

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

ORIGINAL

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,

v.

Jerry A. Bruce, Defendant

and

Jerry A. Bruce, Third Party Plaintiff

Of Whom Jerry A. Bruce Respondent

v.

Flint Equipment Co. Appellant.

FINAL REPLY BRIEF OF APPELLANT FLINT EQUIPMENT CO.

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ARGUMENT

I. BRUCE’S ARGUMENT THAT THE CIRCUIT COURT DID NOT ERR IN REVIEWING FLINT’S MOTION TO SET ASIDE DEFAULT UNDER RULE 60(b) RATHER THAN RULE 55(c) IS BOTH LEGALLY AND FACTUALLY INCORRECT

In seeking to persuade this Court to affirm the judgment below, Respondent Jerry Bruce (“Bruce”) asks the Court to disregard the distinction between an entry of default and a default judgment—a distinction that is established by the South Carolina Rules of Civil Procedure and that has been long recognized by decisions of this Court. In fact, Bruce goes so far as to ask the Court to overrule its own precedents so that it may uphold the judgment he secured in this case. This Court should decline Bruce’s invitation and instead adhere to the requirements of the Rules of Civil Procedure and to its own decisions—both of which require reversal of the judgment that was entered in Bruce’s favor.

The Rules of Civil Procedure provide for two steps before a default judgment may be entered: entry of default (Rule 55(a)) and default judgment (Rule 55(b)). Bruce argues these separate steps may be collapsed into one act and that, as a result, the Order of Default he obtained—which found only that Respondent Flint Equipment Company (“Flint”) “is in default” and which manifestly did not award damages but instead ordered a “hearing to determine damages”—constituted a default judgment. But this argument contradicts not only the text of Rule 55(b), which recognizes a judgment exists only when damages have been awarded, but also this Court’s decision in *Ricks v. Weinrauch*, 293 S.C. 372, 375, 360 S.E.2d 535, 536-37 (Ct. App. 1987), which held that the language of Rule 55(b) “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.” Rule 55(b) and the

decision in *Ricks* are categorical and conclusive: no default judgment exists until damages are awarded.

In the present case, it is undisputed that damages had not been awarded at the time Flint moved to set aside the entry of default. Instead, only an order finding that Flint “is in default” had been entered. Accordingly, Bruce’s argument that this order constitutes a default judgment is not sustainable under Rule 55(c) and multiple decisions of this Court, and the circuit court was required to review Flint’s Motion to Set Aside Default under the less rigorous standard of Rule 55(c) rather than the demanding standard of Rule 60(b).¹ *See, e.g., Ricks*, 293 S.C. at 374, 360 S.E.2d at 536; *Top Value Homes, Inc. v. Harden*, 319 S.C. 302, 460 S.E.2d 427 (Ct. App. 1995); *Wham v. Shearson Lehman Bros., Inc.*, 298 S.C. 462, 465, 381 S.E.2d 499, 501 (Ct. App. 1989).² As this Court has recognized, the failure to use the correct standard when reviewing a Motion to Set Aside Default is not harmless but is reversible error. *Id.* Therefore, Flint requests that the Court reverse the denial of its Motion to Set Aside Default and the resulting default judgment

¹ Bruce’s argument that the “Order of Default” is a default judgment and not an entry of default is also belied by Bruce’s prior categorization of the order and the motion that led to its entry. In his affidavit filed with the circuit court, Bruce averred that “this Affidavit is made in support of Defendant’s Motion **for entry of Third-Party Defendant’s default**, filed herewith.” (R. pp. 17-18) (emphasis added), and the order itself—drafted by Bruce—provided: “This matter is before the Court upon Motion of counsel for the Third Party Plaintiff seeking **an Entry of Default**” (R. p. 20) (emphasis added). In fact, Bruce continues to refer to the order as an “entry of default” in his brief to this Court. (Resp.’s Initial Br., p. 2).

² *Wham* is the case that Bruce asks this Court to overrule. However, *Wham* correctly recognizes the distinction between Rule 55(a) and (b) and is also in keeping with the holdings of *Ricks* and *Top Value*. As such, *Wham* must be followed here, not overruled. *Top Value*, 319 S.C. at 305, 460 S.E.2d at 429 (“This issue is controlled by our decision in *Wham*.”). Bruce’s argument that *Wham* is distinguishable because the clerk and not a judge made the entry of default in that case also fails. Neither Rule 55 nor this Court’s decisions recognize a distinction between an entry of default by the clerk versus by a judge. In fact, this Court has recognized that a Rule 55(c) motion to set aside default is correctly made to set aside an entry of default made by a judge. *See, e.g., Dixon v. Besco Eng’g, Inc.*, 320 S.C. 174, 177, 463 S.E.2d 636, 638 (Ct. App. 1995).

entered in favor of Bruce and remand for reconsideration of the motion under the standard of Rule 55(c) and the factors this Court mandated in *Wham*.

II. THE CIRCUIT COURT ERRED IN GRANTING DEFAULT JUDGMENT ON BRUCE'S THIRD-PARTY CLAIM, WHICH SOUGHT ONLY RELIEF UNAVAILABLE AT LAW AND INADEQUATELY PLED.

A. Flint's Default Did Not Waive its Right to Challenge the Sufficiency of the Pleadings.

In its opening brief, Flint asserted that the circuit court erred in holding that the entry of default waived Flint's right to argue against 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. In his brief, Bruce does not dispute that Flint had the right to contest the validity of Bruce's Rule 14 impleader claim on these grounds and that the circuit court erred to the extent it found Flint's default obviated this right and cured any deficiency in Bruce's pleadings. Instead, he relies solely on the circuit judge's alternative ruling that he considered and rejected on the merits Flint's argument that Bruce's Rule 14 impleader claim was deficient and could not support a default judgment. (Resp.'s Initial Br., p. 8). As such, Bruce has conceded this issue and cannot rely on it as an additional sustaining ground in support of affirmance. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000); *Maxey v. R.L. Bryan Co.*, 295 S.C. 334, 336 n.2, 368 S.E.2d 466, 467 n.2 (Ct.App.1988); *May v. Hopkinson*, 289 S.C. 549, 558, 347 S.E.2d 508, 513 (Ct.App.1986).

B. Bruce's Rule 14 Impleader Claim was not Derivative of Plaintiff's Claims Against Bruce.

Having conceded Flint's right to challenge the sufficiency of his third-party claim, Bruce relies on the assertion that the claim was "intertwined" with Plaintiff's claims against him. This reliance on the claim being "intertwined" is misplaced. Rule 14 nowhere uses the word

“intertwined,” nor do the controlling cases. Instead, a third-party claim must be “derivative” of the Plaintiff’s claim against the defendant. *See, e.g., First General Services of Charleston, Inc. v. Miller*, 314 S.C. 439, 442, 445 S.E.2d 446, 447 (1994) and other authorities cited in Flint’s opening brief. Bruce responds to these authorities by arguing that “Bruce’s claim derived out of Flint’s actions in charging Bruce for repairs he did not authorize.” (Resp.’s Initial Br., p. 9). But Bruce does not provide support for this contention, and, in any event, a third-party claim must be derivative not out of Flint’s own conduct but out of Bruce’s liability to Plaintiff. Bruce’s fraud and deceit and Unfair Trade Practices Act (“UTPA”) claims do not assert derivative liability and do not merely make Bruce whole for any damages he may owe to Plaintiff. Rather, they result in a windfall for Bruce of treble damages and attorney’s fees far in excess of anything he may eventually owe Plaintiff. Moreover, the entry of a judgment on the third-party claim against Flint before Bruce’s liability to Plaintiff is adjudicated also demonstrates its non-derivative nature; after all, Bruce may prevail in his defense of Plaintiff’s claims against him and thus have no liability to Plaintiff whatsoever. For these reasons, the assertion of the fraud and deceit and UTPA claims was never permissible under Rule 14, and the default judgment should be reversed on that basis.

C. The UTPA Claim Was Inadequately Pled.

In response to Flint’s argument that Bruce’s UTPA claim was inadequately pled because it did not allege that he suffered damages, a necessary element to a UTPA recovery, Bruce now alleges, in his initial brief to this Court, that he “suffered damages in having to defend the suit and is exposed to having to pay for labor and parts he never authorized.” (Resp.’s Initial Br.

p. 9).³ Despite his allegations in his appellate brief, Bruce did not allege in his Third-Party Complaint 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). It is too late for Bruce to cure his pleading deficiency now, and his argument on this point must be rejected.

III. THE CIRCUIT COURT’S DAMAGES AWARD MUST BE REVERSED.

Bruce does not respond to Flint’s argument that he generally failed to prove damages. Accordingly, Flint rests on its opening brief on that argument.

On the award of treble damages for knowing and wilful conduct in violation of UTPA, Bruce argues that the record supports the treble damage award and that the Court’s mistaken view that it had “discretion” to award treble damages without making a finding of conduct supporting such damages is accordingly inconsequential. However, both the Supreme Court and this Court have always required the circuit court to make a specific finding of knowing or wilful conduct before awarding treble damages. *Haley Nursery Co., Inc. v. Forrest*, 298 S.C. 520, 525, 381 S.E.2d 906, 909 (1989); *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). This is because the UTPA statute itself requires this finding as a predicate to an award of treble damages:

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

³ Bruce asserts that Flint did not raise this argument before the circuit court. However, Flint did raise this argument. (R. p. 28; R. p. 125; R. p. 138).

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)).

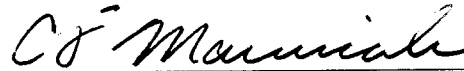
Bruce concedes that the circuit court made no finding of willful or knowing conduct by Flint to support the treble damages award. That being the case, the clear statutory mandate of UTPA, as this Court has recognized, requires reversal of the treble damages award.

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) and the *Wham* factors.⁴

⁴ Should this Court reverse the denial of the Motion to Set Aside Default and the resulting default judgment and remand for reconsideration under Rule 55(c) as Flint requests in its first argument, Flint would respectfully request that the Court also address its second and third arguments on the validity of Bruce’s Rule 14 third-party claims, on the sufficiency of the UTPA claim, and on damages because these issues are likely to recur on remand or will require a subsequent appeal to this Court if the default and default judgment are reentered on remand. *State v. Gullede*, 277 S.C. 368, 371, 287 S.E.2d 488, 490 (1982) (“Although we reverse the case and remand for a new trial, we address the other issue raised because the problem may recur at retrial.”).

Respectfully submitted this the 3rd day of December, 2014.



C. Fredric Marcinak (#73609)
Kristen L. Nowacki (#100944)
Smith Moore Leatherwood LLP
2 West Washington Street, Ste 1100 (29601)
Post Office Box 87
Greenville, South Carolina 29602-0087
Telephone: (864) 751-6000
Facsimile: (864) 751-7800
fredric.marcinak@smithmoorelaw.com

Attorneys for Appellant

CERTIFICATION OF APPELLANT FLINT EQUIPMENT COMPANY

This is to certify that the Final Reply Brief of Appellant Flint Equipment Company complies with Rule 211(b) of the South Carolina Appellate Court Rules.

SMITH MOORE LEATHERWOOD, LLP

By: *C. F. Marcinek*
C. Fredric Marcinek (#73609)
Kristen L. Nowacki (#100944)
Smith Moore Leatherwood LLP
2 West Washington Street, Ste 1100 (29601)
Post Office Box 87
Greenville, South Carolina 29602-0087
Telephone: (864) 751-6000
Facsimile: (864) 751-7800
fredric.marcinek@smithmoorelaw.com
Attorneys for Appellant

Greenville, South Carolina

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