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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Appellate Case No. 2020-000320

Associated Receivables Funding, Inc., ... Respondent,

v.

Dunlap, Inc.; James Stephen Dunlap, an Individual; Dunlap Industrial Coating Services, Inc.; Dunlap Industrial Services, Inc.; Classic Industrial Services, Inc.; and Mark Beuerle, an Individual, ... Defendants,

Of Which Classic Industrial Services, Inc. is the . . . . . Appellant.

APPELLANT'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

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Classic Industrial Services, Inc., Appellant, by and through its undersigned counsel, respectfully submits this Petition for Rehearing, as well as a Suggestion for Rehearing En Banc, with respect to the matters decided by a panel of the Court of Appeals in a decision filed on June 20, 2024, and indexed as Opinion No. 6064 (referred to hereinafter as "**the Opinion**"). This Petition is presented in conformity with the requirements of Rules 219, 221, and 240, SCACR.

To quote the Opinion, the underlying action is one "to enforce a security interest." This necessarily requires an examination of the pertinent provisions of the Uniform Commercial Code and their application to the salient facts of this dispute. In several material aspects, discussed below, the Court's analysis misapprehends or overlooks certain legal and factual circumstances that, upon further evaluation, should yield a different disposition of this case.

The Opinion also addresses an alternative claim for negligent misrepresentation. For similar reasons, the misapprehension or overlooking of certain legal and factual circumstances resulted in a decision whereby the Court upheld the trial court's verdict as to this cause of action. The Court is respectfully invited to reconsider its decision as to negligent misrepresentation, to vacate its prior decision, and to reverse the trial court's verdict.

I. THROUGH A MISAPPREHENSION OR OVERLOOKING OF MATERIAL FACTUAL AND LEGAL CIRCUMSTANCES, THE OPINION ERRANTLY AFFIRMED THE TRIAL COURT'S VERDICT IN FAVOR OF RESPONDENT AS TO ITS UCC CLAIM AGAINST APPELLANT.

In relevant part, the trial court held as follows:

> Pursuant to [S.C. Code § 36-9-607], a secured party may enforce the obligations of an account debtor and exercise the rights of the debtor with respect to the obligation of the account debtor. See S.C. Code § 36-9-

> 607[(a)(3)]. A secured party's rights, however, are subject to all terms and conditions of the agreement between the account debtor and assignor and any defense or claim in recoupment arising from the transaction that gave rise to the contract unless an account debtor has made an enforceable agreement not to assert defenses or claims. See S.C. Code § 36-9-404[(a)(1)].

In clearer English, and as applied to this case:

> Pursuant to S.C. Code § 36-9-607, Respondent may enforce the obligations of Appellant and exercise the rights of Dunlap with respect to the obligation of Appellant. See S.C. Code § 36-9-607(a)(3). Respondent's rights, however, are subject to all terms and conditions of the agreement between Appellant and Dunlap and any defense or claim in recoupment arising from the transaction that gave rise to the contract unless Appellant has made an enforceable agreement not to assert defenses or claims. See S.C. Code § 36-9-404(a)(1).

In short, the foregoing provisions of the UCC contemplate the circumstance in which a person may sell or assign its right to payment on an account to a third party, and further, explain the rights to payment that inure to the benefit of the third party who received the assignment. The circumstances of a factoring transaction—which is the type of transaction giving rise to the dispute involved in these proceedings—give an apt example of how the foregoing UCC provisions were intended to work:

(1) A party (in this case, Dunlap) does work for another (Appellant);

(2) The work that Dunlap did creates a right to receive payment from Appellant;

(3) Dunlap's right to receive payment from Appellant is evidenced by Dunlap's invoice;

(4) Because of the terms and conditions of the agreement between Appellant and Dunlap, Dunlap may not be entitled to receive payment on any given

invoice for a period of days, or weeks, after the date on which the invoice was submitted;

(5) Dunlap may need operating capital more quickly;

(6) To facilitate its need for operating capital, Dunlap may sell its right to receive payment from Appellant to Respondent;

(7) If Respondent is agreeable to purchasing Dunlap's right to receive payment from Appellant, Respondent will buy that right from Dunlap for the face amount of the invoice submitted to Appellant, less a percentage agreed upon by Dunlap and Respondent, in exchange for Dunlap executing an assignment of its right to receive payment from Appellant in favor of Respondent;

(8) As a result of a consummated factoring transaction, and assuming all goes well, Dunlap receives operating capital more quickly, though at a discounted rate, while Respondent receives the entirety of Dunlap's right to receive payment from Appellant, at a non-discounted rate, to be paid at a later date. The tradeoff for the parties to a factoring transaction is cash now vs. cash later;

(9) In the event that Dunlap assigns its right to receive payment from Appellant to Respondent, and with respect to the rights to enforce such payment, Respondent steps squarely into Dunlap's shoes. The right to payment that Respondent receives from Dunlap is the same as the right that Dunlap itself had to receive payment;

(10) Furthermore, in the event that Dunlap assigns its right to receive payment from Appellant to Respondent, Appellant's payment obligation to Respondent is the same as if the payment obligation remained with Dunlap, and is subject to the same defenses.

(11) Respondent does not get any better, different, or stronger power to enforce its rights to receive payment from Appellant than Dunlap had;

(12) Appellant does not suffer any diminished, different, or weaker power to defend against its right to make payment to Respondent than what Appellant had against Dunlap; and finally,

(13) The power dynamic between Appellant and Respondent—whether to enforce payment rights or defend against them—is not disturbed unless Appellant "has made an enforceable agreement not to assert defenses or claims."

A. There was no enforceable agreement between Appellant and Respondent.

The Opinion concludes that Appellant made an enforceable agreement with Respondent to waive payment defenses by executing the following certification, which was placed by Respondent at the bottom of the invoices at issue:

> I certify that the above work has been completed in full, all invoicing for materials used has been provided to project designee. The work performed has been inspected and complete payment should be processed to PO Box 16253, Greenville, SC 29606.

This does not constitute a contract.

The existence of a contract requires an offer, an acceptance, and an exchange of valuable consideration. See, e.g., Carolina Amusement Co. v. Conn. Nat'l Life Ins. Co., 313 S.C. 215, 220, 437 S.E.2d 122, 125 (Ct. App. 1993) (citation omitted).

With respect to the characterization of the foregoing certification as a contract, *what is the offer?* Certainly, as between Respondent and Dunlap, there was a legally cognizable offer. Respondent had offered to purchase certain of Dunlap's rights to receive payment from Appellant, in the event that Dunlap could demonstrate, to Respondent's satisfaction, that the payment right was legitimate. *But where is the offer between Appellant and Respondent?* There wasn't one. Appellant was being asked, through the certification and as an accommodation to Dunlap, to provide an affirmation as to the fact that a payment obligation had arisen because of the work that Dunlap had already performed.

In that same connection, as between Appellant and Respondent, *what is the exchange of valuable consideration?* As between Dunlap and Respondent, the consideration is apparent. Dunlap was selling the entirety of its right to receive payment from Appellant for work that Dunlap had already done, in exchange for the opportunity to receive immediate, but discounted, payment from Respondent. No aspect of the invoice certification establishes consideration given or received by Appellant.

Respondent has argued, and the Court ostensibly held, that the consideration Appellant received came in the form of accommodating Dunlap so that Dunlap could continue performing as a subcontractor. But that conclusion doesn't withstand scrutiny. The invoices that Dunlap sold Respondent were for work that Dunlap had already performed; in other words, the thing that Appellant wanted from Dunlap—its performance of construction services—had already been given, and the right of payment had already accrued. From a legal perspective, it was immaterial *who* Appellant would

pay for Dunlap's work; if Dunlap was entitled to payment for its work, there was no difference to Appellant whether it paid Dunlap or Dunlap's designee.

Furthermore, from the perspective of consideration, it was immaterial whether Dunlap would stay sufficiently solvent to continue providing work to Appellant, and thus making Dunlap's ability to get factor-financing important to Appellant. It cannot be forgotten that Appellant terminated Dunlap as a subcontractor on the construction project at issue swiftly because Dunlap failed to pay its own subcontractors in full, despite Dunlap's assurances to the contrary. Dunlap was replaceable, and as soon as Appellant was placed in reasonable insecurity about Dunlap's ability to continue performing, Dunlap was replaced.

The notion of consideration, sufficient to form the basis of a legally enforceable agreement, requires some demonstration of a bargained-for exchange of value. That is utterly absent from the relationship between Appellant and Respondent, and the record does not suggest otherwise.

Accordingly, without any evidence to support the satisfaction of the material elements of the existence of a contract, it cannot be said that there was a valid, enforceable agreement between Appellant and Respondent that would disturb the payment obligation rights and defenses thereto that existed between Appellant and Dunlap. By virtue of the subcontract agreement between Appellant and Dunlap, Appellant was entitled to satisfy the claims of Dunlap's unpaid subcontractors directly, and to offset those payments against any amounts that would otherwise have been owed by Appellant to Dunlap. When Respondent purchased Dunlap's rights to receive payment from Appellant, Respondent became equally subject to those same offset rights.

Respondent would have known that if it had ever bothered to review the contents of Dunlap's subcontractor agreement with Appellant.

Appellant was not a guarantor of Dunlap's financial obligations to Respondent, and Respondent was never party to an enforceable agreement with Appellant. Accordingly, it was error for the Court to affirm the trial court's determination that an agreement did exist between Appellant and Respondent, such that Appellant had waived its payment defenses, and essentially transform Appellant into a guarantor of Dunlap's payment obligations to Respondent.

B. The Opinion misstates the standard of review.

In evaluating the trial court's determination that a valid, enforceable agreement between Appellant and Respondent sufficient to disturb the rights and defenses to the enforceability of payment obligations, the Court held that "the existence of a contract is a question of fact and our scope of review in this action at law tried without a jury 'extends merely to the correction of errors of law.'"

But that is not exactly accurate. "Although the existence of a contract is ordinarily a question of fact . . . , where the undisputed facts do not establish a contract, the question becomes one of law." Stevens & Wilkinson of S.C., Inc. v. City of Columbia, 409 S.C. 568, 578, 762 S.E.2d 696, 701 (2014). "In an action at law, on appeal of a case tried without a jury, the appellate court's standard of review extends only to the correction of errors of law. . . . The trial judge's findings of fact will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings." Electro-Lab of Aiken v. Sharp Constr. Co. of Sumter, Inc., 357 S.C. 363, 367, 593 S.E.2d 170, 172 (Ct. App. 2004) (citations omitted).

More simply stated, with respect to the appellate evaluation of a contract action tried without a jury, the Court should first evaluate whether—as a matter of law—a valid, enforceable agreement could have existed, and then turn to the question of factual sufficiency.

This reframing of the standard of review has critical implications for the disposition of this case. As a matter of law, and as discussed above, there was no valid, enforceable agreement between Appellant and Respondent. There was no offer; without an offer, there could be no acceptance; and there was no exchange of valuable consideration. The fundamental elements of a contract did not exist.

And, as evidence of this proposition, Appellant invites the Court to consider the question of the existence of a contract if the roles were reversed: *Could Appellant have sued Respondent for breach of contract?* It is not clear how. Respondent did not owe any performance obligation to Appellant; Appellant would have no standing to challenge Respondent's decision to refrain from purchasing any of Dunlap's invoices. In the absence of reciprocity of obligation, it is difficult to conceive how—if at all—it could be said that Appellant was in contract with Respondent.

Accordingly, it was error for the trial court to find the existence of a contract capable of disturbing the payment rights and defenses between Appellant and Dunlap (and Respondent, as Dunlap's successor). As a matter of law, such a contract did not exist, and there is a dearth of evidence in the record to suggest otherwise.

C. The invoice certification at issue did not waive all payment defenses.

Even if a valid, enforceable agreement did exist between Appellant and Respondent, it was error for the Court to conclude that the invoice certification

constituted an agreement for Appellant to refrain from any further assertion of payment defenses. That is essentially a finding that Appellant had waived its payment defenses.

"Waiver is a voluntary and intentional abandonment or relinquishment of a known right." Eason v. Eason, 384 S.C. 473, 480, 682 S.E.2d 804, 807 (2009) (quotation omitted). Waiver "may be expressed or implied by a party's conduct." Parker v. Parker, 313 S.C. 482, 487, 443 S.E.2d 388, 391 (1994) (citation omitted). "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." Lyles v. BMI, Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282, 285 (Ct. App. 1987) (citation omitted).

There is no evidence to suggest that Appellant expressly waived its payment defenses in Respondent's favor. An example of an express waiver is found in Commercial Capital Holding Corp. v. Team Ace Joint Venture, 2000 WL 726880 (E.D. La. June 2, 2000), which the Court found to be "more persuasive" than the contrary authority cited by Appellant, Factor King, LLC v. Block Builders, LLC, 192 F. Supp. 3d 690 (M.D. La. 2016). The "waiver" language applicable in Team Ace, which was found in an "Invoice Acknowledgment Agreement" signed by the account debtor in that case, was as follows:

> [Team Ace] tenders this irrevocable acknowledgment solely to Commercial Capital Holding Corporation that the Invoices approved by [Team Ace] are acceptable and that the Invoices will be paid to Commercial Capital Holding Corporation without any setoff, defense, counterclaim or recoupment.
>
> The rights and remedies of [Team Ace] as it pertains to SIMS Enterprises International, Inc. of Louisiana are not abridged, amended or modified by this agreement, with the exception of the modification of [Team Ace's] right of setoff, defense, counterclaim or recoupment, referenced here and above, and only with regard to the Invoices, acknowledged herein.

Team Ace, 2000 WL 726880 (emphasis added).

Explicitly, Team Ace agreed to waive its rights to setoff and recoupment in favor of its subcontractor's factor, as well as any defense to payment it may have. The language of this waiver is similar to the language found in the pertinent provisions of the UCC (which, in South Carolina, is found at S.C. Code § 36-9-404(a)(1)). And none of the language in the Team Ace "acknowledgment agreement" is in the invoice certifications at issue in this dispute. There is simply no evidence, based on the language of the invoice certification or otherwise, that Appellant explicitly waived any of its payment defenses.

Nor is there any evidence to suggest that Appellant impliedly waived any of its payment defenses. The record does not reflect the existence of any information to support a course of dealing, or parol evidence, or contrary conduct that would establish an implied waiver.

Accordingly, as matters of both fact and law, it was error to conclude that Appellant waived any payment defenses in favor of Dunlap or Respondent, as Dunlap's successor.

D. Section Conclusion

For these reasons, Appellant respectfully requests reconsideration of the relevant portions of the prior Opinion.

II. THROUGH A MISAPPREHENSION OR OVERLOOKING OF MATERIAL FACTUAL AND LEGAL CIRCUMSTANCES, THE OPINION ERRANTLY AFFIRMED THE TRIAL COURT'S VERDICT IN FAVOR OF RESPONDENT AS TO ITS ACTION FOR NEGLIGENT MISREPRESENTATION.

With respect to actions for negligent misrepresentation, the law is clear: "There is no liability for . . . matters which plaintiff could ascertain on his own in the exercise of

due diligence." AMA Mgmt. Corp. v. Strasburger, 309 S.C. 213, 223, 420 S.E.2d 868, 874 (Ct. App. 1992) (citation omitted). In cases where the plaintiff failed to exercise even minimal due diligence in furtherance of the protection of its own interests, it cannot be said that the plaintiff justifiably relied on the information at issue.

In the judgment from which this appeal is taken, the trial court held that Appellant had "specialized knowledge" of the terms and conditions of its subcontractor agreement with Dunlap, through which Appellant came to have a duty to disclose truthful information to Respondent. The trial court's judgment, however, concludes without any analysis that Appellant was possessed of this "specialized knowledge," ostensibly on the sole and threadbare basis that Appellant was in a contract with Dunlap and, by virtue of that relationship, knew that it might have payment defenses. No other findings of fact were made that would support the existence of a duty based on "specialized knowledge." And, if the trial court's conclusion were the law, in every case where a third party brings suit for negligent misrepresentation involving the contents of a contract to which it was not a party, the parties to the contract—by virtue of nothing more than being parties to the contract—would have "specialized knowledge" capable of sustaining this element of negligent misrepresentation, regardless of whether the aggrieved plaintiff knew or could have known of the contents of contract (such as by merely asking for a copy of the contract and reading it). That proposition is not reflective of existing law. See, e.g., AMA Management, 309 S.C. at 223, 420 S.E.2d at 874.

In principal appellate briefing, Appellant argued that the duty of truthfulness did not arise in this case, and therefore, could not have been breached, because Respondent was equally capable of learning of the existence of payment defenses. This could have

been achieved had Respondent ever read Appellant's contract with Dunlap (which it admittedly did not), or asked Dunlap whether those defenses existed in the subcontract (which it did not), or asked Dunlap whether it had engaged in any conduct that would impair its right to payment on any invoice proposed for factoring (which it did not). Accordingly, Appellant's position was that the evidence did not support the satisfaction of several of the material elements of negligent misrepresentation, and therefore, the trial court's decision on this action should have been reversed.

To be very clear on this point: Respondent's undisputed testimony at trial was that it was aware of the subcontractor agreement between Appellant and Dunlap, but that Respondent never reviewed it; it was further undisputed, and was Respondent's trial testimony, that Respondent did nothing to determine whether Dunlap was staying current on paying its subcontractors, or if it had engaged in conduct that created exposure for payment defenses. Respondent engaged in no due diligence before buying hundreds-of thousands-of-dollars-worth of invoices from Dunlap that established rights-to-payment that were made explicitly subject to payment defenses in the subcontractor agreement with Appellant. Unbeknownst to Respondent—because Respondent didn't ask—each of those invoices were compromised, impaired, and encumbered by Appellant's pre-existing contract rights and the consequences of Dunlap's own bad conduct.

All of this was undisputed at trial. And, based on these undisputed circumstances, which comprise a failure of proof as to Respondent's negligent misrepresentation claim against Appellant, a reversal of the trial court's decision was warranted.

The Opinion, however, articulates a new reason why the judgment in favor of Respondent's negligent misrepresentation action is capable of affirmation: a course of

dealing had been established between Appellant and Respondent, based on their prior factoring transactions with Dunlap, which gave rise to Respondent's expectations of truthfulness and accuracy with respect to Appellant's invoice certifications at issue. "Course of dealing" had never previously been cited as a basis for justifiable reliance in this case—not by Respondent at trial, not by the trial court in its decision, and not even by Respondent in its principal appellate briefing. It was a newly articulated basis.

And that was not proper. The legal sufficiency of Respondent's verdict as to negligent misrepresentation must stand or fall based on the evidence in the record. The undisputed evidence is that Respondent did nothing to protect its own financial interests in the factoring transactions at issue. And its undisputed failure to protect its own interests—as to matters that it was capable of protecting—necessarily defeats the element of justifiable reliance.

Additionally, the evidence does not support a finding that Appellant's invoice certifications constitute a misrepresentation. At the time that each certification was provided to Respondent, it was literally true—based on the undisputed testimony available to Appellant at the time in question—that complete payment "should" be made to Dunlap or its designee. Certainly, Appellant had been advised that some of Dunlap's subcontractors had not yet been paid; but Appellant immediately demanded assurances from Dunlap that this would be rectified within five days, and Dunlap gave those assurances. It was only when—merely days later—Dunlap had failed to act on the assurances it had given Appellant as to the nonpayment of subcontractors that Appellant knew it may have payment defenses against the invoices that Dunlap had previously submitted. It was therefore error for the Opinion to transform the conditional "should"

into an unconditional "shall," and to make full payment—for which defenses were available—obligatory based on a contract that did not exist, and contractual language that did not exist.

The standard of negligent misrepresentation is not established by hindsight. And the undisputed testimony is that, to the best of Appellant's knowledge, information, and belief during April and May 2016, complete payment "should" have been processed to Dunlap, assuming that Dunlap had lived up to its own obligations. Hindsight proved it had not.

Regardless, the undisputed facts, testimony, and evidence of record did not support the trial court's judgment as to Respondent's negligent misrepresentation action. And it was not proper for a new evidentiary conclusion to be introduced in the Opinion, in order to sustain the verdict.

CONCLUDING STATEMENT

For the reasons set out in this Petition, Appellant respectfully requests that the Court of Appeals reconsider its previously issued Opinion in this matter, undertake a rehearing of all matters presented in Appellant's briefs, and provide such other and further relief as the Court deems just and proper.

SUGGESTION FOR REHEARING EN BANC

Pursuant to Rule 219(b), SCACR, Appellant respectfully suggests that the rehearing be entertained en banc.

Respectfully submitted,

s/ Steven Edward Buckingham

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PROOF OF SERVICE

The undersigned counsel for Appellant hereby certifies, subject to penalty of perjury, that the following document(s) was/were served upon the following counsel of record by the following means as of the date identified below.

Document(s): Appellant's Petition for Rehearing

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Respectfully,

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