STATE OF SOUTH CAROLINA
In The Court Of Appeals

Appeal from Berkeley County
Court of Common Pleas
Hon. Dale E. Van Slambrook., Master In Equity

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SC Court of Appeals

Case No. 2012-CP-08-2981

Rita Brooks, Respondent,

v.

Velocity Powersports, LLC, American Honda Finance Corporation and American Honda Motor Co. Inc.,

of which Velocity Powersports LLC is the Appellant.

APPELLANT'S FINAL REPLY BRIEF

Mary Leigh Arnold
Sammie@maryarnoldlaw.com
Mary Leigh Arnold, P.A.
749 Johnnie Dodds Blvd., Ste. B
Mt. Pleasant, SC 29464
(843) 971-6053 - phone
Attorney for Appellant

Mount Pleasant, South Carolina
July 5, 2019

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Rule

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ARGUMENT

A. THERE IS NOT UNFAIR TRADE PRACTICE BECAUSE DEFENDANT DID NOT CHARGE PLAINTIFF FOR WORK NOT PERFORMED.

Plaintiff argues the present case is "closely analogous to several bill padding decisions" decided by the South Carolina's appellant courts. (Resp. Brief, p. 14) The cases cited by Plaintiff are inapposite to the present case.

The cases cited by Plaintiff, as conceded by Plaintiff, deal with the factual situations where a consumer was charged for work not performed. [1] That did not happen here.

Here the Court found that the Plaintiff delivered the watercraft to Defendant "for purposes of certain repairs, and a 'summerization' or 'tune-up.'" (R. p. 2) Following that finding, the Court specifically found that the Defendant "did accomplish the 'summerization' or 'tune-up' and charged and billed the Plaintiff for parts and labor attendant to the performance of such 'summarization' or 'tune-up'." (R. p. 2)

Plaintiff ignores these very specific findings. Plaintiff did not cross appeal and has not challenged these findings. Therefore, Plaintiff may not raise issues for the first time on appeal. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.") Moreover, those findings are the law of the case. *Sims v. Hall*, 357 S.C. 288, 293, fn. 2, 592 S.E.2d 315, 318, fn. 2 (Ct. App. 2003) ("Unappealed rulings become the law of the

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[1] Respondent's Brief, p. 14 ("In *Barnes v. Jones Chevrolet Co.*, 292 S.C. 607, 358 S.E. 2d 156 (Ct. App. 1987), the plaintiff was charged by a car dealership for parts and labor that were not actually provided."); Respondent's Brief, p. 17 (citing to *Tuner v. Kellett*, Op. No. 5623 (S.C. Ct. App. filed Feb. 6, 2019), Plaintiff states: "the plaintiff was charged for car repairs that were not provided.")

case and should not be considered by this court.")

Thus, Plaintiff's first time spurious claim "Velocity was clearly guilty of bill padding" (Respondent's Brief, p. 18) fails. There is no evidence to support this new claim. This claim is contrary to the findings of the Court. This remark is contrary to the law of the case. Indeed, Plaintiff ignores the inconsistencies created by the Court's findings and Defendant's position that having found that the only work billed for was work performed, renders the Court's determination that Plaintiff established an unfair trade practices reversible error.

Likewise, Plaintiff's conclusory remark that because Defendant remains in business is evidence of repetition fails. Plaintiff had the burden of establishing all elements of its cause of action. Plaintiff offered no evidence of other acts by Defendant which are offensive to public policy or immoral. Plaintiff offered no evidence or argument that Plaintiff's situation was not unique to her caused by her refusal to pay for work and her deliberate actions and inactions. The Court erred by determining Plaintiff established the necessary element of repetition.[2]

B. DEFENDANT IS ENTITLED TO RECOVER FOR BREACH OF CONTRACT.

No defenses having been pled to the cause of action for breach of contract, Defendant was entitled to recover. *See Costa and Sons Const. Co. v. Long,* 306 S.C. 465, 469, 412 S.E.2d 450, 453 (Ct.App.1991) Contrary to Plaintiff's statement the Defendant did not complete the work, the Court found that the Defendant "did accomplish the

[2] Plaintiff did not respond to or address Defendant's argument that the Court erred by determining actual damages were suffered. Additionally Plaintiff did not respond to Defendant's argument it did not act willfully.

'summerization' or 'tune-up' and charged and billed the Plaintiff for parts and labor attendant to the performance of such 'summarization' or 'tune-up'." (R. p. 2) Following the summarization the Defendant did not undertake any further work including a comprehensive teardown since the Plaintiff would not authorize the work and would not agree to be responsible for the work if the work was not covered by warranty. (R. p. 86, ln 21-22; R. p. 178, ln 10 – p. 1795, ln 25; R. p. 182, ln 9-19; R. p. 199, ln 7-16; R. p. 203, ln 17-25; R. p. 204, ln 16 – p. 205, ln 21; R. p. 217, ln 11-15; R. p. 218, ln 21 – p. 219, ln 6)

Defendant only billed Plaintiff for work completed. Defendant is entitled to recover for the work performed. The Trial Court's determination Defendant was not entitle to recover for breach of contract should be reversed.

C. THE TRIAL COURT ERRED BY CONSIDERING A DEFENSE NOT PLED.

Plaintiff concedes it did not plead any statutory defense. "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).

Plaintiff's reference to Rule 15(b), SCRCP has no application here. Plaintiff never moved before the Court to be allowed to amend pursuant to Rule 15, SCRCP. Thus, Plaintiff cannot not bring up an issue for the first time before this Court, *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998), and Plaintiff should not be able to argue any benefit of an affirmative defense not pled. *Madren v. Bradford*, 378 S.C. 187, 661 S.E. 2d 390 (Ct. App. 2008). The Court committed reversal error by failing to follow the law.

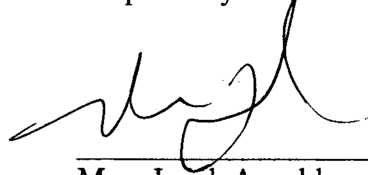
D. PLAINTIFF FAILS TO ADDRESS THE COURT'S FAILURE TO CONSIDER ALL THE REQUIRED FACTORS UNDER BARON DATA.

Plaintiff made no effort to address the Court's failure to follow the requirements of *Baron Data Systems, Inc. v. Loter*, 297 S.C. 382, 377 S.E. 2d 296 (1989), and *Blumberg v. Nealco*, 310 S.C. 492, 494, 427 S.E.2d 659, 661 (1993). The Court having to do so, the Court erred as a matter of law by any award of attorneys' fees.

CONCLUSION

Therefore, for the foregoing reasons, Velocity-Appellant respectfully asks this Court to reverse the lower court.

Respectfully Submitted,



Mary Leigh Arnold
Sammie@maryarnoldlaw.com
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749 Johnnie Dodds Blvd., Ste. B
Mt. Pleasant, SC 29464
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CERTIFICATION OF COUNSEL

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

July 5, 2019

MARY LEIGH ARNOLD, PA

Mary Leigh Arnold (#419)
749 Johnnie Dodds, Blvd., Suite B
Mt. Pleasant, SC 29464
Phone: 843-971-6053
Email:sammie@maryarnoldlaw.com
Attorney for Appellant