

**THE STATE OF SOUTH CAROLINA
In the Court of Appeals**

**APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas**

The Honorable J. Mark Hayes

**C.A. No.: 2016-CP-42-01145
South Carolina Court of Appeals Case no. 2017-000092**

Train Auto Sales, Inc.....Appellant(s)

v.

Ken Howell and Karen Nicole Lamb.....Respondent(s)

INITIAL BRIEF OF RESPONDENTS

ALFORD & HART, LLC

Andrew R. Hart
SC Bar no. 79063
P.O. Box 6326
Spartanburg, South Carolina 29304
(864) 574-0870
office@alfordlaw.com

ATTORNEY FOR RESPONDENTS

RECEIVED

SEP 13 2017

SC Court of Appeals

TABLE OF CONTENTS

	PAGES
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES.....	ii
I. STATEMENT OF ISSUES ON APPEAL.....	1
a. <u>Whether the Circuit Court properly granted Respondent’s Rule 12(b)(6) SCRCP motion to dismiss Appellant’s counterclaim for a mechanic’s lien.</u>	
b. <u>Whether Appellant can rely on statement of fact not contained in it the pleading in arguing its claim for a mechanic’s lien should not be dismissed pursuant to a Rule 12(b)(6) SCRCP motion.</u>	
II. STATEMENT OF THE CASE.....	1
III. STATEMENT OF FACTS.....	2
IV. STANDARD OF REVIEW.....	4
V. ARGUMENTS.....	5
a. <u>The trial court properly granted Respondents’ motion to dismiss Appellant’s Counterclaim for a mechanic’s lien when Appellant voluntarily relinquished possession of the property upon which it was claiming a lien.</u>	
b. <u>Appellant does not allege in its pleadings that Respondents obtained possession of the vehicle wrongfully and cannot show the mechanic’s lien survives Appellant’s failure to maintain continuous possession of the property.</u>	
c. <u>The failure to maintain continuous possession by Appellant is factually distinct from <i>Bouknight v. Hedden</i> cited by Appellant, and <i>Bouknight</i> does not apply to the current matter.</u>	
VI. CONCLUSION.....	8

TABLE OF AUTHORITIES

Cases:

<i>Capital City Ins. Co. v. BP Staff Inc.</i> , 382 S.C. 92, 674 S.E.2d 524 (Ct.App. 2009)....	4
<i>Woodell v. Marion School Dist. One</i> , 414 S.E.2d 295, 299 (Ct.App. 1992).....	4
<i>Hambrick v. GMAC Mortg. Corp.</i> , 370 S.C. 118, 634 S.E.2d 5 (Ct.App. 2006).....	4
<i>Spence v. Spence</i> , 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006).....	4
<i>Welcome Home Center, Inc. v. Central Chevrolet Center, Inc.</i> ,..... 272 S.C. 176, 249 S.E.2d 896 (1978)	5
<i>Bouknight v. Hedden</i> , 188 S.C. 300, 199 S.E. 315 (1938).....	7, 8

Statutes:

S.C. Code Ann. § 29-5-10 (1976).....	5
--------------------------------------	---

Court Rules:

Rule 12(b)(6), SCRCF.....	1, 4, 5, 6, 7
---------------------------	---------------

I. STATEMENT OF ISSUES ON APPEAL

Issues presented in this appeal from the order of the Honorable J. Mark Hayes are:

1. Whether the Circuit Court properly granted Respondent's Rule 12(b)(6) SCRCF motion to dismiss Appellant's counterclaim for a mechanic's lien.
2. Whether Appellant can rely on statement of fact not contained in it the pleading in arguing its claim for a mechanic's lien should not be dismissed pursuant to a Rule 12(b)(6) SCRCF motion.

II. STATEMENT OF THE CASE

The Respondents, Ken Howell and Karen Nicole Lamb, respectfully submit this brief requesting the Circuit Court's order in favor of Respondents' motion to dismiss Appellant's counterclaim pursuant to R. 12(b)(6), SCRCF be affirmed.

Respondents initiated the current action by filing of a Summons and Complaint in the Spartanburg County Court of Common Pleas on March 29, 2016. Appellants filed an Answer and Counterclaim on May 5, 2016, asserting a mechanic's lien on the Respondents' vehicle, a 1998 Ford E-150 Econoline, VIN no. 1FTRE1426WHB98779 (hereinafter referred to as the "subject vehicle"). Respondents filed an Answer and motion to dismiss Appellant's counterclaim pursuant to Rule 12(b)(6), SCRCF on June 1, 2016. Respondent supplemented the motion with a Memorandum in Support filed on September 2, 2016. Appellant did not submit a brief memoranda or other supporting material regarding Respondent's motion to dismiss.

After a hearing on Respondents' motion to dismiss before the Honorable J. Mark Hayes, the court granted Respondents' motion to dismiss Appellant's counterclaim by order dated December 20, 2016. On January 19, 2017, Appellant filed its Notice of Appeal.

III. STATEMENT OF FACTS

Appellant submits the following alternative statement of facts to that presented by Appellant in its initial brief.

In April 2015, Respondent Ken Howell visited Appellant's place of business in Spartanburg County, South Carolina (Complaint ¶5). Respondent, a used vehicle dealership and mechanic, spoke with Howell regarding the subject vehicle, a 1998 Ford E-150 Econoline, VIN no. 1FTRE1426WHB98779, owned by Howell and Respondent Karen Nicole Lamb (Complaint ¶7). Howell described the mechanical difficulties the vehicle was having to Appellant, and Appellant represented to the Howell that the subject vehicle needed a new "o2 sensor or catalytic converter," and that if Howell brought the subject vehicle to Appellant, repair could be performed by Appellant for "no more than \$200.00." (Complaint ¶9). Howell stated that he was interested in repairs being performed, but that he "didn't want to put a lot of money" into the subject vehicle (Complaint ¶10).

On or about April 10, 2015, Respondents dropped the vehicle off at Appellant's place of business for physical inspection of the subject vehicle and potential repair, with the expectation that Appellant would seek authorization prior to any work being performed on the subject vehicle (Complaint ¶11). After not hearing any update from Appellant for two to three weeks regarding the subject vehicle, Howell was contacted by an unknown agent of Appellant, who informed Howell that Appellant "didn't know" what was wrong with the subject vehicle, and that the vehicle had been sent by Appellant to Mauldin, South Carolina for additional inspection (Complaint ¶13). Respondents did not provide consent for the vehicle to be transported elsewhere, nor were they informed prior to the vehicle being moved (Complaint ¶14). After additional time, Appellant contacted Respondents and informed them that the subject vehicle had

been returned to Appellant, and was ready for pickup (Complaint ¶15). Upon arriving at Appellant's place of business on or about May 21, 2015, Howell was presented with an "invoice" by Appellant for \$1,387.46 for repairs, which Howell was informed by Appellant that he "had to pay." (Complaint ¶16). At no point did Respondents authorize Appellants to perform any specific repairs on the subject vehicle (Complaint ¶17). Howell was given physical possession of the subject vehicle by Appellant, and Howell drove the vehicle to a local mechanic for inspection (Complaint ¶18). Howell discovered upon driving the subject vehicle that it would not drive over 10 miles per hour, and was informed by the mechanic that the vehicle still had a problem with the catalytic converter along with unconnected electrical cords and loose parts (Complaint ¶19). Howell, feeling unsafe driving the subject vehicle, parked the vehicle in a parking lot across the street from Appellant's place of business (Complaint ¶21). The property where Howell parked the subject vehicle was not owned by Appellant (Complaint ¶22). When Respondents went to retrieve the subject vehicle later the same day, Respondents discovered that Appellant had towed the subject vehicle back to its place of business (Complaint ¶23). Howell demanded the return of the vehicle from Appellant, who refused to relinquish possession of the subject vehicle (Complaint ¶24).

Appellant, in its Answer and Counterclaim for a mechanics lien on the subject vehicle, the content of which makes up Appellant's Statement of Facts in its Initial Brief, admits that it voluntarily gave Howell (incorrectly identified in Appellant's Answer and Counterclaim as "Powell") physical possession of the subject vehicle (Answer and Counterclaim ¶15, 16, 61); that Howell drove the subject vehicle off of Appellant's place of business (Answer and Counterclaim ¶15); that Howell parked the subject vehicle in the lot next to Appellant's location (Answer and Counterclaim ¶15, 61); that the parking lot across from Appellant's place of

business where the subject vehicle was parked was not Appellant's property (Answer and Counterclaim ¶22); and that Appellant towed the subject vehicle back to its place of business (Answer and Counterclaim ¶23). Appellant does not allege in its Counterclaim that Respondent wrongfully obtained the subject vehicle, that Respondent obtained possession of the vehicle by fraud or misrepresentation, that Respondent had the intent to avoid payment and defeat the lien, or that physical possession of the subject vehicle was removed from Appellant without knowledge or consent.

IV. STANDARD OF REVIEW

Upon review of a dismissal of an action for failure to state a cause of action (Rule 12(b)(6), SCRCF), the appellate court applies the same standard of review implemented by the trial court. *Capital City Ins. Co. v. BP Staff Inc.*, 382 S.C. 92, 99, 674 S.E.2d 524, 528 (Ct.App. 2009). A motion to dismiss under R. 12(b)(6), SCRCF for failure to state facts sufficient to state a cause of action "is directed to the factual and legal sufficiency" of the complaint or claim. *Woodell v. Marion School Dist. One*, 414 S.E.2d 295, 299 (Ct.App. 1992). The court may dismiss a claim when the moving party demonstrates the opposing party's failure to state facts sufficient to constitute a cause of action in the pleading filed with the court. *Hambrick v. GMAC Mortg. Corp.*, 370 S.C. 118, 634 S.E.2d 5 (Ct.App. 2006). In considering a Rule 12(b)(6), SCRCF motion to dismiss, the court must base its ruling solely on the allegations set forth in the complaint. *Spence v. Spence*, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006).

V. ARGUMENT

I. THE TRIAL COURT PROPERLY GRANTED RESPONDENTS' MOTION TO DISMISS APPELLANT'S COUNTERCLAIM FOR A MECHANICS LIEN WHEN APPELLANT VOLUNTARILY RELINQUISHED POSSESSION OF THE SUBJECT VEHICLE UPON WHICH IT WAS SEEKING A MECHANICS LIEN.

Pursuant to SC Code Ann. §29-15-10 (1976):

“a proprietor, owner or operator of any...garage or repair shop...may sell the article at public auction to the highest bidder if:

- (1) the article has been left at the shop for repairs or storage and the repairs have been completed or the storage contract has expired;
- (2) the article has been *continuously maintained in his possession* (emphasis added); and
- (3) thirty days have passed since written notice was given to the owner of the article and to any lienholder that the repairs have been completed or the storage contract has expired.”

The court granted Respondent's motion to dismiss due to Appellant's failure to maintain continuous possession of the subject property upon which it claimed a mechanic's lien. While Appellant argues the court erred in dismissing its claim for a mechanic's lien, Appellants admits that it voluntarily relinquished possession of the subject property, and failed to plead facts in its counterclaim that it now relies on to overturn the court's dismissal.

South Carolina courts have interpreted SC Code §29-15-10 to require “continuous possession” of an article by a repairman in order to maintain a lien on the property. In *Welcome Home Center, Inc. v. Central Chevrolet Center, Inc.*, the direct issue addressed by the South Carolina Supreme Court was “whether a repairman's lien survives a voluntary relinquishment of possession to the owner.” *Welcome Home Center, Inc. v. Central Chevrolet Center, Inc.*, 272 S.C. 176, 249 S.E.2d 896 (1978). Summary judgment in favor of the Plaintiff was granted by the trial court and upheld by the South Carolina Supreme Court. The court reasoned that the repairman seeking to enforce a lien pursuant to SC Code §29-15-10, et seq. had voluntarily relinquished possession of the subject property to the owner, and the lien expired at the time the repairman had relinquished possession of the vehicle. *Id.* Similarly, Appellant admits that it

relinquished possession of the subject vehicle to Respondent Howell (Answer and Counterclaim ¶15, 61). Appellant admits that Respondent did not return possession of the subject vehicle, and that it only re-gained possession of the subject vehicle by towing the vehicle back to its place of business from another's property. (Answer and Counterclaim ¶15, 22, 23). As Appellant does not dispute in its pleadings that possession was voluntarily relinquished to Respondent, the dismissal of Appellant's claim for a mechanic's lien on the property pursuant to Rule 12(b)(6) SCRCF is proper.

II. APPELLANT DOES NOT ALLEGE IN ITS PLEADINGS THAT RESPONDENT OBTAINED POSSESSION OF THE VEHICLE WRONGFULLY AND CANNOT NOT SHOW THE MECHANIC'S LIEN SURVIVES THE APPELLANT'S FAILURE TO MAINTAIN CONTINUOUS POSSESSION OF THE PROPERTY.

In considering a Rule 12(b)(6), SCRCF motion to dismiss, the court must base its ruling solely on the allegations set forth in the complaint. *Spence v. Spence*, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006). As Appellant's argument relies on facts not plead in its Answer and Counterclaim, dismissal of the Appellant's claim is appropriate.

Appellant relies on the "operative facts" in its initial brief that Respondent "misrepresented his intent when he asked to test drive the vehicle," and "did not return the vehicle to Appellant's lot, but instead parked it across the street in an attempt to avoid paying for the work performed and defeat the mechanic's lien." (Appellant initial brief p. 5). Appellant stated that Respondent "obtained the vehicle by fraud and misrepresentation of his intent to avoid payment and to defeat the lien," and that Respondent "obtained possession of the vehicle wrongfully." (Appellant initial brief p. 6, 7).

However, the foregoing factual allegations were not pled in Appellant's actual counterclaim filed in this matter, and cannot be considered in a Rule 12(b)(6) SCRCF motion.

Even viewing the pleadings in the light most favorable to the non-moving party, Appellant does not allege in its Answer and Counterclaim that Respondent asked to test drive the vehicle; misrepresented his intent to Appellant; obtained the vehicle by fraud and/or misrepresentation; that Respondent had the intent to defeat the mechanic's lien; that Respondent parked the vehicle across the street to avoid paying for work performed; or that Respondent obtained possession of the vehicle wrongfully. As the ruling on a Rule 12(b)(6) SCRCF motion relies solely on the pleadings, the operative facts relied on by Appellant in its brief no contained in its pleading should not be considered, and Appellant's claim for a mechanic's lien should be dismissed.

III. THE FAILURE TO MAINTAIN CONTINUOUS POSSESSION BY APPELLANT IS FACTUALLY DISTINCT FROM *BOUKNIGHT v. HEDDEN* CITED BY APPELLANT, AND *BOUKNIGHT* DOES NOT APPLY TO THE CURRENT MATTER..

Appellant cites *Bouknight v. Hedden* for the proposition that a mechanic's lien is not defeated when property is wrongfully recovered. 188 S.C. 300, 199 S.E. 315 (1938). Appellant argues that because Howell "obtained the vehicle by fraud and misrepresentation of his intent to avoid payment and defeat the lien," the mechanic's lien did not expire. The reliance on *Bouknight*, however, is misplaced due to factual distinctions and has no application to the current case.

Bouknight involved a bailee taking possession of a vehicle from a bailor with a potential mechanic's lien at 3:00am in the middle of the night. *Bouknight* at 188 S.C. 300, 199 S.E. 316. The bailee took the vehicle from Bailor's place of business, and did so without the lienholder's knowledge or consent. *Bouknight* at 188 S.C. 300, 199 S.E. 315. Citing 6 C.J. 1136, the court described a the "general rule" that a repairman's lien is lost "if a bailee voluntarily parts with the possession of goods before receiving compensation." *Bouknight* at 188 S.C. 300, 199 S.E. 316. This general rule does not apply when "chattel is wrongfully recovered by the bailor, or removed from the possession of the bailee without his consent," in which case the lien survives. *Id.*, citing

6 C.J. 1136. Based on the bailee's conduct in wrongfully removing the property from the bailor's possession without their knowledge or consent, the court concluded that the bailor's lien on the property survived. *Id.*

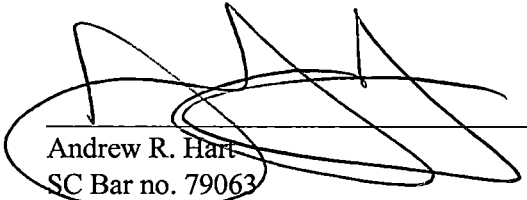
As acknowledged by the Appellant in its initial brief, Respondent did not steal the subject vehicle in the middle of the night (Appellant initial brief p. 6). Appellant argues in its initial brief that "similar to the present case, the owner of the trailer got possession of the trailer without the knowledge or consent of the line holder." (Appellant initial brief p. 6). Appellant fails to plead in its counterclaim, however, that Respondent actually gained possession of the trailer without the knowledge or consent of Appellant. In support of its argument that, consistent with *Bouknight*, Respondent wrongfully gained possession of the subject vehicle, Appellant states that Respondent "obtained the vehicle by fraud and misrepresentation of his intent to avoid payment and defeat the lien." (Appellant initial brief p. 6). Respondent failed to plead these facts in its Answer and Counterclaim, as Appellant do not allege in its Answer and Counterclaim that Respondent obtained the vehicle by fraud or misrepresentation, or that Respondent intended to avoid payment and defeat the lien.

Accordingly, *Bouknight* is a factually distinct case from the current matter, and facts used by Appellant to draw similarities between it and the current matter are not plead by Appellant in its Answer and Counterclaim.

VI. CONCLUSION

For all foregoing reasons stated herein, the judgment of the trial court should be affirmed.

Respectfully submitted,

A handwritten signature in black ink, appearing to be "Andrew R. Hart", is written over a horizontal line. The signature is somewhat stylized and loops back under the line.

Andrew R. Hart
SC Bar no. 79063

P.O. Box 6326

Spartanburg, South Carolina 29304

(864) 574-0870

office@alfordlaw.com

ATTORNEY FOR RESPONDENTS

**THE STATE OF SOUTH CAROLINA
In the Court of Appeals**

**APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
The Honorable J. Mark Hayes**

**C.A. No.: 2016-CP-42-01145
South Carolina Court of Appeals Case no. 2017-000092**

Train Auto Sales, Inc.....Appellant(s)

v.

Ken Howell and Karen Nicole Lamb.....Respondent(s)

CERTIFICATE OF SERVICE

I certify that on September 11, 2017, I served Respondent's Initial Brief in the above-captioned matter by placing a copy of the same in the United States mail, postage pre-paid, addressed to counsel for Appellant as follows:

J. Faulkner Wilkes
114 Whitsett St.
Greenville, SC 29601

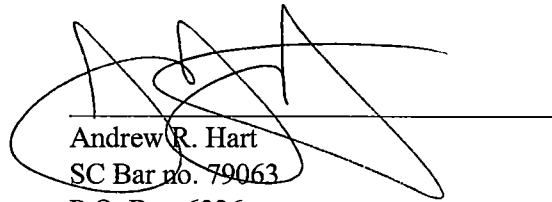
and to the South Carolina Court of Appeals as follows:

Jenny Abbot Kitchings
Clerk of Court, South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211

RECEIVED

SEP 13 2017

SC Court of Appeals

A handwritten signature in black ink, appearing to be 'Andrew R. Hart', is written over a horizontal line. The signature is stylized and somewhat illegible due to overlapping loops.

Andrew R. Hart
SC Bar no. 79063

P.O. Box 6326

Spartanburg, South Carolina 29304

(864) 574-0870

office@alfordlaw.com

ATTORNEY FOR RESPONDENTS

LAW OFFICES
ALFORD & HART LLC

P.O. Box 6326
Spartanburg, SC 29304

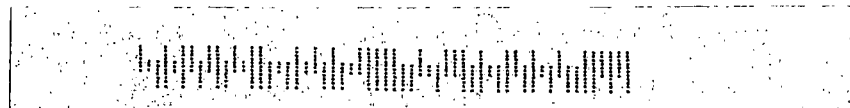


1000



29211

U.S. POSTAGE
PAID
SPARTANBURG, SC
29306
SEP 11, 17
AMOUNT
\$1.61
R2304W120182-16



Jenny Abbot Kitchings
Clerk of Court, South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211

Jenny Abbot Kitchings
Clerk of Court, South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211

RECEIVED

SEP 13 2017

SC Court of Appeals

CONSUMER BANKRUPTCY
LAW