in the record to show that Respondents were aware of any of this evidence prior to allegedly sending notice of the default damages hearing to Appellant, and, as it was not submitted into evidence, it is improper. To the extent that Respondents silently request the Court to take judicial notice of any of these documents, judicial notice would be improper.

> Appellate courts are generally reluctant to notice adjudicative facts even when those facts may be absolutely reliable. Notice of "facts" for the first time on appeal may deny the adverse party the opportunity to contest the matters noticed; it may also violate the general principle that appellate review should be limited to the record. Finally, appellate courts, limited to the "cold" record, cannot be as sensitive to the appropriateness of judicial notice as the trial judge. For the foregoing reasons we hold that original judicial notice of adjudicative facts at the appellate level should be limited to matters which are indisputable.

Wise v. Wise, 394 S.C. 591, 600–01, 716 S.E.2d 117, 122 (Ct. App. 2011). These are not indisputable facts.[3] Further, as these documents were not submitted to the lower court, Appellant has not even been able to review these documents. Respondents are really requesting the Court review additional evidence that was not available to the lower court and use that evidence to hold in their favor without giving Appellant the opportunity to respond or contest, essentially mirroring

[3] Respondents even admit this additional evidence is not indisputable as they note a "small minority of tax bills went to the 1010 address." (Resp. Br. p. 16).

what happened at the default damages hearing. This is improper, and the Court should not consider these new pieces of evidence or Respondents' arguments related to them.

Second, Respondents also attempt to rely on irrelevant correspondence with Greenville Casualty that was not submitted to the lower court. Throughout their brief, Respondents refer to Greenville Casualty and Appellant interchangeably. (*See, e.g.*, Resp. Br. pp. 15, ("Greenville Casualty wants . . ."), 20 ("Greenville Casualty's attempt . . .")). In fact, despite its name not appearing in the caption of this case, "Greenville Casualty" appears at least eighty times in Respondents' brief. Respondents argue that Greenville Casualty received notice of the default damages hearing and attempt to submit new evidence in the form of correspondence between Respondents and Greenville Casualty. However, whether or not Greenville Casualty had notice of anything related to this action is irrelevant to this appeal. This appeal concerns *Appellant's* fundamental due process rights. It is Appellant who this judgment was entered against, and it is Appellant who was entitled to notice of the hearing. As Rule 55(b)(2) states, "[N]otice of any trial or hearing on unliquidated damages shall also be given *to the parties in default*." (emphasis added). Rule 55(b)(2) does not state that notice must be given to the parties in default or their insurance carrier. Respondents improperly attempt to focus this case on an insurance company to detract from Appellant's fundamental due process rights.

Finally, Respondents also attempt, for the first time on appeal, to submit into the record a copy of the two letters they allegedly sent to Appellant on November 10, 2016, regarding the default damages hearing. According to their brief, one letter was sent to 1001 West Turner Gate Road and another was sent to 1001 W. Turngate Road. (Resp. Br. 19). However, as discussed more fully in Appellant's brief, Respondents refused to submit this into evidence at the hearing on Appellant's Motion to Set Aside Default Judgment and refused to allow Appellant's counsel to

see a copy of the letters. In fact, Respondents' counsel responded with "[w]e're not gonna build your record for you" and "we're not doing discovery in the middle of a hearing" when asked by Appellant's counsel to see a copy of any letters they sent or any certificates of service. (April 2019 Tr. 57:24–58:19, 60:24–25; R. pp. 284–85, 287). However, Respondents are now attempting to improperly build a record for themselves on appeal. Respondents never submitted these letters into evidence, and therefore, they cannot rely on them now. Although Respondents' counsel argued about the letters, there is no evidence in the record that the letters were sent. *See Cobb v. Benjamin,* 325 S.C. 573, 581, 482 S.E.2d 589, 593 (Ct. App. 1997) ("[R]epresentation of fact by counsel in written briefs, memoranda, or made during oral argument, may not be considered by the court where it is unsupported by the record."). Further, for the reasons discussed in Appellant's brief and further herein, even if the Court considers these letters, the judgment should still be reversed as Appellant's address is 1010 West Turner Gate Road.

Accordingly, this Court should strike and refuse to consider the new evidence Respondents attempt to submit for the first time on appeal.

III. There is no evidence to support the Special Referee's finding

The only proper evidence actually in the record that Respondents rely on in their brief to support the special referee's finding is (1) the accident report and (2) the affidavit of service of the Summons and Complaint. (Resp. Br. pp. 10–13). However, even considering these pieces of evidence, the Special Referee erred in refusing to vacate the default judgment because there is no evidence in the record that Respondents sent any notice to Appellant and, even if there were, the notice was improperly sent to an incorrect address in violation of Rule 55(b)(2).

First, as to the accident report, it is clear based on Appellant's affidavit that the address on the accident report is incorrect. Respondents cite to *Caldwell v. Wiquist,* 402 S.C. 565, 568, 741

S.E.2d 583, 585 (Ct. App. 2013) for the proposition that the address included in a traffic collision report is the last known address of the defendant. (Resp. Br. p. 12). However, in the instant case, Appellant was not involved in the accident or present at the scene of the accident. He is involved in this action because he is the owner of the car that was involved. In *Caldwell*, on the other hand, the defendant was involved in the accident and presumably spoke with the officer who completed the traffic collision report. *Id.* at 568, 741 S.E.2d at 585. Here, Appellant did not tell the officer his address incorrectly, and it is unclear how the officer obtained the wrong address. Further, *Caldwell* is also factually distinct from the instant case because (1) the defendant there was not arguing that the address on the traffic collision report was incorrect and (2) the defendant was challenging service of the action by publication. *See id.* at 570–77, 741 S.E.2d at 586–90.

Second, as to the affidavit of service, the process served submitted another affidavit admitting that the address contained in the affidavit of service was incorrect. (Harrelson Aff.; R. pp. 132–33). Respondents rely on *Fassett v. Evans*, 364 S.C. 42, 47, 610 S.E.2d 841, 844 (Ct. App. 2005) and *Delta Apparel, Inc. v. Farina*, 406 S.C. 257, 267, 750 S.E.2d 615, 620 (Ct. App. 2013) to argue that the address included in the affidavit of service should be presumed correct. However, these cases stand for the proposition that proper service is presumed where there is an affidavit of service. These cases do not say that the information contained in the affidavit cannot be challenged. Further, Appellant is not contesting that proper personal service occurred, only that the affidavit of service contained a mistake in his address and he was not provided with appropriate notice of the default damages hearing.[4] Thus, these cases have no bearing here.

[4] Numerous times throughout the brief, Respondents state that "the affidavit of service showing 1001 West Turner Gate was sufficient to effect service of the lawsuit." (Resp. Br. p. 13). Appellant notes that the affidavit of service is *not* what effectuated proper service of the lawsuit, and Appellant does not agree that service occurred at 1001 West Turner Gate Road. Instead, as Appellant's affidavit makes clear, Appellant does not contest that the process server personally

IV. Appellant's fundamental right to due process is not moot

Appellant's fundamental right to due process is not "legally irrelevant" despite what Respondents would have this Court believe. (Resp. Br. 14). Respondents argue that the failure to afford Appellant fundamental due process rights is moot because his appearance at the default damages hearing "would not have changed a thing." (Resp. Br. p. 14). Respondents further argue—without citing to any law in support of this proposition—that Appellant must prove prejudice if there was no required notice. However, as South Carolina law makes clear, a judgment that is entered without due process is void. *McDaniel v. U.S. Fid. & Guar. Co.*, 324 S.C. 639, 644, 478 S.E.2d 868, 871 (Ct. App. 1996) ("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."); *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.").

Respondents argue that Appellant's due process rights do not matter because Appellant's affidavit states he "would have come and told them I wasn't involved and that I didn't negligently entrust anyone with my car." (Resp. Br. p. 24). However, this is improper because Appellant is entitled to notice and to be able to participate in a default damages hearing consistent with our rules, regardless of what Respondents believe would happen if another damages hearing were to occur. Respondents also argue "the result will be exactly the same" because this case involved a death, so Appellant should not have the opportunities he is entitled to under our law. (Resp. Br. p. 25). However, this is untrue. The judgment is this case was $3,000,000 and $500,000 came

served him with the Summons and Complaint at his address of 1010 West Turner Gate Road. (Jackson Aff.; R. p. 128).

from punitive damages alone. *See Limehouse v. Hulsey*, 404 S.C. 93, 115, 744 S.E.2d 566, 578 (2013) ("[O]ur courts have scrutinized default judgments involving punitive damages in order to prevent harsh results.").

Further, the harmless error rule does not apply in this case as this involves Appellant's constitutional right to due process. *See LaSalle Bank Nat'l Ass'n v. Davidson*, 386 S.C. 276, 280, 688 S.E.2d 121, 123 (2009) ("The law recognizes two kinds of errors: trial errors and structural defects. The former are subject to the 'harmless error' analysis while the latter are not . . . [as they] affect[] the entire conduct of the trial from beginning to end."); *State v. Rivera*, 402 S.C. 225, 246–47, 741 S.E.2d 694, 705 (2013) (explaining "there are certain constitutional rights which are 'so basic to a fair trial that their infraction can never be treated as harmless error'" (quoting *Arizona c. Fulminante*, 499 U.S. 279, 306–08 (1991))). When a due process violation has occurred, as one has here, the order is void, and this Court should find the Special Referee erred in refusing to vacate the default judgment.

CONCLUSION

For the reasons discussed herein and in Appellant's brief, Appellant respectfully requests this Court vacate the default judgment pursuant to Rule 60(b)(4).

(*Signature page follows)*

RESPECTFULLY SUBMITTED,

s/ Shanon N. Peake
Jonathan M. Robinson (S.C. Bar #68285)
Shanon N. Peake (S.C. Bar #102723)
Smith Robinson Holler DuBose and Morgan, LLC
2530 Devine Street, Third Floor
Columbia, South Carolina 29205
(803) 254-5445
shanonp@smithrobinsonlaw.com

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Of whom Elroy Jackson is the Appellant.

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CERTIFICATE OF COMPLIANCE

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Pursuant to Rule 211(a), SCACR, I certify that this brief complies with the provisions of Rule 211(b), SCACR.

RESPECTFULLY SUBMITTED,

s/ Shanon N. Peake
Jonathan M. Robinson (S.C. Bar #68285)
Shanon N. Peake (S.C. Bar #102723)
Smith Robinson Holler DuBose and Morgan, LLC
2530 Devine Street, Third Floor
Columbia, South Carolina 29205
(803) 254-5445
shanonp@smithrobinsonlaw.com

ATTORNEYS FOR APPELLANT

August 24, 2021.