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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Jr., Circuit Court Judge
Shannon M. Phillips, Master-in-Equity

Case No. 2021-CP-42-01163
Appellate Case No. 2022-000348

Custom Performance Engineering, Inc., ... Respondent-Appellant

v.

AM Industrial Group, LLC, ... Appellant-Respondent.

FINAL RESPONSE BRIEF OF RESPONDENT-APPELLANT

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STATEMENT OF THE ISSUES ON APPEAL

1. DID THE TRIAL COURT PROPERLY DENY AM INDUSTRIAL GROUP, LLC'S MOTION TO SET ASIDE ENTRY OF DEFAULT?

2. DID THE TRIAL COURT PROPERLY AWARD CUSTOM PERFORMANCE ITS LOST PROFITS, THE FULL COST OF THE AMI MACHINE, AND THE COST TO TOOL THE AMI MACHINE?

STATEMENT OF THE CASE

Custom Performance Engineering, Inc., ("Custom Performance"), a Spartanburg, South Carolina firm that deals in engineering and manufacturing parts for the automotive performance industry, conducted an extensive search for a machine that could bend eighteen-gauge stainless steel tubes with three-inch walls. (See R. p. 95, lines 15-18; R. p. 106, line 25 – p. 107, line 3; R. p. 110, line 23 – p. 111, line 1; R. p. 111, lines 19 – 20; R. p. 11.) Custom Performance purchased a like-new VB76 high torque Eaton Leonard machine ("AMI Machine") from Appellant-Respondent AM Industrial Group, LLC ("AMI") in August 2020. (See R. p. 95, lines 15-23; R. p 106, line 25 – p. 107, line 3; R. p. 110, lines 23 – 24; R. pp. 141 – 50; R. p. 12.) The price for the AMI Machine was $132,000.00. (R. p. 150.) As part of the transaction, AMI agreed to purchase a seam welder from Custom Performance for approximately $20,000.00 and credited the $20,000.00 against the $132,000.00 purchase price. (R. p. 151.) Custom Performance also paid $8,694.00 to tool the AMI Machine. (R. p. 115, lines 12 –14.)

The AMI Machine failed to function properly. (R. p. 98, lines 8 – 9.) AMI sent a representative to inspect the AMI Machine, but this representative was unable to make the machine bend three-inch tooling and material. (R. p. 13.) Over a period of several months, AMI attempted to make the AMI Machine operational but failed to do so. (R. p. 13.) A third-party inspector inspected the AMI Machine and concluded that it was refurbished incorrectly. (R. p. 13; R. p. 109, line 19 – p. 110, line 1.) After AMI repeatedly failed to repair the AMI Machine, Custom

Performance rejected the AMI Machine in January 2021. (R. p. 14.) Custom Performance immediately undertook efforts to find a replacement machine and, after conducting a months-long, nationwide search, concluded that the best replacement option was a refurbished YLM CNC-90 MSRSM-6A CNC Bending Machine. (R. p. 98, lines 10 – 12, 20 – p. 99, line 1; R. p. 116, lines 11 – 20; R. pp. 131 – 40.)

Despite its efforts to timely cover, Custom Performance incurred significant losses because of the failure of the defective AMI Machine. (R. p. 125, lines 21 – 23.) In addition to another lost contract, Custom Performance was forced to cancel the following purchase orders because of the AMI Machine:

a) $197,835.00 Eberspacher, a tier one supplier for BMW;

b) $143,340.60 Saleen Automotive Inc.; and

c) $125,235.00 Blow-By Racing.

(R. pp. 155 – 64; R. p. 125, lines 21 – 23.) Applying Custom Performance's usual and customary profit margin for each of these orders, Custom Performance lost the following profit:

	$117,415.00	Eberspacher
	$70,540.00	Saleen Automotive Inc.
+	$69,712.50	Blow-By Racing
	$257,680.00	**Total**

(R. pp. 155 – 64; R. p. 125, lines 21 – 23.)

Prior to filing suit, Custom Performance sent a demand letter to AMI on February 5, 2021. (See R. pp. 49 – 50.) Custom Performance received a response email from AMI's attorneys at the law firm Reminger Co., LPA rejecting Custom Performance's demand. (See R. pp. 49 – 50.) On April 13, 2021, Custom Performance filed a summons and complaint against AMI for breach of

contract, breach of express warranty, and breach of implied warranty of merchantability. (R. pp. 10 – 21.) Custom Performance served the summons and complaint via certified mail at the office of AMI's registered agent, "Reminger Service Company, Inc." (R. pp. 51 – 59.) The certified mailing was restricted delivery and was signed for on April 20, 2021. (R. pp. 51 – 54.) The address for the registered agent, Reminger Service Company, Inc., was identical to the address of the law firm, Reminger Co., LPA: 101 W. Prospect Avenue, Suite 1400, Cleveland, Ohio. (Compare R. pp. 49 – 50 with R. pp. 55 – 59.)

On April 28, 2021, counsel for Custom Performance sent a final demand letter to Reminger Co., LPA and expressly advised that it had filed suit against AMI. (R. pp. 60 – 62 ("Custom Performance has filed suit against AM Industrial…").) AMI never responded.

More than thirty days passed since service of the summons and complaint, and Custom Performance received no response of any kind from AMI. (R. p. 42.) Out of an abundance of caution, Custom Performance served the complaint again, this time via process server. On June 9, 2021, the process server delivered the summons and complaint at the exact same address where the complaint was previously served, 101 West Prospect Avenue, Suite 1400. (R. pp. 63 – 64.)

This time AMI responded via email from its insurer, Liberty Mutual, on June 25, 2021. (R. pp. 65 – 66.) In this email, the insurer requested an extension of the deadline to respond to the complaint. (R. pp. 65 – 66.) That same day, the insurer told AMI's counsel that it requested an extension. (R. pp. 36 – 38.) On June 28, 2021, Custom Performance granted a thirty-day extension from the July 9, 2021 deadline, making the new deadline August 9, 2021. (R. pp. 67 – 70.) The August 9, 2021 deadline was sixty (60) days from the date of service on June 9, 2021, and **One Hundred Eleven (111) days** from the date the complaint was served on April 20, 2021.

The August 9, 2021 deadline to answer passed without any correspondence or filing from AMI. On August 18, 2021, default was entered against AMI. (R. pp. 8 – 9.) On September 8, 2021, **One Hundred Forty-One (141) days** after the complaint was originally served via certified mail and **Ninety-One (91) days** after the complaint was delivered by process server, AMI appeared in the case for the first time, filing a motion to set aside default. (R. p. 35.) Custom Performance filed a response in opposition, and a hearing was held on September 28, 2021. (R. pp. 41 – 70; see R. p. 83.) That same day, the Honorable J. Derham Cole issued an order denying AMI's motion to set aside entry of default, finding that AMI failed to show good cause for setting aside the default, and ordered that the case be referred to Master-in-Equity Shannon Phillips for a damages hearing. (R. p. 6.)

On December 20, 2021, a damages hearing took place before the Master-in-Equity. (R. p. 93.) The only witness at the hearing was Joseph Adams of Custom Performance. (R. p. 94.) Adams testified as to Custom Performance's damages, including the $132,000.00 purchase price for the AMI Machine, the $8,694.00 to tool the AMI Machine, and the $257,680.00 in lost profits. (R. p. 96, lines 12 – 13; R. 115, lines 12 – 14; R. p. 125, lines 21 – 23.) Regarding lost profits, Adams testified to the revenues expected from several lost contracts and, when asked to provide lost profits from those contracts, performed the calculation for three of the contracts with expected profits margins known to his business, resulting in a total of $257,680.00 in lost profits. (R. p. 99, line 17 – p. 101, line 1; R. p. 124, line 13 – p. 125, line 23.)

The Master-in-Equity held that she would allow $132,000.00 for the cost of the AMI Machine, $8,694.00 for tooling the AMI Machine, $257,680.00 for lost profits, as well as costs and post-judgment interest. (R. p. 126, lines 7 – 18.) She tasked counsel for Custom Performance with drafting an order and told counsel for AMI: "If you have any objections, . . . if you would

send those to me in an email as soon as you receive notice that the [proposed] Order has been filed . . . [or] simultaneously with the filing." (R. p. 126, line 21 – p. 127, line 3.)

The Master-in-Equity then asked counsel, "Anything further? Anything that the Court needs to clarify?" (R. p. 127, line 3.) AMI's counsel responded that "it was not clear when those purchase orders were submitted . . . to [Custom Performance]" and that the evidence of lost profits was "too speculative . . . without some more clarification about when these profits would have been generated relative to when the transaction fell apart." (R. p. 127, lines 17 – 29; R. p. 128, lines 1 – 3.) AMI's counsel also opined, "I think you also have to get into some mitigation of damages issues." (R. p. 127, lines 20 – 21.)

The Court then ordered Custom Performance: "Make sure that you have a purchase order supporting any argument as to lost profits on those three companies alone [BMW, Blow-By, and Saleen]." (R. p. 128, lines 7 – 9.) When the court asked counsel for AMI if submitting the lost purchase orders would "resolve the issue," counsel for AMI responded, "I think that is more than fair." (R. p. 128, line 10.) During the hearing, AMI never raised an argument regarding: (1) whether the lost purchase orders were cancelled; (2) whether they were cancelled because of the failure of the AMI Machine to function; (3) whether the lost purchase orders were foreseeable at the time of contracting; or (4) whether the evidence was sufficient to award $8,694.00 in tooling costs.

On February 18, 2022, counsel for Custom Performance submitted the proposed order to the Master-in-Equity's office by email, copying counsel for AMI. (R. pp. 155 – 64.) Counsel for Custom Performance advised that he had "worked with [counsel for AMI] on the order[,] and he and his client have had an opportunity to review." (R. pp. 155 – 64.) Also attached to the email were the three requested purchase orders and a spreadsheet demonstrating the lost profits calculation performed by Adams during the hearing. (R. pp. 155 – 64.)

AMI did not object to the proposed order as instructed by the Master-in-Equity and did not raise any objection to the submission of the purchase orders via email with the proprosed order. On February 21, 2022, the court issued its judgment, awarding the $132,000.00 cost of the AMI Machine, $8,694.00 for tooling the AMI Machine, and $257,680.00 in lost profits. (R. p. 126, lines 7 – 19; R. p. 3.) AMI did not file any post-judgment motion. Instead, on March 21, 2022, AMI filed and served a notice of appeal, appealing both the September 28, 2021 order denying its motion to set aside entry of default and the February 21, 2022 order awarding damages to Custom Performance. (R. pp. 73 – 76.)

STANDARD OF REVIEW

The decision whether to set aside an entry of default 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 must be upheld on appeal absent a clear showing of an abuse of 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 was controlled by some error of law or when the order lacks evidentiary support. In re Estate of Weeks, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct. App. 1997).

Regarding the damages award, an appellate court's review of a damages award "is limited to the correction of errors of law." Vortex Sports & Entm't, Inc. v. Ware, 378 S.C. 197, 208, 662 S.E.2d 444, 450 (Ct. App. 2008). Accordingly, the appellate court does "not weigh the evidence" and upholds the award "if *any evidence* supports the award." Id. (emphasis added).

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED AMI'S MOTION TO SET ASIDE ENTRY OF DEFAULT

A. AMI Failed to Show Good Cause for Its Default

Pursuant to Rule 55(c), SCRCP, to prevail in its motion to set aside entry of default, AMI had to show "good cause," meaning that it had to give a "satisfactory explanation" for its default and why vacating the default would serve the interests of justice. Sundown Operating Co., Inc. v. Intedge Indus., Inc., 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009). After this showing, AMI also had to show that the following factors favored setting aside entry of default: (1) the timing of filing the motion for relief; (2) whether AMI had a meritorious defense to the underlying claims; and (3) the prejudice to Custom Performance if the motion were granted. Id. at 607-08, 681 S.E.2d at 888. AMI has provided no evidence satisfying this standard.

Before the lower court, AMI's sole argument was that its insurer was at fault for AMI's failure to timely answer. (R. p. 33 ("At no time after acknowledging receipt of the Plaintiff's Complaint did Liberty Mutual . . . provide confirmation of the purported extension, nor did Liberty Mutual include in its denial any guidance or explanation as to when a responsive pleading from [AMI] was due. . . . [AMI] has been unduly prejudiced by its insurer's failure to provide it with critical information and defend on [AMI's] behalf . . . .").) On appeal, it continues blaming its insurer: "**AMI's insurer** . . . never notified AMI of the deadline to answer the Complaint" and "six days before the August 9, 2021 deadline for responding to the Complaint, **the insurer** denied coverage" and "[n]either AMI nor its counsel were informed **by the insurer** of the deadline for responding to the Complaint." (Initial Appellant's Br. of Appellant-Resp't AMI 12 (emphasis added).) AMI also raises a new argument on appeal, that its attorney was to blame: "**AMI's then-attorney failed** to apprise himself of AMI's answer deadline **and failed** to secure local South

Carolina counsel until after the Entry of Default had been entered." (Initial Appellant's Br. of Appellant-Resp't AMI 12 (emphasis added).) Even if this new argument could be considered on appeal, both arguments fail as a matter of law.

South Carolina courts "have consistently held that the negligence of an attorney or insurance company is imputable to a defaulting litigant." Roberts v. Peterson, 292 S.C. 149, 151, 355 S.E.2d 280, 281 (Ct. App. 1987). In Richardson v. P.V., Inc., 383 S.C. 610, 682 S.E.2d 263 (2009), the plaintiff sued the defendant hotel for a drowning that occurred at the defendant's pool. Id. at 613, 682 S.E.2d at 264. "[S]hortly after the drowning," the defendant provided its insurance agent with copies of the incident report, police report, and inspection report, and the agent mailed the documents to the insurance company. Id. at 618, 682 S.E.2d at 267. The defendant also sent the insurance agent the summons and complaint, and the insurance agent began corresponding with the plaintiff's counsel. Id. The insurance company never received the incident report, meaning that its internal process of contacting the adjusting company was never triggered, and it never received the summons and complaint. Id. The defendant failed to timely answer the complaint, and default was entered against it. Id. at 614, 682 S.E.2d 265.

In its motion to set aside entry of default, the defendant argued that "the insurance company's failure to respond was inadvertent and constitutes good cause to justify setting aside the entry of default." Id. at 616, 682 S.E.2d at 266. The Supreme Court of South Carolina disagreed: "We hold that even assuming that the insurance company was at fault for not answering the complaint, Appellants failed to show good cause. Negligence of an insurance company is imputed to a defaulting litigant and cannot constitute good cause to relieve Appellants from the entry of default." Id. at 618-19, 682 S.E.2d at 267 (citing Roberts, 292 S.C. at 151, 355 S.E.2d at

281, and Williams v. Vanvolkenburg, 312 S.C. 373, 440 S.E.2d 408 (Ct. App. 1994) (imputing attorney's negligence to defaulting litigant)).

The South Carolina Supreme Court reached a similar result in Sundown Operating Co., Inc. v. Intedge Indus., Inc., 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009). Similar to this case, the defaulting defendant was properly served twice, on August 28, 2001, and on September 4, 2001. Id. at 605, 681 S.E.2d at 887. On September 14, 2001, the defendant notified its insurance agent of the second service and forwarded the summons and complaint to the agent on October 1, 2001. Id. The defendant failed to timely answer, and default was entered for each service. Id. at 605, 681 S.E.2d at 887.

In response to the defendant's argument that its insurer was to blame for the default, the court reiterated its longstanding rule: "This argument is without merit, as the law is clear an attorney or insurance company's misconduct is imputable to the client," and "a defendant may not be relieved from the entry of default solely because it relied to its detriment on a negligent insurance agent." Id. at 609, 681 S.E.2d at 888 (emphasis omitted). In addition, the court found that the defendant "share[d] the responsibility for the entry of default with its insurance agent" because it delayed in forwarding the summons and complaint to the insurance agent. Id. Finally, the court noted that the defendant's entire argument was based on the September 4, 2001 service and that the defendant failed to explain its failure to timely respond to the first service. Id. Accordingly, the court upheld the denial of the defendant's motion to set aside entry of default. Id. at 610, 681 S.E.2d at 889.

Like the defaulting defendants in Richardson and Sundown, AMI cannot be excused from its default by blaming its insurer. *Even if*, as in Richardson, AMI did not share any fault with the insurer for failing to timely answer the complaint, its lack of fault would be irrelevant because its

insurer's negligence "is imputed to [AMI] and cannot constitute good cause to relieve [AMI] from the entry of default." Richardson, 383 S.C. 610, at 618-19, 682 S.E.2d at 267 (citations omitted). Accordingly, AMI's effort to blame the insurer for its default is insufficient.

AMI asks this court to find parallels between it and the defaulting party in Ricks v. Weinrauch, 293 S.C. 372, 360 S.E.2d 535 (Ct. App. 1987). In this 1987 case, default was set aside where, after discovering that her insurance agent had declared bankruptcy and had not delivered its copy of the summons and complaint to the insurer, the defendant could not physically access her copy of the summons and complaint to deliver them to her attorney before the deadline to answer. Id. at 373-74, 375, 360 S.E.2d at 535-36, 537. Ricks is not on point. First, the court in Ricks made clear that it was the combination of numerous factors beyond the defendant's control that supported a finding of good cause. Id. at 375, 360 S.E.2d at 537 ("[W]e hold all of the factors considered together are sufficient for such a showing."). AMI points to one factor, which is insufficient as a matter of law. Richardson, 383 S.C. at 618-19, 682 S.E.2d at 267 ("Negligence of an insurance company is imputed to a defaulting litigant and cannot constitute good cause to relieve Appellants from the entry of default.")

Second, the record shows that AMI's attorney and registered agent had a copy of the summons and complaint since April 20, 2021, Liberty Mutual notified AMI that coverage was denied six days before the answer deadline, and AMI did nothing to ascertain the deadline or file a responsive pleading. AMI seeks to be excused from its own admitted failure to take action despite knowing the case was pending for 141 days. Regardless, AMI's (1) insurance agent did not go bankrupt, (2) its insurer received a copy of the summons and complaint, and (3) AMI and its attorney were not physically prevented from accessing the summons and complaint or filing a response.

AMI is far more similar to the defaulting defendant in Sundown. Like the Sundown defendant, AMI shares the fault for failing to timely answer:

- AMI's attorney's office received notice of this lawsuit *three times*: by the first service on April 20, 2021; by letter referencing the "filed" lawsuit on April 28, 2021; and by the second service on June 9, 2021. (R. pp. 51 – 54; R. pp. 60 – 64.)
- AMI's attorney failed to forward the summons and complaint to its insurer until June 24, 2021, fifteen days after the second service. (R. pp. 49 – 50 ("As per our conversation yesterday. This will acknowledge our receipt of the notice of claim.").)
- If AMI is to be believed, it had no reason to think that its answer was *not* due on or before the original due date of July 9, 2021, because it claims it never obtained confirmation that it received an extension to answer the complaint or what the new answer deadline would be. (Initial Appellant's Br. of Appellant-Resp't AMI 4-5.) Thus, AMI should have filed an answer on or before July 9, 2021, because, according to AMI, it did not know about the extension requested by its insurer and granted by Custom Performance's counsel.
- AMI still had six days to answer the complaint after being denied coverage yet, again, failed to inquire about the answer deadline or file an answer. (Initial Appellant's Br. of Appellant-Resp't AMI 5.)

AMI offers no valid reason for its neglect, and its argument should be rejected.

Finally, both the Sundown defendant and AMI were served twice and point only to the deadline for responding to the *second* service. AMI has yet to offer a "good cause" argument as to why it failed to timely answer the April 20, 2021 service. More than sixty (60) days elapsed from the time the complaint was served on April 20, 2021, and the insurer's email acknowledging

receipt of the claim from AMI. Thus, it appears AMI did absolutely nothing in response to the April 20, 2021 service, ignoring it entirely.

Rather than showing a "satisfactory explanation" for its failure to timely answer, AMI evinces a pattern of ignoring deadlines and blaming others. Custom Performance served the summons and complaint via certified mail, restricted delivery to AMI's registered agent, which was in the exact same office, and almost certainly affiliated with, AMI's attorney. AMI ignored it. Eight days after serving the summons and complaint, Custom Performance sent a letter in which it specifically advised the defendant's attorney that it had filed suit against it. AMI ignored it. Custom Performance served the complaint a second time by process server. AMI ignored the July 9, 2021 deadline. Instead, it appeared two months later seeking relief from its own neglect. The trial court properly held that AMI failed to show good cause for setting aside default, and this Court should affirm.

B. The Remaining Factors Do Not Favor Setting Aside Default

Even though this Court need not consider the remaining factors because AMI has failed to show good cause, the remaining factors do not favor setting aside default.

1. Timeliness

AMI failed to appear until September 8, 2021—almost five months after the April 20, 2021 service, three months after the June 9, 2021 service, and over one month after the extended deadline of August 3, 2021. According to AMI's filings, by August 3, 2021, it knew that (1) it had been sued in South Carolina court; (2) it was served no later than June 9, 2021; and (3) Liberty Mutual was not providing it with a defense, requiring it to take some action to respond to the complaint. Despite knowing all of this, AMI did not take any action with respect to the complaint

until filing its motion to be relieved from default more than a month later. Given this, its motion for relief from default was not timely.

2. Meritorious Defense

To establish a meritorious defense, a defendant must present or proffer evidence or testimony which, if believed, establishes facts constituting a meritorious defense. Cent. Operating Co. v. Util. Workers of Am., AFL-CIO, 491 F.2d 245, 253 (4th Cir. 1974) ("Therefore, we are of the view that a party satisfies his burden of demonstrating a meritorious defense when he introduces uncontradicted testimony which, if believed, establishes facts constituting a meritorious defense."); United States v. Moradi, 673 F.2d 725, 727 (4th Cir. 1982) ("[A]ll that is necessary to establish the existence of a 'meritorious defense' is a presentation or proffer of evidence, which, if believed, would permit either the Court or the jury to find for the defaulting party.").

In the lower court, AMI failed to present any evidence in filings or in oral argument showing that it had a meritorious defense. Instead, in its motion, AMI merely declared, "AM Industrial denies [Custom Performance's] allegations . . . ." (R. p. 34.) A statement in a motion is not evidence. AMI now seeks to present evidence of contractual language for the first time on appeal. AMI did not present this evidence to the lower court and is barred from doing so now. Elam v. S.C. Dep't of Transp., 361 S.C. 9, 23, 602 S.E.2d 772, 779-80 (2004) ("Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court.") Accordingly, AMI failed to present evidence of a meritorious defense to the lower court, and this factor weighs against AMI.

3. Prejudice

AMI states that there would be no prejudice to Custom Performance if this case were now allowed to be fully litigated. This is false. Custom Performance's issues with this machine, and its

efforts to fix it or reject it, have been ongoing for nearly two years. The claims and disputes between the parties depend in large part on communications between AMI and Custom Performance. As time passes, evidence and memories fade and discovery becomes more difficult. Discovery should have begun one year ago in August 2021, and if default were set aside, at least another year would pass before trial would take place. 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.

II. CUSTOM PERFORMANCE ESTABLISHED ITS ENTITLEMENT TO LOST PROFITS DAMAGES

A. AMI Waived Its Arguments Regarding Lost Profits Damages

AMI waived its arguments regarding Custom Performance's entitlement to lost profits because it failed to raise them to the trial court. "Issues on which the trial judge never ruled and which were not raised in a post-trial motion are not preserved for appeal." Dixon v. Besco Eng'g, Inc., 320 S.C. 174, 178, 463 S.E.2d 636, 638-39 (Ct. App. 1995) (citation omitted); see also Elam v. S.C. Dep't of Transp., at 23, 602 S.E.2d at 779-80 ("[South Carolina law has] emphasized the importance and absolute necessity of ensuring that all issues and arguments are presented to the lower court for its consideration. Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court.").

AMI did not raise its lost profits arguments to the trial court and cannot do so now. In response to AMI's concern that the evidence of lost profits was "too speculative . . . without some more clarification about when these profits would have been generated relative to when the transaction fell apart," the Court ordered Custom Performance: "Make sure that you have a purchase order supporting any argument as to lost profits on those three companies alone [BMW, Blow-By, and Saleen]." (R. p. 128, lines 7 – 9.) When the court asked counsel for AMI if

submitting the lost purchase orders would "resolve the issue," counsel for AMI responded, "I think that is more than fair." (R. p. 128, line 10.)

Notably, the Master-in-Equity also ordered counsel for AMI to provide any objections he may have to the proposed order: "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 . . . [o]r . . . simultaneously with the filing." (R. p. 126, line 21 – p. 127, line 1.) Custom Performance submitted the purchase orders, and consulted with AMI in drafting the Damages Order. (R. pp. 155 – 64.) AMI never raised an objection, nor did it file any post-hearing motions.

AMI now belatedly raises arguments regarding the "Post-Hearing Documents," including "Lost POs" submitted after the hearing. (See Initial Appellant's Brief of Appellant-Resp't AMI 16-18.) Not a single one of these arguments was raised to the trial judge, neither upon submission of the proposed order, as requested by the trial judge, nor in a post-judgment motion as required by law. Dixon, 320 S.C. 174, at 178, 463 S.E.2d at 638-39 (citation omitted) (noting that if not ruled upon by trial judge, issues "not raised in a post-trial motion are not preserved for appeal."). AMI cannot raise these arguments for the first time on appeal.

Additionally, even if not waived, AMI's arguments are incorrect. It was within the trial judge's discretion to leave the record open for submission of additional evidence. See Hoyler v. State, 428 S.C. 279, 308-09, 833 S.E.2d 845, 860-61 (Ct. App. 2019) (holding that Master-in-Equity was within his discretion in granting party's motion to keep record open to allow further deposition testimony and submission of post-trial briefs). AMI could have requested the opportunity to examine Custom Performance following submission of the purchase orders or request some other opportunity to respond. AMI did not do so. AMI also could have submitted objections to the Master-in-Equity, as she instructed. AMI did not do so. AMI also could have

moved to reconvene the hearing. Instead, consistent with its course of action since the start of this case, AMI did nothing.

B. Even if AMI Had Not Waived Its Lost Profits Arguments, the Record Shows That the Lost Profits Award Was Proper

Custom Performance was entitled to recover any profits "that have been prevented or lost as the natural consequence of [AMI's] breach of contract" and that were foreseeable at the time of contracting. S.C. Fin. Corp. of Anderson v. West Side Fin. Co., 236 S.C. 109, 121, 113 S.E.2d 329, 335 (1960); Moore v. Moore, 360 S.C. 241, 253, 599 S.E.2d 467, 474 (Ct. App. 2004). Custom Performance was not required to prove its lost profits with "absolute certainty" but only "reasonable certainty that damages are not based upon speculation and conjecture. It is sufficient if there is a certain standard or fixed method by which profits may be estimated . . . ." Proctor v. Dep't of Health and Envl. Control, 368 S.C. 279, 315, 628 S.E.2d 496, 515 (Ct. App. 2006). The standard of reasonable certainty "bears an inherent flexibility facilitating the just assessment of lost profits." Id. at 316, 628 S.E.2d at 516.

Here, Adams of Custom Performance testified that: (1) Custom Performance lost certain purchase orders as a result of the AMI machine; (2) Custom Performance has known profit margins for the three lost contracts; and (3) the profit margins for the lost revenue in three of the lost contracts resulted in lost profits totaling $257,680.00. (R. p. 99, lines 12 – 13; R. p. 124, lines 13 – 18; R. p. 125, lines 14 – 22.) Regarding AMI's argument that its breach of contract could not have caused the lost profits from some of the lost purchase orders because they are dated after Custom Performance rejected the AMI Machine, Custom Performance was never given the opportunity to provide evidence to the lower court regarding timing of these purchase because AMI *never raised this argument*.

Further, AMI's mitigation argument is incredible. It blames Custom Performance for failing to secure financing for a replacement machine "over a year" after purchasing the AMI Machine. But AMI advised Custom Performance to attempt various efforts to repair the AMI Machine for _*months*_ following purchase. (R. pp. 13 – 14; R. p. 41; R. pp. 60 – 62.) These efforts failed. Custom Peformance was then forced to engage in a nationwide search for a replacement machine. (R. p. 109, lines 3 – 9; R. p. 110, lines 1 – 5; R. p. 110, line 20 – p. 111, line 1.) 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.

In addition, it was foreseeable that Custom Performance would use the AMI Machine to obtain business contracts with customers. Custom Performance is a for-profit business that engineers and manufactures parts for the automotive performance industry. (R. p. 11.) AMI is an Ohio-based limited liability company that sells machines for companies to use in their for-profit businesses. (R. pp. 18 – 21.) Surely AMI does not argue that it sold Custom Performance a $132,000.00 machine that could bend eighteen-gauge steel tubes with three-inch walls for recreational use. Regardless, AMI knew that Custom Performance needed the AMI Machine for its business because it agreed to convert the AMI Machine to utilize CSM-style tooling. (R. pp. 12, 20 – 21.) As noted in the purchase order: Custom Performance "currently has way too much **invested** in CSM style tooling." (R. pp. 12, 20 – 21.) AMI was not ignorant of Custom Performance's intended use of the AMI Machine.

Finally, the testimony and post-hearing submissions show that Custom Performance established the $257,667.50 in lost profits with "reasonable certainty." While under oath, Adams performed the calculation for three of the lost purchase orders, those three with the profit margins which he knew. (R. p. 125, lines 17 – 22 ("That would be BMW, just the Blow-By contract, not

even Manza[,] and the Saleen.") Custom Performance then submitted the same three purchase orders (showing the lost revenue amounts) together with a spreadsheet confirming Adams's mathematical calculations of profit margins. Use of profit margins to estimate profits is a common and well-accepted method for calculating anticipated profits. E.g., John D. Hollingsworth on Wheels, Inc. v. Arkon Corp., 279 S.C. 183, 187, 305 S.E.2d 71, 73 (1983) (awarding lost profits based on profit margin). Accordingly, Custom Performance used "a certain standard or fixed method by which profits may be estimated," and the lower court had sufficient evidence to find that Custom Performance's lost profits of $257,680.00 were reasonably certain. Proctor, 368 S.C. at 315, 628 S.E.2d at 515.

In sum, AMI's lost profits arguments are too little too late. AMI failed to raise its arguments before the lower court and is not allowed to do so now. *Even if* AMI had preserved its arguments, the record shows that the Master-in-Equity had sufficient evidence to find that Custom Performance is entitled to the lost profits reward.

III. THE EVIDENCE SUPPORTS THE AWARD OF THE COST OF THE AMI MACHINE AND TOOLING EXPENSES

AMI cannot cherry-pick its evidence. During the hearing, after AMI's counsel asked Adams about a July 31, 2020 AMI invoice showing $112,000.00 for the AMI Machine, Adams testified that "the actual purchase order that [Custom Performance] issued" to AMI, dated August 10, 2020, was for $132,000.00. (R. p. 122, lines 1 – 6; R. p. 150.) He also explained the $112,000.00 invoice: AMI agreed to buy a seam welder from Custom Performance and credited $20,000.00 for it against the price of the AMI Machine, reflecting the exchange in the July 31, 2020 invoice. (R. p. 105, lines 10 – 20.) Adams reiterated: "The purchase price is One Hundred Thirty-Two Thousand. . . ." (R. p. 105, line 9.) In addition, the lower court awarded $8,694.00 for tooling the AMI Machine; it did not award installation costs. (R. 126, lines 10 – 12; R. p. 3.) AMI

is mistaken in its argument that the tooling cost is "unsupported by the evidence"—it is supported by Adams's testimony that Custom Performance expended $8,694.00 for tooling the AMI Machine. (R. p. 115, lines 12 – 14; R. p. 126, lines 10 – 12.); In re Campbell, 427 S.C. 183, 193 n.2, 830 S.E.2d 14, 19 n.2 (2019) (citation omitted) ("[T]estimony is evidence."). The evidence supports the award of $132,000.00 for the cost of the AMI Machine and $8,694.00 for tooling the AMI Machine, and the lower court's order should be affirmed.

CONCLUSION

For the reasons stated above, Custom Performance Engineering, Inc. respectfully requests that this Court affirm the Trial Court's order denying the motion to set aside entry of default and the Master-in-Equity's order awarding lost profits, the cost of the AMI Machine, and the cost to tool the AMI Machine.

October 4, 2022

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In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Jr., Circuit Court Judge
Shannon M. Phillips, Master-in-Equity

Case No. 2021-CP-42-01163
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Custom Performance Engineering, Inc., ... Respondent-Appellant

v.

AM Industrial Group, LLC, ... Appellant-Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Response Brief of Respondent-Appellant complies with Rule 211(b), SCACR.

October 4, 2022

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PROOF OF SERVICE

The undersigned certifies that a copy of the Final Response Brief of Respondent-Appellant was served upon counsel of record in the above-entitled action by electronic mail on October 4, 2022, as follows:

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