

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM HORRY COUNTY  
Court of Common Pleas

The Honorable Larry B. Hyman, Circuit Court Judge

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Case No: 2016-CP-26-1961  
Appellate Case No.: 2018-000852

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SC Court of Appeals

S. Scott Porter, Individually and as Co-Trustee of The Stanley  
Scott Porter Trust UA dated January 2, 1991, a member of  
Peaceful Lane MHP, LLC ..... Respondent,

v.

Kenneth Hucks, Individually and as a member and formerly  
designated manager of Peaceful Lane MHP, LLC ..... Appellant

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**FINAL BRIEF OF APPELLANT**

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## STATEMENT OF ISSUES ON APPEAL

- I. *Whether the involuntary repossession of the Appellant's property under the terms of the obligation is an intentional acknowledgment or new promise of the debt sufficient to toll the statute of limitations*
- II. *Whether the Appellant waived the application of the Uniform Commercial Code to the obligation between the parties by failing to specifically reference the code in his pleadings?*
- III. *Whether the admission of impermissible hearsay evidence that was relied upon by the jury for purposes of finding damages should have resulted in a new trial?*

## STATEMENT OF THE CASE

Stanley Scott Porter Trust UA dated January 2, 1991 (the "Respondent") brought this action on a note against Kenneth Hucks (the "Appellant") on March 21, 2016, designated as Civil Action Number 2016-CP-26-01961. (R.pp. 9-21) Appellant filed and served on Respondent their Answer and Counterclaim on June 9, 2016. (R.pp. 22-29) A trial was had on February 20, 2018 through the 21<sup>st</sup> of 2018. (R.p. 115) On February 21, 2018, the trial court entered a decision in conformity with the verdict of the Jury. Appellants moved the trial court for a new trial and judgment notwithstanding the Verdict on March 2, 2018. (R.p. 91) On April 23, 2018, the trial court denied the motions of Appellants. (R.p. 4) Appellant timely filed a notice of appeal.

## STANDARD OF REVIEW

"The standard of review for an appeal of an action at law tried by a jury is restricted to corrections of errors of law." *Felder v. K-Mart Corp.*, 297 S.C. 446, 448, 377 S.E.2d 332, 333 (1989). A factual finding of the jury will not be disturbed unless there is no evidence which reasonably supports the finding. *Id.*

## FACTS

This is a breach of contract case involving a secured loan resulting from money loaned to the Appellant by the Respondent. The loan was dated May 6, 2011 and had a maturity date of November 5, 2011. As part of the loan, the Appellant pledged his interest in a company he shared ownership in with the Respondent, Peaceful Lane MHP, LLC (the "Collateral"). After the loan matured, the parties began discussions concerning potentially paying off the loan. Ultimately no payment was made after an initial \$1,000 payment in August of 2011.

The Respondent filed the Complaint and alleges that the loan was never paid and credits the amount owed only that \$1000 initial payment. The Appellant answered by asserting that the Respondent brought the action too late and that the Respondent inappropriately took the Collateral and failed to pay the Appellant his share of any surplus from his interest in the Collateral the Respondent took.

Discovery and dispositive motions were completed and trial was had on the action starting February 20, 2018 and finishing on February 21, 2018. The only witnesses presented to the trial court was S. Scott Porter ("Mr. Porter"), on behalf of the Respondent, and the Appellant. Therein Appellant's counsel made several motions including a motion for directed verdict based upon the application of the statute of limitations and a motion to exclude the admission of a certain email that contained reference to an appraisal of the Collateral. Both Motions were denied by the trial court. Finally, Appellant's counsel moved to have certain law charged to the jury concerning how the uniform commercial code has certain requirements of lenders when seeking a deficiency after taking collateral. The trial judge, again, denied the Appellant's motion. The jury ultimately rendered judgment for the Respondent for \$218,000, an amount that can only reasonably be tied to the

calculations contained in the inadmissible email allowed into evidence, Plaintiff's Exhibit 2 (the "Email"). (R.p. 293) The Appellant moved for judgment notwithstanding the verdict and for a new trial. These motions were also denied.

### **LEGAL ARGUMENT**

The Trial Court erred in not granting the Defendant either a judgment notwithstanding the verdict or a new trial. The statute of limitations as to the Plaintiff's action was not tolled by the involuntary repossession of collateral securing the obligation. Similarly, the law established by the uniform commercial code cannot be waived by a party by failing to specifically raise its relevance in the initial pleadings. Finally, the evidence relied upon by the Jury in making its determination of damages was inadmissible and grounds for new trial. Therefore, the trial court's Order denying the Defendant judgment notwithstanding the verdict or, in the alternative, a new trial should be reversed.

#### **A. The Statute of Limitations Barred the Respondent's Claim**

The trial court concluded in error that if "there is any evidence that supports" a finding that the Collateral was taken and applied against the debt with the acquiescence of the Appellant, the statute of limitation does not apply. (R.p. 200, lines 15-16) This conclusion is erroneous because the three year statute of limitations is not tolled based upon an allegedly unwritten understanding among the parties regarding possession of collateral. The claims based upon breach of contract by the Respondent were barred by the applicable statute of limitations and judgment should have been given to Appellant upon the Respondent's claims.

The Respondent failed to present the evidence necessary to avoid having his claim barred by the applicable statute of limitations. South Carolina law provides that the action brought by

the Respondent must be commenced within three years of the breach of the contract. See S.C. Code Ann. § 15-3-530. The Respondent brought the underlying claim more than three years after the breach of the agreement the Respondent claims damaged him. The Respondent is unable to point to any law that provides for the tolling of the statute of limitations under the facts as presented in this matter. Therefore, the court erred in failing to grant a directed verdict, and later a judgment notwithstanding the verdict, to the Appellant.

The law is settled, actions involving contracts must be commenced within three years from when the contract is breached or broken and are tolled under only very specific circumstances. Statutes of limitations embody important public policy considerations in that they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs. See *Anonymous Taxpayer v. South Carolina Dept. of Revenue*, 377 S.C. 425, 661 S.E.2d 73 (2008). The period of time for commencing an action involving contracts is prescribed by S.C. Code Ann. § 15-3-530. It provides for a three-year statute of limitations for a cause of action accruing on or after April 5, 1988. A cause of action is barred if it is not brought within the appropriate period. South Carolina law holds that the statute of limitations begins to run at the time the cause of action accrues. *Harvey v. S.C. Dep't. of Corr.*, 338 S.C. 500, 527 S.E.2d 765 (S.C. Ct. App. 2000). The fundamental test for determining whether a cause of action has accrued is whether the party asserting the claim can maintain an action to enforce it. *Id.* Thus, a particular cause of action accrues “ at the moment when the plaintiff has a legal right to sue on it.” *Id.* 388 S.C. at 508, 527 S.E.2d at 769. Under contract law, the terms of the agreement determines the moment the plaintiff has a legal right to sue. See *State v. McClinton*, 369 S.C. 167, 631 S.E.2d 895 (2006)(The court held that a breach of contract action *usually* accrues at the

time a contract is breached or broken). Thus, a court looks to the contract terms in determining when the cause of action accrues. *Id.* Here, the Court and the Parties agree that the cause of action accrued, at the latest, upon the Appellant's failure to pay the principal on November 5, 2011. Thus, the statute ran on November 5, 2014 and the Respondent's claim is barred.

The law is equally well settled in relation to when and how the statute of limitations for an action for breach of contract may be tolled. An acknowledgment or promise contained in a writing signed by the party to be charged is considered sufficient evidence of a new or continuing contract so as to remove the case from the operation of the statute of limitations. S.C. Code Ann. § 15-3-120.<sup>1</sup> Further, any payment of principal or interest is considered equivalent to a written promise. *Id.* Under South Carolina law, "[i]t is not necessary, in order to toll the running of the statute of limitations, that such payment be in actual money." *Wolfe v. Brannon*, 211 S.C. 282, 287, 44 S.E.2d 833, 835 (1947). "An agreement between the payee and maker to apply as a credit on the note a debt owing by the payee to the maker, or an agreement to credit the note on account of goods delivered by the maker to the payee or services rendered to him, is sufficient for the purpose of interrupting the running of the statute of limitations." *Id.* The agreement between the payee and the maker "may be implied as well as expressed, but it must amount to an **unqualified** admission of a subsisting legal liability and must be established by evidence **unambiguous and full.**" *Black v. White*, 13 S.C. 37, 40 (S.C.1880)(emphasis added). Reviving a stale debt requires

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<sup>1</sup> This statute was enacted in 1870 and its relevant text has not changed. "The main purpose of enacting the statute was to require the new promise to be in writing, as previous common law would sometimes permit revival upon an oral promise." *In re Vaughn*, 536 B.R. 670, 678 (Bankr. D.S.C. 2015)(finding previous common law cases with regards to revival still apply to the statute)(citing *Hill v. Hill*, 51 S.C. 134, 28 S.E. 309, 312 (1897)(noting that the new statute "does not change the pre-existing law as to what acknowledgment will continue a debt barred.")).

“an **express** promise to pay, or such **unqualified and unequivocal** admission that the debt is still due, unaccompanied by any expression indicative of an intention not to pay” *Hill*, 51 S.C. at 134, 28 S.E. at 312 (emphasis added). Thus, when a party expressly admits the debt exists, but in doing so also expressly states he will not pay the debt, instead stating the debt will “come in to be paid with my other debts,” then the debt is not revived. *Horlbeck v. Hunt*, 26 S.C.L. 197, 201 (S.C.Ct.App.1841). Any alleged payment must be “shown to have been made with the knowledge and consent of [the parties], or that [they] about the time of the entry [intended] such credits as payments upon the claim or note.” *Bulcken v. Rhode*, 81 S.C. 503, 62 S.E. 786, 787 (1908)(noting that the result barring a claim “may seem hard, but the statute is imperative, and it is [the court’s] duty to enforce it”).

An “unqualified and unequivocal” admission of the debt shown through evidence that is “unambiguous and full” is required to toll the statute, not, as the trial court held, “any evidence that supports” a finding that the Collateral was taken and applied against the debt with the acquiescence of the Appellant. The court erroneously held that there remained a question of fact for the jury to determine regarding whether there was a voluntary acknowledgment of a liability by the Appellant in writing that would toll the statute of limitations. The Respondent asserted on multiple occasions that the “voluntary” payment was evidenced by the Respondent’s taking the collateral (R.p. 149, lines 20-21), (R.p. 167, lines 23-25), (R.p. 168, line 20), (R.p. 169, lines 1-6), (R.p. 177, lines 11-14), and that the Appellant did not want the Respondent to take it (R.p. 150, lines 1-2) True the Respondent asserted the taking was consented to, only to later argue the consent should be evidenced by the Appellant’s failure to object by filing an action in a court of law (R.p. 179, line 23) But this does not meet the standard required under South Carolina law.

At best, the Respondent testified that the only thing the Respondent did in regards to the transfer of the collateral and the application of credit to the amount allegedly owed by Appellant was to make what is best described as a book entry. Such an act has been held to not qualify as the type of payment or writing necessary to toll the statute. See *Bulcken*, supra.

This is in fact how the Fourth Circuit Court of Appeals in *Zaks v. Elliott*, ruled, a case in which the Fourth Circuit reversed the U.S. District Court for the District of South Carolina. 106 F.2d 425, 427 (4th Cir. 1939). The Fourth Circuit ruled that “the application of the proceeds from the sale of the remaining collateral” did not amount to “voluntary payments” by the obligor sufficient to toll the period of limitations on the note. The court went on to state:

It is established in South Carolina that partial payment on a note within the six year period immediately preceding the bringing of an action therein will remove the bar of the statute. But, apparently, the question of whether application to the debt by the creditor of the proceeds from the sale of collateral deposited with a note is such a payment as will toll the statute has never been decided in South Carolina. According to the great weight of authority, an application to the debt by the creditor of the proceeds from the sale of collateral will not have this effect because the payment is not voluntary on the part of the debtor. ‘The principle on which part payment takes a case out of the statute is, that the party paying intended by it to acknowledge and admit the greater debt to be due. If it was not in the mind of the debtor to do this, then the statute, having begun to run, will not be stopped by reason of such payment.’ We think that the reasoning of these decisions is to be preferred to that of the North Carolina and Nebraska cases on which the District Judge relied.

Id. (Citations omitted). The purpose of S.C. Code Ann. § 15-3-120 was not enacted to allow oral testimony that a new understanding had taken place in regards to the debt, but to allow the tolling of the statute only in those instances in which there is “unambiguous and full” evidence of an “unqualified and unequivocal” admission of the debt. Thus, the district court’s reliance upon any such application of credit to toll the statute of limitations was misplaced and this Court should

reverse the Order of the Court denying directed verdict in favor of the Appellant.

**B. The Uniform Commercial Code Precluded Judgment For the Respondent**

The trial court erroneously held that the uniform commercial code did not apply to the matters before the jury because the Appellant did not specifically plead that the uniform commercial code applied to the matter in his Answer. South Carolina law does not provide for such a waiver of legal principals. The trial court had the responsibility to charge the jury with the complete law applicable to the matter, irregardless of whether the Appellant directly cited to that law in his Answer. This erroneous decision by the trial court precluded the jury from hearing a charge of the law that the actions of the Respondent precluded his recovery under the loan. Thus, the Appellant should be granted a new trial.

“When instructing the jury, the trial court is required to charge only the current and correct law of South Carolina.” *Cohens v. Atkins*, 333 S.C. 345, 349, 509 S.E.2d 286, 289 (Ct.App.1998). “The substance of the law is what must be instructed to the jury, not any particular verbiage.... A jury charge which is substantially correct and covers the law does not require reversal.” *Burroughs v. Worsham*, 352 S.C. 382, 391, 574 S.E.2d 215, 220 (Ct.App.2002). When reviewing a jury charge for alleged error, the appellate court must consider the charge as a whole in light of the evidence and issues presented at trial. *Daves v. Cleary*, 355 S.C. 216, 224, 584 S.E.2d 423, 427 (Ct.App.2003). If the charge is reasonably free from error, isolated portions which might be misleading do not constitute reversible error. *Id.* “To warrant reversal for refusal to give a requested instruction, the refusal must have not only been erroneous, but prejudicial as well.” *Cohens*, 333 S.C. at 349, 509 S.E.2d at 289; see also *Daves*, 355 S.C. at

224, 584 S.E.2d at 427 (stating a circuit court's refusal to give a properly requested charge is reversible error only when the requesting party can demonstrate prejudice from the refusal).

Not only should the trial court have granted a directed verdict based upon the evidence regarding Respondent's conduct towards the Collateral, it erred in not charging the jury with the applicable South Carolina law. At trial, the trial court denied the Appellants request to apply and charge the jury with the law concerning the rights of a payee when a lender undertakes certain rights against pledged collateral. The trial court held that "if you haven't pled" the law included within the South Carolina Uniform Commercial Code (the "UCC") regulating the rights of a payee in the response to the complaint, the Respondent "doesn't have to respond to it." (R.p. 232, lines 5-6) The South Carolina Commercial Code precluded a judgment in favor of the Respondent. These errors of the trial court should result in a reversal of the judgment entered by the trial court and judgment being held in favor of the Appellant.

South Carolina law did not require the Appellant to specifically plead the application of the UCC. Under South Carolina law, a party in replying to a pleading shall affirmatively set forth his or her defenses. Rule 8(c), SCRCF. "Every defense, in law or fact, to a cause of action in any pleading ... shall be asserted in the responsive pleading thereto...." Rule 12(b), SCRCF; see also *Strickland v. Strickland*, 375 S.C. 76, 85, 650 S.E.2d 465, 470 (2007) ("[A]ffirmative defenses to a cause of action in any pleading must generally be asserted in a party's responsive pleading."). "The failure to plead an affirmative defense is deemed a waiver of the right to assert it." *Whitehead v. State*, 352 S.C. 215, 220, 574 S.E.2d 200, 202 (2002). What constitutes an affirmative defense is explicitly defined by the Rules. The following defenses are required by law to be affirmatively plead in a response:

accord and satisfaction, arbitration and award, assumption of risk, condonation, contributory negligence, discharge in bankruptcy, duress, fraud, illegality, injury by fellow servant, laches, license, misrepresentation, mistake, payment, plene administravit or the administration of the estate is closed, recrimination, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense.

Rule 8(C) SCRCPP. Importantly, nowhere in this litany of defenses does the application of the UCC to the conduct of the Respondent reside. Nor does the application of the UCC act as a matter constituting avoidance or some other “affirmative” defense.

The South Carolina Supreme Court in *Moore v. New S. Exp. Lines*, expounded on what is necessarily an “affirmative” defense, holding

a fundamental principle of pleading under the Code [is] that every fact must be affirmatively [plead] by the party who is first required to prove it, and that no new matter can be offered in evidence by a defendant who has simply denied plaintiff's allegations, unless it tends to disprove a fact to be in the first instance affirmatively established by the plaintiff.

184 S.C. 266, 192 S.E. 261, 262 (1937)(citing *Kirby v. Gulf Ref. Co.*, 173 S.C. 224, 175 S.E. 535, 536 (1934)). Thus, the Appellant is required to “affirmatively” plead those facts he is first required to prove.

The Appellant sufficiently plead an issue concerning the sale of collateral so as to raise any necessary allegation concerning the rights relating thereto. The Respondent's Complaint makes a very brief assertion concerning the Appellant's alleged breach of contract without so much as mentioning, yet alone providing, a reduction in the principal amount for the sale of collateral. The Appellant's answer specifically pled that “[Respondent] must account to [Appellant] and be required to [credit Appellant] for the difference between the value of [the Collateral] and the amount of the alleged debt.” This assertion is enough to raise the issue

concerning the Respondent's acting in accordance with the laws regulating a debtor taking collateral. See *Robinson v. Code*, 384 S.C. 582, 585, 682 S.E.2d 495, 496 (Ct. App. 2009) ("Where a pleading is attacked for an alleged failure to state a cause of action, the pleading must be liberally construed in favor of the pleader and sustained if the facts and reasonable inferences to be drawn therefrom entitle the pleader to relief on any theory of the case." citing *Burns v. Wannamaker*, 286 S.C. 336, 339, 333 S.E.2d 358, 360 (Ct.App.1985)). Thus, any affirmative duty should be found to have been met by the Appellant.

Under South Carolina law, once the Appellant raised an issue in the Answer concerning the Respondent's failure to account for the value of the collateral, the Respondent had "the burden of establishing that the collection, enforcement, disposition, or acceptance" was conducted in accordance with the UCC. S.C. Code Ann. § 36-9-626. Unless the Respondent "proves that compliance [...] would have yielded a smaller amount, [...] the amount that a complying collection, enforcement, or disposition would have yielded is deemed to be equal to the amount of the secured obligation, together with expenses and attorney's fees." *Id.* (Comments therein). The Plaintiff testified that he neither provided the required notice under the UCC, nor did he conduct the sale of the collateral as required by the UCC. (R.pp. 178-179 and 209-210). Thus, the Plaintiff admitted that his disposal of the collateral was not in accordance with the UCC. The Plaintiff failed to present any evidence that he either conducted the sale in a commercially reasonable manner or provide the necessary notice to the Defendant. Thus, the Respondent was not permitted to recover any deficiency unless it proved the amount rightly credited to the amount allegedly owed left a deficiency. The Respondent failed to make the necessary showing, and by precluding the Appellant from having the Jury charged on this issue,

the trial court committed reversible error.

**C. The Admission of the Hearsay Evidence was Erroneous and Prejudicial.**

The trial court erroneously allowed the Respondent to put into evidence hearsay that was contained within hearsay, the Email, under what the trial court defined as the business record exemption. This exception does not allow for the Email to be allowed and allowing the only such evidence regarding a material issue of fact was an error of law. The jury awarded the Respondent damages based entirely upon the Email. Thus, the prejudicial error of law should be reversed and a new trial granted the Appellant.

“The admission of evidence is within the [circuit] court’s discretion.” *R & G Constr., Inc. v. Lowcountry Reg’l Transp. Auth.*, 343 S.C. 424, 439, 540 S.E.2d 113, 121 (Ct.App.2000). “The [circuit] court’s ruling to admit or exclude evidence will only be reversed if it constitutes an abuse of discretion amounting to an error of law.” *Id.* “To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury’s verdict was influenced by the challenged evidence or the lack thereof.” *Fields v. Reg’l Med. Ctr. Orangeburg*, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005). “[T]he admission of incompetent evidence having some probative value upon a material issue of fact in the case is ordinarily presumed to be prejudicial.” *Mali v. Odom*, 295 S.C. 78, 84, 367 S.E.2d 166, 170 (Ct.App.1988); see also *S.C. State Hwy. Dept. v. Graydon*, 246 S.C. 509, 144 S.E.2d 484, 485 (1965). Not only is the Email inadmissible hearsay, but the Email was the only evidence supporting the value of collateral relied upon by the jury and was, therefore, prejudicial.

“The rule against hearsay prohibits the admission of evidence of an out-of-court statement

to prove the truth of the matter asserted unless an exception to the rule applies.” *Fowler v. Nationwide Mut. Fire Ins. Co.*, 410 S.C. 403, 411, 764 S.E.2d 249, 253 (Ct.App.2014); see also Rule 802, SCRE (“Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court of this State or by statute.”). However, “[a] statement that is not offered to prove the truth of the matter asserted should not be excluded as hearsay.” *R & G Constr., Inc.*, at 439, 540 S.E.2d at 121. Hearsay within hearsay is admissible if each level of hearsay satisfies an exception to the hearsay rule. Rule 805, SCRE. In order to find certain hearsay evidence admissible that contains hearsay within the hearsay, the Court must determine that both the hearsay evidence with the hearsay evidence is exempt under some rule of evidence and that the hearsay evidence itself is exempt.

The trial court erroneously relied solely on the business records exception to admit the Respondent’s email. According to Rule 803(6), the following is not excluded by the rule against hearsay:

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness....

See also § 19–5–510 (“A record of an act, condition or event shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.”); *Ex parte Dep’t of Health*

*& Envtl. Control*, 350 S.C. 243, 249–50, 565 S.E.2d 293, 297 (2002) (explaining business records are admissible under Rule 803(6) and section 19–5–510 “as long[ ] as they are (1) prepared near the time of the event recorded; (2) prepared by someone with or from information transmitted by a person with knowledge; (3) prepared in the regular course of business; (4) identified by a qualified witness who can testify regarding the mode of preparation of the record; and (5) found to be trustworthy by the court”). Further, “[w]hile the business-records exception to the hearsay rule allows the admission of ‘[a] memorandum, report, record, or data compilation,’ it does not authorize hearsay testimony concerning the contents of business records which have not been admitted into evidence.” *Deep Keel, LLC v. Atl. Private Equity Grp., LLC*, 413 S.C. 58, 72, 773 S.E.2d 607, 614 (Ct. App. 2015)(citations omitted).

At the hearing, Mr. Porter testified on direct that as of 2014 he was owed “around \$170,000” or “roughly” \$178,000. (R.p. 172, lines 1-16) The value of the collateral was said to be worth \$280,000. (R.p. 170, line 6) The only basis for this valuation was an appraisal. (R.p. 169, lines 20-21) No other testimony supporting the valuation of the Collateral was given by Mr. Porter, nor was any testimony concerning the amount alleged to have been owed to the Respondent. On cross examination by Appellant’s counsel, Mr. Porter testified that he gave the Appellant notice that he would take the Collateral in January of 2014. (R.p. 177, lines 11-14) Appellant’s counsel then showed Mr. Porter the Email in order to refresh his recollection as to the date of Appellant’s notice being in November of 2014. (R.p. 177, lines 3-17) Mr. Porter testified that the Email was not the notice he gave to the Appellant of the taking of the Collateral. (R.p. 178, lines 3-5) Later on redirect Respondent’s counsel asked Mr. Porter to identify the Email and moved to have the Email admitted into evidence. (R.pp. 187-188) Appellant’s

counsel specifically objected on the grounds that the Email “contain[s] hearsay testimony in it, specifically as it relates to an alleged appraisal.” (R.p. 188, lines 20-21) The trial court admitted the Email stating:

23 THE COURT: Well, there again, if it is a  
24 business record, it was between the parties, I think  
25 there is no hearsay there. It is something that is  
1 discussed in the normal course of business, so I'm  
2 going to allow it.

(R.p. 188-189) After closing arguments and deliberations, the jury returned an award of \$218,000. This amount is notably different from the figure testified to by Mr. Porter, but remarkably similar to the \$217, 889.73 figure included in the Email.

The Respondent cannot deny the reliance upon the Email for purposes of proving damages, a material issue of fact for the Respondent. In Respondent’s counsel’s closing arguments, the following was the great majority of the closing:

2 So when you go back, you'll see from Scott Porter  
3 to Mr. Hucks. Here is a worksheet with a balance on  
4 Peaceful Lane Mobile Home Park with market values and  
5 valuations of your interest the date you forfeited it  
6 in partial payment of the note. So he is telling  
7 him -- he testified that he talked to him about it and  
8 told him that. Mr. Hucks said he wasn't sure he did  
9 that, but he is telling him at this point in time.  
10 Also included in the worksheet taps is a  
11 calculation showing the balance of the note as of  
12 today after giving credit for the deemed payment on  
13 3/31. So this document sets forth what had taken  
14 place. In it you will see that he says the bank  
15 prepared an appraisal of the property as of that date,  
16 which is \$280,000. Now he testified to it. It was  
17 challenged. Then their document shows that that is  
18 what it was, \$280,000. He sent that to him. This was  
19 years ago. This is not something we prepared for  
20 trial. This is an honest exchange during the time

21 frame that it is going on, \$280,000.  
22 It was subsequently determined that you have  
23 retained proceeds of \$31,985 from mobile home sales  
24 which belong to the mobile home park, which was  
25 receivable from you, et cetera, et cetera. The  
1 balance sheet indicates that each fair interest to  
2 \$48,458 on March 31st. So that would be their  
3 interest at that time.  
4 Porter explains where the deduction from that  
5 figure comes from. Then he goes into explaining the  
6 \$155,000 note when it was signed, when payment was  
7 made and what the final calculation on it is. This  
8 number is a little different than some of the numbers.  
9 We don't have to prove it to a mathematical certainty.  
10 You have some freedom to make these decisions, but  
11 there was a portion of money that showed it wasn't  
12 there. We can't prove any of that, so that is not in  
13 there. But there was calculations with that money  
14 that is not in here.

(R.pp. 248-249) Notably and as admitted in the statement, nowhere in Mr. Porter's testimony is this information corroborated, and nowhere else in the closing is there any mention of by how much Respondent has been harmed or how the jury should calculate the amount of harm. The Email is the only evidence relied upon for the purposes of calculating the \$218,000 in damages it awarded.

These statements and the Email are the very definition of hearsay. See Rule 801, SCRE. Mr. Porter had no personal knowledge of any of the calculations used in the email. Respondent presented no evidence of no personal knowledge regarding the details of the appraisal. The testimony of Mr. Porter and statements within the Email demonstrate his knowledge was based exclusively on those documents referenced that purport to show amounts owed and a valuation of the collateral. By testifying to a conclusion based only on statements read in documents and by submitting the Email that similarly relied upon these documents, Respondent necessarily relied

upon the truth of those statements asserted within the Appraisal, namely the amount. Thus, the statements in Respondent's counsel's closing and the Email, therefore, was offered to prove the truth of the value and certain calculations based off of it and was hearsay. While the Email itself, likely falls within a number of exceptions to the hearsay exception, including an out of court statement made by a party, see SCRE 803, it is the hearsay within the Email that must be addressed and to which the trial court erroneously ruled was permitted under the business records exception.

First, the business records exception does not apply in this case because the records that were hearsay were not actually offered into evidence. The email purports to demonstrate that Mr. Porter reviewed the "balance sheets" and "appraisal" that showed the balance due on the note and the value of the collateral, but these records were never offered into evidence at the hearing. The plain language of Rule 803(6) allows for the admission of "[a] memorandum, report, record, or data compilation," not testimony describing such a document. Rule 803(6) does not apply to admit live testimony offered to prove the contents of a record containing hearsay, nor does it apply to admit out of court statements offered to prove the contents of a record when that record is not offered in evidence. *Deep Keel, LLC*, at 72, 773 S.E.2d at 614. Secondly, the Respondent failed to lay the foundation of the "balance sheet" and "appraisal" so as to meet the requirements of Rule 803(6) and section 19-5-510. See *State v. Davis*, 371 S.C. 170, 178-79, 638 S.E.2d 57, 62 (2006) (stating the proponent of evidence has the burden of establishing that a record falls within a hearsay exception). There are numerous elements to the foundation for a business record to which Plaintiff did not testify in this case. See *Deep Keel*, 413 S.C. at 72, 773 S.E.2d at 614. Because the business records exception applies only to the admission of business records

themselves, the exception does not apply to Respondent's Counsel's hearsay statements, nor can it apply to the "balance sheets" and "appraisal" relied upon by the Respondent in its case in chief. The trial court did not hold or find that any other hearsay exception applies. Thus, the trial court abused its discretion by erroneously admitting the testimony and email. The error in permitting the Email into evidence was not harmless and would have changed the outcome of the trial.

The erroneous admission of the email containing the appraised value of the property is almost identical to the admission overturned by the Supreme Court in *Cooper Corp. v. Jeffcoat*, 217 S.C. 489, 61 S.E.2d 53 (1950). Therein the court held that the admission of hearsay evidence concerning the price of tires was reversible error. The answer therein set forth among other things that the tires were defective and that appellants had been sufficiently damaged by reason of such faulty tires to offset any difference between the purchase price and that paid on account. The court went on to hold:

The Trial Judge in his charge to the jury, after setting forth the contentions of the parties, stated: 'The dispute then is as to the value of the tires. The defendants set up that they were not worth that much, and that the tires that they did return was sufficient to pay any balance due the plaintiff.' The question of the value of the tires was therefore a material issue of fact to be determined by the jury.

217 S.C. 489, 495, 61 S.E.2d 53, 56. Similarly, the question of the value of the Collateral was critical to the Respondent's claim of how much he was harmed and a material issue of fact to be determined by the jury. The trial court impermissibly allowed the jury to rely upon several figures included in the Email to determine the issue of fact and should be reversed.

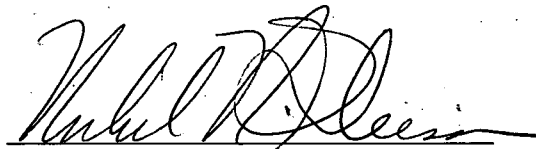
### CONCLUSION

The trial court made clear legal error in finding that the statute of limitations had been tolled through an oral understanding of the parties as evidenced by mere testimony of a party. Similarly the

trial court made clear legal error when it found the Appellant had somehow waived the right to have the UCC control the actions of the Respondent in its taking of the Collateral. Finally, the trial court made clear error when it allowed the jury to rely upon impermissible hearsay evidence in determining the amount of the debt owed. The trial court's order must be reversed.

Respectfully submitted,

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**CERTIFICATE OF COUNSEL**

I hereby certify that Appellant's Final Brief complies with Rule 211(b), SCACR.

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