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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Mikell R. Scarborough, Master-in-Equity Judge
Trial Court Case No. 2021-CP-10-001711

Appellate Case No: 2025-000089

John Michael Barnett...Respondent,

v.

CNT Foundations, LLC and Christopher T. Bedson, of Which CNT Foundations, LLC is the Appellant..Appellant,

---

BRIEF OF RESPONDENT

May 31, 2025

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STATEMENT OF ISSUE ON APPEAL

Did the trial court abuse its discretion by denying Appellant's request to amend their answer to add an affirmative defense not plead for three years and ten months after service of the initial complaint?

I.

STATEMENT OF THE CASE

This matter is an appeal of an Order of the Honorable Master-in-Equity judge, Mikell R. Scarborough granting Respondent judgment for damages for breach of a construction contract by Appellant. Appellant's sole ground for appeal is their claim that they were entitled to assert the affirmative defense of statutory prohibition pursuant to SC Code 40-59-840 *three years and ten months* after they were served with the initial Complaint in this case, never previously having plead the defense in either of their two Answers. The parties entered into two contracts for foundation work at a house owned by Respondent in Mount Pleasant as part of a project to expand the house. One contract, not at issue in this case, was for reinforcement of the existing foundation. The second contract was for the expansion itself. After Appellant was paid, Respondent quickly discovered that the work had not been done according to the plans and specifications he provided.

Respondent immediately contacted Appellant and informed the company's representative and subsequently its owner, Chris Bedson, that the foundation CMU walls were installed too high and in the wrong location. He asked them to come and inspect the work and make necessary corrections. Mr. Bedson refused to do either, but offered a $300 reimbursement, which was never paid. Respondent's counsel sent Bedson a letter requesting payment of the costs he had incurred. Bedson refused, through Appellant's counsel, to do so and on November 2, 2020, Respondent filed a Complaint in Charleston County Small Claims Court seeking recovery of his damages for breach of contract. (R. p. 30). Appellant filed an answer on December 3, 2020

asserting seven affirmative defenses and a counterclaim for attorneys fees. (R. p. 37). In February, 2021, Respondent filed an Amended Complaint adding claims for Appellant's failure to secure a building permit for the reinforcement work under the first contract. The damages plead exceeded the jurisdictional limit of the Small Claims Court, causing the case to be transferred to Common Pleas. Respondent filed a Second Amended Complaint on May 7, 2021 and Appellant filed an Answer on June 17, 2021 asserting the same seven affirmative defenses and counterclaim as in their first Answer. (R. p. 43 and 50). Appellant did not assert a defense based on SC Code 40-59-840, the right to cure statute, in either answer they filed.

On September 29, 2021, Respondent filed and served on Appellant an Offer of Judgment pursuant to SCRCP 68 offering to accept $4,000 to resolve the matter. (R. p. 55). Appellant never responded to the offer. The parties engaged in normal discovery. As part of discovery, Respondent was required to file two motions to compel in Circuit Court to secure complete answers to his interrogatories and requests to produce. The case was tried before the Charleston County Master in Equity, Mikell R. Scarborough, on September 19, 2024. Six days before the scheduled trial date, on September 13, Appellant filed a motion seeking to amend their answer to add the defense of the statutory prohibition in SC Code 40-59-840. (R. p. 56). This was the first time Appellant mentioned the right to cure statute in any filing in the case. At that point, the case had been pending for three years and ten months. Prior to commencement of the trial, Judge Scarborough, heard the motion and denied Appellant leave to add the defense based on the statute, holding that the extreme delay in raising the issue

substantially prejudiced Respondent and constituted a waiver of this affirmative defense. (R. p. 81, lines 8-15).

Again, at the conclusion of the trial, counsel for Appellant renewed the motion to amend the answer stating that the amendment would conform to the evidence at the trial. (R. p. 229, line 14-p. 230, line 9). He did not, either in the original motion, or in the renewed motion, point to any facts learned by Appellant after the first two Answers were filed omitting any defense based on SC Code 40-59-840. On October 4, 2024, Appellant filed a Motion to Alter or Amend the denial at trial of their motion to amend the answer. (R. p. 59). Judge Scarborough denied this motion on October 9. (R. p. 21). Judge Scarborough filed an Order on November 25, 2024 awarding Respondent $7,228.56 in damages for Appellant's breach of contract and providing that Respondent was entitled to an increase in the judgment based on costs allowed by Rule 68 based on the Offer of Judgment being less than the damages recovered. In the same Order, he again held that Appellant's Motion to Amend to assert a defense under SC Code 40-59-840 was untimely and that the delay in raising the issue prejudiced Respondent. (R. p. 5). Again, on December 5, 2024, Appellant filed a second Motion to Alter or Amend and again, Judge Scarborough denied the motion on December 18. (R. p. 62). On December 18, 2024, Judge Scarborough granted Respondent's motion to increase the judgment to $12,667.06 reflecting the costs permitted to be recovered under Rule 68. (R. 27).

At trial, Appellant introduced evidence in support of their counterclaim for recovery of attorneys fees claiming to have incurred $15,400 in attorneys fees and

$480.88 in costs. (R. p. 213, line 19-p. 214, line 5). Judge Scarborough denied Appellant recovery. (R. 5-6). Appellant filed a Notice of Appeal on January 10, 2025.

II.

FACTS

In the summer of 2019, Respondent secured a building permit from the Town of Mount Pleasant to construct an expansion of the house in which he, his wife and infant son lived at 603 Atlantic Street. Plans for this expansion to add two rooms to the back of the house were prepared for him by Hans Altenbach and Residential Structures. The plans showed the floor elevation of the new rooms was to be the same as the elevation of the existing house. They also showed that the wall dividing the two new rooms was to be in perfect alignment with the wall between the existing laundry room and half bath. (R. p. 85, lines 3-21; p. 87, line 25-p. 93, line 14; p. 97, line 1-p. 99, line 1; p. 103, line 2-p. 104, line 18; p. 105, line 3-p. 107, line 23; p. 112, line 7-p. 113, line 20; p. 119, lines 1-14; p. 120, line 20-p. 126, line 10; p. 252 and p. 261).

In September 2019, Respondent entered into two contracts with Appellant to perform foundation work at the house, one to reinforce the existing house's foundation, and one, Contract #21195, to install foundation walls for the expansion. (R. p. 151, line 20-p. 152, line 9; p. 232). Appellant sent a crew of non-employee contract labor to perform the work who were not supervised by any employee of Appellant. They spoke little English, but did work with Respondent to set the level of the top of block consistent with what the plans showed the finished floor elevation was to be. (R. p. 126, line 11-p. 129, line 22; p. 146, line 8-p. 147, l. 17; p. 218, line 21-p. 219, line 5). A set of the

plans was continuously located, as per Town requirements, at the project site. (R. p. 114, line 23-p. 115, line 8).

When Appellant's contract labor crew was finished, Respondent's other subcontractors started to perform the work necessary for adding the required mud sill to the top of the foundation wall blocks. As they examined the wall, it became clear that the wall was built too high so that the mud sill required by the plans could not be installed. (R. p. 129, line 23-p. 132, line 11; p. 133, line 24-p. 135, line 4). They also saw that the foundation to support the wall between the two new rooms was several inches off to the side from the location shown. This made it impossible to align the wall between the two new rooms with the wall in the existing house between the laundry room and half bath, as shown on the plans. (R. p. 92, line 10-p. 93, line14; p. 103, line 2-p. 104, line 18; p. 137, line 24-p. 139, line 2).

Respondent immediately called Appellant's office and spoke to the individual who had prepared Appellant's quote to Respondent. That person put Respondent on the phone with the owner of Appellant, Chris Bedson. (R. p. 131, line 2-p. 133, line 16; p. 220, line 20-p. 222, line 24). Respondent explained to Bedson exactly what was wrong with the foundation work. It is undisputed that the two had a conversation that included identification of the problems and Bedson's suggestion to notch joists as a solution. Respondent's framers were uncomfortable with that option. Bedson at one point said he would come to the site. Respondent and his subcontractors waited for hours, but he never came. Bedson offered to pay Respondent $300 toward the cost of the copper necessary as an alternative to the mud sill shown on the plans, but this payment was not made. It is undisputed that neither Bedson nor anyone from Appellant went to the

project site after Respondent's call and request that they come inspect the work. (R. p. 132, line 23-p. 133, line 3).

Respondent directed his subcontractors to go forward with the work, installing copper instead of the mud sill. His house was open because of removal of the rear door and wall sections and Appellant was living in the house with his wife and infant son. No one from Appellant ever visited the house after the defects were reported to them. In addition, a new floor joist had to be purchased as the one originally ordered would not work with the foundation wall's incorrect location several inches to the side of where it was supposed to be. (R. p. 137, line 24-p. 139, line 2). Respondent did not attempt to align the wall in the addition with the wall in the existing house as that would have required knocking down the foundation wall Appellant had incorrectly installed and building a new one. (R. p. 139, line 10-p. 140, line 4).

III.

ARGUMENT

THE MASTER IN EQUITY WAS CORRECT TO DENY APPELLANT'S REQUEST TO AMEND THEIR ANSWER TO ADD AN AFFIRMATIVE DEFENSE NOT PLEAD FOR THREE YEARS AND TEN MONTHS.

A. STANDARD OF REVIEW

The decision to allow an amendment of an answer is within the sound discretion of the trial court and will rarely be disturbed on appeal. The trial court's finding will not be overturned without showing of an abuse of discretion or unless manifest injustice has occurred. Sullivan v. Hawker Beechcraft Corp., 397 S.C. 143, 153, 723 S.E.2d 835, 840 (Ct. App. 2012), affirming the trial court's denial of a motion to amend an answer. Abuse of discretion requires a showing that the trial

court's ruling had no reasonable factual support, resulted in prejudice to the right of Appellant, and thus amounted to an error of law. Culbertson v. Clemens, 322 S.C. 20, 24, 471 S.E.2d 163, 165 (1996).

B. STATUTORY PROHIBITION IS AN AFFIRMATIVE DEFENSE THAT MUST BE ASSERTED IN DEFENDANT'S ANSWER OR IT IS WAIVED

Three years and ten months after being served with the initial complaint in this case, Appellant sought to raise for the first time *six days before trial* the defense that SC Code 40-59-840 was not complied with and that as a result the trial judge was required to dismiss or stay the case. This defense is one of the class of defenses of statutory prohibition. Such defenses are affirmative defenses which Rule 8(c) requires must be plead in an answer and failing that, are waived. Madren v. Bradford, 378 S.C. 187, 661 S.E.2d 390 (Ct. App. 2008), citing Strickland v. Strickland, 375 S.C. 76, 85, 650 S.E.2d 465, 470 (2007) (citing Wright v. Craft, 372 S.C. 1, 20-21, 640 S.E.2d 486, 497 (Ct.App.2006) and Costa and Sons Const. Co. v. Long, 306 S.C. 465, 469, 412 S.E.2d 450, 453 (Ct.App.1991).

In Madren, a property owner sought one month before trial to have a case brought by a construction contractor dismissed because the contractor was not properly licensed and was barred from suit by SC Code 40-11-30. The court denied the motion holding that having failed to plead the defense of statutory prohibition, the defendant had waived the defense and could not raise it a month before trial in a motion to dismiss. Appellant's failure to assert the defense they now base their appeal on is an even more egregious example of the failure to comply with the rules of pleading.

C. APPELLANT WAIVED THE DEFENSE BASED ON SC CODE 40-59-840 AND WAS PROPERLY BARRED FROM RAISING IT AT TRIAL.

Appellant filed two Answers in this case, one on December 3, 2020 and one on June 17, 2021. While both contained the same seven affirmative defenses, neither asserted that SC Code 40-59-840 barred Respondent's action. As noted above, it is very well established that Rule 8(c) applies to defenses like this one. It is exactly like the statutory prohibition defense involved in the Madren case and those it cites.

This is not a case in which a defendant early in a litigation realized that an affirmative defense had been inadvertently omitted from the answer. Appellant waited three years and ten months after being sued to raise this defense and then filed their motion only six days prior to the scheduled trial date. Such a delay is unconscionable and, had the request been granted, would have inherently and substantially prejudiced the Respondent, contrary to Appellant's unsupported claim of the lack of any prejudice.

In a case of similar failure to plead an affirmative defense – for sixteen months, only one third the amount of delay by Appellant in this case – the Fourt Circuit held it was an abuse of discretion to *allow a defendant to plead an affirmative defense* so late. Georgia Pacific Consumer Products, LP v. von Drehl Corp., 710 F.3d 527 (4th Cir. 2013). The court's description of the prejudice in that instance is precisely applicable to the facts of this case. The court said that the defendant's motion was untimely because: (1) defense counsel had immediate knowledge of the availability of the defense; (2) defendant failed to provide a valid reason for its delay; (3) defendant's "inaction caused Georgia-Pacific to expend considerable time, energy, and resources

litigating this matter"; and (4) after several years of litigation in the district court and this Court, the case was ready for trial.

In their Brief, Appellant does not mention the fact that they failed to raise this defense in either of their Answers. They have never offered any justification for their unjustifiable delay of nearly four years. Their claim that Respondent has not been prejudiced by their delay rings exceedingly hollow. Litigation takes time, energy and money. One need look no further for confirmation of this fact than Appellant's request for an award of over $15,000 in attorneys fees and costs.

The trial court's denial of Appellant's request to amend their answer to raise the affirmative defense of lack of notice under the Right to Cure statute was not an abuse of discretion. The court's decision was based on the fact that Appellant knew, or should have known of this defense, for three years and ten months, but did not raise it. The prejudice and forfeiture of their right to argue this defense was the result of Appellant's own inexplicable failure to raise the defense as required by Rule 8(c). The denial of the motion to amend was not, therefor, an error of law. If Rule 8(c) does not mean that an effort as untimely as the one being attempted by Appellant to raise an un-plead defense is barred, then the rule has no meaning at all.

D. THE TRIAL COURT WAS CORRECT TO DENY APPELLANT'S REQUEST TO AMEND THEIR ANSWER TO "CONFORM TO THE EVIDENCE" AT TRIAL.

At the conclusion of the trial Appellant's counsel made a motion to renew his earlier motion to amend the answer to add the defense based on SC Code 40-59-840. He used the phrase "conforms to the evidence". If his motion can be construed as one made pursuant to SCRCP 15(b), the trial judge was correct to deny the motion. While

Appellant's original motion filed on September 13, 2024 claimed that, "Since the time of filing their Answer, they (the Defendants) were unaware of certain facts of the case and their defenses and potential claims." At no time has Appellant identified any facts they learned since the filing of this action related to the notice they say was not provided to them requited by the statute. That would be, at a minimum, required to justify granting a Rule 15(b) motion. In truth, Appellant knew everything about what notices he received and did not receive when the Complaint was served. Those are the only facts relevant to the statute's application.

E. THE EQUITIES IN THIS CASE WEIGH HEAVILY IN RESPONDENT'S FAVOR.

Not surprisingly, Appellant casts this case as a question of their absolute right, apparently regardless of timing, to have Respondent's case dismissed based on the requirements of SC Code 40-59-840 not having been technically complied with. As explained above, Respondent sees the question differently. Appellant was required to plead this defense in a timely manner and did not, waiting nearly four years to raise the issue. Not only did this subject Respondent to the costs in time, money and energy of litigating the case, it exposed him to Appellant's threat to recover their attorneys fees, a sum made far larger because of their inexplicable and inexcusable delay in asserting the defense.

Appellant not only argues, with nothing that would pass the straight face test, that Respondent was not prejudiced by their delay, they also argue that Appellant never had any notice of the construction defects created by their contract work crew. The facts are uncontested that Appellant was told exactly what was done wrong, that it was a construction defect and that Respondent would incur costs unless Appellant corrected

the problem. Appellant's owner, Chris Bedson, simply ignored the issue, not bothering to send someone or go himself to inspect his company's work. The lack of notice in precisely the form laid out in the statute, does not constitute no actual notice. Bedson was fully informed of the problem immediately upon its discovery and was given ample opportunity to inspect and correct the problem.

In Grazia v. South Carolina State Plastering, LLC, 390 S.C. 562, 703 S.E.2d 197 (2020), the Supreme Court highlighted what it said was the, "public policy of the Right to Cure Act: the predominant concern should be on the contractor/subcontractor's actual exercise of the rights to notice and the opportunity to cure ... the rights to a pre-litigation opportunity to inspect and remedy/settle." The undisputed facts of this case leave no doubt that Appellant was afforded a full opportunity to inspect and remedy or settle the matter of their crew's dual failures to follow the plans and specifications provided to them by Respondent. The Supreme Court made these points as part of its rejection of a hyper-technical interpretation of the statute untethered to any protection of a contractor's ability to resolve a matter of defective construction without recourse to litigation.

In this case, the Court does not need to explore carving out an exception to the specific requirements of the statute. The law is well established that failure for such a very long time after commencement of a lawsuit to plead an affirmative defense constitutes waiver of the defense. The opinion of the Fourth Circuit in the Georgia Pacific case cited above is instructive on why this is true and how important is the obligation to plead affirmative defenses at the earliest instance. That court actually held it was abuse of discretion to allow a defendant to plead an affirmative defense after

sixteen months. However, as Appellant has gone to lengths to argue they were prejudiced and Respondent was not, it is important to look at what actually happened. Review of the facts leaves no doubt that all of the prejudice in this case fell on Respondent. Any prejudice suffered by Appellant was entirely self-inflicted.

CONCLUSION

For the reasons stated above, Respondent respectfully requests this Court to affirm the Order of the Honorable Mikell R. Scarborough.

Respectfully submitted,

s/ Stan Barnett

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief complies with Rule 211(b), SCAR.

May 31, 2025

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PROOF OF SERVICE

I certify that I have served the Final Brief of Respondent and Respondent's Certificate of Counsel on CNT Foundations, LLC, by electronic mail to their attorney of record, Charles A. Krawczyk, Charley@CAK-LAW.com on May 31, 2025.

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RE: Barnett v. CNT Foundations, LLC
Appellate Case No. 2025-000089

Dear Ms Harrison:

I am hereby filing Respondent's Final Brief and Certificate of Counsel (bound with the brief) in the above appeal. Also being filed is the Proof of Service. I have engaged a printer to prepare the required bound copies for the Court and opposing counsel and they will be filed with the Court and delivered to opposing counsel as soon as they are prepared. The reason for filing the Final Brief in advance of having the bound copies is the delay in receipt of a correct Record on Appeal which was only received yesterday.

With kindest regards, I remain

Sincerely,

Stan Barnett

Cc: John Michael Barnett
Ryan D. Bluestein, Esq.
Charles A. Krawczyk, Esq.