THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Hon. Edward W. Miller, Circuit Court Judge

Case No. 2013-002435
Trial Court Case No. 2011-CP-23-07943

John Deere Financial, f.s.b., f/k/a FPC Financial, f.s.b. Plaintiff,

vs.

Jerry A. Bruce, Defendant/Third Party Plaintiff

vs.

Flint Equipment Co., Third Party Defendant

Of which

Jerry A. Bruce,
(Third Party Plaintiff) Respondent

vs.

Flint Equipment Co.
(Third Party Defendant) Appellant.

INITIAL BRIEF OF APPELLANT FLINT EQUIPMENT CO.

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STATEMENT OF ISSUES ON APPEAL

I. DID THE CIRCUIT COURT ERR BY REVIEWING FLINT EQUIPMENT CO.'S MOTION TO SET ASIDE ENTRY OF DEFAULT UNDER THE WRONG LEGAL STANDARD WHEN IT REVIEWED THE MOTION UNDER THE HEIGHTENED STANDARD OF RULE 60(b) WHERE NO DEFAULT JUDGMENT HAD BEEN ENTERED?

II. DID THE CIRCUIT COURT ERR BY ENTERING A DEFAULT JUDGMENT AGAINST FLINT EQUIPMENT CO. WHEN THE THIRD-PARTY COMPLAINT SOUGHT ONLY RELIEF NOT AVAILABLE UNDER SOUTH CAROLINA LAW OR THAT WAS INSUFFICIENTLY PLED?

III. DID THE CIRCUIT COURT ERR IN AWARDING DAMAGES AGAINST FLINT EQUIPMENT CO. WHERE THE THIRD-PARTY PLAINTIFF FAILED TO PROVE THOSE DAMAGES AND WHERE THE COURT FAILED TO FIND FACTS SUPPORTING TREBLE DAMAGES?

STATEMENT OF THE CASE

This appeal arises from a Third-Party Complaint filed by Jerry A. Bruce ("Bruce") against Flint Equipment Co. ("Flint"). On November 30, 2012, Plaintiff John Deere Financials, f.s.b. ("John Deere") filed suit against Bruce, seeking $6,476.90, plus fees and costs, allegedly owed by Bruce on an open account with John Deere. (Complaint pp. 1-3). Bruce answered (Answer) and sought leave, under S.C. R. Civ. P. 14(a), to file a Third-Party Complaint against Flint (Motion for Leave to File Third-Party Complaint), alleging that Flint was liable to Bruce under Rule 14(a) because it improperly charged certain disputed equipment repair items to Bruce's account with John Deere. The Third Party Complaint asserted causes of action for fraud and deceit as well as violations of the Unfair Trade Practices Act, S.C. Code § 39-5-10 et seq. ("UTPA"). (Third-Party Compl., pp. 2–3). The Third-Party Complaint sought an unspecified amount of damages, treble damages, and attorneys' fees and costs. (*Id.* at 4–5). The Court granted Bruce's Motion and authorized filing and service of the Third-Party Complaint against Flint. (Order of Feb. 15, 2013). Bruce filed his Third-Party Complaint against Flint on February 8, 2013, and the Third-Party Complaint was served on Flint by certified mail on February 11, 2013. (Third-Party Compl.; Aff. of Service of Feb. 11, 2013).

When Flint failed to answer the Third-Party Complaint, Bruce filed an "Affidavit of Default for Third-Party Defendant Flint Equipment Co." on April 12, 2013. (Aff. of Default). The Affidavit of Default stated that proper service had been made on Flint but that no answer or other response had been received. (*Id.*) Along with the Affidavit of Default, Bruce submitted a proposed "Order of Default and Order Setting Damages Hearing." (Order of May 30, 2013). The Order noted that the "matter is before the Court upon Motion of counsel for the Third-Party Plaintiff seeking an Entry of Default and requesting that a hearing be set to determine

appropriate damages, attorneys [*sic*] fees and costs." (*Id.*) After noting that Flint failed to respond to the Complaint, the Court ordered that "Third Party Defendant is in default on the Third Party Plaintiff's Complaint" and that a damages hearing be set. The Order was signed in chambers without a hearing on May 28, 2013 and filed on May 30, 2013. (Order of May 30, 2013). The Order did not enter a default judgment against Flint.

On June 17, 2013, after receiving notice of the entry of default and damages hearing, Flint moved to set aside the default and for leave to file an answer. (Motion to Set Aside, filed June 17, 2013). The Court held a hearing on the Motion on July 10, 2013. (Hearing Transcript). On July 26, 2013, the Court entered an order denying the Motion under S.C. R. Civ. P. 60(b)(1). (Order of July 26, 2013). On July 10, 2013, the Court also held a damages hearing on Bruce's request for a default judgment. (Hearing Transcript). After hearing evidence on damages, the Court orally entered judgment in favor of Bruce against Flint in the amount of $7,772.28, plus attorney's fees. (Hearing Transcript, p. 45). On July 23, 2013, the Court entered an order, in the Court's "discretion" trebling the principal amount of the judgment, and entering final judgment in Bruce's favor in the amount of $31,508.04 (Order of July 23, 2013, filed August 2, 2013).

On July 25, 2013, Flint filed a Motion to Alter or Amend the Order denying its Motion to Set Aside Default. (Motion to Alter or Amend Order denying Motion to Set Aside Default). On August 9, 2013, after receiving the Court's formal Order, Flint filed an Amended Motion to Alter or Amend the Order Denying the Motion to Set Aside Default. (Amended Motion to Alter or Amend Order denying Motion to Set Aside Default). On August 20, 2013, Flint filed a Motion and Memorandum to Reconsider and/or Alter or Amend the Judgment entered in favor of Bruce. (Motion to Reconsider and/or Alter or Amend the Judgment). The Court denied all these Motions in Orders dated October 8, 2013. (Order Denying Motion and Memorandum to

Reconsider and/or Alter or Amend the Judgment; Order Denying Motion to Alter or Amend Order Denying Motion to Set Aside Default). On November 4, 2013, Flint filed its Notice of Appeal (Notice of Appeal).

STATEMENT OF FACTS

Flint, a Georgia corporation, is an authorized service provider and dealer of John Deere equipment, and maintains offices in Simpsonville, SC. (Memorandum in Support of Motion to Set Aside Default, p. 1). Bruce, an individual and resident of South Carolina, purchased a track hoe from Flint. (Original Compl., ¶ II; Third-Party Compl., ¶ 4). Subsequently, Bruce engaged Flint to repair the track hoe. (*Id.* at ¶ 4). John Deere filed a debt collection action against Bruce on November 30, 2014, alleging that Bruce owes John Deere $6,476.90 on an open account. (Original Compl., ¶ IV). Thereafter, Bruce answered John Deere's Complaint and sought leave to implead Flint pursuant to S.C.R.C.P. 14(a). (S.C.R.C.P. 14(a) Motion; Bruce Ans.). The court granted Bruce's Motion and allowed Bruce to file a third-party Complaint against Flint. (Order of Feb. 15, 2013).

On February 8, 2013, Bruce filed the Third-Party Complaint alleging that Flint "made unauthorized charges on the John Deere credit card of Bruce" and therefore was liable for the debt complained of by John Deere. (Third-Party Compl., ¶ 9.) In the Third-Party Complaint, Bruce set forth causes of action for fraud and deceit as well as violations of UTPA, seeking an unspecified amount of damages, treble damages, and attorney's fees and costs. (Third-Party Compl., pp. 2–5.) On February 8, 2013, Bruce attempted to serve CT Corporation System ("CT"), Flint's registered agent in South Carolina, via certified mail. (Hearing Transcript p. 5.) Although the Third-Party Complaint incorporated the Original Complaint by reference, as well as Bruce's Answer thereto, the pleadings did not contain either of these documents. (Third Party Compl., p. 1). CT Corporation forwarded the Summons and Third-Party Complaint to Flint's headquarters in Georgia. (Hearing Transcript, p. 3.) Thereafter, the Summons and Third-Party

Complaint went missing and never reached the appropriate party. (Hearing Transcript, p. 3–4.) Accordingly, Flint did not answer the Third-Party Complaint or appear. (*Id.*)

On April 12, 2013, Bruce filed an "Affidavit of Default for Third-Party Defendant Flint Equipment Co", attesting that Flint had been properly served, but failed to respond. (Aff. of Default). The Affidavit further attested that "this Affidavit is made in support of Defendant's Motion for entry of Third-Party Defendant's default, filed herewith." (*Id.*). In conjunction with the Affidavit, Bruce submitted a proposed order, providing as follows:

> This matter is before the Court upon Motion of counsel for the Third Party Plaintiff seeking an Entry of Default and requesting that a hearing be set to determine appropriate damages, attorneys fees, and costs.

(Order of Default, p. 1). Along with details regarding service and Flint's failure to appear, the Order stated:

> Based on the foregoing, it is hereby ordered that the Third Party Defendant is in default on the Third Party Plaintiff's Complaint. The Clerk of Court shall immediately set a hearing to determine damages, such hearing to be held on _________, the _______ day of _____________, 2013, at ____________ o'clock ___.m. in the Court of Common Pleas of Greenville, South Carolina.

(Order of Default, p. 2). The court signed the Order of Default on May 28, 2013, and it was duly filed on May 30, 2013.

Flint was first apprised of the litigation on or about June 4, 2013, when it received notice of the damages hearing. (Mem. in Supp. Mot. to Set Aside Entry of Default or Default Judgment., p. 2). Thereafter, Flint moved to set aside or vacate the default judgment. (Mot. to Set Aside Default Entry of Default or Default Judgment and for Leave to File Answer). The Motion to Set Aside Default requested that the court set aside the entry of default pursuant to S.C.R.C.P. 55(c) and the factors articulated in *Wham v. Shearson Lehman Bros., Inc.*, 298 S.C. 462, 465, 381 S.E.2d 499, 501 (Ct. App. 1989). (Mem. in Supp. Mot. to Set Aside Entry of

Default or Default Judgment, pp. 2–5). In contrast, Bruce argued that the court should analyze the Motion to Set Aside under the standard set forth in S.C.R.C.P. Rule 60(b). (Mem. in Opp'n to Mot. to Set Aside Default Entry). The circuit court agreed with Bruce and stated in an Order denying the Motion to Set Aside Default:

> Initially Flint sought to have its motion for default [*sic*] determined by the less strict legal standard of Rule 55(c). Part of its argument for the lesser standard was that the Order of Judge Hill was not an order of default. This interpretation of Judge Hill's Order is misplaced. This Court finds Judge Hill's Order was for default and therefore the more stringent requirements of Rule 60(b)(1) must be applied. . . . Flint has not presented excusable neglect and therefore, good cause for setting aside the default.

(Order of July 26, 2013, pp. 2–3). Before the court, Flint also argued that the Third-Party Complaint sought relief that was unavailable under Rule 14, which governs third-party practice. (Revised Mem. of Law in Support of Mot. to Set Aside Default, pp. 7–8; Hearing Transcript, p.11). However, the court declined to declare the default judgment void, reasoning that Rule 14 is a procedural rule, not subject to challenge after a default, and, alternatively, that Bruce's claims against Flint are "intertwined" with the Original Complaint. (Order of July 26, 2013, pp. 3–4).

At the damages hearing, Bruce stated that he purchased a track hoe from Flint for $150,000, financed under the "John Deere Credit Power [P]lan." (Hearing Transcript p. 13). Bruce testified extensively about repairs that the track hoe allegedly necessitated. (Hearing Transcript pp. 13–19). However, he did not present clear or substantial testimony with regard to the damages suffered, nor did Bruce testify that he has actually paid any of the monies to John Deere, with the exception of "authorized charges" that were not in dispute. (Hearing Transcript, p. 33). The court even acknowledged that "[t]he numbers aren't adding up." How come the numbers don't add up . . . . ?" (Hearing Transcript p. 36). Nonetheless, the court proceeded to

award Bruce "$7,772.28 plus the attorney's fees." (Hearing Transcript p. 45). Notably, the court did not make any finding with regard to willful or knowing conduct under the UTPA at the damages hearing.

On August 2, 2013, the circuit court filed a "Judgment Against Flint Equipment Company." The Order found that Bruce was entitled to "$6,476.90 unpaid charges and twenty percent (20%) attorney fee in the amount of $1,295.38 for a total of $7,772.28" based upon the debt John Deere alleged that Bruce owes in the Original Complaint. (Judgment Against Flint Equip. Co., p. 2). "In the exercise of discretion," the court trebled the damages to $23,316.84. (*Id.* at p. 2). Finally, the court awarded Bruce $8,191.20 in attorney's fees for a total judgment of $31,508.04. (*Id.* at 2.) Again, the court did not make any finding regarding willful or knowing UTPA violations on the part of Flint.

Flint filed a Motion to Alter or Amend the Order denying its Motion to Set Aside Default, and, after receiving the Court's formal Order, Flint filed an Amended Motion to Alter or Amend the Order Denying the Motion to Set Aside Default. (Motion to Alter or Amend Order denying Motion to Set Aside Default); (Amended Motion to Alter or Amend Order denying Motion to Set Aside Default). Thereafter, Flint duly filed a Motion to Reconsider and/or Alter or Amend the Judgment Against Flint Equipment Company. In the Motion, Flint argued that the pleadings were defective because the Third-Party Complaint did not comport with the derivative liability requirements of S.C. R. Civ. P. 14, and were insufficient to support a cause of action under UTPA. (Mot. to Reconsider and/or Alter or Amend the Judg. Against Flint Equip. Co., pp. 1–7). The Motion also asserted that the evidence presented at the damages hearing did not support the damages or attorneys' fees awarded and that trebling of the damages was improper. (*Id.* at pp. 7–10). The Court denied all these Motions in Orders dated October 8, 2013. (Order

Denying Motion and Memorandum to Reconsider and/or Alter or Amend the Judgment; Order Denying Motion to Alter or Amend Order Denying Motion to Set Aside Default). On November 4, 2013, Flint duly filed its Notice of Appeal (Notice of Appeal).

ARGUMENT

I. THE CIRCUIT COURT COMMITTED AN ERROR OF LAW BY REVIEWING FLINT EQUIPMENT CO.'S MOTION TO SET ASIDE ENTRY OF DEFAULT UNDER THE WRONG LEGAL STANDARD WHEN IT REVIEWED THE MOTION UNDER THE HEIGHTENED STANDARD OF RULE 60(b) WHERE NO DEFAULT JUDGMENT HAD BEEN ENTERED.

The first issue in this appeal is whether the circuit court committed an error of law when it analyzed Flint's Motion to Set Aside Default under the heightened standard of S.C. R. Civ. P. 60(b) rather than the more lenient standard of Rule 55(c) when only an entry of default—and not a default judgment—had been entered against Flint. While this Court reviews the denial of a Motion to Set Aside Default for abuse of discretion, an abuse of discretion will be found where the trial court committed an error of law. *Ricks v. Weinrauch*, 293 S.C. 372, 375, 360 S.E.2d 535, 536-37 (Ct. App. 1987). Whether the trial court used the correct legal standard when reviewing a Motion to Set Aside Default is a question of law, which this Court reviews *de novo. Wham v. Shearson Lehman Bros., Inc.*, 298 S.C. 462, 465, 381 S.E.2d 499, 501 (Ct. App. 1989).

Under the South Carolina Rules of Civil Procedure, where the damages claimed by the plaintiff are not liquidated, obtaining a default judgment is a two-step process. First, the plaintiff must obtain an entry of default against the defendant under Rule 55(a);[1] second, the plaintiff must obtain a default judgment under Rule 55(b).[2] Recognizing this distinction between an entry of default and a default judgment, the Court of Appeals has noted:

> "If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages . . . the court

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[1] Rule 55(a) provides: "When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default upon the calendar (file book)."

[2] Rule 55(b), in relevant part, provides: ". . . [T]he party entitled to a judgment by default shall apply to the Court therefor. . . . If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages . . . the court may conduct such hearings or order such references as it deems necessary and proper. . . ."

> may conduct such hearings or order such references as it deems necessary and proper. . . ." This language indicates a court is unable to enter judgment until damages are determined. The entry of default is an official recognition of the failure to appear or otherwise respond, but it is not a judgment by default.

Ricks, 293 S.C. at 374, 360 S.E.2d at 536 (quoting Rule 55(b) and citing H. Lightsey, J. Flanagan, *South Carolina Civil Procedure*, 77 (2d Ed. 1985)).

The distinction between an entry of default and a default judgment is not merely academic. It is vital because it determines the standard by which a court will judge the defaulted defendant's attempt to avoid the default. In that regard, Rule 55(c) provides that an entry of default may be set aside "on good cause shown." Rule 60(b), in contrast, requires a higher showing of mistake, inadvertence, surprise, or excusable neglect; newly discovered evidence; fraud, misrepresentation, or misconduct on the adverse party; or that the judgment is void or has been satisfied. This Court has recognized that the different standards of Rule 55(c) and Rule 60(b) lead to a meaningful difference in a trial court's decision on a defendant's motion to avoid a default:

> The standard for granting relief from an entry of default is good cause under Rule 55(c), while the standard is more rigorous for granting relief from a default judgment under Rule 60(b). Relief granted at the point of entry of default is within the equitable power of the court and excuses previous failure to act promptly.

Ricks, 293 S.C. at 374, 360 S.E.2d at 536. Moreover, this Court has held that a trial court's improper use of the heightened Rule 60(b) standard rather than the Rule 55(c) standard in reviewing a motion to set aside default where no default judgment has been entered constitutes reversible error:

> In deciding the question of whether to grant the motion by [Defendant] for relief from the entry of default, the master did not employ the "good cause" standard. Instead, the master erroneously applied the more rigorous standard of "excusable neglect," a standard used under Rule 60(b). He did this even though he recognized the "good cause" standard was applicable. We therefore remand for a

> redetermination by the master the issue of whether [Defendant] should be relieved from the entry of default.

Wham, 298 S.C. at 465, 381 S.E.2d at 501; *see also Top Value Homes, Inc. v. Harden*, 319 S.C. 302, 460 S.E.2d 427 (Ct. App. 1995) (reversing judgment entered against defendant and remanding for court to review motion to set aside default under correct standard of Rule 55(c) rather than higher standard of Rule 60(b)). In fact, in both *Wham* and *Top Value*, the Court articulated specific factors (the "*Wham* factors") that must be considered by the trial court in its use of Rule 55(c):

> We therefore remand for a redetermination by the master the issue of whether [Defendant] should be relieved from the entry of default. In determining the issue, the master, exercising a broader, more liberal discretion than he otherwise would under Rule 60(b), shall consider the following factors: (1) the timing of [Defendant's] motion for relief; (2) whether [Defendant] has a meritorious defense; and (3) the degree of prejudice to [Plaintiff] if relief is granted.

Wham, 298 S.C. at 465; 381 S.E.2d at 501–02; *see also Top Value*, 319 S.C. at 306, 460 S.E.2d at 429.

It is therefore well established that there is a difference between an entry of default and a default judgment, and that difference determines the correct standard of review to be applied by the court to a defendant's motion for relief. Where the trial court erroneously applies the rigorous standard of Rule 60(b) when no default judgment has been entered, the judgment against the defaulted defendant must be vacated and the case remanded for the trial court to apply the correct standard of Rule 55(c).

In the present case, there can be no reasonable dispute that, at the time Flint filed its Motion to Set Aside Default, an entry of default only and not a default judgment had been entered against Flint. After being sued by John Deere for debts allegedly owed on an open account, Bruce filed and served a Third-Party Complaint against Flint, alleging that Flint was

liable to Bruce under Rule 14 because it fraudulently charged certain amounts to Bruce's John Deere account without his consent for equipment repair work Bruce never authorized. (Third-Party Complaint p. 2). After receiving no answer or response from Flint, Bruce filed an affidavit of default, stating only that Flint had been properly served, that no answer or other response had been received, and that "this Affidavit is made in support of Defendant's Motion for entry of Third-Party Defendant's default, filed herewith." (Affidavit of Default). Along with the affidavit of default, Bruce submitted a proposed order, which provided:

> This matter is before the Court upon Motion of counsel for the Third Party Plaintiff seeking an Entry of Default and requesting that a hearing be set to determine appropriate damages, attorneys' fees, and costs.

(Order of Default, p. 1). After reciting details on service and Flint's failure to appear, the Order further stated:

> Based on the foregoing, it is hereby ordered that the Third Party Defendant is in default on the Third Party Plaintiff's Complaint. The Clerk of Court shall immediately set a hearing to determine damages, such hearing to be held on _________, the _______ day of _____________, 2013, at ____________ o'clock ___.m. in the Court of Common Pleas of Greenville, South Carolina.

(Order of Default, p. 2). The Order was signed on May 28, 2013 and filed on May 30, 2013. Before the damages hearing was held and any default judgment entered, Flint filed a Motion to Set Aside the Entry of Default. (Motion to Set Aside Entry of Default).

Under these facts, it is clear that no default judgment had been entered at the time Flint moved to set aside the default. Both the affidavit of default and the Order entering default referenced only entry of default. Further, the Third-Party Complaint and the affidavit of default contained no information on which damages could have been calculated, and the Order of default required that a hearing be held to determine damages. As this Court held in *Ricks*, under these facts, "a court is unable to enter judgment until damages are determined. The entry of default is

an official recognition of the failure to appear or otherwise respond, but it is not a judgment by default."

At the time the court ruled on Flint's Motion to Set Aside Default, there was no default judgment in place; therefore, the circuit court was required by the Rules of Civil Procedure and by this Court's decisions in *Wham* and *Top Value* to analyze the Motion under Rule 55(c) rather than Rule 60(b). Flint's Motion to Set Aside Default expressly requested a ruling based on Rule 55(c) argued that the "good cause" standard of that rule had been met under the factors set forth in *Wham*. Nonetheless, Bruce asserted that Rule 60(b) was the correct standard (Memorandum in Opposition to Motion to Set Aside Default Entry), and the circuit court adopted this view. In its Order denying the Motion to Set Aside Default, the court noted:

> Initially Flint sought to have its motion for default [*sic*] determined by the less strict legal standard of Rule 55(c). Part of its argument for the lesser standard was that the Order of Judge Hill was not an order of default. This interpretation of Judge Hill's Order is misplaced. This Court finds Judge Hill's Order was for default and therefore the more stringent requirements of Rule 60(b)(1) must be applied.

(Order of July 26, 2013, pp. 2–3). Thus, by the terms of its Order, the court expressly applied the wrong legal standard to Flint's Motion to Set Aside Default. The Order further shows that the court, in fact, applied the Rule 60(b) standard because it found that "Flint has not presented excusable neglect and therefore, good cause for setting aside the default." (*Id.* at 3). To support this finding, the court's Order focused on whether Flint had an excuse for its neglect to respond to service of the Third-Party Summons and Complaint based on Flint's claim that the documents had simply been misplaced, an analysis that is relevant only to "excusable neglect" under Rule 60(b) and not "good cause" under Rule 55(c). Excusable neglect is relevant only to Rule 60(b) and not to a Rule 55(c) analysis, and the court clearly required Flint to meet this higher element required by Rule 60(b). Lastly, despite Flint's invocation of the *Wham* factors required by this

Court for analysis of a Motion to Set Aside Default under Rule 55(c), the Court did not apply or discuss those factors in its Order.

Accordingly, the circuit court erred in refusing to analyze Flint's Motion to Set Aside Default under Rule 55(c) and instead requiring Flint to meet the higher standard of Rule 60(b). Under *Wham* and *Top Value*, cases in which the lower court similarly erred by employing the Rule 60(b) standard instead of Rule 55(c)'s good cause standard, the circuit court's Order denying Flint's Motion to Set Aside Default and the resulting default judgment in favor of Bruce must be vacated and the case remanded for the circuit court to analyze the motion under the correct legal standard and employing the *Wham* factors.

II. THE CIRCUIT COURT ERRED BY ENTERING A DEFAULT JUDGMENT AGAINST FLINT WHERE THE THIRD-PARTY COMPLAINT SOUGHT ONLY RELIEF THAT IS NOT AVAILABLE UNDER SOUTH CAROLINA LAW OR WAS INSUFFICIENTLY PLED.

Even if the circuit court properly denied Flint's Motion to Set Aside Default, the default judgment entered in Bruce's favor must nonetheless be reversed because the court erred by entering that judgment based on a Third-Party Complaint that sought only relief unavailable under South Carolina law or that was insufficiently pled.

A. Entry of Default Does Not Permit a Judgment for Relief Unavailable at Law or that was Insufficiently Pled nor does it Waive the Defaulted Defendant's Right to Challenge the Sufficiency of the Pleadings

Before the circuit court, Flint argued that Bruce was not entitled to a default judgment because the Third-Party Complaint sought only relief unavailable under Rule 14 or, alternatively, on an UTPA claim that was insufficiently pled. (Revised Mem. of Law in Support of Mot. to Set Aside Default, pp. 7-8; Hearing Transcript, p. 45). The circuit court found that the entry of default against Flint barred these arguments. (Hearing Transcript, p. 45; Order of July 26, 2013, p. 3). This was error.

The entry of default against Flint did not obviate Flint's right to contest Bruce's entitlement to a default judgment on the grounds that the pleadings were defective, failed to state a claim upon which relief can be granted, or did not comply with the Rules of Civil Procedure.

> [A] default admits only what has been well pleaded, and it does not forfeit the rights of a defendant, except as to matters necessarily admitted by the default... Therefore, if the complaint fails to state facts sufficient to constitute a cause of action, any judgment thereon, except one of dismissal, goes beyond the allegations of the complaint[,]. . . is without authority of law and cannot be sustained.

Gadsden v. Home Fertilizer & Chemical Co., 89 S.C. 483, 484, 72 S.E. 15, 17 (1911); *see also Masters v. Rodgers*, 283 S.C. 251, 254, 321 S.E.2d 194, 196 (Ct. App. 1984) ("[The] default [judgment] did not preclude [the defendant] from challenging the sufficiency of the complaint as the basis for judgment."); *Mutual Savings and Loan Assoc. v. McKenzie*, 274 S.C. 630, 632, 266 S.E. 2d 423, 424 (1980) ("A party seeking a default judgment is entitled to only such relief as is framed by his pleading, and then only to the extent requested therein .... if a complaint fails to state a cause of action, the rendering of a default judgment thereon is without authority of law and therefore reversible error."). Thus, an entry of default is not "an absolute confession by the defendant of his liability and of the plaintiff's right to recover." *Ryan v. Homecomings Fin. Network*, 253 F.3d 778, 780 (4th Cir. 2001).

The above cited authorities follow the reasoning articulated by the U.S. Supreme Court in *Thomson v. Wooster*, 114 U.S. 104, 112–114 (1885). In this, "venerable but still definitive case" the Court held that:

> a default judgment may be lawfully entered only according to what is proper to be decreed upon the statements of the bill, assumed to be true, and not as of course according to the prayer of the bill. The defendant is not held . . . to admit conclusions of law.

Ryan, 253 F.3d at 780 (internal punctuation omitted). Applying this principle, our Supreme Court announced that the plaintiff winning by default is afforded no more relief than what would have been granted had a motion to dismiss been timely filed. *Mutual Savings*, 274 S.C. at 632, 266 S.E.2d at 425. Thus, in *Mutual Savings*, because the facts contained in the four corners of the complaint failed to plead the required elements of the plaintiff's cause of action for fraud, the entry of a default judgment that was grounded on the insufficient pleadings was necessarily improper:

> It is essential that the facts and circumstances which constitute the fraud should be set out clearly. The complaint must allege facts which would afford a basis upon which a jury could properly find support for each of the elements above set forth, and if the complaint fails to allege facts to support any one of the elements of fraud and deceit, then the complaint is fatally defective.

Id. (Internal citations omitted.)

Here, Flint sought to follow the rules laid down in these cases by challenging the Third-Party Complaint's claim for relief under Rule 14 and the sufficiency of its UTPA claim. The circuit court erred by refusing to consider these arguments based on Flint's default. As explained below, when these arguments are considered, it becomes apparent that the Third-Party Complaint sought only relief that was unavailable under Rule 14 or that was insufficiently pled.

B. The Third-Party Complaint Sought Only Relief Unavailable Under South Carolina Law

As noted, the default judgment in this case was entered on a Third-Party Complaint, filed against Flint pursuant to S.C. R. Civ. P. 14. However, Bruce's Third-Party Complaint sought only relief that is not available under Rule 14. It is well established that "[a] third-party claim may be asserted under Rule 14(a) only when the third party's liability is in some way dependent on the outcome of the main claim or when the third party is secondarily liable to defendant." 6 C. WRIGHT AND A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1460 at 246

(1971) (quoted in *Beach v. Hudson*, 298 S.C. 424, 427, 380 S.E.2d 869, 871 (Ct. App. 1989)). Accordingly, a third party complaint can be maintained if it alleges indemnity, subrogation, express and implied warranty, or the like. C.J.S. *Parties* §143 (2010). As our Supreme Court has held, "Under Rule 14, the third-party plaintiff must have a substantive claim against the third-party defendant founded upon derivative liability. The outcome of the principal claim must impact the third-party defendant's liability." *First General Services of Charleston, Inc. v. Miller*, 314 S.C. 439, 442, 445 S.E.2d 446, 447 (1994).

In the present case, Bruce's Third-Party Complaint is clearly improper under Rule 14. The original Complaint against Bruce alleges liability on an open account or for breach of contract. (Complaint). In contrast, the Third-Party Complaint seeks to recover for fraud and UTPA violations, claims which are not derivative and are improper under Rule 14. *See Beach*, 298 S.C. at 427, 380 S.E.2d at 871.[3] Bruce asserted no claim to derivative liability, such as equitable, statutory, or contractual indemnity. The Third-Party Complaint shares no identical issues with the original Complaint, and the fact that the third-party claims may be "intertwined" with the Plaintiff's Complaint (Order Denying Motion to Set Aside Default, p.4) is not sufficient to make the Third-Party Complaint valid. The claims must not only be related, they must be derivative. Because they were not, Bruce's Third-Party Complaint sought only relief that was unavailable under Rule 14. As such, the circuit court erred in awarding a default judgment in Bruce's favor, since there were no valid claims against Flint on which the judgment could be entered.

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[3] By way of illustration as to why an UTPA claim is not proper under Rule 14, such a claim exposed Flint to treble damages—which were in fact awarded against Flint here—which far exceed any liability Bruce could have to John Deere, the original Plaintiff. Thus, far from simply recovering what he allegedly owed John Deere, Bruce has received a windfall on his Third-Party Complaint against Flint.

C. Bruce's Unfair Trade Practices Act Claim Was Insufficiently Pled

Even if Bruce's Third-Party Complaint were valid under Rule 14, it failed to adequately plead a claim for relief under the S.C. Unfair Trade Practices Act, and the circuit court erred in entering judgment—and the resulting treble damages—in Bruce's favor on that cause of action.

Under South Carolina law, in order to prevail on a claim for violations of UTPA, in addition to other required elements, the plaintiff must show that he "suffered monetary or property loss as a result of the defendant's unfair or deceptive act(s)." *Health Promotion Specialists, LLC v. S. Carolina Bd. of Dentistry*, 403 S.C. 623, 638, 743 S.E.2d 808, 816 (2013). This requirement is mandated under S.C. Code § 39-5-140(a), which requires that the plaintiff "suffer[ed]. . . ascertainable . . . actual damages. . . . as a result" of any purportedly unfair or deceptive acts. Bruce's Third-Party Complaint did not allege that Bruce ever paid his repair bill to John Deere or suffered any loss as a result of Flint's allegedly illegal conduct. Thus, the Third-Party Complaint failed to allege that Bruce suffered any actual damages, ascertainable or otherwise. That the Third-Party Complaint merely recited the element of damages, without asserting how the element was met by the purported facts, is conclusory and would not have enabled the pleading to survive a motion to dismiss, regardless of Flint's default.

To allow the entry of default or default judgment to stand on this fundamentally deficient UTPA claim would lead to the incongruous and untenable result that the Third-Party Plaintiff is rewarded with trebled damages that he did not plead. Regardless of default, without the damages element satisfied, the Third-Party Complaint could not have stood on its own. Accordingly, the circuit court erred in entering a default judgment based on the insufficient allegations of the UTPA claim.

III. THE CIRCUIT COURT ERRED IN AWARDING BRUCE DAMAGES BECAUSE DAMAGES WERE NOT SUFFICIENTLY PROVEN AND THE COURT FAILED TO FIND FACTS SUPPORTING AN AWARD OF TREBLE DAMAGES

Even if Bruce's Third-Party Complaint adequately pled an entitlement to relief under S.C. R. Civ. P. 14 and UTPA, Bruce had an obligation to present adequate evidence establishing his damages to recover a default judgment against Flint. Further, with regard to his UTPA claim for treble damages, Bruce was obligated to present evidence proving Flint's alleged UTPA violations were knowing or willful, and the circuit court was required to make a finding of a "knowing or willful" violation of UTPA before awarding treble damages. Because Bruce failed to present adequate evidence of his damages and because the circuit court failed to make a finding that any UTPA violation was knowing or willful, the default judgment against Flint must be reversed.

A. Bruce Failed to Prove Damages Against Flint

The default judgment against Flint cannot stand because Bruce failed to present sufficient proof of his damages against Flint at the damages hearing before the circuit court.

> In a default case, the plaintiff must prove by competent evidence the amount of his damages, and such proof must be by a preponderance of the evidence. Although the defendant is in default as to liability, the award of damages must be in keeping not only with the allegations of the complaint and the prayer for relief, but also with the proof that has been submitted.

Jackson v. Midlands Human Resources Ctr., 296 S.C. 526, 529, 374 S.E.2d 505, 506 (Ct. App. 1988). In the present case, Bruce did not present clear testimony regarding the amount of the damages, nor did he testify that he had actually paid any monies to John Deere as a result of Flint's alleged wrongdoing. (Hearing Transcript, pp. 33–38). In fact, the only money that Bruce paid to John Deere was for "authorized charges" that were not in dispute. (Hearing Transcript, p. 33). The court even recognized that the damages testimony was confusing, stating: "The

numbers aren't adding up. . . . How come the numbers don't add up . . . . ?" (Hearing Transcript, p. 36). Accordingly, Bruce did not prove the amount of the damages by the preponderance of the evidence, nor did he prove that that he actually suffered any damages, and the default judgment cannot stand.

B. The Circuit Court Made No Finding that Any UTPA Violation Was Willful or Knowing, and Bruce Presented No Proof on this Point

It is well established that a UTPA violation does not lead to an automatic award of treble damages to the plaintiff. Instead, the plaintiff is required to prove—and the circuit court is required to make a finding—that the UTPA violation was willful or knowing before treble damages can be awarded. Because Bruce failed to present adequate proof that any UTPA violation was willful or knowing, and because the circuit court did not find that Flint committed a willful or knowing UTPA violation, the default judgment against Flint must be reversed or, alternatively, the treble damages portion of the judgment vacated.

Both our Supreme Court and this Court have long held that treble damages under UTPA can be awarded only where the circuit court finds that the defendant's conduct was willful or knowing. "The UTPA provides for treble damages *upon a finding* of a willful violation of the Act." *Haley Nursery Co., Inc. v. Forrest*, 298 S.C. 520, 525, 381 S.E.2d 906, 909 (1989) (emphasis added); *Top Value*, 319 S.C. at 307, 460 S.E.2d at 430 (affirming denial of treble damages where circuit court found no willful or knowing violation). The courts have based these holdings on the language of the statute itself, which requires the specific finding of a willful or knowing violation before treble damages can be awarded:

> If the court finds that the use or employment of the unfair or deceptive method, act, or practice was a willful or knowing violation . . ., the court shall award three times the actual damages sustained. . . .

S.C. Code § 39-5-140(a); *see Mull v. Ridgeland Realty, LLC*, 387 S.C. 479, 488, 693 S.E.2d 27, 32 (Ct. App. 2010) ("Section 39-5-140(a) also provides *if a court finds* a defendant's violation of the SCUTPA to be willful or knowing, the court shall award treble damages." (emphasis added)); *In re Daniel*, 137 B.R. 884, 887 (D.S.C. 1992) ("*If there is a finding* of a willful violation of the SCUTPA, the court is required to award treble damages and attorney's fees and costs. S.C. Code § 39–5–140 (1976)." (emphasis added)); *Liberty Mut. Ins. Co. v. Employee Res. Mgmt., Inc.*,176 F. Supp. 2d 510, 530 (D.S.C. 2001) ("The jury not only found that defendant violated the South Carolina Unfair Trade Practices Act, it found that defendant committed said violation willfully or knowingly. *This finding* dictates that this court treble damages and award plaintiff attorney's fees pursuant to S.C.Code Ann. § 39–5–140(a)." (emphasis added)).

In the present case, the circuit court made no finding that Flint's alleged UTPA violation was willful or knowing—in fact it offered no explanation at all for its trebling of damages. At the conclusion of the damages hearing, in awarding damages the court simply stated on the record, "So I'll give it $7772.28 plus the attorney's fees." (Hearing Transcript, p. 45). Later, when it issued a formal order, the court merely held: "The Court finds Bruce is entitled to judgment against Flint in the amount of $7,772.28. In the exercise of discretion, the Court will treble those damages to $23,316.84." (Judgment of July 23, 2013, p. 2).[4] Thus, on neither occasion did the Court find any willful or knowing violation of UTPA. Accordingly, on this basis alone, the default judgment—and particularly its treble damage element—against Flint

[4] Of course, the circuit court has no *discretion* on treble damages under UTPA. If the court finds willful or knowing conduct it "shall award" treble damages. S.C. Code § 39-5-140(a). Given that treble damages are mandatory and not discretionary, the necessity of a finding of willful or knowing conduct becomes apparent. Therefore, our appellate courts have always insisted that such a finding be made before treble damages can be awarded.

should be reversed because is not supported by the statutorily required finding of a willful or knowing violation.

However, even if a treble damage award under UTPA can be sustained absent an express finding of willful or knowing conduct, the record here shows that no such conduct has been proven. At the damages hearing Bruce presented no evidence that Flint knowingly and willfully engaged in unfair or deceptive conduct. At most, Bruce presented testimony that Flint charged certain disputed repairs to his John Deere line of credit without his authorization. Nonetheless, Bruce did not present any evidence that Flint knowingly or intentionally made the charges without his consent, or that it did so with intent to deceive or commit fraud. In fact, Bruce testified that he did authorize Flint to place charges on the John Deere credit line, which implies Flint made charges on Bruce's account either with his consent or by mistake (and certainly not with a willful or knowing intent to engage in unfair or deceptive conduct). (Hearing Transcript, p. 33). Accordingly, the record does not support a treble damages award, and the default judgment must therefore be reversed or the treble damages portion of it vacated.

CONCLUSION

For these reasons, Flint respectfully requests that the default judgment entered against it and the circuit court's order denying its Motion to Set Aside Default be reversed and the case remanded for rehearing of the Motion to Set Aside Default under S.C. R. Civ. P. 55(c).

Respectfully submitted this the 22d day of August, 2014.

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THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2013-002435
Trial Court Case No. 2011-CP-23-07943

John Deere Financial, f.s.b., f/k/a FPC Financial, f.s.b. Plaintiff,

vs.

Jerry A. Bruce, Defendant/Third Party Plaintiff

vs.

Flint Equipment Co., Third Party Defendant

Of which

Jerry A. Bruce,
(Third Party Plaintiff) Respondent

vs.

Flint Equipment Co.
(Third Party Defendant) Appellant.

CERTIFICATE OF SERVICE

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I hereby certify that a copy of **Appellant Flint Equipment Company's Initial Brief and Designation of Matters to be Included in the Record on Appeal** was served upon counsel of record this 22nd day of August, 2014, via electronic mail and by placing the same in the United States Postal Service with proper, first-class postage affixed and addressed as follows:

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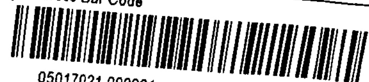

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