THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Steven C. Kirven, Master in Equity

Case No. 2016-CP-04-00443
Appellate Case No. 2020-000890

Vicki Littlefield ……. Respondent

v.

Paul W. Cromer, Jr., individually and d/b/a Paul Cromer, Inc. ….....Appellant.

FINAL BRIEF OF APPELLANT

PRUITT & PRUITT

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STATEMENT OF THE CASE

The Plaintiff (hereinafter "Littlefield") initiated this suit based on alleged breach of a 2007 Promissory Note. Defendant Paul W. Cromer, Jr. (hereinafter "Cromer") executed the Note on behalf of Paul Cromer, Inc. and also provided a personal guarantee of that instrument. (R. p. 172, Plaintiff's Ex. 1). The original holder of the Note, Charles H. Whitfield, died prior to this action. (R. p. 91). At the time she initiated this action, Littlefield was the holder of the Note having inherited it from her Mother, Helen Whitfield, who had previously inherited the Note from her husband Charles Whitfield. Littlefield brought additional causes of action seeking Accounting and for additional damages based on tort theories of recovery. The named Defendants were Paul Cromer, Inc., as Maker of the Note, and Cromer, based on his personal guarantee. Cromer answered, denying that any amounts were due under the Note, asserting Counterclaims based on an alleged partnership with Charles Whitfield, and averring that he had overpaid the Note pursuant to its terms.

Following extensive discovery, the parties agreed to refer the entire matter to the Master in Equity for final disposition (R. p. 15, Order of Reference). Pursuant to the

Order of Reference, incorporating the agreement of the parties, Littlefield dismissed her fourth and fifth causes of action seeking tort-based recovery. *Id*.

The matter proceeded to trial before the Honorable Steven C. Kirven, Master in Equity for Anderson County, on September 24, 2019. R. p. 59. Following a day-long trial, the Court invited the parties to submit additional arguments to the Court. R. p. 269. Both parties availed themselves of the opportunity to fully brief their positions. R. p. 32; p. 41. On April 17, 2020, the Trial Court issued its Final Order finding in favor of Littlefield and awarding judgment in the amount of $257,073.00. R. p. 1. The Trial Court also awarded Littlefield, and her counsel, attorney's fees in the amount of $56,868.52. *Id*. On April 21, 2020 Defendants filed their Motion to Reconsider, Alter, or Amend. R. p. 55. The Trial Court denied Defendants' Motion by Form 4 Order on May 26, 2020. R. p. 12. Defendants' counsel received notice of the Trial Court's Order denying their Motion on May 26, 2020, and this appeal followed on June 16, 2020.

STANDARD OF REVIEW

A breach of contract claim is an action at law. *Barnacle Broad., Inc., v. Baker Broad., Inc.*, 343 S.C. 140, 146, 538 S.E.2d 672, 675 (Ct.App.2000). In an action at law tried without a jury, "our scope of review extends merely to the corrections of errors of law." *Id*. Therefore, [the]… court will not disturb the trial court's findings unless they are found to be without evidence that reasonably supports those findings. *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). *South Carolina Elec. & Gas Co. v. Hartough*, 654 S.E.2d 87, 375 S.C. 541 (S.C. App. 2007).

"An action for an accounting is an action in equity. Accordingly, '[the] court may review the record and make findings in accordance with … [its] own view of the preponderance of the evidence.'" *Consignment Sales Llc v. Tucker Oil Co.*, 391 S.C. 266, 705 S.E.2d 73, 76-77 (Ct.App. 2011) (*citing Historic Charleston Holdings, LLC v. Mallon*, 381 S.C. 417, 427, 673 S.E.2d 448, 453 (2009))

STATEMENT OF FACTS

Cromer had been engaged in the used-car loan business with Charles Whitfield for many years. R. p. 89. Cromer executed a promissory note (the "Note") in the principal amount of $800,000.00 in favor of Charles H. Whitfield on or about January 1, 2007. R. p. 272. Pursuant to the terms of the Note, Cromer would make payments of principal and interest on said Note with interest payable semi-annually and calculated on the basis of an even (50/50) division of profits on car loans during the year less an equal (50/50) division of any bad debts on such car loans. *Id*. It was undisputed at trial that

Cromer and Mr. Whitfield, the original holder of the Note, had operated in a business relationship on essentially the same terms as outlined in the Note for many years prior to execution of the Note. R. p. 223. Charles Whitfield died on or about March 24, 2008 and apparently devised his interest in the Note to his wife, Helen D. Whitfield. Helen D. Whitfield died on February 25, 2012, and apparently devised her interest in the Note to her daughter Vicki Littlefield, the Plaintiff in this action. R. p. 92.[1]

At trial, the testimony of the parties and witnesses- together with certain stipulations of counsel- demonstrated a number of undisputed facts. Cromer originally owed Charles H. Whitfield the principal sum of $800,000.00 due on the Note. R. p. 272. Cromer made total payments of principal in the amount of $450,000.00. R. p. 92. Cromer made regular interest payments on the Note as required by the terms of said Note through at least 2013. R. p. 127. Cromer made additional payment to Helen Whitfield in the amount of $258,855.75 from proceeds he obtained as the survivor of a joint bank account he held with Charles Whitfield. R. pp. 109-110. The parties stipulated that Cromer was entitled to these funds as the surviving account holder. R. p. 75.

During the business arrangement envisioned pursuant to the Note, Cromer incurred substantial losses due to loans made to Darrell Massey or his business Massey Motors. R. p. 275. Cromer obtained a judgment against Massey in the amount of $282,142.00, no part of which has ever been paid. R. p. 284. The losses on loans to Mr. Massey arose out of Defendant's business relationship with Charles Whitfield and the car loan business envisioned by the terms of the Note. R. p. 110. Helen Whitfield,

1 Documentation regarding ownership of the Note, or the probate estates of previous holders, was not introduced at trial but is not challenged on appeal.

together with Littlefield, was aware of and participated in efforts to collect on the bad debts associated with loans to Mr. Massey R. p. 110. Littlefield or her predecessors claimed the losses attributable to bad debts from loans to Darrell Massey on their federal tax returns. R. p. 151; p. 393. The parties did, however, dispute responsibility for the losses incurred due to business dealings with Mr. Massey.

Cromer and Charles Whitfield both employed Darrell Hardy as their accountant for many years. R. p. 112. Mr. Hardy admitted that during the course of business between the parties he had not reconciled amounts due on the Note until specifically requested to do so. R. pp. 175-176. On that basis, expert witness testimony at trial involved calculation of interest, payments, and remaining amounts due pursuant to the Note, if any. R. pp. 125-131; pp. 185-186. While the parties were in agreement as most facts as stated, the parties did dispute the amount of principal and interest, if any, still due under the Note. The parties did not dispute that Cromer incurred substantial losses from loans to Darrell Massey, although the parties disputed whether Cromer was entitled to any credits for these bad debts. [2]

ARGUMENT

Cromer has paid all amounts due on the Note, including repayment of all principal and interest. In holding to the contrary, the Trial Court found that alleged misconduct by Cromer- characterized as deviation from business practices- prevented offset of payments against previously uncredited bad debt losses. Indeed, once interest is calculated to account for deduction of bad debts from the amount due, Cromer overpaid

2 Indeed, Plaintiff's expert agreed, based on a hypothetical question posed to him that if Cromer was entitled to credit for the Massey losses that the debt under the Note would have been paid in full and no further interest would have accrued after 2013. R pp. 159-160.

the amount due pursuant to the Note.[3] The problematic nature of recovery was evident before Cromer was ever served, as Plaintiffs sought to incorporate allegations of fraud against Cromer in his business practices.[4] Proof of fraud was lacking, evidence of negligence ambiguous, but either way evidence presented as to that point was and remains wholly irrelevant to the remaining contract-based causes of action. The Court below compounded the erroneous exclusion of calculated losses by finding such losses would have also been excluded by the applicable statute of limitations. However, Littlefield waived the statute of limitations by asking the Court to construe the Note to determine the amounts due and account for all financial transactions associated with the Note, specifically invoking Massey as part of her request for Accounting. This Court should REVERSE the judgment below and direct entry of judgment that the Note has been fully satisfied. In the alternative, to the extent proper calculation is not possible based on the existing record, this Court should REVERSE the judgment below and REMAND for a calculation of the amount due, if any, upon proper consideration of credit for losses attributable to bad debts.

3 The testimony presented by both parties was congruent on this point. Plaintiff's expert admitted that the so-called "Massey losses" were bad debts, as agreed by Defendant's expert and the Defendant. R. pp. 148-149. The only remaining question for the Court is whether there is any legal basis for disregarding such bad debts in calculating the amounts allegedly owed on the Note.

4 The Summons and Complaint included two causes of action based on theories of fraudulent misconduct related to an "insolvent dealer" identified at trial as a Mr. Massey relative to what the parties' called the "Massey losses." R. p. 17. Plaintiff later abandoned recovery based on such alleged misconduct, agreeing to dismiss both causes of action related to fraud as part of the Order of Reference. R. p. 15.

1. The Trial Court erred in Allowing Allegations of Tortious Misconduct to Supplant Evidence of Contractual Intent

The Court need not question the intent of the contracting parties in the primary terms of their agreement. They provided their intent to calculate payments based on accounting for both profits and bad debts in the Note.[5] In overlooking that intent, in favor of discounting bad debts based on alleged misconduct, the Trial Court erred.

If Cromer is entitled to credit for bad debts in calculating interest due under the Note, and more specifically the Massey losses, then Whitfield's case fails as the Note has been fully satisfied. Not surprisingly, Whitfield expended considerable energy at trial devoted to allegations of fault for such losses. Whitfield's position was that the Defendant should not receive credit for these losses based on one of two theories: first, allegations of breach of duty or fault on the part of the Defendant, referred to alternatively as negligence, gross negligence, or misconduct; or, second, breach of the duty of good faith. Neither argument withstood scrutiny and the Cromer is entitled to credit for bad debts under the Note.[6]

a. Allegations of Fraud or Negligence are Irrelevant in this Contract Action.

Whitfield, having initiated this case and as master of her complaint, chose to pursue recovery based on contract law. Whitfield originally pled allegations of fraud and bad faith but voluntarily dismissed those causes of action at the time of the Order of

5 R. p. 272.

6 Pursuant to the Note, admitted as Plaintiff's Exhibit #1, the interest rate on the note was calculated whereby the "Maker [Cromer] agrees to pay on the principal sum…a sum equal to fifty percent (50%) of the profits on car loans during each calendar year, minus fifty percent (50%) of the bad debts on car loans." Neither the Note itself nor other contemporaneous documents between the parties provide any additional definitions or guidance on the business relationship between the parties or calculation of such bad debts.

Reference in this matter. While Cromer questioned and still has significant doubts that Whitfield would have been able to prove fraud or bad faith, it is beyond dispute that no causes of action remained for trial that would allow recovery based on anything other than contract law. Indeed, the irrelevance of negligence or fraud-based principles to this contract case is axiomatic.[7]

To further illustrate, Defendant would direct the Court to principles of election of remedies. In *Brown v. Felkel*, the Court of Appeals confronted allegations that the Plaintiff in that case had waived any tort-based recovery when he proceeded first on contract theories.[8] In *Brown*, the Plaintiff brought two separate actions arising out of the same background facts seeking to recover for both breach of contract and professional negligence. Brown first obtained judgment based on the contract at issue in the case in a separate lawsuit. Later, Brown sought judgment based on tort theories and the trial court awarded actual and punitive damages over the Defendant's directed verdict motion. In reversing the trial court, the Court of Appeals agreed with Defendant that the election to proceed with a contract case foreclosed subsequent recovery based on tort theories.[9] While that case involved two separate lawsuits, the principle is the same. The Plaintiff here elected to pursue recovery based on contract. Allegations of negligence or other tort-based theories for recovery, or calculation of damages, are irrelevant.[10]

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7 Cromer acknowledges that the Trial Court specifically found that it was not basing its ruling on findings of tortious conduct. R. p. 4 (Final Order). However, Cromer's position at trial and on appeal has been consistent: such a finding was required to use Cromer's conduct to defeat calculation of bad debts. While the Trial Court declined this specific finding, the Order below is still premised on findings related to Cromer's conduct.

8 320 S.C. 292, 465 S.E.2d 93 (Ct.App. 1995).

9 *Id*. at 95.

10 In this case, the Trial Court specifically found that there was not a "double redress", citing *Finkel*. Respectfully, that missed Appellant's point on this issue. While dual theories may have also risked a double

In this case, Whitfield could have elected to pursue recovery- and calculation of damages- based on pleading and proof of fraud. Whitfield originally did so but subsequently dismissed causes of action related to fraud and bad faith.[11] Furthermore, Whitfield could have elected to attempt proof of breach of contract accompanied by a fraudulent act.[12] While Cromer maintains that Whitfield would have been unable to prove such tort claims, or other theories of fraud, the Plaintiff failed to pursue recovery on that basis, failed to prove facts sufficient to allow recovery on that basis, and is precluded from recovery or calculation of damages based on these tort theories.

b. There is no Proof of Bad Faith

Similarly, Whitfield appeared to object to inclusion of bad debts based on bad faith.[13] Whitfield was correct in one particular: good faith (and fair dealing) is an implied element of every contract. However, this undisputable point of law has no application absent proof of bad faith. Black's Law Dictionary defines bad faith as "the opposite of 'good faith,' generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive."[14] As indicated by the very definition, actual bad faith reeks of the same fraud that the Plaintiff dismissed from her pleadings and failed to

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recovery, the larger point remains that electing a remedy requires proof sufficient to sustain damages alleged under that theory. In dismissing the possibility of tort recovery, Littlefield foreclosed recovery based on her theory of misconduct that may have been relevant, albeit unproven, in pursing recovery by other means.

11 *See* Order of Reference filed December 10, 2018.

12 *See, e.g., Perry v. Green*, 313 S.C. 250, 437 S.E.2d 150 (Ct.App. 1993).

13 Whitfield relied on this theory in her testimony, putting before the Court her belief that Cromer had a responsibility to safeguard property associated with the business set forth in the Note that he violated in his dealings with Massey. R. pp. 106-107. Whitfield was similarly dependent on alleging bad faith in further explaining her position post-trial. R. p. 32 (Plaintiff's Post Trial Memorandum).

14 Black's Law Dictionary Revised 4th Ed. (1968).

prove in any event. Even assuming, without admitting, that Cromer was somehow negligent- or even grossly so- the elements of fraud are beyond the most far-reaching and favorable interpretation of trial evidence here. Of course, Whitfield had the burden of proof. As such, allegations of bad faith failed as a matter of law for the same reason that Whitfield's tort-based recovery fails: the absence of pleading to allow for such relief and the failure of proof to sustain it.[15]

The record reflects that the parties agreed that Cromer sustained substantial losses due to business transactions with Mr. Massey. Their agreement, however, is limited to the fact of the losses as trial testimony diverged as to the reason for the losses and application to the amounts due under the Note.[16] The parties also agreed that Cromer had previously sustained losses in his dealings with Mr. Massey, which Cromer alone testified had been "made right." R. p. 142. Inasmuch as the decision of the Court below turned, in part, on the course of conduct under the Note, the judgment is silent on this aspect of trial testimony. More specifically, in the volatile use car lending business bad debts were apparently common, as the parties had previously experienced such bad debts and accounted for such losses pursuant to the Note. To attribute so substantial a degree of fault to Cromer for his business relationship with someone who had previously addressed a business dispute to his satisfaction implies that he should have anticipated the

15 Cromer acknowledges that the Trial Court declined to make a finding of misconduct. *See* FN7, *supra*. However, in incorporating theories of Cromer's conduct to support its findings, the Trial Court implicitly found what it implicitly failed to do: that Cromer's misconduct prevented calculation of amounts due under the Note from inclusion of bad debts.

16 Littlefield's testimony reflects her belief that Cromer gave away title to all vehicles which made these bad debts uncollectable. R. p. 106. In Contrast, Cromer testified that Mr. Massey had titles to some vehicles that were eventually sold without payment, as identified in his records. R. p. 227 (Defendant's Exhibit #7). Cromer also detailed how the nature of his business could allow the vehicle in question to be sold by fraudulent conduct of a third-party alone. R. p. 222.

fraud of another party. Respectfully, that finding makes little sense in light of the entire history of business relationships at issue in this case.[17] The parties could have elected to specify, in greater detail, their business procedures but declined to do so. The parties might have specified which types of bad debts should be included in the envisioned payment calculations, to the extent they sought to further clarify that term. They did neither. Hindsight may suggest the value of a more detailed agreement, or changes to a long-standing business relationship. However, "[a] Court must enforce an unambiguous contract according to its terms regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully."[18]

c. The Trial Court Erred in Characterizing Allegations of Misconduct as Damages Beyond Contractual Contemplation

The intention of contracting parties is of paramount importance when Courts are called upon to construe agreements and effectuate the intent of the parties. Indeed,

> The primary concern of the court interpreting a contract is to give effect to the intent of the parties. The best evidence of the parties' intent is the contract's plain language.
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> *N. Am. Rescue Prods., Inc. v. Richardson*, 411 S.C. 371, 378, 769 S.E.2d 237 (S.C. 2015) (*citing Lee v. Univ. of S.C.*, 407 S.C. 512, 517, 757 S.E.2d 394, 397 (2014))

In this case, the parties intended to continue their business as they had, with Cromer paying Whitfield towards principal owed and the parties' equally dividing profits after deducting bad debts.[19] The parties contemplated success, and failure, during the course

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17 Here Cromer would direct the Court's attention to two key points. First, the parties had previously dealt with Mr. Massey, experienced losses, and worked to rectify those losses. As indicated at Trial, the Note merely incorporated their existing business practices. R. p. 223. Second, despite previous losses to Massey, and the possibility of future bad debts, the original parties to the Note elected to both continue their existing business practice AND afford credit for bad debts in calculating repayment. R. p. 272 (Plaintiff's Exhibit #1).

18 *Dept. of Transp. V. M&T Ent*., 379 S.C. 645, 667 SE2d 7 (Ct. App. 2008).

19 Cromer's testimony reflected that at the time the Note was prepared, they sought to write out the essential

of continuing business and provided for division of both in the Note. R. p. 272 (Plaintiff's Exhibit #1, Promissory Note).

The Trial Court found that the Massey losses at the crux of this case were based on Cromer's departure from the normal course of dealing.[20] While declining to find that Cromer engaged in tortious conduct, the Trial Court found that Cromer's conduct to "effectively give away" inventory was beyond the contemplation of the parties.[21] Respectfully, that finding substituted a finding of negligence, perhaps even an allegation of gross negligence, for evidence of what the parties may have intended not evidenced by the Note. Cromer's position at trial and on appeal has been clear: ignoring evidence of bad debts, even those based on negligent conduct, would abandon rather than fulfill the language of the Note. At the time the losses were incurred, Whitfield and his successors had an immediate remedy for allegations of bad business practices: demand payment in full pursuant to the Note. R. p. 272. At the time Littlefield brought suit, she similarly had the option to pursue recovery based on misconduct: pleading and proof of tortious conduct in the breach.[22]

In support of its Order, the court below found *Kline Iron & Steel Co. v. Superior*

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terms of their existing business relationship. R. p. 223. As indicated by Cromer's testimony, this involved estimating the amount of money Whitfield invested into the enterprise to arrive at the face value of the Note. *Id.*

20 R. p. 4. (Final Order) The Trial Court based this finding on "Defendant Cromer's own testimony." *Id.* However, Cromer's testimony reflected that business practices varied with regard to holding titles pending payment. R. pp. 223-227. Furthermore, his testimony reflected several ways in which bad debts originated. Id. If the parties anticipated divided some bad debts and not others, they did not say so in the Note.

21 R. p. 5. (Final Order)

22 Again, Littlefield pursued that strategy and directed that conclusion squarely at Cromer's conduct regarding Massey. R. p. 17 (Complaint). However, Littlefield chose to proceed solely on contract theories and accounting to ask the Court to construe the relevant contractual language. R. p. 15 (Order of Reference).

Trucking Co., Inc. controlling in this case.[23] In *Kline*, the parties contracted for delivery of steel by a specified date notated by both the calendar date and ASAP. *Id*. at 389. When the shipment did not arrive by the anticipated date, the buyer brought suit for breach. The case turned on what the parties intended by reference to the delivery date. *Id*. at 391. Concluding that the record reflected that the parties were aware of potential special damages from delay, the Court affirmed judgment. *Id*.

In this case, in contrast to *Kline*, the record does not reflect any special understanding of the terms of the Note. Rather, the record reflects that the parties intended to continue in the same manner they had and divide any bad debts as offsets on calculated payments.[24] Indeed, the *Kline* Court found that "[t]he rule is well settled that 'notice at the time of the contract of circumstances from which special damages may reasonably be expected to result will make the defendant liable for such damages on the ground that they were within the contemplation of the parties, and therefore are regarding as forming a part of the contract."[25] In this case, the opposite is true. The parties were aware at the time of contracting that they would experience problems collecting bad debts, which they did not further specify, and included bad debts as a means to calculate interest. The exclusion of bad debts in this case, based on the language of contractual expectation, contrasts dramatically with both the factual background and detailed explanation of the *Kline* Court. Respectfully, the Trial Court in attempting to apply *Kline* to this case, in the service of contractual intent, which instead served to alter the parties' agreement and excise the parties' own unique method of calculating payments under the long-standing

23 R. p. 4. (citing 261 S.C. 542, 201 S.E.2d 388 (SC 1973).
24 R. p. 272 (Plaintiff's Exhibit #1, Promissory Note).
25 Kline, 281 S.C. at 391. (*quoting Towles et al. v. Atlantic Coast Line R. Co.*, 83 S.C. 501, 65 S.E. 638.

relationship.

2. The Trial Court Erred in Refusing to Afford Cromer Credit for Losses that were Bad Debts within the Meaning of the Note.

Whitfield asserted, and the Trial Court found, an unpaid balance on the Note in the amount of $257,073.00. R. p. 1. That amount is based on the testimony of Dr. Charles Alford. R. p. 7. On cross-examination, Dr. Alford admitted that the "Massey losses" were bad debts.[26] Furthermore, Dr. Alford admitted that if Defendants were afforded credit for the Massey losses then the applicable Note was paid off at some point and no further interest payments would be due.[27] Furthermore, Dr. Alford admitted that his calculations did not afford Defendant any credit for the Massey losses. R. pp. 148-149. Accordingly, by the testimony of Whitfield's own expert she would have not been entitled to any recovery if the Massey losses were included as bad debts in calculations pursuant to the Note. While Dr. Alford did not go so far as to testify as to the legal effect of these bad debts, and in any event such testimony would have been outside the scope of his expertise, the resulting conclusion is obvious: if interest is calculated based on profits and bad debts pursuant to the language of the Note, then Plaintiff is not entitled to further payment.

In contrast to Dr. Alford, Defendant's expert Darrell Hardy was previously familiar with the parties to the Note and the business relationship related thereto. Mr.

26 R. p. 110. Black's Law Dictionary defines bad debts as "generally speaking, one which is uncollectible". Revised 4th Ed. (1968). Having pursuant a collection action against Massey to judgment, and having been unable to collect on the judgment, it is difficult to imagine how the Massey losses are not bad debts within the meaning of the Note. Indeed, Dr. Alford apparently agreed with that proposition.

27 R. p. 149. In candor, Dr. Alford equivocated in reaching any potential legal conclusions but agreed as to both the hypothetical presented and the nature of these losses.

Hardy noted bad debts under the Note had not been calculated as they should have been, but that he was able to calculate appropriate payments based on both profits and bad debts.[28] In affording Cromer credit for the Massey losses, Mr. Hardy determined that he had overpaid the Note by $120,809.80.[29] That amount afforded Plaintiff credit for bad debts attributable to loans to Darrell Massey or his business. Furthermore, Hardy testified that the losses he characterized as bad debts due to loans for Mr. Massey also appeared on tax returns he repaired for Charles Whitfield or his family members.[30]

In order to reach the conclusion that Cromer owed money under the Note, and in credited Whitfield's expert on this point, the Trial Court necessarily excluded evidence of, or credit for, bad debts.[31] In applying the language of the Note, as the Court should, the calculation of the balance must include calculation of interest with due credit for both payments made and deductions for bad debts. If the Court is inclined to reduce the amount owed on the Note by the amount of bad debts, then the bad debts reduce the

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28 Here, Plaintiff took issue with Hardy's multiple calculations during the pendency of this case. However, Mr. Hardy admitted that he had performed calculations based on whether various categories of payments and losses were properly included based on the continuing receipt of information and requests to change the parameters of his opinion on account of this information. It would be far more unusual if the calculated amounts did NOT change as the case progressed and discovery proceeded, just as Plaintiff's calculations changed in light of acknowledging various payments received.

29 At the time of trial, the distinction between bad debts and other types of losses was elicited in testimony from various witnesses. See, e.g. R. p. 172. However, the final calculation produced by Mr. Hardy is itemized in Defendant's Exhibit #1 such that if this Court were to determine that certain losses are not properly included- such as attorney's fees or receipt of automobiles- then the amounts calculated for these categories could readily be excised from the calculation.

30 Notably, Plaintiff did not offer any evidence contrary to this point. While the Trial Court did not find Mr. Hardy's testimony credible, that finding was ostensibly based on his multiple calculations during the course of the case. R. pp. 6-7. There was no specific finding that Hardy was not credible as to his previous preparation of tax returns for the parties.

31 As indicated herein above, the Plaintiff cannot seek to exclude calculation of these losses based on either theory proffered for attributing fault to the Defendant. Similarly, the Plaintiff waived any claim as to the statute of limitations to avoid inclusion of bad debts in the calculation of amounts due under the Note by filing suit to determine the amount due and demanding an accounting.

balance to zero and the Note should be deemed satisfied by payment.[32] While the Trial Court was entitled to make credibility determinations, the expert testimony converged when each expert was asked, specifically, whether any amounts would be due under the Note if the Massey losses were included as bad debts.[33] In exercising its review, this Court may determine that the Trial Court erred in excluding these bad debts and enter judgment accordingly.

Finally here, the Trial Court failed to find that the Massey losses were not bad debts. Rather, the Court concluded that Cromer was not entitled to credit for these losses based on the expectations of the contracting parties. R. p. 5. It is difficult to imagine how losses in the course of business, pursued to judgment against the party causing the losses but not ultimately resulting in recovery, are anything other than bad debts.[34] The parties may not have envisioned every scenario in which bad debts may arise. They may have sought further clarification of the language employed in their agreement. Regardless, the terms of the Note are clear: Cromer was entitled to credit for bad debts. The Trial Court failed to articulate how the Massey losses did not meet the definition of bad debts. In using contractual intent to prevent Cromer from receiving credit for bad debts, the Court was effectively excluding a category of the very term as

32 While plead as a counterclaim for affirmative recovery, Cromer was still entitled to pursue his claim for crediting bad debts construed as a defense on the grounds of recoupment and reduce or defeat recovery. *See Tuloka Affiliates, Inc. v. Moore*, 275 S.C. 199, 258 S.E.2d 293 (1980). Appellant notes that at trial he pursued this theory as alternative forms of relief, either as an affirmative recovery of any overpayment or as a defense to defeat recovery. Appellant has abandoned the argument that he is entitled to a judgment for any overpayment and only seeks to rely on his counterclaim based on his alternative theory of recoupment as a defense.

33 R. pp. 125-131; pp. 185-186.

34 Black's Law Dictionary. Revised 4th Ed. (1968) (defining bad debts based on collectability).

referenced in the Note.[35] In doing so, the Trial Court committed an error of law that grafted categorization of bad debts, rather than plain meaning, onto the relevant portions of the Note.

3. The Trial Court Erred in Applying the Statute of Limitations to Prevent Calculation of the Correct Amount Due Pursuant When Littlefield Waived the Statute of Limitations in Requesting Accounting.

Whitfield to recover amounts allegedly due under a Note. As part of her pleadings, Whitfield requested an accounting of transactions related to the Note.[36] In his initial responsive pleadings, Cromer sought credit for both his payments and losses based on the applicable language of the Note. Whitfield then interposed the statute of limitations as a defense.[37] Whitfield was not entitled to have it both ways: either the parties were to account for the transactions related to the Note, and Whitfield's potential recovery, or not. Regardless, the doctrine at issue is waiver and the Whitfield's own pleadings demonstrate the basis for waiving any applicable statute of limitations.[38]

By seeking affirmative relief regarding amount allegedly due under the Note, Whitfield waived her right to assert the statute of limitations regarding calculation of the amounts due. More specifically, Whitfield sought to recover under the Note. In asserting the statute of limitations, Whitfield sought accounting as a sword to recover

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35 On this point, the Trial Court appears to direct asses the "wisdom or folly" of including all bad debts within the language of the Note rather than whether these losses would actually meet the definition of bad debts as commonly understood. *See Dept. of Transp. V. M&T Ent*., 379 S.C. 645, 667 SE2d 7 (Ct. App. 2008). For the reasons outlined above, allegations of misconduct are insufficient to prevent these losses from coming within the meaning of bad debts as set forth in the Note.

36 R. p. 17 (Complaint).

37 R. p. 30.

38 R. p. 30 (Complaint) Whitfield's request for an accounting was based, inter alia, on transactions with a certain dealer later identified as Massey. While her pleading was ostensibly directed at alleging misconduct, Whitfield herself directed the Court's attention not merely to calculation of bad debts but the VERY transactions with Massey that permeate the issues in this case.

under the Note while concomitantly refusing its equal value as a shield in the event the accounting reflected uncredited losses. That request, while not denominated as such, was an effort to perform calculations of the amount due using only one half of the ledger. Neither law nor equity will afford a party seeking affirmative relief the ability to keep their hand on one side of the scales as they ask the Court to weigh the evidence. That is the essence of waiver, and having requested for the Court to determine amounts due under the Note Plaintiff cannot exclude all consideration of evidence bearing on that question but unfavorable to her position.[39]

The demonstrable application of waiver in this instance is readily apparent by analogy to situations where the statute of limitations would afford a party even greater protection. It is well settled that the government is not amenable to suit based on the doctrine of sovereign immunity except to the extent such immunity has been waived. However, when the government institutes an action for damages the government waives sovereign immunity as to any counterclaims and the applicable statute of limitations- even if any independent action for the counterclaim would be time barred.[40] Similarly, where an action has been instituted the government waives immunity- and the applicable statute of limitations- as to any defenses that would reduce or defeat recovery as well.[41] If the federal government waives application of the statute of limitations, and its

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39 *See, e.g. Mende v. Conway Hosp., Inc*., 304 S.C. 313, 315, 404 S.E.2d 33, 34 (1991) (holding that waiver of the statute of limitations may result from any action or inaction manifestly inconsistent with an intention to insist on the statute). Here the Trial Court found the delay in asserting these losses was self-serving. R. p. 6. That may be correct, as the assertion of any defense would serve the interest of the party making such assertion. However, this strategic decision was Cromer's to make notwithstanding the passage of time as Littlefield invited such a defense, and waived reliance on the statute of limitations, by invoking the specter of unknown financial transactions related to the Note and more specifically Massey.

40 *See United States v. Capital Transit Co.*, 108 F.Supp. 348 (D.D.C. 1952).

41 *See, e.g., Bull v. United States*, 295 U.S. 247 (1934); *In Re Monogahela Rye Liquors*, 141 F.2d 864 (3rd. Cir. 1944).

sovereign immunity, by instituting an action to recover damages it strains credulity to imagine that a private party does not also waive the statute of limitations.[42] While Littlefield would presumably not have instituted this action if she did not believe she was entitled to recovery, she requested an accounting and assumed the risk of what such account would reflect. A party may not invoke the equitable powers of the court and call another to account while simultaneously insisting that no unfavorable line items merit the Court's attention. Statutes of Limitations embody important principles in our system of jurisprudence, but none strong enough to override the basic fairness of affording parties equal access to use of information when compelled to litigate. Whitfield waived her ability to invoke the statute of limitations and this Court should reverse the ruling of the court below to the contrary.

CONCLUSION

Cromer has paid all amounts due on the Note, including repayment of all principal and interest. Cromer's position was and remains that if he is afforded credit for both his payments and losses due to bad debts, that he has actually overpaid the Note. The Court bellowed erred in applying, but not finding, evidence of tortious misconduct to redefine the agreement of the parties. Similarly, the Trial Court miscalculated amounts due under the Note by refusing to afford proper credits for bad debts within the meaning of that agreement. Finally, any allegations related to the statute of limitations are irrelevant as Whitfield waived that defense in pursuing this collection action and demanding an

42 As noted herein above, even if Cromer may not seek affirmative recovery based on the statute of limitations he would still be entitled to seek recoupment even where denominated as a counterclaim. *See, e.g., Tuloka Affiliates, Inc.* v. Moore, 275 S.C. 199, 258 S.E.2d 293 (1980) (allowing recoupment as a defense to reduce or defeat recovery even where plead as a counterclaim and where such claim would be barred as an independent action by the applicable statute of limitations).

accounting. This Court should REVERSE the judgment below and declare the Note satisfied. In the alternative, to the extent this Court cannot calculate the amount due under the Note with proper credit for all bad debts, the Court should REVERSE the lower court's exclusion of bad debts and REMAND for calculation of the amount due, if any.

Respectfully Submitted,

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February 2, 2021