

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
In The Circuit Court

Teasa K. Weaver, Master in Equity

Appellate Case No. 2020-001023

RECEIVED

Dec 09 2020

SC Court of Appeals

Mark Giles Pafford,

Appellant,

v.

Robert Wayne Duncan, Jr.,
Robert Duncan, Sr., and Frank Eason,
d/b/a "Rock City Heavy Hauling, Inc."
of whom

Robert Wayne Duncan, Jr. and
Robert Duncan, Sr. are the

Respondents.

BRIEF OF APPELLANT

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TABLE OF CONTENTS

Table of Authorities
Statement of Issues on Appeal
Statement of the Case
Arguments

I. DO THE FACTS PRESENTED PROVE FRAUD ON THE PART OF APPELLANT AS TO THE
VEHICLE CONTRACT?
II. IS A CLAIM OF FRAUD PRECLUDED BY WAIVER OR ESTOPPEL?
III. DOES THE EVIDENCE PRESENTED ALLOW THE APPELLANT A CLAIM TO UNPAID
WAGES?
IV. IS THERE EVIDENCE ESTABLISHING THE WORTH OF RETURNED THUNDERBIRD?
V. IS THERE CREDIBLE EVIDENCE OF DAMAGES FROM APPELLANT’S ATTEMPT AT
REPOSSESSION?

Conclusion

TABLE OF AUTHORITIES

CASES: SOUTH CAROLINA SUPREME COURT

Temple v. Tec-Fab, Inc., 381 S.C. 597, 675 S.E.2d 414 (2009)

CASES: SOUTH CAROLINA COURT OF APPEALS

Branche Builders, Inc. v. Coggins, 386 S.C. 43, 686 S.E.2d 200 (Ct.App. 2009)

Johnson v. Little, 426 S.C. 423, 827 S.E.2d 207 (Ct.App. 2019)

Miller Constr. Co. v. PC Constr. of Greenwood, Inc., 418 S.C. 186,
791 S.E.2d 321 (Ct.App. 2016)

Nexstar Media Grp. v. Davis Roofing Grp., App. Case No. 2017-001546,
Op. No. 5772, (Ct.App. 2020)

STATUTES

S.C. Code § 15-3-540

CASES: UNITED STATES SUPREME COURT

United States v. New York, N. H. & H. R. Co., 355 U.S. 253, 2 L.Ed.2d 247,
78 S.Ct. 212 (1957)

CASES: FEDERAL APPELLATE COURTS

Browzin v. Catholic University of America, 174 U.S. App. DC 60, 527 F.2d 843 (1975)

Keeler Brass Co. v. Continental Brass Co. (CA4 NC) 862 F.2d 1063 (1988)

Lindahl v. Office of Personnel Management (CA FC) 776 F.2d 276 (1985)

United States v. Continental Ins. Co. (CA 11 Fla) 776 F.2d 962 (1985)

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Bank of Crete, S.A. v Koskotas (SD NY) 733 F.Supp. 648 (1990)

CASES: CONNECTICUT

Albert Mendel & Son, Inc. v. Krogh, 4 Conn.App. 117, 492 A.2d 53 (1985)

CASES: INDIANA

Miller v. Schmidt, 123 Ind.App. 379, 110 N.E.2d 347 (Ind.App. 1953)

CASES: KENTUCKY

H.C. Whitmer Co. v. Richardson, 271 Ky. 112, 111 S.W.2d 577 (1937)

CASES: LOUISIANA

Cole Oil & Tire Co. v. Davis, 567 So.2d 122 (La.App. 2d Cir 1990)

Horton v. Haralson, 130 La. 100, 57 So. 643 (1912)

Pitre v Bourg, 77 So.2d 113 (La.App. 1st Cir 1954)

Rabalais v. Al-Dahir, 563 So.2d 514 (La.App. 4th Cir 1990)

CASES: MICHIGAN

Palenkas v. Beaumont Hospital, 432 Mich. 527, 443 N.W.2d 354 (1989)

CASES: MINNESOTA

Bass v. Ring, 210 Minn. 598, 299 N.W. 679, 169 A.L.R. 980 (1941)

CASES: MISSOURI

J. D. Streett & Co. v Bone, 334 S.W.2d 5 (Mo. 1960)

CASES: MISSISSIPPI

Philly v. Toler, 239 Miss. 347, 123 So.2d 223 (1960)

CASES: TEXAS

Jackson v. Green (Tex.App.) 700 S.W.2d 620 (1985)

CASES: PENNSYLVANIA

Thomas v. Allegheny & Eastern Coal Co., 309 Pa.Super. 333, 455 A.2d 637 (1982)

OTHER AUTHORITIES

1 AM.JUR.2D *Accounts and Accounting* § 17 (11/2002)

29 AM.JUR.2D *Evidence* § 127 (1994)

29 AM.JUR.2D *Evidence* § 160 (1994)

29 AM.JUR.2D *Evidence* § 161 (1994)

STATEMENT OF ISSUES ON APPEAL

STATEMENT OF THE CASE

The Appellant PAFFORD sued in claim and delivery to recover a 2003 Kenworth W 3900 truck, VIN # 1XKWDB9X03J392961, a 1998 TrailKing trailer and a 2009 TrailKing trailer (hereafter “the vehicles”). The Respondents DUNCAN, operating as “Rock City Heavy Hauling” acknowledge that sale, but deny PAFFORD’s ability to deliver good title. PAFFORD also sues for unpaid wages as a trucker for the Respondents, and for penalties and attorney fees under S.C. Code § 41-10-40 *et seq.*

The Respondents asserted full payment under the truck sale agreement, repairs to the truck, damages from PAFFORD’s attempt at repossession and damages from a separate agreement by which PAFFORD was to buy a Thunderbird automobile. At trial, they elected to have title be executed to them, for reimbursement for repairs, and attorney fees. They also asserted fraud or negligent misrepresentation due to PAFFORD’s lack of title. The Respondents asserted payment of PAFFORD’s wages.

After a hearing without jury, the Trial Court held the Appellant liable for \$42,500.00, the difference in value between the vehicles could convey and those he could not. Against that figure the Trial Court offset an unpaid balance of \$931.91 in wages and \$8,000.00 for the resale value of the Thunderbird auto. The Respondents were thus awarded damage in the amount of \$33,569.09. The Order also required transfer of the 2003 Kenworth and 1998 TrailKing trailer to the Respondents, and return of the 2009 TrailKing trailer to PAFFORD.

STANDARD OF REVIEW

This Court has recently restated the rules as to the review of matters determined by a lower Court hearing a case without a jury:

"An action for breach of contract seeking money damages is an action at law." *Johnson v. Little*, 426 S.C. 423, 428, 827 S.E.2d 207, 210 (Ct. App. 2019) (quoting *Branche Builders, Inc. v. Coggins*, 386 S.C. 43, 47, 686 S.E.2d 200, 202 (Ct. App. 2009)). "In an action at law tried without a jury, an appellate court's scope of review extends merely to the correction of errors of law." *Miller Constr. Co. v. PC Constr. of Greenwood, Inc.*, 418 S.C. 186, 195, 791 S.E.2d 321, 326 (Ct. App. 2016) (quoting *Temple v. Tec-Fab, Inc.*, 381

S.C. 597, 599-600, 675 S.E.2d 414, 415 (2009) (per curiam)). "The [c]ourt will not disturb the trial court's findings unless they are found to be without evidence that reasonably supports those findings." *Id.* (quoting *Temple*, 381 S.C. at 600, 675 S.E.2d at 415). [Nexstar Media Grp. v. Davis Roofing Grp., App. Case No. 2017-001546, Op. No. 5772, August 26, 2020, p.4.]

In this case, not all issues deal with contract, but it is the understanding of counsel that the general rule as quoted will apply.

The burden of proof is upon the Respondents in a civil case whenever that party has the affirmative on an issue. 29 AM.JUR.2D *Evidence* § 127. In this case, the Respondents produced:

No written agreements for sale of the vehicles;
No employment contracts with PAFFORD;
No tax returns;
No W-4 forms dealing with payments to PAFFORD;
No 1099 forms dealing with payments to PAFFORD;
No ledgers, spreadsheets or writings showing how payments to PAFFORD were intended; and
No persons claiming to have written checks, or to have written payments to PAFFORD;
No persons claiming ownership of the vehicles to be sold under the recited contract;
No titles showing ownership of the vehicles to be sold under the recited contract; and
No persons with knowledge of such titles;
[RECORD ON APPEAL, p.____.]

I. DO THE FACTS PRESENTED PROVE FRAUD ON THE PART OF APPELLANT AS TO THE VEHICLE CONTRACT?

In proof of the agreement for sale of the vehicles, PAFFORD produced title copies – some in his name and some in the name of third parties. He testified that he owned the vehicles to be conveyed or could convey titles. [RECORD ON APPEAL, p.____.] In cross-examination, PAFFORD admitted that procuring titles to some vehicles could entail getting a dubious title form from the Respondents. [RECORD ON APPEAL, p.____.]

Over objection, the Trial Court allowed the introduction during trial of a third party document purporting to show a 2009 ownership, obtained over the internet and produced by the

Respondents outside discovery. [RECORD ON APPEAL, p.____.] This was done despite the Court's earlier disallowance of such matter in response to PAFFORD's *in limine* Motion. [RECORD ON APPEAL, p.____.] Counsel for Appellant also objected to testimony flowing from, or in support of that document. [RECORD ON APPEAL, p.____.]

No opposing titles or any other evidence from the SC DMV were produced by the Respondents nor any testimony or evidence from the claimed insurance company owner of the 2009 TrailKing trailer. [RECORD ON APPEAL, p.____.] The title copies entered by PAFFORD were dated 08-15-2012 and showed the owner as "Douglas Elizabeth dba Versatile Transport LLC dba."

By its Order, the Trial Court found that PAFFORD fraudulently represented himself as having ownership of the 2009 TrailKing trailer and being capable of transferring title to the Respondents. [RECORD ON APPEAL, p.____.]

The insurance company which Respondents claimed to be an owner was not joined as a party. No evidence of any claim of ownership or possession of the 2009 TrailKing trailer by that insurance company was shown. [RECORD ON APPEAL, p.____.] No title more current than that dated 08-15-2012 in a third party was produced.

No credible evidence of the Court's conclusion exists in the Record. The claim of ownership – without title – by an insurance company is barred as based upon evidence which should have been excluded. In light of the title placed in evidence dated 08-15-2012, no credible proof of ownership by an insurance company exists.

The Appellant would also note that after concluding PAFFORD lacked or could not convey good title to the 2003 Kenworth W 3900 truck, she nevertheless ordered it returned to him. If the Court doubted PAFFORD's right to that vehicle, it had the duty to have it turned over, either to the insurance company or to the Sheriff for investigation.

Even should such evidence be allowed, the claimed ownership by an insurance company apparently concern events in 2009; any claim based thereon is precluded by operation of the Statute of Limitations as set out in S.C. Code § 15-3-540. The Respondents have suffered no damage as the result of PAFFORD's alleged problems with that title.

No cognizable basis for a claim of lack of title has been shown, and any claims or defenses based thereon are precluded.

II. IS A CLAIM OF FRAUD PRECLUDED BY WAIVER OR ESTOPPEL?

In addition to the argument above, the Appellant would note the testimony of Robert Wayne Duncan, Jr.; he testified that he discovered a problem with the title of the 2009 TrailKing trailer some 18 months after the vehicle contract was made, that is to say, in approximately August, 2016. [RECORD ON APPEAL, Transcript of Hearing, p.72, l.1-11.] In spite of this fact, payments to PAFFORD by the Respondents continued through April, 2017. The Respondents' claim for fraud as to that trailer was raised for the first time in the Respondents' Amended Answers and Counterclaims filed in May, 2018. [RECORD ON APPEAL, p.____.]

Whether the payments after August, 2016 are considered as wages to an employee who the Respondents knew had committed fraud, or for the purchase of equipment with questionable title, the Respondents' action were a waiver of their claim, or an estoppel to advance it.¹

III. DOES THE EVIDENCE PRESENTED ALLOW THE APPELLANT A CLAIM TO UNPAID WAGES?

In its Order, in dealing with the payment of PAFFORD's wages, the Trial Court held:

The parties agree that the sum total of payments made to Plaintiff toward wages and the sale agreement is \$163,000.00²; however, Respondents dispute the amounts allotted by Plaintiff between these categories in his self-prepared spreadsheet (Plaintiff's exhibit 6). Most of the checks and receipts in evidence do not show the purpose of the payment. A few show that \$2,000.00 was paid toward wages, and \$63,000.00 was paid toward the sale agreement. (Plaintiff's exhibit 5). Plaintiff admitted the payment amounts listed in his spreadsheet were applied arbitrarily, and there was no other evidence proving which category the remaining \$98,000.00 in payments should be attributed. Therefore, this court is unable to make any such findings.

[RECORD ON APPEAL, Order of May 4, 2020, p. ____.]

The Respondent Robert Wayne Duncan, Jr. and the Office Manager Nancy Green Duncan had earlier submitted their Affidavits in response to Plaintiff's Summary Judgment Motion alleging full payment for the vehicles in the amount of \$85,000.00, which they then maintained to be the full amount agreed to be paid for the vehicles. [RECORD ON APPEAL, p.____.] At trial, they submitted a list stating the sales amount to be \$95,000.00, and testified to that larger figure.

¹ This defense to the Respondents' claim as to fraud was set out in the Appellant's Reply to the said Counterclaims.

² The expenses of \$11,067.62 are not in dispute and are omitted from further discussion or calculation.

[RECORD ON APPEAL, Respondent's Exhibit 1, p.____.] Duncan has also plead full payment in Paragraph 25. of his Amended Answer and Counterclaim. [RECORD ON APPEAL, p.____.]

The conclusion of the Trial Court's Order that the burden of assigning payments between wages and the truck sale lies on the Plaintiff is incorrect. To quote the commentary of AMERICAN JURISPRUDENCE 2D:

Occasionally the law divides the burdens in connection with certain defenses and assigns the burdens of pleading and production to the Respondent, while imposing upon the plaintiff the burden of persuasion.

[29 AM.JUR.2D *Evidence* § 160 (1994); Ftn. 21, citing *Keeler Brass Co. v. Continental Brass Co.* (CA4 NC) 862 F.2d 1063, 9 U.S.P.Q.2d 1331, 27 Fed.Rules Evid. Serv. 278 (defense of independent creation in copyright infringement actions); *Palenkas v. Beaumont Hospital*, 432 Mich. 527, 443 N.W.2d 354 (Respondent must satisfy the burden of production when raising the statute of limitations as a defense.)]

Where the information necessary to prove an issue is peculiarly within the possession of one party, courts sometimes reason that convenience and fairness justify placing the burdens of pleading and proving those facts upon that party.

[29 AM.JUR.2D *Evidence* § 161 (1994, Ftn. 22, citing *United States v. New York, N. H. & H. R. Co.*, 355 U.S. 253, 2 L.Ed.2d 247, 78 S.Ct. 212; *Bank of Crete, S.A. v Koskotas* (SD NY) 733 F.Supp. 648; *United States v. Continental Ins. Co.* (CA 11 Fla) 776 F.2d 962, 33 CCF ¶ 74094; *Browzin v. Catholic University of America*, 174 U.S. App. DC 60, 527 F.2d 843; *Lindahl v. Office of Personnel Management* (CA FC) 776 F.2d 276; *Albert Mendel & Son, Inc. v. Krogh*, 4 Conn.App. 117, 492 A.2d 536; *Thomas v. Allegheny & Eastern Coal Co.*, 309 Pa.Super. 333, 455 A.2d 637; *Jackson v. Green* (Tex.App. Corpus Christi) 700 S.W.2d 620, *writ ref n r e* (Jan 22, 1986) and *rehg of writ of error overr* (Feb 26, 1986).]

The general rule as to the effect of information peculiarly within the possession of party has been applied specifically to matters relating to accounts. To quote again the commentary of AMERICAN JURISPRUDENCE 2D:

Ordinarily, an account is proved by proving each item, including the date, the correctness of each item contained in the account, the charge made, and the reasonableness of that charge, [Footnote omitted] although this does not mean that, in order to support a suit on an open account, each individual item must be specifically proved.

[Footnote 17:

17. *Miller v. Schmidt*, 123 Ind.App. 379, 110 N.E.2d 347 (Ind.App. 1953); *Horton v. Haralson*, 130 La. 100, 57 So. 643 (La. 1912); *Bass v. Ring*, 210 Minn. 598, 299 N.W. 679, 169 A.L.R. 980 (Minn. 1941).

Once a *prima facie* case has been established, the burden of proof shifts to the Respondent to disprove the inaccuracy of the account, or to prove entitlement to credits.

[Footnote 18:

18. *Rabalais v. Al-Dahir*, 563 So.2d 514 (La.App. 4th Cir 1990); *Cole Oil & Tire Co. v. Davis*, 567 So.2d 122 (La.App. 2d Cir 1990)

Testimony of a witness to the effect that certain of the invoices exhibited to the original declaration appeared, when exhibited to the final amended declaration, to have been changed, in that some of them bore notations upon the issue of whether they had been paid, and to the effect that one of the invoices originally appearing in the name of another person was switched and made to appear in the Respondent's name, is competent as tending to impeach the plaintiffs claim on the invoices. *Philly v. Toler*, 239 Miss. 347, 123 So.2d 223 (Miss. 1960).

The Respondent also has the burden of proving affirmative defenses, such as payment.

[Footnote 19]:

19. *H.C. Whitmer Co. v. Richardson*, 271 Ky. 112, 111 S.W.2d 577 (Ky. 1937); *Pitre v Bourg*, 77 So.2d 113 (La.App. 1st Cir 1954); *Philly v. Toler*, 239 Miss. 347, 123 So.2d 223 (Miss. 1960); *J. D. Streett & Co. v Bone*, 334 S.W.2d 5 (Mo. 1960).

[1 AM.JUR.2D *Accounts and Accounting* § 17 (11/2002).]

The Respondents had the burden of showing payment for the vehicles, which they asserted, and by extension the burden of showing which payments were not made for that purpose. They failed to meet this burden.

From Counsel's examination of the checks received from the Respondents, the only statements on their respective memo lines are for purchase of equipment or reimbursement of expenses. The remaining amounts are, therefore, logically assignable to wages.

The Appellant notes that after stating it could not assign the payments between those for the truck and those for wages, the Trial Court went on to effectively do so, stating:

Plaintiff also failed to show that he has not been fully paid for wages he earned. Plaintiff marked ninety-one (91) weeks of earned wages in his spreadsheet. With a weekly wage of \$1000.00, Plaintiff earned a total of \$91,000.00. Plaintiff has been paid a total of \$100,000.00 in addition to the \$63,000.00 shown to have been paid toward the sale agreement.

[RECORD ON APPEAL, Order of May 4, 2020, p.____.]

In argument, counsel for Respondents asserted the Plaintiff was employed for 91 weeks: no testimony or other evidence to support that period was produced. No testimony to contradict the Plaintiff's testimony for employment over the greater period shown on his spreadsheet entered as Plaintiff's Exhibit 6. [RECORD ON APPEAL, p.____ and generally.]

Rejecting the Plaintiff's assertion that his pay rose by agreement to \$1,500.00 per week, the Trial Court found that the Plaintiff, according to his submitted spreadsheet had worked 91 weeks. [RECORD ON APPEAL, p.____.] This Court may take judicial notice that the period from 02/10/2015 through April 15, 2017 (the dates on which PAFFORD received payments) consists of 115 weeks.³

The Plaintiff was reimbursed for expenses by the Respondents. For the purpose of this discussion, those amounts are disregarded, in that they would lower the amount owed by the Respondents to the Plaintiff.

\$161,500 was shown as paid by the Appellant's testimony and Exhibit 6; an additional \$15,000.00 was agreed at trial paid to Plaintiff, for a total payment of \$176,500.00. Assuming

3 These dates are from a \$1,000.00 payment to Plaintiff on February 10, 2015 through his last payment of \$4,000.00 on April 15, 2017. [RECORD ON APPEAL, Plaintiff's Exhibit 6, p.____; Transcript of Hearing, p.____ l.____.] There was no evidence of differing employment dates from the Respondents.

payment made at \$95,000.00 for the vehicles, the non-vehicle payments made by the Respondents would amount to \$81,500.00. ($\$176,500.00 - \$95,000.00 = \$81,500.00$) Given the proof of the Plaintiff's uncontested employment for 115 weeks, and accepting (for this argument) a weekly payment of \$1,000.00 per week, the Plaintiff is still owed an amount of \$33,500.00. ($\$115,000.00 - \$81,500.00 = \$33,500.00$).

The Trial Court's math is incorrect, and the resulting findings and conclusions must be corrected. Those corrections show that the Appellant is owed wages, plus the remedies accorded for that lack of payment.

PAFFORD testified to his salary being \$1,500.00 per week. The Respondents produced no tax forms and no ledgers, check stubs or proof as to the amount of PAFFORD's weekly payments. As stated before, from Counsel's examination of the checks received from the Respondents, the only statements on their respective memo lines are to purchase of equipment or reimbursement of expenses. The remaining amounts are, therefore, logically assignable to wages. Allowing this point, the payments indicate a rate of \$1,500.00 per week.

Given this fact, the payments owed by the Respondents, and PAFFORD's resulting damages and remedies, must be adjusted accordingly.

IV. IS THERE EVIDENCE ESTABLISHING THE WORTH OF RETURNED THUNDERBIRD?

Dealing with another issue, the Trial Court held, in relevant part:

Thereafter, Plaintiff and Duncan Jr. agreed to modify the sale agreement. The modifications reduced the purchase price owed to Plaintiff. First, Plaintiff agreed to reduce the amount owed by \$14,000.00 in exchange for a 2002 Ford Thunderbird. . . .

After having the Thunderbird for about a week, Plaintiff returned it to Respondents' property, stating only he was not satisfied. Plaintiff refused return of the vehicle or the transfer of its title. Respondents later sold the vehicle to a third party for \$8,000.00.

[RECORD ON APPEAL, Order of May 4, 2020, p.____.]

It is undisputed that the reduction the Order references was agreed to. It is also undisputed that the Ford Thunderbird was returned within ca. a week; there is no evidence title to

this car was ever placed in PAFFORD's name. By the Court's reasoning, PAFFORD's rescission of the purchase of this car entitles the Respondents the full value of the car less its resale. This conclusion can only be reached if there is proof that the true value of the vehicle was \$14,000.00. This fact was placed in dispute by PAFFORD in his testimony as to the cause of the car's return. [RECORD ON APPEAL, p.___] No contrary evidence, showing a true value of \$14,000.00 was put forward. [RECORD ON APPEAL, p.___] There is therefore no evidentiary basis to assume that the car was worth the \$14,000.00 as against the claimed amount of \$8,000.00 which the Respondents received.

To state this argument in another way, for the Trial Court to hold PAFFORD charged with having agreed to a true value of \$14,000.00, there must either be no contest on his part as to value, or independent proof thereof. PAFFORD did contest the value by rescinding the purchase on the explicit ground that the car had problems; there was no other evidence of the car's value or dispute as to his action, and no independent proof of value; there is, therefore, no evidentiary basis for the car's value. Without proof of its value (whether by the Appellant or independent evidence), there is no basis for the Court's ruling as to remaining debt.

The Appellant would also point out that if the intended conclusion of the Trial Court was that he had no basis to rescind, that conclusion is nowhere stated in the Court's Orders.

V. IS THERE CREDIBLE EVIDENCE OF DAMAGES FROM APPELLANT'S ATTEMPT AT REPOSSESSION?

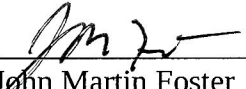
The Respondents claim damages from PAFFORD's attempt to repossess the 2003 Kenworth W 3900 truck from them. They acknowledge filing criminal charges against PAFFORD for this attempt. [RECORD ON APPEAL, p.___] Their testimony and a repair invoice created by themselves is the proof of such damage. [RECORD ON APPEAL, p.___] PAFFORD acknowledged breaking a lock to enter the building where the truck was held. [RECORD ON APPEAL, p.___]

The Appellant has listed above the items and witnesses which were not produced by the Respondents in this case. The decision of the Trial Court as to damages from PAFFORD's attempted repossession must, therefore, rest on the Trial Court's judgment. The Appellant can only argue that, in light of the Respondents' failure to produce evidence in this case, as listed above, shows that the Trial Court's finding herein is not reasonably supported by the evidence.

CONCLUSION

Appellant are entitled to a ruling of this Court granting them relief from the Orders of May 4th and June 24th, 2020. The findings of the Trial Court are, in the matter of ownership of the 2003 Kenworth W 3900 truck, and in that of wages, unsupported. The other issues as discussed are improper in law.

Respectfully submitted,



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December 9, 2020

Rock Hill, South Carolina

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APPEAL FROM YORK COUNTY
In The Circuit Court

Teasa K. Weaver, Master in Equity

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Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Initial Brief of Appellant complies with Rule 210(b),
S.C.A.C.R.

December 9, 2020



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PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellant and Designation of Matter to be included in the Record on Appeal, dated December 9th, 2020, on the following counsel of record:

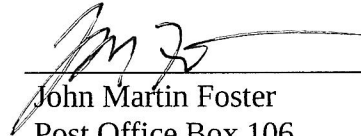
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by depositing the same with the United States mail, with sufficient first class postage attached, properly addressed to the clerk of the Court, and with a copy also directed to the respective last known address(es) of those attorney(s) and/or persons set out below; or

by hand delivering copies of the same to the following persons, or by leaving the same at that person's office with that person's clerk or some other person in charge thereof, or by leaving it in a conspicuous place therein; or if the office was closed or the person to be served has no

office, by leaving a copy at that person's dwelling place or usual place of abode with some person of suitable age and discretion then residing therein, all pursuant to Rule 233(b), S.C.A.C.R.

December 9, 2020



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