IN THE SUPREME COURT OF MISSISSIPPI

CAUSE NO. 2007-CA-00952

GREATER CANTON FORD MERCURY, INC., **APPELLANT**

v.

PEARL LEE LANE **APPELLEE**

APPEAL FROM THE CIRCUIT COURT OF MADISON COUNTY, MISSISSIPPI

REPLY BRIEF OF THE APPELLANT, GREATER CANTON FORD MERCURY, INC.

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The Appellee's Brief fails to address the single most important issue presented in this appeal: the absolute defense on the merits established by sworn proof. This defense, absolute in terms of both fact and law, have not been addressed or challenged either in the lower court or on appeal.

The case should not only be reversed, but the Plaintiff and her counsel should be required to explain why sanctions should not be considered in a case where there is absolutely no evidentiary support whatsoever in support of the alleged claim against this Defendant, and it appears that the allegations contained in the Complaint are simply false.

REPLY TO STATEMENT OF THE CASE

This is a case in which the Plaintiff in the court below asserted claims of breach of contract and fraud in connection with the Defendant's alleged failure to honor an extended warranty that the Plaintiff had purchased with her vehicle. [1] What the Plaintiff failed to mention in her Complaint with regard to her claims for repairs under the warranty is that she had cancelled the warranty contract prior to bringing the vehicle in for repairs. Upon

[1] The Plaintiff states, incorrectly, that the Defendant financed the vehicle in question. As shown by the record, the Defendant sold the vehicle to the Plaintiff, but the vehicle was financed by a third party. In addition, the Plaintiff's extended warranty agreement was not with the Defendant, but was purchased through the Defendant from Ford Motor Company.

cancellation, the Plaintiff was given credit for the extended warranty plan, reducing the amount that she would ultimately have to pay under her finance contract.

In other words, the Plaintiff never had a warranty claim in the first instance, and concealed this fact from the trial court.

Rather than address the only sworn evidence before this Court, that the Plaintiff requested that the warranty plan be cancelled, and received a refund, she concentrates on this Defendant's failure to timely file its Answer. As discussed below, at the time that the Complaint was filed, the Plaintiff was no longer doing business, and its affairs had been placed in the hands of an agent for liquidating its corporate assets. C.T. Corporation Systems was served with the Summons, and forwarded that Summons to an employee of the liquidating agent. No one who actually was employed on a day-to-day basis with the Defendant ever received notice of this suit.

Regardless, the only evidence before this Court shows that the Plaintiff purchased the vehicle on March 26th, and requested cancellation of the extended warranty plan on March 27th. In response, the only statement made by the Plaintiff is that the Affidavit does not demonstrate that the request for repairs occurred prior to the request for cancellation. That is an insufficient response. In the court below, the burden was on the Plaintiff to establish that the warranty was in effect at the time repairs were requested. If not, she had no claim. Yet the record is silent with regard to any claim whatsoever by the Plaintiff that she made any request for work under the warranty prior to cancelling it. It is respectfully submitted that the reason for this lack is that the Plaintiff and her counsel are acutely aware that the Plaintiff has pushed the limits of sanctionable conduct, and that to present Affidavit testimony such as

would be required to sustain a claim against the Defendant would be to push beyond the limits to such an extent as to expose the Plaintiff to possible civil sanctions, if not criminal.

Similarly, the sworn Affidavit of the Plaintiff that is presented to this Court states nothing beyond conclusory statements that she would be prejudiced if the default judgment were to be set aside because one of her "witnesses" has died and others have diminished memories or have relocated out of state. What is lacking in this Affidavit (and that of her counsel) is any information whatsoever of what she would hope to establish through those witnesses or any evidence to which they might have access. Are these witnesses who know about the sequence of events? Or are these simply witnesses who will testify as to the Plaintiff's supposed "damages"? The Affidavits do not say.

Indeed, as will be discussed more fully below, there is not a scintilla of evidence to support an award of actual damages in this case that exceeds the purchase price of the vehicle in question by more that $15,000.00, and an award of punitive damages that is fifteen (15) times greater than the purchase price of the vehicle.[2]

No record was made, nor was any proof introduced to support the cost of repairing the vehicle, the estimated cost of repairing the vehicle, or any other indicia of to what extent the Plaintiff incurred any actual damages.

In short, the Plaintiff asks this Court to affirm an award that, insofar as she has provided information to inform the lower court's judgment, bears no relation to reality. The Plaintiff may as well have obtained a judgment for breach of the Defendant's agreement to sell her the Brooklyn Bridge. That is what this Court is being asked by the Plaintiff to do:

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[2] The measure of damages - the benefit of the bargain - in this case is not even the purchase price of the vehicle, but the cost paid for the extended warranty had it not been cancelled. The punitive damage award exceeds this amount by more than 130 time. See, Appellee's Record Excerpts at Page 11.

affirm a judgment of more than $160,000.00 in her favor with no basis in the pleadings, no basis in law, no basis in any alleged fact, no basis of any kind or nature whatsoever. Because the law of this jurisdiction does not support such a request, the Plaintiff's argument should be rejected, and this case should be reversed.

ARGUMENT AND AUTHORITIES

A. The Judgment Is Void Under Rule 60 (b) Of The Mississippi Rules Of Civil Procedure

Mississippi Rule of Civil Procedure 60(b) sets out grounds for relief from final judgments. Plaintiff argues that Greater Canton failed to timely file its Motion to Set Aside Default Judgment pursuant to *Mississippi Rule of Civil Procedure* 60(b). Plaintiff cites the comment to Rule 60 for the position that motions under the rule must be filed within six (6) months. The Plaintiff fails to mention that motions under Rule 60(b), which are to be filed within six (6) months, are limited only to the following reasons:

(1) Fraud, misrepresentation, or other misconduct of an adverse party;

(2) Accident or mistake; and

(3) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b). See *Mississippi Rule of Civil Procedure* 60(b).

Specifically, the rule states "the motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than six (6) months after the judgment, order, or proceeding was entered or taken." Thus, the six-month time limitation is inapplicable for the other grounds set out under Rule 60(b). Defendant respectfully submits that the judgment is void and under the catch all provision of *Mississippi Rule of Civil Procedure* 60(b) said judgment should be set aside. Defendant's Motion to Set Aside Default Judgment was the subject of these arguments and thus the six-month limitation is inapplicable.

B. The Default Judgment Should Be Set Aside

If a default judgment has been entered, Rule 60(b) is the avenue to set aside the judgment. In ruling on a motion to set aside a default judgment, the Court will consider three (3) factors:

(1) Whether the defendant has good cause for default;

(2) Whether the defendant has a colorable defense to the merits of the claim; and

(3) The nature and extent of prejudice which may be suffered by the plaintiff if the default is set aside. *Johnson v. Weston Lumber & Bldg. Supply Co.*, 566 So. 2d 466, 468 (Miss. 1990).

No one factor is determinative. Instead, the Court has recognized that the three-factor test boils down to a balancing of the equities. *McCain v. Dauzat*, 791 So. 2d 839, 843 (Miss. 2001). Where there is a reasonable doubt as to whether or not a default judgment should be vacated, the doubt should be resolved in favor of opening the judgment and hearing the case on the merits. *Id.* The Defendant submits that no credible evidence supports the default judgment and it would be manifest injustice for the judgment to stand. *Caldwell v. Caldwell*, 805 So. 2d 659, 663 (Miss.Ct.App. 2002). Thus, relief under Rule 60(b)(6) is proper.

When Greater Canton was served with the Complaint, it was in a state of transition from being an active, on-going business venture, to an inactive corporation in good standing, but being administered by an out of state accounting firm on behalf of the officers and directors. Under these circumstances, Defendant's neglect in answering the allegations of the Complaint should be excused. See, *King v. Sigrest,* 641 So.2d 1158, 1163 (Miss. 1994).

C. The Defendant Has Uncontested Defenses On The Merits

Whether or not the Defendant has a colorable defense has been called the "most important factor" in determining whether or not to set aside a default judgment. *American Cable Corp. v. Trilogy Communications, Inc.*, 754 So. 2d 545, 554 (Miss.Ct.App. 2000). To prove that it has a defense on the merits, a party should present affidavits or other sworn forms of evidence with specific details as to the defenses which would be presented. The

affidavit or sworn testimony must show specific facts and not merely conclusions. *Capital One Services, Inc. v. Rawls*, 904 So. 2d 1010, 1016 (Miss. 2004).

Plaintiff brought suit against the Defendant for alleged failure to honor an extended warranty which she had purchased with the used vehicle. However, the Plaintiff requested a cancellation of her extended service plan and a refund in the amount of $1,010.00 was issued to the Plaintiff pursuant to the terms and conditions of the retail installment contract with Ford Motor Credit Company. (See, Affidavit of Wanda Patrick, and *exhibit* thereto.) In support of its Motion to Set Aside Default Judgment, the Defendant attached an affidavit of Wanda Patrick, the former office manager of Greater Canton Ford Mercury. As shown by the affidavit of Ms. Patrick, the Plaintiff requested cancellation of the extended service plan. The effective date of the cancellation of the extended service plan was March 27, 2002. This request for cancellation was processed on June 24, 2002. (See, Affidavit of Wanda Patrick, and *Exhibit* thereto.) (R: 109-110). Additionally, the request for cancellation was initiated by the Plaintiff. *Id.* Plaintiff has presented no evidence to contradict the affidavit of Wanda Patrick or the matters set forth in the proposed Answer and Defenses and Motion to Set Aside Default Judgment. Instead, Plaintiff relies wholly on the allegations contained in her Complaint which are unsworn and conclusory.

This case is analogous to *Allstate Ins. Co. v. Green*, 794 So. 2d 170 (Miss. 2001). In *Allstate*, plaintiff filed suit in Tishomingo County, Mississippi, seeking judgment against Allstate Insurance Company for repair labor and materials furnished by Green's Repair Shop in the State of New York on a 1992 BMW automobile owned by Allstate. *Id* at 172-173. Green obtained service of process on Allstate through the CT Corporation, Allstate's registered agent in Mississippi. *Id.* Allstate filed no response, and Green filed his application

for entry of default against Allstate with the Tishomingo County Circuit Clerk. *Id.* The clerk entered the default. *Id.* Thereafter, a default judgment was entered for $8,130.80 for repair work and hauling charges in favor of Green. *Id.* On appeal, the Mississippi Supreme Court found that Allstate failed to show excusable neglect for its miscommunications between its Mississippi office and its New York office over whether the BMW was actually covered by one of its policies. *Id* at 174. However, the Court found that the trial court did err in denying Allstate's Motion to Set Aside Default Judgment as Allstate had shown the existence of a colorable defense. *Id.* Thus, the Mississippi Supreme Court reversed and found that the trial court abused its discretion in refusing to set aside the entry of default judgment. *Id* at 178. See also *American Cable Corp. v. Trilogy Communications, Inc.*, 754 So. 2d 545 (Miss.Ct.App.2000) (holding defendant did not show good cause but affidavit by the company's president stating that company had not ordered two of the shipments of goods raised a colorable defense to the merits of seller's claim for payment of the goods and thus the Court reversed the default judgment and remanded the case for further proceedings); *Bailey v. Georgia Cotton Goods Co.*, 543 So. 2d 180, 182 (Miss. 1989) (trial courts should vacate a default judgment where the defendant has shown that he has a meritorious defense); *Martin v. Palmertree*, 312 So. 2d 447, 450 (Miss. 1975) (reversed default judgment and held a Motion to Set Aside Default Judgment supported by an affidavit of meritorious defense should have been granted).

The Defendant properly submitted a sworn affidavit that would eliminate any liability alleged by the Plaintiff. The Plaintiff was given full credit for the price she had paid for the extended service plan and thus has no claim against the Defendant for breach and/or failure to honor it. In this case, the former business manager of the Defendant, Wanda Patrick,

executed an affidavit, filed with the Court, which set forth specific facts and references documentary evidence establishing that the Plaintiff has no claim against the Defendant. The Defendant has a colorable defense and advanced it before the trial court. In considering the "most important factor", a meritorious defense, the balancing scale is lopsided in favor of the Defendant.

D. No Prejudice Has Been Demonstrated

Where a dispute is long-standing and the subject matter of the suit is unchanging, no prejudice exists. *King v. Seagrest*, 641 So. 2d 1158, 1163 (Miss. 1994). Likewise, the required procedural delays in waiting for a trial court's final resolution of a motion to set aside a default judgment does not constitute prejudice. *American Cable Corp. v. Trilogy Communications, Inc.*, 754 So. 2d 545, 555 (Miss.Ct.App. 2000). The Plaintiff has been fully aware of Greater Mercury's contentions and defenses since the inception of this case. This is not a case concerning witnesses' memories regarding a split second event. Plaintiff relies upon a case in which the Supreme Court held a delay of over one year was too long. However, that case involved a motor vehicle accident, prompting the Supreme Court's note that:

> "Plaintiff Pittman may well have suffered substantial prejudice from the granting of the Motion to Vacate. That motion was not filed until January 25, 1985, and the circuit court was not able to rule thereon until January 10, 1986. Even if the judgment had been vacated at that time and Pittman given the earliest possible trial setting, the trial would still have occurred more than one year following the original February 6, 1985 setting. It requires no great insight to know that a year's postponement of a trial which will turn on witnesses' memories regarding a split second event – a motor vehicle accident – will often substantially prejudice one or both of the parties in terms of the common human phenomenon of loss of memory of specific events over time, not to mention the fact that the injured plaintiff is without a

> resolution to her claim for that period of time." See *Guaranty Nat'l Inc. Co. v. Pittman*, 501 So. 2d 377, 388 (Miss. 1987).

In the present case, Plaintiff has failed to identify the nature of the testimony of any "witnesses" that will testify on her behalf. Plaintiff has failed to identify any "evidence" that will support her claim. Plaintiff cannot claim that she will be prejudiced if the default judgment is set aside while at the same time she failing to identify what evidence and/or what testimony she intends to rely on. In fact, the primary source of evidence, aside from the testimony of the Plaintiff, will be that of the former business manager and the service and accounting records of the Defendant and Ford Motor Credit Corporation. Plaintiff has failed to satisfy this prong.

In *Bryant, Inc. v. Walters*, 493 So. 2d 933 (Miss. 1986), the Mississippi Supreme Court stated:

> "Indeed, upon a showing by the defendant that he has a meritorious defense, we would encourage trial judges to set aside default judgments in a case where, as here, no prejudice would result to the plaintiff. The importance of litigants having a trial on the merits should always be a serious consideration by a trial judge in such matters." *Id.* at 937.

Clearly, the Defendant has asserted colorable defenses to the allegations contained in Plaintiff's Complaint. There would be no prejudice suffered by the Plaintiff should the parties be allowed to have a trial on the merits. Accordingly, this case should be reversed and remanded for trial.

E. Plaintiff's Failure To Make A Record On Damages Requires Reversal

An on-the-record hearing *must* be held prior to the entry of a default judgment under which unliquidated damages are requested. See, *Miss. R. Civ. Proc.* 55(b); *Journey v. Long*, 585 So. 2d 1268, 1272 (Miss. 1991) (default judgment reversed based on the fact that no

record was made of hearing); *American 3-CI v. Farrow*, 749 So. 2d 298, 299 (Miss.Ct.App. 1999). In this case, Plaintiff seeks damages "in an amount to be determined at trial, but not less than Five Million Dollars ($5,000,000)." (See, Plaintiff's Complaint, an *exhibit* thereto). Obviously, the Plaintiff sought an unliquidated amount and the lower court was required tot conduct a hearing to determine the amount of damages to be awarded. *Journey v. Long*, 585 So. 2d 1268, 1272 (Miss. 1991). Where a hearing is required, it must be made of record. *Id.*

Recently, the Mississippi Supreme Court discussed the general distinction between liquidated and unliquidated damages. *Moeller v. Am. Guar. & Liab. Ins. Co.*, 812 So. 2d 953 (Miss. 2002). The Court noted that liquidated damages are set or determined by contract, while unliquidated damages are established by a verdict or award and cannot be determined by a fixed formula. *Id.* at 959-60. In the instant case, the damages awarded were not predetermined or contractually established. Under the Mississippi Supreme Court's precedent addressing *Miss. R. Civ. Proc.* 55(b), a judgment for unliquidated damages cannot be entered until an on-the-record hearing of such has occurred. Because no record of an evidentiary hearing on the issue of damages exits, the judgment must be vacated as a matter of law. *Journey v. Long*, 585 So. 2d 1268, 1272 (Miss. 1991).

F. Punitive Damages Were Excessive And Improper

The awarded damages in this case are in extreme excess of the actual economic damages. This is especially so given the fact that the Plaintiff is entitled to nothing. As set out in argument above, the lower court arbitrarily awarded Plaintiff $15,000 as actual damages, $10,000 as economic damages, and $135,000 as punitive damages without conducting an on-the-record hearing as required under Mississippi law. The lower court simply entered a judgment for $135,000 for punitive damages, without explaining how this

figure was calculated. In fact, none of the damages that were awarded to the Plaintiff were explained and/or justified. Thus, there is no way of knowing whether the circuit court followed any of the *Miss. Code Ann.* § 11-1-65 factors for punitive damages or how the circuit court arrived at such award. Consequently, the default judgment must be vacated.

A proper hearing on the issue of punitive damages must be conducted to support a default judgment for punitive damages. *Bailey v. Beard*, 813 So. 2d 682, 685-686 (Miss. 2002). At this hearing, the trial judge should consider the factors outlined in the punitive damages statute and create a record from which the Appellate Court, in the event of an appeal, can determine how the amount of punitive damages was calculated. *Id.* Additionally, the record should clearly demonstrate how the amount of the award was calculated. *Id.* There was no hearing regarding the punitive damages that was awarded in this case and the excessive punitive award must be reversed. Furthermore, a failure to draft a written finding of facts that set-forth clearly how the amount of the award was calculated is grounds for remand. *Id.* See also *Precision Interlock Log Homes, Inc. v. O'Neal*, 689 So. 2d 778, 780 (Miss. 1997).

In *Bailey*, the trial court entered a default judgment against the defendant and awarded punitive damages in the amount of $250,000. The *Bailey* court stated:

> "The circuit judge merely announced an award of $250,000 in punitive damages for the arrest related to the malicious mischief charges, without explaining how this figure was calculated. This court has no way of knowing whether the circuit court followed any of *Miss. Code Ann.* § 11-1-65 factors for punitive damages or how the circuit court arrived at this award. Consequently, this matter is reversed..." *Id.* at 685.

CONCLUSION

The sole argument made by the Plaintiff in defending the appeal of the default judgment in her favor is that it is … a default judgment. She makes no argument and presents no record to defend either the imposition of liability or the amount of the award. Her argument – her sole argument – is that she filed a Complaint and the Defendant failed to timely answer.

As set forth above, the law of this jurisdiction requires more than this in order to affirm an award obtained by default. Because the Plaintiff did not - and has not - addressed those requirements, her claim that the judgment be affirmed should fail, and this Court should reverse the holding of the lower court, and direct that the default judgment entered in this case be set aside.

Respectfully submitted, this the 20th day of February, 2008.

Thomas A. Wicker
Attorney for Appellant

CERTIFICATE OF SERVICE

I, the undersigned counsel of record for the Appellant, do hereby certify that I have this day delivered a true and correct copy of the above and foregoing Reply Brief of Appellant to the following by placing true and correct copies thereof in the sent via United States Mail, postage prepaid, addressed as follows:

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This the 20th day of February, 2008.

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