RECEIVED
Jan 14 2026
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Case No. 2023-CP-42-02216
Ct. App. No. 2024-002016

Founders Federal Credit Union, ... Respondent,

v.

Kyle Anthony Tracy,..... Appellant.

FINAL BRIEF OF RESPONDENT

---

s/ Carl H. Petkoff
Suzanne Taylor Graham Grigg (SC Bar No. 70681)
Kyle A. Brannon (SC Bar No. 100550)
MAYNARD NEXSEN PC
1230 Main Street, Suite 700
Columbia, South Carolina 29201
Phone: 803-540-2168
Email: sgrigg@maynardnexsen.com
kbrannon@maynardnexsen.com

Carl H. Petkoff (SC Bar No. 104895)
MAYNARD NEXSEN PC
205 King Street, Suite 400
Charleston, South Carolina 29401
Phone: 843-720-1773
Email: cpetkoff@maynardnexsen.com

Attorneys for Respondent Founders Federal Credit Union

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

COUNTER-STATEMENT OF ISSUES ON APPEAL

1. Did Appellant fail to preserve the issues raised in this appeal for appellate review?

2. Did the circuit court err in granting summary judgment in favor of Founders?

COUNTER-STATEMENT OF THE CASE

Respondent Founders Federal Credit Union ("Founders") has reviewed the Statement of the Case set forth in Appellant's Initial Brief. (Appellant's Initial Br. at 3.) Founders contends that Appellant's Statement of the Case does not comply with South Carolina Appellate Court Rule 208(b)(1)(C) because it does not provide citations to specific documents listed in Appellant's Designation of Matter. Founders' Counter-Statement of the Case is as follows:

A. Vehicle Loan, Repossession and Sale

On or about November 5, 2021, Appellant Kyle Anthony Tracy ("Tracy") submitted and executed in favor of Founders that certain Consumer Lending Plan, whereby Tracy agreed to pay all costs incurred by Founders in collecting any amounts owed to it by Tracy, including reasonable attorneys' fees and litigation costs. (Verified Compl. ¶ 5; Aff. Supp. Motion Summ. J. ¶ 2 (hereinafter, "McCain Aff."), R. pp. 2–3, 32.) Also on or about November 5, 2021, Founders extended a loan to Tracy ("Vehicle Loan"), as evidenced by that certain Security Agreement and Advance Receipt executed by Tracy in favor of Founders ("Note"). (Verified Compl. ¶ 6; McCain Aff. ¶ 3, R. pp. 3, 32–33.) The Vehicle Loan was secured by a 2011 BMW 5 Series automobile VIN # WBAFR7C57BC605969 ("BMW"). (*Id.*, R. pp. 3, 32–33.)

Tracy defaulted under the Note by failing to repay the indebtedness due

and owing to Founders. (Verified Compl. ¶ 7; McCain Aff. ¶ 4, R. pp. 3, 33.) On or about January 4, 2022, Founders sent Tracy a right to cure letter. (McCain Aff. ¶ 4, Ex. C, R. pp. 33, 45.) Thereafter, on March 1, 2022, Founders repossessed the BMW and provided notice to Tracy regarding the right of redemption of the BMW. (Verified Compl. ¶ 7; McCain Aff. ¶ 6, R. pp. 3, 33.) Based on records received by Founders from Travelers Property Casualty Insurance ("Travelers"), the BMW sustained damage in an automobile accident on February 1, 2022, which occurred one month prior to Founders repossessing the BMW. (McCain Aff. ¶ 6, R. p. 33.)

After repossession, Founders began working with Travelers on the insurance claim. (*Id.* ¶ 8, R. p. 34.) The adjuster for Traveler's closed the original claim due to the repossession, without notifying Founders. (*Id.*, R. p. 34.) Additionally, the Traveler's adjuster was out of the office for an extended period of time during the relevant period. (*Id.*, R. p. 34.) Upon the adjuster's return, Founders reopened the insurance claim on June 28, 2022. (*Id.*, R. p. 34.) Travelers issued payment on the claim for $2,474.56 on July 18, 2022, which Founders applied to reduce the balance owed on the Note. (*Id.*, R. p. 34.)[1]

Prior to sending the BMW to auction, Founders engaged Southeastern

[1] In addition, Founders received an MRC Warranty refund on the BMW in the amount of $1,480.62, which Founders applied to reduce the balance owed on the Note.

Automotive Group, LLC ("SAG") to perform limited repair work on the BMW; SAG's invoice for the repair work was in the amount of $1,191.43. (*Id.* ¶ 9, R. p. 34.) Pursuant to the Carolina Pro Recovery Invoices, the involuntary repossession fee was $375.00 and the Auction Transportation expense was $300.00. (*Id.*, R. p. 34.) The auctioneer – County Auto Auction – charged $175.00 in auction-related fees. (*Id.*, R. p. 34.) Thus, the total cost of repossession and repair work was $2,041.43. (*Id.*, R. p. 34.)

Founders arranged for the sale of the BMW and provided Tracy with all required notices. (*Id.* ¶ 10, R. p. 34.) Founders sent the BMW to auction on August 4, 2022, and the BMW sold for $5,500.00 on August 23, 2022. (*Id.*, R. p. 34.)[2] Founders applied the net sale proceeds from the sale to reduce the amount of indebtedness due and owing by Tracy to Founders under the Note. (Order Granting Summ. J. at 2, R. p. 60.) However, after application of the net sale proceeds to reduce the Note balance, a deficiency balance remained due and owing under the Note by Tracy. (Verified Compl. ¶ 8, R. p. 8.)

[2] Founders anticipates that repossessed vehicles will sell in the range of 75–80% of the average trade value for the subject vehicle. (*Id.* ¶ 11, R. p. 34.) At the time of auction, the average trade value for the BMW was $6,125.00. (*Id.*, R. p. 34.) Therefore, in light of the $5,500.00 sale price, the BMW received 89.7% of the average trade value and exceeded Founders' expectations. (*Id.*, R. p. 34.)

B. Procedural History

Founders, through counsel, instituted the debt-collection proceeding by filing its summons and verified complaint on June 21, 2023. (Summons & Verified Compl., R. pp. 1–16.) Through its verified complaint, Founders sought to collect the deficiency balance owed on the Note ($9,151.60 as of June 21, 2023), its attorneys' fees and costs as provided in the loan documents, and pre- and post-judgment interest. (Verified Compl. at 3, R. p. 4.) Tracy was properly served on June 23, 2023. (Aff. Service, R. p. 17.)

Tracy, appearing *pro se* throughout this case, filed his Answer to the Complaint on August 2, 2023. (Answer, R. pp. 18–21.) In Tracy's Answer, he claims the BMW should have sold for more and the amount he owes to Founders should be less because it "took five months to sell the vehicle." (*Id.*, R. p. 20.)

On August 23, 2023, Founders filed its Motion for Judgment on the Pleadings and subsequently filed its Affidavit of Attorney's Fees and Costs on August 31, 2023. (Motion J. Pleadings; Aff. Attorney's Fees & Costs, R. pp. 22–25.) After the hearing, at which counsel for Founders and Tracy presented arguments, the trial court denied Founders' Motion for Judgment on the Pleadings via Form 4 Order entered on September 13, 2023. (Form 4 Order, R. pp. 26–28.)

On August 22, 2024, Founders filed its Motion for Summary Judgment ("MSJ"). (Motion Summ. J., R. p. 29.) On October 15, 2024, Founders filed the

McCain Affidavit in Support of the MSJ and Supplemental Affidavit of Attorney's Fees and Costs. (McCain Aff.; Suppl. Aff. Attorney's Fees & Costs, R. pp. 32–52.) Prior to the hearing on the MSJ, Founders properly served Tracy with the Notice of Hearing specifying the date, time and location of the hearing on Founders' MSJ. (Notice Hr'g, R. pp. 30–31.) Tracy did not respond to the MSJ, nor did he attend the October 22, 2024 hearing on the MSJ. (Oct. 24, 2024 Hr'g Tr., R. p. 55, lines 11–15.) Following the hearing, at which counsel appeared on behalf of Founders, the trial court granted Founders' MSJ and awarded judgment against Tracy in the amount of $14,929.63, plus post-judgment interest accruing at the contract rate. (Order Granting Summ. J., R. pp. 59–65.)

Tracy filed his Notice of Appeal on November 25, 2024, appealing the trial court's order granting summary judgment in favor of Founders.

STANDARD OF REVIEW

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). Summary judgment is appropriate when "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." SCRCP 56(c).

On appeal, the court reviews a grant of summary judgment under the same standard applied by the circuit court. *Guinan v. Tenet Healthsystems of Hilton Head, Inc.*, 383 S.C. 48, 53, 677 S.E.2d 32, 35 (Ct. App. 2009). "[T]o resist a motion for summary judgment, the nonmoving party must come forward with specific facts showing genuine issues necessitating trial. Once a party moving for summary judgment carries the initial burden of showing an absence of evidentiary support for the nonmoving party's case, the nonmoving party may not simply rest on mere allegations or denials contained in the pleadings." *Nationsbank v. Scott Farm*, 320 S.C. 299, 303, 465 S.E.2d 98, 100 (Ct. App. 1995) (citation omitted). "When plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." *USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 653–54, 661 S.E.2d 791, 796 (2008) (citation omitted).

ARGUMENT

I. Both Arguments Raised on Appeal by Tracy Are Unpreserved and Meritless.

Tracy argues that Founders violated the Uniform Commercial Code ("UCC") because Founders did not provide reasonable notice of his right to redeem the BMW and Founders did not mitigate the deficiency balance. (Appellant Br. at 4.) These arguments fail, however. First, these arguments are not properly before the Court because Tracy failed to raise them at the trial court level. Second, even if the issues were preserved, they are meritless; Founders provided Tracy with all required notices, including the redemption notice, and Founders sold the BMW in a commercially reasonable manner.

A. Tracy failed to preserve the issues for appeal.

"In order for an issue to be properly preserved for appeal, it must have been both raised to and ruled on by the trial court." *Mathis v. Brown & Brown of South Carolina, Inc.*, 389 S.C. 299, 311, 698 S.E.2d 773, 779 (2010); *see also State v. Rogers*, 361 S.C. 178, 183, 603 S.E.2d 910, 912–13 (Ct. App. 2004) ("There are four basic requirements to preserving issues at trial for appellate review. The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." (quoting Jean Hoefer Toal, et al., *Appellate Practice in South Carolina* 57 (2d ed. 2002))).

Founders filed and served its MSJ on August 22, 2024, and the McCain Affidavit in Support of Founders' MSJ on October 15, 2024. (Motion Summ. J.; McCain Aff., R. pp. 29, 32–50.) Founders served Tracy with the Notice of Hearing on September 25, 2024, which specified that a hearing on Founders' MSJ would take place on "**Tuesday, October 22, 2024, at 9:30 a.m.,** before the Honorable J. Derham Cole, located at the Spartanburg County Judicial Center located at 180 Magnolia Street Spartanburg SC 29306 in Courtroom 6B." (Notice of Hr'g, R. pp. 30–31.)

Tracy did not file anything in response to the MSJ or McCain Affidavit, nor did Tracy attend the in-person hearing on October 22, 2024. (Oct. 24, 2024 Hr'g Tr., R. p. 55, lines 11–15.) Indeed, Tracy has not filed anything at the trial court level since Founders filed its MSJ. Because Tracy did not make any argument – written or oral – in response to Founders' MSJ at the trial court level, none of the issues raised in Tracy's appeal are preserved for review. *See Repko v. Cnty. of Georgetown*, 424 S.C. 494, 503, 818 S.E.2d 743, 748 (2018) ("An appellate court may not reverse a lower court order based on a legal or factual premise not advanced by the party who lost at the trial court level."); *see also South Carolina Dept. of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007) (holding that "[i]t is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate

review" (citation omitted)).

B. Tracy's arguments that the sale of the BMW did not comply with the Uniform Commercial Code are meritless.

Even if Tracy's arguments were properly before this Court, which they are not, the arguments lack any merit. Under South Carolina law, "[a]fter default, a secured party may sell, lease, license, or otherwise dispose of any or all of the collateral in its present condition or following any commercially reasonable preparation or processing." S.C. Code Ann. § 36-9-610(a). Further, the "disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable." *Id.* § 36-9-610(b).

Here, Tracy's UCC arguments fail because he did not dispute the "commercial reasonableness" of the BMW sale at the trial court level, nor does he include any legal authority in support of his arguments at the appellate level. *See John Deere Constr. & Forestry Co. v. N. Edisto Logging, Inc.*, 443 S.C. 424, 445, 904 S.E.2d 889, 900 (Ct. App. 2024) ("[A] secured party does not have to prove it made the sale in a commercially reasonable manner *unless* the debtor disputes the sale was reasonable." (emphasis in original)); *see also Shapemasters Golf Course Builders, Inc. v. Shapemasters, Inc.*, 360 S.C. 473, 480 n.4, 602 S.E.2d 83, 87 n.4 (Ct. App. 2004) ("It is not necessary for this court to address Appellants' remaining issues because Appellants fail to provide legal authority to support their arguments.").

Moreover, Tracy now asserts that Founders did not provide reasonable

notice of his right to redeem the BMW. (Appellant Br. at 4.) Under South Carolina law, "a debtor may redeem collateral at any time before a secured party has collected, disposed of, contracted for the disposition of, or accepted the collateral." *In re Altman*, 647 B.R. 148, 150 (Bankr. D.S.C. 2022) (citing S.C. Code Ann. § 36-9-623(c)). The trial court explicitly found that Founders "provided notice to Defendant Tracy regarding the right of redemption of the BMW." (Order Granting Summ. J., R. p. 60.) Indeed, Founders provided Tracy with notice of his right to redeem the very same day it repossessed the BMW (*i.e.*, on March 1, 2022). Founders did not sell the BMW at auction until August 23, 2022; thus, Tracy had over five (5) months to redeem the collateral, which is more than sufficient time to redeem a vehicle. *See Kirby v. Horne Motor Co.*, 295 S.C. 7, 12, 366 S.E.2d 259, 262 (Ct. App. 1988) (recognizing 10-day redemption period as sufficient).

Lastly, Tracy argues that Founders failed to "mitigate the deficiency [balance]" owed. (Appellant Br. at 4.) Although not clearly articulated in Tracy's brief, the implication is that Tracy asserts the sale was unreasonable based on the sale price of the BMW. Founders anticipates that repossessed vehicles will sell in the range of 75–80% of the average trade value for the subject vehicle. (McCain Aff. ¶ 11, R. p. 34.) At the time of auction, the average trade value for the BMW was $6,125.00. (*Id.*, R. p. 34.) Therefore, in light of the $5,500.00 sale price, the BMW received 89.7% of the average trade value and exceeded Founders' expectations.

(*Id.*, R. p. 34.) In sum, Tracy's arguments as to the manner in which Founders disposed of the BMW are unpreserved and lack any merit.

II. The trial court properly granted summary judgment in favor of Founders.

The trial court correctly found that there was no genuine issue of material fact surrounding Tracy's breach of contract and resulting indebtedness and Founders was entitled to judgment as a matter of law. The elements of a debt collection cause of action based on a written agreement are analogous to the elements for breach of contract. *See Coastal Fed. Credit Union v. Brown*, 417 S.C. 544, 552–53, 790 S.E.2d 417, 422 (Ct. App. 2016). "The elements for breach of contract are the existence of the contract, its breach, and the damages caused by such breach." *Branche Builders, Inc. v. Coggins*, 386 S.C. 43, 48, 686 S.E.2d 200, 202 (Ct. App. 2009).

A valid and enforceable secured loan agreement existed between Tracy and Founders (*i.e.*, the Note). (Verified Compl. ¶ 6, Ex. C; McCain Aff. ¶ 3, Ex. B, R. pp. 3, 12–14, 32–33, 41–43.) The Note states, in pertinent part:

> **Disposition of Collateral:** If a default under the Plan occurs, [Founders] may repossess and sell the [BMW] in a lawful manner. . . . If [Founders] decide[s] to sell the [BMW] at a public sale, private sale, or otherwise dispose of the [BMW], [Founders] will provide reasonable notice if required by law and will otherwise comply with applicable state law. If [Founders] sell[s] or otherwise dispose[s] of the [BMW] [Founders] may collect from [Tracy] reasonable expenses incurred in the retaking, holding and preparing the [BMW] for and arranging the sale of the [BMW], *as well as any deficiency balance as allowed under applicable law*. [Founders] *may also collect reasonable*

> *attorney's fees and legal expenses*, permitted by applicable law, incurred in connection with disposition of the [BMW].

(Verified Compl. ¶ 6, Ex. C, p. 3; McCain Aff. ¶ 3, Ex. B, p. 3, R. pp. 14, 43) (emphasis added.) Tracy defaulted under terms of the Note by failing to make payment when due. (Verified Compl. ¶ 7; McCain Aff. ¶ 4, R. pp. 3, 33.) Indeed, Tracy never made a single payment on the Note. (Oct. 24, 2024 Hr'g Tr., R. p. 55, lines 23–24.) Providing all required notices to Tracy, Founders repossessed the BMW then subsequently sold the BMW at auction in a commercially reasonable manner. (McCain Aff. ¶ 10, R. p. 34.) After the sale, a deficiency balance remained due and owing on the Note. (Verified Compl. ¶¶ 7–8, R. p. 3.) Pursuant to the Note, Founders is entitled to collect – and Tracy is obligated to pay – the deficiency balance owed, plus Founders' reasonable attorneys' fees and costs. (Verified Compl. ¶ 6, Ex. C, p. 3; McCain Aff. ¶ 3, Ex. B, p. 3, R. pp. 14, 43.)

By virtue of the McCain Affidavit and Supplemental Affidavit of Attorney's Fees, Founders presented to the trial court evidence of the Note default, balance owed on the Note, and attorneys' fees incurred. (McCain Aff.; Suppl. Aff. Attorney's Fees & Costs, R. pp. 32–52.) Tracy did not present any evidence to rebut the evidence presented by Founders. Accordingly, the trial court properly found no issue of material fact and Founders' entitlement to judgment as a matter of law.

For these reasons, the trial court correctly granted Founders' MSJ.

CONCLUSION

In light of the foregoing, Respondent Founders Federal Credit respectfully asks the Court to affirm the Order Granting Summary Judgment.

s/ Carl H. Petkoff
Suzanne Taylor Graham Grigg (SC Bar No. 70681)
Kyle A. Brannon (SC Bar No. 100550)
MAYNARD NEXSEN PC
1230 Main Street, Suite 700
Columbia, South Carolina 29201
Phone: 803-540-2168
Email: sgrigg@maynardnexsen.com
kbrannon@maynardnexsen.com

Carl H. Petkoff (SC Bar No. 104895)
MAYNARD NEXSEN PC
205 King Street, Suite 400
Charleston, South Carolina 29401
Phone: 843-720-1773
Email: cpetkoff@maynardnexsen.com

Attorneys for Respondent Founders Federal Credit Union

November 20, 2025
Charleston, South Carolina