THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

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SC Court of Appeals

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.

FINAL OPENING BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES ON APPEAL

1. Did the trial court commit reversible error in holding Appellant liable for Respondent's damages under South Carolina Code § 36-9-607, in derogation of Appellant's rights under South Carolina Code § 36-9-404?

2. Did the trial court commit reversible error in holding Appellant liable to Respondent under a common-law theory of negligent misrepresentation, by not only misapplying the essential elements of the action, but also by failing to substantiate its determination of liability with evidentiary support?

3. Did the trial court commit reversible error in holding Appellant liable to Respondent under an equitable theory of promissory estoppel, by not only misapplying the essential elements of the action, but also by failing to substantiate its determination of liability with evidentiary support?

4. Did the trial court commit reversible error in determining the amount of damages for which Appellant is liable to Respondent, by failing to give due regard to Appellant's contractual rights with Defendant Dunlap, Inc., and by failing to appreciate the inequitable consequences that would result from a judgment that awards Respondent damages from Appellant?

STATEMENT OF THE CASE

This appeal arises from what, at first blush, would seem to be nothing more than a garden-variety debt-collection action against a debtor and its personal guarantor. These ordinary claims, however, are not presently involved in these proceedings. Instead, in addition to the debt-collection portion of the underlying action, the plaintiff below—the Respondent in this appeal—also filed actions against Appellant, seeking to hold Appellant vicariously liable for the debt whose collection was sought. This, despite the fact that Appellant had neither an agreement with Respondent, nor had promised to personally guarantee any debt at issue. After a trial conducted without a jury on May 3, 2019, remarkably, Respondent prevailed, and a judgment was entered against Appellant in favor of Respondent in the amount of $323,718.31. It is from this judgment, and the order under which it was created—entered on January 31, 2020, (see R. p. 10), that this appeal is taken.

With regard to the material procedural circumstances of these proceedings, the underlying complaint was filed in the Court of Common Pleas of Greenville County on July 19, 2016. (R. p. 20.) Initially, the case was indexed as Civil Action No. 2016-CP-23-04370. The complaint asserted three causes of action against Appellant: (1) enforcement of a security interest held by Respondent under South Carolina Code § 36-9-607; (2) negligent misrepresentation; and (3) fraudulent inducement. Appellant answered the complaint on September 27, 2016, (R. p. 117), and subsequently, filed a motion for summary judgment on March 7, 2017, (R. pp. 217 & 220), which was denied, (R. p. 1).

On July 21, 2017, Respondent filed an amended complaint, which continued to assert three causes of action against Appellant. (R. p. 138.) However, instead of including an action for fraudulent inducement, Respondent alleged promissory estoppel. The trial

court granted Respondent's motion for leave to amend by order dated August 31, 2017. Appellant filed its answer on September 28, 2017. (R. p. 152.) For the purposes of this appeal, these are the operative pleadings.

On November 14, 2017, the parties stipulated to dismissal of the case pursuant to Rule 40(j), SCRCP. (R. p. 250.) The case was restored to the active docket by order dated October 3, 2018. (R. p. 4.) At that point, the civil action number became 2018-CP-23-05208, as reflected in the caption, above.

On January 2, 2019, Appellant filed a second motion for summary judgment, seeking judgment in its favor as a matter of law as to each of the actions asserted against it in the amended complaint. (R. pp. 251 & 254.) By order dated February 12, 2019, Appellant's motion was denied. (R. p. 7.)

The matter proceeded to trial on May 3, 2019, though the only portion of the case tried pertained to Respondent's claim against Appellant. (See generally R. p. 165.) As previously referenced, the case was tried without a jury. Only two witnesses were called to testify. Respondent's witness was Kevin Gilbert, Respondent's executive vice president of operations. Appellant's witness was Jessica DeLaune, Appellant's controller. At the conclusion of testimony, both Appellant and Respondent moved for directed verdict. (R. p. 213, line 11-p. 214, line 24.) With regard to Appellant, the court inquired whether Appellant's motion was based upon the arguments presented in Appellant's previously filed-and-decided motions for summary judgment; counsel for Appellant affirmed that the bases were the same. The court declined to rule on the cross-motions for directed verdict at that time, but instead, invited both Appellant and Respondent to prepare and submit post-trial briefs. Those briefs were filed on June 10, 2019. (See R. pp. 436 & 440.)

For several months, the case sat dormant. However, on January 31, 2020, the trial court issued an order which not only found in favor of Respondent as to all causes of action against Appellant, it appeared that such order reflected an adoption of Respondent's post-trial brief in its entirety. (R. p. 10.) This January 31, 2020 order forms the basis of this appeal, and is referred to throughout this brief simply as "**the Order**." Appellant filed a timely notice of appeal on February 21, 2020. (R. p. 449.)

For the reasons set out hereinafter, and for any other reason that may be apparent to the Court based on the record below, Appellant would respectfully request that the trial court's decision granting judgment in favor of Respondent be reversed—if not vacated—in its entirety, and that the case be remanded for further proceedings consistent with the decision to be rendered by this Court.

STATEMENT OF FACTS

A. High-Level Overview

This case arises from a factoring agreement. At the risk of explaining to the Court what it already knows, factoring is a type of financial transaction in which a business sells its accounts receivable to a third party at a discount. Though there are many risks to factoring, it can be a useful financial-management tool for participants in an industry where there are long lead-times between performing work and payment, as well as significant overhead to carry. For these reasons, it is not uncommon to see participants in the construction industry use factoring agreements, and in fact, this case presents one such circumstance.

B. Discussion of Specific Factual Circumstances

On September 24, 2010, Respondent entered into a factoring agreement with Defendant Dunlap, Inc. ("**Dunlap**"). (R. p. 184, line 23-p. 185, line 7.) A true and accurate copy of the factoring agreement is included in the record on appeal, and is referred to hereinafter as "**the Factoring Agreement**." (R. p. 414.) Respondent is a South Carolina company principally engaged in making accounts receivable financing available to its customers. (R. p. 168, lines 15-16.) Dunlap was a South Carolina company who was principally engaged in the business of providing industrial coating services *(e.g. painting at commercial and industrial facilities)*. It is Appellant's understanding that Dunlap is no longer in business.

During or about November 2014, American Electric Power awarded a substantial construction contract to a general contractor, who, in turn, subcontracted a certain scope of that work to Appellant. Appellant then subcontracted the industrial-paintings-and-coatings

portion of its work to Dunlap. (R. p. 169, lines 15-17.) In that connection, during October 2015, Appellant and Dunlap entered into an agreement to memorialize their subcontracting relationship. A true and accurate copy of this agreement is included in the record on appeal, and is referred to hereinafter as "**the Subcontract Agreement**." (R. p. 422.)

To fulfill its scope of work, Dunlap procured materials and equipment from third parties. More specifically, materials were procured from an Ohio company known as "Carboline;" equipment was rented from Hertz Equipment Rental Company, now known simply as "HERC." (R. p. 430.)

In March 2016, Dunlap was factoring its accounts receivables with Respondent for work done in furtherance of the Subcontract Agreement. (R. p. 12.) In general, this process consisted of two parts: (1) Dunlap would submit an invoice for services rendered to Appellant; and (2) Dunlap would also submit a work completion form—in a format prepared by Respondent—to Appellant. (R. p. 174, lines 17-25.) Each invoice would identify the work that Dunlap had performed during the reporting period and the total balance due for that period. (See, e.g., R. p. 309.) Each invoice also included the following advisory, signed by a Dunlap representative:

> For value received, we [Dunlap] hereby assign and transfer this invoice and its proceeds to Associated Receivables Funding, Inc.[,] who is the owner of this invoice unencumbered by any other security or claims, and pursuant to the master agreement. The undersigned does herewith assign all lien rights, chooses in action, chattel paper or contract rights. We further certify that the goods have been shipped and/or services have been rendered in agreement with all terms and conditions.

(Id.; see also R. p. 322, for a more legible example.)

Each work completion form—which, again, was in a format prepared by Respondent—that pertained to a particular invoice contained similar information, but

consisted of two separate certification-style statements. (See, e.g., R. p. 321.) The first certification was made by Dunlap, and it affirmed that the work reflected on the pertinent invoice "has been satisfactorily completed," and further, "that payment for this invoice is not contingent upon any other work being completed." The second statement (authored by Respondent) was Appellant's, and—because its language is central to this appeal—is quoted in full below:

> I certify that the above work has been completed in full, all invoicing for material used has been provided to project designee. The work performed has been inspected and complete payment should be processed to PO Box 16253, Greenville, SC 29609.

(Id.)

Each of the work completion forms was required to be signed by representatives of both Dunlap and Appellant, then transmitted to Respondent. Upon receipt of Dunlap's invoice and associated work completion form, Respondent would then decide whether to purchase any specific Dunlap invoice. (R. p. 174, lines 17-25.) Meanwhile, regardless of Respondent's purchase decision, Appellant would submit invoices—both its own and Dunlap's—to the general contractor. When payment was received from the general contractor, and to the extent that Dunlap was owed anything, Appellant would tender payment to Dunlap (or its assignee) as directed.

For the purposes of these proceedings, the first factored invoice at issue that Dunlap submitted to Appellant was dated March 2016—March 28, 2016, to be precise. (R. p. 12.) During April 2016, Appellant became suspicious that certain of Dunlap's suppliers, who Dunlap had used in furtherance of its obligations under the Subcontract Agreement, had not been paid. (R. p. 197, lines 9-17.) Appellant immediately demanded proof from Dunlap to assuage these concerns. (R. p. 197, line 20-p. 198, line 1.) Initially, Dunlap

provided Appellant with written assurances that Dunlap's suppliers were being, or would be, paid. (R. p. 430.) But these assurances proved false. Consequently, on May 12, 2016, and pursuant to the Subcontract Agreement, Appellant issued a notice of default to Dunlap, giving Dunlap five days within which to provide conclusive assurance that its suppliers had been paid. (R. p. 433.) Dunlap was unable to cure its default. Accordingly, by letter dated May 17, 2016, Dunlap was terminated as Appellant's subcontractor. (R. p. 434.)

There is no question that Dunlap's termination was warranted. But it was not without consequence. First, and perhaps most immediately, Appellant had to assess whether and to what extent Dunlap had failed to pay its suppliers. This burden fell to Appellant, since Dunlap's nonpayment for materials used in furtherance of the Subcontract Agreement could very easily have resulted in the imposition of a lien against the entirety of the project, which, in turn, would have likely jeopardized Appellant's further involvement in the project. Ultimately, Appellant determined that Dunlap had failed to pay both Hertz and Carboline, and made payments to those third parties to satisfy any lien claims they may have against the project. Specifically, Appellant paid Hertz approximately $142,000.00, (R. p. 207, lines 1-2); Carboline was paid approximately $37,000.00, (R. p. 208, lines 23-25).

The second consequence of Dunlap's termination continues to play out in these proceedings. Between March 28, 2016 and May 9, 2016, Dunlap factored a total of fifteen (15) invoices with Respondent; the face value of these invoices was $202,390.92, (R. p. 174, lines 14-16), though at the time of default, Respondent was owed only $189,822.36, (R. p. 173, lines 4-6). As explained in the foregoing paragraph, when Appellant received payment of these invoices from the general contractor, the vast majority of such proceeds

were used to satisfy the claims to payment of those that Dunlap failed to pay. Quite obviously, Dunlap did not use the money generated from the sale of its accounts receivable to pay its suppliers. It is not clear how Dunlap used the proceeds raised from factoring; presumably, the cash was frittered away. Regardless, Respondent was thrust into a position of insecurity as to its own repayment.

Appellant empathizes with Respondent's position. But empathy is not a substitute for liability. And, under the circumstances described above, as well as the reasons discussed below, Appellant is not liable for Respondent's financial losses. Respondent's opportunities for recourse are limited to Dunlap, through the Factoring Agreement, and to the individual who personally guaranteed Dunlap's payment and performance of the obligations established in the Factoring Agreement.

ARGUMENT

As described above, Appellant takes exception to each and every aspect of the trial court's Order, and in particular: (1) the determination of Appellant's liability under South Carolina Code § 36-9-607; (2) the determination of Appellant's liability under negligent misrepresentation; (3) the determination of Appellant's liability under promissory estoppel; and (4) the trial court's determination as to the amount of damages for which Appellant is liable. Each of these matters is considered in turn.

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN HOLDING APPELLANT LIABLE FOR RESPONDENT'S DAMAGES UNDER SOUTH CAROLINA CODE § 36-9-607, IN DEROGATION OF APPELLANT'S RIGHTS UNDER SOUTH CAROLINA CODE § 36-9-404.

A. Identification & Translation of the Portion of the Order at Issue

In relevant part, the trial court held as follows:

> Pursuant to [S.C. Code § 36-9-607], a secured party may enforce the obligations of an account debtor and exercise the rights of the debtor with respect to the obligation of the account debtor. See S.C. Code § 36-9-607[(a)(3)]. A secured party's rights, however, are subject to all terms and conditions of the agreement between the account debtor and assignor and any defense or claim in recoupment arising from the transaction that gave rise to the contract unless an account debtor has made an enforceable agreement not to assert defenses or claims. See S.C. Code § 36-9-404[(a)(1)].

(R. p. 13.)

These provisions may be written in English, but they are not necessarily plain. Consequently, and for everyone's benefit, the undersigned has attempted to translate the foregoing paragraph into something more digestible.

The first term-of-art in the language quoted above is "secured party." It describes "a person in whose favor a security interest is created or provided for under a security agreement, whether or not any obligation to be secured is outstanding," as well as "a person

to which accounts, chattel paper, payment intangibles, or promissory notes have been sold." S.C. Code § 36-9-102(72)(A) & (D).

The next term-of-art is "account debtor." It describes "a person obligated on an account . . . ." Id. § 36-9-102(3). An "account . . . means a right to payment of a monetary obligation . . . for services rendered or to be rendered . . . ." Id. § 36-9-102(2)(ii).

The next term-of-art is "debtor," which is distinct from an "account debtor." A "debtor"—under the Uniform Commercial Code, or U.C.C.—means "a seller of accounts . . . ." Id. § 36-9-102(28)(B).

The final two terms to address are "assignor" and, by implication, "assignee." These are not defined in the Code sections pertaining to the U.C.C., and therefore, should be given their ordinary meanings. Very simply, an assignor is a party who makes an assignment; an assignee is a party who receives an assignment.

When a party enters into a service contract with a service provider, and the service provider renders performance under the contract, a right to payment is created in favor of the service provider. That right to payment is an account; the party obligated to make payment is the account debtor. The service provider, in turn, can sell the account to a third party. If it does so, under the language of the U.C.C., the party selling an account becomes a debtor; the purchaser of the account becomes the secured party. Additionally, because the account seller—*a/k/a* the debtor—is assigning its right to payment on the account to the account buyer—*a/k/a* the secured party—the seller is also known as the assignor, and the buyer is known as the assignee.

Applying the foregoing explanation to the circumstances of this case, Appellant is the party who entered into a contract with the service provider; the service provider is

Dunlap; and the account buyer is Respondent. Consequently, consistent with the language of the U.C.C.: (1) Appellant is the account debtor; (2) Dunlap is both the debtor and the assignor; and (3) Respondent is both the secured party and the assignee.

With this understanding of the terminology, the pertinent provisions of the trial court's Order, quoting the U.C.C., can be more readily deciphered:

> Pursuant to S.C. Code § 36-9-607, Respondent may enforce the obligations of Appellant and exercise the rights of Dunlap with respect to the obligation of Appellant. See S.C. Code § 36-9-607(a)(3). Respondent's rights, however, are subject to all terms and conditions of the agreement between Appellant and Dunlap [*i.e.*, the Subcontract Agreement] and any defense or claim in recoupment arising from the transaction that gave rise to the contract unless Appellant has made an enforceable agreement not to assert defenses or claims. See S.C. Code § 36-9-404(a)(1).

(Cf. R. p. 13.)

Even when translated, the foregoing provisions are still cumbersome to read, especially since they describe a fairly simple proposition: With regard to Appellant's payment obligations, Respondent steps into the shoes of Dunlap—and is subject to the same terms and conditions of Dunlap's agreement with Appellant (the Subcontract Agreement)—unless Appellant has made some other enforceable agreement (either with Dunlap or Respondent) to not assert claims or defenses against making payment to Dunlap.

So far, so good. But then, the trial court's Order takes a hard turn toward error:

> In the matter at hand, [Appellant] agreed not to assert defenses or claims against payment of each Dunlap Invoice to [Respondent], when [Appellant] represented to [Respondent] that the work was inspected and "complete payment should be processed" to [Respondent]. . . . This Court finds that the ordinary, plain meaning of "should" is the past tense of shall and, accordingly, connotes a duty or obligation. . . . As [Appellant] obligated itself to process complete payment to [Respondent], [Respondent], in accordance with [South Carolina Code § 36-9-607], is entitled to enforce [Appellant's] obligations under the Dunlap Invoices."

(Cf. R. pp. 13-14.)

These conclusions constitute legal error and must be reversed.

B. Standard of Review

Assuming—though not conceding—that South Carolina Code § 36-9-607 (referred to hereinafter as simply "§ 9-607") creates a private right of action through which Respondent may seek relief against Appellant, see, e.g., Forest Capital, LLC v. BlackRock, Inc., 658 F. Appx. 675, *16-17 (4th Cir. Aug. 10, 2016) (construing Maryland's version of § 9-607, which appears identical to South Carolina's, to hold that a private right of action does not exist under § 9-607), such an action would seem to be an action at law. "In an action at law, on appeal of a case tried without a jury, the appellate court's standard of review extends only to the correction of errors of law. . . . The trial judge's findings of fact will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings." Electro-Lab of Aiken v. Sharp Constr. Co. of Sumter, Inc., 357 S.C. 363, 367, 593 S.E.2d 170, 172 (Ct. App. 2004) (citations omitted).

C. The trial court committed reversible error in concluding that Appellant had entered into an enforceable agreement with Respondent by which Appellant agreed to refrain from asserting available claims or defenses against payment to Dunlap.

The trial court's ruling is explicit as to the basis of the alleged agreement by which Appellant supposedly agreed to refrain from asserting claims or defenses against payment. According to the Order, the agreement was formed by each and every of the work completion forms that Appellant submitted to Respondent in furtherance of Dunlap's efforts to factor its accounts receivable. (R. p. 13.)

Before examining this conclusion any further, there is an important point that merits special attention: In the absence of the alleged agreements formed by the work completion

forms, there is no other basis to assert the existence of any agreement by which Appellant waived its claims or defenses against payment. The court's Order does not identify another basis; Respondent has never articulated another basis; there is no other agreement between Appellant and Dunlap, other than the Subcontract Agreement; and certainly, Appellant has not knowingly subjected itself to any other form of agreement with Respondent or Dunlap. In fact, at trial, Respondent expressly disclaimed having any contractual relationship with Appellant whatsoever. (R. p. 190, lines 11-18; R. p. 193, lines 16-18.) The entire validity of Respondent's ability to obtain recovery against Appellant under § 9-607 hinges on whether any of the work completion forms constitutes a valid, enforceable agreement. They do not.

The elements of a valid, enforceable agreement—that is, a contract—are not mysterious. The existence of a contract requires an offer, an acceptance, and an exchange of valuable consideration. See, e.g., Carolina Amusement Co. v. Conn. Nat'l Life Ins. Co., 313 S.C. 215, 220, 437 S.E.2d 122, 125 (Ct. App. 1993) (citation omitted).

"An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." Id. (citation omitted). It has also been described as "a promise to do or refrain from doing some specified thing in the future conditioned on the other party's acceptance." Joseph M. Perillo, Calamari & Perillo on Contracts § 2.5 (5th ed. 2003). Perhaps most succinctly stated, an offer is a promise of future payment or performance.

But, as noted above, an offer—even if accepted—does not form a valid, enforceable contract unless the parties have exchanged valuable consideration. "Valuable consideration may consist of some right, interest, profit[,] or benefit accruing to one party[,]

or some forbearance, detriment, loss[,] or responsibility given, suffered[,] or undertaken by the other." McPeters v. Yeargin Constr. Co., 290 S.C. 327, 331, 350 S.E.2d 208, 211 (Ct. App. 1986) (citation omitted). Importantly, a party's promise to perform what it is already legally bound to do does not constitute valid consideration. See, e.g., Rabon v. State Fin. Corp., 203 S.C. 183, 186-87, 26 S.E.2d 501, 502 (1943). To summarize, a party's consideration is valid only if it represents a change in that party's legal rights or posture. And, to drive the point home, both parties must give consideration in order for an agreement to attain the status of a contract.

For these very reasons, the trial court's determination that the language of the work completion forms constitutes a valid, enforceable agreement must necessarily fail. As noted above, each work completion form contains the following statement:

> I certify that the above work has been completed in full, all invoicing for materials used has been provided to project designee. The work performed has been inspected and complete payment should be processed to PO Box 16253, Greenville, SC 29606.

(See, e.g., R. p. 321.)

As a first step, it is important to identify—specifically—which aspects of the foregoing language could possibly form the basis of a contract. The initial phrase "I certify that the above work has been completed in full" cannot form the basis of a contract because it is lacking the most elemental aspect of an agreement; that is, an offer. No part of this initial phrase constitutes a promise of future payment or performance. It is nothing more than an assertion of existing fact. The same is true of the next two phrases, "all invoicing for materials used has been provided to project designee," and "[t]he work performed has been inspected."

The final phrase, "that complete payment should be processed" to Respondent's post office box, at least sounds somewhat like a traditional offer. But it is still problematic, precisely because it is ambiguous. For example, it could be that the "payment-should-be-processed" phrase constitutes nothing more than an acknowledgment of Appellant's pre-existing responsibility, under § 9-406(a), to direct payments for Dunlap's assigned invoices to Respondent. Or, as the trial court held, the "payment-should-be-processed" phrase represents a promise—given by Appellant to Respondent—of future performance.

This latter interpretation seems like a stretch, though. Suppose the phrase at issue were stated more bluntly: "I [Appellant] promise that payment should be processed to Respondent's post office box." It would be fair to question what this "promise" means, and more particularly, what performance it would require. Would this "promise" describe Appellant's opinion that payments ought to be directed to Respondent? Would it, instead, refer to Appellant's expectation that payments ought to be so directed? Neither construction would result in a legally cognizable offer. See, e.g., Joseph M. Perillo, Calamari & Perillo on Contracts § 2.6(b) & (c) (5th ed. 2003).

To avoid this confusion, the trial court undertook extreme linguistic heroics. First, the court found that "the ordinary, plain meaning of 'should' is the past tense of shall." (R. p. 13.) Then, the court found that, because of this common etiology, the word "should" necessarily "connotes a duty or obligation." (Id.) Finally, the court held that "should," as used in the work completion forms, constitutes a promise of Appellant's future performance enforceable by Respondent. (R. pp. 13-14.)

There is no question that, linguistically, "should" and "shall" share a common origin, and that "should" is, technically, the past tense of "shall." But there is wide

disagreement among the judiciary, nationally, as to whether and to what extent "should" carries the force of a mandate. For example, in just the past three years, the Fourth Circuit Court of Appeals has construed the word "should" as both discretionary, Flynn v. SEC, 877 F.3d 200, 208 (4th Cir. 2017), and compulsory, Casa de Md. v. DHS, 924 F.3d 684, 700 n.12 (4th Cir. 2019). The rest of our country's state and federal courts seem just as split.

Vocational linguists seem less confused. The very same dictionary cited by the trial court—www.Merriam-Webster.com—offers eight common usages of the word "should." Only one connotes compulsion:

1. Used in auxiliary function to express condition: *If he should leave his father, his father would die.*

2. Used in auxiliary function to express obligation, propriety, or expediency: *(i) 'Tis commanded I should do so. (ii) This is as it should be. (iii) You should brush your teeth after each meal.*

3. Used in auxiliary function to express futurity from a point of view in the past: *She realized that she should have to do most of her farm work before sunrise.*

4. Used in auxiliary function to express what is probable or expected: *With an early start, they should be here by noon.*

5. Used in auxiliary function to express a request in a polite manner or to soften direct statement: *I should suggest that a guide . . . is the first essential.*

6. Ought to: *They should be here soon.*

7. Happen to: *If you should see them, say hello for me.*

8. Used as a more polite or less assured form of shall: *Should I turn the light on?*

Merriam-Webster, Definition of Should, available at https://www.merriam-webster.com/dictionary/should (accessed July 7, 2020).

Somewhat surprisingly, Wikipedia offers a very accessible explanation of the various usages of "should." The extended quotation that follows is taken from that source:

> The main use of *should* in modern English is as a synonym of *ought to*, expressing quasi-obligation, appropriateness, or expectation . . . . Examples:
>
> -You should not say such things. (it is wrong to do so)
>
> -He should move his pawn. (it is appropriate to do so)
>
> -Why should you suspect me? (for what reason is it proper to suspect me?)
>
> -You should have enough time to finish the work. (a prediction)
>
> -I should be able to come. (a prediction, implies some uncertainty)
>
> -There should be some cheese in the kitchen. (expectation)
>
> Other specific uses of *should* involve the expression of irrealis mood:
>
> -In condition clauses (protasis), *e.g.* "If it should rain" or "Should it rain"; see English conditional sentences
>
> -As an alternative to the subjunctive, *e.g.* "It is important that he (should) leave"; see English subjunctive
>
> . . . .
>
> When *would* and *should* function as past tenses of *will* and *shall*, their usage tends to correspond to that of the latter verbs (*would* is used analogously to *will*, and *should* to *shall*).
>
> Thus *would* and *should* can be used with "future-in-the-past" meaning, to express what was expected to happen, or what in fact did happen, after some past time of reference. The use of *should* here (like that of *shall* as a plain future marker) is much less common and is generally confined to the first person. . . .
>
> In particular, *would* and *should* are used as the past equivalents of *will* and *shall* in indirect speech reported in the past tense:
>
> -You shall obey me! [can be recounted as] He said that I should obey him.

> -I shall go swimming this afternoon. [can be recounted as] I said that I should go swimming in the afternoon.
>
> As with the conditional use referred to above, the use of *should* in such instances can lead to ambiguity; in the last example, it is not clear whether the original statement was *shall* (expressing plain future) or *should* (meaning "ought to"). Similarly, "The archbishop said that we *should* all sin from time to time" is intended to report the pronouncement that "We *shall* all sin from time to time" (where *shall* denotes simple futurity), but instead gives the highly misleading impression that the original word was *should* (meaning "ought to").

Wikipedia, Shall and Will, available at https://en.wikipedia.org/wiki/Shall_and_will (accessed July 7, 2020).

In short, "should" has a variety of meanings, the least common of which is the one that suggests compulsion. If that is not the case, then certainly, the undersigned—and every other litigating lawyer—must become more cautious when insisting that a court "should" grant the relief they request, for fear of gaining a reputation for insolence toward the judiciary.

But that does not end the matter. Even if the trial court were correct in its conclusion that "should" means "shall," there would still remain a substantial question as to whether Appellant's promise to direct payments to Respondent's post office box was part of an agreement supported by a mutual exchange of valuable consideration. In other words, what did Appellant give Respondent, and what did Respondent give Appellant in return?

If, in fact, the statement on Dunlap's work completion forms directing Appellant to make payment directly to Respondent was a promise sufficient to constitute an offer, then there is no legally cognizable consideration. As discussed previously, a party's consideration must be based on something other than a pre-existing obligation. And that

is lacking from this equation. Dunlap entered into the Factoring Agreement with Respondent in September 2010. As part of that Agreement, Dunlap gave Respondent a security interest in a substantial amount of its assets, including all of its receivables, whether purchased under the Factoring Agreement or not. (R. p. 416, at § 7.)

This is a critical point: Under this provision of the Factoring Agreement, Respondent owned the right to payment on all of Dunlap's accounts receivables, regardless of whether Respondent had agreed to purchase any specific invoice. Consequently, when Appellant received an invoice from Dunlap, the face of that invoice set out a statement which advised Appellant that both the invoice and its proceeds had already been assigned to Respondent. (See, e.g., R. p. 321.) These circumstances implicate § 9-406(a), which provides that:

> [A]n account debtor on an account, chattel paper, or a payment intangible may discharge its obligation by paying the assignor until, but not after, the account debtor receives a notification, authenticated by the assignor or the assignee, that the amount due or to become due has been assigned and that payment is to be made to the assignee. After receipt of the notification, the account debtor may discharge its obligation by paying the assignee and may not discharge the obligation by paying the assignor.

To apply this Section to the circumstances of this case:

> Appellant may discharge its obligation by paying Dunlap until, but not after, the Appellant receives a notification, authenticated by Dunlap or Respondent, that the amount due or to become due has been assigned and that payment is to be made to Respondent. After receipt of the notification, Appellant may discharge its obligation by paying Respondent and may not discharge the obligation by paying Dunlap.

Respondent owned the proceeds of each and every of Dunlap's invoices at the time that such invoices were provided to Appellant. Appellant's certification on each work completion form had no effect on Respondent's ownership of those invoices; it only affected whether Respondent would provide financing to Dunlap based on their face value.

Regardless of whether Respondent provided such financing to Dunlap, Appellant—under the foregoing § 9-406(a)—was obliged to forward all Dunlap payments to Respondent. Therefore, even if Appellant had promised to forward all Dunlap payments to Respondent by virtue of the work completion forms, that promise does not constitute valid consideration, specifically because Appellant was already under an obligation to do so.

There is a final deficiency to address, which pertains to the consideration that Respondent gave to Appellant. Which was none. (R. p. 190, lines 8-10.) Respondent gave Appellant nothing in order to induce Appellant to provide work completion forms in furtherance of the factoring relationship with Dunlap—no promises of payment, no promises of some other performance. Nothing. And there is no evidence in the record to support the trial court's implicit conclusion that any consideration was given.

Which brings us back to the larger question presented by this issue. As discussed above, in determining what rights that Respondent may enforce against Appellant under § 9-607, the trial court misapplied both that statute and § 9-404. Section 9-607 explains that Respondent—as a secured party—"may enforce the obligations of an account debtor [Appellant] . . . and exercise the rights of the debtor [Dunlap] with respect to the obligations of the account debtor [Appellant]." S.C. Code § 36-9-607(a)(3). Section 9-404 explains what those rights and obligations are: They are the same as those established in the agreement between Appellant and Dunlap, which are expressed in the Subcontract Agreement, unless those terms were modified by some other enforceable agreement. Id. § 36-9-404(a)(1).

The trial court held that the work completion forms provided by Appellant to Respondent constituted the type of "enforceable agreement" contemplated by § 9-404.

This holding was error; the foregoing U.C.C. statutes were misapplied by the trial court, and there is no factual basis in the record to substantiate the court's findings that any enforceable agreement between Appellant and Respondent was created.

The trial court compounded its error by determining that the fictitious agreement created between Appellant and Respondent through the work completion forms resulted in Appellant agreeing to refrain from asserting any defenses or claims in recoupment it may have had against Dunlap. There is no factual basis in the record to substantiate this conclusion; in fact, Respondent's only witness testified to just the opposite, that Respondent never asked Classic to waive any defenses, (R. p. 194, lines 21-23). Instead, the court's conclusion that Appellant waived payment defenses in favor of Respondent seems to have been crafted out of thin air. See Hardee v. Hardee, 355 S.C. 382, 387, 585 S.E.2d 501, 503 (2003) (explaining that, with respect to contracts, the judicial function is limited to enforcement, and cautioning against revisions or distortions "under the guise of judicial construction").

Ultimately, these erroneous decisions were exceptionally prejudicial to Appellant's interests. The trial court refused to consider the fact that Appellant had to pay nearly $180,000.00 to settle unpaid debts incurred by Dunlap, despite the fact that Appellant was explicitly permitted to undertake this protective action under the terms of the Subcontract Agreement, (R. pp. 427-28, at ¶ 23), despite the fact that Appellant's defenses and claims for recoupment against Dunlap are explicitly preserved by § 9-404(b), and despite the fact that Respondent—as Dunlap's assignee—stepped squarely into Dunlap's shoes with respect to those claims and defenses, with payment rights subordinate to those claims and defenses, S.C. Code § 36-9-607(a)(3). As a consequence of all these errors, the trial court

awarded Respondent the sum of $202,390.92—which represents more than a full reimbursement to Respondent of all amounts financed to Dunlap under the fifteen invoices at issue.

The practical effect of the trial court's decision should (*read: "ought"*) be apparent. The trial court transformed Appellant from a party with no relationship with Respondent or the Factoring Agreement into Dunlap's personal guarantor. (Cf. R. p. 190, lines 15-16 (in which Respondent affirms that Respondent had "[n]o guarantee" from Appellant).) There was no basis in law or fact for the court having done so.

Appellant would encourage the Court to follow the decision reached in Factor King, LLC v. Block Builders, LLC, which is substantially identical to the circumstances of the instant case in both law and fact. 192 F. Supp. 3d 690 (M.D. La. 2016); see also Factor King, LLC v. Block Builders, LLC, C.A. No. 3:14-cv-00587 (M.D. La. Feb. 29, 2016) (Docket Entry No. 82 (disposition of cross-motions for summary judgment)). In Factor King, a general contractor subcontracted a portion of its scope of work to a subcontractor; their relationship was governed by a subcontract agreement, which—through a modification—explicitly permitted the general contractor to pay the subcontractor's suppliers directly. Separately, the subcontractor factored its accounts receivable with a third-party factoring company. When the subcontractor failed to pay its suppliers, the general contractor used funds that would have gone toward the subcontractor's payment to satisfy those suppliers' payment claims. This, of course, resulted in the factor's non-payment.

Like Respondent in the present case, the plaintiff in Factor King sought payment from the general contractor directly; in general, it was plaintiff's position that the general

contractor's payment of the subcontractor's suppliers was a violation of the factor's payment rights established by the factoring agreement. The district court held otherwise.

The court's analysis began with an acknowledgment that the factor's right to payment from the subcontractor was coextensive with the subcontractor's right to payment from the general contractor, as established by their subcontract agreement. Factor King, C.A. No. 3:14-cv-00587, *7. The authority for this proposition was supplied by Louisiana's version of § 9-404, (id.), which appears largely the same as South Carolina's, cf. La. R.S. § 10:9-404(a)(1). From there, the court observed that the subcontract agreement explicitly authorized the general contractor to make payment directly to the subcontractor's unpaid suppliers. Factor King, C.A. No. 3:14-cv-00587, *7. Consequently, not only were the funds used to pay the subcontractor's suppliers excluded—by contract—from any claim of right to payment by the subcontractor, they were excluded from any claim of right to payment by the factor. Id. *7-8. The only right to payment that the factor could claim after the general contractor's payment of the subcontractor's unpaid suppliers was whatever balance may have remained. Id. *8.

Following this adverse decision, the factor filed a motion for reconsideration. Specifically, the factor complained that the court failed to appreciate its argument, under Louisiana's version of § 9-404, that the general contractor had entered into a separate payment agreement with the factor. Factor King, 192 F. Supp. 3d at 693-94 (disposing of the factor's motion for reconsideration). The basis for that agreement will sound familiar. The factor asserted that this agreement arose by virtue of "invoice letters" that the general contractor sent to the factor in connection with the subcontractor's invoices, to advise that the work identified by each invoice had been completed. Factor King, C.A. No. 3:14-cv-

00587, *3. The court swiftly, and with little discussion, concluded that these "invoice letters" did not form the basis of an agreement by which the general contractor had relinquished any of its rights established in the subcontract agreement, and particularly, the right to pay the subcontractor's unpaid suppliers directly. Factor King, 192 F. Supp. 3d at 693-94.

Appellant—like the general contractor in Factor King—had an agreement with Dunlap that allowed Appellant to pay Dunlap's suppliers directly. That provision required Dunlap:

> To fully and promptly pay all of [Dunlap's] laborers, suppliers, and sub-subcontractors who provided labor, skill[,] or material to [Dunlap] for the completion of the Work. [Dunlap] shall hold all moneys received for the performance of this Subcontract [Agreement] in trust and shall apply said moneys first for the payment of its laborers, suppliers[,] and sub-subcontractors who performed work on this Project. [Appellant] reserves the right to make payments directly to [Dunlap's] laborers, suppliers[,] and sub-subcontractors and deduct the sum paid from amounts owed to [Dunlap].

(R. pp. 427-28, at § 23.)

This provision was plainly available in the Subcontract Agreement for Respondent to consider, in order to evaluate what risk it was comfortable undertaking with regard to the purchase of Dunlap's invoices. Despite the fact that Respondent knew of the existence of the Subcontract Agreement between Appellant and Dunlap, (R. p. 186, lines 3-5), Respondent never even bothered to request a copy for review, (id., lines 9-11). Regardless, Respondent would have known of the existence of Appellant's set off rights had it exercised even minimal due diligence. Cf. S.C. Code § 36-1-202(f) ("Notice, knowledge, or a notice of notification received by an organization is effective for a particular transaction from the time it is brought to the attention of the individual conducting that

transaction and, in any event, from the time it would have been brought to the individual's attention if the organization had exercised due diligence.").

Despite the obvious similarities between Factor King and the case presently before the Court, there is one difference that merits special attention. In the instant case, it was Respondent's position that the phrase "payment-should-be-processed" constituted the so-called agreement by which Appellant had relinquished all its payment defenses. The language in Factor King was stronger. In that case, each "invoice letter" sent by the general contractor to the factor said that each of the subcontractor's invoices "will be paid by [the general contractor] to [the factor] on or before the due date without recoupment, setoff, defense[,] or counterclaim." C.A. No. 3:14-cv-00587, *3-4. Not even these express waivers of payment defenses were found by the court in Factor King to constitute an agreement between the general contractor and the factor to displace the contractor's rights—established in the subcontract—to pay the subcontractor's unpaid suppliers directly.

D. Request for Relief

As to this specific issue, the decision of the trial court must be reversed, and the case remanded for further proceedings. Specifically, the trial court should consider whether and to what extent there was an enforceable agreement, supported by a mutual exchange of valuable consideration, capable of disturbing Appellant's right to pay Dunlap's unpaid suppliers directly, as established by the Subcontract Agreement and as preserved under § 9-404. In light of that determination, the trial court should then re-examine the scope and extent of Appellant's and Respondent's rights, respectively, under § 9-607. And finally, the trial court should proceed to determine what, if any, amount that

Respondent may be entitled to claim from Appellant by virtue of § 9-607, after giving due regard to the totality of Appellant's defenses and rights to set off or recoupment.

II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN HOLDING APPELLANT LIABLE TO RESPONDENT FOR NEGLIGENT MISREPRESENTATION, BY NOT ONLY MISAPPLYING THE ESSENTIAL ELEMENTS OF THE ACTION, BUT ALSO BY FAILING TO SUBSTANTIATE ITS DETERMINATION OF LIABILITY WITH EVIDENTIARY SUPPORT.

A. Identification of the Portion of the Order at Issue

Beginning on Page 5 of the Order, and continuing onto Page 6, the trial court determined that Appellant is liable to Respondent under a theory of common-law negligent misrepresentation, and provided its findings of fact in support of its judgment. (R. pp. 14-15.) Appellant takes exception to both.

B. Standard of Review

Negligent misrepresentation is a legal cause of action. See, e.g., Rushing v. McKinney, 370 S.C. 280, 289, 633 S.E.2d 917, 922 (Ct. App. 2006) (citations omitted). "In an action at law, on appeal of a case tried without a jury, the appellate court's standard of review extends only to the correction of errors of law. . . . The trial judge's findings of fact will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings." Electro-Lab of Aiken v. Sharp Constr. Co. of Sumter, Inc., 357 S.C. 363, 367, 593 S.E.2d 170, 172 (Ct. App. 2004) (citations omitted).

C. Elements

The essential elements of an action for negligent misrepresentation, tailored to this case, are:

(1) Appellant made a false representation to Respondent;

(2) Appellant had a pecuniary interest in making such representation;

(3) Appellant owed Respondent a duty of care to see that truthful information was communicated to Respondent;

(4) Appellant breached its duty to Respondent by failing to exercise due care;

(5) Respondent justifiably relied upon Appellant's representation; and,

(6) Respondent suffered a pecuniary loss as a direct and proximate result of its reliance on Appellant's representation.

See, e.g., Quail Hill, LLC v. County of Richland, 387 S.C. 223, 240, 692 S.E.2d 499, 508 (2010) (citation omitted).

D. The trial court erred in determining that Appellant made a false representation to Respondent.

On Page 5 of the Order, the trial court found that "[Appellant] falsely represented to [Respondent] that 'complete payment should be processed' to [Respondent] on the Dunlap Invoices despite having knowledge since April 2016 that Dunlap had not paid its subcontractors or suppliers." (R. p. 14.) Similar to the issues in Section I, above, the sole and exclusive basis for the trial court's determination of negligent misrepresentation arises from the portion of Appellant's statement on each work completion form that "complete payment should be processed" to Respondent's post office box.

As an initial matter, the trial court erred in equating the word "should" with "shall." For the sake of brevity, Appellant incorporates its prior discussion regarding "shall" into this Section. There is more than a semantic difference in the selection of these words. If "should" is interpreted as "ought," and the statement at issue is that "complete payment ought to be processed," the result is an expression of expectation, not a representation of fact, and that cannot sustain an action for negligent misrepresentation. See, e.g., Fields v. The Melrose L.P., 312 S.C. 102, 105, 439 S.E.2d 283, 285 (Ct. App. 1993) (citation omitted).

Even if Appellant's statement regarding "complete payment" were a false representation, it is Respondent's burden to prove that each such statement was false when made. See, e.g., GSM Dealer Servs., Inc. v. Chrysler Corp., 32 F.3d 139, 142 (4th Cir. 1994). This obligation is somewhat cumbersome under the circumstances of this case, since—according to Respondent's theory—Appellant made fifteen separate, but identical, false statements of fact, one for each work completion form at issue. These forms were not submitted to Respondent at the same time; instead, they were submitted on eight separate occasions over a period of about six weeks, from late March 2016 until early May 2016. For reference, Page 3 of the Order sets out a schedule identifying when each work completion form was submitted to Respondent. (R. p. 12.)

The trial court determined that Appellant knew of issues that may affect Respondent's payment rights by virtue of Dunlap's conduct "since April 2016." (R. p. 14.) The court did not identify a specific date by which Appellant had such knowledge, and there are no facts in the record to evidence such information. Consequently, it was impossible for the court to determine, with any certitude, which of the work completion forms contained false representations of fact at the time of their issuance. Regardless, the trial court held Appellant responsible under negligent misrepresentation for all work completion forms issued, even those issued in March 2016—the month before Appellant was aware of any rumors regarding Dunlap's failure to pay suppliers.

Additionally, even if Appellant's statement regarding "complete payment" is a representation of fact, there is a question—arising under the U.C.C.—about what this term means. Obviously, Respondent interprets "complete payment" to mean full repayment of all amounts financed by Respondent to Dunlap. But, from Appellant's perspective, and

giving due regard to its claims and defenses preserved under § 9-404 and the Subcontract Agreement, which Respondent inherited as-is, "complete payment" could very reasonably mean all rights of payment to which Dunlap may be entitled, less amounts set off for other losses occasioned by Dunlap. See also Factor King, C.A. No. 3:14-cv-00587; 192 F. Supp. 3d 690. Notably, the work completion form did not require Appellant—or Dunlap, for that matter—to make any representations about the satisfaction of payment to Dunlap's suppliers, or known issues regarding non-payment to the same. (See, e.g., R. p. 321.)

For all these reasons, Appellant takes exception to the trial court's determination that Appellant made any false representations to Respondent.

E. The trial court erred in concluding that Appellant breached its duty of due care to Respondent.

On Page 6 of the Order, the trial court determined that Appellant "had specialized knowledge regarding its offsets to the Dunlap Invoices," as established in the Subcontract Agreement, "and whether it would pay the Dunlap Invoices and the underlying claims thereto." (R. p. 15.)

As discussed in Subsection D, above, the record does not contain any evidence as to when Appellant learned of issues that might require Appellant to invoke set off rights against Dunlap, other than a vague reference to sometime in April 2016. By contrast, evidence was presented to the court, at trial, to establish that Appellant was working diligently during the early days of May 2016 to ensure that Dunlap's suppliers had been paid. In fact, as illustrated by these documents, by May 5, 2016, Dunlap had assured Appellant that its suppliers had been paid. (R. pp. 430-32.) However, when Appellant learned that Dunlap's assurances were false, just a week later—on May 12, 2016, Appellant issued a formal notice of default to Dunlap with a demand to cure within five days. (R. p.

433.) Dunlap did not cure its default. And accordingly, by letter dated May 17, 2016, Appellant terminated the Subcontract Agreement with Dunlap. (R. pp. 434-35.) The trial court ostensibly disregarded these facts in determining that Appellant took some cavalier attitude toward Dunlap's defaulting on its payment obligations.

Certainly, Appellant did not occupy the position of a fiduciary with respect to Respondent. Therefore, Appellant was under no general duty to disclose any information to Respondent. See, e.g., Allegro, Inc. v. Scully, 409 S.C. 392, 419, 762 S.E.2d 54, 68 (Ct. App. 2014) (citations omitted), rev'd on other grounds by 418 S.C. 24, 791 S.E.2d 140 (2016). And, to the extent that Appellant was obliged to any particular standard of care with respect to its communications with Respondent, there is no evidence in the record to suggest that Appellant did anything in derogation of that responsibility.

Finally, with respect to the trial court's determination that Respondent had no knowledge of Appellant's set off rights under the Subcontract Agreement, ostensibly thrusting Appellant into a position of "specialized knowledge," this is plainly unsupported by the evidence. Respondent's witness—Kevin Gilbert—testified that he was aware of the Subcontract Agreement, but that he never reviewed it. (R. p. 186, lines 3-11.) Mr. Gilbert further testified that Respondent did nothing to determine whether Dunlap was staying current on paying its suppliers. (R. p. 190, line 22-R. p. 192, line 1; R. p. 194, lines 7-17.) Had Respondent exercised even minimal due diligence, it would have known of Appellant's set off rights, as well as of Dunlap's payment delinquencies, which would ultimately trigger Appellant's set off rights. Respondent's failure to act reasonably in protection of its own interests should have, as a matter of law, resulted in rejection of the

action for negligent misrepresentation. See, e.g., AMA Mgmt. Corp. v. Strasburger, 309 S.C. 213, 223, 420 S.E.2d 868, 874 (Ct. App. 1992) (citation omitted).

F. Request for Relief

For the foregoing reasons, the trial court's determination that Appellant is liable to Respondent under a theory of common-law negligent misrepresentation should be reversed, and the matter remanded for further proceedings.

III. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN HOLDING APPELLANT LIABLE TO RESPONDENT FOR PROMISSORY ESTOPPEL, BY NOT ONLY MISAPPLYING THE ESSENTIAL ELEMENTS OF THE ACTION, BUT ALSO BY FAILING TO SUBSTANTIATE ITS DETERMINATION OF LIABILITY WITH EVIDENTIARY SUPPORT.

A. Identification of the Portion of the Order at Issue

On Page 7 of the Order, the trial court determined that Appellant is liable to Respondent under an equitable theory of promissory estoppel, and provided its findings of fact in support of its judgment. (R. p. 16.) Appellant takes exception to both.

B. Standard of Review

An action for promissory estoppel arises in equity. See, e.g., Barnes v. Johnson, 402 S.C. 458, 469, 742 S.E.2d 6, 11 (Ct. App. 2013) (citations omitted). In an equity action, tried by the judge alone, the appellate court has jurisdiction to find facts in accordance with its views of the preponderance of evidence. See, e.g., Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976) (citation omitted). In other words, the standard of review applicable to this portion of the order is de novo. See, e.g., Lewis v. Lewis, 392 S.C. 381, 386, 709 S.E.2d 650, 652 (2011). "De novo review permits appellate court fact-finding, notwithstanding the presence of evidence supporting the trial court's findings." Id., 392 S.C. at 390, 709 S.E.2d at 654-55.

C. Elements

The elements of promissory estoppel, as tailored to this case, are:

(1) Appellant made a promise to Respondent that was unambiguous in its terms;

(2) Respondent reasonably relied on Appellant's promise;

(3) Respondent's reliance on such promise was both expected by and foreseeable to Appellant; and,

(4) Respondent sustained injury in reliance on Appellant's promise.

D. The Order, as written, contains a legal inconsistency that should have precluded a judgment in favor of Respondent under promissory estoppel as a matter of law.

Before addressing the trial court's determinations as to the constituent elements of promissory estoppel, it is appropriate to consider the general contours of the action. First and foremost, promissory estoppel is a substitute for, or equivalent of, consideration sufficient to transform an ordinary agreement into an enforceable contract; it is not an alternative mechanism for creating an agreement where none exists. See, e.g., Glover v. Lockheed Corp., 772 F. Supp. 898, 907 (D.S.C. 1991) (citing Duke Power Co. v. South Carolina Public Serv. Comm'n, 284 S.C. 81, 326 S.E.2d 395 (1985)). In that connection, the existence of a valid, enforceable agreement—a contract—necessarily precludes an action for promissory estoppel. See, e.g., Barnes, 402 S.C. at 470, 742 S.E.2d at 11.

In the instant case, the trial court held that Appellant, "on each Dunlap Invoice, unambiguously promised that 'complete payment should be processed' to [Respondent]." (R. p. 16.) It is worth noting that the court's reference to the Dunlap Invoices was incorrect. The Dunlap Invoices were invoices provided by Dunlap to Appellant to reflect the work performed. (See, e.g., R. p. 322.) They did not contain the language referenced, and provided no opportunity for Appellant to state that "complete payment should be

processed" to anyone. Appellant presumes the trial court meant to refer to the work completion forms.

These forms, as discussed previously and at length, contained the "complete payment" statements to which the court referred. (See, e.g., R. p. 321.) And, most importantly for the immediate discussion, these forms—and in particular, their "complete payment" statements—are the sole and exclusive basis on which the court based its determination of liability under a theory of promissory estoppel.

Which is problematic. As discussed above, promissory estoppel does not provide a remedy where an enforceable agreement already exists. Yet the trial court found, in connection with its analysis of Respondent's claim for relief under the U.C.C., that each "complete payment" statement on each work completion form constituted an enforceable agreement between Appellant and Respondent that Respondent could use to avoid all payment defenses available to Appellant and to obtain full recovery against Appellant. (R. pp. 13-14.)

Both cannot be true. Respondent either had an agreement enforceable against Appellant under § 9-404 by virtue of the "complete payment" statements on the work completion forms, or it could have an action under promissory estoppel. By concluding that an enforceable agreement existed under § 9-404, the trial court should have necessarily, and as a matter of law, denied relief under promissory estoppel.

E. Relief under promissory estoppel could not have been provided specifically because of the absence of an unambiguous promise.

The first and most basic element of promissory estoppel is that the defendant must have made a promise to the plaintiff that was both clear and unambiguous in its terms. That

promise must be demonstrated by clear and convincing evidence. See, e.g., Barnes, 402 S.C. at 471, 742 S.E.2d at 12 (citations omitted).

Prior decisions of this State's appellate courts have explained, through examples, what types of facts are required in order to establish a promise capable of remediation through estoppel. It takes more than a general understanding between the parties, see, e.g., id., 402 S.C. at 472, 742 S.E.2d at 13; more than the ability to articulate some terms of an agreement, see, e.g., Rushing, 370 S.C. at 295, 633 S.E.2d at 925; Satcher v. Satcher, 351 S.C. 477, 487, 570 S.E.2d 535, 540 (Ct. App. 2002). In fact, to quote this Court, the promise-aspect of promissory estoppel requires nothing less than "clarity, definiteness, and specificity." Barnes, 402 S.C. at 471, 742 S.E.2d at 12.

In short, details. And in actions for the payment of money, the details that have mattered to this Court are "who will pay what amount" and "when." See, e.g., Furman Univ. v. Waller, 124 S.C. 68, 117 S.E. 356 (1923). It is precisely these details that are lacking from Respondent's action.

The trial court held that Appellant promised to make "complete payment." But from whose perspective? As explained previously, the phrase "complete payment"—to Appellant—meant all rights of payment to which Dunlap was entitled, less set offs authorized by the Subcontract Agreement for Dunlap's nonpayment of suppliers and materialmen. Respondent, for its part, ostensibly believed that "complete payment" meant all rights of payment to which Dunlap was entitled, regardless of set offs. As it turned out, this was a discrepancy in detail to the tune of about $200,000.00.

The trial court also held that Appellant—by virtue of the word "should"—was under a compulsory obligation to tender "complete payment" to Respondent, again,

regardless of any set off rights. Appellant will not belabor this point. But, by now, it has hopefully been sufficiently established that the meaning of "should" is hopelessly ambiguous.

And finally, to the question of when payment should be made, there is no detail. The work completion forms are silent on this matter; the trial court made no findings of fact in furtherance of this detail; and there is no evidence in the record to assist in identifying when Appellant's payment obligation to Respondent, if any, would accrue.

In the absence of these material details, there is simply not a clear promise capable of relief through the doctrine of promissory estoppel, let alone a promise established by clear and convincing evidence.

F. Appellant's conduct was not motivated by inequity toward Respondent, and in fact, the interests of equity are not served by fashioning an equitable remedy in favor of Respondent against Appellant.

Although it is not described as an independent element of an action for promissory estoppel, the appellate courts of this State have been clear that, in considering whether a remedy under promissory estoppel is appropriate, the courts must take care that the remedy, itself, would not inflict inequity on the party estopped. See, e.g., Barnes, 402 S.C. at 469, 742 S.E.2d at 11 (citation omitted). In that connection, the relief available under promissory estoppel is intended to prevent fraud or some other injustice. See, e.g., id., 402 S.C. at 468-69, 742 S.E.2d at 11 (citation omitted). This necessarily requires some balancing of equities.

If it is not already clear, the true bad-actor in the totality of this equation is Dunlap. The reason this case is before the Court is because Dunlap took money from Respondent, ostensibly in part to pay its suppliers and materialmen, didn't, and left Appellant

responsible for Dunlap's nonpayment. Had Dunlap only honored its contractual obligations with third parties, Respondent would have been paid for the invoices factored. But, because of Dunlap's failure to honor its contractual obligations, Appellant was thrust into the unenviable position of having to choose whether to pay Dunlap's materialmen and suppliers, in furtherance of its own legitimate financial and legal interests, or Respondent. Ultimately, it has become the obligation of the judicial branch to determine who, between Appellant and Respondent, as a matter of equity, should bear the risk of loss for Dunlap's bad conduct.

As an initial observation, it does not appear that the trial court undertook any balancing of equities as between Appellant and Respondent. Certainly, the Order does not indicate that the trial court gave any consideration to the fact that Appellant had legitimate legal rights—by virtue of the Subcontract Agreement—to set off any payment that was due to Dunlap to satisfy any claim to payment that any of Dunlap's materialmen and suppliers may have. Or that such rights and opportunities are explicitly preserved under the U.C.C.

Regardless, the undisputed evidence of record is that Appellant paid Dunlap's suppliers nearly $180,000.00 to satisfy their own legitimate claims for nonpayment. These were not fictitious debts, conjured up to deprive Respondent of any amounts to which it may have been entitled; they were real, substantial debts that, if left unsatisfied, could very easily have resulted in the impositions of liens against the larger construction project, and further, jeopardized Appellant's ability to continue participating in that project.

In any event, with regard to the damages that Respondent has sustained, it is well-settled that promissory estoppel will not provide a remedy "against all potential external forces acting against [Respondent's] interests or guarantee realization of an agreement's

benefits." Barnes, 402 S.C. at 474, 742 S.E.2d at 14 (citation omitted). The decisions of this State's appellate courts on the element of "injury in reliance" explain that, for purposes of promissory estoppel, such element cannot be satisfied when there is evidence that the damages complained of were occasioned by conduct or circumstances beyond the control, in part or in whole, of the promising party. For example, in Clyde, this Court held that plaintiff had sustained no injuries in reliance on defendant's promise to sell him a certain house, which was not honored, because lightning struck the house and burned it down. 402 S.C. 458, 475-76, 742 S.E.2d 6, 14-15 (Ct. App. 2013); see also Craft v. South Carolina Comm'n for the Blind, 385 S.C. 560, 568, 685 S.E.2d 625, 629 (Ct. App. 2009).

The circumstances of this case fall squarely in that line. There is no suggestion—and certainly no evidence of record—that Appellant would have failed to remit Dunlap's payment to Respondent, but for Dunlap's failure to pay its suppliers and Appellant's exercise of its contractual rights to pay those suppliers. It is regrettable that Dunlap's bad conduct thrust Respondent into a position of financial loss. But Respondent's loss was not Appellant's gain, and promissory estoppel does not provide Respondent with an avenue for relief against Appellant.

G. Request for Relief

For the foregoing reasons, the trial court's determination that Appellant is liable to Respondent under a theory of promissory estoppel should be reversed, and the matter remanded for further proceedings.

IV. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN CALCULATING THE AMOUNT OF DAMAGES TO WHICH RESPONDENT IS ENTITLED.

Consistent with the foregoing discussion, Appellant does not perceive that it should be subject to any award of damages to Respondent. Regardless, in the event the Court

determines any portion of the Order granting relief to Respondent can be sustained, it is appropriate to consider the propriety of the trial court's damages calculation.

A. Identification of the Portions of the Order at Issue

The final page of the Order holds that Appellant is liable to Respondent in the amount of $323,718.31. (R. p. 17.) However, this amount arises only in connection with the action for negligent misrepresentation. (R. p. 15.) With regard to Respondent's actions to enforce its security interest and for promissory estoppel, the trial court determined the amount of damages to be $202,390.92. (R. pp. 14 & 16.) This amount was, of course, subsumed by the larger amount awarded for negligent misrepresentation. However, as explained below, the calculation of the amount of these damages, on all counts, constitutes reversible error.

B. Standard of Review

Appellant is mindful that the trial judge has considerable discretion to determine the amount of damages capable of award. See, e.g., Collins Entm't Corp. v. Coats & Coats Amusement, 355 S.C. 125, 138, 584 S.E.2d 120, 127 (Ct. App. 2003). Because of this discretion, the scope of review on appeal is limited to the correction of errors of law. See, e.g., Kuznik v. Bees Ferry Assocs., 342 S.C. 579, 611, 538 S.E.2d 15, 32 (Ct. App. 2000) (citation omitted). In substantial part, the Court must determine if there is any evidence to support the damages award. See, e.g., Austin v. Specialty Transp. Servs., Inc., 358 S.C. 298, 311, 594 S.E.2d 867, 873 (Ct. App. 2004) (citation omitted).

C. The trial court's calculation of damages with respect to negligent misrepresentation is contrary to law.

The Order is conspicuously silent as to how the trial court came to determine that the appropriate amount of damages for negligent misrepresentation was $323,718.31. (R.

p. 15.) For that information, we must look to the trial transcript. Following is excerpt of Respondent's counsel's examination of Respondent's only witness:

> Q: At the time of [Dunlap's] default[,] how much money was due and owing to [Appellant]?
>
> A: I know at the time it was $189,822.36.
>
> Q: Okay. And if you are to run the contractual interest on that amount, what—what is the interest rate per year, or the fee rate per year?
>
> A: 24.64 percent.
>
> Q: Okay. And how many days of interest are related to Dunlap, Inc.?
>
> A: 1,045 days.
>
> Q: Okay. And what is the interest per day?
>
> A: $128.13.
>
> Q: And what is the total amount of interest on the obligations for Dunlap, Inc.?
>
> A: The total due would be $133,895.95.
>
> Q: All right. And the 189 plus the 133 gets you to a total balance of what related to Dunlap, Inc.?
>
> A: $323,718.31.

(R. p. 173, lines 6-23.)

Quite obviously, $133,895.95 of the $323,718.31 judgment for negligent misrepresentation is based on interest, which accrued at the rate of 24.64% per year, as established by the Factoring Agreement. However, Appellant was not a party to the Factoring Agreement; nor was Appellant a party to any other contract with Respondent by which Appellant agreed to pay interest on amounts owed to Respondent at any rate of interest, much less such an exorbitant one. The record does not offer any evidence to

suggest that, prior to this litigation, Appellant was even aware of the terms of the Factoring Agreement. Under these circumstances, it is not entirely clear on what legal basis the trial court could have lawfully held Appellant responsible for Respondent's lost interest, particularly since that interest was not—nor ever would be—collectible from Dunlap.

D. The trial court's calculation of damages with respect to the promissory estoppel action is not supported by the evidence.

The trial court held that damages under promissory estoppel were appropriate in the amount of $202,390.92. (R. p. 16.) This amount is derived from the face value of the receivables that Dunlap factored to Respondent. (R. p. 174, lines 11-13.) However, as explained above, at the time of Dunlap's default, Respondent was owed only $189,822.36. (R. p. 173, line 6.) The difference between these amounts represents profit, to which Respondent is not entitled under promissory estoppel. See, e.g., Blanton Enters. v. Burger King Corp., 680 F. Supp. 753, 776-77 (D.S.C. 1988) (citation omitted).

E. The trial court's calculation of damages as to all causes of action fail to appreciate the set off that Appellant is entitled to by virtue of paying Dunlap's creditors.

As explained several times throughout this brief, the Subcontract Agreement explicitly gave Respondent the right to satisfy, on Dunlap's behalf, any claims to payment that Dunlap's suppliers might have in the event of Dunlap's nonpayment. (R. pp. 427-28, at ¶ 23.) This is consistent with various provisions of relevant state law. (See, e.g., R. pp. 225-26.) Appellant exercised these rights. And therefore, to the extent that Respondent is entitled to any judgment against Appellant under any theory advanced, the amount of such judgment must be set off by how much Appellant has paid to satisfy the payment claims of Dunlap's suppliers.

The undisputed evidence at trial was that Appellant paid two creditors of Dunlap, who supplied materials and equipment in furtherance of Dunlap's services under the Subcontract Agreement, and who were not paid by Dunlap. One of Dunlap's creditors—Hertz—was paid $141,677.37, (see R. pp. 158-159, at ¶ 42; R. p. 207, lines 1-2); the other—Carboline—was paid $37,162.70, (see R. pp. 158-159, at ¶ 42; R. p. 208, lines 23-25). The total that Appellant was forced to pay, on Dunlap's behalf to Dunlap's unpaid suppliers, was $178,840.07. Had the trial court honored Appellant's contractual and statutory set off rights, this amount would necessarily have been deducted from any damages award rendered in favor of Respondent. The trial court's failure to do so was error.

F. Request for Relief

For the foregoing reasons, and to the extent that any of the causes of action sued upon are found to be legally cognizable and capable of providing relief to Respondent, and award to Respondent under any such cause of action must be reduced by the amount that Appellant has paid Dunlap's suppliers. This Court is requested to reverse the judgment of the trial court as to the amount of damages awarded, and remand the case for the court to reconsider its damages calculation.

CONCLUDING STATEMENT

Consistent with the foregoing discussion, 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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December 15, 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

RECEIVED
Dec 15 2020
SC Court of Appeals

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.

CERTIFICATION OF CONFORMITY

The undersigned counsel for Appellant hereby certifies that this Final Opening Brief complies with Rule 211(b), SCACR.

Respectfully submitted,

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December 15, 2020