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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Kristi F. Curtis, Circuit Court Judge

Appellate Case No. 2023-001829

Jones Nissan, Inc., Respondent,

v.

THAG, LLC; Nissan of Sumter, LLC; Terry L. Holmes; and Merrill Lynch, Pierce, Fenner & Smith, Incorporated, Defendants,

Of which THAG, LLC and Nissan of Sumter, LLC, are the Appellants.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE ISSUE ON APPEAL

Whether the circuit court properly granted summary judgment in favor of Jones Nissan because no genuine issue of material fact exists as to Jones Nissan's claims for breach of contract and conversion or Appellants' corresponding counterclaims.

STATEMENT OF THE CASE

This case arises out of the collective failure of THAG, LLC; Nissan of Sumter, LLC; and Terry L. Holmes (together, "Appellants") to satisfy a $389,555.98 debt obligation owed to Respondent Jones Nissan, Inc. on the purchase of a Nissan automobile dealership in Sumter, South Carolina, in 2017. Jones Nissan owned and operated the Jones Nissan automobile dealership ("the dealership") in Sumter from 1990 until early 2017. (Am. Compl. ¶ 8, R. 46; Defendants' Answer to Am. Compl. ¶ 7, R. 38). In July 2016, Jones Nissan entered into an "Asset Purchase Agreement" ("the contract") with THAG, LLC pursuant to which THAG agreed to purchase the dealership for $2,250,000.00 cash along with other considerations. (Asset Purchase Agr., R. 66); *see also* (Defendants' Answer to Am. Compl. ¶ 7, R. 38) (admitting Plaintiff and THAG entered into the Asset Purchase Agreement). The contract was amended multiple times by the parties prior to the transaction closing in early 2017. (First Am. to Asset Purchase Agr., R. 90; Second Am. to Asset Purchase Agr., R. 93; Third Am. to Asset Purchase Agr., R. 95); *see also* (Defendants' Answer to Am. Compl. ¶ 7, R. 38) (admitting each of the amendments). Terry Holmes was the sole member and had sole control over THAG. (Dep. of Terry Holmes at 36:15–37:17, R. 154–55).

Pursuant to the third amendment, Jones Nissan—at THAG's request—agreed to finance $650,000.00 of the $2,250,000.00 purchase price. (Third Am. to Asset Purchase Agr., R. 95–96); *see also* (Dep. of Terry Holmes at 12:22–13:1, R. 148–49). The terms and conditions of the financed portion of the sale price were memorialized through a combination of documents, namely

a Promissory Note, a "Pledged Collateral Account Control Agreement," and a "Pledge Agreement," all of which were signed by Terry Holmes purportedly on behalf of THAG. (Pledged Collateral Account Control Agr., R. 99–101; Promissory Note, R. 103; Pledge Agr., R. 104). The financing agreement required that THAG (or its assigns) at all times maintain a sufficient balance in Merrill Lynch Account No. XXX-XX250 ("the account") to satisfy the outstanding balance of the financed portion of the purchase price of the dealership as contemplated in the third amendment to the Asset Purchase Agreement. (Pledged Collateral Account Control Agr., R. 99–100; Pledge Agr., R. 104–05). The agreement also gave Jones Nissan a security interest in the account and allowed Jones Nissan to issue a "Notice of Exclusive Control" to take control of the account if THAG defaulted on its debt obligation. (Pledged Collateral Account Control Agr. ¶ 6, R. 100; Pledge Agr. ¶¶ 1, 6, R. 104–05). Appellants initially funded the account with $650,000.00 as required. (Verification of Deposit, R. 382); *see also* (Merrill Lynch's Answer to Am. Compl. ¶ 12).

THAG, via Terry Holmes, assigned the contract to Nissan of Sumter on February 28, 2017. (Assignment, R. 384–85; Dep. of Terry Holmes at 104:14-17, R. 171). Nissan of Sumter thus assumed THAG's obligations under the contract. (*Id.*).

Appellants made monthly payments of $12,566.32 or $12,566.33 on the $650,000.00 debt obligation from March 2017 through July 2019. (Aff. of Neecie Oliver ¶ 5, R. 388–90); *see also* (Dep. of Terry Holmes at 120:10-17, 123:13–130:10, R. 175–78). Despite still owing 31 of the 60 required payments, Appellants never made another required payment after July 2019. (Aff. of Neecie Oliver ¶ 6, R. 390; Dep. of Terry Holmes at 130:5-10, R. 178). On August 20, 2019, Jones Nissan notified THAG and Terry Holmes of their default on the Promissory Note, and in exercise of its rights under the Note, demanded that the then-outstanding debt of $360,035.15 be satisfied

in full.[1] (Notice of Default, R. 110–11). Appellants failed to satisfy the outstanding debt. (Aff. of Neecie Oliver ¶¶ 5–6, R. 388–90; Aff. of James Jones ¶¶ 5–7, R. 238–40).

Because Appellants defaulted and failed to satisfy the outstanding debt, Jones Nissan attempted to exercise its contractual rights to collect the outstanding debt from the designated, collateralized funds on deposit in the pledged Merrill Lynch account. (Notice of Exclusive Control, R. 112–13). However, when Jones Nissan issued a Notice of Exclusive Control to exercise control over the account, it discovered the designated, collateralized funds had been withdrawn, transferred, or otherwise disposed of by Appellants and were no longer in the account nor available to Jones Nissan to satisfy the debt it was owed. (Aff. of James Jones ¶ 3, R. 237–38; Dep. of Terry Holmes at 109:21-25, R. 173). Jones Nissan eventually learned that Appellants sold the dealership in 2019. (Dep. of Terry Holmes at 205:9-19, R. 197). Appellants have never paid the remaining $389,555.98 they agreed to pay Jones Nissan. (Aff. of Neecie Oliver ¶ 6, R. 390; Aff. of James Jones ¶¶ 6–7, R. 240).

Jones Nissan filed this action on April 16, 2020. (Compl., R. 21). After amending its complaint, Jones Nissan asserted claims against THAG, Nissan of Sumter, and Terry Holmes for breach of contract, breach of contract accompanied by a fraudulent act, conversion and civil theft, money had and received, and quantum meruit; against THAG and Holmes for breach of the implied covenant of good faith and fair dealing, fraud, and constructive fraud; against THAG and Nissan of Sumter for piercing the corporate veil or alter ego; against Merrill Lynch for breach of contract, negligence, and money had and received;[2] and against all the defendants for an accounting. *See*

[1] The amount of $360,035.15 was incorrect, as it represented only the outstanding principal at that time. The correct amount was $389,555.98. (Aff. of Neecie Oliver ¶ 6, R. 390; Aff. of James Jones ¶ 7, R. 240).

[2] Jones Nissan settled with Merrill Lynch in 2022.

generally (Am. Compl., R. 45–65). THAG, Nissan of Sumter, and Holmes asserted counterclaims against Jones Nissan for breach of contract and breach of the implied covenant of good faith and fair dealing. (Defendants' Answer to Am. Compl. ¶¶ 53–62, R. 42–44). The counterclaims alleged that Jones Nissan breached the Asset Purchase Agreement by (1) misrepresenting "material facts concerning the market value of the dealership"; (2) "[c]harging an exorbitant amount of rent to THAG in exchange for its use of the dealership property"; (3) "[r]epresenting to THAG that it would be allowed to rent a 1.5 acre lot, when in fact it was allowed to use only about 0.25 acres; (4) "[n]ot renting THAG sufficient space to display its inventory"; (5) "[n]ot renting THAG the building on the premises, instead using it for Jones' detailing business"; and (6) "[o]wning and operating a car dealership next door to THAG, in direct competition with THAG and in violation of the non-compete agreement." (*Id.*).

Jones Nissan moved for summary judgment on its claims, arguing it is undisputed that Appellants did not make all the payments required under the Asset Purchase Agreement and drained the Merrill Lynch account.[3] In response, Appellants raised several contentions based solely on an affidavit Holmes submitted two days before the summary judgment hearing in which he regurgitated Appellants' counterclaims in affidavit form. *See* (Memo in Opp. to Motion for Summ. J. at 4, R. 466; Aff. of Terry Holmes, R. 474). Appellants also filed a memorandum in opposition to Jones Nissan's summary judgment motion, arguing Jones Nissan somehow breached the Asset Purchase Agreement (1) "by over-charging Nissan of Sumter for lot rent," (2) "offering insufficient space for Nissan of Sumter to display its inventory," and (3) "owning and operating a competing auto dealership next door to Nissan of Sumter." (*Id.*). Appellants further contended

[3] Jones Nissan also argued it is entitled to attorney's fees and to pierce the corporate veil of THAG and Nissan of Sumter, but the circuit court did not rule on those issues. The issues are therefore not before this Court.

that they are entitled to a setoff of the funds Jones Nissan received in its settlement with Merrill Lynch. (Memo in Opp. to Motion for Summ. J. at 4, R. 466). Finally, they argued summary judgment was premature because they hoped to conduct additional discovery, despite having three years to conduct discovery before the summary judgment hearing. (*Id.* at 5–6, R. 467–68).

After hearing arguments on Jones Nissan's summary judgment motion on July 13, 2023, the circuit court entered an order on September 19, 2023, granting summary judgment in favor of Jones Nissan on its breach of contract and conversion claims. (Sept. 19, 2023 Order, R. 6–17). The court found it is undisputed that the contract between Appellants and Jones Nissan required Appellants to pay Jones Nissan $650,000, plus interest, in 60 monthly installments and that Appellants failed to make all the required payments. (*Id.* at 5, R. 10). The court therefore found Appellants "breached the contract as a matter of law." (*Id.*). The circuit court also found as a matter of law that Appellants funded the Merrill Lynch account with $650,000.00, agreed to maintain a sufficient balance in the account at all times to cover the outstanding debt obligation, agreed that Jones Nissan was entitled to issue a notice and take exclusive control over the account if Appellants defaulted, and drained the account when they still owed Jones Nissan the determinative sum of $389,555.98. (*Id.* at 7, R. 12). Accordingly, the circuit court found Jones Nissan was entitled to judgment as a matter of law on its conversion claim. (*Id.*).

Additionally, the circuit court found Appellants' affirmative defenses and their counterclaims for breach of contract and breach of the implied covenant of good faith and fair dealing were based, in part, on allegations that (1) Jones Nissan misrepresented material facts concerning the market value of the dealership, (2) Jones Nissan charged "an exorbitant amount of rent to THAG," and (3) Jones Nissan "owned and operated a car dealership next door to THAG, in direct competition with THAG and in violation of the non-compete agreement contained within

the parties' contract." (*Id.* at 8–10, R. 13–15). The circuit court rejected each of Appellants' arguments and granted summary judgment on the portions of Appellants' counterclaims and affirmative defenses based on those allegations. The circuit court did not rule on Appellants' setoff argument or their contention that they needed more than three years to conduct discovery.

Appellants filed a Rule 59(e) motion and asked the Court to reconsider only the setoff issue. (Mot. to Reconsider, R. 476–78). The circuit court entered a Form 4 order on October 23, 2023, granting Appellants' motion to reconsider and clarifying that the court "makes no ruling on the issue of whether [Appellants] are entitled to a setoff or credit of any amounts previously tendered by Defendant Merrill Lynch." (Oct. 23, 2023 Form 4 Order, R. 18). Appellants served their notice of appeal on November 22, 2023.

STANDARD OF REVIEW

A court must grant summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. In reviewing a summary judgment motion, the court must view "the evidence and all inferences which can reasonably be drawn therefrom . . . in the light most favorable to the nonmoving party." *Quail Hill, LLC v. Richland Cty.*, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010). However, "it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine." *Kitchen Planners, LLC v. Friedman*, 440 S.C. 456, 463, 892 S.E.2d 297, 301 (2023) (quoting *Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013)). When reviewing a decision granting summary judgment, this Court applies the same standard. *Turner v. Milliman*, 392 S.C. 116, 121–22, 708 S.E.2d 766, 769 (2011).

ARGUMENT

I. The circuit court properly granted summary judgment in favor of Jones Nissan because no genuine issue of material fact exists as to Jones Nissan's claims for breach of contract and conversion or Appellants' corresponding counterclaims.

Appellants never presented any legitimate evidence contradicting Jones Nissan's claims or supporting their counterclaims. On the contrary, Appellants made numerous admissions throughout this case that prove Jones Nissan's claims. The circuit court therefore properly granted summary judgment in favor of Jones Nissan.

As an initial matter, Appellants do not cite any authority or any evidence in the record supporting their arguments on the merits of the circuit court's summary judgment ruling. Their arguments are therefore abandoned. *See Equivest Fin., LLC v. Ravenel*, 422 S.C. 499, 506, 812 S.E.2d 438, 441 (Ct. App. 2018) ("When a party provides no legal authority regarding a particular argument, the argument is abandoned and the court will not address the merits of the issue."). This Court should affirm the summary judgment on that ground alone.

Even if the Court considers the merits, Appellants' arguments are groundless. It is undisputed that THAG—and Nissan of Sumter as its assignee—had a contractual duty to pay Jones Nissan $650,000.00, plus interest, but failed to pay $389,555.98 of their debt. There is also no genuine dispute that THAG pledged the Merrill Lynch account as collateral, that THAG agreed to at all times maintain sufficient funds in the account to cover its outstanding debt, that Jones Nissan had a right to exercise exclusive control over the account and use the funds in the account to satisfy the outstanding debt if Appellants defaulted, and that THAG drained the account before the debt was satisfied. The circuit court therefore properly found THAG is liable as a matter of law on Jones Nissan's breach of contract and conversion claims.

A. Appellants breached the contract as a matter of law because they agreed to pay $650,000.00 plus interest to Jones Nissan but failed to pay $389,555.98 of their debt obligation.

Appellants breached multiple contracts with Jones Nissan. The contracts required Appellants to pay Jones Nissan $650,000.00, plus interest, in 60 monthly installments. Appellants failed to make all the required payments and therefore breached the contracts as a matter of law.

A plaintiff asserting a breach of contract claim must prove "the existence of a contract, its breach, and damages caused by such breach." *Hotel & Motel Holdings, LLC v. BJC Enterprises, LLC*, 414 S.C. 635, 652, 780 S.E.2d 263, 272–73 (Ct. App. 2015). The breaching party is "liable for whatever damages follow as a natural consequence and a proximate result of such breach." *Id.* The interpretation and enforcement of an unambiguous contract is a question of law for the court and can be properly disposed of at summary judgment. *S. Glass & Plastics Co. v. Kemper*, 399 S.C. 483, 491, 732 S.E.2d 205, 209 (Ct. App. 2012). The court must apply the plain language of the agreement and enforce its terms according to their plain meaning. *Bardsley v. Gov't Emps. Ins. Co.*, 405 S.C. 68, 76, 747 S.E.2d 436, 440 (2013).

The contract documents at issue in this case contain no ambiguities. Jones Nissan agreed to finance $650,000.00 of the purchase price for the dealership in exchange for THAG's agreement to repay the $650,000.00, plus interest, over the course of 60 months. (Third Am. to Asset Purchase Agr., R. 95–96). THAG entered into the Pledged Collateral Control Agreement with Jones Nissan and Merrill Lynch, in which it agreed that the Merrill Lynch account would be maintained for the benefit of Jones Nissan and that Jones Nissan could exercise exclusive control over the account with proper notice. (Pledged Collateral Control Agr. ¶¶ 1, 6, R. 99–100). THAG, via Terry Holmes, executed the Promissory Note memorializing their commitment to pay the $650,000.00 plus interest and entered into the Pledge Agreement providing Jones Nissan a security

interest in the account and the right to collect the debt from the account if Appellants defaulted on the debt. (Promissory Note, R. 103; Pledge Agr., R. 104–07). When they executed the Promissory Note, THAG and Terry Holmes expressly waived any rights to "demand, presentment, notice of non-payment, dishonor, protest, and notice of protest." (Promissory Note, R. 103).

Appellants do not dispute that THAG entered into the Asset Purchase Agreement or the three amendments. In fact, Appellants admitted that THAG entered into these contracts in their answer to the amended complaint. (Defendants' Answer to Am. Compl. ¶ 7, R. 38). It is also undisputed that, pursuant to the third amendment, THAG was required to pay Jones Nissan $650,000.00 amortized over 60 months at 6% interest. Terry Holmes admitted this fact in a letter to Jones Nissan in August 2019. (Aug. 2019 Letter and Cashier's Check, R. 244) (attempting to "send a portion of my payments as agreed upon" and stating, "I intend to bring my payments back to the agreed upon amount"); *see also* (Dep. of Terry Holmes at 111:6–114:9, R. 173–74) (admitting he sent the August 2019 letter). Further, it is undisputed that THAG made only 29 of the required 60 monthly payments and that THAG failed maintain sufficient funds in the pledged account to cover the outstanding debt obligation. (Dep. of Terry Holmes at 109:21-25, R. 173; Aff. of Neecie Oliver ¶ 6, R. 390; Aff. of James Jones ¶¶ 3, 5–7, R. 237–40).

Thus, the circuit court properly found no genuine issue of material fact exists as to Appellants' breach of the unambiguous agreements. Moreover, Appellants also breached the implied covenant of good faith and fair dealing by failing to satisfy their contractual obligations and by siphoning funds they had agreed to pay to Jones Nissan. *See Hotel & Motel Holdings, LLC v. BJC Enterprises, LLC*, 414 S.C. 635, 653, 780 S.E.2d 263, 273 (Ct. App. 2015) ("[T]here exists in every contract an implied covenant of good faith and fair dealing."). The circuit court therefore

properly granted summary judgment in favor of Jones Nissan on its claims for breach of contract and breach of the implied covenant of good faith and fair dealing.

Appellants do not even argue that they did ***not*** breach the Asset Purchase Agreement or convert the funds in the Merrill Lynch account. Instead, they rely solely on the unsubstantiated allegations in their counterclaims—repeated verbatim by Holmes in his affidavit—that Jones Nissan (1) overcharged Nissan of Sumter for lot rent; (2) offered insufficient space for Nissan of Sumter to display its inventory; and (3) owned and operated a competing car dealership next door to Nissan of Sumter. (App. Br. 7).

Appellants' allegations related to the amount of rent and leased space are not based on the contracts at issue in this case. Instead, the allegations appear to be based on a separate commercial lease agreement between Mar-Gin Properties and Sumter Real Estate Holdings, LLC, which is referenced in the Second Amendment to the Asset Purchase Agreement. *See* (Second Am. to Asset Purchase Agr., R. 93) (providing the obligations of the parties to consummate the transaction contemplated by the Asset Purchase Agreement were subject to the simultaneous closing of a commercial lease agreement between Mar-Gin Properties and Sumter Real Estate Holdings, LLC). Appellants' allegations are meritless because (1) the contracts at issue in this case do not mention rent or leased space, and therefore any purported rent or space issues are irrelevant to the parties' compliance with the contracts at issue; and (2) the commercial lease agreement on which Appellants rely was entered into by Mar-Gin Properties and Sumter Real Estate Holdings, LLC, neither of which is a party to this case. (*Id.*). Appellants therefore have not asserted their rent and space-related claims against the proper defendant, and they did not bring the claims in the name of the proper plaintiff.

Appellants' allegations also fail on the merits. As to the first allegation, Jones Nissan did not "charge exorbitant rent." Appellants agreed to the amount of rent, and they cannot ask the courts to rescue them because they later decided the agreed-upon rent was more than they were willing or able to pay. Holmes admitted in his deposition that the $32,500 rent "was the amount of the lease agreement" and that he agreed to the lease agreement, including the amount of rent. (Sept. 19, 2023 Order at 9, R. 14; Dep. of Terry Holmes at 94:22-25, 96–98, R. 169–70). Moreover, the circuit court properly found that the parties to the Asset Purchase Agreement were sophisticated parties, represented by counsel, who had adequate time to conduct their own inquiry before entering into the transaction. (Sept. 19, 2023 Order at 9, R. 14). Appellants' own decision to enter into what they now believe was a bad business deal is not a defense to Jones Nissan's claims and is not a valid basis for a breach of contract counterclaim against Jones Nissan. *See Mitchum v. Mitchum*, 183 S.C. 75, 190 S.E. 104, 113 (1937) ("It is not the business of courts to protect parties from the consequences of bad contracts . . . ."); *Cont'l Ins. Co. v. Boykin*, 25 S.C. 323, 327 (1886) ("This contract may have been an unwise and improvident one, but still the defendants made it, and as was said by Judge Hudson in his decree: 'It being so explicit, the court is prevented from any effort to relieve the parties from the full consequences thereof.'").

Regardless, Appellants do not cite any evidence in the record supporting their allegations about the amount of the rent. The Asset Purchase Agreement does not provide for rent or the lease of any property. Their unsupported contentions that they were unhappy with the terms of a separate contract (which is not in the record) is not a defense to their undisputed failure to make the payments required under the Asset Purchase Agreement. The circuit court properly rejected Appellants' arguments.

As to Appellants' second allegation, they do not even explain the source of the purported requirement that Jones Nissan offer sufficient space "for Nissan of Sumter to display its inventory," nor do they cite any evidence supporting their contention that Jones Nissan breached that purported requirement. (App. Br. 7). The Asset Purchase Agreement does not provide for the specific amount of space alleged by Appellants. Thus, Appellants again contend an alleged breach of some other purported contract (which is not in the record) is somehow a defense to their undisputed failure to make the required payments under the Asset Purchase Agreement. *See Silver v. Aabstract Pools & Spas, Inc.*, 376 S.C. 585, 592, 658 S.E.2d 539, 543 (Ct. App. 2008) (explaining a court cannot "look beyond the four corners to discern the parties[']' intentions" if a contract "is clear, explicit, unambiguous, and capable of only one reasonable interpretation"). The circuit court properly rejected Appellants' unsupported contentions.

Finally, as to Appellants' bare assertion that Jones Nissan violated the terms of a noncompete clause in the Asset Purchase Agreement, the circuit court properly found the Assert Purchase Agreement did not prevent Jones Nissan from operating a competing car dealership. (Sept. 19, 2023 Order at 10, R. 15; Asset Purchase Agr. ¶ 12(b)(vii), R. 76–77). Rather, it states that Jones Nissan will not directly or indirectly compete with Appellants "by engaging in any new ***Nissan brand*** motor vehicle sales or service dealership" for a five-year period. (*Id.*). Appellants presented no evidence that Jones Nissan breached the terms of the noncompete, and they do not cite any such evidence in their brief. They do not even allege that Jones Nissan operated a competing ***Nissan*** dealership. The circuit court therefore properly rejected Appellants' argument.

This case is simple—Jones Nissan performed its contractual obligations under the Asset Purchase Agreement and sold the dealership to Appellants, but Appellants failed to make all required payments and drained the collateral funds from the Merrill Lynch account. They cannot

dispute this simple conclusion. In fact, they have admitted their breaches throughout this litigation. The circuit court properly granted summary judgment in favor of Jones Nissan. Their attempts to muddy the case with vague references to phantom breaches of other contracts that are not in the record does not create a ***genuine*** issue of material fact. *See Kitchen Planners*, 440 S.C. at 463, 892 S.E.2d at 301 ("[I]t is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine.").

B. The circuit court properly granted summary judgment on Jones Nissan's conversion claim because Appellants drained the Merrill Lynch account despite Jones Nissan's security interest and entitlement to exercise exclusive control over the account if Appellants defaulted on their debt obligation.

The circuit court properly granted summary judgment on Jones Nissan's conversion claim based on Appellants' undisputed draining of the Merrill Lynch account. As an initial matter, Appellants do not even contend in their brief that the circuit court erred in granting summary judgment on Jones Nissan's conversion claim, nor do they raise any argument or cite any evidence contradicting Jones Nissan's claim that Appellants converted the collateralized funds in the Merrill Lynch account. For that reason alone, the Court should affirm the circuit court's summary judgment order because Appellants have abandoned the conversion issue and therefore have failed to raise a dispositive issue on appeal. *See Equivest*, 422 S.C. at 506, 812 S.E.2d at 441; *see also Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 328, 730 S.E.2d 282, 284 (2012) ("Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become law of the case." (quoting *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010)).

Even if the Court considers the merits of the issue, the circuit court properly found Jones Nissan is entitled to judgment as a matter of law on its conversion claim. Conversion is "the unauthorized assumption and exercise of the rights of ownership over goods or personal chattels

belonging to another, to the alteration of their 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). Money may be the subject of conversion if "it is capable of being identified and there may be conversion of determinate sums even though the specific coins and bills are not identified." *Id.* at 507, 570 S.E.2d at 551 (quoting *SSI Med. Servs., Inc. v. Cox*, 301 S.C. 493, 498, 392 S.E.2d 789, 792 (1990)).

Appellants funded the Merrill Lynch account with $650,000.00, (Verification of Deposit, R. 382); *see also* (Merrill Lynch's Answer to Am. Compl. ¶ 12), agreed to maintain a sufficient balance in the account at all times to cover the outstanding debt obligation, (Pledged Collateral Account Control Agr., R. 99–101; Pledge Agr., R. 104–07), and agreed that Jones Nissan was entitled to issue a notice and take exclusive control over the account if Appellants defaulted, (Pledged Collateral Account Control Agr. ¶ 6, R. 100; Pledge Agr. ¶¶ 1, 6, R. 104–05). Nonetheless, Appellants drained the account when they still owed Jones Nissan the determinative sum of $389,555.98. (Aff. of James Jones ¶ 3, R. 237–38; Dep. of Terry Holmes at 109:21-25, R. 173). No genuine issue of material fact exists; Appellants unlawfully converted the funds in the account. The circuit court therefore properly granted summary judgment in favor of Jones Nissan on its conversion claim. *See Mullis*, 351 S.C. at 507, 570 S.E.2d at 551 (affirming a judgment on a conversion claim because the plaintiff identified a determinative sum improperly withheld by the defendant).

C. The circuit court properly found no genuine issue of material fact exists as to the portions of Appellants' counterclaims on which the circuit court granted summary judgment.

Appellants assert counterclaims against Jones Nissan for breach of contract and breach of the implied covenant of good faith and fair dealing. (Defendants' Answer to Am. Compl. ¶¶ 53–

62, R. 119–21). The claims are based in part on the same allegations Appellants raised in opposition to Jones Nissan's summary judgment motion: that (1) Jones Nissan misrepresented material facts concerning the market value of the dealership, (2) Plaintiff charged "an exorbitant amount of rent to THAG in exchange for its use of the dealership property," and (3) Plaintiff owned and operated a car dealership next door to THAG, in direct competition with THAG and in violation of the non-compete agreement contained within the parties contract. (*Id.*). The circuit court properly granted summary judgment in favor of Jones Nissan as to the counterclaims based on the above allegations.

Appellants bore the burden of coming forward with specific evidence supporting their allegations in response to Jones Nissan's summary judgment motion. *See Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991) ("With respect to an issue upon which the nonmoving party bears the burden of proof, this initial responsibility 'may be discharged by "showing"—that is, pointing out to the [trial] court—that there is an absence of evidence to support the nonmoving party's case. . . . Once [the] moving party carries its initial burden, [the] opposing party must, under Rule 56(e), 'do more than simply show that there is some metaphysical doubt as to the material facts" but "must come forward with 'specific facts showing that there is a *genuine issue for trial*.'" (first alteration in original)).

Appellants presented no evidence supporting any of their allegations that Jones Nissan breached either the express terms of the Asset Purchase Agreement or the implied covenant of good faith and fair dealing. In fact, Appellants never mentioned any alleged breaches by Jones Nissan until well after this litigation commenced. (Dep. of Terry Holmes at 115:5-25, R. 174). Appellants' contention that THAG performed its obligations under the Asset Purchase Agreement is contradicted by numerous admissions outlined in this brief. Moreover, Appellants have not even

sued the correct entity for their lease-based allegations. *See* (Second Am. to Asset Purchase Agr., R. 93). Consequently, the circuit court properly granted summary judgment in favor of Jones Nissan on the portions of Appellants' counterclaims that are based on the allegations recited above.

The only evidence Appellants presented in support of their counterclaims—and in opposition to Jones Nissan's summary judgment motion—is an affidavit of Terry Holmes that merely recites the counterclaim allegations in affidavit form. The affidavit was a self-serving attempt by Holmes to create a sham issue of material fact supporting the counterclaims and defenses asserted by Appellants, and the circuit court properly gave the affidavit no weight. (Sept. 19, 2023 Order at 8–10, R. 13–15).

In the affidavit, Holmes claims, among other things, that THAG and Nissan of Sumter made the required monthly payments under the promissory note until "further performance" (i.e., continuing to make the monthly payments they agreed to make and had been making for 29 months) was "frustrated and rendered impossible" by Jones Nissan's purported "non-performance/breaches." (Aff. of Holmes ¶ 4, R. 474). As the circuit court properly found, however, Jones Nissan performed all of its obligations under the agreement at issue in this case. The only obligation remaining to be performed was Appellants' obligation to continue making the agreed-upon monthly payments.

Moreover, the evidence in this case—particularly Holmes' own prior testimony and statements—contradicts the affidavit. Holmes testified in his deposition that he had fallen into dire financial straits and had been forced to sell most of his dealerships and assets ***before*** he stopped making the required payments to Plaintiff. (Dep. of Terry Holmes at 111:6–115:25, R. 173–74). In August 2019, as he admitted during his deposition, he submitted a partial payment to Plaintiff with a letter stating,

> Good Morning Mr Jones.
>
> I am forwarding a check in the amount of $2500.00. Due to the excessive debt and demands, I was forced to sell most of the dealerships and assets. I am forced to only send a portion of my payments as agreed upon. As i get my affairs in order, I intend to bring my payments back to the agreed upon amount. I appreciate your understanding in this matter, as I rectify my financial situation.
>
> Sincerely
> Terry Holmes

(Aug. 2019 Letter and Cashier's Check, R. 244; Dep. of Terry Holmes at 111:6–115:25, R. 173–74). In his deposition, Holmes admitted under oath that he prepared the letter because he "just wanted to let them know what the circumstances I was in and what my intent was." (Dep. of Terry Holmes at 111:20-25, R. 173). Specifically, his financial circumstances were "highly impaired, greatly impaired and diminished by -- I don't know -- 80, 90 percent" because he was "highly leveraged and . . . overleveraged," and as a result he had been forced to sell four dealerships he owned. (*Id.* at 112:1–113:17, R. 173–74). He also admitted that he was obligated to pay Jones Nissan more than $12,000 per month and that he intended to resume making the requirement payments if he could turn his two remaining dealerships around and "get those profitable." (*Id.* at 113:18–114:22, R. 174). Thus, he admitted in his deposition that he stopped making the required payments because he could no longer afford to make them, not because of any act or omission by Jones Nissan.

Despite these admissions, Appellants pursued baseless counterclaims and defenses against Jones Nissan. Faced with an imminent hearing on Jones Nissan's motion for summary judgment and no evidence supporting the counterclaims or defenses, Holmes recast the counterclaims in the form of an affidavit and filed it with the circuit court in an effort to manufacture issues of material "fact." The affidavit is a sham and was properly disregarded by the circuit court.

A court may disregard an affidavit for purposes of summary judgment "when it was submitted 'to contradict that party's own prior sworn statement' in 'an attempt to create a sham issue of material fact.'" *McMaster v. Dewitt*, 411 S.C. 138, 149, 767 S.E.2d 451, 456 (Ct. App. 2014) (quoting *Cothran v. Brown*, 357 S.C. 210, 218, 592 S.E.2d 629, 633 (2004)). In deciding whether to disregard an affidavit because the affidavit is a sham, courts consider six factors:

> (1) whether an explanation is offered for the statements that contradict prior sworn statements; (2) the importance to the litigation of the fact about which there is a contradiction; (3) whether the nonmovant had access to this fact prior to the previous sworn testimony; (4) the frequency and degree of variation between statements in the previous sworn testimony and statements made in the later affidavit concerning this fact; (5) whether the previous sworn testimony indicates the witness was confused at the time; (6) when, in relation to summary judgment, the second affidavit is submitted.

Id. Each of these factors is met by Holmes' affidavit.

First, Appellants offered no explanation for the statements in the affidavit that contradicted Holmes' prior sworn testimony. The affidavit merely states the contradictory "facts" as if the deposition testimony never occurred. Holmes "cannot create a conflict and resist summary judgment with an affidavit that . . . does not give a satisfactory explanation of why the testimony is changed." *Id.* at 149, 767 S.E.2d at 457 (alteration in original) (affirming a trial court's decision to disregard an affidavit because it "contains no justification" for the contradiction and "makes no reference to [the affiant's] deposition testimony at all"). Second, the contradiction is important to the outcome of this litigation. Without the affidavit, Appellants had no evidence supporting their counterclaims or defenses. *Id.* ("Under this consideration, the more important the fact contradicted by the affidavit is to the outcome of litigation, the more likely a circuit court will be justified in refusing to consider the affidavit.").

Third, Appellants had access to the purported "facts" in the affidavit—which are within Holmes' personal knowledge—years before Holmes' deposition, yet Holmes' testimony under

oath in his deposition contradicts the affidavit. Fourth, the affidavit directly contradicts Holmes' deposition testimony. *Id.* ("Because his statement in the affidavit . . . directly contradicts his deposition testimony, this consideration weighs in favor of excluding the affidavit."). Fifth, Holmes' deposition testimony is clear and provides no indication that he was confused at the time. Finally, Appellants filed the affidavit ***two days*** before the scheduled hearing on Jones Nissan's motion for summary judgment. Thus, like the affidavit this Court held was properly disregarded in *McMaster*, the "last-minute submission of the affidavit indicates" Appellants were "attempting to create an issue of fact for purposes of summary judgment." *Id.* at 151, 767 S.E.2d at 458.

The Holmes affidavit was a transparent attempt to manufacture sham "facts" to defeat summary judgment by recasting Appellants' pleadings in affidavit form. The circuit court properly disregarded the affidavit and granted Jones Nissan's motion for summary judgment.

II. Appellants' arguments as to setoff and purported discovery issues are not properly before this Court.

In addition to their arguments about whether summary judgment was warranted, Appellants argue (1) they are entitled to a setoff and (2) the circuit court should not have granted summary judgment based on purported discovery deficiencies. Neither argument is properly before this Court.

The circuit court has not ruled on Appellants' setoff arguments. In fact, in response to Appellants' Rule 59(e) motion, the circuit court expressly stated in its October 23, 2023 Form 4 order that it was ***not*** ruling on the issue: "Defendant's Motion to Reconsider the Court's order of 9-19-23 is granted insofar as the Court clarifies that the previous order makes no ruling on the issue of whether Defendants are entitled to a setoff or credit of any amounts previously tendered by Defendant Merrill Lynch." (Oct. 23, 2023 Form 4 Order, R. 18). Because the circuit court has not made any setoff ruling, the setoff issue is neither appealable nor preserved for this Court's

review. S.C. Code Ann. § 14-3-330; *Malloy v. Thompson*, 409 S.C. 557, 561, 762 S.E.2d 690, 692 (2014) ("At a minimum, issue preservation requires that an issue be raised to ***and ruled upon*** by the trial judge." (emphasis added)). The Court should dismiss Appellants' attempted appeal of any setoff issues.

Appellants' discovery-related arguments are meritless and moot. (App. Br. 8–10). First, Appellants admit that Jones Nissan responded to their discovery requests on September 13, 2023—six days ***before*** the circuit court entered its order granting summary judgment. (App. Br. 9). If any issues remained that were relevant to Jones Nissan's summary judgment motion, Appellants had plenty of time to raise those issues to the circuit court before the court entered its order. However, they did not raise any further discovery-related issues to the circuit court, either before or after the court entered its summary judgment order, other than their request that the circuit court order production of Jones Nissan's settlement agreement with Merrill Lynch, which contained a confidentiality provision and could not be produced by Jones Nissan without a court order.[4] *See generally* (Motion to Reconsider, R. 476–78). Jones Nissan produced that settlement agreement once ordered to do so by the circuit court. Because Jones Nissan responded to Appellants' discovery requests in full before the circuit court granted summary judgment, Appellants' discovery-related arguments are moot.[5] *See Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 26, 630

[4] The settlement agreement is relevant only to Appellants' setoff argument, which has not been ruled upon by the circuit court and therefore is not before this Court. Regardless, Jones Nissan was precluded from voluntarily producing the settlement agreement based on a confidentiality provision in the agreement, but it has since produced the agreement to Appellants pursuant to a circuit court order.

[5] Although not relevant to the issues on appeal, Jones Nissan disputes Appellants' characterization of the discovery process. Jones Nissan was forced to file ***seven*** motions to compel to obtain information from Appellants during three years of discovery. Appellants filed ***one*** motion to compel, and Jones Nissan produced the requested information before the circuit court entered its summary judgment order. (App. Br. 8–10). Jones Nissan raises this point only to refute

S.E.2d 474, 477 (2006) ("If there is no actual controversy, this Court will not decide moot or academic questions.").

Regardless, Appellants cannot show that summary judgment was premature. As they acknowledge in their brief, they bear the burden to show that the amount of time allotted for discovery was insufficient and that further discovery would uncover additional relevant evidence and create a genuine issue of material fact. (App. Br. 9); *Guinan v. Tenet Healthsystems of Hilton Head, Inc.*, 383 S.C. 48, 54–55, 677 S.E.2d 32, 36 (Ct. App. 2009). They do not even attempt to meet their burden. Rather, they recite the text of four discovery requests while simultaneously acknowledging they received Jones Nissan's discovery responses ***before*** the circuit court issued its summary judgment ruling. (App. Br. 9–10). Discovery in this case had been ongoing for more than three years when the circuit court granted summary judgment. Appellants had ample time to participate in the discovery process and cannot explain why additional time would uncover information they could not have uncovered during the previous three years, nor can they explain how further discovery would create a genuine issue of material fact as to their undisputed failure to comply with their contractual obligations. Their discovery-related arguments are meritless.

CONCLUSION

Each of Appellants' arguments is either meritless, not before the Court, or both. No genuine issue of material fact exists as to Jones Nissan's breach of contract and conversion claims nor as to Appellants' corresponding counterclaims, and Appellants cite no evidence establishing any genuine issues. This Court should affirm the summary judgment.

Appellants' implication that they cooperated in discovery throughout this case while Jones Nissan refused. In fact, the opposite is true.

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July 30, 2024

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Kristi F. Curtis, Circuit Court Judge

Appellate Case No. 2023-001829

Jones Nissan, Inc., Respondent,

v.

THAG, LLC; Nissan of Sumter, LLC; Terry L. Holmes; and Merrill Lynch, Pierce, Fenner & Smith, Incorporated, Defendants,

Of which THAG, LLC and Nissan of Sumter, LLC, are the Appellants.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

(signature page attached)

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