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

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

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Greater Canton Ford Mercury, Inc.

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v.

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court may evaluate possible disqualification or recusal.

1. Greater Canton Ford Mercury, Inc., Defendant/Appellant;
2. Thomas A. Wicker, Holland, Ray, Upchurch & Hillen, P.A., Tupelo Mississippi, counsel for Defendant/Appellant, Greater Canton Ford Mercury, Inc.;
3. Pearl Lee Lane, Plaintiff/Appellee;
4. Benjamin R. Henley, Ridgeland, Mississippi, counsel for Plaintiff/Appellee;
5. J. Peyton Randolph, II, Ridgeland, Mississippi, counsel for Plaintiff/Appellee; and
6. Honorable William E. Chapman, III, Circuit Court Judge of Madison County, Mississippi.

SO CERTIFIED, this the 12th day of October, 2007.

THOMAS A. WICKER
Counsel of Record for Appellant

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STATEMENT OF THE ISSUES

1. Whether the lower court erred in denying the Appellant's Motion to Set Aside Default Judgment when presented with clear evidence of a meritorious defense.

2. Whether the actual and punitive damages awarded to the Plaintiff/Appellee are excessive given the circumstances of the case.

3. Whether the punitive damages awarded in the Default Judgment violate the due process provisions of the United States and Mississippi Constitutions and Amendments thereto.

STATEMENT OF THE CASE

This is an appeal from an Order of the Circuit Court of Madison County, Mississippi, denying the Appellant's Motion to Set Aside Default Judgment in the above referenced matter. The Defendant/Appellant in moving to set aside the Default Judgment presented the Court with a basis for a meritorious defense and to allow the Default Judgment to stand would result in an injustice and an undeserved windfall for the Plaintiff/Appellee.

I. Nature of the Case

This is a case in which the Plaintiff/Appellee, Pearl Lee Lane, sued the Appellant, Greater Canton Ford Mercury, Inc., alleging breach of warranty in connection with the purchase of a used car. In fact, the Plaintiff purchased a used car warranty, but shortly after her purchase she requested and received a refund on the cost of the warranty. Because the warranty had been cancelled at the Plaintiff's request, when she subsequently asked for repairs to be performed as warranty work, she was told that she would have to pay for the repairs.

By the time that the Plaintiff sued the Defendant, Greater Canton Ford Mercury, Inc., the Defendant was in liquidation, and the Summons and Complaint were forwarded by CT Corporation, the Registered Agent for service of process, to Alegnani & Company, P.C., an accounting firm in Dallas, Texas. Unfortunately, the Summons and Complaint were not forwarded to any Officer or Director of Greater Canton Ford Mercury, Inc., nor was the matter turned over to counsel, and no Answer to the Complaint was filed.

A default judgment was ultimately taken, but the amount of the judgment for both actual and punitive damages relative to the complete lack of harm suffered by the Plaintiff are such as should shock the conscious of the Court.

II. Procedural History

The Complaint in this matter was filed July 23, 2003 (R:4-12) and Summons was issued on that same date. (R:13). Summons was served on the Registered Agent for process of Greater Canton Ford Mercury, Inc., on July 25, 2003. (R:14) CT Corporation forwarded the Summons to Alegnani & Company, P.C., a Dallas, Texas accounting firm that was handling the affairs of the Appellant, which by July of 2003 was in liquidation. The Summons and Complaint were not, however, brought to the attention of any Officer or Director of Greater Canton Ford Mercury, Inc., nor was the matter referred to counsel for defense until sometime after May 24, 2006, when the Plaintiff/Appellee attempted to join the Officers and Directors of the Corporation as substitute parties for the Appellant. [1] A default was entered on September 12, 2003, (R:18) and a Motion for Default Judgment was filed on August 26, 2005. (R:20-22) A hearing on the Motion for Default Judgment was conducted on September 12, 2005, and a Default Judgment was entered at that time. The judgment awarded $15,000.00 as actual damages, $10,000.00 for non-economic damages and $135,000.00 as punitive damages plus costs incurred for a total amount of $160,120.00.(R:23-24)

On May 24, 2006, Summonses were issued for the Officers and Directors of Greater Canton Ford Mercury, Inc., (R:60-63) in connection with a Motion to Substitute Parties and for Declaratory Judgment.(R:26-32) It was after being serviced with the Summons issued in May of 2006, that the Officers and Directors of the Appellant became aware of the Default Judgment that had been entered. On June 23, 2006, a Motion to Set Aside the Default

[1] The Plaintiff/Appellee's Motion to Substitute Parties and for Declaratory Judgment was denied by the lower court and is not an issue on this appeal.

Judgment was filed (R:48-51) and later supplemented with a proposed Answer and Defenses and Affidavit testimony of the former Business Manager of the Appellant. (R:102-110)

Despite the excessive amount of the judgment and the meritorious defenses advanced by the Appellant, the lower court refused to set aside the Default Judgment.(R:111)

III. Statement of the Facts

As indicated above, this is a case involving the purchase of a used vehicle by the Plaintiff/Appellee, Pearl Lee Lane, from Greater Canton Ford Mercury, Inc. The vehicle was purchased March 26, 2002, and, at the time of the purchase of the vehicle the Plaintiff also purchased an extended service plan. As shown by the worksheet attached to the Affidavit of Wanda Patrick, the former Business Manger of Greater Canton Ford Mercury, Inc., the Plaintiff subsequently requested cancellation of the extended service plan. The purchase price of the extended warranty was $1,060.00. After deduction of a processing fee of $50.00, the Plaintiff was given credit pursuant to the terms of her Retail Installment Contract with Ford Motor Company for $1,010.00. The effective date of the cancellation of the extended service plan was March 27, 2002. The request for cancellation was processed on June 24, 2002. (See, Affidavit of Wanda Patrick an *Exhibit* thereto.) (R:109-110)

As shown by the Affidavit of Wanda Patrick, the request for cancellation was initiated by the Plaintiff.

Sometime after the extended service plan was cancelled at the Plaintiff's request, she brought the vehicle in for repairs. It is at this point that a disagreement arose between the Plaintiff and the Defendant concerning who would be responsible for the cost of those repairs. This dispute was not resolved by the parties and the Plaintiff initiated the instant action for damages to honor the extended warranty which she had purchased with the used vehicle.

By the time that the Plaintiff brought suit, however, the Defendant was no longer actively operating the car dealership but was an inactive corporation in good standing with the Secretary of State of Mississippi. Through apparent miscommunication by those responsible for handling the affairs of the corporation in liquidation, the Summons and Complaint were not referred to counsel for defense of the suit, resulting in the default judgment.

There is 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, to wit: the Plaintiff had herself cancelled the extended service plan and was entitled to nothing as a consequence. The Plaintiff was given full credit for the price she had paid for the extended service plan.

In essence, the Plaintiff had second thoughts about the cost of the extended service plan and cancelled it. She then had second thoughts about her decision to cancel the extended service plan when she began to experience problems requiring repair of the vehicle, at which time she wanted to hold the Appellant responsible for repairs under the extended warranty which she herself had cancelled.

This information is not contained in the Complaint, nor is there any evidence that it was presented to the Circuit Court at the time the default judgment was obtained. Neither is there any evidence in the record to justify or support an award of $15,000.00 in actual damages and $10,000.00 in non-economic damages. There is certainly no evidence to support an award of $135,000.00 in punitive damages in a case of this nature.

The only evidence of record that exists in this case demonstrates that the Plaintiff received a judgment of more than $160,000.00 in a case in which she was clearly entitled to nothing.

SUMMARY OF THE ARGUMENT

The lower court erred in denying the Appellant's Motion to Set Aside Default Judgment in the face of clear evidence of a meritorious defense that demonstrated no liability whatsoever to the Appellee. The lower court further erred in awarding a judgment for which there is no evidentiary support in the record whatsoever, as well as punitive damages which are, on the face of the judgment, clearly excessive.

In awarding a judgment for punitive damages of this amount in the context of the proceedings below constitutes a denial of both the Appellant's procedural and substantive due process rights under the United States and Mississippi Constitutions.

ARGUMENT

A. The Default Judgment Should Have Been Set Aside

The law is well settled with regard to the standard to be applied in determining whether or not to grant a Motion to Set Aside Default Judgment. Three factors are to be considered:

(1) Whether the Defendant has good cause for the 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 and Building Supply Company, 566 So.2d 466, 468 (Miss. 1990).

No one factor is determinative. Rather, this Court has recognized that the three factor test boils down to a balancing of the equities involved. *McCain v. Dauzat,* 791 So.2d 839, 843 (¶10)(Miss. 2001). Where there is doubt as to whether or not a default judgment should be vacated, that doubt should be resolved in favor of setting the judgment aside in favor of a hearing on the merits. *Id.* Generally, the issue of a colorable defense on the merits of the claim often outweigh the other factors in balancing the equitable interests of the parties. *Allstate Insurance Company v. Green,* 794 So.2d 170, 174 (¶9) (Miss. 2001).

In this case, the defendant is frank to admit that the delay involved was lengthy and does not contest that Summons was properly served. However, the circumstances of this case, where the corporation 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 are such that neglect in answering the allegations of the Complaint may be excused. See, *King v. Sigrest,* 641 So.2d 1158, 1163

(Miss. 1994). This is particularly true where the record reflects no evidence whatsoever in support of the Default Judgment or the damages awarded. *Caldwell v. Caldwell,* 805 So.2d 659, 663 (¶14)(Miss. App. 2002). In the instant case, the only basis in the record supporting an adverse judgment against the Defendant from the standpoint of both liability and damages are the conclusory allegations of the Complaint, which are unsworn. A careful review of the allegations of the Complaint reveal that those allegations would not even contradict the defense which has been advanced by Greater Canton Ford Mercury, Inc.: that the Plaintiff did indeed purchase an extended warranty, but requested and received a refund and cancellation of the warranty before she began experiencing problems with the vehicle.

The second factor to be considered, whether or not the Defendant has a colorable defense, has been categorized as 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 (¶32)(Miss. App. 2000). In this case, the former Business Manager of the Defendant has executed an Affidavit, filed with the Court, which sets forth specific facts and references documentary evidence establishing that the Plaintiff has no claim whatsoever against the Defendant. Under such circumstances, it would constitute a gross injustice to allow a default judgment to stand. *Capital One Services, Inc. v. Rawls,* 904 So.2d 1010, 1016 (¶20)(Miss. 2004).

With regard to the third factor to be considered, that of prejudice to the party opposing the Motion to Set Aside Default Judgment, there has been no demonstration that any prejudice will occur. If this case is reversed for a trial on the merits, 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.

In short, the balancing of the three factors to be considered in this case result in the overwhelming weight of the equities falling on the side of vacating the default judgment.

B. There Is No Evidentiary Support For The Damages Awarded The Plaintiff

As shown by the pleadings, this case involves a dispute with regard to repairs to a used vehicle purchased by the Plaintiff from the Defendant. On the face of the Judgment, the amount awarded in both actual and punitive damages is such that it should shock the conscience of the Court. This Court has specifically held that the amount of money involved is a factor to be considered in determining whether or not to enter a default judgment. *City of Jackson v. Presley,* 942 So.2d 777, 794 (¶28) (Miss. 2006). Even if liability were clear in this case, the trial court should have conducted an evidentiary hearing on the record before awarding damages of the magnitude awarded in this case. *Capital One Services, Inv., v. Rawls,* supra.

As the record now stands, there is not evidentiary support whatsoever for economic, non-economic or punitive damages. On that basis alone, the trial court's decision should be reversed and the cause remanded for an evidentiary hearing.

C. Punitive Damages Violate the Constitutional Rights Of The Appellant

The award of damages in this cause is, by several orders of magnitude, far in excess of the economic damages awarded to the Plaintiff. This fact, when coupled with the lack of any evidence to support the award of actual damages constitutes not only a denial of the substantive due process rights of the Defendant as discussed in *Blue Cross & Blue Shield of Miss., Inc. v. Campbell* ,466 So2d 833 (Miss. 1984); and *BMW of North America, Inc. v. Gore,* 517 U.S. 559 (1996), but a denial of even a modicum of procedural due process rights

both from a Constitutional standpoint and from the standpoint of our own Rules of Civil Procedure and Evidence. See, *Capital One Services, Inc., v. Rawls,* supra.

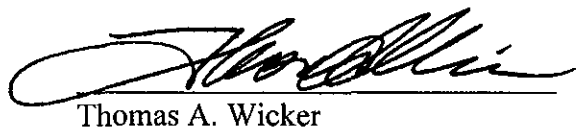
There is simply no way to determine whether or not the relationship between the award of punitive damages in this case bears any relationship whatsoever to the award of actual damages where there is no evidentiary basis supporting the award of actual damages itself.

CONCLUSION

This is a case in which, through the circumstances of the Defendant's demise as a going business concern resulted in the Defendant's failure to timely file an Answer to the Plaintiff's Complaint. However, the evidence in the record clearly demonstrates that the Plaintiff's claims are not only without merit, the border on the frivolous. She bought a warranty. She changed her mind and cancelled the warranty in order to have the cost of that warranty credited against her indebtedness for the used vehicle she purchased. She was credited with the cost of the warranty. She subsequently wanted to have repairs performed, but did not want to pay for those repairs. She then sued the Defendant, which was not longer actively conducting its business at the site where it had maintained the automobile dealership, and obtained a default judgment on a claim that she had been denied repairs under the warranty which she purchase. There is not dispute about the underlying facts of this case. The Plaintiff did not have a warranty which would have afforded her the very cause of action she advanced in the lower court. To allow this judgment to stand would be to allow the Plaintiff to sustain a mockery of our judicial system. For those reasons, and based upon the argument and authority set forth above, the trial court's denial of the Defendant/Appellant's Motion to Set Aside Default Judgment should be reversed, and this case remanded for a

hearing on the merits and such other proceedings as the evidence may show to be appropriate in the premises.

Respectfully submitted, this the 12th day of October, 2007.



Thomas A. Wicker

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 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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Honorable William E. Chapman, III
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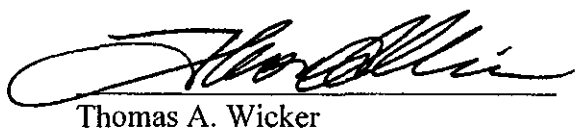
This the 12th day of October, 2007.



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