THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Jr., Circuit Court Judge
Shannon M. Phillips, Master-in-Equity

Case No. 2021-CP-42-01163
Appellate Case No. 2022-000348

Custom Performance Engineering, Inc., ... Respondent-Appellant

v.

AM Industrial Group, LLC, ... Appellant-Respondent.

INITIAL REPLY BRIEF OF RESPONDENT-APPELLANT

Adam C. Bach (SC Bar # 74885)
Emily R. Godwin (SC Bar # 103708)
ELLER TONNSEN BACH, LLC
1306 South Church Street
Greenville, SC 29605
Telephone: (864) 236-5013
Facsimile: (864) 312-4191
abach@etblawfirm.com
egodwin@etblawfirm.com

Attorneys for Respondent-Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

ARGUMENT

BACK TO BASICS: THE UCC PROVIDES THAT AMI IS ENTITLED TO COVER DAMAGES

AMI pulls a spattering of cases to set forth an unpredictable standard for awarding cover, going so far as to argue that cover cannot be awarded for goods that "are merely different (not even better)" than the contracted-for goods. (Initial Resp't's Br. of Appellant-Resp't AMI 15.) By contrast, the standard set by South Carolina's Uniform Commercial Code ("UCC") is straightforward:

> (1) After a breach within the preceding section (§ 36-2-711) the buyer may "cover" by making in **good faith** and **without unreasonable delay** any **reasonable purchase** of or contract to purchase goods **in substitution** for those due from the seller.
>
> (2) The buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages as hereinafter defined (§36-2-715), but less expenses saved in consequence of the seller's breach.

S.C. Code Ann. § 36-2-712(1), (2). In addition, case law and secondary sources confirm that the burden of proof is upon the *seller* to prove the unreasonableness of the buyer's cover. BRC Rubber & Plastics, Inc. v. Cont'l Carbon Co., Cause No. 1:11-CV-190, 2014 WL 554580, at *9 (N.D. Ind. Feb. 11, 2014), vacated and remanded on other grounds, 804 F.3d 1229 (7th Cir. 2015) ("The burden of proof rests with the seller to establish that the buyer acted unreasonably in failing to prevent his own loss" (quoting Simeone v. First Bank Nat. Ass'n, 73 F.3d 184, 189 (8th Cir. 1996)); Roy Ryden Anderson, A Look Back at the Future of UCC Damages Remedies, 71 SMU L. Rev. 185, 195 n.32, 211 n.90 (2018) (listing cases). Even if this standard were reversed, the record reveals that Custom Performance is entitled to cover damages because it has satisfied each element of the UCC standard.

1. Custom Performance bought the Replacement Machine as cover in "good faith."

Custom Performance acted in good faith, and there is no evidence to the contrary. Indeed, AMI made no bad faith arguments before the Master-in-Equity and only now makes a half-hearted bad-faith-by-delay argument in which it conflates the two statutory elements. Moreover, the Master-in-Equity made no findings that Custom Performance acted other than in good faith. Custom Performance's purchase of the Replacement Machine satisfies this element.

2. Custom Performance bought the Replacement Machine as cover "without unreasonable delay."

The uncontradicted record shows that *AMI* repeatedly assured Custom Performance that *AMI* would correct the problem with the AMI Machine, and accordingly, Custom Performance spent months following *AMI's* advice in attempting various repairs to the AMI Machine. (Compl. ¶¶ 11-13; Resp. in Opp'n to Mot. to Set Aside Default 1, Ex. D ("[AMI] sent out its representative who was unable to fix the issues. [AMI] then sent out a third-party to evaluate and set-up the Machine, but . . . the third-party was unable to correct any of the problems. . . . [AMI] continued to assure Custom Performance that it would correct the problem.").) Any "delay" occurred at *AMI's* suggestion, and AMI cannot now fault Custom Performance for following its own advice.

Moreover, Custom Performance rejected the AMI Machine in January and February 2021 and located the Replacement Machine by September 2021 (as evidenced by the Equipment Finance Agreement dated September 21, 2021); accordingly, covering its loss took eight months, not fourteen. (Compare Compl. ¶¶ 16-17 and Tr. of R., Dec. 20, 2021, Pl.'s Ex. 2 with Initial Resp't's Br. of Appellant-Resp't 5, 14-16.) Regardless, AMI offered no evidence that Custom Performance somehow delayed its efforts to purchase a replacement machine, nor did AMI offer any evidence

that Custom Performance could have purchased a similar machine more quickly. Custom Performance also satisfied this element.

3. Custom Performance bought the Replacement Machine as a "reasonable purchase . . . in substitution for" the AMI Machine.

The comment to this statute provides:

> [Cover goods include] goods **not identical** with those involved but **commercially usable as reasonable substitutes** under the circumstances of the particular case. . . . **The test of proper cover is whether at the time and place the buyer acted in good faith and in a reasonable manner**, and it is **immaterial** that hindsight may later prove that the method or cover used was not the cheapest or most effective.

S.C. Code Ann. § 36-2-712 cmt. n.2 (emphases added). AMI's entire argument on this point is that the machines are not identical, having different "capabilities." But this argument ignores the UCC's inquiry: whether the Replacement Machine is "commercially usable as [a] reasonable substitute[] under the circumstances" for the AMI Machine. S.C. Code Ann. § 36-2-712 cmt. n.2. Notably, AMI's own case law confirms that the fundamental question is whether the replacement goods are reasonable substitutes that accomplish the purpose of the contracted-for goods. E.g., Kanzmeier v. McCoppin, 398 N.W.2d 826, 832 (Iowa 1987) (denying cover where lighter cattle "**could not substitute for the purpose** for which [the buyer] had purchased the defendant's cattle" (emphasis added)); Bockman Printing & Servs., Inc. v. Baldwin-Gregg, Inc., 213 Ill. App. 3d 516, 525, 572 N.E.2d 1094 (Ill. App. Ct. 1991) (denying cover where the contracted-for folder machine was supposed to be a "specially manufactured in-line folder to operate with its Didde press at a specified rate and accuracy . . . [and that could] fold at the same rate as the Didde press," but the replacement folders "did not attach in-line to the Didde press, did not operate at a similar speed, and did not give plaintiff a manufacturing cost advantage."); Martella v. Woods, 715 F.2d 410, 413 (8th Cir. 1983) (denying cover where the original contract called for 144 heifers and buyer

replaced with 50 pregnant heifers). The remaining cases cited by AMI concern disputes over car models where the consumer apparently took advantage of the seller's breach to upgrade his ride; they are not on point in a case about specialized commercial machinery negotiated by two sophisticated businesses in a limited market. Cetkovic v. Boch, Inc., 2003 Mass. App. Div. 1, 1 (Mass. 2003); Freitag v. Bill Swad Datsun, 3 Ohio App.3d 83 (Ohio Ct. App.1981).

In satisfaction of the UCC's standard, the Replacement Machine does exactly what the AMI Machine was supposed to do: "bend thin wall stainless steel" with "18 gauge 3 inch" capacity. (Tr. of R. 19:19-20, 20:16-17 ("The bottom premise is that [the Replacement Machine] could bend 3 inch stainless steel.").) AMI does not dispute this. Regarding the "capabilities" of the Replacement Machine that AMI cites, Custom Performance's Joseph Adams testified that an increased diameter capacity "doesn't mean it's going to bend over 3-inch stainless steel. And [the vendor of the Replacement Machine] will tell you that." (Tr. of R. 19:17-25.) Custom Performance has also used only the single-stack capacity on the Replacement Machine. (Tr. of R. 20:12.) Custom Performance did not use the triple-stack capacity and any alleged "windfall" is merely speculation. AMI fails to explain why replacement goods do not constitute cover when they have been used to accomplish the exact purpose of the original good and any potential additional benefit remains unknown and untried. In addition, even if, "in hindsight," AMI had provided evidence of a better substitute than the Replacement Machine (it did not), the UCC provides that Custom Performance is still entitled to cover. S.C. Code Ann. § 36-2-712 cmt. n.2 ("[I]t is immaterial that hindsight may later prove that the method or cover used was not the cheapest or most effective.").

Finally, the record shows that the Replacement Machine satisfies the last element of cover because it was a reasonable substitute "under the circumstances": (1) Custom Performance had only recently searched the national market for the AMI Machine; (2) Custom Performance again

searched the market and negotiated with potential vendors before purchasing the Replacement Machine; and (3) Custom Performance purchased the Replacement Machine in an active effort to meet ongoing business obligations and maintain contracts. (Tr. of R., Dec. 20, 2021, 6:10-12, 7:12-9:1, 14:25-15:3, 17:3-19:1, 19:19-20, 20:16-17.)

In sum, the Replacement Machine satisfies each element of the UCC's standard for cover. Accordingly, Custom Performance is entitled to the difference in value between the Replacement Machine and the AMI Machine.

CONCLUSION

For the reasons stated above, Custom Performance Engineering, Inc. respectfully requests that this Court reverse the Master-in-Equity's ruling that it is not entitled to the difference in price between the AMI Machine and the Replacement Machine.

August 18, 2022

s/Adam C. Bach
Adam C. Bach (SC Bar # 74885)
Emily R. Godwin (SC Bar # 103708)
ELLER TONNSEN BACH, LLC
1306 South Church Street
Greenville, SC 29605
Telephone: (864) 236-5013
Facsimile: (864) 312-4191
abach@etblawfirm.com
egodwin@etblawfirm.com

Attorneys for Respondent-Appellant

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Jr., Circuit Court Judge
Shannon M. Phillips, Master-in-Equity

Case No. 2021-CP-42-01163
Appellate Case No. 2022-000348

Custom Performance Engineering, Inc., ... Respondent-Appellant

v.

AM Industrial Group, LLC, ... Appellant-Respondent.

PROOF OF SERVICE

The undersigned certifies that a copy of Respondent-Appellant's Initial Reply Brief was served upon counsel of record in the above-entitled action by electronic mail on August 18, 2022, as follows:

cganjehsani@richardsonplowden.com
wharte@richardsonplowden.com
Carmen V. Ganjehsani
R. Wilder Harte
RICHARDSON, PLOWDEN & ROBINSON, PA
P.O. Box 7788
Columbia, SC 29202

Signature follows.

August 18, 2022

s/Adam C. Bach

Adam C. Bach (SC Bar # 74885)
Emily R. Godwin (SC Bar # 103708)
ELLER TONNSEN BACH, LLC
1306 South Church Street
Greenville, SC 29605
Telephone: (864) 236-5013
Facsimile: (864) 312-4191
abach@etblawfirm.com
egodwin@etblawfirm.com

Attorneys for Respondent-Appellant