

**INITIAL BRIEF OF APPELLANT**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

Tanya A. Gee, Circuit Court Judge

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Case No. 2014-CP-40-1484  
Appellate Case No. 2015-001187

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SC Court of Appeals

Autovest, LLC,

Appellant,

v.

Portia Smith a/k/a Portia  
Sentennial Smith, for herself and on behalf  
of all other similarly situated individuals,

Respondent.

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**INITIAL BRIEF OF APPELLANT**

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Gregory Preston Cowan  
Brock & Scott, PLLC  
1315 Westbrook Plaza Dr.  
Winston-Salem, NC 27103  
Telephone: 336-354-1797  
Telefax: 336-354-1588  
Attorney for Appellant

Thomas Lydon  
1320 Main Street  
10th Floor  
Columbia, SC 29211  
Attorney for Respondent

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STATEMENT OF ISSUES ON APPEAL

- I. THE CIRCUIT COURT ERRED, AS A MATTER OF LAW, IN DETERMINING THAT THE APPLICABLE STATUTE OF LIMITATIONS FOR PLAINTIFF'S CLAIM WAS ONLY THREE YEARS.
  
- II. THE CIRCUIT COURT ERRED, AS A MATTER OF LAW, IN GRANTING PARTIAL SUMMARY JUDGMENT TO DEFENDANT AS TO PLAINTIFF'S CLAIM.

## STATEMENT OF THE CASE

Appellant commenced this action with a Complaint filed on March 6, 2014 alleging default by Respondent on a deficiency balance and seeking to collect the same. This appeal concerns the deficiency balance in the amount of \$8,989.56. Plaintiff thereafter moved to amend the complaint to append correct claim documentation on August 11, 2014, which motion was granted.

Respondent filed an answer and counterclaims, alleging that the deficiency claim was outside the applicable statute of limitations. Respondent filed a motion for partial summary judgment, seeking dismissal of the deficiency claim, and thereafter filed a brief in support. Appellant responded with a brief in opposition and by filing unanswered Request for Admissions under SCRCP, Rule 36(a). Judge Gee entered partial summary judgment against Appellant on April 23, 2015.

On May 1, 2015, Appellant served a motion to reconsider, citing additional authority for a six-year statute of limitations under S.C. Code 36-2-725 (2013). By order dated May 14, 2015, Judge Gee denied Plaintiff's motion to reconsider. On May 28, 2015, Appellant served a Notice of Appeal of the April 23, 2015 order and May 14 order.

## STATEMENT OF FACTS

On February 29, 2006, Respondent formed a retail installment contract with an automobile vendor for the purchase of a vehicle, a 2005 Honda Civic. (Complaint p. 1, Amended Ex. Retail Installment Sale Contract). Respondent went to the dealership, executed a retail installment contract, and completed a credit application at the dealership on the same day. (Complaint p. 1, Amended Ex. Credit Application). Once approved on the same day, the dealership assigned its interest in the contract to Wells Fargo Auto Finance, Inc. (Complaint p. 1, Amended Ex. Retail Installment Sale Contract)

Respondent subsequently defaulted on the loan by missing payments, and the vehicle was repossessed. (Complaint p. 1, Amended Ex. Retail Installment Sale Contract). Respondent has admitted that the last payment she made was on February 25, 2009. (Plaintiff's second set of Request for Admissions).

The Creditor repossessed the vehicle, and sold the same at auction, leaving a deficiency balance owed for the vehicle. (Complaint p. 1). Wells Fargo Bank, N.A. thereafter assigned the retail installment contract to Appellant. (Complaint p. 1, Amended Ex. Assignment of Installment Contract).

Appellant subsequently filed suit in the Circuit Court of South Carolina in the County of Richland, seeking to collect the deficiency balance. The deputy sheriff of Greenville served the Respondent at 115 Crest Hill Drive, Fountain Inn, SC on May 6, 2014. (Affidavit of Service p. 1).

## ARGUMENTS

I. THE CIRCUIT COURT ERRED, AS A MATTER OF LAW, IN DETERMINING THAT THE APPLICABLE STATUTE OF LIMITATIONS FOR PLAINTIFF'S CLAIM WAS ONLY THREE YEARS AND GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT BASED ON SAME.

### A. Standard of Review

On appeal, the Court reviews the granting of summary judgment "under the same standard as applied by the trial court under Rule 56(c)." *Sea Cove Dev., L.L.C. v. Harbourside Cmty. Bank*, 387 S.C. 95, 691 S.E.2d 158 (2010). Accordingly, "[t]he judgment may be affirmed only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Singletary v. Aetna Cas. & Sur. Co.*, 316 S.C. 199, 200, 447 S.E.2d 869, 870 (Ct. App. 1994); Rule 56(c), SCRPC. Further, in reviewing a grant of summary judgment, the reviewing court, like the trial court, must consider the facts and inferences in the light most favorable to the non-moving party. However, to defeat a motion for summary judgment, a party may not rest upon the mere allegations or denials of his pleading but must set forth specific facts showing that there is a genuine issue for trial. Rule 56(e), SCRPC.

### B. South Carolina's enactment of the Uniform Commercial Code applies to Plaintiff's claim for a deficiency balance.

Plaintiff filed the present civil action to collect a deficiency balance following the sale of collateral in the form of personal property. Pursuant to S.C. Code § 36-2-101 (2013), *et. seq.*, (hereinafter the "S.C. UCC"), the provisions of Chapter 2 – Sales, apply to all "transactions in goods" between a buyer and seller. For these purposes, "buyer" is defined as a person who buys or contracts to buy goods and "seller" is defined as a person who sells or contracts to sell goods. *See* S.C. Code § 36-2-103 (2013). "Financing

agency” is then defined as a bank, finance company or other person who in the ordinary course of its business makes advances against goods or documents of title. *See* S.C. Code § 36-2-104 (2013).

S.C. Code § 36-2-102 (2013) concerns the scope of Chapter 2 of the South Carolina Uniform Commercial Code, and states as follows:

[u]nless the context otherwise requires, this Chapter applies to transactions in goods; it does not apply to any transaction which although in the form of an unconditional contract to sell or present sale is intended to operate only as a security transaction nor does this chapter impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers.

Transactions may both transfer title as a sale, and operate as a secured transaction. Thus, transactions that also function as a secured transaction are not excluded from the provisions of Article 2.

S.C. Code § 36-2-105 (2013) defines "goods" to mean: "all things [...] which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities [...] and things in action."

Applying the definitions contained in these statutes to the instant case, the vehicle (goods) purchased by Respondent (buyer) from the auto dealership (seller) was financed by Appellant's predecessor in interest (finance company). Thus, the contract falls within the scope of Article 2 of the Uniform Commercial Code.

The Order of the Trial Court granting partial summary judgment to Respondent states the statute of limitations section of the Uniform Commercial Code applies only to

claims based on warranties. (See Order Granting Partial Summary Judgment, p. 2). Nothing under the text of the statute, or any South Carolina precedent indicates such a conclusion. Indeed, S.C. Code § 36-2-709 (2013) permits a seller to recover the price “[w]hen the buyer fails to pay the price as it becomes due.” Since the text of the Uniform Commercial Code acknowledges that sellers have the right to recover the balance owed for the price of goods, and since Respondent’s claim for a deficiency balance arose following Defendant’s failure to remit as provided for in a contract for the purchase of goods, Respondent’s underlying claim is governed by South Carolina’s Uniform Commercial Code.

Assuming, *arguendo*, that Respondent had executed a contract with the dealership to buy the vehicle, and arranged financing outside of the dealership, there would be no underlying transaction in goods. This is not the situation presented by the facts on the record at the summary judgment hearing, thus the Court’s ruling that the matter was not governed by the Uniform Commercial Code was reversible error.

**C. S.C. Code § 36-2-725 provides the applicable statute of limitations to Plaintiff’s deficiency claim.**

"An action for breach of any contract for sale under the Uniform Commercial Code must be commenced within six years after the cause of action accrues." S.C. Code § 36-2-725 (2013). Since Defendant purchased a vehicle under a contract for sale, Plaintiff had six years from the time the action accrued in which to bring the present civil action to collect the balance owed. Plaintiff’s business records indicated that Defendant last made a payment on the account in 2009; thus, the present civil action was within the applicable statute of limitations.

The Supreme Court of South Carolina has held that the statute of limitations found in S.C. Code § 36-2-725 (2013) applies over the more general three-year statute of limitations found in S.C. Code § 15-3-530(1). *See Atlas Food Sys. & Servs., Inc. v. Crane Nat'l Vendors Div. of Unidynamics Corp.*, 319 S.C. 556, 462 S.E.2d 858 (S.C. 1995). In *Atlas Food Sys.*, the Supreme Court held that "[a]ctions arising under Article 2 of the U.C.C. are governed by § 36-2-725's statute of limitations." The statute of limitations applies to any action arising under Article 2. Indeed, S.C. Code § 36-2-709 (2013) explicitly allows sellers to recover "the price[ ... ] of goods accepted or of conforming goods lost or damaged within a commercially reasonable time after risk of their loss has passed to the buyer." Thus, Plaintiff's cause arose under Article 2, and the more specific statute of S.C. Code § 36-2-725 applied to provide a six year statute of limitations.

The question of whether the statute of limitations set forth under the Uniform Commercial Code governs the collection of a deficiency balance appears to be a case of first impression in South Carolina. Every appellate court that has considered this issue, with one exception, has held that the uniform commercial code statute of limitations applies to an action to collect a deficiency balance. *See Massey-Ferguson Credit Corp. v. Casaulong*, 62 Cal. App. 3d 1024, 133 Cal. Rptr. 497 (1976, 3d Dist.); *See also Jack Heskett Lincoln-Mercury, Inc. v. Metcalf*, 158 Cal. App. 3d 38, 204 Cal. Rptr. 355 (1984, 3d Dist.); *Worrel v. Farmers Bank of Del.*, 430 A.2d 469 (1981 Del. Supp.); *First Nat'l Bank v. Chase*, 118 N.M. 783, 887 P.2d 1250 (1994); *Chaney v. Fields Chevrolet Co.*, 264 Or. 21, 503 P.2d 1239 (1972); *Assocs. Disc. Corp. v. Palmer*, 47 N.J. 183, 219 A.2d 858, (1966); *Indus. Valley Bank & Trust Co. v. Sharpe*, 15 Pa. D. & C.3d 506 (1980).

The exception comes from *N.C. Nat'l Bank v. Holshouser*, 247 S.E.2d 645, 38 N.C. App. 165 (N.C. App. 1978). The North Carolina Court of Appeals in *Holshouser* determined that a deficiency following a specialty contract did not fall within the operation of the UCC, thus allowing the creditor to apply a ten year statute of limitations rather than a four year statute of limitations. The Court reasoned that the legislature intended the statute of limitations for specialty contracts to apply to purchase money security agreements. *Id.* at 647, 38 N.C. App. at 169-170. The Court's reasoning in *Holshouser* was later distinguished by *Hudson v. Game World, Inc.*, 126 N.C. App. 139, 484 S.E.2d 435 (N.C. App. 1997). The Court of Appeals in *Hudson* determined that under a credit purchasing agreement, the credit account for the goods constitutes the pure sales aspect of the transaction, which would be governed by North Carolina's statute of limitations under the commercial code, whereas an action to recover the goods would be governed by the general limitations period. *Id.* at 143-145, 484 S.E.2d at 439-440.

Since Plaintiff's claim concerns the collection of an account, which relates to the pure sales aspect of the transaction in the goods, and since the form of the transaction arose for the purchase of goods, the applicable statute of limitations comes from S.C. Code § 36-2-725.

**D. Since Respondent last made payment on the loan in February 2009, Appellant was within the applicable statute of limitations when it filed suit in March 2014.**

Defendant's payment under the contract constitutes an acknowledgment for purposes of S.C. Code § 15-3-120 (2013). S.C. Code § 15-3-120 states: "No acknowledgment or promise shall be sufficient evidence of a new or continuing contract whereby to take the case out of the operation of this chapter unless it be

contained in some writing signed by the party to be charged thereby. But payment of any part of principal or interest is equivalent to a promise in writing." Under S.C. Code § 15-3-130 (2013), "All actions upon causes of action which would be barred by the statute of limitations but for part payment or a written acknowledgment shall be brought on the original cause of action and the part payment or written acknowledgment shall be evidence to prevent the bar of the statute of limitations." *See also Wolfe v. Brannon*, 211 S.C. 282, 286, 44 S.E.2d 833, 855 (1947). Thus, the time to file the statute of limitations ran from the time of the last payment in February 2009 until February 2015, and Respondent was within the applicable six-year statute of limitations when they filed their claim in March 2014.

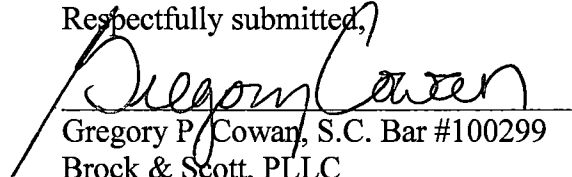
II. THE CIRCUIT COURT ERRED, AS A MATTER OF LAW, IN GRANTING PARTIAL SUMMARY JUDGMENT TO DEFENDANT AS TO PLAINTIFF'S CLAIM.

There being no statute of limitations bar to Appellant filing this action against Respondent, the Trial Court further erred by granting partial summary judgment against Appellant. Respondent's brief in support of her motion for summary judgment acknowledged her default in making payments due under the Sales Contract, and further acknowledged the last payment date in February 2009. The evidence in the record before the Trial Court established the existence of the contract for the sale of goods, and that the last payment made on the account was within the applicable limitations period. Thus, it was reversible error for the Trial Court to grant partial summary judgment against Appellant.

CONCLUSION

Since the statute of limitations applicable to a claim on a deficiency balance following the sale of personal property should be six years, this Court should reverse the order of the Circuit Court granting partial summary judgment to Respondent, and remand the case to the Circuit Court.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Gregory P. Cowan", is written over a horizontal line.

Gregory P. Cowan, S.C. Bar #100299

Brock & Scott, PLLC

1315 Westbrook Plaza Dr.

Winston-Salem, NC 27103

Telephone: 336-354-1797

Telefax: 336-354-1588

Attorney for Appellant

**PROOF OF SERVICE OF THE INITIAL BRIEF OF APPELLANT**

THE STATE OF SOUTH CAROLINA  
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APPEAL FROM RICHLAND COUNTY  
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\_\_\_\_\_  
**PROOF OF SERVICE**  
\_\_\_\_\_

I certify that I have served the Initial Brief of Appellant on Counsel for Respondent Thomas Lydon by depositing a copy of it in the United States Mail, postage prepaid, addressed to his office of record at: Thomas Lydon, Esq., 1320 Main Street, 10th Floor, Columbia, SC 29211.

This the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

\_\_\_\_\_  
Paralegal  
Brock & Scott, PLLC  
1315 Westbrook Plaza Dr.  
Winston-Salem, NC 27103

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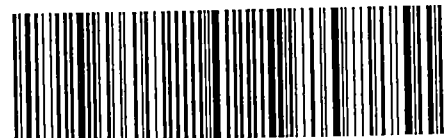
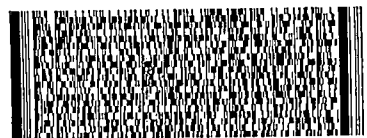
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