

 ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

\_\_\_\_\_  
Appeal from Horry County  
D. Craig Brown, Circuit Court Judge  
\_\_\_\_\_

**RECEIVED**  
MAY 07 2015  
SC Court of Appeals

THE STATE,

RESPONDENT,

V.

KATHRYN KING,

APPELLANT

APPELLATE CASE NO. 2014-001250

\_\_\_\_\_  
INITIAL BRIEF OF APPELLANT  
\_\_\_\_\_

JOHN H. STROM  
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**STATEMENT OF THE ISSUE ON APPEAL**

Did the trial court abuse its discretion when it ordered Appellant to pay \$10,472.97 in restitution where Appellant provided evidence that she had made significant payments totaling \$6,111.28 to complainant, Homewood Depot, that the trial court failed to account for when determining restitution?

## STATEMENT OF THE CASE

On May 30, 2013, the Horry County Grand Jury indicted Appellant Kathryn King for making a fraudulent check in an amount more than one thousand dollars. R. \* (Indictment).

On March 11, 2014, Appellant pled guilty before the Honorable D. Craig Brown. Tr. Vol. I p. 2 – Tr. Vol. I p. 10.<sup>1</sup> Melinda Knowles represented Appellant, and Assistant Solicitor Thomas Terrell represented the State. Judge Brown sentenced Appellant to term of three years imprisonment suspended on the service of thirty months of probation and restitution. R. \* (Sentencing Sheet).

On May 12, 2014, a restitution hearing was held before the Honorable George C. James, Jr. Tr. Vol. II p. 1 – Tr. Vol. II p. 23.<sup>2</sup> Judge James ordered Appellant to pay \$2,850.60 in restitution to Wilco-Hess. R.\* (Restitution Order May 15, 2014). Judges James declined to order restitution to Homewood Depot, the complaining party here, at the May 12, 2014 hearing. Tr. Vol. II p. 18, ll. 25 – Tr. Vol. II p. 21, ll. 15.

On May 29, 2014, a second restitution hearing was held before the Honorable Roger M. Young. Tr. Vol. III p. 1 – Tr. Vol. III p. 14.<sup>3</sup> Judge Young ordered Appellant to pay ten thousand four hundred seventy two dollars and ninety seven cents in restitution to Homewood Depot as a condition of probation. Tr. Vol. III p. 13, ll. 20 – Tr. Vol. III p. 14, ll. 2.

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<sup>1</sup> Transcript Volume I is the transcript of the March 11, 2014 guilty plea hearing and is cited as “Tr. Vol. I.”

<sup>2</sup> Transcript Volume II is the May 12, 2014 restitution hearing and is cited as “Tr. Vol. II.” This transcript does not continue with the same pagination.

<sup>3</sup> Transcript Volume III is the May 29, 2014 restitution hearing and is cited as “Tr. Vol. III.” This transcript does not continue with the same pagination.

## STATEMENT OF FACTS

### **Procedural History**

Appellant's family owns and operates JBK Trucking in Conway, South Carolina. Tr. Vol. I p. 8, ll. 18-23. Appellant's case involves two Horry County gas stations JBK purchased gasoline from at the time. The first was a Wilco-Hess Station. The second was the Homewood Depot.

### **Wilco-Hess Gas Station, Conway**

On July 18, 2012, Appellant through JBK issued check #552 to the Wilco-Hess in Conway for \$1,4717.99. Tr. Vol. II p. 7, ll. 18-22; R.\* (Arrest Warrants). On July, 19, 2012, Appellant and JBK issued check #749 to the Wilco-Hess for \$1,373.57. *Id.* Both check #552 and #749 were deposited within ten days of being presented. *Id.* Appellant and JBK did not have the funds on deposit to pay the checks. After the expiration of the statutory waiting period and receiving no response to a certified letter, Wilco-Hess contacted law enforcement. R.\* (Arrest Warrant).

On April 17, 2013, an arrest warrant was issued for Appellant in connection to the checks. *Id.* On May 30, 2013, Appellant was indicted by the Horry County Grand Jury for one count of issuing a fraudulent check valued at more than one thousand dollars. R.\* (Indictment)

### **JBK Trucking and Homewood Depot**

Unlike the Wilco-Hess, JBK had an established business relationship with Vijay Tolani, the owner of Homewood Depot. *Id.*; Tr. Vol. III p. 4, ll. 1-3. JBK regularly purchased gasoline from Homewood. Tr. Vol. II p. 8, ll. 12-25. The parties' usual business practice was for Appellant to give her truck drivers a blank check for the fuel they would purchase from Homewood. *Id.*

The check would serve as evidence of the debt. Appellant would then periodically pay down the debt using either a cashier's check, cash, or by signing over a check written to JBK by a customer. Tr. Vol. III p. 5, ll. 18 – Tr. Vol. III p. 12, ll. 12; R.\* (Defense Ex. No: 1 and 2). The

checks delivered were not intended to be cashed. In late 2012, Appellant informed Tolani that JBK would no longer be purchasing gasoline from Homewood. Tr. Vol. I p. 9, ll. 14-22.

On December 18, 2013, Tolani attempted to cash check #2907 from Appellant for \$5,000.00. Tr. Vol. III p. 4, ll. 1-25. On December 21, 2012, Tolani attempted to cash check #2908 for \$5,472.97. *Id.* Check #2907 was returned for insufficient funds on December 21, 2012. *Id.* Likewise, check #2908 was returned on December 27, 2012 for insufficient funds. Tr. Vol. III p. 5, ll. 4-9.

### **Guilty Plea**

On March 11, 2014, Appellant pled guilty to a single count of making a fraudulent check in an amount more than one thousand dollars. Tr. Vol. I p. 7, ll. 18-22. Specifically, Appellant pled guilty to writing check #522 for \$1,417.09 to the Wilco-Hess on July 18, 2012 when there “was not enough money in the bank account to cover that [check]”. *Id.* While the State and Appellant agreed to a three year sentence suspended to thirty months of probation and restitution; the parties were unable to agree on an amount of restitution. Tr. Vol. I p. 2, ll. 11 –Tr. Vol. I p. 3, ll. 7.

Appellant explained to the court that, with respect to the Wilco-Hess Station, Appellant provided JBK’s drivers with blank checks to pay for gasoline. Tr. 8, ll. 18-23. Unfortunately, the drivers frequently wrote checks for more money than they were authorized. Tr. 9, ll. 1-8. Predictably, this caused JBK financial problems and resulted in check #522 and #749 being returned for insufficient funds. Tr. 8, ll. 18 – Tr. 9, ll. 22.

Appellant informed the court that she had since turned over the company’s accounting to her son and that JBK now pays for their gas on a weekly basis at a different gas station. *Id.* Appellant admitted to the court that providing driver’s with blank checks was a bad practice. Since they started making weekly payments, JBK has had better control over their cash flow. *Id.* The Court accepted

the plea and sentenced Appellant to the recommended three years imprisonment suspended on timed served with thirty months of probation. Tr. 10, ll. 2-9. The court then scheduled a restitution hearing for the first week of April. *Id.*

### **First Restitution Hearing**

On May 12, 2014, a restitution hearing was held before the Honorable George C. James. Melinda Knowles represented Appellant, and Assistant Solicitor Thomas Terrell represented the State. Judge James heard testimony from Tolani of Homewood Depot and from Angela Roberts, the manager of the Wilco-Hess Station.

### Attempted Restitution Amount Determination for Homewood Depot

Tolani testified that JBK wrote check #2907 to Homewood Depot for \$5,221 and check #2908 for \$5,693.97. Tr. Vol. II p. 4, ll. 8-13. Tolani averred that Homewood had not been paid on either check. *Id.* at ll. 17-23. Tolani provided no documentation to support his restitution claim.

When confronted with a cashier's check for \$3,985.38 signed over from JBK to Homewood and cashed on December, 6, 2012, Tolani alleged that the check represented a payment for past invoices; not part of the restitution Homewood was seeking. Tr. Vol. II p. 5, ll. 12 – Tr. Vol. II p. 6, ll. 25; R.\* (Def Exhibit 1). Tolani stated that Homewood would send JBK invoices every fifteen days for the gas they purchased. Tr. Vol. II p. 6, ll. 12-15.

Specifically, Tolani assured the court that while he, “didn’t bring the bill file. . . . I can bring it. [Appellant] has the bills, ma’am. ***The bills were billed to her, the exact amount, those were the bills from that amount.***” Tr. Vol. II p. 6, ll. 22-25 (*emphasis added*). Tolani claimed that the cashier’s checks presented as evidence of payment towards the restitution amount were in fact payments for the exact amount of past bills. *Id.* Tolani further averred that was seeking payment for

gasoline purchased from him sometime in “October and November, December.” Tr. Vol. II p. 11, ll. 10-17.

The trial court stopped Tolani’s testimony and advised the parties that nothing that the State presented to him at the hearing provided the court with a basis for determining a restitution amount. Tr. Vol. II p. 10, ll. 6-10.

#### Restitution Amount Determination for Wilco-Hess

Roberts, the Wilco-Hess manager, alleged a total loss of \$3,232.68. Tr. Vol. II p. 12, ll. 11 – Tr. Vol. II p. 13, ll. 11. Roberts stated that she came up with this number by including not only the two checks Appellant was indicted for, but money supposedly owed by JBK for other, unspecified dishonored checks. Tr. Vol. II p. 14, ll. 4-15. Roberts conceded that she only had proof of the two checks amounting to a total of \$2,790.67. *Id.* at ll. 16-21. Like Tolani, Roberts had no proof of the checks or their amounts. Tr. Vol. II p. 15, ll. 1-19.

At the trial court’s prompting, the State then produced its indictment with copies of the JBK checks to Wilco-Hess attached. Tr. Vol. II p. 15, ll. 3 – Tr. Vol. II p. 16, ll. 24. This revealed an additional error by the State, as the solicitor had included the administrative fees already ordered by the trial court at Appellant’s guilty plea in its restitution demand. *Id.* Once this error was corrected, Appellant and the State agreed that Appellant owed \$2,850.67 to Wilco-Hess. Tr. Vol. II p. 18, ll. 1-3.

#### May 12, 2012 Restitution Order and Continuance

The trial court refused to order restitution to Homewood Depot because Tolani was unable to provide any supporting documentation or to coherently testify as to how Homewood was owed the \$10,472.97 in restitution he sought. Tr. Vol. II p. 18, ll. 21-24. The Court noted with dismay that Tolani failed to bring any of his records and that the issue of restitution was complicated by

evidence showing that Appellant had made significant payments towards the amount JBK owed Homewood. Tr. Vol. II p. 18, ll. 25 –Tr. Vol. II p. 21, ll. 15. Accordingly, the trial court postponed ruling on the amount of restitution owed by Appellant to Homewood. *Id.*

### **Second Restitution Hearing**

On May 29, 2014, a second restitution hearing was held before the Honorable Roger M. Young. Melinda Knowles again represented Appellant, and Assistant Solicitor Thomas Terrell again represented the State. Tolani again testified on the alleged loss to Homewood Depot caused by Appellant's checks. Tr. Vol. III p. 3, ll. 5-14.

In support of his testimony, Tolani brought a worksheet he created purporting to reflect the entire course of performance and all transactions between JBK trucking and Homewood Depot over the three month period encompassing the dishonored checks. Tr. Vol. III p. 4, ll. 1 – Tr. Vol. III p. 5, ll. 14. Tolani confirmed that JBK trucking regularly purchased gasoline from Homewood and he recognized checks #2907 and #2908 as two checks from JBK that were dishonored.

However, now Tolani claimed that check #2907 was written for \$5,000.00 and check #2908 was written for \$5,472.97. Tr. Vol. III p. 4, ll. 7-25. This was four hundred forty two dollars less than he alleged at the first restitution hearing. Tr. Vol. II p. 4, ll. 8-13. Tolani again alleged that no payments had been made towards those checks. *Id.*

Tolani alleged that this suddenly – never produced before – worksheet represented the entirety of Homewood and JBK's business relationship over the three months during which the checks at issue were written. Tr. Vol. III p. 5, ll. 17 – Tr. Vol. III p. 6, ll. 15. Tolani's worksheet was not entered into evidence and his efforts to explain its contents revealed inexplicable and alarmingly imprecise accounting practices.

Cashier's Check, Issued December 5, 2012

For example, the worksheet did not reflect a cashier's check, dated December 5, 2012, given to him from JBK for \$3,985.38. Tr. Vol. III p. 6, ll. 1 – Tr. Vol. III p. 7, ll. 19. Tolani claimed that this cashier's check was for partial satisfaction of a previous invoice for \$4,657.72. *Id.* Tolani averred the remaining \$694 was paid on a different check. *Id.* Tolani's worksheet did not reflect how the invoice was paid, it did not reflect the date that payment was made, and it did not provide any identifying information on the ostensible second check.

The worksheet did not record check numbers; or whether the payment was made by a cashier's check, business check, cash, credit card, or a combination thereof. The worksheet simply alleged that at some point Tolani accepted payment that he contended satisfied the previous debt of \$4,657.72. This testimony directly contradicts Tolani's previous claim, during the May 12, 2014 restitution, that the cashier's checks represented, "the exact amount," Appellant owed from an earlier invoice. Tr. Vol. II p. 6, ll. 22-25 (*emphasis added*).

Cashier's Check, Issued December 7, 2012

By way of further example, Tolani was cross-examined about a cashier's check written to Homewood Depot on December 7, 2014 for \$2,676.99. Tr. Vol. III p. 7, ll. 20 – Tr. Vol. III p. 9, ll. 11. This time, Tolani claimed that the cashier's check was a replacement for a previously undisclosed check that had been dishonored. *Id.* Confusingly, Tolani claimed that the cashier's check was part of payment for a \$7,474.42 invoice that Appellant previously paid for with three checks. *Id.*

Again, Tolani's worksheet failed to provide any identifying information on the three or possibility four checks allegedly used by Appellant to pay the "prior" invoice. Tr. Vol. III p. 9, ll. 1-11. Tolani never provided the court with copies of any of the alleged invoices. No date

information, no check numbers, no notation indicating that the invoice was paid with three checks was ever produced. Curiously, after being questioned on the checks allegedly used to pay for the \$7,447.44, Tolani added:

And even [Appellant] could not make – ***repay the cashier’s check***. The gas I gave her was after she brought me the cashier’s check. ***She didn’t even know what amount I was going to bill her on 21st of December that she wrote the check for.***”

Tr. Vol. III p. 9, ll. 7-11. (*emphasis added*). What Tolani meant by this statement is unclear; obviously, a purchaser cannot fail to “repay” a cashier’s check since the funds are guaranteed by the issuing bank. Equally mystifying is Tolani’s claim that checks written on December 14th and December 17th were supposed to pay for an invoice billed on December 21st. *Id.*

#### Cashier’s Check, Issues December 17, 2012

Tolani was then cross-examined regarding a cashier’s check issued on December 17, 2012 for \$1,973.93. Tr. Vol. III p. 10, ll. 6-23. Tolani deposited this check on December 18, 2012 and claimed that the check, along with a \$100.00 in cash satisfied a previous invoice for \$2,077.93. *Id.* As with the other entries on his worksheet, there is no information on how the payment was made. *Id.* Moreover, Tolani never explained why, even accepting his account of the payment methods, the payments made by Appellant on this invoice failed to equal the amount owed. *Id.*

#### Closing Arguments

In closing, Appellant argued that Homewood Depot and JBK Trucking had an ongoing business relationship. Tr. Vol. III p. 11, ll. 20 – Tr. Vol. III p. 12, ll. 15. Appellant stated JBK owed Homewood \$4,361.69 because Appellant had made substantial payments to Homewood which were unaccounted for in Tolani’s testimony or in his worksheet. *Id.* Appellant argued she “should not have to pay twice for one service.” Tr. Vol. III p. 12, ll. 7-8.

The State countered that the checks presented by Appellant all pre-dated Tolani depositing the two checks at issue in the restitution hearings. Tr. Vol. III p. 13, ll. 5-19. The State alleged that “there’s no way that these three checks could be payments for these two checks.” *Id.* In summation, the State requested restitution totaling \$10,472.97 for the returned checks. *Id.* The State also noted that they were unable to prosecute a third check because of “a post-date issue.” *Id.*

#### Restitution Order

The court ordered Appellant to pay \$10,472.97 in restitution to Homewood Depot. *Id.* at ll. 20-25. The court summarily concluded that Tolani had given Appellant credit for all payments JBK made Homewood, which had not been dishonored. *Id.*

The court did not make specific findings on the financial resources of Appellant and Homewood, nor did the court inquire as to Appellant’s ability to pay restitution in full during the course of her thirty-month long period of probation. On May 19, 2012, Judge Young issued a written restitution order mandating Appellant to pay \$13,323.63 in restitution to Homewood Depot and Wilco-Hess. R.\*( Restitution Order, May 29, 2014).

## ARGUMENT

**The trial court abused its discretion when it ordered Appellant to pay \$10,472.97 in restitution where Appellant provided evidence that she had made significant payments to complainant, Homewood Depot, which the trial court failed account for when determining restitution.**

Appellant presented evidence that JBK trucking had given Homewood Depot three cashier's checks totaling \$6,111.28 as partial payment of money owed for gasoline purchased in the course of performance of an ongoing business relationship between JBK trucking and Homewood Depot. Tr. Vol. III p. 6, ll. 1 – Tr. Vol. III p. 11, ll. 2. The trial court erred reversibly in not applying some or all of these payments to the \$10,472.97 Appellant allegedly owed to Homewood Depot. R.\* (Order of Restitution, May 29, 2014).

### **Discussion**

When the elements of the crime justifying restitution are admitted or proven beyond a reasonable doubt, the trial court must determine by a preponderance of the evidence if the state has proven the amount of restitution. *State v. Gullede*, 326 S.C. 220, 487 S.E.2d 590 (1997). "Restitution" is defined as "payment for all injuries, **specific losses**, and expenses sustained by a crime victim resulting from an offender's criminal conduct." S.C. Code Ann. §16-3-1110 (Supp. 2005) (*emphasis added*).

Before a court may order restitution to a victim, it must hold a hearing and determine the actual amount of damage or loss. *State v. Wilson*, 274 S.C. 352, 264 S.E.2d 414 (1980); S.C. Code Ann. § 24-21-430 (2010). As in most sentencing proceedings, a trial court may conduct a broad inquiry, "largely unlimited as to the kind of information . . . or the source from which [information] may come." *State v. Franklin*, 267 S.C. 240, 246, 226 S.E.2d 896, 898 (1976).

However, the admissibility of evidence is limited by constitutional provisions which require the evidence to be relevant, reliable and trustworthy. *Gulledge*, 326 S.C. at 222, 487 S.E.2d at 594. Moreover, there must be a factual basis which shows that the victim suffered the claimed losses as a result of appellant's conduct. *State v. Fussell*, 299 S.C. 162, 383 S.E.2d 1 (1989).

In the present case, the State failed to show that Appellant caused Homewood Depot to suffer a \$10,472.97 loss. The evidence presented at the restitution hearings showed that JBK trucking and Homewood Depot had an ongoing business relationship with an established course of performance or course of dealing at the time that the checks in question were dishonored.<sup>4</sup> Tr. Vol. III p. 6, ll. 1 – Tr. Vol. III p. 11, ll. 2. JBK would provide blank checks to its truck drivers to pay for gas from Homewood. *Id.* Homewood and/or the truck drivers would then fill in the amount JBK owed for the gasoline purchased. *Id.*

The checks served as evidence of a debt which JBK would periodically pay with cashier's checks, cash, and checks signed over from their customers. *Id.* Tolani's testimony at both restitution hearings confirmed this course of performance. Tr. Vol. II p. 5, ll. 3 – Tr. Vol. II p. 9, ll. 1; Tr. Vol. III p. 6, ll. 1 – Tr. Vol. III p. 11, ll. 2; *see State v. Brazzell*, 248 S.C. 118, 149

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<sup>4</sup> S.C. Code § 36-1-303 (2014):

(a) A "course of performance" is a sequence of conduct between the parties to a particular transaction that exists if:

- (1) the agreement of the parties with respect to the transaction involves repeated occasions for performance by a party; and
- (2) the other party, with knowledge of the nature of the performance and opportunity for objection to it, accepts the performance or acquiesces in it without objection.

(b) A "course of dealing" is a sequence of conduct concerning previous transactions between the parties to a particular transaction that is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct. . . .

S.E.2d 339 (1966) (defendant not guilty of uttering a false check as course of performance between the parties revealed that checks at issue were promises to pay and evidence of debts used by the parties to circumvent the prohibition against selling liquor on credit).

At the first restitution hearing, Tolani stated that the checks presented by Appellant represented the full outstanding amount owed by JBK for past invoices. Tr. Vol. II p. 6, ll. 22-25. At that hearing, Tolani had no documentation to support this claim and the court declined to issue a restitution order in favor of Homewood. Tr. Vol. II 18, ll. 25 –Tr. Vol. II p. 21, ll. 15. When pressed at the May 29th hearing to explain the same series of checks, Tolani confessed that the checks were actually partial payments for past sales which combined with other checks and cash to satisfy invoices. Tr. Vol. III p. 8, ll. 5-22.

For example, Tolani claimed that the cashier's check issued on December 7, 2012 was a replacement for an earlier dishonored check. Tr. Vol. III 7, ll. 20 – Tr. Vol. III 9, ll. 11. The dishonored check was allegedly part of a group of three checks that Appellant had signed over or given to Homewood as payment for a \$7,474.42 invoice. *Id.* Tolani gave conflicting answers to the same questions about the same checks.

Tolani claimed that the two dishonored checks represented the exact amount of gasoline owed by Appellant for two invoices, this conflicts with Tolani's own account of how the parties' conducted business in the months leading up to the alleged dishonored checks. Tr. Vol. III p. 6, ll. 1 – Tr. Vol. III p. 11, ll. 2. To complicate matters, Tolani's worksheet (only produced after failing to secure payment in the first restitution hearing) did not provide any information on the date or the method of payment for past invoices. *Id.*

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(d) A course of performance or course of dealing between the parties . . . is relevant in ascertaining the meaning of the parties' agreement . . .

According to Tolani's testimony, the two dishonored checks would represent the only instance, in the three months of transactions that the worksheet purported to record, where two checks drawn by JBK on their bank account were used to pay invoices instead of a cashier's check, a signed-over check from a JBK client, cash, or a combination thereof.<sup>5</sup> *Id.* The checks would also represent the only occasion where JBK provided payment in advance as Tolani alleged that the two checks written December 14th and 17th, were to pay for an invoice issued on December 21st. Tr. Vol. III p. 9, ll. 7-11.

Tolani's worksheet and testimony contrast sharply with the thorough financial records provided by the complainant in *Gulledge*. 326 S.C. 220, 487 S.E.2d 590 (1997). In *Gulledge*, the defendant, complainant's bookkeeper, pled guilty to stealing \$87,999.77 by writing checks to herself from a company account that received customers' lease payments before forwarding them to a financing company. *Id.* at 404, 468 S.E.2d at 668-669. Her theft was uncovered following an audit of complainant's books which revealed a large cash shortage. *Id.* The trial court ordered defendant to pay \$210,000 in restitution and defendant appealed.

In affirming the trial court's restitution order, the Supreme Court held that a handwritten summary created by the complainant was admissible to show complaint's losses. *Id.* However, the Court stressed that a pre-sentencing report evidenced a course of performance between the complainant and the finance company that "convincingly demonstrate[d] that defendant received all the money paid by customers, but failed to deposit all the cash receipts." *Id.* Specifically, the court held that:

[Complainant] always paid [the financing company] by check [in] the exact amount of money [complainant] actually received from customers. Had persons

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<sup>5</sup> The amount that check #2907 and check #2908 were written for decreased from the first restitution hearing to the second restitution hearing by a combined four hundred forty two dollars. Tr. Vol. II p. 4, ll. 8-13.

other than [defendant] been stealing the money before [defendant] got it, [defendant] would have been receiving less money than the customers were paying [complainant] and [complainant's] payments to [financier] would have reflected this deficiency.

*Id.* By comparison, Tolani's restitution demand is not supported by a detailed ledger tracing the acceptance and issuance of checks at specific dates and for determinable amounts. *Id.*; Tr. Vol. III p. 5, ll. 17 – Tr. Vol. III p. 6, ll. 15.

Like *Gulledge*, the evidence in Appellant's case demonstrated a course of performance or course of dealing between JBK and Homewood where JBK routinely issued blank checks as evidence of a debt owed for purchasing gasoline from Homewood.<sup>6</sup> Tr. Vol. III p. 6, ll. 1 – Tr. Vol. III p. 11, ll. 2. JBK would then make payments on the amount owed by cash, cashier's check, or by signing over checks written to JBK to satisfy the debt while continuing to purchase gasoline on credit from Homewood. *Id.*

Thus, Tolani's contention that the two dishonored checks were intended to pay the full amount of an invoice contradicts his own testimony on the parties' established course of performance. *Carter v. American Fruit Growers*, 130 S.C. 280, 128 S.E.2d 641 (1924)(reversing the trial court and siding with the defendant in an action to recover purchase price of sixteen cartloads of watermelons; South Carolina Supreme Court held testimony of plaintiff and evidence of course of dealings in past transactions between the parties were relevant to show that the contract in dispute made on the same basis as prior transactions).

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<sup>6</sup> "Subsequent action of the parties, such particularly as the acceptance of [a course of dealing, a course of performance or a usage of trade] as expressed by the other party, may . . . establish sufficiently the intention of the parties." *Southern Fire & Cas. Co. v. Teal*, 287 F. Supp. 617, 622 (D.S.C. 1968) (*citing: Bondy v. Harvey*, 62 F.2d 521, 522-523, (2nd Cir. 1933) cert. denied 289 U.S. 740, 53 S.Ct. 659).

In keeping with the parties' course of performance, Appellant gave Tolani three cashier's checks as partial payments towards JBK's gasoline invoices. Tr. Vol. III p. 6, ll. 1 – Tr. Vol. III p. 11, ll. 2. One of these payments, the cashier's check for \$1,973.93 created on December 17, 2012, was inarguably drafted contemporaneously with two checks at issue. Tr. Vol. III p. 10, ll. 6-23.

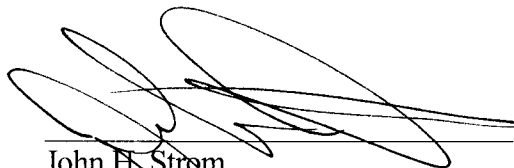
The State failed to show by a preponderance of the evidence that Appellant owed Homewood Depot \$10,472.97. Tolani's testimony and fortuitously vague worksheet are insufficient to support the amount of restitution ordered. *Fussell*, 299 S.C. at 164, 383 S.E.2d at 2.

Accordingly, the trial court committed an abuse of discretion when it ordered Appellant to pay that amount restitution where Appellant provided evidence that she had made three significant payments to Homewood Depot, as part of their ongoing business relationship, something the trial court failed to account for when determining restitution.

**CONCLUSION**

Based on the foregoing, the May 29, 2015 restitution order should be vacated and remanded for a new hearing.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John H. Strom", is written over a horizontal line.

John H. Strom  
Appellate Defender

ATTORNEY FOR APPELLANT

This 7th day of May, 2015.

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

\_\_\_\_\_  
Appeal from Horry County  
D. Craig Brown, Circuit Court Judge  
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**SC Court of Appeals**

THE STATE,

RESPONDENT,

V.

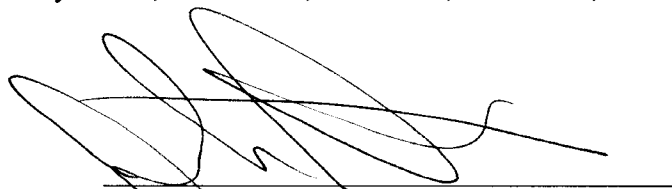
KATHRYN KING,

APPELLANT

APPELLATE CASE NO. 2014-001250

\_\_\_\_\_  
CERTIFICATE OF SERVICE  
\_\_\_\_\_

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 7th day of May, 2015.



\_\_\_\_\_  
John H. Strom  
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 7th day of May, 2015.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 3, 2022.