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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM LANCASTER COUNTY

Court of Common Pleas

DeAndrea G. Benjamin Circuit Court Judge

Case No. 2014-CP-29-00442

Appellate Case No. 2015-002524

Josh Hammond..... Respondent,

v.

Richard Tod Hammond ..... Appellant,

v.

Titan Logging, LLC..... Third - Party Defendant.

FINAL BRIEF OF APPELLANT

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## STATEMENT OF ISSUES ON APPEAL

- I. THE RESPONDENT VIOLATED THE SOUTH CAROLINA RULES OF CIVIL PROCEDURE BY PERFORMING A DOCUMENT DUMP OR TRIAL BY AMBUSH ON DATE OF SUMMARY JUDGMENT HEARING.
- II. THE RESPONDENT VIOLATED THE SOUTH CAROLINA RULES OF CIVIL PROCEDURE BY USING A MEMORANDUM OF LAW INSTEAD OF AN AFFIDAVIT AS A VEHICLE TO INTRODUCE EVIDENCE TO THE COURT.
- III. THE LOWER COURT ERRED IN ALLOWING RESPONDENT TO PROCEED WITH THE HEARING AFTER VIOLATING THE SOUTH CAROLINA RULES OF CIVIL PROCEDURE WITH THE DOCUMENT DUMP AND ALLOWING THE EVIDENCE OFFERED TO BE PRESENTED BY A MEMORANDUM OF LAW.
- IV. THE LOWER COURT ERRED IN GRANTING SUMMARY JUDGMENT ON THE ISSUE OF THERE WAS NO GENUINE ISSUE OF MATERIAL FACT OF WHO OWNED THE EQUIPMENT IN QUESTION OR THE HAMMOND LAND CLEARING BUSINESS.

## **STATEMENT OF THE CASE**

Respondent filed this action April 10, 2014, in the Circuit Court of Lancaster County seeking to claim pieces of logging equipment among other things. Parties traded interrogatories and other discovery materials, but before depositions were scheduled Respondent moved for Summary Judgment on May 6, 2015 and included no other filings with the Motion. The initial hearing was on August 24, 2015. The Honorable Deandrea G. Benjamin presided. Respondent performed a document dump over objections by Appellant. The Judge allowed them and heard arguments and allowed the record to stay open for 15 days for extra evidence to be presented. After new affidavits and evidence were submitted from Appellant and the first affidavit with the same exhibits from the hearing were submitted from the Respondent, the trial Judge granted Respondent's motion and those issues in the case were dismissed and certain pieces of equipment demanded be turned over. That order was filed November 16, 2015. Appellant filed his Notice of Appeal on December 8, 2015.

## **FACTS**

Appellant Richard Tod Hammond started Hammond Land Clearing, an unincorporated business at the time, in 1988 and has continuously operated it since that date. (R. p. 74) Respondent Josh Hammond, son of the Appellant, began working for Hammond Land Clearing after he graduated high school in 2006. (R. p. 74) In 2008, Respondent ceased working with Hammond Land Clearing temporarily and moved to the coastal area of South Carolina to live with his mother Rhonda Brewer and stepfather, Brad Brewer. (R. p. 74) Respondent chose to return to Lancaster shortly after and started working at Hammond Land Clearing again. In 2009, Hammond Land Clearing began logging timber full time and

Respondent continued to work with the business. (R. p. 74) Respondent again left the company in 2012 temporarily then returned to work and left the business again in May of 2013 and started timber cutting jobs with his stepfather, Brad Brewer, again. (R. p. 75) There was a disagreement between the Respondent and the stepfather and Respondent requested Appellant's company to help finish a job in Timmonsville, South Carolina, for Keels Land and Timber. (R. p. 75) There was a dispute between the Respondent and Appellant about the distribution of funds after the job for Keels Land and Timber and that was the last of the dealings between Respondent and Appellant. (R. p. 75)

Since 2007 Respondent has had access to all of Appellant's personal and business funds. (R. p. 75) Personal expenses, vehicle payments and insurance payments all came out of Hammond Land Clearing bank accounts. (R. p. 75) Respondent was offered a part of Hammond Land Clearing in 2009 or 2010 but drawn paperwork was never signed. (R. p. 75) The primary bank accounts for Hammond Land Clearing were moved to Respondent's name as a DBA Hammond Land Clearing account after Respondent began working full time for the logging business. (R. p. 75) The accounts were previously listed as Tod Hammond DBA Hammond Land Clearing. (R. p. 75)

After Respondent began working, the decision was made to grow the logging side of the land clearing business so new equipment was to be purchased. (R. p. 75) Down payments on the equipment were paid with the Hammond Land Clearing checking accounts. (R. p. 75) Loans were taken out in Respondent's name at the request and direction of the Appellant to help his son establish his credit and get loans in his name. (R. p. 75) One loan was secured with collateral in the form of Bank Certificates of Deposits belonging to Josh Hammond and Nancy Hinson, who is Appellant's mother and Respondent's grandmother.

(R. p. 75) Nancy Hinson was approached by Appellant with the understanding that Hammond Land Clearing would be paying off the loan. (R. pp. 75-76) The large equipment in question in this suit includes a 2004 Tigercat 720D Cutter (S/N 720890) that was purchased on June 11, 2009, a 2004 Tigercat 724D Cutter (S/N 724065) purchased on December 11, 2011, and a 2004 Tigercat 620C Skidder (S/N 6200569) purchased on January 18, 2010. (R. p.76) The contract of sale from Tidewater Equipment Company in Brunswick, Georgia for the 2004 Tigercat 720D was to Hammond Land Clearing and signed by Respondent Josh Hammond. (R. pp. 81-82) The loan was signed by Respondent and Nancy Hinson with the monthly payments being made by Hammond Land Clearing checking account until Respondent left the company in 2013. (R. pp. 230, 240, 263-278) The 2004 Tigercat 724D was purchased by Hammond Land Clearing, signed by Respondent Josh Hammond. (R. p. 83) The payments were made from the Hammond Land Clearing Checking account until Respondent left the company in 2013. (R. pp. 240, 263-278) The 620C Skidder contract of sale was through Tidewater Equipment to Hammond Land Clearing, signed by Josh Hammond. (R. p. 84) The payments were made with the Hammond Land Clearing Checking account. (R. pp. 240, 263-278)

Appellant has always owned and operated Hammond Land Clearing, filed the taxes for Hammond Land clearing including the years 2009, 2010 and 2011 which were filed prior to this lawsuit. (R. p. 76) 1099s provided show Hammond Land Clearing collecting money either under Appellant's social security number or the Federal Tax ID number that Appellant set up for Hammond Land Clearing. (R. pp. 86-94) When the Hammond Land Clearing checking accounts were switched to the Respondent's name, DBA Hammond Land Clearing, Appellant still had an interest in those accounts, had access to write checks

and withdraw money including Carolina First/TD Bank accounts ending in 5105 and 7154. (R. pp. 301, 303-306, 308-310) On the accounts, as well as the contract of sales for the equipment, the address of 2552 Kirkover Drive, Lancaster, South Carolina was used which is Appellant's home address. (R. p. 300) The Contract for sale for the 620C Tigercat listed 1369 Lynwood Drive, Lancaster, South Carolina which is the address for the Hammond Land Clearing shop. Both Properties are owned by Appellant. (R. p. 300)

Respondent filed his Motion for Summary Judgment on May 6, 2015 and the hearing was held August 24, 2015. The Respondent filed no attachments with his motion and none were served to the Appellant prior to the hearing. (R. p. 15) At the hearing, Respondent handed delivered a packet of documents to Appellant's Counsel table that was filed that morning at 9:09AM, August 24, 2015. (R. p.22, lines 16-23) The documents handed to Appellant included a memorandum and attachments and were not clocked copies, but the Court agreed that they were clocked in that morning. Appellant objected to this process to the court. (R. p.22, lines 7-9) Appellant believed it was a document dump or trial by ambush and a violation of the South Carolina Rules of Civil Procedure. The hearing continued with all documents presented allowed in. (R. p. 30, lines 4-10) The hearing concluded and Judge Benjamin allowed for the record to stay for 15 days for more evidence to be provided about the ownership of the three pieces of equipment. (R. pp. 63-65) During that 15 day period Appellant filed and submitted a Memorandum of Law, a second affidavit of the Appellant, an affidavit of Timothy Griggs who owns Grigg's Forestry, and multiple attachments. Respondent also submitted documents including an affidavit of the Respondent. The Judge reviewed the documents and submitted a Form 4 to the parties granting partial summary judgment on September 22, 2015 with instructions for Respondent

to prepare a formal order. The formal Order was signed by the Lower Court Judge on November 10, 2015 and filed on November 16, 2015. This appeal followed that Order

## ARGUMENTS

### I. THE RESPONDENT VIOLATED THE SOUTH CAROLINA RULES OF CIVIL PROCEDURE BY PERFORMING A DOCUMENT DUMP OR TRIAL BY AMBUSH ON DATE OF SUMMARY JUDGMENT HEARING.

Rule 1 of the South Carolina Rules of Civil Procedure is titled “Scope of Rules” and explains that the rules “shall be construed to secure the just, speedy and inexpensive determination of every action.” Rule 1, SCRPC. The Supreme Court of South Carolina has even touched on the intended goal of the rules stating “the primary purpose of the civil procedural rules at issue, i.e., preventing or limiting ambush tactics at trial.” Fields v. Regional Medical Ctr. Of Orangeburg, 363 S.C. 19, 609 S.E.2d 506 (S.C., 2005). The purpose of the rules is to prevent the trial by ambush that were common in this State during the code pleading era before the introduction of the formal South Carolina Rules of Civil Procedure. In interpreting a statute and a rule of civil procedure, courts follow the cardinal rule that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute or rule. Marichris, LLC v. Derrick, 384 S.C. 345, 682 S.E.2d 301 (S.C. App. 2009.)

Prehearing discovery is important and useful in allowing a party to review the evidence expected to be presented by an opposing party and to intelligently prepare for a contested hearing. It prevents trial by ambush and assists the parties in concentrating on the relevant, contested issues at the hearing. Rule 56 SCRPC has to be read with Rule 6

SCRCP to determine the timeliness of motions and attachments. Rule 6(d), SCRCP says that when a motion is supported by affidavit, the affidavit shall be served with the motion. Rule 56(a) SCRCP states that the movant may move with or without supporting affidavits, but when read with Rule 6, SCRCP those affidavits must be served with the motion. Rule 56(c) SCRCP does allow for a judgment to be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on files, together with affidavits, if any, show no genuine issue as to any material fact.

The Respondent in this case filed his Motion for Summary Judgment on May 6, 2015 with no affidavits or supporting documents. (R. p. 15) Appellant in response with no real direction on the issues to be brought in the Summary Judgment Hearing, prepared an affidavit with supporting documents and filed and served those documents. (R.pp. 74-205) Respondent then the day of the hearing filed and hand delivered a packet containing a memorandum in support of Respondent's Motion for Summary Judgment and other supporting documents that totaled eighty seven (87) pages. (R. pp. 206-290) Appellant argued unsuccessfully to the judge that it was a trial by ambush and a document dump by the Respondent and in violation of the South Carolina Rules of Civil Procedure. (R. p. 22, line 7-p. 30, line 10)

Appellant takes the position that if Rule 56, SCRCP specifies that affidavits, if any be served with the motion, then these type of supporting documents should also be served with the motion in the interest of justice. Being handed an eighty seven page packet of supporting documents to Respondent's position at the start of a contested hearing is in no way in the scope or reason for the Rules of Civil Procedure. The SCRCP were put in place to prevent these type of ambush tactics and keep these types of hearings

on the path to be just, fair and efficient. The document dump in this case started an open argument in court on the legality of the dump of supporting documents at the hearing, delayed and possibly clouded the actual contested issues at hand. Respondent should have included these documents in the Motion and should not have performed a document dump on the Appellant at the hearing in violation of the South Carolina Rules of Civil Procedure.

**II. THE RESPONDENT VIOLATED THE SOUTH CAROLINA RULES OF CIVIL PROCEDURE BY USING A MEMORANDUM OF LAW INSTEAD OF AN AFFIDAVIT AS A VEHICLE TO INTRODUCE EVIDENCE TO THE COURT.**

Rule 56, SCRCP governs summary judgment in the civil courts. Rule 56(c), SCRCP states the “judgment sought shall be rendered forthwith if 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....” Affidavits do not have to be filed, but if they are filed they have to be served with the motion per Rule 6, SCRCP. The moving party may use the pleadings, depositions, answers to interrogatories and admissions on file to help prove its position.

Black’s Law Dictionary states that a memorandum is a “party’s written statement of it’s legal arguments presented to the court, usually in the form of a brief.” Black’s Law Dictionary 998 (7th ed. 1999). An affidavit is described by Black’s as a “voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths. A great deal of evidence is submitted by affidavit, esp. in pretrial matters such as summary-judgment motions.” Black’s Law Dictionary 58 (7<sup>th</sup> ed. 1999).

Respondent in this case filed no affidavits with the motion, and submitted a memorandum supporting their Motion for Summary Judgement. (R. p. 28 lines 12-13) In accordance to what is allowed to be used per Rule 56(c), SCRCPP, the pleadings were not introduced at the hearing, there have been no depositions in this case at this time, some select interrogatories were introduced, and there are no admissions on file. Respondent, through his memorandum, introduced several exhibits that came from request for production during the discovery process. (R. p. 222) Requests for production are listed under Rule 34, SCRCPP and are separate and distinct from interrogatories that are listed under Rule 33, SCRCPP. Rule 56(c), SCRCPP specifically does not list requests for production. Appellant believes that since request for productions are not specifically listed under Rule 56, SCRCPP that any evidence listed outside that list in the rule must be introduced to the court by an appropriate vehicle such as deposition or an affidavit. Memorandums are allowed and are used to help guide someone to the legal argument of the submitting party of that memorandum. The court cannot rely on statements of counsel to support summary judgment. “[F]actual statements of the attorneys, whether made during argument or in written briefs or memoranda, ordinarily may not be considered by the court in determining whether a genuine issue of material fact exists.” Higgins v. Medical University of South Carolina, , 326 S.C. 592, 486 S.E.2d 269 (S.C. App., 1997)

Appellant believes that Respondent strategically used their Memorandum in lieu of an Affidavit to bypass the time constraints listed in Rule 6, SCRCPP that govern when affidavits must be submitted. But there was no affidavit submitted with the motion in this case. Respondent successfully attempted to introduce evidence to the court that is outside the specifics listed in Rule 56(c), SCRCPP. The Respondent needed a vehicle to introduce

that evidence to the court and successfully used the memorandum which Appellant believes is a violation of Rule 56(c), SCRPC and Rule 6(d), SCRPC and that he should have used an affidavit which Respondent would have been required to file with the motion.

**III. THE LOWER COURT ERRED IN ALLOWING RESPONDENT TO PROCEED WITH THE HEARING AFTER VIOLATING THE SOUTH CAROLINA RULES OF CIVIL PROCEDURE WITH THE DOCUMENT DUMP AND ALLOWING THE EVIDENCE OFFERED TO BE PRESENTED BY A MEMORANDUM OF LAW.**

Rule 56, SCRPC and Rule 6, SCRPC control the procedure for a motion for summary judgment and the timing of filing the motion and supporting affidavits. Affidavits, if any, shall be filed with the motion. The South Carolina Rules of Civil Procedure also function to prevent trial by ambush or document dumps. The scope of the rules is to promote the fairness and justness of all court procedures including pretrial matters. Rule 56(c), SCRPC also sets forth appropriate supporting documents to be used with or without affidavits to show if there is no genuine issue as to any material fact.

The Lower Court erred in allowing Respondent to proceed in the Motion for Summary Judgment Hearing after his violation of Rule 56, SCRPC and Rule 6, SCRPC. Respondent performed a document dump on the Appellant on the morning of the hearing and did not provide Appellate with an affidavit or any supporting documents when they filed for the Summary Judgment Motion. (R. p. 15) Appellate agrees that the rules state that a party does not have to submit an affidavit at all, but Appellant believes that the Respondent attempted to bypass the time constraints in Rule 6, SCRPC by using a memorandum instead of an affidavit to introduce evidence to the court. Appellant objected to the document dump immediately at the start of the hearing, with the copy of the packet handed to Appellant not being clocked in. (R. pp. 22, lines 7-9, p. 29, lines

11-14.) Appellant claimed the document dump was against the SCRCP and constituted a trial by ambush. The Lower Court allowed Respondent to continue over objections. (R. p. 30, lines 4-10)

The Respondent violated the South Carolina Rules of Civil Procedure with a document dump on the Appellant at the beginning of the Hearing. The Respondent also violated the South Carolina Rules of Civil Procedure by attempting successfully to introduce evidence to the court through a memorandum and bypassing the rules for submitting an affidavit which would have been a more appropriate way to introduce evidence to the court that is not listed as supporting documents under Rule 56(c). The Lower Court should not have allowed the Respondent to continue after their violation of the SCRCP with the document dump or the inappropriate use of the memorandum.

**IV. THE LOWER COURT ERRED IN GRANTING SUMMARY JUDGMENT ON THE ISSUE OF THERE WAS NO GENUINE ISSUE OF MATERIAL FACT OF WHO OWNED THE EQUIPMENT IN QUESTION OR THE HAMMOND LAND CLEARING BUSINESS.**

On appeal from an order granting summary judgement, the appellate court will review all ambiguities, conclusions and inferences arising in and from the evidence in a light most favorable to the nonmoving party below. USAA Property and Cas. Ins. Co v. Clegg, 377 S.C. 643, 661 S.E. 2d 791 (S.C. 2008.) In determining whether any triable issue of fact exists on motion for summary judgment, the evidence, and all inferences, which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. Quail Hill, LLC v. County of Richland, 387 S.C. 223, 692 S.E.2d 499 (S.C. 2010.)

To withstand a motion for summary judgment in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence. Savannah Bank, N.A. v. Stalliard, 400 S.C. 246, 734 S.E.2d 161 (S.C. 2012.) Courts considering summary judgment neither makes factual determinations nor considers the merits of competing testimony. David v. McLeod Regional Medical Center, 367 S.C. 242, 626 S.E.2d 1 (S.C. 2006.)

As referenced with our previous arguments, Respondent did not file any supporting documents with his Motion for Summary Judgment. (R. p. 15) Appellant filed an affidavit in response and served it on the Respondent in a timely manner. (R. pp. 74-76, p. 22 lines 10-15) That initial affidavit by the Appellant set out that Hammond Land Clearing was established in 1988 by Appellant and that when Respondent graduated high school in 2006, he began working for Hammond Land Clearing full time. (R. p. 74) It also establishes that there were multiple times where Respondent would stop working for Hammond Land Clearing. (R. pp. 74-75) Appellant states that he wanted Respondent to be involved and offered a part of the business to him but the partnership paperwork was never signed. (R. p. 74) The affidavit also sets out that Respondent, at the direction of the Appellant, went and purchased equipment for Hammond Land Clearing. (R. pp. 75-76) The Respondent was young and the Appellant wanted to help him establish credit so loans were taken out in his name. (R. p. 75) The equipment was paid for by Hammond Land Clearing funds, and while the account had Respondent's name on them, it was a DBA or Doing Business As account for Hammond Land Clearing. The business of Hammond Land Clearing was owned by Appellant, the equipment was paid for by

business funds. (R. pp. 75-76) Respondent was involved in that business, but to what degree is a question for a jury.

Also provided in Appellant's initial affidavit were supporting documents that were referenced in the affidavit. They include titles to multiple big rig trucks and log trailers in the name of either Appellant or Hammond Land Clearing and all are addressed as the Appellant's home address on Kirkover Dr. in Lancaster. Also attached were two contracts of sales for the 2004 Tigercat 720 S/N 7203890. (R. pp. 81-82) They list the equipment was sold to Hammond Land Clearing, purchaser listed as Hammond Land Clearing, and were signed by Josh Hammond. One is dated June 3, 2009 and the other is June 11, 2009. Both documents for the 720 Tigercat list Appellant's address as the purchaser's address. An offer to purchase the 2004 724D Tigercat S/N 7240651 that lists Hammond Land Clearing as buyer, addressed to Appellant's home address and is signed by Josh Hammond on December 6, 2011. (R. p. 83) A contract of sale for the 620 Tigercat that lists Hammond Land Clearing as whom it was sold to and addressed to 1269 Lynwood Dr. which is Hammond Land Clearing's business address owned by Appellant. (R. p. 84) A contract of sale was also provided for a 1999 Tigercat 630 Skidder that was sold to Hammond Land Clearing and signed by Josh Hammond on February 12, 2009. (R. p. 85)

Appellant also provided 1099 tax forms that show Appellant or Hammond Clearing, addressed to either Appellant's home address or Appellant's PO Box in Lancaster. (R.p. 86-94) Appellant also provided tax documents for 2009, 2010, 2011, 2012 and 2013 which include business tax information and the business' tax ID information. (R. pp. 95-204)

At the hearing Respondent performed a document dump on the Appellant. (R. p. 22, lines 7-15) Those documents included a Memorandum in Support of Plaintiff's Motion for Summary Judgment, a copy of Appellant's Answer and Counterclaim and Third Party Complaint, Defendant/Third Party Plaintiff's Responses to Plaintiff's Second set of Requests for Production, Copy of Contract of Sale for the 2004 720D Tigercat, Promissory Note from First Citizens, multiple check copies from First Citizens Bank and BB&T, a BB&T account form, Offer to purchase for the 2004 724D Tigercat, a First Citizens Promissory Note, multiple checks from First Citizens Bank and TD bank, an agreement from Carolina First Bank, Contract of Sale for the 2004 Tigercat 620C, Promissory Note from High Tide Two, LLC, copies of checks from Carolina First Bank and TD Bank, a copy of Defendant/Third Party Plaintiff's answers to Plaintiff's First Set of Interrogatories and a copy of Appellant's Affidavit in opposition to Motion for Summary Judgment.

After the initial arguments about the potential violation of the South Carolina Rules of Civil Procedure, the Respondent states that Appellant and Respondent "both operated independently and together between 2006 and 2009 as Hammond Land Clearing. Both had their own jobs, both had their own money, both had their own bank accounts." (R. p. 31, line 23-p. 32, line 2) Respondent goes on to explain that he purchased the equipment at issue in this case evidenced by him signing the contract of sale that states Josh Hammond Land Clearing and a promissory note signed personally by Respondent for the amount of the 2004 Tigercat 720D. (R. p. 34, lines 7-16) Respondent provides the same argument for the 2004 Tigercat 724D (mistakenly referred to as the 720D at the Hearing, R. p. 37, line 6) and the 2004 Tigercat 620C skidder. (R. p. 37, lines

9-20, p. 38, lines 13-25, p. 39, lines 1-15) Appellant disagrees that there were two separate and distinct Hammond Land Clearing Businesses operating in the area. (R. p. 45 lines 9-11) The business was started by Appellant in 1988 and he has continued that business and still does continue that business. (R. p. 74) The documents supporting Appellant's affidavit that was submitted to the court include 1099s to Appellant DBA Hammond Land Clearing, and Appellant's tax information that include profits and losses from the business and depreciation of equipment that Hammond Land Clearing was operating. Hammond Land Clearing has a Federal Tax ID number that was set up by Appellant to help keep his business legitimate and in the good graces of the government. It was mentioned in the hearing that Respondent has failed to show any tax information for his supposed separate and apart Hammond Land Clearing. (R. p. 45, lines 19-22) He has shown no proof of income coming into his claimed separate business. (R. pp. 296-299) Appellant argued in the Lower Court that Hammond Land Clearing, the business owned by Appellant, purchased the equipment. (R. p. 45, lines 8-9, p. 51, lines 5-6, p. 52, lines 18-21) Respondent may have signed for the equipment, but the business was paying for the loans, and the equipment was purchased under the direction of Appellant. (R. pp. 75-76) Respondent refused to provide tax information through interrogatories or production requests. (R. pp. 296-299) The tax returns were provided to show the fact that Appellant owns the business named Hammond Land Clearing and that there is only one Hammond Land Clearing operating in the logging industry specifically in this area. (R. pp. 86-204) The purchaser documents for the equipment were mentioned and Hammond Land Clearing is listed as the Purchaser on every contract along as listing the

home address that is owned by Appellant. (R. p. 300) Respondent signing the contracts simply means that he as an agent for Hammond Land Clearing is purchasing equipment.

The Lower Court allowed the record to be held open for 15 days so that the Judge could review the large amount of documents submitted and Appellant could produce any further information on the ownership of the three pieces of equipment. (R. p. 65, lines 1-3) The Appellant took the position that the biggest question was who was operating as Hammond Land Clearing, because there is only one. (R. p. 61, lines 10-12) The Judge inquired about bank account information that Appellant would be on. (R. p. 56, lines 5-6) Appellant offered to the judge the records we had already produced including 1099s that are not self-provided; they are provided by the Payer. (R. p 62, line 13- p. 63 line 2) The Lower Court Judge was not interested in the tax information and states in reference to the 1099s offered by Appellant: “[n]ot the tax stuff. That is what he puts on his taxes.” (R. p. 62, lines 22-23) With the record left open, Appellant submitted a Memorandum in opposition to Motion for Summary Judgment that set out Appellant’s concerns about the South Carolina Rules of Civil Procedure and the Summary Judgment hearing. (R. pp. 293-295) Appellant also supplemented the affidavit with the following documents: Plaintiff’s Answers to Defendant’s First Set of Interrogatories to show that Respondent objected to provide any tax information, Appellant’s second Affidavit, a Carolina First Bank form with Appellant listed as an agent of the account dated June 11, 2010, multiple documents from Carolina First Bank that showed Appellant had a debit card in his own name listed on the Joshua Tod Hammond DBA Hammond Land Clearing account, a TD bank business account form for Josh Hammond DBA Hammond Land Clearing with Appellant listed as a signer on the account dated August 20, 2012, multiple checks signed

by Appellant from the Josh Hammond DBA Hammond Land Clearing account for payments on equipment and other costs including the U.S. Treasury, and affidavits by Timothy Griggs and Danny McKittrick who both own forestry companies that contract land clearing businesses and both state that there is only one Hammond Land Clearing business in operation and that it is owned by Appellant. Respondent also filed their first affidavit and attached the same documents that were previously introduced at the hearing.

Respondent's position is that Appellant and he were operating two separate Hammond Clearing Businesses. (R. p. 51, lines 19-20) Appellant provided 1099s and tax returns that show that Hammond Land Clearing was a business operated by Appellant and has been for some time. (R. pp. 86-204) Respondent has not provided any tax information that Respondent has made any money from a separate and distinct Hammond Land Clearing business. The Lower Court Judge did not view the tax information that Appellant produced as important, but the Judge's duty is not to weight the facts presented or determine the merits of evidence presented, only to see if there is a genuine issue of material fact. Appellant has filed two affidavits that reflect his testimony since depositions have yet to have been taken in this case. In both of those affidavits Appellant states that he opened the Hammond Land Clearing business, allowed his son the Respondent to come work with him and wanted to grow the business with him. (R. p. 74) Hammond Land Clearing was purchasing equipment, using the equipment for jobs, those jobs provided profits for the entire business that included Appellant and Respondent. (R. pp. 74-75) The contracts for the pieces of equipment in question were signed by Respondent, but he was purchasing the equipment for Hammond Land Clearing. (R. pp. 75-76) The address of the Hammond Land Clearing purchaser on the contracts is the

home address owned by Appellant. (R. p. 300) That helps show that there was never another Hammond Land Clearing business. The affidavits of Timothy Griggs and Danny McKittrick show that in this area that there was only one Hammond Land Clearing and that it was operated by Appellant. (R. pp. 327, 330) Both witnesses admit that they know the Respondent, and have done business with him as an employee of Hammond Land Clearing operated by the Appellant. (R. pp. 327, 330) The Lower Court Judge was very interested in Appellant showing that he was on checking accounts associated with the Respondent. (R. pp. 58, lines 3-9, p. 63 lines 3-6) Appellant provided multiple bank documents from Carolina First, and TD Bank that show Appellant was on the accounts, had debit cards in his own name from the accounts listed as Josh Hammond DBA Hammond Land Clearing and had signatory or agent powers. (R. pp. 301, 303-310) Appellant provided multiple checks that specifically list equipment payments that were signed by Appellant. (R. pp. 311-326)

Appellant feels like he has more than provided a mere scintilla of evidence to refute any argument that Respondent brought up in the Summary Judgment Hearing. Appellant has provided evidence that he owned and operated Hammond Land Clearing through 1099s and tax returns, provided affidavits outside of his own that show there was only one Hammond Land Clearing operating. Appellant has provided information that shows he was on different bank accounts listed as Josh Hammond DBA Hammond Land Clearing and provided checks from that account that he personally signed for equipment payments of the equipment in question in this case. Providing these multiple pieces of evidence more than covers the burden of the non-moving party that there is a genuine issue of material fact as to the ownership of the three pieces of equipment in this case.

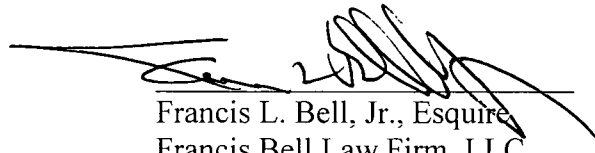
The Lower Court Judge in her Form 4 Order stated that Defendant was given an additional 15 days to produce documentation he had an ownership interest in the equipment and checks in question, and failed to do so. (R. p. 12) Appellant submitted affidavits along with supporting documents while the record was kept open. Appellant believes that the Lower Court Judge's language in the Form 4 Order show that she went beyond the mere existence of evidence, and got into the believability or credibility of the evidence presented. Per David v. McLeod Regional Medical Center, the Lower Court Judge erred by making factual determinations and considering the merits of competing testimony.

## **CONCLUSION**

Summary Judgment was not appropriate in this case. The standard for Summary Judgment is it should be allowed when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The non-moving party need only submit a mere scintilla of evidence to escape Summary Judgment. Appellant overcame this burden initially by providing an affidavit at the Hearing for Summary Judgment stating that he owned Hammond Land Clearing and the equipment in question was owned by Hammond Land Clearing. He supported his affidavit with tax records from the business to establish that he was in fact the owner of Hammond Land Clearing. When the record was left open, Appellant provided his second affidavit and additional affidavits of members of the forestry service industry that stated there was only one Hammond Land Clearing and it was operated by the Appellant. Appellant also provided bank information and checks that showed that even when the business' accounts changed names to Joshua Hammond, DBA Hammond Land Clearing, the Appellant still had

access to those accounts and signatory power over those accounts. The issue falls on the existence of evidence, not on the believability of evidence. Appellant overcame his burden of presenting a mere scintilla of evidence, and showed there was a genuine issue of material fact. It was inappropriate for the Lower Court to grant Summary Judgment and it should be overturned.

January 17, 2017



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THE STATE OF SOUTH CAROLINA

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In the Court of Appeals

JAN 19 2017

SC Court of Appeals

APPEAL FROM LANCASTER COUNTY

Court of Common Pleas

DeAndrea D. Benjamin Circuit Court Judge

Trial Case No. 2014-CP-29-00442

Appellate Case No. 2015-002524

Josh Hammond..... Respondent,

v.

Richard Tod Hammond.....Appellant,

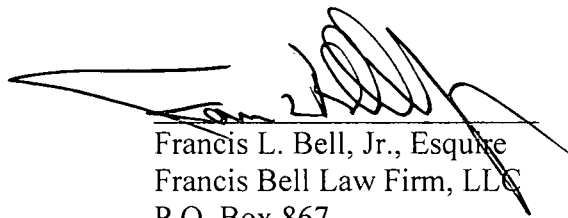
v.

Titan Logging, LLC..... Third Party Defendant.

CERTIFICATE OF COUNSEL

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

January 17, 2017



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PROOF OF SERVICE

I certify that I have served the *Final Brief*, by depositing copies of same in the United States Mail, postage prepaid, on January 18, 2017, addressed to Respondents' attorneys of record as follows:

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