THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Appellate Case No. 2020-000320
Trial Court Case No. 2018-CP-23-05208

RECEIVED
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SC Court of Appeals

Associated Receivables Funding, Inc., ... Respondent,

vs.

Dunlap, Inc.; James Stephen Dunlap, an Individual; Dunlap Industrial Coating Services, Inc.; Dunlap Industrial Services, Inc.; Classic Industrial Services, Inc.; and Mark Beuerle, an Individual, ... Defendants,

Of Which, Classic Industrial Services, Inc. is . . . . Appellant.

INITIAL REPLY BRIEF OF APPELLANT

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Rebuttal Arguments

I. Rebuttal to Respondent's Challenge as to Issue Preservation

A. Identification of the Portion of Respondent's Brief at Issue

Beginning on Page 5 of Respondent's brief, and continuing to Page 7, Respondent has asserted that a substantial number of the issues raised by Appellant in these proceedings—if not all issues—were inadequately preserved for appellate review. In support of this assertion, Respondent has listed twenty-four discrete items which Respondent contends the Court cannot consider, specifically on issue-preservation grounds. And these, allegedly, are just the tip of the iceberg. Respondent insists that its list "includes, but is not limited to," those twenty-four items—that there are other, unenumerated issues raised by Appellant which are equally incapable of review.

At the outset, it should be noted that Appellant's Statement of the Issues on Appeal identifies only four issues that are squarely presented in these proceedings. Regardless, in the balance of this Section, Appellant will endeavor to correct Respondent's misstatements of law regarding issue preservation, and will then proceed to demonstrate, with citations to the record, when and how such allegedly unpreserved issues were, in fact, preserved for review.

B. Correction of Respondent's Issue-Preservation Argument

Judging by the length and breadth of the list of allegedly unpreserved items, it would appear to be Respondent's position that Appellant has not preserved any issue whatsoever for appellate review. And that is because, ostensibly, Appellant did not file any post-trial motions following the issuance of the order from which this appeal is taken.

If these assumptions accurately reflect Respondent's train of logic, then Respondent's conclusion—that no issues have been preserved for review—is contrary to law.

To begin with, it is true that Appellant did not file a motion to alter or amend the judgment established by the order from which this appeal is taken. Nor was it necessary. As this Court well knows, the filing of a Rule 59 motion is not a condition precedent to the commencement of an appeal or to consideration of issues actually and necessarily decided by the trial court. See, e.g., Wilder Corp. v. Wilke, 330 S.C. 71, 77, 497 S.E.2d 731, 733 (1997). Therefore, in the context of an appeal arising from an order where there was no motion for reconsideration, the focus of the analysis—for purposes of issue preservation—is on what matters were, in fact, actually and necessarily decided by the court below.

It is also important to consider the manner in which trial occurred. In the instant case, the trial was conducted without a jury. This implicates Rule 52(b), SCRCP. In relevant part, Rule 52(b) provides that, "[w]hen findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the trial court an objection to such findings or has made a motion to amend them or a motion for judgment." Simply stated, under Rule 52(b), findings of fact arising from a bench trial are appealable regardless of whether a Rule 59 motion seeking reconsideration of those findings was ever filed prior to the commencement of the appeal. See, e.g., Norell Forest Prods. v. H&S Lumber Co., 308 S.C. 95, 417 S.E.2d 96 (Ct. App. 1992), aff'd in part & rev'd in part, 310 S.C. 368, 426 S.E.2d 800 (1993).

With these standards in mind, Appellant will turn to examine each and every of the twenty-four issues that Respondent claims were unpreserved.

C. Appellant's Specific Rebuttals to the Suggestion of Lack of Preservation

Following is the laundry-list of issues that Respondent claims were not preserved, with Appellant's rebutting citations set out in connection with each complaint.

1. Whether there existed a legally cognizable offer to form an agreement between Appellant and Respondent as to Appellant's agreement not to assert defenses or claims.

Both the Complaint and the Amended Complaint sought affirmative relief from Appellant under South Carolina Code § 36-9-607 (hereinafter referred to as "§ 9-607"). Such relief is not available to Respondent unless, under South Carolina Code § 36-9-404(a)(1) (hereinafter referred to as "§ 9-404"), Appellant had entered into an agreement to refrain from asserting claims or defenses. The non-existence of such an agreement was raised numerous times in the proceedings below, initially in Appellant's first motion for summary judgment. (Appellant's Memo. Supp. Mot. Summ. Judg. at 5-8.) It was raised again in Appellant's second motion for summary judgment. (Appellant's Memo. Supp. 2nd Mot. Summ. Judg. at 5-8.) It was subsequently raised at trial, when Respondent's only witness testified that Respondent had no contractual relationship with Appellant, (Tr. 26:11-18; 29:16-18), and that Appellant never waived any defenses against payment, (Tr. 30:21-23). And it was raised a fourth time in Appellant's post-trial brief. (Appellant's Post-Trial Brief at 2.)

Furthermore, at the close of trial, Appellant moved for a directed verdict as to the totality of Respondent's claim, including the issue of liability under § 9-607. (Tr. 49:11-12.) Importantly, since this case was tried without a jury, there was no need for Appellant to make a formal motion for directed verdict. See, e.g., Norell, 308 S.C. 95, 417 S.E.2d 96. Regardless, in response to Appellant's motion, the trial court made explicit reference

to both of Appellant's previously filed motions for summary judgment, which addressed this issue. (Tr. 49:13-50:4.) The trial court did not rule on the motion for directed verdict at that time, but instead, requested post-trial briefs from the parties and took the entire matter under advisement. When the trial court ultimately decided the case, it explicitly held that Appellant had "agreed not to assert defenses or claims" against Respondent. (Or. at 4.)

It is black-letter law in this and every other State that a legally enforceable agreement cannot exist without a legally cognizable offer, acceptance, and mutual exchange of valid consideration. Accordingly, the trial court necessarily determined that—somehow—a legally cognizable offer existed sufficient to form the basis of an agreement between Appellant and Respondent. And because that issue was raised to, and ruled upon by, the trial court, the issue is adequately preserved for appellate review, regardless of whether it may be characterized as a question of law or finding of fact.

2. *Whether the offer to form an agreement between Appellant and Respondent was ambiguous.*

The matter of whether the terms of an agreement are ambiguous is a question of law. See, e.g., S.C. Dep't of Nat. Res. v. Town of McClellanville, 345 S.C. 617, 623, 550 S.E.2d 299, 302-03 (2001). The terms of a contract are said to be ambiguous when they are susceptible of more than one reasonable interpretation. Id. If, in a given case, the trial court finds that the terms of a contract are ambiguous, then it should proceed to consider the intention of the parties regarding the meaning of the ambiguous terms, which is a matter of fact. Id. Accordingly, issues involving the ambiguity of contractual terms are very often mixed questions of both law and fact.

And so it is in this case. As discussed above, by holding Appellant liable to Respondent under § 9-607, the court necessarily found the existence of a contract waiving claims and defenses in favor of Respondent under § 9-404. In order to arrive at this conclusion, the court must necessarily have found either: (i) that the terms of this supposed agreement were unambiguous; or (ii) that, even if the terms were ambiguous, the facts surrounding the meaning of the terms at issue establish a meeting of the minds between the parties capable of rendering an ambiguous contractual term both legally cognizable and enforceable.

The Order from which appeal is taken does not explain which of these conclusions the trial court reached. However, if it is the former—that the putative agreement is unambiguous—then that is a question of law which was presented to, and ruled upon by, the trial court, and therefore, presently within the ambit of the appellate court's review; if it is the latter—that a legally cognizable offer and acceptance were established by virtue of the evidence of the parties' intent—then that, too, is a matter presently capable of review under Rule 52(b), SCRCP.

Accordingly, for these reasons, and further, consistent with same citations to the record described in (1), above, this issue is preserved.

3. *Whether there existed a legally cognizable consideration to form an agreement between Appellant and Respondent as to Appellant's agreement not to assert claims or defenses.*

As explained in (1) and to some extent in (2), above, a legally enforceable agreement cannot exist without the mutual exchange of legally cognizable consideration. In holding that Respondent was able to pursue relief from Appellant under § 9-607, the trial court necessarily found that Appellant had entered into a legally enforceable

agreement to refrain from asserting defenses under § 9-404, which means that the trial court necessarily found the existence of legally cognizable consideration. And because that issue was raised to, and ruled upon by, the trial court, the issue is adequately preserved for appellate review, regardless of whether it may be characterized as a question of law or finding of fact.

4. *Whether Appellant was already under an obligation to forward all Dunlap payments to Respondent by virtue of the work completion forms.*

For the same reasons as (3), above, and consistent with the same citations to the record, this issue is preserved.

5. *Whether Appellant's promise to process complete payment to Respondent was an obligation it was already legally bound to do.*

For the same reasons as (3), above, and consistent with the same citations to the record, this issue is preserved.

6. *Whether there is any evidence in the record to support the Circuit Court's implicit conclusion that consideration was given.*

For the same reasons as (3), above, and consistent with the same citations to the record, this issue is preserved.

7. *Whether the Circuit Court misapplied South Carolina Code §§ 36-9-404 or 607.*

The construction of these statutes, individually and as they may work together, was at the very heart of the proceedings below. It strains the imagination to conceive how these issues were somehow not preserved for appellate review, since they were squarely raised to, and ruled upon by, the trial court, and all as evidenced by the citations to the record referenced in (1) & (2), above.

8. *Whether the Appellant waived payment defenses in favor of Respondent.*

For the same reasons as (1) and (2), above, and consistent with the same citations to the record, this issue is preserved.

9. Whether the word "should" as stated on the work completion forms is ambiguous.

For the same reasons as (1) and (2), above, and consistent with the same citations to the record, this issue is preserved. Furthermore, and by way of further citations to the record, there is no question that the meaning of "should" was raised to, and ruled upon by, the trial court. The trial transcript reflects an extended—and wholly irrelevant—section of testimony where Respondent attempts to cross-examine Appellant's witness with the meaning of "shall" as set out in various dictionaries. (Tr. 35:16-38:19.) Regardless, the trial court explicitly held, in the Order, that "the ordinary, plain meaning of 'should' is the past tense of shall and, accordingly, connotes a duty or obligation." (Or. at 4.) Under these circumstances, there can be little doubt that this specific issue is preserved.

10. Whether Appellant should be responsible for all work completion forms issued, even those issued in March 2016.

The trial court explicitly found, in both its "Findings of Fact" and liability analysis sections, that Appellant is responsible for all invoices placed into suit by Respondent, including those dating back to March 2016, prior to the time at which Appellant had any notice of third-party Dunlap's failure to pay subcontractors. (Tr. 33:9-34:8.) This, too, was at the heart of the underlying proceedings, and was directly argued to the court at both trial and in post-trial briefs. That alone should establish the proposition that this issue is preserved for review, and certainly when coupled with Rule 52(b), SCRCP.

11. Whether the Respondent failed to meet its burden to prove each statement regarding "complete payment" was false when made.

Appellant sued Respondent for negligent misrepresentation. One of the material elements of that cause of action is that defendant made a false representation of fact to complainant, and that the representation was false when it was made. The trial court explicitly held that this element was satisfied. (Or. at 5-6.) Therefore, regardless of whether this matter is characterized as a question of law or a finding of fact, the issue is preserved for review.

12. Whether the Circuit Court could determine, with any certitude, which of the work completion forms contained false representations of fact at the time of their issuance.

For the same reasons as (11), above, and consistent with the same citations to the record, this issue is preserved.

13. Whether "complete payment" means payment in full or giving due regard to any of Appellant's claims and defenses.

For the same reasons as (1), (2) & (11), above, and consistent with the same citations to the record, this issue is preserved.

14. Whether Appellant occupied the position of a fiduciary with respect to Respondent.

To be clear, no one has argued—or is presently arguing—that Appellant stood in the capacity of a fiduciary with respect to Respondent. On this "issue," Respondent seems to be referring back to a line in Appellant's opening brief, (Appellant's Op. Br. at 31), addressing other elements of negligent misrepresentation: that of the applicable duty owed by Appellant to Respondent, and whether that duty was breached. As explained in Appellant's brief, it is the law of this State that a fiduciary—and only a fiduciary—is under a general duty to voluntarily disclose material information to the opposite party in a transaction; all other parties to a transaction are subject to a different, and presumably less onerous, standard of care. The point Appellant was trying to make is that, under the

circumstances of this case, Appellant was subject to the ordinary, non-fiduciary standard of care, and further, that there is no evidence in the record to suggest that this duty was breached.

In any event, in order to hold Appellant liable for negligent misrepresentation, the trial court must necessarily have concluded that Appellant breached the standard of care for communications with Respondent. That issue was raised to, and ruled upon by, the trial court, and it is preserved for review, regardless of whether it is characterized as a question of law or a finding of fact.

15. Whether Appellant had a general duty to disclose information to Respondent.

For the same reasons as (14), above, and consistent with the same citations to the record, this issue is preserved.

16. Whether there is evidence in the record that suggests Appellant acted in derogation of any standard of care.

For the same reasons as (14), above, and consistent with the same citations to the record, this issue is preserved.

17. Whether Respondent failed to act reasonably in protection of its own interests.

This matter is similar to the discussion with regard to (14), above. Consistent with South Carolina's decisions regarding negligent misrepresentation, and as explained in Appellant's opening brief, a party seeking recovery under negligent misrepresentation cannot prevail if it has failed to act reasonably in protection of its own interests. Because the trial court held Appellant liable for negligent misrepresentation, it must necessarily have held that Respondent did, in fact, act reasonably in protection of its own interests. Therefore, whether this matter is characterized as a question of law or a finding of fact, it is preserved for review.

18. Whether Respondent's cause of action for negligent misrepresentation failed if Respondent failed to act reasonably in protection of its own interests.

For the same reasons as (17), above, and consistent with the same citations to the record, this issue is preserved.

19. Whether the Order, as written, is inconsistent in finding in favor of Respondent on both its causes of action for enforcement of its security interest and promissory estoppel.

This "issue" misses the point raised in Appellant's opening brief. The point is that the Order, as written, fails in multiple respects to find facts consistent with the evidence and to apply those well-founded facts to the material elements of Respondent's causes of action.

20. Whether there were sufficient payment details to support a promissory estoppel cause of action.

Respondent sued Appellant for promissory estoppel, and accordingly, bore the burden of eliciting proof in support of each of its material elements. As explained in Appellant's opening brief, the fundamental element of an action for promissory estoppel is the existence of a promise unambiguous in its terms; this element can only be met by clear and convincing evidence. Appellant sought summary judgment against Respondent on this cause of action, in substantial part because there was no evidence of any such promise. (Appellant's 2nd Mot. Summ. Judg. at 11-12.) This was renewed by Appellant's motion for directed verdict. (Tr. 49:11-50:4.) Yet, despite the lack of evidence, the trial court found Appellant liable to Respondent under a theory of promissory estoppel. (Or. at 7.) Accordingly, whether this matter is characterized as a question of law or a finding of fact, it is preserved for review.

21. Whether the interests of equity are served by fashioning an equitable remedy in favor of Respondent against Appellant.

As explained in Appellant's opening brief, the State's appellate courts have implied a quasi-fifth element into actions for promissory estoppel, which requires trial courts to balance the equities in determining whether and to what extent to grant relief under this theory. In the instant case, it does not appear that the trial court undertook any such analysis. Regardless, it held Appellant liable under promissory estoppel anyway. Accordingly, whether it was error for the trial court to fail to balance equities, or whether it was error for the court to impose liability under promissory estoppel without finding facts to impose a remedy in Respondent's favor at Appellant's expense, the issue is preserved for review.

22. Whether Appellant could be responsible for Respondent's lost interest.

It appears that Respondent is referring here to Pages 40 & 41 of Appellant's opening brief, where Appellant argues the impropriety of the trial court awarding damages in the form of lost interest to Respondent at a rate of 24.64% per annum, which is the interest rate established in Respondent's contract with Dunlap. This issue was, of course, raised at trial. (Tr. 9:6-23.) And it ultimately became part of the trial court's judgment. (Or. at 6.) Appellant contends it was legal error for the trial court to award damages to Respondent at a rate of interest established by a contract that—indisputably—Appellant was not a party to. Additionally, consistent with Rule 52(b), this would appear to be a type of factual finding that Appellant could appeal without seeking any modification of first. Therefore, regardless, the issue is properly preserved for appellate review.

23. Whether the award of $202,390.92 under Respondent's promissory estoppel cause of action was appropriate.

This, like so many other things on this list, appears to be a mixed question of law and fact, actually raised to and ruled upon by the trial court, both in court and on brief, and therefore, subject to appellate review.

24. Whether Appellant's set off rights, if any, applied to all three of Respondent's causes of action.

The arguments for preservation here are largely already represented in (1) and (21), above. Appellant has set off defenses, under the U.C.C., the Subcontract Agreement, and in equity generally, that were explicitly developed at trial, based on the undisputed fact that Appellant satisfied the claims to payment made by Dunlap's unpaid subcontractors, (Tr. 43:1-2 & 44:23-25). The trial court ultimately gave no regard to this circumstance, in derogation of Appellant's rights. Accordingly, whether it was an error of law for the trial court to ignore Appellant's set off rights, or if it is characterized as an improper factual finding (in light of the amounts of damages awarded Respondent), the issue is preserved for review.

D. Respondent's suggestion that it has other, unenumerated arguments regarding issue preservation must be disregarded.

This needs little discussion. On Pages 5 & 6 of its opening brief, Respondent has asserted that Appellant has failed to preserve arguments for this appeal, and proceeds to identify a list of unpreserved issues, which "includes, but is not limited to," the twenty-four items discussed above. Obviously, Respondent is trying to preserve its ability to raise additional arguments that may dawn upon it later by using such a generalized qualifying phrase.

However, this Court routinely disregards arguments—regardless of whether they are made by the appellant or respondent—if they are presented in a short, conclusory

manner. See, e.g., Crawford v. Century Mortg. Co., 404 S.C. 39, 744 S.E.2d 538 n.2 (2013). Appellant would respectfully urge the Court to give such swift, summary treatment to Respondent's attempt to establish a reservation of right to argue issue-preservation positions in the future that are other or different than those explicitly raised in its brief.

E. Concluding Statement

For the foregoing reasons, and further, with particular regard for the procedural facts set out in Appellant's opening brief and which also appear in the record, Appellant respectfully requests this Court to proceed swiftly past Respondent's suggestions of improper preservation and dispose of these proceedings on the merits.

II. REBUTTAL TO RESPONDENT'S POSITION AS TO LIABILITY UNDER § 9-607

Beginning on Page 7 of its opening brief, and continuing on to Page 9, Respondent has attempted to explain how the Order properly held Appellant liable to Respondent under § 9-607. In this Section, Appellant will first endeavor to identify where—it seems—the parties agree; then, Appellant will attempt to explain what it appears Respondent's legal position is, and offer a rebuttal with citations to testimony and the evidentiary record.

A. Where the Parties Appear to Agree

Appellant spent several pages of its opening brief parsing through the language of § 9-607 and § 9-404 in order to explain how, under the relationship of those statutory sections, a party in the position of Appellant could become liable to a party in the position of Respondent. The conclusion of that section was that some party like Appellant could become liable to some party like Respondent under § 9-607 if and only if there were a valid, enforceable agreement—as contemplated by § 9-404—whereby the Appellant-like party had agreed to refrain from asserting applicable claims or defenses.

It does not appear that Respondent disputes any part of Appellant's analysis with regard to these statutory sections or the way they interact. Moreover, it seems that Respondent agrees with Appellant, that the only way Appellant could be liable to Respondent under § 9-607 is if a valid, enforceable agreement regarding the non-assertion of claims and defenses—as described in § 9-404—is found to exist. Accordingly, the focus of the argument set out in Respondent's brief is on the propriety of the trial court's conclusion that just such an agreement does exist.

B. Understanding Respondent's Argument

Respondent's argument section as to its ability to hold Appellant liable under § 9-607 is somewhat confusing. The caption of this section is as follows: "The court properly found that Respondent could enforce Appellant's obligations and exercise the rights of the Dunlap [sic] with respect to the obligation of Appellant pursuant to [§ 9-607]." (Resp. Op. Br. at 7.) To be clear, the only obligation that Appellant owed Dunlap that is in any way material to this dispute is the obligation to tender payment for work that Dunlap performed. This obligation is defined by Appellant's Subcontract Agreement with Dunlap, and is explicitly limited by certain defenses which are reserved to Appellant.

This is not an insubstantial point. If it is Respondent's argument that it stepped into Dunlap's shoes under the Subcontract Agreement for purposes of compelling payment from Appellant under § 9-607, then it must accept the consequences of that posture in their totality. For the purposes of these proceedings, the most important of these consequences is that Appellant is entitled to a dollar-for-dollar set off for all amounts that Appellant paid to satisfy any claims that Dunlap's unpaid subcontractors and materialmen may have had. (Subcontract Agreement ¶¶ 16 & 23.) Therefore, to the extent that Respondent merely

stepped into Dunlap's shoes, its ability to "enforce Appellant's obligations [under the Subcontract Agreement] and exercise the rights of Dunlap" is likewise limited by Appellant's own rights under the Subcontract Agreement, including the rights of set off.

Certainly, it is possible that, if Appellant and Dunlap had ever entered into a modification of the Subcontract Agreement, Respondent could have succeeded to Dunlap's rights under that modification. But that is not the case. It is undisputed that the only agreement that Appellant ever had with Dunlap of any relevance to these proceedings was the Subcontract Agreement. There is no contention, much less any evidence to suggest, that the Subcontract Agreement was ever modified as between Appellant and Dunlap. Therefore, the totality of rights and obligations to which Respondent could have possibly succeeded with respect to Dunlap is described—completely—in the Subcontract Agreement. Accordingly, if the assertion that Respondent were merely trying to enforce Dunlap's rights under the Subcontract Agreement were accurate, then Respondent would have no legally cognizable claim against Appellant under § 9-607, specifically because of the absence of an agreement to refrain from asserting defenses under § 9-404.

But this, of course, is not an accurate description of the position that Respondent has taken in the course of this litigation, including these proceedings. Despite the fact that Respondent is asserting the opportunity to do nothing more than enforce Dunlap's rights under the Subcontract Agreement—to step squarely into Dunlap's shoes, it is actually seeking more successor rights through Dunlap than even Dunlap was entitled to under the Subcontract Agreement. This is the motivation behind Respondent's argument—which regrettably prevailed at trial—that each work completion form forwarded to Respondent

constituted an agreement, binding upon Appellant, to refrain from asserting any defense to payment.

C. The Legal & Factual Deficiencies of Respondent's § 9-404 Argument

The sole and exclusive means by which Respondent may succeed to greater rights than even Dunlap had under the Subcontract Agreement is if Respondent can demonstrate the existence of a valid, enforceable agreement by which Appellant had agreed to refrain from asserting its claims and defenses. As no such forbearance agreement was ever entered into between Appellant and Dunlap, that circumstance leaves only one avenue available to Respondent: to demonstrate that Appellant and Respondent entered into such an agreement.

Before delving into a deeper analysis of Respondent's contention that each work completion form constituted the type of forbearance agreement contemplated by § 9-404, one item of testimony has particular relevance. At trial, Respondent's own witness—its only witness—testified clearly, without any ambiguity, that Appellant and Respondent did not have any contractual relationship whatsoever. (Tr. 26:11-18; 29:16-18.) It is hard to square how Respondent could have explicitly disclaimed the existence of any contractual relationship with Appellant, on the one hand, with the trial court's Order, on the other, holding that a contract between the parties not only existed, but was a competent basis on which to impose liability against Appellant.

Regardless, in the context of these proceedings, Respondent seems to have offered only a perfunctory defense of the determination that each work completion form constituted the type of forbearance agreement contemplated by § 9-404. Appellant spent a significant portion of its opening brief discussing the basic legal construct of "an offer,"

and explaining how even that basic element was missing in this case. (Appellant's Op. Br. at 14-19.) By way of recap, it was Respondent's position in the proceedings below that—for purposes of a § 9-404 agreement—Appellant was the offeror, and that the offer arose in connection with the language on each work completion form saying that "payment should be processed" to Respondent. To be very clear, this was Respondent's argument in the proceedings below, and it prevailed.

Now, through its opening brief, Respondent has articulated a brand-new theory of liability under § 9-404. Respondent contends that it—Respondent—was actually the offeror, not Appellant. (Respondent's Op. Br. at 8 ("In the matter at hand, Respondent offered to fund Dunlap's receivables and keep Dunlap available for work on Appellant's project if Appellant would change its position and waive any defenses it had to processing complete payment to Respondent on Dunlap's receivables.").) This is factually indefensible.

Respondent entered into the Factoring Agreement with Dunlap in 2010. (Tr. 20:23-21:7; see also the Factoring Agreement.) Under the Factoring Agreement, Dunlap sold Respondent the totality of its right to collect all of its accounts receivable, regardless of whether Respondent had agreed to purchase any specific receivable from Dunlap. (Factoring Agreement § 7.) Dunlap did not enter into the Subcontract Agreement with Appellant until 2015. (See the Subcontract Agreement.) Accordingly, the assertion that "Respondent had offered to fund Dunlap receivables," insofar as it was some offer that had been communicated to Appellant, is just plain false.

As is the second part of the putative "offer," which is that Respondent would keep Dunlap available to work on Appellant's project. There is no evidence anywhere in the

record to suggest that Respondent could direct Dunlap's work activities, restrict those activities, or stop Dunlap's work altogether. Nor is there any evidence to suggest that Respondent ever communicated this ostensible authority over Dunlap to Appellant. Perhaps most importantly, none of these representations appear on any work completion form. In the absence of any evidence of a written or oral transmission of a promise to Appellant, it is baffling to conceive how—as a matter of law and fact—a legally cognizable offer can exist.

For these reasons, and for those set out in Appellant's opening brief, there is no legitimate legal basis through which to conclude that a competent § 9-404 agreement existed capable of imposing liability under § 9-607 against Appellant.

D. A Brief Rebuttal to Respondent's Disparagement of Factor King

On Page 9 of its opening brief, Respondent has suggested that the Factor King case cited by Appellant is inapposite to the circumstances of this case, and is not even competent to serve as persuasive authority. Appellant has reviewed Factor King and does not perceive any appreciable difference—either in fact or law—to the matters before the Court. Therefore, Appellant would continue to commend Factor King as a significant source of persuasive authority. See Factor King, LLC v. Block Builders, LLC, 192 F. Supp. 3d 690 (M.D. La. 2016); 193 F. Supp. 3d 651 (M.D. La. 2016).

E. Concluding Statement

Because Respondent has not offered any substantive challenge to Appellant's statement of legal standards pertinent to § 9-607, § 9-404, or § 9-406, Appellant's discussion of facts applicable to this cause of action, or Appellant's assignment of error to the trial court's determination of both, Appellant stands on the bases for reversal and

remand articulated above and as set out in its opening brief. (Appellant's Op. Br. at 10-27.)

III. Rebuttal to Respondent's Position as to Negligent Misrepresentation

Respondent's counterargument as to negligent misrepresentation is set out at Pages 10 and 11 of its opening brief. At the outset, it should be noted that Respondent undertook no defense whatsoever of Appellant's challenge to the foundational element of negligent misrepresentation; that Appellant had communicated a false representation of material fact, and that such representation was false at the time it was made. (Appellant's Op. Br. at 28-30.)

Respondent's counterargument focuses instead on the sufficiency of evidence as to breach of the applicable standard of care, and as to the prudence of Respondent's reliance on Appellant's "specialized knowledge." As to the first matter—the applicable standard of care, both the Order and Respondent's brief appear to be of two minds. In the same paragraph, both acknowledge that the non-fiduciary standard of care in a negligent misrepresentation action is to merely act as an ordinary, reasonable person under the same or similar circumstances, while contending immediately thereafter that Appellant must be held to a higher standard consistent with its "specialized knowledge."

In its opening brief, Appellant explained, with citations to testimony, the circumstances which led Appellant to perceive that Dunlap may not have been paying its subcontractors, the actions that Appellant took to cure these concerns, the false assurances that Dunlap gave Appellant, and the ultimate termination of the Subcontract Agreement based on Dunlap's misfeasance. (Appellant's Op. Br. at 30-31.) From the time that Appellant learned of Dunlap's financial problems until the time of contract termination,

less than one month had elapsed. For most of that month, Appellant was operating under the assumption—based on Dunlap's false representations—that any issues with nonpayment of subcontractors were being resolved. For its part, Respondent has not contested a single fact in the timeline that has been represented by Appellant, which is the same timeline that was presented at trial.

Regardless, the trial court invented a novel "specialized knowledge" standard of care—which appears to have no basis in existing appellate authority, and applied that standard to Appellant in such a way as to make Appellant strictly liable to Respondent for Dunlap's false representations of fact. This was error, and notably, Respondent has not offered any defense based in legal authority for the trial court's innovations.

It was also incumbent on Respondent—as the plaintiff below—to explain how it acted prudently in protection of its own financial interests. As explained in Appellant's opening brief, the undisputed testimony is that, in furtherance of this obligation, Respondent did absolutely nothing. Respondent was aware of the Subcontract Agreement but never bothered to read it. (Tr. 22:3-11.) Consequently, Respondent's blindness to Appellant's set off rights, which were clearly spelled out in the Subcontract Agreement, was a wholly self-inflicted wound. Respondent was also blind as to whether its client—Dunlap—was staying current with paying its subcontractors, (Tr. 26:22-28:1; 30:7-17); this, too, was self-inflicted. Respondent has not disputed any of these facts, or is even capable of pointing to other parts of the trial transcript to offer facts in support of the proposition that it acted prudently in furtherance of its own self-interest. To the contrary, Respondent's contention on appeal—stated bluntly—is that undertaking any self-protective action would have been a waste of its time. (See Respondent's Op. Br. at 10.)

It is difficult—if not impossible—to reconcile: (i) the fact that Respondent was under a duty of self-protection, see, e.g., AMA Mgmt. Corp. v. Strasburger, 309 S.C. 213, 420 S.E.2d 868 (Ct. App. 1992); (ii) Respondent—by its own admission—did nothing in furtherance of that duty; and (iii) Respondent nonetheless prevailed on its claim for negligent misrepresentation.

For the foregoing reasons, and for those articulated in Appellant's opening brief, (Appellant's Op. Br. at 27-32), the trial court's legal and factual determinations with regard to negligent misrepresentation should be reversed and remanded.

IV. Rebuttal to Respondent's Position as to Promissory Estoppel

Because Respondent has not disputed Appellant's statement of legal standards pertinent to promissory estoppel, Appellant's discussion of facts applicable to this cause of action, or Appellant's assignment of error to the trial court's determination of both, Respondent stands on the bases for reversal and remand set out in its opening brief. (Appellant's Op. Br. at 32-38.)

V. Rebuttal to Respondent's Position as to Damages

Because Respondent has not presented any legal or factual challenge to Appellant's assignment of error to the trial court's calculation of damages, Respondent stands on the bases for reversal and remand set out in its opening brief. (Appellant's Op. Br. at 39-42.)

Concluding Statement

Consistent with the foregoing discussion, the arguments and authorities set out in Appellant's opening brief, and for any other reason that may appear in the record presented, Appellant respectfully requests a decision from the Court which reverses—if not vacates—the entirety of the Order at issue in these proceedings, remands the matter to the trial court

for further proceedings consistent with the decision of this Court, and for such other and further relief as the Court deems just and proper.

Respectfully submitted,

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October 26, 2020

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Appellate Case No. 2020-000320
Trial Court Case No. 2018-CP-23-05208

Associated Receivables Funding, Inc., ... Respondent,

vs.

Dunlap, Inc.; James Stephen Dunlap, an Individual; Dunlap Industrial Coating Services, Inc.; Dunlap Industrial Services, Inc.; Classic Industrial Services, Inc.; and Mark Beuerle, an Individual, ... Defendants,

Of Which, Classic Industrial Services, Inc. is . . . . Appellant.

PROOF OF SERVICE

The undersigned counsel for Appellant hereby certifies, subject to penalty of perjury, that the following document(s) was/were served upon the following counsel of record by the following means as of the date identified below.

Document(s): (1) Appellant's Initial Reply Brief; and,
(2) Appellant's Designation of Matter to be included in the Record on Appeal Arising from the Reply

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