STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
Gordon G. Cooper, Master-In-Equity
Trial Court Case No. 2018-CP-42-01540

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SC Court of Appeals

Appellate Case No. 2019-000819

Karolee Russell, Individually, and as Personal Representative of the Estate of Kevin Brian Russell, Respondent,

v.

B&R Contracting, LLC, Brian K. Bass, and Richard A. Robertson, Defendants,

Of Whom Richard A. Robertson is the Appellant.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR BY CONDUCTING A HEARING FOR DAMAGES PRIOR TO THE FILING OF A MOTION FOR DEFAULT JUDGMENT, AND WITHOUT PROOF THAT APPELLANT WAS GIVEN NOTICE THAT A DAMAGES HEARING WAS TO OCCUR ON SEPTEMBER 27, 2018?

2. DID THE TRIAL COURT ERR BY ENTERRING JUDGMENT BY DEFAULT AGAINST APPELLANT, WHERE THERE WAS NOT THE REQUIRED FACTUAL OR EVIDENTIARY SUPPORT FOR THE CAUSES OF ACTION IN RESPONDENT'S COMPLAINT, BASED ON THE EVIDENCE BEFORE THE COURT AT THE DEFAULT HEARING?

3. DID THE TRIAL COURT ERR BY ENTERING JUDGMENT AGAINST APPELLANT, WHEN THERE WAS NO CAUSE OF ACTION SEEKING VEIL-PIERCING, AND THERE WAS NO EVIDENCE OF ANY ACTION BY APPELLANT, PERSONALLY?

4. DID THE TRIAL COURT ERR BY REFUSING TO SET ASIDE THE ENTRY OF DEFAULT UPON THE MOTION OF APPELLANT?

STATEMENT OF THE CASE

On May 9, 2018, Kevin Russell (now deceased) and Karolee Russell (Karolee Russell is hereafter singularly referenced as "Respondent") (Kevin Russell and Karolee Russell are hereafter collectively referenced as "Plaintiffs") collectively filed this action (the "Action") alleging breach of contract, fraud, breach of contract accompanied by fraudulent act, conversion, and violations of the S.C. Unfair Trade Practices Act against B&R Contracting, LLC, Brian K. Bass, and Appellant Richard A. Robertson (Robertson is hereafter referenced as "Appellant"). (*See generally*

Summons and Complaint.) Plaintiffs attached a document labelled "Residential Construction Contract, as Exhibit A to their Summons and Complaint. (Exhibit A to Summons and Complaint.)

Plaintiffs served each of the Defendants in this action on May 19, 2018. (*See generally* Affidavit of Service of Richard A. Robertson; Affidavit of Service of Brian Keith Bass; Affidavit of Service of B&R Contracting, LLC.) On May 19, 2018, Kevin Russell died intestate. (*See* Affidavit of Death, p. 1, ¶ 2; Ex. A to Affidavit of Death.) Plaintiffs filed an Affidavit of Default against all Defendants on June 20, 2018. (Affidavit of Default.) On June 21, 2018, the Spartanburg Clerk of Court entered an Order of Reference referring the matter to the Spartanburg Master-in-Equity. (Order of Reference.) The Clerk of Court file does not reflect that there was ever a Motion for Default Judgment filed in the case. (*See generally* Index of Filings with the Spartanburg County Clerk of Court.)

On July 31, 2018, Respondent filed a Motion for Substitution of Parties, based upon the death of Kevin Russell. (Motion for Substitution of Deceased Plaintiff.) On August 1, 2018, the trial court issued an Order making Respondent the sole party-plaintiff in this Action. (Order for Substitution for Deceased Plaintiff.)

On August 21, 2018, Respondent issued a Notice of Hearing, not specifying the nature of the hearing, scheduled for September 11, 2018 at 11:00 am. (Notice of Hearing, dated August 21, 2018; *see also* Certificate of Service for Notice of Hearing, dated August 21, 2018.) The hearing was rescheduled for September 27, 2018. (Transcript of September 27, 2018 Hearing, p. 2, ll. 1 – 6.) On September 11, 2018, counsel for Respondent served Affidavits of Costs and Attorneys Fees by U.S. Mail. (*See* Affidavit of Costs; *see also* Affidavit of Attorneys Fees; Certificate of Service for Affidavit of Costs, dated September 11, 2018; Certificate of Service for Affidavit of Attorneys Fees, dated September 11, 2018.) Respondent's counsel also filed a Certificate of Service on

September 11, 2018, presumably for the September 27, 2018 hearing; however, Respondent did not file the Notice of Hearing with the Clerk. (Certificate of Service for Notice of Hearing, dated September 11, 2018; *see generally* Index of Filings with Spartanburg Clerk of Court.) Accordingly, prior to the hearing of September 27, 2018, Appellant had no notice of the purpose of said hearing.

At the September 27, 2018 hearing, the trial court noted that affidavits had been filed, but the trial court did not note the filing of any Motion for Default Judgment, nor did Respondent's counsel note the filing of any Motion for Default Judgment. (Transcript of September 27, 2018 Hearing, p. 2, ll. 1 – 17.) At the hearing, Appellant stated that he had nothing to do with the contract, and he was not a part of B&R Contracting, LLC. (Transcript of September 27, 2018 Hearing, p. 9, ll. 16 – 23.) Appellant stated that he did not file an answer, because he thought Mr. Bass filed one for him. (Transcript of September 27, 2018 Hearing, p. 10, ll. 1 – 7.) The Court refused to allow Appellant to pose questions, except as to damages. (Transcript of September 27, 2018 Hearing, p. 10, ll. 8 – 25.) Appellant asked to challenge the default, using the term "appeal," and the trial court advised Appellant to consult an attorney, rather than inquiring into bases to set aside an entry of default. (Transcript of September 27, 2018 Hearing, p. 11, ll. 3 – 12.)

On October 8, 2018, the trial court entered an Order of Default Judgment. (*See generally,* Order of Default Judgment.) The trial court found that all Defendants were provided notice of the time, place, and date of the hearing; however, the trial court had no evidence in the record demonstrating that -- the trial court did not review the form of the Notice, because the Notice was not in the Court's record for this matter. (Order of Default Judgment, p. 1; *see generally* Clerk's Record of Filings.) The Order appears to enter judgment combining a trebled amount for the Unfair Trade Practices Act claim, and then add a separate amount for "special damages," in

addition to attorneys' fees and costs. (Order of Default Judgment, pp. 3 – 4.) The Order does not require Respondent to elect a remedy, and it appears to spread the judgment across multiple remedies. (Id.)

On October 18, the undersigned counsel appeared for Appellant, and the undersigned filed a Motion to Reconsider the Order of Default Judgment on that date. (Motion to Reconsider.) Appellant was not served with that Order of Default Judgment until October 19, 2018. (Certificate of Service for Order of Default Judgment, dated October 19, 2018.)

In the Motion to Reconsider, Appellant noted that the Exhibit did not contain Appellant as a Party, and that Respondent's testimony indicated she had no interaction with Appellant. (Motion to Reconsider, pp. 1 – 2.) The Motion also noted that Appellant showed good cause to set aside the entry of default. (Motion to Reconsider, pp. 2 – 3.) Respondent did not file a Memo in Opposition to the Motion to Reconsider, but on February 22, 2019, Appellant filed a Memo in Support of the Motion to Reconsider, which pointed out that there was no evidence of a contract between Plaintiffs and Appellant, and the sole evidence received showed that Plaintiffs had no interaction with Appellant. (Brief in Support of Motion to Reconsider, pp. 3 – 4.) Appellant filed the entire transcript of the September 27, 2018 hearing, as an exhibit to its Brief in Support of the Motion to Reconsider; so the trial court was able to review all evidence from the hearing before ruling on the Motion to Reconsider. (Id., p. 1.)

The trial court conducted a hearing on the Motion to Reconsider on February 25, 2019. (Order Denying Motion to Reconsider, p. 1.) At that hearing, Appellant's counsel noted that there was no corporate veil-piercing action filed, and the contract at issue was between Plaintiffs and B&R Contracting, LLC, which rendered the causes of action for breach of contract and breach of contract accompanied by fraud unsupported by evidence; Appellant's counsel also noted the lack

of facts necessary to establish causes of action for fraud, conversion, civil conspiracy, and violation of the S.C. Unfair Trade Practices Act. (Transcript of February 25, 2019 Hearing, p. 2, l. 20 – p. 3, l. 10.) Appellant also argued that Respondent suffered no prejudice with the setting aside the entry of default, due to still possessing judgments against Bass and B&R Contracting, with whom Plaintiffs had contracted. (Id., p. 3, ll. 15 – 22.)

The trial court denied the Motion to Reconsider via an Order, dated April 11, 2019, in which it stated that based on evidence presented at the hearings, and Appellant's failure to answer, evidence existed of a relationship between the co-Defendants. (Order Denying Motion to Reconsider, p. 2.) In that Order, the trial court acknowledged that, in the Motion to Reconsider, the trial court was evaluating a Motion to Set Aside Default, based on Appellant's request at the September 27, 2018 hearing for leave to file an answer. (Id., p. 1.) The trial court found that there was no "good cause" to set aside the entry of default. (Id. pp. 1 – 2.)

Appellant filed a Notice of Appeal on May 13, 2019. (Notice of Appeal.)

STATEMENT OF FACTS

Respondent's claims are based upon allegations that Plaintiffs entered into a contract (the "Contract") with all of the Defendants, including Appellant. (Complaint, p. 1, ¶ 5.) Plaintiffs incorporated the Contract into their Complaint, and the Contract states that it is between B&R Contracting, LLC and Kevin and Karolee Russell. (Ex. A to Complaint, p. 1.) The Contract is signed by Brian K. Bass for B&R Contracting, LLC, and by Kevin B. Russell. (Ex. A to Complaint, pp. 5, 15.) The Complaint does not state any specific actions taken by Appellant, even though, for claims of fraud, the circumstances constituting fraud must be stated with particularity. Rule 9(b), SCRCP. (*See generally* Complaint.)

Respondent testified at that hearing that she never met Appellant. (Transcript of September 27, 2018 Hearing, p. 3, ll. 7 – 11.) Respondent identified a contract with B&R Contracting, LLC, signed by Brian Bass, and she testified that she and her husband "hired Brian to construct the home." (Id., p. 3, l. 12 – p. 4, l. 22.)

Respondent was asked whether she talked to Appellant, and she responded:

> I talked to Brian Bass the day that he came and gave us a quote. I talked to him again when we met him at a gas station outside of Columbia for signing some paperwork. And I talked to him briefly again when we turned over the check for the down payment and the remainder of the logs.

(Id., p. 5, ll. 2 – 5.) When asked whether she had any contact with the Defendants, Respondent said that she believed her husband contacted Brian Bass – she made no reference to Appellant. (Id., p. 6, ll. 11 – 14.)

Respondent stated that she did not believe the conduct of the Defendants would affect other people in South Carolina. (Id., p. 8, ll. 17 -20.) After a further leading question from her counsel, Respondent said it was "possible" that the Defendants could affect others. (Id., p. 8, ll. 21 – 22.)

At the same hearing, Appellant rose to question Respondent regarding the Contract, in an effort to point out his lack of involvement, and the trial court instructed Respondent that his questions were inappropriate. (Id., p. 9, l. 16 – p. 10, l. 10.) Respondent again pointed out his lack of involvement, and the trial court did not make any consideration in that regard, saying the trial court would not consider facts that were not pled. (Id., p. 10, ll. 12 – 21.) The trial court did not instruct Appellant that he was allowed to ask questions regarding damages. (Id., p. 11, ll. 9 – 19.) Brian Bass also testified at the hearing, subject to questioning by Appellant's counsel, and Bass also identified no involvement of Appellant in the transaction at issue. (Id., p. 12, l. 10 – p. 13, l. 6.)

Respondent testified that she paid a deposit under the Contract, which was with B&R Contracting, LLC. (Id., p. 4, ll. 17 – 22.) She did not identify to whom she paid the deposit. (*See generally* Transcript of September 27, 2018 Hearing.) In his sworn testimony, Brian Bass appears to acknowledge that he, either personally or through B&R Contracting, LLC, received the money paid on Appellant's behalf, and that he returned some of that money to Southland Log Homes. (Id., p. 12, l. 10 – p. 13, l. 6.) Respondent provided no direct evidence that Appellant received funds from Respondent or that he had any interaction with Respondent or her late husband.

STANDARD OF REVIEW

Appellate courts have a clear standard in assessing the denial of a Motion to Set Aside Default, or a motion seeking relief from default judgment:

> The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the trial judge. The trial court's decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion. An abuse of discretion occurs when the judge issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support.

Sundown Operating Co. v. Intedge Indus., Inc., 383 S.C. 601, 606-07, 681 S.E.2d 885, 888 (2009) (internal citations omitted).

"The discretionary element makes it clear that the party requesting a judgment by default is not entitled to one as of right, even when the defendant is technically in default." *In re Estate of Weeks,* 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct. App. 1997). "Rule 55(c) should be liberally construed so as to promote justice and dispose of cases on the merits." *Id.* A trial court's findings of fact must be upheld, unless they are "wholly unsupported by the evidence or controlled by an error of law." *Harbor Island Owners' Ass'n v. Preferred Island Props., Inc.*, 369 S.C. 540, 546, 633 S.E.2d 497, 500 (2006), *quoting Roberson v. S. Fin. Of S.C., Inc.,* 365 S.C. 6, 11, 615 S.E.2d

112, 115 (2005). "Whether a defendant is or is not in default, it is incumbent upon the judge and/or the jury to make a judicial determination of the amount of damages based on the proof, and such proof must be by a preponderance of the evidence." *Lewis v. Congress of Racial Equality*, 275 S.C. 556, 561, 274 S.E.2d 287, 289 (1981). "A party seeking default judgment to only such relief as is framed by his pleading, and then only to the extent requested therein." *Mut. Sav. and Loan Ass'n v. McKenzie*, 274 S.C. 630, 632, 266 S.E.2d 423, 424 (1980) (internal citations omitted). "It follows that 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. *Id.* (internal citations omitted).

ARGUMENT

I. THE TRIAL COURT ERRED BY CONDUCTING A HEARING FOR DAMAGES PRIOR TO THE FILING OF A MOTION FOR DEFAULT JUDGMENT, AND WITHOUT EVIDENCE THAT RESPONDENT NOTIFIED APPELLANT THAT A DAMAGES HEARING WAS TO OCCUR.

A party seeking a default judgment in a case not involving a claim of liquidated damages or a sum certain is required to make an application to the court for such relief. Rule 55(b)(2), SCRCP. Further, "notice of any trial or hearing on unliquidated damages shall also be given to parties in default by first class mail to the last known address of such party whether or not such party has appeared in the action." *Id.*

A. The Trial Court Had No Authority to Enter Default Judgment, Because Respondent Never Made Application for Default Judgment.

The Clerk of Court's record for this case shows that Respondent never filed a Motion or any other document seeking a default judgment in this matter. (*See generally* Index of Filings with the Spartanburg County Clerk of Court.) It is clear that a party seeking judgment by default must

make a motion or application for such relief. *See* Rule 55(b), SCRCP. If a defendant has made an appearance in a case, even if in default, a plaintiff must serve the defaulted defendant with a written notice of the motion at least three days prior to a hearing. Rule 55(b)(2), SCRCP; *see also Stark Truss Co. v. Superior Constr. Corp.*, 360 S.C. 503, 511-12, 602 S.E.2d 99, 103 (Ct. App. 2004) (reversing entry of judgment where failure to give required notice of application for default judgment). In this case, there is no evidence that Respondent made any motion or application for default judgment; therefore, there was no basis under the Rules of Civil Procedure for the trial court to enter judgment by default. Accordingly, the order entering default judgment should be reversed, with the matter remanded to trial court.

B. **The Trial Court Did Not Have Any Evidence that Respondent Notified Appellant that a Damages Hearing Was to Occur on September 27, 2018.**

In this case, Respondent mailed a Notice of Hearing to Appellant; however, the Notice did not state the purpose of the hearing. (*See* Notice of Hearing, dated August 21, 2018; see also Certificate of Service for Notice of Hearing, dated August 21, 2018.) As noted above, Respondent did not place its Notice of Hearing for the September 27, 2018 hearing in the record; however, there is no evidence that the September 27, 2018 Notice was different from the one for September 11.[1]

Where a trial court determines a damages hearing is necessary for entry of default judgment, "a defaulting party is entitled to notice of the damages hearing." *Thomas & Howard*

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[1] Although the Notice of Hearing for September 27, 2018, is not in the record, the undersigned has reviewed the Notice, and it does not make any reference to the purpose of the September 27 hearing.

Co. v. T.W. Graham and Co., 318 S.C. 286, 290, 457 S.E.2d 340, 343 (1995). In this case, the trial court determined that a damage hearing was necessary, but Appellant was not told that a damages hearing was to occur. Specifically, Appellant received notice only that some type of hearing was to occur. Rule 55(b)(2), SCRCP, requires "notice of any trial or hearing on unliquidated damages." Rule 55(b)(2), SCRCP. The purpose of a damages hearing is that a plaintiff is required to prove its damages, even in cases of default. A defaulting defendant must be given notice of the damages hearing, and that the matter being considered is damages, because that defendant is allowed to participate in the assessment of damages. *See, e.g., Lewis*, 275 S.C. at 561, 274 S.E.2d at 289-90 (discussing notice requirement for damages hearing).

In this case, the trial court erred by conducting a damages hearing where there not proper notice. The trial court then further complicated the matter by instructing Appellant that he was not allowed to question Respondent about liability, and not asking Appellant if he wished to question the witness on damages. (Transcript of September 27, 2018 Hearing, p. 9, l. 16 – p. 11, l. 20.) The trial court should not have proceeded with a damages hearing, without verifying that Appellant received notice of a damages hearing, and not just a general hearing notice. Accordingly, the Order of Judgment by Default should be reversed and remanded to the trial court.

II. THE TRIAL COURT ERRED BY ENTERING JUDGMENT BY DEFAULT AGAINST APPELLANT, WHERE THERE WAS NOT THE REQUIRED FACTUAL OR EVIDENTIARY SUPPORT FOR THE CAUSES OF ACTION IN RESPONDENT'S COMPLAINT, BASED ON THE EVIDENCE BEFORE THE COURT AT THE DEFAULT HEARING.

At the September 27, 2018 hearing, it appeared that the trial court intended to grant judgment to Appellant on her cause of action under the S.C. Unfair Trade Practices Act; however,

the trial court's damage recitation does not make that clear, as the trial court trebles some, but not all, of the damages claimed. (Transcript of September 27, 2018 Hearing, p. 15, l. 17 – p. 16, l. 1.) The Order of Default Judgment appears to enter judgment on all causes of action, without requiring an election of remedy by Respondent. (Order of Default Judgment, pp. 2 – 3.) South Carolina law is clear that, there can be no double recovery for a single wrong, and that "when an identical set of facts entitle to the plaintiff to alternative remedies, he may plead his entitlement to either or both; however, the plaintiff may not recover both." *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 56, 691 S.E.2d 135, 153 (2010).

Because it appears that the trial court entered judgment on all causes of action, even though it was legally required to compel Respondent to elect remedies, Appellant addresses the legal and factual insufficiencies of each of Respondent's causes of action separately. If the trial court merely intended to enter judgment solely on the cause of action under the S.C. Unfair Trade Practices Act, that cause of action is addressed below. For each of the causes of action presented, the trial court abused its discretion in entering default judgment against Appellant, because the findings of fact necessary to enter said judgment were in direct contradiction of the evidence before the trial court. Further, the trial court committed clear errors of law by finding Appellant liable for causes of action, the elements of which were not supported, and were in fact contradicted, by the evidence before the trial court.

A. The Contract, Which Was Incorporated into the Complaint, Shows that Appellant Was Not a Party to the Contract, and Therefore Could Not Breach Said Contract. This is Fatal to Appellant's Causes of Action for Breach of Contract, and Breach of Contract Accompanied by Fraud.

When the trial court conducted its damages hearing on September 28, 2018, the Complaint at issue included the Contract, which had been incorporated by reference. (Complaint, p. 1, ¶ 5.) As a result, the language of the very Complaint demonstrated that the contractual agreement at issue was between B&R Contracting, LLC, and Kevin Russell and Karolee Russell. (Ex. A to Complaint, p. 1.) Further, at the same hearing, Appellant and Brian Bass testified, and neither witness identified any involvement of Appellant in any of the facts at issue. (Transcript of September 27, 2018 Hearing, p. 3, l. 7 – p. 4, l. 9, p. 12, l. 10 – p. 13, l. 6.) The Complaint itself showed that Appellant was not a party to the contract, and Respondent and her counsel verified that fact at the hearing. (Id., p. 3, l. 7 – p. 5, l. 5.)

The sole evidence before the trial court (and evidence which was presented by Respondent) showed that the Contract was between B&R Contracting, LLC, and Kevin and Karolee Russell. There was no evidence supporting the claim that Appellant was a party to the Contract, other than a conclusory statement in Paragraph 5 of the Complaint, which was directly contradicted by the actual Contract which was incorporated in the same paragraph. (Complaint, p.1, ¶5; *see also* Ex. A to Complaint, p. 1.) The Court expressly found that Appellant entered into a residential construction agreement, on October 10, 2016, for the construction of a log style home, even though there were no facts to support this finding, and the Complaint directly contradicted it. (Order of Default Judgment, p. 1, Finding 6.) This finding was wholly unsupported by the evidence, and it therefore constitutes an abuse of discretion.

Further, because Appellant failed to provide any evidence of the existence of a contract, she failed to meet the first element for her causes of action for breach of contract and breach of contract accompanied by fraud; therefore, the trial court abused its discretion, through an error of law, by entering judgment on those causes of action. "The elements for a breach of contract are the existence of a contract, its breach, and damages caused by such breach." *Hotel and Motel Holdings, LLC v. BJC Enters., LLC,* 414 S.C. 635, 652, 780 S.E.2d 263, 272 (Ct. App. 2015), *quoting S. Glass & Plastics Co. v. Kemper,* 399 S.C. 483, 491-92, 732 S.E.2d 205, 209 (Ct. App. 2012). Similarly, the first element required for a claim of breach of contract accompanied by fraudulent act is a breach of contract. *Id.* at 654, 780 S.E.2d at 273-74. Without a contract, there is no basis for Appellant to recover under either of these causes of action, and the trial court abused its discretion by entering default judgment on both of these causes of action.

B. There Is No Evidence to Support the Cause of Action for Fraud, and the Elements of Fraud Are Not Sufficiently Detailed to Comply with Rule 9(b), SCRCP; Therefore, the Trial Court Erred By Entering Default Judgment on This Cause of Action.

Rule 9(b), SCRCP, requires that the circumstances constituting fraud or mistake be stated with particularity. Rule 9(b), SCRCP. Under South Carolina law:

> Fraud is not presumed, but must be shown by clear, cogent, and convincing evidence. In order to prove fraud, the following elements must be shows: (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury. A complaint is fatally defective if it fails to allege all nine elements of fraud. Where the complaint omits allegations on any element of fraud, the trial court should grant the defendant's motion to dismiss the claim.

Ardis v. Cox, 314 S.C. 512, 515, 431 S.E.2d 267, 269 (Ct. App. 1993). As an initial matter, the Complaint fails to allege that Appellant possessed intent that any representations be acted upon by Respondent; therefore, this cause of action was subject to dismissal. *Id.* at 515, 431 S.E.2d at 269. (Complaint, p. 2.) Because the fraud cause of action failed to state a claim on which relief can be granted, entering default judgment on that cause of action is an error of law, which must be reversed. *McKenzie*, 274 S.C. at 630, 266 S.E.2d at 424 (internal citations omitted).

Additionally, the Complaint identifies no specific representations allowing for a fraud claim – it merely states that "Defendants . . . [represented] they would undertake certain work pursuant to a written contract after receiving payment. (Complaint, p. 2, ¶ 12.) This allegation was directly contradicted, at least as to Appellant, by Respondent's testimony that she never met Appellant, and her further testimony that her communications were limited to Brian Bass. (Transcript of September 27, 2018 Hearing, p. 3, l. 7 – p. 5, l. 5.) There is no evidence to support the claim that Appellant made any representations to Respondent, and, in fact, all evidence in this case contradicts this assertion. Accordingly, entry of judgment by default for fraud constitutes an abuse of discretion.

C. The Complaint Does Not Allege Any Additional Facts in Support of the Civil Conspiracy Cause of Action, and It Does Not Allege Any Damages Beyond Those for the Other Causes of Action. Accordingly, the Trial Court Erred in Granting Judgment By Default on That Cause of Action.

The Complaint includes a cause of action for civil conspiracy; however, the alleged wrongful conduct constituting such a conspiracy is identical to the conversion cause of action, and the damages claimed in the civil conspiracy cause of action are identical to those set forth in the causes of action for breach of contract and conversion. (Complaint, pp 1 - 3.)

Civil conspiracy is not meant to be a repetition of other claims. "A claim for civil conspiracy must allege additional acts in furtherance of a conspiracy rather than reallege other claims within the complaint." *Hackworth v. Greywood at Hammett, LLC*, 385 S.C. 110, 115, 682 S.E.2d 871, 874 (Ct. App. 2009) (internal citations omitted). Additionally, "the damages alleged must go beyond the damages alleged in other causes of action." *Id.* (internal citations omitted).

As noted above, Respondent's allegations of wrongful acts by Appellant in her civil conspiracy cause of action are identical to those set forth in the conversion cause of action. (Complaint, p. 3.) A motion to dismiss should be granted as to civil conspiracy claims where the claim "does no more than incorporate the prior allegations and then allege the existence of a civil conspiracy." *See Vaught v. Waites,* 300 S.C. 201, 209, 387 S.E.2d 91, 95 (Ct. App. 1989) (approving prior case requiring demurrer where civil conspiracy claim merely repeats prior allegations and affirming trial court grant of summary judgment on same basis). Further, "[i]f a plaintiff merely repeats the damages from another claim instead of specifically listing special damages as part of their civil conspiracy claim, [that plaintiff's] conspiracy claim should be dismissed." *Hackworth*, 385 S.C. at 117, 682 S.E.2d at 875. As noted above, the damages alleged in Respondent's civil conspiracy cause of action are identical to those set forth in Respondent's causes of action for breach of contract and conversion; therefore, the civil conspiracy cause of action was and is subject to dismissal. (Complaint, pp. 1 – 3.) Because the civil conspiracy cause of action was subject to dismissal for failure to state a claim, entering default judgment on that cause of action is an error of law, which must be reversed. *McKenzie*, 274 S.C. at 630, 266 S.E.2d at 424 (internal citations omitted).

D. The Trial Court Abused Its Discretion By Entering Judgment By Default on Appellant's Conversion Claim, When the Evidence Demonstrated that Brian Bass Possessed the Money at Issue, and There Was No Evidence that Appellant Possessed Any of the Property at Issue.

"Conversion is defined as the unauthorized assumption and exercise of rights of ownership over goods or personal chattels belonging to another, to the alteration of heir condition or to the exclusion of the rights of the owner." *Mullis v. Trident Emergency Physicians,* 351 S.C. 503, 506-07, 570 S.E.2d 549, 550 (Ct. App. 2002) (*quoting Green v. Waidner*, 284 S.C. 35, 37, 324 S.E.2d 331, 333 (Ct. App. 1984)).

In the Complaint, Appellant alleges three different defendants converted the same property, without any allegation of how they would have done so. (Complaint, p. 3.) At the hearing, Appellant testified that she paid a deposit of $29,500.00 under the Contract, which was with B&R Contracting, LLC. (Transcript of September 27, 2018 Hearing, p. 4, l. 17 – p. 6, l. 5.) Further, Appellant testified that, through her counsel, she asked B&R Contracting, LLC to return the deposit received. (Id., p. 5, l. 17 – p. 6, l. 5.) Additionally, the Complaint before the trial court at the damages hearing confirmed that Respondent's counsel requested the return of the funds at issue from B&R Contracting, LLC. (Ex. C to Complaint.) Of course, this request was logical, because B&R Contracting, LLC was the sole entity with whom Plaintiffs contracted. (Ex. A to Complaint.) Even though Paragraph 6 of the Complaint alleged that Plaintiffs made payment to all the Defendants, the evidence in the record, both in the form of Exhibit C, and the testimony of Brian Bass and Appellant contradict that assertion. (Ex. C to Complaint; Transcript of September 27, 2018 Hearing, p. 3, l. 25 – p. 6, l. 5, p. 12, l. 10 – p. 13, l. 4.) Brian Bass' testimony, for which he was not cross-examined by Appellant's counsel, was that he received money and that the money

was frozen in his divorce. (Id., p. 12, l. 10 – p. 13. l. 4.) Although Respondent testified at the September 27, 2018 hearing, she never specifically stated to whom she paid the deposit. The trial court never inquired of Appellant or Bass, even though Bass acknowledged receipt of said payment. (Id., p. 12, l. 10 – p. 13. l. 4.)

The trial court made a finding of fact that Plaintiffs made a payment to all Defendants, when the evidence before the trial court did not support that finding. (Order of Default Judgment, p. 2, Finding 8.) Further, this finding was unsupported by evidence, because there was no testimony that either of the Plaintiffs had any relationship to Appellant by which they would have sent a deposit to Appellant. (*See, e.g.,* Transcript of September 27, 2018 Hearing, p. 3, l. 7 – p. 5, l. 5.) Based on the lack of evidence of any payment to Appellant, coupled with the testimony of Respondent and Bass that payment went to Bass, the trial court abused its discretion by entering judgment against Appellant on the conversion cause of action.

E. The Trial Court Abused Its Discretion By Entering Default Judgment Against Appellant of the Cause of Action Under the S.C. Unfair Trade Practices Act, Because There Was No Factual or Legal Support for That Claim.

Even though Appellant has discussed herein the reasons that the trial court erred in finding a breach of contract by Appellant in this matter, the crux of Respondent's claim for violation of the S.C. Unfair Trade Practices Act is the allegation, contradicted by the evidence incorporated into the Complaint and the testimony presented at the September 27, 2018 hearing, that Appellant failed to perform a construction contract and that Appellant failed to refund a deposit. (Complaint, p. 4, ¶ 28.) As summarized above, both allegations stand directly contradicted by the evidence that was before the trial court at the September 27, 2018 hearing. Even were that evidence not directly contradicted, the trial court committed an error of law by

entering judgment on the Unfair Trade Practices Act, based on an allegation of an intentional breach of contract (which would necessarily include the alleged improper retention of deposited funds).

The Unfair Trade Practices Act declares unlawful "[u]nfair methods of competition and unfair or deceptive acts in the conduct of any trade or commerce." S.C. Code Ann. § 39-5-20(a) (2019). It allows a private cause of action for damages, by a person who suffers a loss of money or property as a result of an unfair or deceptive method. S.C. Code Ann. § 39-5-140(a) (2019). "To be actionable under the UTPA, an unfair or deceptive practice or act must adversely affect the public interest[, and] . . . conduct which only affects the parties to the transaction provides no basis for a UTPA claim." *Jefferies v. Phillips*, 316 S.C. 523, 527, 451 S.E.2d 21, 23 (Ct. App. 1994). The UTPA statutes, however, do not allow parties who have other means of redress to seek treble damages under the UTPA. South Carolina's courts have clearly stated that "a mere breach of contract does not constitute a violation of the UTPA." *Key Co. v. Fameco Distribs., Inc.*, 292 S.C. 524, 526, 357 S.E.2d 476, 477 (Ct. App. 1987). Even intentional breaches of contract constitute inappropriate bases for UTPA claims, because these acts do not implicate practices "that either directly or indirectly [affect] the rights of anyone but the contracting parties." *Id.*

To establish a basis for a UTPA claim, the adverse effect of allegedly unfair practices "must be proved by specific facts." *Jefferies,* 316 S.C. at 527, 451 S.E.2d at 23. Neither Respondent's Complaint, nor Respondent's testimony at trial contain any evidence showing that the conduct complained of had any effect on the public interest. (*See* Complaint, pp. 3 - 4; *see also* Transcript of September 27, 2018 Hearing, p. 8, l. 17 – p. 9, l. 6.) The sole basis alleged for a public impact is Respondent's answer to leading questions that Appellant "may

do other work in the State of South Carolina" and that Appellant "may affect other people in the State of South Carolina." (Transcript of September 27, 2018 Hearing, p. 8, l. 23 – p. 9, l. 3.) Respondent did not provide any foundation that she possessed any direct knowledge on these claims, and the claims do not constitute the specific facts required to show an impact on the public interest. (Id.)

In the *Jefferies* case, applying an abuse of discretion standard, the Court of Appeals reversed the Cherokee County Master-in-Equity's finding that a contractor was liable under the UTPA, based on allegations that the contractor padded a construction estimate and received payment for work that was unnecessary, finding that the UTPA was inapplicable because there was no evidence that the contractor deceived others; therefore, there was no evidence that the claim affected the public interest. *Jefferies*, 316 S.C. at 526-27, 451 S.E.2d at 22-23. In this case, the trial court had no evidence that there had been any similar deception to that alleged in the Complaint by any party to this action. "The mere fact that the actor is still alive and engaged in the same business is not sufficient to establish [the potential for repetition necessary to support a UTPA claim]." *Id.* at 529, 451 S.E.2d at 24. And the fact that Appellant is still alive, coupled with the mere allegation that Appellant is engaged in the same business is the only evidence which Respondent offered to support her claim that the alleged wrongful acts by Appellant effected the public interest. Accordingly, the trial court's entry of default judgment on Respondent's UTPA cause of action was premised on an error of law and unsupported by the facts, constituting an abuse of discretion. Accordingly, the judgment must be reversed.

III. THE TRIAL COURT ERRED BY ENTERING JUDGMENT AGAINST APPELLANT, WHEN THERE WAS NO CAUSE OF ACTION SEEKING VEIL-PIERCING, AND THERE WAS NO EVIDENCE OF ANY ACTION BY APPELLANT, PERSONALLY.

Appellant has demonstrated that the evidence before the trial court, and the testimony of Respondent demonstrated that Appellant had no direct interactions with Respondent, and Respondent and her husband contracted solely with B&R Contracting, LLC for the construction services at issue in this case. (Complaint, p. 1, ¶ 5; Ex. A to Complaint, p. 1; Transcript of September 27, 2018 Hearing, p. 3, l. 7 – p. 4, l. 9, p. 12, l. 10 – p. 13, l. 6.) Respondent's Complaint does not seek any corporate veil-piercing against B&R Contracting, LLC nor does it allege that Appellant is a member of B&R Contracting, LLC such that veil-piercing is allowed. (*See generally* Complaint.) At the hearing on Appellant's Motion to Reconsider, Appellant's counsel informed the trial court that there had been no cause of action for veil-piercing filed. (Transcript of February 25, 2019 Hearing, p. 3, ll. 1 – 2.) At the Motion to Reconsider, Respondent's counsel argued that Appellant was a member of B&R Contracting, LLC; however, he offered no evidence to support that contention, and the Complaint contains no allegation that Appellant is a member of B&R Contracting, LLC. (Transcript of February 25, 2019 Hearing, p. 4, l. 11 – p. 5, l. 25.) In ruling, the trial court made a statement that Appellant's testimony that Bass would answer on his behalf "indicates to [the trial court] that there was a relationship or something there or there was a business relationship." (Transcript of February 25, 2019 Hearing, p. 7, ll. 4 – 6.) Such a finding constitutes mere speculation, and it is an abuse of discretion.

Further, by piercing the corporate veil to find liability by Appellant when the sole evidence is that Respondent contracted with B&R Contracting, LLC the trial court provided Respondent

with relief which Respondent did not expressly seek in her complaint. (*See generally* Complaint.) "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." *Mut. Sav. and Loan Ass'n v. McKenzie*, 274 S.C. 630, 632, 266 S.E.2d 423, 424 (1980). By granting veil-piercing in a default judgment, when such relief was not sought in the Complaint, the trial court committed an error of law, which constitutes an abuse of discretion. Accordingly, the trial court's judgment should be reversed.

IV. THE TRIAL COURT ERRED BY REFUSING TO SET ASIDE THE ENTRY OF DEFAULT UPON THE MOTION OF APPELLANT.

At the September 27, 2018 hearing, the trial court did not consider whether it should set aside the entry of default as to Appellant, even though Appellant, acting *pro se*, requested leave to "appeal" the entry of default or to file a late answer. (Transcript of September 27, 2018 Hearing, p. 10, l. 3 – p. 11, l. 11.) The trial court advised Appellant to "talk to your attorney" rather than analyzing whether good cause existed to set aside the default. (Id.) Appellant moved to reconsider the failure to assess whether default should be set aside. (Motion to Reconsider, p. 2.) The trial court evaluated the Motion to Set Aside Default as part of the Motion to Reconsider, and it denied the Motion to Set Aside Default. (Order Denying Motion to Reconsider, pp. 1 – 2.)

An entry of default may be set aside for "good cause shown." Rule 55(c), SCRCP. "Rule 55(c) should be 'liberally construed to promote justice and dispose of cases on the merits.'" *Melton v. Olenik*, 379 S.C. 45, 54, 664 S.E.2d 487, 492 (Ct. App. 2008) (*quoting Bage, LLC v. Southeastern Roofing Co. of Spartanburg,* 373 S.C. 457, 471, 646 S.E.2d 153, 160 (Ct. App. 2007), *vacated by subsequent settlement,* 383 S.C. 489, 681 S.E.2d 867 (2009)). When a trial court evaluates whether good cause exists to set aside an entry of default, a trial court should consider the factors set forth in *Wham v. Shearson Lehman Bros., Inc.,* 298 S.C. 462, 381 S.E.2d 499 (Ct.

App. 1989). *Melton,* 379 S.C. at 55, 664 S.E.2d at 492. Under the *Wham* factors, the court should consider: (1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted. *Wham,* 298 S.C. at 465, 381 S.E.2d at 501-02.

A. The Trial Court Failed to Determine Whether Good Cause Existed to Set Aside the Entry of Default, Even Though It Was Required to Do So.

At the September 27, 2018 hearing, Appellant stated that he did not file an Answer, because he thought Defendant Bass had filed one on his behalf. (Transcript of September 27, 2018 Hearing, p. 9, l. 24 – p. 10, l. 17.) Appellant further explained that he had no dealings with Respondent and he was not a party to the contract at issue, which was confirmed by the contract, which was incorporated into the Complaint, and by the testimony of Appellant. (Transcript of September 27, 2018 Hearing, p. 3, ll. 7 – 18, p. 16, l. 17.) This basis meets the initial good cause hurdle for consideration of a Motion to Set Aside Entry of Default, by giving a reason for the late response and demonstrating why setting aside the entry of default would serve the interests of justice; such a showing then required consideration of the *Wham* factors. *Sundown Operating Co. v. Intedge Indus., Inc.*, 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009). The trial court showed that it failed to properly consider whether there was good cause by stating, in response to Appellant's reasons for not filing a timely answer, "Well I understand what you – but I can't understand that because it is not pled." (Transcript of September 27, 2018 Hearing, p. 10, l. 18.) The trial court plainly stated that it did not consider whether there was good cause, because the good cause was not in a pleading. The first step the trial court was required to take when Appellant requested leave from the entry of default was to determine whether good cause existed for such relief, and the failure to do so constituted an abuse of discretion. Although the determination of whether good cause exists

is a matter of discretion, "a court's failure to exercise its discretion is itself an abuse of discretion." *Patton v. Miller,* 420 S.C. 471, 490, 804 S.E.2d 252, 262 (2017). Even in ruling on the Motion to Reconsider, the trial court failed to make findings as to whether good cause existed – the trial court merely stated that the failure to respond for several months barred him from answering. (Transcript of February 25, 2019 Hearing, p. 6, l. 20 – p. 7, l. 12.) The trial never considered whether the reliance upon Bass was good cause, and such failure was an abuse of discretion.

B. The Trial Court Failed to Properly Consider the *Wham* Factors in Assessing Whether or Not to Set Aside the Entry of Default.

The trial court's summary of its ruling on the Motion to Reconsider and the bases therefore demonstrates that the trial court abused its discretion by failing to properly apply the *Wham* factors. In stating the bases for its opinion, the trial court stated:

> As far as the initial stages of this action, my concern was and still and that is that Mr. Robertson was served for this case, on May 19, 2018. The default was entered June 20th. And at no time did Mr. Robertson respond in any way. No letter, no phone calls to the attorney for the Plaintiff. And then he shows up at the hearing with the statement, I thought Mr. Bass was going to file. Indicating that there was some relationship between the two of them. And he had nothing to do with it. If that is his meritorious defense, that is for a whole different determination. But that is not what we are here today to do. We are here today to reconsider not set aside the default. The bottom line is Mr. Robertson can not just sit there after being served and simply say somebody else is going to take care of it for him and then just proceed. I don't think that is a – well he is saying that he has nothing to do with it and then yet he says that Mr. Bass was going to answer or do something for him. That indicates to me that there was a relationship or something there or there was a business relationship. Any way, no answer by Mr. Robertson. There was no request during the time of or after the default as to a timely motion to set aside the default. So those were my concerns at the time of the hearing. And we also had the situation with Mr. Russell who did apparently a lot of negotiations during that time and he passed during the time between the contract and the bringing of the action or in the middle of the action. So having said all of that, the Motion is denied.

(Transcript of February 25, 2019 Hearing, p. 6, l. 20 – p. 7, l. 12.) As is clear from the trial court's comments, the trial court focused exclusively on the time between service of the Complaint (May 19, 2018) and the time of the request to set aside the Entry of Default (September 27, 2017). (*See* Affidavit of Service of Richard A. Robertson; *see also* Transcript of September 27, 2018 Hearing, p. 11, ll. 3 – 12.) This period was less than four months.

Prior to the hearing on the Motion to Reconsider, the trial court was informed of the arguments which establish Appellant's meritorious defense, which were based solely on the pleadings and testimony before the trial court when the trial court instructed Appellant to consult an attorney about how to file an answer at the hearing of September 27, 2018. (*See generally* Motion to Reconsider; Brief in Support of Motion to Reconsider; Transcript of September 27, 2018 Hearing, p. 11, ll. 5 - 12.) Even so, the trial court said, "if that is his meritorious defense, that is for a whole different determination. But that is not what we are here today to do. We are here today to reconsider not set aside the default." (Transcript of February 25, 2019 Hearing, p. 6, l. 25 – p. 7, l. 2.) In its Order Denying the Motion to Reconsider, the trial court stated that "the Court evaluated Defendant's Motion to Set Aside Default, based on Robertson's request at the September 27, 2018 hearing that the Court grant him leave to file an Answer." (Order Denying Motion to Reconsider, p. 1.) In evaluating the Motion to Set Aside Default, the trial court said that it was not there to consider whether Appellant possessed a meritorious defense, even though the *Wham* factors require consideration of that very question. *Wham*, 298 S.C. at 465, 381 S.E.2d at 501-02.

Appellant's summary of the legal and factual insufficiencies of Respondent's allegations against Appellant, presented in Appellant's argument on Appellate Issue II, clearly demonstrate that Appellant has meritorious defenses to each of Respondent's causes of action against

Appellant. Under *Wham,* the trial court was required to evaluate whether Appellant presented a meritorious defense, and it failed to make that consideration – at the initial hearing, the trial court made no consideration, stating "I can't understand that because it is not pled." (Transcript of September 27, 2018 Hearing, p. 10, l. 18.) At the Motion to Reconsider, the trial court stated that whether there was a meritorious defense was for a whole different consideration, and not appropriate in a Motion to Set Aside Default. (Transcript of February 25, 2019 Hearing, p. 6, l. 25 – p. 7, l. 2.) The trial court's Order Denying the Motion to Reconsider further demonstrates no effort by the trial court to evaluate whether Appellant possessed meritorious defenses to Respondent's claims. (Order Denying Motion to Reconsider, p. 2.) Accordingly, the trial court abused its discretion by failing to consider Appellant's meritorious defenses, when those defenses were explicitly presented to the trial court. (*See generally*, Motion to Reconsider; *see generally* Brief in Support of Motion to Reconsider; Transcript of September 27, 2018 Hearing, p. 11, ll. 5 - 12.)

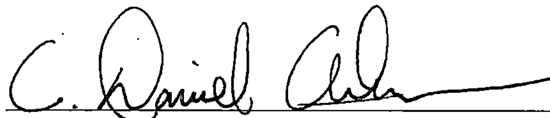
Additionally, the trial court abused its discretion in finding that Respondent would face undue prejudice if default were set aside, with that finding dependent on the death of Kevin Russell. (Transcript of February 25, 2019 Hearing, p. 7, ll. 8 – 11; Order Denying Motion to Reconsider, p. 2.) This finding ignores a critical fact that was before the trial court at the time it considered whether to set aside the entry of default – Kevin Robertson died on May 19, 2018, which was the same day that Appellant was served with the Summons and Complaint in this action. (*See* Ex. 1 to Motion for Substitution of Deceased Plaintiff; *see also* Affidavit of Service of Richard A. Robertson.) Accordingly, Respondent would suffer no prejudice due to the delay in answering by Appellant. Had Appellant answered timely, Kevin Robertson would not have been available to testify in the case. Even if the trial court had set aside default as to Appellant, Plaintiff would

still have a default judgment against the two parties with whom she interacted as to the transactions at issue. (Transcript of February 25, 2019 Hearing, p. 3, ll. 16 – 19.) It is not prejudice that Respondent cannot prove a valid claim against Appellant, because the facts and evidence show she does not possess a valid claim, and it was an abuse of discretion to ever enter a judgment against Appellant.

CONCLUSION

For the reasons set forth above, this Court should reverse entry of default judgment by the trial court, because the trial court entered judgment without a motion or application for default judgment, and without proper notice to Appellant. This Court should also reverse the trial court's entry of default judgment against Appellant, because there was not a legal and factual basis to support the order of default judgment. Additionally, this Court should reverse the entry of default judgment against Appellant, because corporate veil-piercing was necessary to enter judgment against Appellant, and Respondent's Complaint did not seek veil-piercing. Finally, this Court should reverse the trial court's denial of Appellant's Motion to Set Aside Default, because the trial court abused its discretion in failing to set aside the entry of default.

July 24, 2019



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STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
Gordon G. Cooper, Master-In-Equity
Trial Court Case No. 2018-CP-42-01540

RECEIVED
JUL 26 2019
SC Court of Appeals

Appellate Case No. 2019-000819

Karolee Russell, Individually, and as Personal Representative of the Estate of Kevin Brian Russell, Respondent,

v.

B & R Contracting, LLC, Brian K. Bass, and Richard A. Robertson, Defendants,

Of Whom Richard A. Robertson is the Appellant.

PROOF OF SERVICE

I certify that I have served ***Initial Brief of Appellant*** on the following by depositing a copy of same in the United States Mail, postage prepaid, on **July 24, 2019**.

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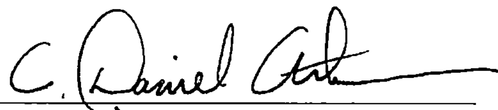

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July 24, 2019

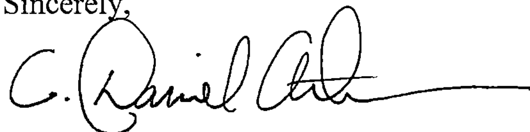
Via U.S. Mail Only
The Honorable Jenny Abbott Kitchings
The South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211
Att: Shelby

Re: Russell A. Robertson, Appellant v. Karolee Russell, et al, Respondents
C.A. No: 2018-CP-42-01540
Appellate Case No. 2019-000819

Please find enclosed an original and one copy of ***Appellant's Initial Brief and Proof of Service,*** together with ***Appellant's Designation of Matter to be Included in the Record on Appeal*** **and** ***Certificate of Counsel,*** along with ***Proof of Service*** for each. Please file same and return a filed copy to me in the envelope provided.

If you have any questions, please advise.

Sincerely,



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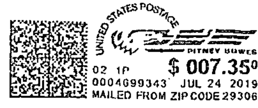
Enclosures
cc: Paul A. McKee, III, Esq.
Brian K. Bass



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