THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM LAURENS COUNTY
Frank R. Addy, Jr., Circuit Court Judge

Appellate Case No. 2017-002434

Laurens Cycle Sales, Inc. d/b/a Honda of Laurens, LLC and Cooper Motor Sales, LLC,

Respondent,

v.

Estate of Ruth Tumblin,

Appellant.

INITIAL REPLY BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Rather than requiring the Court to read a complete Statement of the Case containing much of the same information set forth in the Statement provided by Appellant, Respondent will confine itself to those matters in Appellant's Statement about which there is disagreement or which require clarification.

The Respondent's final amendment of its pleadings pursuant to an order granting its motion to amend gave notice of a defense of recoupment and again made known that Respondent Cooper Motor Sales, LLC is a non-existent entity. Appellant filed an answer which did not assert any counterclaims or allege any affirmative defenses. The record is unclear whether she withdrew this answer. If so, the answer under which she was proceeding stated that the parties had only one contract which had been modified twice.

At the time Respondent's president, Lynn W. Cooper III, began negotiations to buy an interest in Laurens Cycle Sales, Inc. it was in severe financial difficulty, and time was of the essence if it was to be rescued. This necessitated Mr. Cooper's placing a great deal of trust in the representations of the business's owner, Ruth F. Tumblin, and prevented normal due diligence. Mr. Cooper also had major health problems in the form of brain tumors which hindered his verification of what he was being told.

On July 2, 2010 Mr. Cooper and Ms. Tumblin, who was in decline from a fatal illness, entered into a modification of their original 2008 agreement under which Ms. Tumblin would receive the two years salary to which she was entitled under the old contract even if she did not work to earn it. Ms. Tumblin gave no additional consideration for this modification, and Respondent received no benefit from it. At the time this document was signed Mr. Cooper was unaware of a number of material misrepresentations made to him by Ms. Tumblin which were to prove quite costly. A subsequent modification of the parties' agreement on August 23, 2010 reduced the amount Ms. Tumblin was to receive to offset the tax lien she had failed to disclose.

All of these agreements pertained to the sale of Laurens Cycle Sales, Inc. to Respondent, and the judge below in evaluating the evidence found that the June 23, 2008 agreement is inseparable from its July 2, 2010 and August 23, 2010 modifications.

At trial Respondent established the unity of the agreements and the substantial abuses of Ms. Tumblin in her representations to induce the purchase of her business. Although there were some inventories of the parts before the agreements were signed, a complete close down audit was not done until 2017. This showed that many thousands of dollars worth of parts were missing. The existence of the Freeman claim arising from Ms. Tumblin's negligence, the lack of documentation for personal loans made by Ms. Tumblin from business funds and the extent of business credit card abuse by Ms. Tumblin for personal expenses were likewise not known at the time the modifications were entered into.

Respondent claimed damages of $ 703,118.14 arising from Ms. Tumblin's material misrepresentations and bad management; and Appellant claimed damages of $ 108,944.44 arising from Respondent's ceasing to pay her under the contract after her breaches of it became fully known. Judge Addy found that the statute of limitations prevented Respondent's contesting Appellant's contract claim but agreed that recoupment applied. He found that the damage inflicted upon Respondent by Appellant exceeded what Appellant claimed and so awarded Appellant nothing. Respondent was awarded $ 19,400 to compensate it for the costs and attorney fees associated with the Freeman litigation caused by Ms. Tumblin's negligence. Appellant filed a Motion to Alter or Amend which introduced waiver as a ground, although this had not been pled or argued at trial. The Appellant also argued for the first time that recoupment did not apply because the parties allegedly had three separate agreements instead on one agreement twice modified as alleged in her pleadings. The motion was denied and Appellants filed this appeal.

ARGUMENT

I. The Appellant is barred from arguing on appeal a ground for relief she did not argue at trial.

It is beyond dispute that issues must be raised and ruled on at trial to be preserved for appellate review. *Staubles v. City of Folly* Beach, 339 S.C. 406, 529 S.E.2d 543 (2000); *International Fidelity v. China Const.*, _____ S.C. _____, 650 S.E.2d 677 (Ct. App. 2007). An issue cannot be raised for the first time in a post-trial motion. *Gartside v. Gartside*, 383 S.C. 35, 677 S.E.2d 621 (Ct. App. 2009).

At trial the Appellant confined herself to proving the terms of the contract and establishing her statute of limitations defense. She ignored Respondent's right of recoupment, though notice of it had been given long before trial. This is especially significant, because the statute of limitations is not a defense to recoupment. *Tuloka Affiliates, Inc. v. Moore*, 275 S.C. 199, 268 S.E.2d 293 (1980).

In her Motion to Alter or Amend (R. pp. >) Appellant for the first time argued that there were three contracts instead of one and that the unpled affirmative defense of waiver applied. By then it was too late. New issues cannot be introduced through a post-trial motion.

The Appellant's Motion to Alter or Amend contradicted Appellant's prior position as stated in Paragraph 11 of her Answer to Cross-Complaint that there was one contract with two modifications (R. pp. >: "[The parties had] an agreement dated June 23, 2008 and subsequently modified on July 2, 2010....This agreement was subsequently modified on August 23, 2010...."). Parties are judicially bound by their pleadings. *Charleston School Dist. v. Laidlaw Transit, Inc.*, 348 S.C. 420, 559 S.E.2d 362 (Ct. App. 2001). At no time during the trial did Appellant attempt to argue her present position, so it cannot benefit her now.

South Carolina is a notice pleading state. "The principal purpose of all pleadings is to inform the pleader's adversary of the legal and factual positions which he will be required to

meet upon trial." *Howell v. Littlefield*, 211 S.C. 462, 470, 46 S.E.2d 47 (1947). See also Rule 8, SCRCP. This means that litigants have to give fair notice to their opponents of their legal theories, the factual basis for those theories and what relief they are seeking. Appellant is barred from adding new defenses, theories and prayers for relief post-trial.

II. The Appellant is barred from arguing an affirmative defense she did not plead or argue at trial.

The pleadings here are convoluted, because the case began as a lawsuit by a third party with a cross-claim and a counterclaim by the present parties. The original lawsuit was settled, so that left the cross-claim and the counterclaim for trial. In the end, the judge ruled in favor of Appellant's counterclaim because of the statute of limitations and in favor of Respondents' right of recoupment. Appellant now argues that the judge should have ruled in her favor on the waiver defense she did not argue at trial.

Waiver is an affirmative defense which under Rule 8(c), SCRCP must be pled. A failure to plead an affirmative defense means that it is unavailable. *Pyler v. Burns*, 373 S.C. 637, 647 S.E.2d 188 (2007); *Crescent Co. of Spartanburg, Inc. v. Insurance Co. of North America,* 266 S.C. 598, 225 S.E.2d 656 (1976); and *Emery v. Smith*, 361 S.C. 207, 603 S.E.2d 598 (Ct. App. 2004). Appellant's pleadings can be found at R. pp. >. Waiver was not pled and was not even argued during the trial. It cannot form a basis for relief now.

III. Appellant is barred from recovering on the contract by her prior breach of it.

The parties' agreement was for the transfer of a healthy business from Appellant's predecessor in interest to Respondent. The seller, Ruth Tumblin, made numerous representations that her business was very profitable and in great shape, although she claimed to have a temporary cash flow problem which threatened to cause her to forfeit her Honda dealership. There was no time for due diligence because Honda was demanding immediate action, so

Respondent's president trusted her representations and gave her a $ 50,000 loan to solve her cash flow problems. This then led to his continuing to work with Ms. Tumblin to salvage the repayment of his loan.

It later developed that Ms. Tumblin's debt to Honda was worse than she had disclosed and that her business location was in foreclosure because she had not used Respondent's loan to bring her mortgage current. This necessitated an expensive move and expensive modifications to a new building to meet Honda's specifications. There began to be indications that the parts inventories conducted by Ms. Tumblin and her relatives were inaccurate, though they strongly denied that; but the full extent of this problem did not become known until there could be a full shut down audit with inspection of the contents of each box in the 2017 inventory. It further became known that Ms. Tumblin had not kept documentation for personal loans she had made from business funds, which rendered the debts uncollectible, as did the size of the debt resulting from her allowing the use of the company credit card for substantial personal expenses. Finally, a large undisclosed tax lien came to light. The total damages to Respondent from Ms. Tumblin's intentional misrepresentations and concealment of material facts was $ 703,118.14.

The essence of a contract is bilateral obligation. If one party to a contract refuses to perform as required by the contract, he cannot after his abandonment of it force the other party to continue his performance. "A plaintiff suing on a conditional contract has the burden of proving that all conditions precedent to his right of performance have occurred." *Champion v. Whaley*, 280 S.C. 116, 120, 311 S.E.2d 404 (Ct. App. 1984). "[O]ne who prevents a condition of a contract cannot rely on the other party's resulting nonperformance in an action on the contract." *Idem.*

> Repudiation... includes refusal or declination to perform in accordance with the contact. If a contract provides for a series of acts and actual default is made in the performance of one of them, accompanied by a refusal to perform the rest, the other party need not perform but may treat the refusal as a breach of the entire contract and

may recover accordingly. It can make no difference whether the contract is partially performed. 7 Am.Jur.2d *Contracts* Section 443.

> Thus, where a contract is repudiated, the injured party may, if he desires, put an end to it, in toto, as if it had never been made, or he may treat the contract as ended merely for purposes of further performance and hold the wrongdoer liable for the damages sustained by reason of the repudiation. 7 Am.Jur.2d, *Contracts* Section 446.

The extreme breaches of the parties' contract by the seller/Appellant here flowing from her willful concealment and misrepresentation of material facts on which buyer was entitled to rely and did rely to his detriment, justified the buyer/Respondent's cessation of performance and prevents the seller from suing to enforce the contract or to get damages. Appellant is estopped to claim that she is entitled to further payment. *State Acc. Fund v. South Carolina Second Injury Fund*, 388 S.C. 67, 693 S.E.2d 441 (Ct. App. 2010). Appellant also comes before the Court with Unclean Hands and is not entitled to be unjustly enriched .

IV. Appellant is barred from recovering on the contract at issue because she has violated its implied covenant of good faith and fair dealing.

"[T]here exists in every contract an implied covenant of good faith and fair dealing." *Commercial Credit Corp. v. Nelson Motors, Inc.*, 247 S.C. 360, 367, 147 S.E.2d 481 (1966). This is no more than the judicial system's expression of a commitment to justice and to not lending itself to being an agent for the accomplishment of deception and unfairness. It may be seen as the legal version of the equitable concept of Clean Hands. The breach of this implied provision, like the breach of a written term of the contract, justifies the other party in ceasing his performance.

In this case, through a multitude of misrepresentations and fraudulent concealments Ruth Tumblin cheated the Respondent. The judge below rightly found that the sum of her wrongdoing toward Respondent exceeded any claim Appellant might have against Respondent. (See Plaintiff's Ex. No. 5).

> It is a necessary implication of every contract with promises or covenants binding each party that neither will interfere to prevent performance by the other, and a contracting party whose performance of his promise is prevented by the adverse party is not obligated to perform. His nonperformance is not a breach and does not render him liable to pay damages for the breach.... The party prevented from performing is at liberty to treat the contract as broken and... recover damages for the breach. 7 AmJur2d *Contracts* Section 442.

> [N]oncontradictory terms may be implied in a contract in order to effectuate the manifest intention of the parties when the circumstances warrant it.....In the absence of an express provision therefor, the law will imply an agreement by the parties to a contract to do and perform those things that according to reason and justice they should do in order to carry out the purpose for which the contract was made. *Commercial Credit Corp.*, 247 S.C. at 367.

It was certainly not the intention of Respondent to be cheated out of $ 703,118.14. See Plaintiffs' Ex. No. 5. Nor is it Respondent's intention to pay to Appellant $ 89,544.44 to which she is not entitled after her breach. Appellant cannot violate her duty of good faith and fair dealing and then claim entitlement to all she would have received if she had abided by the contract's terms. The Court below rightfully recognized this and ruled accordingly.

V. The Court below correctly determined the facts.

The interpretation of a contract and the determination of whether it was breached are questions of law. In an action at law without a jury, the judge's factual findings are not disturbed unless they are found to be without evidentiary support. *Townes Associates Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976). "This Court has no power to review matters of fact in an action at law, except to determine if a verdict is wholly unsupported by evidence." *Odom v. Weathersbee*, 225 S.C. 253, 260, 81 S.E.2d 788 (1954); *Butler Contracting v. Court Street*, 369 S.C. 1, 631 S.E.2d 252 (2006). "We are therefore not at liberty to pass on conflicting evidence." *Johnson v. Johnson*, 235 S.C.542, 546, 112 S.E.2d 647 (1960).

The evidence to be considered is that supporting properly pled claims or defenses. It is not the duty of this Court to search the record in aid of a litigant who neither pled nor argued the basis for her appeal, and the fact that evidence introduced for another purpose may by chance support new post-trial theories is irrelevant.

The important issue in this case is Respondent's right to recoup from Appellant the damages her deception caused him.

> Recoupment is the right of the defendant to cut down or diminish the claim of the plaintiff in consequence of his failure to comply with some provision of the contract sought to be enforced, or because he has violated some duty imposed upon him by law in the making or performance of that contract.
>
> *Tuloka Affiliates, Inc. v. Moore*, 275 S.C. 199, 202, 268 S.E.2d 293 (1980).

As was shown *supra*, Appellant is not entitled to argue against recoupment for procedural reasons, but it will be addressed here for the sake of completeness. The learned judge in this case determined that the Respondent was entitled to recoupment for the damages arising out of the parties' contract. Appellant assigns error to this determination, so the question becomes whether there is evidence in the record which reasonably supports the judge's finding.

There were three writings between the parties which were in fact an original agreement

and two modifications of it (Order, R. pp. >). The key to understanding the true situation is to focus on consideration. If the document on which Appellant is suing is a separate contract, then there should be separate consideration supporting it. (This is a different issue from whether the contract is void for lack of consideration.)

A reading of the document on which Appellant bases her claim (R. pp. >) readily reveals that Appellant gave no additional consideration for this July 2, 2010 contract modification (Defendant's Ex. No. 2). Ms. Tumblin did not pay anything extra and did not agree to any extra performance or forbearance for this agreement. The agreement was solely a gratuitous attempt by Respondent to provide Ms. Tumblin, who was suffering from a fatal illness, with extra money at a time that she needed it by paying her for work not performed. Although there is language in this document indicating that it was a new contract, a judge is not foreclosed by this from his own view of the evidence, especially in light of Appellant's subsequent admission in her pleadings that only one contract was involved (R. pp. >, Paragraph 11). This admission is a waiver of Appellant's right to argue that there were multiple contracts. Appellant is also estopped by her pleadings to claim that there were three contracts instead of one. See *Owings v. Hunt*, 53 S.C. 187, 31 S.E. 237 (1898).

The judge below would further have taken into consideration the facts known or not known to the Respondent at the time it entered into the first contractual modification. At that time it was not known that Ms. Tumblin had created liability for the Respondent by accepting an insurance premium from Jerry Dale Freeman and then not forwarding that to the insurance company for which she was independently an agent, with the result that the Respondent wound up as a defendant in a lawsuit brought by Mr. Freeman's survivor. Although Respondent knew there was a problem with missing parts inventory, the full extent of it was concealed by Ruth Tumblin and her daughter Rhonda, the present appellant, who did the parts inventories Respondent relied on. The Tumblins falsely represented that the inventories were accurate and complete. It was not until a formal parts inventory was done in 2017 (R. pp. >) -which required

that the business be temporarily shut down- that the full extent of the parts debacle became apparent. Respondents were aware of personal loans Ms. Tumblin had made from business assets, but it was not immediately apparent that there was no documentation for those loans. It was also not apparent at the time of the first contractual modification how much Ms. Tumblin had spent of business funds on her personal expenses (See Plaintiff's Ex. No. 8) or that she would take for herself the Roy Crooms key man life insurance proceeds after he died in 2013 or 2014.

"As to all factual issues passed upon by the trial judge, the question before this court is not whether the evidence would support contrary findings, but whether there is any evidence to support the findings actually made." *U.S.F. and G. Co. v. First Nat'l Bank*, 244 S.C. 436, 443, 137 S.E.2d 582 (1964). "We review the evidence, not to weigh it..., but to determine if there is any evidence to be weighed...." *Allstate Ins. Co. v. State Farm Mut. Ins. Co.*, 260 S.C. 350, 352, 195 S.E.2d 711 (1973). "We have [no jurisdiction] to pass upon the weight of the evidence." *Mickle v. Blackmon*, 252 S.C. 202, 225, 166 S.E.2d 173 (1969).

In her post-trial motion and on appeal Appellant has claimed that Respondent waived its losses, but she failed to plead this affirmative defense or to argue it at trial and cannot do so now. See Rule 8(c), SCRCP. She also did not argue at trial that the parties' agreements could not be considered one contract. A new claim or defense cannot be introduced for the first time in a post-trial motion. *Miller Construction Company, LLC v. PC Construction of Greenwood, Inc.*, 418 S.C. 186, 791 S.E.2d 321 (Ct. App. 2016); Rule 59, SCRCP. Respondent showed a remarkable forbearance toward Ruth Tumblin out of a genuine concern for her declining health. (See the gratuitous July 10, 2010 contract modification, Plaintiff's gift of $ 2500 (Plaintiff's Ex. No. 6) and Mr. Cooper's statement that he "didn't have the heart to sue" her, R. pp. >.), but this gratuitous forbearance does not create any new rights for Appellant.

CONCLUSION

Respondent is entitled to the dismissal of Appellant's appeal and to its costs and attorney fees. In evaluating the positions of the parties, Respondent asks the Court to consider that Appellant has not met her burden of proof and to give positive consideration to all of Respondent's additional sustaining grounds in accordance with Rules 208(2) and 220(c), SCACR.

The undersigned will be retired by the time this case is considered by the Court, and his client has already incurred too much attorney fees without hiring replacement counsel. The undersigned therefore requests that the Court decide this case without oral argument or give sufficient notice of oral argument to enable the substitution of replacement counsel and time for the new attorney to become familiar with the case.

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May 15, 2018

THE STATE OF SOUTH CAROLINA
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APPEAL FROM LAURENS COUNTY
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Laurens Cycle Sales, Inc. d/b/a Honda of Laurens, LLC and Cooper Motor Sales, LLC,

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Estate of Ruth Tumblin,

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CERTIFICATE OF SERVICE

The undersigned certifies that she is an employee at Cox Ferguson and Wham LLC and that on the 15 day of May, 2018 she served the Initial Reply Brief of Respondent and Designation of Matter herein by depositing a copy of them in the United States Mail, postage prepaid and addressed to:

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Deborah S Ball

May 15, 2018

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May 15, 2018

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Re: Laurens Cycle Sales, Inc., etc. v. Estate of Ruth Tumblin, 2017-002434

Dear Ladies:

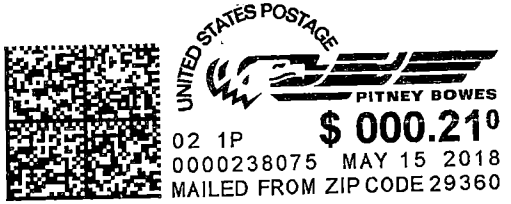
With this letter I am enclosing for filing the Initial Reply Brief of Respondent, a Designation of Matter and a Certificate of Service on opposing counsel with a copy. Please file the originals and send me a clocked copy of the Certificate of Service in the envelope provided. Thank you for your help.

Sincerely,

John R. Ferguson

John R. Ferguson

JRF/wp
Encl.
CC: C. Rauch Wise, Esq.



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