

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Case No.: 2018-CP-21—02958
Appellate Case No.: 2019-001370

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MAY 22 2020

SC Court of Appeals

Walt Parker,Appellant,

v.

John C. Curl,Respondent.

v.

Palmetto Floor Covering Installation, LLC,
and Florence Custom Countertops, Inc.,Third-Party Defendants.

FINAL REPLY BRIEF OF APPELLANT

WILLCOX, BUYCK & WILLIAMS, P.A.

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ATTORNEYS FOR APPELLANT

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ARGUMENTS

I. THE ISSUES UNDER APPEAL ARE PROPERLY BEFORE THIS COURT.

Subject matter jurisdiction is “the power to hear and determine cases of the general class to which the proceedings in question belong.” *Dove v. Goldkist, Inc.*, 314 S.C. 235, 237-38, 442 S.E.2d 598, 600 (1994); *Gantt v. Selph*, 423 S.C. 333, 337, 814 S.E.2d 523 (2018). Lack of subject matter jurisdiction may be raised at any time and may even be raised for the first time on appeal or by the court *sua sponte*. The question of subject matter jurisdiction is a question of law which an appellate court may decide with no particular deference to the trial court. *Ibid*. The failure to plead an affirmative defense is deemed a waiver of the right to assert it. *E.G. Adams v. B & D, Inc.*, 297 S.C. 416, 377 S.E.2d 315 (1989); *Whitehead v. State*, 352 S.C. 215, 220, 574 S.E.2d 200, 202 (2002). No court has subject matter jurisdiction to hear a case not presented to it so the Defendant’s failure to plead the doctrine of unclean hands not only deprived the Plaintiff the opportunity to defend against that doctrine but also deprived the court of the power to hear and determine the defense. See, *Dove, supra*.

The Respondent attempts to rely upon its 4th – 6th defenses (the counterclaims which were not tried before the court in these proceedings) (SR. pp. 682-688, R. p. 138), as if they constituted notice to the Appellant giving the Appellant an opportunity to be heard upon an unclean hands defense. The three counterclaims themselves contain no dates whatsoever, thus it is mere speculation they related to events occurring in calendar years 2007 – 2011. (R. pp. 95-99). It is in the record below and within the knowledge of the parties to the litigation, that all the

predicate facts recited in those three counterclaims occurred after the relevant time period: rent after 2017, tax returns after 2015, 2019 vendors, and 2012 and later operations of allegedly competing LLCs. The Respondent will no doubt argue that two corporate entities mentioned in them were chartered by the Secretary of State in the Fall of 2011 (September and October) (R. pp. 437-446) but there is no evidence in the pleadings nor in the facts presented at trial that either entity undertook business in calendar year 2011. The recitations of those three counterclaims can not reasonably be seen as pleading the affirmative defense of “unclean hands”.

The Respondent argues that its failure to plead unclean hands was not properly raised below, that Appellant’s Supplemental Memorandum should not be considered as part and parcel of its request for reconsideration because it was filed a couple of days after the 10-day time mentioned in Rule 59 SCRPC. That motion, the timeliness of which Respondent does not contest, did request the court to reconsider “its finding that Walt Parker’s hands were unclean” thereby placing at issue the entirety of the finding, not only all of Conclusion of Law number 12 but also the facts and law related to such finding.

Respondent apparently wants this court to attach some significance to the fact that Appellant has taken an appeal from the trial court’s Order denying the motion to reconsider and not from the Findings of Fact and Conclusions of Law filed April 29, 2019, as if we somehow have no dispute with those findings or conclusions. The Order from which the appeal is taken, however, is no mere Form 4 or rubber stamp saying “denied.” The August 6, 2019 Order denying reconsideration was a 10-page order with 8 pages of substantive text in large measure restating the earlier Findings of Fact and Conclusions of Law, but without the irrelevant portions

addressing the unpled issue of the sanitation level of the Plaintiff's hands. This appeal was taken in full from that newly minted Order.

II. THE RESPONDENT CAN FIND LITTLE RELIABLE EVIDENCE TO PERSUADE THIS COURT THAT THIS APPELLANT'S HANDS WERE UNCLEAN IN ANY WAY DIRECTLY RELATED TO THE ISSUE TRIED BELOW, THE RELATIVE OWNERSHIP PERCENTAGES OF FLORENCE CARPET & TILE

Any reference, argument, ruling, finding of fact, or consideration of equity that is based upon Florence Custom Countertops' or Palmetto Floor Covering's status as a competitor to Florence Carpet & Tile is misplaced. Florence Custom Countertops has been doing business that Florence Carpet & Tile elected not to do, making that election because the Respondent Curl specifically rejected that line of work. (R. p., 171, lines 9-15). Palmetto Floor Covering, in like manner, was doing work that Florence Carpet & Tile did not wish to do because of the liability, workers' compensation insurance, and other issues that made it unsuitable in the eyes of the Appellant (R. p. 175, line 21-p. 179, line 18), and the rejection of that line of work was never complained of by the Respondent Curl. (R. pp. 293-394).

Palmetto Floor Covering cannot have been a competitor to Florence Carpet & Tile since it took on work that Florence Carpet & Tile had never historically done. Only after Palmetto Floor Covering had proven the concept did Florence Carpet & Tile start doing that sort of work (installing floor covering that had been sold by third parties). (R. p. 177, line 15-p. 179, line 1). There is a complete failure of any evidence whatsoever that during the years 2007-2011 there was any activity by those two companies, the granite business or the installation business, much

less competitive activity. Nothing in the pleadings; nothing in the testimony. (R. pp. 93-100; pp. 139-396).

In considering whether Florence Custom Countertops or Palmetto Floor Covering were competitors, an important fact for the court below was overlooked by it: Walt Parker was not an owner of Florence Custom Countertops. (R. p. 173, lines 2-10; p. 231, lines 18-21). Mike Barker, General Manager of Florence Carpet & Tile, testified that Florence Custom Countertops paid rent, as did Parker. (R, p. 286, lines 4-20; p. 234, lines 7-8; p. 239, lines 1-23).

The Respondent asserts, without supporting argument or reasoning, that the Appellant's formation of Florence Custom Countertops and Palmetto Floor Covering in late 2011 somehow manipulated and inflated the 2011 profits ("inequity taints them") in such a way as to advance the Appellant's implicitly unmerited ownership in Florence Carpet & Tile, supposedly creating a profit when one would otherwise not have existed. (Respondent's Brief, 11, ¶ 4 – 12, end of (C)). To state that argument is to demonstrate its speciousness. In exactly what way does the purported diversion of profits away from Florence Carpet & Tile to the other two entities result in an inflation of those same profits to Florence Carpet & Tile? These are wondrous profits indeed if they can both be diverted away from FCT and inflated into it.

CONCLUSION

For the reasons stated, this Court should reverse the Order below, declare the rights and status of the parties with respect to the ownership of Florence Carpet & Tile, and compel Respondent to issue consistent stock certificates.

Respectfully submitted,

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May 21, 2020

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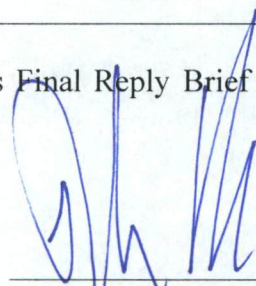
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CERTIFICATE OF COUNSEL

I do also certify that the Appellant's Final Reply Brief and complies with Rule 211(b) SCACR.

May 21, 2020



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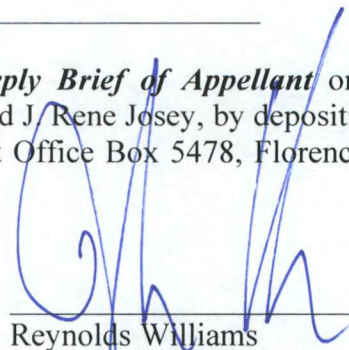
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PROOF OF SERVICE

I certify that I have served the *Final Reply Brief of Appellant* on the Respondent, through his attorneys of record, Jeffrey L. Payne and J. Rene Josey, by depositing a copy of same in the United States Mail, postage prepaid, to Post Office Box 5478, Florence, South Carolina, 29502 on May 11, 2020.



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