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SC Court of Appeals

**THE STATE OF SOUTH CAROLINA**
**IN THE COURT OF APPEALS**

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APPEAL FROM SPARTANBURG COUNTY
COURT OF COMMON PLEAS
THE HONORABLE J. DERHAM COLE, CIRCUIT COURT JUDGE
THE HONORABLE SHANNON M. PHILLIPS, MASTER-IN-EQUITY

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APPELLATE CASE NO. 2022-000348
CIVIL ACTION NO. 2021-CP-42-01163

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Custom Performance Engineering, Inc.,

**RESPONDENT-APPELLANT,**

versus

AM Industrial Group, LLC,

**APPELLANT-RESPONDENT.**

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# INITIAL REPLY BRIEF OF APPELLANT-RESPONDENT AM INDUSTRIAL GROUP, LLC

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## STATEMENT OF ISSUES IN REPLY

**I.** The Trial Court improperly denied Appellant-Respondent AMI's Motion to Set Aside Entry of Default because good cause existed to set aside the Entry of Default.

**II.** The Master-In-Equity erred in awarding damages inconsistent with South Carolina law and unsupported by the evidence because Respondent-Appellant Custom Performance failed to meet its burden for establishing lost profits damages and failed to adduce evidence in support of portions of its other purported damages.

**A.** The issue of lost profits was raised by AMI and ruled upon by the Master-in-Equity and thus the issue is preserved for appellate review; AMI did not waive its arguments.

**B.** Custom Performance failed to meet its burden of proof as to lost profits damages.

**C.** The evidence in the record does not support other portions of the damages order.

## ARGUMENT IN REPLY

### I. The Trial Court improperly denied Appellant-Respondent AMI's Motion to Set Aside Entry of Default because good cause existed to set aside the Entry of Default.

The Trial Court erred by denying AMI's[1] Motion to Set Aside Entry of Default because the facts giving rise to the default demonstrate that multiple intervening events beyond AMI's control rendered AMI unable to timely secure legal services necessary for answering or otherwise responding to the Complaint.

While a defendant may not be relieved from an entry of default solely because it relied to its detriment on a negligent insurance agent, setting aside an entry of default is warranted where the totality of the circumstances demonstrate that the defaulting party acted reasonably in seeking to timely respond to a complaint. Sundown Operating Co. v. Intedge Indus., 383 S.C. 601, 609-10, 681 S.E.2d 885, 889 (2009); see also Ricks v. Weinrauch, 293 S.C. 372, 373-75, 360 S.E.2d 535, 536-37 (Ct. App. 1987). In Ricks, appellant contacted her insurance agent regarding a complaint filed against her pursuant to advice she received from her attorney. 293 S.C. at 373,

[1] Unless otherwise defined, all capitalized terms have the same meaning set forth in the Appellant's Brief of Appellant-Respondent AM Industrial Group, LLC.

360 S.E.2d at 536. After returning from a holiday vacation nearly a month later, and just two days before the deadline to answer the complaint, Appellant discovered that the insurance agency had closed or gone bankrupt and that her insurance carrier had therefore never received the complaint. Id. Appellant was unable to provide her copy of the complaint to her attorney before the default deadline. Id. at 373-74, 360 S.E.2d at 536. The Court of Appeals of South Carolina affirmed vacating the entry of default because appellant "acted reasonably" and "all of the factors considered together" were sufficient to set aside the entry of default. Id. at 375, 360 S.E.2d at 537.

Here, upon becoming aware that AMI had been served with the Complaint on June 9, 2021, AMI promptly worked with its then-attorney and its insurer to secure insurance coverage and protect AMI's interests by timely answering or otherwise responding to the Complaint. [R.pp. ____; Motion to Set Aside Entry of Default, pp. 2-3.] AMI's insurer denied coverage shortly before AMI's deadline to respond to the Complaint, but never notified AMI or AMI's counsel of the extended deadline it secured from Custom Performance to answer the Complaint. [R.pp. ____; ____; Motion to Set Aside Entry of Default, p. 3; Sept. 28, 2021 Transcr., 3:22-4:3.] AMI attempted to work with its attorney to timely answer or otherwise respond to the Complaint, but the applicable time limitation ran before AMI was able to do so. [R.pp. ____; Motion to Set Aside Entry of Default, pp. 2-3.] Despite Custom Performance's familiarity with AMI's counsel and AMI's insurance representative, Custom Performance did not serve or otherwise inform AMI of Custom Performance's Motion for Entry of Default. [R.pp. ___; Sept. 28, 2021 Transcr., 6:6-7:7.]

As in Ricks, AMI acted reasonably given the circumstances in seeking to respond to the Complaint, and AMI's failure to timely answer or otherwise respond to the Complaint was not solely the result of the negligence of either AMI's then-attorney or AMI's insurer. Instead, AMI's default was the result of multiple intervening failures of communication involving AMI's insurer,

its then-attorney, and Custom Performance. Even if each cause of the default "would not, alone, meet the requisite showing for good cause," here "all of the factors considered together are sufficient for such a showing." Ricks, 293 S.C. at 375, 360 S.E.2d at 537.

Custom Performance is incorrect that the Wham factors do not favor setting aside the Entry of Default. [Response Brief of Respondent-Appellant Custom Performance, pp. 12-14.] Factors bearing on whether an entry of default should be set aside include (1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted. Wham v. Shearson Lehman Bros., Inc., 298 S.C. 462, 465, 381 S.E.2d 499, 501-02 (Ct. App. 1989).

Citing no legal authority, Custom Performance contends that AMI's Motion to Set Aside Entry of Default was untimely. [Response Brief of Respondent-Appellant Custom Performance, p. 13.] AMI filed its Motion on September 8, 2021, 30 days after its deadline to answer the Complaint and less than three weeks after the Entry of Default. [R.pp. ___; ___; Motion to Set Aside Entry of Default; Order of Default.] A one-month delay between an entry of default and a motion to set aside is not untimely. Yoko Kim Melton v. Chong Olenik, 379 S.C. 45, 55-56, 664 S.E.2d 487, 492-93 (Ct. App. 2008) (reversing order denying motion to set aside entry of default and remanding to the trial court where defaulting party filed a motion for relief from an entry of default seven months after being served and over a month after being notified of the entry of default).

AMI's default rendered it unable to present its defenses or otherwise defend itself in the litigation, but the record on appeal nonetheless demonstrates that AMI has a meritorious defense. AMI's invoices to Custom Performance contain terms indicating that the AMI Machine was sold "as is" with a disclaimer as to any warranties. [R.pp. ___; ___; ___; Compl., Ex. A; Damages

Hearing, Plaintiff's Exhibit 1 and Defendant's Exhibit 1.] Moreover, Mr. Adams also testified that Custom Performance provided AMI with a new seam welder as part of the transaction for the AMI Machine. [R.p. ___; Damages Transcr., 13:18-25 (Mr. Adams agreed that "part of [the] transaction was that a seam welder went from [Custom Performance] to [AMI].").] Custom Performance's provision of the seam welder to AMI contradicts Custom Performance's allegation in the Complaint that it rejected the AMI Machine. [R.p. _____; Compl., ¶¶ 16-17.] See also Thompson v. Hammond, 299 S.C. 116, 120, 382 S.E.2d 900, 903 (1989) (a defense "need be only one which is worthy of a hearing or judicial inquiry because it raises a question of law deserving of some investigation and discussion or a real controversy as to real facts arising from conflicting or doubtful evidence") (internal citation omitted).

Finally, Custom Performance's contention that it would be prejudiced by a delay in prosecuting its case is unavailing. [Response Brief of Respondent-Appellant Custom Performance, p. 14 ("As time passes, evidence and memories fade and discovery becomes more difficult. . . Custom Performance would be forced to try to prove its case based on evidence and testimony that is three to four years beyond the dates they occurred through no fault of its own.").] Delay alone is not sufficient prejudice to defer relief where other factors weigh in favor of setting aside an entry of default. Williams v. Watkins, 384 S.C. 319, 327, 681 S.E.2d 914, 918 (Ct. App. 2009) (concluding that "the degree of prejudice [plaintiff] will suffer if relief is granted is not so high as to outweigh the other factors" where plaintiff was on notice of defendants' denials and had already gathered and preserved relevant evidence) (citation omitted); see also Colleton Preparatory Acad., Inc. v. Hoover Universal, Inc., 616 F.3d 413, 418 (4th Cir. 2010) ("[D]elay in and of itself does not constitute prejudice to the opposing party."). Indeed, if the Trial Court had appropriately

set aside the default originally, then there would have been very little delay. Any delay at this point owes solely to the Trial Court's error and should not be used to prejudice AMI.

The "law favors the resolution of disputes based upon all parties having their day in court," and Rule 55(c), SCRCP, is to be "liberally construed so as to promote justice and dispose of cases on the merits." Williams, 384 S.C. at 918, 681 S.E.2d at 327 (internal citation omitted); In re Estate of Weeks, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct. App. 1997); Columbia Pools, Inc. v. Galvin, 288 S.C. 59, 61, 339 S.E.2d 524, 525 (Ct. App. 1986) ("[W]e hold that where there is a good faith mistake of fact, and, no attempt to thwart the judicial system, there is a basis for relief. We favor trial of issues on merit over securing judgment by slight technicalities."). Under this principle, the Trial Court erred in disregarding that the totality of the circumstances giving rise to AMI's default constituted good cause to set aside the Entry of Default. Accordingly, this Court should reverse the Trial Court's denial of AMI's Motion to Set Aside Entry of Default and remand the case for resolution on its merits.

## II. The Master-In-Equity erred in awarding damages inconsistent with South Carolina law and unsupported by the evidence because Respondent-Appellant Custom Performance failed to meet its burden for establishing lost profits damages and failed to adduce evidence in support of portions of its other purported damages.

The Master-In-Equity's award of lost profits damages was based on an error of South Carolina law and was unsupported by the evidence in the record. The issue was preserved for appeal because AMI raised the issue to the Master-In-Equity and the Master-In-Equity issued a ruling granting lost profits; AMI did not waive the issue.

### A. The issue of lost profits was raised by AMI and ruled upon by the Master-in-Equity and thus the issue is preserved for appellate review; AMI did not waive its arguments.

Rather than meaningfully address its failure to prove the causation, foreseeability, or reasonable certainty of the lost profits award, Custom Performance instead argues that AMI failed

to preserve this issue for appeal. [Response Brief of Respondent-Appellant Custom Performance, pp. 14-16.] The South Carolina Rules of Civil Procedure and the transcript from the Damages Hearing make clear that is not accurate.

As an initial matter, Rule 52(b), SCRCP, establishes that AMI was not required either to raise any objections or to make a post-trial motion to preserve this challenge of the sufficiency of the evidence to support the Master-In-Equity's damages award:

> When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised **whether or not the party raising the question has made in the trial court an objection to such findings or has made a motion to amend them or a motion for judgment**.

Rule 52(b), SCRCP (emphasis added); see also Potts v. Yager, No. 2017-UP-464, 2017 S.C. App. Unpub. LEXIS 498, at *3 n.1 (S.C. Ct. App. Dec. 20, 2017) (appellants were not required to raise a post-trial motion regarding trial court's damages award because appellant's arguments regarding whether damages were proved were "a challenge to the sufficiency of the evidence").

Rule 52(b), SCRCP, notwithstanding, issues and arguments are preserved for appellate review if they are raised to and ruled on by the lower court. Elam v. S.C. Dep't of Transp., 361 S.C. 9, 23, 602 S.E.2d 772, 779-80 (2004). In raising an issue, a party need not "phrase its objection in the exact terms used in the issues on appeal" so long as the objection contains "sufficient specificity to allow the trial court to rule on the issue." S.C. Dep't of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 302, 641 S.E.2d 903, 907 (2007); see also Herron v. Century BMW, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011) ("Of course, a party is not required to use the exact name of a legal doctrine in order to preserve the issue."). Instead, a party's objection must be "sufficiently clear to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the judge." Herron, 395 S.C. at 466, 719 S.E.2d at 642 (collecting

cases). A party's concession to a court's ruling after initially objecting does not constitute a waiver. First Carolina, 372 S.C. at 303, 641 S.E.2d at 907 (counsel's statement, "I understand and, your honor, if you are going to use this form then that's fine, either way" was not a concession that waived counsel's initial objection but was instead "simply a response to the court's question concerning any requests for additional instructions to the jury on the form"); see also Wilder Corp. v. Wilke, 330 S.C. 71, 76-77, 497 S.E.2d 731, 733-34 (1998) ("[W]e disagree that Seller, by its stipulation [as to accuracy of calculation] waived any objections to [the underlying presumptions contained in] Buyer's amortization schedule.").

A party is only required to file post-trial motions pursuant to Rule 59(e), SCRCP, when an issue it raised was not ruled on by the trial court:

> [O]ur rule contemplates two basic situations in which a party should consider filing a Rule 59(e) motion. A party *may* wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.

Elam, 361 S.C. at 24, 602 S.E.2d at 780 (emphasis in original). Moreover, a Rule 59(e) motion is not required under circumstances where the motion would be futile because a lower court's order makes clear that the issue has been decided. Staubes v. City of Folly Beach, 339 S.C. 406, 414-15, 529 S.E.2d 543, 547 (2000) ("This Court does not require parties to engage in futile actions in order to preserve issues for appellate review") (citing State v. Bryant, 316 S.C. 216, 220, 447 S.E.2d 852, 855 (1994) (where the Court found that it would have been futile to move to strike testimony which the trial court had already ruled was proper)).

During the Damages Hearing, which was tried to the Master-In-Equity without a jury, AMI's counsel sufficiently raised the lost profits issue to the Master-In-Equity on three separate occasions – both before and after the Master-In-Equity ruled on the issue by granting Custom

Performance lost profits damages. [R.pp. ___; ___; ___; Damages Transcr., 32:7-8, 33:3-7, 35:5-36:3.]

AMI first objected to opposing counsel's request that Mr. Adams provide an estimate of Custom Performance's profit margin, given Mr. Adams' earlier testimony that "it would be a difficult task" to reduce Custom Performance's revenue to net profits because "each contract holds a different profit margin" and because Mr. Adams did not bring substantiating evidence with him to the hearing. [R.pp. ___; ___; Damages Transcr., 32:7-8 ("Your Honor, I am going to object. He's already testified he can't do that as to these contracts."); id. at 26:1-9 (Mr. Adams testifying that estimating profits "would be a difficult task without the spreadsheets in front of me").] The objection was overruled. [R.p. ___; Damages Transcr., 32:9 ("I am going to allow him to answer.").]

AMI again objected when Mr. Adams requested permission to calculate Custom Performance's lost profits, using the calculator on his phone, without the benefit of any substantiating documentation regarding expenses:

> Judge, I don't have an objection in a practical sense. You know, he can do the calculation. But this is their opportunity to present damages as to the lost profits. This never should have been presented as lost revenue. This hearing has been noticed for several months. They could have reduced this figure to profit for each contract that they are purporting to be owed damages for.

[R.p. ___; Damages Transcr., 33:3-7.] The objection was overruled. [R.p. ___; Damages Transcr., 33:11 ("I am going to allow it.").]

The Master-In-Equity then, sitting as the finder of fact, issued a bench ruling granting Custom Performance lost profits in the amount estimated by Mr. Adams. [R.p. ___; Damages Transcr., 34:14-16 ("Then I will allow lost profits due to the machine not functioning as represented in the amount the witness has testified to, [$257,680.00].").] Despite how Custom

Performance characterizes the Damages Hearing in its Response Brief, it was at this point that the Master-In-Equity advised AMI's counsel that he could submit objections by email to Custom Performance's forthcoming proposed order. [R.p. ___; Damages Transcr., 34:21-22 ("If you have any objections, Mr. Harte, if you would send those to me in an email as soon as you receive notice that the Order has been filed.").]

Custom Performance argues that AMI failed to submit objections to the Master-In-Equity, but AMI did object – for a third time – directly to the Master-In-Equity:

> Your Honor, I guess just **for purposes of the record**, **had I been permitted the opportunity as to the lost profits issue**, I would have handed up a case from the South Carolina Supreme Court, Drews Co., Inc. versus Ledwith-Wolfe Associates, 296 SC 207. It deals with the speculative nature of lost profits in existing contracts versus the new business rule. **Your Honor has already ruled and I don't think there is any need to ask you to rehash that issue, but for the purposes of the record, that is what I would have handed up had I been given the opportunity**.

[R.p. ___; Damages Transcr., 35:5-11 (emphasis added).]. AMI's objection specifically referenced Drews Co. v. Ledwith-Wolfe Assocs., Inc., 296 S.C. 207, 371 S.E.2d 532 (1988), a case standing for the proposition that a party seeking lost profits must establish causation, foreseeability, and reasonable certainty, and which AMI cited in its Appellant Brief six times – more than any other case.

The Master-In-Equity requested AMI's attorney to elaborate on his objection, at which point he highlighted Custom Performance's failure to meet its burden of proof under the Supreme Court's holding in Drews:

> The Plaintiff has not produced copies of those purchase orders. There is, at least to me, it was not clear when those purchase orders were submitted from the potential buyer or the potential client to [Custom Performance] and so I think there's some issue of fact there with regard to when this transaction ultimately fell apart and the machine that they were using was not able to be used in the way they wanted it to.

> I think you also have to get into some mitigation of damages issues. You know, what effort was made by [Custom Performance] to purchase a replacement machine once it became clear that the [AMI Machine] was not going to function as properly - - or as it was agreed upon.
>
> The purpose of contract damages are to put the parties in the place that they would have been had both sides performed the contract as it was bargained for and I don't think there is enough evidence that has been presented and it's too speculative for [Custom Performance] to say that we've lost out on these profits without some more clarification about when these profits would have been generated relative to when the transaction fell apart.

[R.pp. ___; Damages Transcr., 35:16-36:3.] AMI therefore raised to the Master-In-Equity several of the issues it now argues on appeal, including causation, mitigation of damages, and conformance with the reasonable certainty standard.

Once again, AMI's objection was overruled, and the Master-In-Equity reiterated that she would grant Custom Performance lost profits damages. [R.p. ___; Damages Transcr., 36:5-7 ("I'm going to allow him to get lost profit at the profit margins that he said, this 2.5 on BMW, 3.5 on Blow-By and Saleen, I believe it was").] The Master-In-Equity then ordered Custom Performance to submit the Lost POs as exhibits to its proposed order. [R.p. ___; Damages Transcr., 36:7-9 ("But if you will attach those purchase orders as exhibits. Make sure that you have a purchase order supporting any argument as to lost profits on those three companies alone.").] After having considered and overruled AMI's third objection on lost profits, the Master-In-Equity asked AMI's counsel whether her order awarding lost profits and requiring submission of the Lost POs "resolve[d] the issue." [R.p. ___; Damages Transcr., 36:9.]. Having satisfied the concern about preserving the record, and in light of the Master-In-Equity's repeated rulings that she would grant Custom Performance its claimed lost profits, AMI's counsel responded: "I think that is more than fair." [R.p.___; Damages Transcr., 36:10.].

The transcript from the Damages Hearing makes clear that AMI raised the lost profits issue via three separate objections. [R.pp. ___; ___; ___ Damages Transcr., 32:7-8, 33:3-7, 35:5-36:3.] AMI's counsel directly cited Supreme Court precedent regarding Custom Performance's burden to satisfy the elements of lost profits damages and specifically raised issues of causation, mitigation, and the reasonable certainty standard. [R.pp. ___; Damages Transcr., 35:5-36:3.] AMI was not required to "phrase its objection in the exact terms used in the issues on appeal" or to "use the exact name of a legal doctrine," because AMI's objections were reasonably understood by the Master-In-Equity and allowed her to issue her ruling granting Custom Performance lost profits damages. First Carolina, 372 S.C. at 302, 641 S.E.2d at 907; Herron, 395 S.C. at 466, 719 S.E.2d at 642.

What's more, AMI had no obligation to continue to object to, or to file post-hearing briefs regarding, the Master-In-Equity's ruling given that the Master-In-Equity overruled each of AMI's three objections. Elam, 361 S.C. at 24, 602 S.E.2d at 780 ("A party *must* file [a Rule 59(e), SCRCP, motion] when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.") (emphasis in original); Staubes, 339 S.C. at 415, 529 S.E.2d at 547 ("This Court does not require parties to engage in futile actions in order to preserve issues for appellate review"); see also Wilder Corp., 330 S.C. at 77, 497 S.E.2d at 734 ("Post-trial motions are not necessary to preserve issues that have been ruled upon at trial; they are used to preserve those that have been raised to the trial court but not yet ruled upon by it."). AMI's counsel's statement "I think that is more than fair" to the Master-In-Equity's question about resolving the lost profits issue cannot be deemed to constitute a waiver of the multiple objections already made. First Carolina, 372 S.C. at 304, 641 S.E.2d at 907 (counsel's statement to the court was not a concession that

waived counsel's initial objection but was instead "simply a response to the court's question concerning any requests for additional instructions to the jury on the form").

AMI cannot be deemed to have waived its lost profits arguments because AMI repeatedly and adequately raised those arguments, and the Master-In-Equity considered and then ruled on them. Elam, 361 S.C. at 24, 602 S.E.2d at 779-80. The issues have been preserved for appeal.

### B. Custom Performance failed to meet its burden of proof as to lost profits damages.

The Master-In-Equity's award of lost profits was the result of an erroneous application of South Carolina law and unsupported by the evidence in the record and should therefore be reversed.

As the party seeking lost profits damages, Custom Performance bore the burden of demonstrating that it satisfied each of the elements for lost profits set forth by the Supreme Court: (1) causation; (2) foreseeability; and (3) reasonable certainty. Drews Co. v. Ledwith-Wolfe Assocs., Inc., 296 S.C. 207, 213-14, 371 S.E.2d 532, 535-36 (1988); see also Harbor Island Owners' Ass'n v. Preferred Island Props., Inc., 369 S.C. 540, 546-47, 633 S.E.2d 497, 500 (2006) ("Respondent had the burden of proving damages" at the damages hearing upon appellant's default). "Neither the existence, causation[,] nor amount of damages can be left to conjecture, guess[,] or speculation." Gray v. S. Facilities, Inc., 256 S.C. 558, 570-71, 183 S.E.2d 438, 444 (1971). Instead, proof "must consist of actual facts from which a reasonably accurate conclusion regarding the cause and the amount of the loss can be logically and rationally drawn." Drews, 296 S.C. at 213, 371 S.E.2d at 536 (emphasis added) (internal citation omitted).

On the element of causation, Custom Performance's Response Brief attempts to paper over a fatal issue: each of the contracts Custom Performance claimed to have lost as a result of the AMI Machine were dated after Custom Performance secured possession of the AMI Machine and

"immediately" informed AMI that the Machine "was not performing as warranted." [R.pp. ___; ____; Compl., ¶¶ 11-12; Lost POs.] Two of the contracts are dated after Custom Performance rejected the Machine. [R.pp. ____; ____; ___; Eberspacher PO (dated over six months after Custom Performance's rejection); Blow-By-Racing PO (dated at least two months after Custom Performance's rejection); Compl., ¶ 16.]

Custom Performance mischaracterizes both South Carolina law and the record below in contending that "Custom Performance was never given the opportunity to provide evidence to the lower court regarding timing of these purchase [sic] because AMI *never raised this argument*." [Response Brief of Respondent-Appellant Custom Performance, p. 17 (emphasis in original).] First, as outlined above, AMI did explicitly raise the argument that Custom Performance failed to demonstrate causation. [R.pp. ___; ___; Damages Transcr., 35:17-20 ("[I]t was not clear when those purchase orders were submitted from the potential buyer or the potential client to [Custom Performance] and so I think there's some issue of fact there with regard to when this transaction ultimately fell apart[.]"; id. at 36:1-3 ("[I]t's too speculative for [Custom Performance] to say that we've lost out on these profits without some more clarification about when these profits would have been generated relative to when the transaction fell apart.").] Second, and more importantly, even if AMI had not raised the issue, it was Custom Performance's duty to establish causation as an element of lost profits damages. Drews 296 S.C. at 213-14, 371 S.E.2d at 535-36; Harbor Island, 369 S.C. at 546-47, 633 S.E.2d at 500. Custom Performance cannot reasonably contend that it was prevented from meeting its burden of proof by AMI's supposed failure to raise an argument.

Custom Performance asserts a similarly tepid response to AMI's argument that Custom Performance's failure to timely mitigate its losses should itself be deemed an intervening cause of

any lost profits damages. Custom Performance attempts to explain away its delay of over a year by contending that "AMI advised Custom Performance to attempt various efforts to repair the AMI Machine for *months* following purchase." [Response Brief of Respondent-Appellant Custom Performance, p. 17 (emphasis in original).] Accepting this argument at face value, however, still compels the conclusion that Custom Performance sat on its hands for at least nine months before mitigating its damages. [R.pp. ___; ___; Compl., ¶¶ 16-17 (alleging Custom Performance "rejected" the AMI Machine in January or February 2021); Damages Hearing, Plaintiff's Exhibit 2 (Financing Agreement for Replacement Machine signed November 1, 2021).] Custom Performance again inappropriately seeks to shift its burden of proof onto AMI, writing: "Regardless, AMI presented no evidence to the lower court that Custom Performance delayed in finding a replacement machine or could have secured a similar machine more timely." [Response Brief of Respondent-Appellant Custom Performance, p. 17.] As the party asserting damages, it was Custom Performance's burden to prove that AMI caused the damages; whether AMI presented evidence of delay is irrelevant. Drews 296 S.C. at 213-14, 371 S.E.2d at 535-36; Harbor Island, 369 S.C. at 546-47, 633 S.E.2d at 500.

As to the foreseeability element, Custom Performance again disregards the crucial fact that the lost profits it seeks are for contracts that Custom Performance entered into after identifying issues with the AMI Machine or, in some cases, rejecting the AMI Machine. Custom Performance merely asserts, without citation to any legal authority, that "it was foreseeable that Custom Performance would use the AMI Machine to obtain business contracts with customers." [Response Brief of Respondent-Appellant Custom Performance, p. 17.] But it could not "reasonably be supposed to have been within [AMI's] contemplation" that Custom Performance would enter into new contracts, such as the Eberspacher PO, months after rejecting the AMI Machine. Drews 296

S.C. at 213, 371 S.E.2d at 535; Manios v. Nelson, Mullins, Riley & Scarborough, LLP, 389 S.C. 126, 138-40, 697 S.E.2d 644, 651-52 (Ct. App. 2010) (holding trial court did not err in finding lost profits were not in the contemplation of the parties because defendant attorney could not have reasonably foreseen that plaintiff investor would lose future investment and tax opportunities as a result of plaintiff's loan). Deeming such contracts foreseeable merely for the reason Custom Performance asserts – i.e., solely on the basis that Custom Performance is a for-profit manufacturing business – would allow buyers of purportedly defective equipment to seek damages for contracts entered into despite longstanding actual knowledge that they could not possibly perform.

With respect to the reasonable certainty element, Custom Performance's evidence of damages was – by its own witness's testimony – impermissible "conjecture, guess[,] or speculation." Gray, 256 S.C. at 570-71, 183 S.E.2d at 444. Mr. Adams literally testified that he was guessing as to Custom Performance's profit margins on the Eberspacher PO. [R.p. ___; Damages Transcr., 32:17-18 ("Something the nature of [Eberspacher], probably 2.5 if I had to guess, 2.5 times the cost.").]

Mr. Adams testimony as to the other contracts was inconsistent and contradictory at best. He first testified that he was incapable of estimating Custom Performance's lost profits without the benefit of additional data (ostensibly about profit margins) because "each contract holds a different profit margin." [R.p. ___; Damages Transcr., 26:5-9 (testifying that calculating lost profits "[o]ff the fly . . . would be a difficult task without the spreadsheets in front of me").].

Despite his earlier testimony that each contract holds a different profit margin, Mr. Adams alternatively testified that Custom Performance "strive[s] to get . . . four times the overhead and material cost as well as labor," and that Custom Performance "tr[ies to] achieve a 4, 4.2 profit

margin." [R.pp. ___; ___;a Damages Transcr., 26:8-9; id. at 32:14-18.] Still later, without any explanation for the change, Mr. Adams calculated Custom Performance's lost profits for the Blow-By PO and the Saleen PO with his cellphone based on an assumption of 3.5 times the cost. [R.p. ___; Damages Transcr., 33:18-20 (testifying that the $257,680.00 figure "would be putting the turbo kits [for the Blow-By PO and the Saleen PO] at 3.5 and 3.5 and then [Eberspacher] at 2.5 margin[.]").].

Objecting as to Mr. Adams's calculation of lost profits, AMI's counsel noted Custom Performance's failure to meet its burden of proof: "This never should have been presented as lost revenue. This hearing has been noticed for several months. They could have reduced this figure to profit for each contract that they are purporting to be owed damages for." [R.p. ___; Damages Transcr., 33:5-7.] Mr. Adams testified that he had access to data which would show Custom Performance's actual anticipated profit margins related to the claimed lost revenues, he just failed to bring it to the hearing. When asked whether Custom Performance had "reduced to . . . numbers what your profit would have been with these new orders," Mr. Adams answered: "Oh, we have. We've chopped all that up halfway 'til Sunday, but that's not – I don't have that on me." [R.p. ___; Damages Transcr., 28:1-4.]

Custom Performance did not provide any information regarding the actual anticipated costs or profit margins associated with its purported lost revenues, either during the hearing or after. Instead, the spreadsheet submitted by Custom Performance after the Damages Hearing merely parrots Mr. Adams' testimony about lost profits without accounting for costs. [R.pp. ____; Post-Hearing Documents.] Custom Performance therefore failed to establish an entitlement to lost profits with the requisite degree of certainty because the evidence it asserted in support of lost profits did not "consist of actual facts from which a reasonably accurate conclusion regarding the

cause and the amount of the loss can be logically and rationally drawn." Drews, 296 S.C. at 213, 371 S.E.2d at 536 (emphasis added).

Instead, Custom Performance calculated it lost profits using an inadequately explained and unverifiable profit margin, without substantiating data regarding overhead, material cost, labor, or other operating expenditures. South Carolina law establishes that such a calculation is insufficient for proving lost profits. In Drews, the Supreme Court reversed an award of lost profits for failure "to clear the 'reasonable certainty' hurdle" where appellee owner produced evidence only of gross profits, without "corresponding figures for overhead or operating expenditures." 296 S.C. at 214, 371 S.E.2d at 536. The Court held that the owner's testimony that he "'would expect at least a third of that [gross figure] to be' net profit," without any substantiating standard or fixed method for establishing net profits, was "wholly insufficient." Id. (alteration in original); see also Morningstar Fellowship Church v. York Cty., No. 2018-UP-250, 2018 S.C. App. Unpub. LEXIS 253, at *4-5 (S.C. App., June 13, 2018) (affirming exclusion of damages in part because "Morningstar failed to establish with reasonable certainty the . . . costs it would incur due to York County's noncompliance" with the applicable contract). Here, as in Drews, Custom Performance's evidence was wholly insufficient to meet its burden of establishing its lost profits with reasonable certainty.

The record establishes that Custom Performance failed to prove that the lost profits (1) were caused by AMI; (2) were reasonably within AMI's contemplation at the time the parties' contract was made; and (3) were reasonably certain. Accordingly, the Master-In-Equity's lost profits award was unsupported by the evidence and the result of an erroneous application of law and should be reversed.

### C. The evidence in the record does not support other portions of the damages order.

The Master-In-Equity also committed reversible error by awarding Custom Performance damages unsupported or directly contradicted by the evidence in the record. Harbor Island Owners' Ass'n v. Preferred Island Props., Inc., 369 S.C. 540, 546-47, 633 S.E. 2d 497, 500-01 (2006). Mr. Adams testified that Custom Performance paid $112,000.00 for the AMI Machine and also agreed to provide AMI with a seam welder in consideration for a $20,000.00 credit. [R.p. ___; Damages Transcr., 13:13-20.] The seam welder was not consideration for the AMI Machine itself but was instead exchanged for purposes of securing a credit that Custom Performance could use for purposes of financing. [R.p. ___; Damages Transcr., 13:15-25.] The Master-In-Equity's award of $132,000.00 was unsupported by the evidence because Mr. Adams' testimony confirmed that the parties agreed the AMI Machine was only worth $112,000.00.

## CONCLUSION

For the reasons set forth herein and in its Appellant's Brief, Appellant-Respondent AM Industrial Group, LLC respectfully requests this Court to reverse the Trial Court's denial of the Motion to Set Aside Entry of Default and remand the case for resolution on its merits. In the alternative, AM Industrial requests this Court to reverse the Master-In-Equity's Damages Order awarding Custom Performance lost profits damages and other damages not supported by the evidence, or to remand the Damages Order for further finding of fact as to Custom Performance's damages.

Respectfully submitted,

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August 15, 2022.

**CERTIFICATE OF SERVICE**

I, the undersigned, an employee of Richardson Plowden & Robinson, P.A., for Appellant-Respondent, AM Industrial Group, LLC, do hereby certify that I have this date served the foregoing Initial Reply Brief, dated August 15, 2022, by personally serving the same pursuant to Section (d)(1) of the Supreme Court's Order dated May 6, 2022, on the following counsel of record using the primary email addresses listed in the Attorney Information System (if applicable):

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A copy of the sent email is enclosed with this Certificate of Service.

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Pursuant to the Supreme Court's Order dated May 6, 2022, please find served upon you the Initial Reply Brief on behalf of Appellant-Respondent AM Industrial Group, LLC.

Thank you,
Carmen Ganjehsani


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