

STATE OF SOUTH CAROLINA

In The Court of Appeals

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APPEAL FROM GREENVILLE COUNTY

Court of Common Pleas

SC Court of Appeals

Hon. Edward W. Miller, Circuit Court Judge

Case No. 2013-002435

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

v.

Jerry A. Bruce, Defendant,

and

Jerry A. Bruce, Third Party Plaintiff,

Of Whom Jerry A. Bruce is the Respondent,

v.

Flint Equipment Co., Appellant.

FINAL BRIEF OF RESPONDENT

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## STATEMENT OF THE CASE

This appeal arises from a Third Party Complaint filed by Jerry B. Bruce (“Bruce”) against Flint Equipment Co. (“Flint”). By way of background, 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. (R. p. 1). 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”). (R. p. 8). The Third Party Complaint sought an unspecified amount of damages, treble damages, and attorney fees and costs. (R. pp. 12-13).

The Court heard Bruce’s Motion to File a Third Party Complaint against Flint on February 5, 2013 and orally granted the motion. (R. pp. 63-64). The Court filed a Form 4 Order confirming its decision on February 15, 2013. (R. p. 15). 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. (R. p. 14).

After Flint failed to answer the Third Party Complaint, Bruce filed an Affidavit of Default of Third Party Defendant Flint Equipment Co. on April 12, 2013. (R. p. 17).

The Affidavit of Default stated that proper service had been made on Flint but that no answer or other response had been received. (R. p. 17). Along with the Affidavit of Default, Bruce submitted a proposed Order of Default and Order Setting Damages Hearing. The proposed 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.” (R. p. 20). 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 further stated, “Based on the foregoing, it is hereby ordered that the Third Party Defendant is in default on the Third Party Complaint. The Clerk of Court shall immediately set a hearing to determine damages.” (R. p. 21). The Order was signed in chambers without a hearing on May 28, 2013 and filed on May 30, 2013.

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. (R. p. 22). The Court held a hearing on the Motion on July 10, 2013. (R. p. 55). On July 26, 2013, the Court entered an order denying the Motion under S.C.R. Civ. P. 60(b)(1). (R. p. 110). The Court also held a damages hearing on July 10, 2013 on Bruce’s request for damages on the default judgment. (R. p. 55). 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. (R. p. 99). 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. (R. p. 114).

On July 25, 2013, Flint filed a Motion to Alter or Amend the Order Denying Flint Equipment Company’s Motion to Set Aside Default. (R. p. 104). On August 9, 2013, after receiving the Court’s formal Order, Flint filed an Amended Motion to Alter or Amend the Order Denying Flint Equipment Company’s Motion to Set Aside Default. (R. p. 114). On August 20, 2013, Flint filed a Motion and Memorandum to Reconsider

and/or Alter or Amend the Judgment entered in favor of Bruce. (R. p. 133). The Court denied all these Motions in its Order dated October 8, 2013. (R. p. 146). On November 4, 2013, Flint filed its Notice of Appeal. (R. p. 153).

### SUMMARY OF FACTS

In 2005, Bruce purchased a John Deere trackhoe from the John Deere dealer, Van Lott, for \$150,000. (R. p. 67, lines 12-13; p. 76, lines 13-14). With a year of purchase the boon cracked which resulting in Bruce bringing a lawsuit to have the boon replaced by Van Lott. (R. p. 67, line 22 – p. 68, line 22). During mediation, the then dealer, Van Lott, agreed to pay for the new boon. One Bill Payton, the service manager, told Bruce that he, Bruce, would pay for the boon one way or the other. (R. p. 69, lines 1-9). Flint bought out Van Lott but retained the same employees to include Bill Payton. (R. p. 77).

Bruce had additional problems with the trackhoe and in May, 2010, he took the trackhoe in for repair. (R. p. 78, lines 14-16). Bruce requested to be advised before Flint put any parts on the backhoe. (R. p. 69, lines 12-22; p. 71, lines 9-16). Flint kept the trackhoe for several days during which Bruce agreed to a 4,000 hour service on it. Finally, Flint fixed the trackhoe with the replacement of a controller valve which cost a little over \$300. (R. p. 71, line 19 – p. 72, line 23).

On June 7, 2010, Bruce signed a credit application from John Deere Financial, known as a Power Plan Credit Agreement. (R. p. 78, lines 17-24). The Power Plan Agreement provides in part:

You authorize FPC to honor any purchase you make by mail, telephone, internet, facsimile transmission, and or electronic message on your account. You agree your signature is not necessary as authorization in such cases. You agree that any authorization use of your account or card constitutes your acceptance of the terms and conditions of this agreement.

Once the work was completed Flint billed Bruce \$2,800 for the 4,000 hour service and nearly \$9,000 for labor and repairs on the trackhoe. (R. p. 72, line 24 – p. 73, line 4). Bruce paid the bill for the 4,000 hour service but protested the labor and parts bill.

Although Bruce protested the bill, Flint charged Bruce's John Deere account as though Bruce had approved the contested repairs. John Deere paid Flint for the contested repairs and billed Bruce who refused to pay on the grounds that he did not authorize Flint to charge for the service and parts except the controller valve.

On November 29, 2011, John Deere Financial sued Bruce for \$6,476.90. Bruce denied he owed the money by Answer filed December 19, 2011. On December 6, 2012, Bruce filed a motion to bring Flint into the litigation pursuant to Rule 14(a), S.C.R. Civ. P. On February 5, 2013, the Honorable Leticia H. Verdin heard the motion and orally granted Bruce's motion to join Flint. On February 8, 2013 Bruce filed a Third Party Complaint against Flint and served Flint's authorized agent for service by mail. On February 11, 2013 the authorized agent for service signed a receipt for Bruce's Third Party Complaint. On February 15, 2013, Judge Verdin filed a Form 4 Order confirming her oral order of February 5, 2013 which allowed Flint to be made a party.

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. (R. p. 17). 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." (R. p. 18). 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.

(R. p. 20). 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.

(R. p. 21). The court signed the Order of Default on May 28, 2013, and it was duly filed on May 30, 2013.

After being notified of the damages hearing, Flint moved to set aside or vacate the default judgment. Both Flint's motion and the damages hearing were heard on July 10, 2013. The court denied Flint's motion and awarded Bruce \$7,772.28 actual damages trebled to \$23,316.84 and attorney fees of \$8,191.20.

Flint filed a Motion to Alter or Amend and an Amended Motion to Alter or Amend. Flint's motions were denied. This appeal followed.

### **ARGUMENT**

- I. THE TRIAL COURT DID NOT COMMIT AN ERROR OF LAW IN USING THE LEGAL STANDARD IN RULE 60(b) RATHER THAN THE LEGAL STANDARD IN RULE 55(c) BECAUSE THE COURT ENTERED A FINAL JUDGMENT AS TO DEFAULT BEFORE THE APPELLANT MOVED TO SET THE DEFAULT JUDGMENT ASIDE.

Flint argues the lower court erroneously applied the stricter standard of S.C.R. Civ. P. 60(b) rather than the less strict standard of Rule 55(c) in considering its motion to set aside its default. Flint's position rests on two assertions. The first is that no court action on a claim of unliquidated damages becomes a default judgment until damages are awarded. The second assertion is that Judge Hill's order of default is a nullity.

Flint supports its first assertion in two ways. The first is its interpretation of that portion of Rule 55(b)(2) which provides, in part:

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 or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearing or order such references as it deems necessary and proper.... *Rule 55(b)(2), S.C.R. Civ. P.*

Flint ignores the words "... or carry it into effect...." "It" obviously means the judgment of default where damages are not liquidated.

Flint's assertion that the court cannot enter a judgment of default with damages to be decided later makes unliquidated damages determine the standard for setting aside a default rather than that the timing of a motion to set aside the default. To illustrate, Rule 55(b)(1) states:

When the claim of a party seeking judgment by default is for a liquidated amount, a sum certain or a sum which can by computation be made certain, the judge, upon motion or application of the party seeking default, and upon affidavit of the amount due, shall enter judgment for that amount and costs against the party against whom judgment by default is sought, if that party has been defaulted for failure to appear and if such party is not a minor or incompetent person. A verified pleading may be used in lieu of an affidavit when the pleading contains information sufficient to determine or compute the sum certain. *Rule 55(b)(1), S.C.R. Civ. P.*

Thus, the defaulting defendant of liquidated damages suffers a judgment of default containing an award of damages and must seek to set such judgment aside under Rule 60(b). On the other hand, the defaulting party with unliquidated damage must have notice of the damage hearing and always has that window of opportunity to seek to set aside the default under the good cause standard of Rule 55(c) because no default judgment can be entered, according to Flint's argument, until damages are awarded.

To allow the difference between liquidated damages and unliquidated damages to determine the test for relieving default is illogical and strains the intent of Rule 55.

Flint argues that the decision in Wham v. Shearson Lehman Brothers, Inc., 298 S.C. 462, 381 S.E.2d 499 (Ct. App. 1989) supports its position that the court cannot enter a judgment by default unless it contains an award of damages. In Wham, the plaintiff filed an affidavit of default and the clerk entered the default the same day. (*Id.* p. 499) The matter was referred to the master. Default was therefore entered by the clerk, not by a judge's finding of default formalized in an order of the court as in the case here.

The second assertion of Flint is that Judge Hill could not enter an order of default because damages were yet to be determined. Nothing in Rule 55 states a court cannot make a finding of default with damages to be determined in a separate hearing. In other words, the proceeding was bifurcated with Judge Hill entering a judgment on the issue of default with damages to be determined later. See Sundown Operating Company, Inc. v. Intedge Industries, Inc., 383 S.C. 601, 681 S.E.2d 885 (2009). Default and damages seems to have been bifurcated in that case.

In the event this Court considers the holding in Wham to require all defaults with unliquidated damages to remain non-final as to default until damages are awarded, then, under Rule 217, S.C.R. Civ. P., Bruce would argue the holding in Wham should be overruled. In its place, a court can hold a circuit judge's findings of default as a final judgment on that issue and have damages assessed later by the court in order to carry out or complete the order of default. Such a change in precedent would be logical, consistent with Rule 55, and remove the distinction between judgment of default with liquidated damages and default with unliquidated damages.

In conclusion, Bruce requests the Court to approve the decision of the lower court.

II. THE COURT DID NOT ERR IN FINDING BRUCE COULD MAINTAIN HIS CLAIM UNDER THE SOUTH CAROLINA

UNFAIR TRADE PRACTICES ACT BECAUSE BRUCE'S CLAIM WAS THE RESULT OF FLINT'S FRAUDULENT ACTIONS AND WAS INTERTWINED AND DERIVATIVE OF FLINT'S CONDUCT.

The standard of review of a motion to dismiss third party claim is abuse of discretion. Beach v. Hudson, 298 S.C. 424, 380 S.E.2d 869 (Ct. App. 1989).

Initially Flint argued the trial judge refused to consider its claim that relief was not available to Bruce under Rule 14 because of the default. However, the trial judge also ruled, "Even if Flint's Rule 14 motion is proper, the Court declines to set aside the default under the exercise of its discretion." (R. p. 112, 113). Thus, the trial court considered Flint's motion on the merits.

Next Flint asserts that Bruce requested relief not available to him under a Rule 14 third party pleading. Flint cites Beach for the requirement 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. (*Id.* p. 425, 871.)

Bruce was sued on his account by John Deere for parts and labor charged by Flint which Bruce did not authorize. If Bruce loses the suit to John Deere Credit, he must reimburse John Deere Credit for charges he did not make. By defaulting, Flint admits Bruce did not authorize the charges to his John Deere credit account.

The trial court properly found that Bruce's claim against Flint "was certainly intertwined with John Deere's claim against Bruce." (R. p. 113). Therefore, the findings of the trial judge are supported by sufficient facts and withstand an abuse of discretion charge.

While Flint acknowledges Bruce's claim against it may be "intertwined" with the John Deere Credit complaint, Flint asserts Bruce's claim must be derivative. Contrary to

Flint's assertion, Bruce's claim derived out of Flint's actions in charging Bruce for repairs he did not authorize.

Finally, Flint argues for the first time that Bruce's UTPA claim was not adequately pled. Hornbook law dictates that this argument should not be considered.

Bruce's complaint sets forth the acts that constitute the unfair trade. Specifically, Flint charged Bruce's John Deere account for work and parts not authorized by Bruce and for obtaining payment from John Deere for the unauthorized work. Bruce was subsequently sued by John Deere for the fraudulent charges. Thus, Bruce suffered damages in having to defend the suit and is exposed to having to pay for labor and parts he never authorized.

Under the facts of this case Bruce requests this Court to reject the claim of Flint.

III. THE TRIAL COURT DID NOT ERR IN TREBLING BRUCE'S DAMAGES UNDER THE SOUTH CAROLINA UNFAIR TRADE PRACTICES ACT BECAUSE FLINT ADMITTED BY DEFAULT THE ACTS WERE UNFAIR AND DECEPTIVE AND WERE WILFUL AND THE EVIDENCE SUPPORTED THE COURT'S FINDING.

Flint argues that the trial court erred for lack of proof in awarding damages against it and then trebling the damages.

By defaulting, Flint admitted it charged Bruce's credit with John Deere for work that was neither authorized nor performed and obtained payment from John Deere for that work. (R. p. 12, para. 23). Flint also admitted that its acts were unfair and deceptive and continue to be willful. (R. p. 12, para. 26). Limehouse v. Hulsey, 404 S.C. 93, 744 S.E.2d 566 (2013) quoting Roche v. Young Bros., Inc., of Florence, 332 S.C. 75, 81, 504 S.E.2d 311, 314 (1998), "It is well settled that by suffering a default, the defaulting party is deemed to have admitted the truth of the plaintiff's allegations and to have conceded liability."

While the trial court may have misspoken on trebling the damages, its order reflects that it found the violation was willful.

**CONCLUSION**

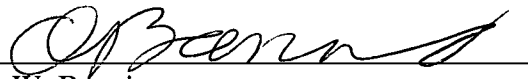
Bruce respectfully requests this Court find that Judge Hill's Order of Default was a final order on that issue and the application of the Rule 60(b) requirement for setting aside a default was proper.

Bruce respectfully requests this Court find that Bruce's third party complaint under Rule 14 was proper.

Finally, Bruce respectfully requests that this Court find the trial court did not err in the trebling of damages under the South Carolina Unfair Trade Practices Act under the admitted facts of this case.

Respectfully submitted,

BANNISTER, WYATT & STALVEY, LLC



O. W. Bannister

Attorney for Respondent

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**Certificate of Counsel**

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

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