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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Bentley D. Price
Circuit Court Judge

Appellate Case No. 2023-000029

James R. Brady, Respondent,

v.

Hilton Head Homes at Allenwood, LLC,
Village Square Development Company LLC
Lancaster Redevelopment Corp., and
Gary L. Grossman, Appellants.

FINAL BRIEF OF RESPONDENT

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JAMES R. BRADY

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STATEMENT OF THE CASE

This appeal arises from a two-day trial in Beaufort County, wherein the jury returned a unanimous verdict in favor of Plaintiff James Rod Brady (hereinafter, "Respondent" or "Mr. Brady") on two separate and distinct causes of action: Breach of Contract and Conversion. The jury found that Appellant Gary L. Grossman (hereinafter, "Mr. Grossman" or "Appellant"), (a) breached a contract with Mr. Brady, and (b) converted property belonging to Mr. Brady (payments owed to Mr. Brady). (Verdict Form, R. pp. 9-10). The jury also found that Appellant's breach of contract caused Mr. Brady $711,027.00 in damages and that his conversion of property had caused Mr. Brady an equivalent amount in damages. (Verdict Form, R. pp. 9-10).

The central issue in this appeal is whether the Circuit Court properly denied Appellant's Motions for Directed Verdict and Judgment Notwithstanding the Verdict (JNOV). Appellant's Brief presents two arguments wherein he attempts to challenge the jury's unanimous verdict as to Breach of Contract, purporting that "Defendant Gary Grossman had no agreement with Plaintiff," and that the Statute of Frauds somehow barred enforcement of Appellant's express written agreement to compensate Mr. Brady for work which Appellant admitted Mr. Brady performed and was later not paid for. (App. Brief, at p. 12 and 15). As set forth below, Appellant's arguments are without merit and run in direct contravention to the record, his own prior statements, and the law of the case.

However, even without addressing these arguments, the Circuit Court must be affirmed because Appellant has failed to appeal the jury's verdict as to the Conversion cause of action. Specifically, Appellant's Brief does not make a single argument nor cite a single case challenging the jury's unanimous verdict that Mr. Grossman converted property belonging to Mr.

Brady, causing Mr. Brady $711,027.00 in damages. "Failure to argue is an abandonment of the issue and precludes consideration on appeal." *Biales v. Young*, 315 S.C. 166, 168, 432 S.E.2d 482, 484 (1993). "Under the two[-]issue rule, whe[n] 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 the law of the case." *Skywaves I Corp. v. Branch Banking & Trust Co.*, 814 S.E.2d 643 (Ct. App. 2018) (citations omitted). "[W]hen a jury's general verdict is supportable by more than one cause of action submitted to it, the appellate court will affirm unless the appellant appeals *all* causes of action." *Anderson v. South Carolina Dept. of Highways and Public Transp.,* 472 S.E.2d 253, 322 S.C. 417 (S.C. 1996). [Emphasis added].

In the instant case, Appellant failed to appeal the jury's verdict on Mr. Brady's Conversion cause of action. The terms "conversion" or "converted" do not even appear under a single argument set forth in Appellant's Brief. This alone is sufficient grounds to affirm the Circuit Court's orders and uphold the jury's unanimous verdict awarding Mr. Brady equivalent damages under two separate theories of liability.

Factual Background

This lawsuit involves a claim for payment. (Summons and Complaint, R. pp. 182-188). On February 2, 2004, Appellant Gary L. Grossman, in his individual capacity, sent Mr. Brady a written proposal to work together in developing townhomes and single-family residences in the Allenwood neighborhood of Hilton Head Island. (Pl., Exh. 1, 2/2/04 Letter of Agreement, R. pp. 653-655; Trial Tr., Vol. I, R. pp. 411:20 – 420:23). The letter was sent to Mr. Brady on Mr. Grossman's personal letterhead, with Mr. Grossman's name and home address listed at the top. (R. p. 653; p. 413:19-24; p. 220:1-4). Mr. Grossman testified he could have chosen to write the letter on company letterhead had he wanted to, but did not. (R. pp. 230:23-231:8). Mr.

Grossman's name appeared in the signature block without qualification indicating he was acting on behalf of a business. (R. at p. 655; R. p. 415:4-10).

The purpose of the letter was to establish business dealings between the two men as to the Allenwood project. (Letter of Agreement, R. pp. 653-655; pp. 413:25-414:2; p. 222:2-8 and 12-23; p. 224:1-7). As Mr. Brady testified, "He [Mr. Grossman] created this and I performed on it." (R. pp. 413:25-414:2). Mr. Brady agreed to the terms proposed by Mr. Grossman, wherein Mr. Brady was to provide construction, marketing, and real estate sales services in connection with the residential development. (Letter of Agreement, R. pp. 653-655; pp. 413:25-414:2; pp. 415:11-416:24; pp. 417:19-420:23; pp. 228:12-229:7). In exchange, Mr. Grossman was to pay Mr. Brady for those services and to share the profits made after the residential units were sold to the public. (Letter of Agreement, R. pp. 653-655; pp. 417:19-420:23; pp. 222:12-23; p. 224:1-7).

The subject project commenced and continued for approximately three years. During that time, Mr. Brady oversaw the construction and sale of forty-four homes in the Allenwood development. (R. p. 418:5-13; Pl. Exh. 2, Ginger Griffith letter, at R. p. 586). His work was undoubtedly successful. (R. at Ibid.) The LLCs made net profits from these sales, after deducting all expenses, and the money from the sales went into bank accounts that Mr. Grossman controlled. (Pl. Exh. 2, Ginger Griffith letter, R. pp. 584-587; pp. 426:19-427:9; 430:10-431:4). Mr. Brady was paid some money for this work and the profits made therefrom. (Pl. Exh. 2, Ginger Griffith letter, R. pp. 584-587). Then Mr. Grossman began to fail making payments to Mr. Brady. (R. p. 423:5-18).

In the fall of 2007, Mr. Brady requested an accounting from Defendants as to the amount they owed him. Mr. Grossman's treasurer and staff accountant, Ms. Ginger L. Griffith, replied to Brady's request by writing a letter to him dated September 13, 2007. (Pl. Exh. 2, R. pp. 584-587;

pp. 423:19-431:4; Griffith *De Bene Esse* Depo, R. pp. 538:19-539:1; pp. 545:14-546:14). In the letter, Ms. Griffith admitted that pursuant to the February 2, 2004 letter of agreement, Mr. Brady was owed $711,027 for profit sharing and for construction, marketing, and sales services. (R. at Ibid.). However, the letter stated that Defendants could not pay this money right away because they were suffering business losses on other projects that had nothing to do with Mr. Brady. (R. at p. 587; Griffith Depo, R. pp. 539:9-19; pp. 539:24-544:22).

On September 15, 2007, Mr. Grossman sent an email to Mr. Brady, copying Ms. Griffith, wherein he expressly acknowledged that Mr. Brady was owed $711,027 for profit sharing and for construction, marketing, and sales services he had performed pursuant to the February 2, 2004 letter of agreement, stating, "Hi Rod, I finally got a chance to look at Ginger's Sept 13 letter and the worksheets. It looks to me like she has accurately accounted for the various forms of compensation **as laid out in our Feb 2, 2004 letter of agreement**." (Emphasis added) (Pl. Exh. 3, 9/15/07 Email from Grossman to Brady, R. p. 583; pp. 431:23-434:21).

At trial, Mr. Grossman admitted that his February 15, 2007 email—which directly references the February 2, 2004 Letter of Agreement—makes no mention or reference to "operating agreements" or "assignments". (R. pp. 242:13-17, 243:1-11). Mr. Grossman also acknowledged that in addition to his own email, Ms. Griffith's September 13, 2007 letter makes six separate and distinct references to the "February 2, 2004 letter of Agreement" and contains zero references to the terms "operating agreement" or "assignment"). (R. pp. 232:18-233:15; p. 236:22-23; 292:24-293:3; pp. 584-587).

Additionally, despite his later attempts to argue that the February 2, 2004 letter of agreement was superseded by operating agreements and assignments, Mr. Grossman admitted that neither the operating agreements nor assignments addressed payments to Mr. Brady for

construction management, sales, and marketing—the very subject matter of the February 2, 2004 Letter of Agreement, and the basis of the instant lawsuit:

> Q. All right. So you're free to have as much time as you need to to look, but these operating agreements don't say anything about who is going to get paid for managing construction, do they?
>
> A. No, it doesn't.
>
> Q. And these operating agreements do not say anything about who is going to get paid, or do the sales and marketing for Allenwood, do they?
>
> A. No, it doesn't.
>
> Q. And these operating agreements -- take time to look if you need this--to—to look for this too, but these operating agreements do not contain the phrase incentive management fee anywhere in there, do they?
>
> A. They do not.
>
> (Trial Tr., Vol II, R. pp. 297:16-298:5)
>
> Q. And, in fact, these assignments don't even mention construction management or sales, do they?
>
> A. Not on the assignments.
>
> Q. These assignments do not contain the phrase incentive management fee anywhere in them, do they?
>
> A. They do not.
>
> (Trial Tr., Vol II, R. pp. 289:22-290:2)
>
> Q. Okay. So construction management, sales, incentive management fees, they're not the subject of this assignment, are they?
>
> A. I don't have an answer to that. It's -- it -- it admits -- it admits people to a limited liability company.
>
> (Trial Tr., Vol II, R. p. 291:12-17)

At trial, Mr. Grossman also begrudgingly admitted that under the February 2, 2004 Letter of Agreement, Mr. Grossman would, *in his individual capacity*, derive a benefit from the transaction with Mr. Brady in the form of interest paid to him, 500 points equaling 15% annum. (Letter of Agreement at R. p. 585; p. 222:2-23). Ms. Griffith confirmed the same during her testimony. (Griffith *De Bene Esse* Depo, R. pp. 525:9-25; 537:18-539:1). Additionally, Mr. Grossman admitted that the $711,027 figure set forth in Ms. Griffith's email and his September 15, 2007 email were accurate, and stipulated—in open court—that Mr. Brady was owed that exact amount of money for the work Mr. Brady performed. (R. p. 241:12-23; p. 298:13-15).

After receiving the September 13, 2007 letter from Ginger L. Griffith, Mr. Brady contacted an independent accountant T. Gardiner Brower to verify Ms. Griffith's calculations. (R. pp. 434:18-435:21). Mr. Brower determined that Defendants owed Mr. Brady $724,114, an amount slightly higher than what Defendants alleged was owed to Brady. (Pl. Exh. 4, R. p. 566) However, Mr. Brower passed away before the trial. (R. p. 437:4-5). Accordingly, for purposes of simplicity, Mr. Brady testified at trial that he was willing to stipulate that his actual damages in this matter were $711,027.00 (the figure Mr. Grossman and Ms. Griffith testified was owed to him) instead of the higher amount that Mr. Brower calculated. (R. p. 439:8-12).

Mr. Grossman refused to pay Mr. Brady this amount owed, and, as a result, Mr. Brady stopped working on the project and demanded payment. (R. pp. 439:18-441:14). The financial loss caused by Mr. Grossman's refusal to pay Mr. Brady his fees were personally and financially devastating for Mr. Brady and his family, resulting in loss of income, ruined credit, foreclosure, and loss of his family home. (R. pp. 441:15-442:24).

Procedural History

On June 5, 2009, Mr. Brady timely filed a lawsuit seeking payment of moneys owed to him, asserting claims for breach of contract, conversion, and *quantum meruit*. (2009 and 2015 Summons and Complaint, R. at p. 200 and p. 182, respectively).[1] In Response to Mr. Brady's lawsuit, Defendants filed counterclaims against him for breach of contract and unjust enrichment, seeking damages "in excess of $600,000." (2009 and 2015 Answer and Counterclaim, R. at p. 199 and p.172, respectively; R. pp. 247:13-248:8). This case then stalled for several years while Defendants were involved with several other federal lawsuits that impeded their ability to pay the claim. The parties then mediated this case in January 2017. At mediation, the parties entered into a provisional settlement agreement. However, Defendants never signed the settlement documents. As a result, Mr. Brady then filed a motion to place this case back on track.

The instant case was previously rostered for a jury trial on February 11, 2019. Judge Mark Hayes summarily dismissed the Defendants' counterclaims one business day before the trial was scheduled to go forward. (2/18/19 Order, R. pp. 18-20). Defendants immediately appealed that ruling, and as a result, avoided the jury trial at that time.

On March 9, 2022, the Court of Appeals affirmed Judge Hayes' order dismissing the counterclaims brought against Mr. Brady. (R. p. 248:9-22). That unpublished Court of Appeals opinion constitutes the law of this case.[2] It states:

> Griffith's testimony and the 2007 Letter show that Appellants owe Brady $711,027. Griffith admitted during her deposition that the total amount due to Brady was the $711,027 listed in the 2007 Letter, that the letter accounted for all debts Brady owed to

[1] Pursuant to Rule 40(j), SCRCP, the original case was dismissed and subsequently restored.
[2] Rule 268(d)(2), SCACR, states, "unpublished orders have no precedential value and should not be cited *except in proceedings in which they are directly involved*." [Emphasis added].

> Appellants for third-party contractors' fees, and that the total figure owed to Brady was based on duties he had already performed under the 2004 Agreement.
>
> *Brady v. Grossman*, S.C. Ct. App. Opinion No. 2022-UP-105. [Emphasis added] (R. pp. 12-14)

The term "Griffith's testimony" in the above quoted portion of the appellate opinion refers to the same deposition *de bene esse* of Ginger Griffith played in video format during the instant trial. (Griffith Depo, R. pp. 511-565).

Following remand of the case, a two-day jury trial was held in Beaufort County, South Carolina from August 29, 2022 to August 30, 2022 before the Honorable Bentley D. Price. On the first day of trial, Mr. Brady's counsel moved to have Defendants Hilton Head Homes at Allenwood, LLC, Village Square Development Company LLC, and Lancaster Redevelopment Corp. dismissed from the lawsuit pursuant to Rule 41(a)(2), SCRCP (Motion, R. pp. 47-48; R. pp. 367:4-383:19). Mr. Brady previously sent the aforementioned business defendants a stipulation of dismissal, which they curiously refused to sign despite the obvious benefit to them. (R. p. 367:13-19). Mr. Grossman, through his counsel—who also represented the business entities—opposed the motion to dismiss. (R. p. 369:6-8). Mr. Grossman now wished to place blame on largely defunct business entities, excuse himself from liability, and leave Mr. Brady holding the proverbial bag after Mr. Grossman had used proceeds from these transactions for his own personal gain and benefit. (R. pp. 47-48; pp 367:4-383:19; p. 222:2-23; p. 525:9-25; p. 537:18-539:1).

After hearing arguments from the parties, the Court granted Mr. Brady's motion to dismiss the business defendants noting, "The plaintiff can sue whoever they want for whatever they want. That's their decision. They can dismiss parties, causes of action, whatever they'd like to do at any time. It's their case and their case to try." (R. pp. 384:25-385:5). The case then

proceeded to trial, wherein the jury heard testimony from Mr. Brady, Ms. Griffith, and Mr. Grossman, and reviewed the various agreements and communications between the parties.

After resting his case as the Defendant, Appellant then moved to Amend his pleadings to add the affirmative defense of the Statute of Frauds and for a directed verdict on Mr. Brady's claims for Breach of Contract, Quantum Meruit, and Conversion. (R. pp. 305:6-307:20; 308:5-310:2). Having considered the parties' respective arguments, the Court denied Appellant's motions. (R. pp. 310:22-311:18).

After considering testimony from Ms. Griffith, Mr. Brady, and Mr. Grossman, and weighing the evidence at trial, including the operating agreements and assignments submitted by Mr. Grossman, the jury unanimously found that Mr. Grossman had (a) breached a contract with Mr. Brady, and (b) converted property belonging to Mr. Brady. (Verdict Form, R. pp. 9-10). The jury also unanimously found that Mr. Brady suffered damages under two separate and distinct theories of liability, specifically finding that Appellant's breach of contract caused Mr. Brady $711,027.00 in damages and that his conversion of property (payments owed to Mr. Brady) had caused Mr. Brady an equivalent amount in damages. (Verdict Form, R. pp. 9-10; Judgment, R. pp. 7-8).

Following the unanimous jury verdicts, Mr. Grossman moved for a judgment notwithstanding the verdict (JNOV), filing a Motion on September 7, 2022. (R. pp. 44-46). On October 31, 2022, Mr. Brady filed his Memorandum in Opposition. (R. pp. 31-43).

A hearing on Appellant's post-trial motion was held on November 2, 2022. (H'rg Tr., R. pp. 485-491). On January 13, 2023, the court entered an Order denying Appellant's Motion for Judgment Notwithstanding the Verdict. (Order, R. pp. 1-6). This appeal follows.

STANDARD OF REVIEW

"When reviewing the denial of a motion for directed verdict or JNOV, this Court applies the same standard as the trial court." *Fettler v. Gentner*, 396 S.C. 461, 466, 722 S.E.2d 26, 29 (Ct. App. 2012) (quoting *Gibson v. Bank of America, N.A.*, 383 S.C. 399, 405, 680 S.E.2d 778, 781 (Ct. App. 2009)). "The Court is required to view the evidence and inferences that reasonably can be drawn from the evidence in the light most favorable to the non-moving party." *Id*. at 466, 722 S.E.2d at 29 (quoting *Gibson*, 383 S.C. at 405, 680 S.E.2d at 781). "The appellate court will reverse the trial court's ruling on a [directed verdict] motion only when there is no evidence to support the ruling or where the ruling is controlled by an error of law." *Zinn v. CFI Sales & Mktg., Ltd*., 415 S.C. 93, 108-09, 780 S.E.2d 611, 619 (Ct. App. 2015) (quoting *Law v. S.C. Dept. of Corrections*, 368 S.C. 424, 434–35, 629 S.E.2d 642, 648 (2006)). "The motion should be denied if the evidence yields more than one inference or if its inferences are in doubt." *Moore v. Levitre*, 294 S.C. 453, 454, 365 S.E.2d 730 (S.C. 1988)

ARGUMENT

I. The Circuit Court did not err in denying Appellant's Motions for a Directed Verdict and Judgment Notwithstanding the Verdict (JNOV).

A. The subject Assignments do not supersede Appellant's February 2, 2004 Letter of Agreement. They have no effect on the subject-matter of this litigation.

After weighing the evidence presented at trial, the jury properly determined that Appellant was contractually obligated to compensate Mr. Brady for work Appellant admits Mr. Brady performed and was not paid for. Both Mr. Grossman and Ms. Griffith stated—in writing and at trial—that Mr. Brady was owed $711,027.00 as a result of the terms set forth under the

February 2, 2004 Letter of Agreement.[3] (Pl. Exh. 3, 9/15/07 Email from Grossman to Brady, R. p. 583; R. p. 241:12-23; p. 298:13-15; Pl. Exh. 2, p. 584-587; Griffith Depo, pp. 538:19-539:1; pp. 545:14-546:14). As late as September 15, 2007, Mr. Grossman acknowledged that Mr. Brady was owed this exact amount for the construction management, marketing, and sales services Mr. Brady performed pursuant to the February 2, 2004 letter of agreement, writing, "Hi Rod, I finally got a chance to look at Ginger's Sept 13 letter and the worksheets. It looks to me like she has accurately accounted for the various forms of compensation as laid out in our Feb 2, 2004 letter of agreement." (Emphasis added) (Pl. Exh. 3, 9/15/07 Email from Grossman to Brady, R. p. 583; pp. 431:23-434:21).

It was only after the filing of this lawsuit that Mr. Grossman changed his position, asking the Circuit Court, and now this Court to misconstrue certain Assignments of membership interests in an attempt to avoid compensating Mr. Brady from work Mr. Brady performed and from which Mr. Grossman personally profited. (Letter of Agreement, at R. p. 654; p. 222:2-23; Griffith *De Bene Esse* Depo, R. p. 525:9-25; pp. 537:18-539:1). Specifically, Mr. Grossman now argues that the "Entire Agreement" clause contained in the Assignments acts to supersede the February 2, 2004 Letter of Agreement. (App. Brief, p. 12). Mr. Grossman's arguments are without merit. First, as noted above, Mr. Grossman expressly acknowledged that Mr. Brady was due compensation under the February 2, 2004 Letter of Agreement in his September 15, 2007 correspondence with Mr. Brady and Ms. Griffith. (Pl. Exh. 3, Grossman Email, R. p. 583). He also acknowledged Mr. Brady was owed this amount during trial. (R. p. 241:12-23; p. 298:13-15). The Assignments, which Mr. Grossman now wishes to rely upon, were notably entered in

[3] The term "February 2, 2004 Letter of Agreement" was precisely the language used by both Ms. Griffith and Mr. Grossman" in their correspondence to Mr. Brady before a lawsuit was filed. (Pl. Exh. 2, R. pp. 584-587; and Exh. 3, R. at p. 583).

2004. If the parties truly believed that the 2004 Letter of Agreement was superseded by the Assignments, Ms. Griffith and Mr. Grossman would not have referenced the Letter of Agreement or the services and forms of compensation addressed therein in their 2007 communications with Mr. Brady. Minimally, there was evidence from which the jury could have drawn a reasonable inference that a contract existed between Mr. Brady and Mr. Grossman.

Second, as Mr. Grossman was forced to acknowledge at trial, neither the Operating Agreements nor the Assignments address the subject matter of the 2004 Letter of Agreement and instant lawsuit—payments to Mr. Brady for the construction management, marketing, and sales services Mr. Brady performed, and from which Mr. Grossman derived a personal benefit. (R. pp. 297:16-298:5; pp. 289:22-290:2; pp. 291:12-17; p. 222:2-23; Griffith *De Bene Esse* Depo, R. p. 525:9-25; pp. 537:18-539:1). The Entire Agreement clauses cited by Appellant specifically limit themselves to the subject matter *of the Assignments* (i.e the purchase and sale of membership interests), stating, "This assignment constitutes the entire agreement between the parties pertaining to its subject matter […]." (Assignments, R. p. 644, para 9.5; p. 650, para 9.5). While the Assignments might address the purchase and sale of membership interests, they do not in any way address the services performed by Mr. Brady and corresponding forms of compensation addressed in the 2004 Letter of Agreement. In fact, the terms "Construction Management Fee," "Sales and Marketing Fees," "Incentive Management Fees," and "500 Basis points to Gary Grossman, individually," do not appear anywhere in the Assignments. These terms, which are at the heart of the 2004 Letter of Agreement, clearly fall outside the scope and subject matter of the Assignments. Thus, the 2004 Letter of Agreement cannot be superseded by them.

Third, Mr. Grossman is not even a party to the Assignments because he did not sign the Assignments in his individual capacity. (Assignments, R. pp. 645 and 651; Trial Tr., pp. 289:22-290:2). Accordingly, Mr. Grossman cannot rely on them to supersede an earlier agreement between Mr. Brady and himself, absolving himself from his obligation to compensate Mr. Brady for work that Mr. Brady performed, and from which Mr. Grossman derived a personal financial benefit.

B. The Circuit Court correctly determined that the Statute of Frauds was not applicable in the present case and did not bar Respondent's claim for breach of contract.

Appellant's Statute of Frauds argument fails for multiple reasons, each of which is sufficient in and of itself to render the defense inapplicable to the instant matter.

1. The Statute of Frauds is an affirmative defense that must be pled, which Appellant failed to do.

In the instant case, Appellant failed to plead the Statute of Frauds as an affirmative defense in his Answer as required under Rule 8(c), SCRCP. (Answer, R. pp. 172-180). Rule 8(c), SCRCP, states:

> **(c) Affirmative Defenses; Reply.** In pleading to a preceding pleading, a party **shall** set forth affirmatively the defenses: accord and satisfaction, […] statute of frauds […] and any other matter constituting an avoidance or affirmative defense.
>
> [Emphasis added]

Having failed to plead the Statute of Frauds defense in his Answer, Appellant moved to amend his Answer pursuant to Rule 15(b), SCRCP, but waited until after both the Plaintiff and Defendant had rested their case to do so. (R. p. 303:9-11; p. 303:20-25; p. 305:3-18). A defendant cannot wait until after both parties have rested to amend his Answer, because such amendment would clearly prejudice the Plaintiff who then lacks the opportunity to refute it.

> A motion to amend is addressed to the sound discretion of the trial judge. Stanley v. Kirkpatrick, 357 S.C. 169, 592 S.E.2d 296 (2004); City of North Myrtle Beach v. Lewis-Davis, 360 S.C. 225, 599 S.E.2d 462 (Ct.App.2004). Leave to amend pleadings pursuant to Rule 15, SCRCP, shall be liberally and freely given when justice so requires and does not prejudice any other party. Crestwood Golf Club, Inc. v. Potter, 328 S.C. 201, 493 S.E.2d 826 (1997); Pruitt v. Bowers, 330 S.C. 483, 499 S.E.2d 250 (Ct.App.1998). The prejudice Rule 15 envisions is a lack of notice that the new issue is going to be tried, and a lack of opportunity to refute it. Tanner v. Florence County Treasurer, 336 S.C. 552, 521 S.E.2d 153 (1999); Lewis-Davis, 360 S.C. at 232, 599 S.E.2d at 465.
>
> *Parker v. Spartanburg Sanitary Sewer Dist*., 362 S.C. 276, 286, 607 S.E.2d 711 (Ct. App. 2005) [Emphasis added]

In the instant case, the timing of Appellant's motion deprived Mr. Brady of sufficient notice and opportunity to refute the newly-raised defense, which Appellant clearly waived by not pleading as an affirmative defense in the first place. "The statute of frauds is an affirmative defense that must be set forth in the responsive pleading of the party seeking its protection." *Shirey v. Bishop*, 431 S.C. 412, 423, 848 S.E.2d 325, 331 (Ct. App. 2020). "[T]he party seeking the protection of the statute of frauds must plead it." *Am. Wholesale Corp. v. Mauldin*, 122 S.E. 576, 128 S.C. 241 (1924).

Contrary to Appellant's contention, the Circuit Court exercised its sound discretion in denying Appellant's ill-timed motion to amend its Answer. Respondents could have moved to amend their pleadings at any time since this action was initially filed in 2009, and later restored in 2015, but chose not to do so. Appellant clearly waived the Statute of Frauds defense by not pleading it as an affirmative defense and waiting until after both parties had rested their case to move for an amendment. It is impossible for Plaintiff to refute such a defense after both sides have rested their case. Accordingly, Respondent respectfully submits this Honorable Court should affirm the Circuit Court's denial of Appellant's Motion to Amend and uphold the jury's unanimous verdict.

2. Appellant's Statute of Frauds defense is barred by the Doctrine of Promissory Estoppel.

Appellants Statute of Frauds argument is undermined by the Doctrine of Promissory Estoppel. The elements of promissory estoppel are: (1) presence of a promise unambiguous in its terms; (2) reasonable reliance upon the promise by the party to whom the promise is made; (3) the reliance is expected and foreseeable by the party who makes the promise; and (4) the party to whom the promise is made must sustain injury in reliance on the promise. *Rushing v. McKinney,* 370 S.C. 280, 295, 633 S.E.2d 917, 925 (Ct. App. 2006) (emphasis omitted).

All four elements for promissory estoppel are clearly established in the present case. First, both Ms. Griffith's September 13, 2007 Letter of Accounting and Mr. Grossmann's September 15, 2007 email to Mr. Brady establish there is no ambiguity as to the terms set forth in the February 2, 2004 Letter of Agreement. (Letter of Accounting, R. pp. 584-587; Grossman Email, p. 583; Letter of Agreement, pp. 653-655). Specifically, Ms. Griffith admitted that Mr. Brady was owed $711,027 for profit sharing and for construction, marketing, and sales services that he performed. (Pl. Exh. 2, Letter of Accounting, R. at p. 586; Griffith Depo, p. 538:19-539:1; 545:14-546:14). Mr. Grossman's September 15, 2007 email to Mr. Brady expressly acknowledges that Mr. Brady was owed $711,027 for services Mr. Brady had performed, stating, "Hi Rod, I finally got a chance to look at Ginger's Sept 13 letter and the worksheets. It looks to me like she has accurately accounted for the various forms of compensation as laid out in our Feb 2, 2004 letter of agreement." (Emphasis added) (Pl. Exh. 3, 9/15/07 Email from Grossman to Brady, R. p. 583; pp. 431:23-434:21). At trial, Mr. Grossman admitted that the $711,027 figure set forth in Ms. Griffith's email and his September 15, 2007 email were accurate, and

stipulated—in open court—that Mr. Brady was owed that exact amount of money for the work Mr. Brady performed. (R. p. 241:12-23; p. 298:13-15). Ms. Griffith confirmed the same in her testimony. (Griffith Depo, R. pp. 538:19-539:1; pp. 545:14-546:14).

Second, the evidence presented at trial clearly establishes that Mr. Brady relied upon the promises made to him in the February 2, 2004 Letter of Agreement, forgoing other business opportunities in the process. (R. pp. 419:19-420:1). As Mr. Brady testified, "He [Mr. Grossman] created this and I performed on it." (R. pp. 413:25-414:2). Mr. Brady testified that he performed the work called for under the agreement, which included construction management, marketing, and sales. (R. pp. 418:8-421:4). Additionally, Ms. Griffith's Letter of Accounting, Mr. Grossman's September 15, 2007 correspondence, and their respective trial testimonies establish that Mr. Brady performed the work he promised to do, and was owed $711,027 as a result of the services he provided. (Pl. Exh. 2, Letter of Accounting, R. at p. 586; Griffith Depo, p. 538:19-539:1; 545:14-546:14; Exh. 3, 9/15/07 Email from Grossman to Brady, R. p. 583; pp. 241:12-23; p. 298:13-15).

Third, Mr. Brady's reliance was expected and foreseeable by Mr. Grossman, who himself derived a personal financial benefit from the transaction in the form of interest paid to him, 500 points equaling 15% annum. (Letter of Agreement at R. p. 654; p. 222:2-23; Griffith *De Bene Esse* Depo, p. 525:9-25; pp. 537:18-539:1). It was expected and foreseeable that Mr. Brady would carry out his construction management, marketing, and sales services and expect compensation in return.

Fourth, the evidence clearly demonstrates that Mr. Brady sustained injury in reliance on the promise, giving up other opportunities to focus on the Allenwood project. (R. p. 419:19-420:1). The financial loss caused by Mr. Grossman's refusal to pay Mr. Brady his fees were

personally and financially devastating for Mr. Brady and his family, resulting in loss of income, ruined credit, foreclosure, and loss of his family home. (R. pp. 441:15-442:24).

3. Appellant's Statute of Frauds defense is barred by the Doctrine of Equitable Estoppel.

"[T]he doctrine of estoppel may be invoked to prevent a party from asserting the statute of frauds." *Collins Music Co. v. Cook*, 281 S.C. 580, 583, 316 S.E.2d 418, 420 (Ct. App. 1984) (citing *Florence Printing Co. v. Parnell*, 178 S.C. 119, 127, 182 S.E. 313, 316 (1935)). The party asserting estoppel "must show that he has suffered a definite, substantial, detrimental change of position in reliance on the contract, and that no remedy except enforcement of the bargain is adequate to restore his former position." Id. "It is not sufficient to show merely that he has lost an expected benefit under the contract." Id.

In the present case, it is undisputable that Mr. Brady suffered a definite, substantial, detrimental change of position in reliance of Mr. Grossman's agreement to compensate him for services performed. As set forth above, the evidence clearly demonstrates that Mr. Brady sustained injury in reliance of Mr. Grossman's promises, giving up other opportunities to focus on the Allenwood project. (R. pp. 419:19-420:1). As set forth above, the financial loss caused by Mr. Grossman's refusal to pay Mr. Brady his fees were devastating, resulting in loss of income, ruined credit, foreclosure, and loss of Mr. Brady's family home. (R. pp. 441:15-442:24).

Additionally, there is no remedy other than enforcement of the bargain that would adequately restore Mr. Brady to his former position. The work is done. The money is owed. The damages are real. There is no remedy short of receiving compensation for the work that has been performed that would restore Mr. Brady to his former position. Accordingly, this Court should affirm the Circuit Court, uphold the jury's unanimous verdict, and hold Mr. Grossman

accountable for work that Mr. Brady performed, and from which Mr. Grossman derived a personal financial benefit.

4. Respondent satisfied the Statute of Frauds by showing an agreement, in writing, that is digitally signed by Appellant, and who later subsequently acknowledged its terms.

"In order to satisfy the statute of frauds, there must be a writing signed by the party against whom enforcement is sought, and 'the writings must establish the essential terms of the contract without resort to parol evidence.'" *Springob v. Univ. of S.C.* , 407 S.C. 490, 757 S.E.2d 384 (2014) (citations omitted.), "However, '[u]nder the statute of frauds, the form of the writing is not material, and may be shown entirely by written correspondence....' *Id*., *citing Barr v. Lyle*, 211 S.E.2d 232, 234, 263 S.C. 426, 430 (1975). Additionally, a party's electronic signature has the same legal effect as wet signature. See See S.C. Code § 26-6-70(d), titled, Legality of electronic contracts, records, and signatures, stating, "An electronic signature satisfies a law requiring a signature."

Here, we have a Letter of Agreement, dated February 2, 2004, authored by Mr. Grossman, signed with an electronically typed signature, setting forth the agreement of the parties. (Pl. Exh. 1, Plaintiff's Letter of Agreement, R. pp. 653-655). Moreover, both Ms. Griffith and Mr. Grossman established the clear and unambiguous terms of the Letter of Agreement by way of their September 2007 correspondence to Mr. Brady, acknowledging that Mr. Brady was owed $711,027.00 pursuant to the very terms of the "February 2, 2004 letter of agreement." (Pl. Exh. 2, Griffith Letter, R. at p. 586; Pl, Exh. 3, Grossman email to Brady, R. p. 583). Additionally, both Ms. Griffith and Mr. Grossman testified that Mr. Brady was owed $711,027.00 for service he provided pursuant to the Letter of Agreement. (Griffith Depo, p. 538:19-539:1; pp. 545:14-546:14; p. 241:12-23; p. 298:13-15). Accordingly, even if this Court

were to find that the statute of frauds was applicable to the present case, Mr. Brady would still prevail because he meets the requirements.

II. Additional Sustaining Grounds Exist for Affirming the Jury's Unanimous Verdict.

A. The Circuit Court must be affirmed because Appellant failed to appeal the jury's verdict as to the Conversion cause of action. This is now the unappealed law of the case.

The jury granted a unanimous verdict in favor of Mr. Brady on two separate and distinct causes of action: Breach of Contract and Conversion. Appellant's Brief does not address the Conversion verdict. Specifically, Appellant's Brief does not make a single argument nor cite a single case challenging the jury's unanimous verdict that Mr. Grossman converted property belonging to Mr. Brady, causing Mr. Brady $711,027.00 in damages. "Failure to argue is an abandonment of the issue and precludes consideration on appeal." *Biales v. Young*, 315 S.C. 166, 168, 432 S.E.2d 482, 484 (1993). "Under the two[-]issue rule, whe[n] 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 the law of the case." *Skywaves I Corp. v. Branch Banking & Trust Co.*, 814 S.E.2d 643 (Ct. App. 2018) (citations omitted). "[W]hen a jury's general verdict is supportable by more than one cause of action submitted to it, the appellate court will affirm unless the appellant appeals *all* causes of action." *Anderson v. South Carolina Dept. of Highways and Public Transp.,* 472 S.E.2d 253, 322 S.C. 417 (S.C. 1996). [Emphasis added].

In the instant case, Appellant failed to appeal the jury's verdict on Mr. Brady's Conversion cause of action. The terms "conversion" or "converted" do not even appear under a single argument set forth in Appellant's Brief. This alone is sufficient grounds to affirm the Circuit Court's orders and uphold the jury's unanimous verdict awarding Mr. Brady equivalent damages under two separate theories of liability.

B. Respondent is entitled to compensation for the services he provided under the Equitable Doctrine of *Quantum Meruit*.

Mr. Brady's Complaint also asserts that he is entitled to compensation from Appellant pursuant to the Doctrine of *Quantum Meruit*. (R. at pp. 186-187). At trial, Mr. Brady's counsel specifically moved for a ruling from the Court on this equitable doctrine for purpose of obtaining a ruling for purposes of appeal. (R. p. 359:20-23.). However, Mr. Grossman's counsel objected to a ruling on the grounds that Mr. Grossman and his counsel had already obtained a legal remedy, stating, "They've got conversion, they've got their full duties, I think quantum meruit is there when the law doesn't provide a remedy. The law has provided a remedy. Equity doesn't need to, because equity follows law." (R. p. 360:5-9). The Court agreed with counsel's reasoning and did not rule on the equitable claim.

Regardless, the ultimate result obtained in the Circuit Court should still be affirmed because Mr. Brady clearly established the elements for a claim under the doctrine. "When legal and equitable actions are maintained in one suit, each retains its own identity as legal or equitable for purposes of the applicable standard of review on appeal." *Kiriakides v. Atlas Food Sys. & Servs., Inc*., 338 S.C. 572, 580, 527 S.E.2d 371, 375 (Ct. App. 2000) (citing *Corley v. Ott*, 326 S.C. 89, 92, n.1, 485 S.E.2d 97, 99, n.1 (1997)). "In equitable actions, an appellate court may find facts in accordance with its own view of the preponderance of the evidence." *Denman v. City of Columbia*, 387 S.C. 131, 140, 691 S.E.2d 465, 470 (2010).

"[Q]uantum meruit, quasi-contract, and implied by law contract are equivalent terms for an equitable remedy." *QHG of Lake City, Inc. v. McCutcheon*, 360 S.C. 196, 202, 600 S.E.2d 105, 108 (Ct. App. 2004) (citations and internal quotation marks omitted) (alteration by court). "The terms 'restitution' and 'unjust enrichment' are modern designations for the older doctrine

of quasi-contracts." *Ellis v. Smith Grading & Paving, Inc*., 294 S.C. 470, 473, 366 S.E.2d 12, 14 (Ct. App. 1988). To prevail on a quantum meruit claim, a plaintiff must establish (1) he conferred a benefit upon the defendant; (2) the defendant realized that benefit; and (3) retention of the benefit by the defendant under the circumstances make it inequitable for the defendant to retain it without paying its value. *Swanson v. Stratos*, 350 S.C. 116, 121, 564 S.E.2d 117, 119 (Ct. App. 2002); *See also*, *Williams Carpet Contractors, Inc. v. Skelly*, 400 S.C. 320, 734 S.E.2d 177 (Ct. App. 2012).

Here, Mr. Brady clearly establishes the elements for relief under the doctrine of *Quantum Meruit.* First, he conferred a benefit on Mr. Grossman by providing construction management, sales, and marketing services, resulting in the sale of forty-four homes in the Allenwood development. (R. p. 418:5-13; Pl. Exh. 2, Ginger Griffith letter, at R. p. 586).

Second, Mr. Grossman realized that benefit. In addition to proceeds from sales of the homes, Mr. Grossman derived a personal financial benefit from the transaction in the form of interest paid to him, individually, 500 points equaling 15% annum. (Letter of Agreement, at R. p. 654; p. 222:2-23; Griffith *De Bene Esse* Depo, R. pp. 525:9-25; 537:18-539:1). As both Ms. Griffith and Mr. Grossman confirmed, as a result of the services performed, Mr. Brady was owed $711,027.00. Mr. Grossman has not paid this amount, and instead retained the benefit that should have been conferred on Mr. Brady.

Third, retention of the benefit by the Appellant under the circumstances make it inequitable for the Appellant to retain it without paying its value. It is indisputably inequitable for Mr. Grossman to retain the benefit of Mr. Brady's labor, while Mr. Brady receives nothing in return.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Honorable Court affirm the Circuit Court's order and uphold the jury's unanimous verdict. The Circuit Court did not err in denying Appellant's Motions for a Directed Verdict and Judgment Notwithstanding the Verdict (JNOV). Despite Appellant's contention, the Assignments submitted at trial do not supersede the February 2, 2004 Letter of Agreement. Further, the Circuit Court correctly determined that the Statute of Frauds was not applicable in the present case for multiple reasons, including the insurmountable fact that Appellant did not plead it as an affirmative defense as required under Rule 8(c), SCRCP, and waited until both parties rested their case to move for an Amendment of his Answer. Additionally, Defendant's Statute of Frauds defense is barred by the equitable doctrines of Promissory Estoppel and Equitable Estoppel, and even if they were not, Mr. Brady clearly demonstrated that he met the Statute's requirements.

There are also additional sustaining grounds for affirming the jury's unanimous verdict. Even if this Honorable Court were to disregard every single substantive argument set forth in this brief, the Circuit Court order and jury's unanimous verdict must *still* be affirmed because Appellant has failed to appeal the jury's verdict as to the Conversion cause of action. As a result, it is now the unappealed law of the case. Finally, in addition to the legal remedies obtained in trial, Respondent is entitled to the relief under the equitable doctrine of *Quantum Meruit*. Accordingly, Respondent respectfully request that this Court affirm the Circuit Court's order and uphold the jury's unanimous verdict.

Respectfully submitted,

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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Bentley D. Price
Circuit Court Judge

Appellate Case No. 2023-000029

James R. Brady, Respondent,

v.

Hilton Head Homes at Allenwood, LLC,
Village Square Development Company LLC
Lancaster Redevelopment Corp., and
Gary L. Grossman, Appellants.

CERTIFICATE OF COMPLIANCE

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

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