THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Walton J. McLeod, Circuit Judge

Appellate Case 2021-000033
Case No. 2018-CP-32-04329

John Deere Construction & Forestry Company,
Plaintiff-Respondent,

v.

North Edisto Logging, Inc. and Paul Gunter,
Defendants-Appellants.

FINAL BRIEF OF RESPONDENT

Amy H. Wooten, Esq.
S.C. State Bar I.D. No.: 100128
N.C. State Bar I.D. No.: 39762
For the firm of Ward and Smith, P.A.
Post Office Box 33009
Raleigh, NC 27636-3009
Telephone: 919.277.9100
Facsimile: 919.277.9177
E-mail: ahwooten@wardandsmith.com

Paul A. Fanning
N.C. State Bar I.D. No.: 25477
Admitted *Pro Hac Vice*
For the firm of Ward and Smith, P.A.
Post Office Box 33009
Raleigh, NC 27636-3009
Telephone: 919.277.9100
Facsimile: 919.277.9177
email: paf@wardandsmith.com

Attorneys for Respondent-Plaintiff

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

FINAL BRIEF OF RESPONDENT

NOW COMES Plaintiff-Respondent John Deere Construction & Forestry Company ("Respondent"), by and through its undersigned attorneys, and pursuant to Rule 208(a)(2) of the South Carolina Appellate Court Rules (the "Rules"), respectfully files its Final Brief. For the reasons more fully set forth herein, Respondent seeks an Order affirming the Trial Court's grant of its Motion for Summary Judgment pursuant to Rules 208(b)(2) and 220(c).

I. STATEMENT OF ISSUES ON APPEAL

1. Did the Trial Court properly hold that Appellants' First Counterclaim for breach of the implied duty of good faith and fair dealing is only actionable if there is also a cognizable claim for breach of contract?
2. Did the Trial Court properly grant summary judgment to Respondent on Appellants' Second Counterclaim for negligent supervision of the claim and delivery proceeding based on Respondent's compliance with the South Carolina Claim and Delivery statute?
3. Did the Trial Court properly grant summary judgment to Respondent on Appellants' Third Counterclaim for negligent supervision of the loan origination based on Respondent's action surrounding the loan origination?
4. Did the Trial Court properly award summary judgment in Respondent's favor on its monetary claims in the amount of $946,378.65, together with interest and attorneys' fees?
5. Did the Trial Court properly grant summary judgment to Respondent on Appellants' Fourth Counterclaim for class action before a Motion for Class Certification was before the Court?

II. STATEMENT OF THE CASE

On December 20, 2018, Respondent filed a verified Complaint ("Complaint") against Appellants asserting five separate claims for relief for breach of contract and a sixth claim for relief for possession of certain items of equipment that serve as collateral for the underlying contractual obligations ("Claims"). (R. pp. 12-31). In support of its claim for possession, Respondent also filed an Affidavit in Claim and Delivery and a Notice of Right to Pre-Seizure Hearing on January 8, 2019 ("Claim and Delivery Affidavit"), seeking an order granting Respondent immediate possession of its collateral and advising Appellants of their right to a pre-seizure hearing. (R. pp. 41-43). On February 19, 2019, Appellants filed a Demand for pre-seizure hearing. (R. pp. 47-49).

On March 13, 2019, Appellants filed an unverified Answer and Counterclaims, asserting counterclaims against Respondent for breach of good faith and fair dealing, negligent supervision, and for a class action (collectively, the "Counterclaims"). (R. pp. 32-38).

On June 10, 2019, the Trial Court heard the Respondent's Demand for pre-seizure hearing. (R. pp. 8-10). On June 12, 2019, an Order for Immediate Dispossession was entered, ordering Appellants to immediately deliver possession of Respondent's collateral to Respondent ("Dispossession Order"). (*Id.*).

On June 26, 2019, Respondent filed a Reply to Appellants' Counterclaims, which it amended on July 23, 2019 (collectively, the "Reply"). (R. pp. 50-57).

The parties exchanged extensive written discovery between August 20, 2019 and August 28, 2020, which included: (i) Respondent's First Set of Interrogatories, Requests for Production of Documents and Requests for Admission Directed to Appellants, and Appellants' responses thereto; (ii) Appellants' First Set of Continuing Interrogatories on Respondent and Respondent's responses thereto (R. pp. 58-63); and (iii) Respondent's subpoena to Flint Equipment Company ("Flint Equipment"). In addition, on June 24, 2020, Respondent conducted a videotaped deposition of Paula Gunter, both individually and as the South Carolina Rules of Civil Procedure Rule 30(b)(6) corporate designee of Appellant North Edisto Logging, Inc. (R. pp. 262-334).

On August 19, 2020, Respondent filed its Motion for Summary Judgment and the Affidavit of Kathleen Klag-Banks in support of summary judgment ("Banks Affidavit") seeking, among other things, a monetary judgment in its favor in the amount of $946,378.65, plus interest and reasonable attorneys' fees. (R. pp. 64-66, 71-180). On October 22, 2020, Appellants filed an Affidavit of Paula Gunter in opposition to Respondent's Motion for Summary Judgment ("Gunter Affidavit"). (R. pp. 67-70). On October 27, 2020, the Trial Court heard Respondent's Motion.

(R. pp. 1-7). The Trial Court entered its Order on Respondent's Motion on December 8, 2020 ("Summary Judgment Order"), granting summary judgment to Respondent's as to the relief sought in the Complaint and on Appellants' Counterclaims. (*Id.*). On January 6, 2021, Appellants filed a Notice of Appeal of the Summary Judgment Order ("Notice"), and served Respondent with a copy of its Notice that same day. (R. pp. 198-99).

III. STATEMENT OF FACTS

Between January 30, 2014 and September 30, 2015, Appellants executed and delivered to Respondent five separate Loan Contract-Security Agreements (collectively, the "Contracts"). (Compl. ¶¶ 7, 12, 17, 22, 27; R. pp. 13-15). The aggregate principal amount owing to Respondent under the Contracts was $1,439,026.06 as of November 15, 2018. (Compl. ¶¶ 11, 16, 21, 26, 31; R. pp. 13-16). As security for the Contracts, Appellants granted Respondent a security interest in several items of logging equipment (collectively, the "Collateral"). (Compl. ¶¶ 9, 14, 19, 24, 29; R. pp. 13-16). Respondent's security interest in the Collateral was perfected as reflected by the UCC Financing Statements attached to the Complaint. (Compl. ¶¶ 10, 15, 20, 25, 30; R. pp. 13-16). Pursuant to valid cross-collateralization provisions contained in each of the Contracts, each item of Collateral secured the debt arising under each of the Contracts. (Compl. ¶ 33; R. p. 16). Appellants have not disputed that the Contracts were properly executed for the benefit of Respondent, nor have they disputed the validity of those Contracts. (Answ. ¶¶ 3, 5, 7, 9, 11, 16, 20, 24, 28, and 32; R. pp. 32-35). In addition, Appellants admit that the "Transaction Histories" associated with those Contracts represent a complete and accurate accounting of all payments made under each Contract, confirming that no payments have been made on any of the contracts since January 13, 2017. (R. p. 39, lines 8-13; R. p. 46, line 23-p. 47, line 22).

On or about October 25, 2016, upon request of Appellants, Respondent provided a payment extension/deferral on the relevant loan documents identified as "Contract 1" in the Complaint, extending the maturity date of Contract 1 by five months (the "Contract 1 Extension"). (Banks Aff. ¶ 14, Ex. 2; R. pp. 72, 128-30). Appellants admit Respondent was under no contractual obligation to modify or extend the payment deadlines for the Contracts. (R. p. 321, line 19-p. 322, line 12). Despite being granted the Contract 1 Extension, Appellants' payment obligations owing to Respondent under all of the Contracts became past due and in default. (Compl. ¶¶ 40, 49, 58, 67, 76; R. pp. 17-20). As a result of Appellants' default, Respondent was financially damaged. (Compl. ¶¶ 42, 51, 60, 69, 78; R. pp. 17-20).

Appellants' allegations and Counterclaims in this lawsuit center around Contract 5 (as that term is defined in the Complaint) and the alleged "inconsistent figures" on the underlying loan documents. (SJ Order p. 2; Answ. ¶ 41; R. pp. 2, 35). But as evidenced by Contract 5 and Appellants' sworn testimony, the alleged inconsistency between the initial purchase order and Contract 5 is simply in the manner in which the figures are broken down and describe the application of a warranty package purchased in connection with Contract 5 ("Warranty Plan"). (R. p. 293, line 9-294, line 4; R. p. 295, lines 16-20). Appellants have conceded there is no inconsistency between the actual agreed upon purchase price, which was and remained $459,263.00 throughout the transaction, and Appellants have not contested the amount of the purchase price itself. (R. p. 295, line 16-20; R. p. 297, lines 8-16).

In addition, Respondent's records evidence that Appellants at all times received timely service on the Contract 5 Collateral (as that term is defined in the Complaint) as required under the Warranty Plan. (Banks. Aff. ¶¶ 40-41, Ex. 11; R. pp. 75, 175-180). Appellants admit that (1) they agreed to pay the full purchase price for the Contract 5 Collateral, (2) they received the

Contract 5 Collateral along with the Warranty Plan, and (3) there was no dispute as to their receipt of either of those items. (SJ Order p. 4; R. p. 4; R. p. 295, line 16-p. 296, line 18).

Following Appellants' payment default, Respondent made formal demand on Appellants by letter dated December 10, 2018, notifying Appellants of its intention to seek attorneys' fees. (Compl. ¶¶ 34-35, Ex. K; R. pp. 16-17, 125-127). Appellants failed and refused to pay the balance due and owing. (*Id.*). Following the entry of the Dispossession Order, and in accordance with the terms of the Contracts, Respondent obtained possession of the Collateral. (Banks Aff. ¶ 18; R. p. 73). On November 22, 2019, Respondent provided written notice of its intent to market and sell the Collateral on December 5, 2019, and proceeded to do so through Respondent's national and international marketing platform on that date. (Banks Aff. ¶¶ 19-21, Ex. 8; R. pp. 73, 150-65).

After applying the net proceeds received from the sale of the Collateral to the outstanding indebtedness under the Contracts, Appellants owed Respondent the total aggregate sum of $946,378.65 as of August 10, 2020, plus interest accruing thereafter on account of the Contracts. (Banks Aff. ¶¶ 22-26; R. pp. 73-74).

IV. STANDARD OF REVIEW

A. Summary judgment standard

In South Carolina, the appellate court applies the same standards as the Trial Court when reviewing grants of summary judgment. *Kirkman v. Parex, Inc.*, 369 S.C. 477, 482, 632 S.E.2d 854, 856 (S.C. 2006). Rule 56(c) provides that "judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. While the evidence must be viewed in a light most favorable to the non-moving party, summary judgment should be granted

"when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ." *Moore v. Barony House Rest., LLC*, 382 S.C. 35, 40, 674 S.E.2d 500, 503 (S.C. Ct. App. 2009) (citation omitted) (emphasis added); *see also Singleton v. Sherer*, 377 S.C. 185, 197, 659 S.E.2d 196, 202 (S.C. Ct. App. 2008) (finding summary judgment is proper "[w]hen reasonable minds cannot differ on plain, palpable, and indisputable facts"); *M & M Grp., Inc. v. Holmes*, 379 S.C. 468, 473, 666 S.E.2d 262, 264 (S.C. Ct. App. 2008) (holding "summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner"). Denial of summary judgment is only appropriate when further inquiry into the facts is needed to clarify the application of the law, or if there is a dispute over a conclusion or inference to be drawn from the facts. *Singleton*, 377 S.C. at 197, 659 S.E.2d at 202.

It is well settled that the moving party may discharge its burden of proof by showing an "absence of evidence to support the nonmoving party's case" and need not specifically "negat[e] the opponent's claim." *Sides v. Greenville Hosp. Sys.*, 362 S.C. 250, 255, 607 S.E.2d 362, 364 (S.C. Ct. App. 2004); *see also Gauld v. O'Shaugnessy Realty Co.*, 380 S.C. 548, 559, 671 S.E.2d 79, 85 (S.C. Ct. App. 2008) (The movant may meet its burden by proving an essential element of the opposing party's claim is nonexistent as "[a] complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial.").

"Once the moving party carries its initial burden, the opposing party must come forward with specific facts that show there is a genuine issue of fact remaining for trial." *Sides*, 362 S.C. at 255, 607 S.E.2d at 364 (emphasis added). The opposing party may not rest on the mere allegations of the pleadings, but must set forth or point to specific facts in the record showing that

there is a genuine issue of material fact. Rule 56(e), SCRCP; *see also Strickland v. Madden*, 323 S.C. 63, 67–68, 448 S.E.2d 581, 584 (S.C. Ct. App. 1994). "A conclusory statement as to the ultimate issue in a case is not sufficient to create a genuine issue of fact for purposes of resisting summary judgment." *Shupe v. Settle*, 315 S.C. 510, 516-17, 445 S.E. 2d 651, 655 (S.C. 1994) (referencing *Germann v. New York Life Ins. Co.*, 286 S.C. 34, 331 S.E.2d 385 (S.C. Ct. App. 1985)).

B. **Attorneys' fee standard**

Attorney's fees are awarded in the discretion of the trial judge and will not be disturbed absent a finding of an abuse of discretion. *Laser Supply and Servs., Inc.*, 382 S.C. 326, 340, 676 S.E.2d 139, 147 (S.C. Ct. App. 2009) (citing *S.C. Elec. & Gas Co. v. Hartough*, 375 S.E. 541, 550, 654 S.E.2d 87, 91 (S.C. Ct. App. 2007)). Although no one factor is controlling, the following factors may be considered by the trial court in determining an award of fees:

1) The nature, extent and difficulty of the legal services rendered.
2) The time and labor necessarily devoted to the case.
3) The professional standing of counsel.
4) The contingency of compensation.
5) The fee customarily charged in the locality for similar legal services.
6) The beneficial results obtained.

Baron Data Sys., Inc. v. Loter, 297 S.C. 382, 384–85, 377 S.E.2d 296, 297 (S.C. 1989)

V. ARGUMENT

In the Summary Judgment Order, the Trial Court found that Respondent was entitled to judgment as a matter of law because Appellants failed to show that there was a genuine issue of material fact. In short, the Trial Court awarded summary judgment to Respondent on its claims and Appellants' counterclaims, finding that: (i) there is no standalone cause of action for breach of the implied covenant of good faith and fair dealing; (ii) there was no issue of fact on the record to

establish the elements of breach of the covenant of good faith and fair dealing; (iii) there was a complete lack of evidence to establish the elements of negligent supervision; (iv) there was no evidence before the Court to establish a class action; and (v) there was no evidence that Appellants suffered any damages as a result of any actions or inactions on the part of Respondent. (SJ Order pp. 4-6; R. pp. 4-6).

Based on the record before this Court, and for the reasons addressed more fully herein, Respondent respectfully requests that this Court affirm the Trial Court's grant of summary judgment to Respondent on its Claims and Appellants' Counterclaims.

A. The Trial Court properly held that Appellants' First Counterclaim for breach of the implied duty of good faith and fair dealing is only actionable if there is also a cognizable claim for breach of contract.

1. There is no independent cause of action for the implied covenant of good faith and fair dealing separate from a breach of contract claim.

Appellants' First Counterclaim based on the implied covenant of good faith and fair dealing is not a cognizable claim in the absence of a breach of some express term of the Contracts. Every contract includes an "implied covenant of good faith and fair dealing that neither party will do anything to impair the right of the other to receive the benefits of the agreement." *Episcopal Church in S.C. v. Church Ins. Co. of VT*, 993 F. Supp. 2d 581, 593 (D.S.C. 2014) (applying South Carolina law) (emphasis added). But there is no independent cause of action separate from a claim for breach of contract for the implied covenant of good faith and fair dealing. *RoTec Servs., Inc. v. Encompass Servs., Inc.*, 359 S.C. 467, 473, 597 S.E.2d 881, 884 (S.C. Ct. App. 2004) (holding that "the implied covenant of good faith and fair dealing is not an independent cause of action separate from the claim for breach of contract"). Further, “there is no breach of an implied covenant of good faith where a party to a contract has done what provisions of the contract expressly gave him the right to do.” *Adams v. G.J. Creel & Sons, Inc.*, 320 S.C. 274, 277, 465 S.E.2d 84, 85 (S.C. 1995).

Here, Appellants assert a cause of action for breach of contract based solely on the implied covenant of good faith and fair dealing and not on the breach of any explicit term of the Contracts or any actual harm suffered by Appellants. Appellants' implied covenant claim cannot stand alone; it simply is not a cognizable claim in the absence of a separate claim for breach of an express term of the Contracts. In their Initial Brief, Appellants appear to argue that this case is distinguishable from *RoTec* and *Adams* because the facts of those two cases involved two separate causes of action: (i) for the breach of the contract; and (ii) for breach of the duty of good faith and fair dealing. (Appellant Brief pp. 4-5). Appellants opine that this case is different because there is only one cause of action asserted for breach of the implied covenant of good faith and fair dealing. But Appellants' reasoning is circular and unsupported by South Carolina law.

In *RoTec*, the Court relied heavily on its sister jurisdiction of Georgia for guidance. *RoTec Serv., Inc.*, 359 S.C. at 471-72, 597 S.E. 2d at 883-84. The *RoTec* Court based its holding on the case of *Stuart Enters. Int'l, Inc. v. Peykan, Inc.*, 252 Ga. App. 231, 555 S.E. 2d 881 (Ga. Ct. App. 2001). There, the Georgia Court of Appeals held that "[t]he covenant to perform in good faith is not an independent contract term"; rather, "[i]t is a doctrine that modifies the meaning of all explicit terms in a contract, preventing a breach of those explicit terms." *Stuart Enters. Int'l, Inc.*, 252 Ga. App. at 234, 555 S.E. 2d 884. In adopting that reasoning for South Carolina, the *RoTec* Court found that the holding was in accord with the law of other jurisdictions that have addressed the question. *RoTec Servs., Inc.*, 359 S.C. at 472, 597 S.E. 2d at 883-84 (citing *Baxter Healthcare Corp. v. O.R. Concepts, Inc.*, 69 F.3d 785, 792 (7th Cir. 1995), *Cambee's Furniture, Inc. v. Doughboy Recreational, Inc.*, 825 F.2d 167 (8th Cir. 1987), and *Designers N. Carpet, Inc. v. Mohawk Indus., Inc.*, 153 F.Supp. 2d 193, 196 (E.D.N.Y. 2001)).

Appellants' position is in direct conflict with the reasoning behind the *RoTec* decision. Indeed, Appellants' mischaracterization of *RoTec* would transform the implied duty of good faith and fair dealing into an independent, express contract term, rather than a doctrine that prevents a breach of a contract's explicit terms. *See Stuart Enters. Int'l, Inc.*, 252 Ga. App. at 234, 555 S.E. 2d 884. Importantly, Appellants have failed to allege a single breach of any explicit terms of the Contracts by Respondent, or any proposed damages suffered. Accordingly, the Trial Court properly granted summary judgment to Respondent on Appellants' Counterclaim for breach of contract based on the implied duty of good faith.

2. **Appellants' own breach of the Contracts bar them from recovering under a breach of contract claim.**

Appellants cannot seek to recover from Respondent under a breach of contract claim when they have failed to perform the terms of the Contracts. "It is an elementary principle that one who seeks to recover damages for the breach of a contract, to which he was a party, must show that the contract has been performed on his part, or at least that he was at the appropriate time able, ready and willing so to perform it." *Parks v. Lyons*, 219 S.C. 40, 48, 64 S.E.2d 123, 126 (S.C. 1951). Appellants have admitted that the Contracts are valid and enforceable. (Answ. ¶¶ 3, 5, 7, 9, 11, 16, 20, 24, 28, and 32; R. pp. 32-35). In addition, Appellants specifically testified that there have been no payments on the Contracts since at least January 13, 2017. (R. p. 308, line 23-p. 309, line 22). In light of the undisputed fact that Appellants have defaulted under each individual Contract, they cannot now take the position that they have performed under the Contracts.

3. **Appellants' failure to support any allegation of damages bars them from recovering under a breach of contract claim.**

In the absence of any evidence of damages allegedly suffered as a result of Respondent's actions or inactions, Appellants' Counterclaim cannot stand. Assuming *arguendo* that Appellants' implied covenant claim was viable, Appellants have not presented any evidence to support their

Counterclaim. They have not even alleged that Respondent intentionally and purposely took action to prevent them from carrying out their part of the Contracts or to destroy or injure their rights to receive the fruits of the Contracts. *See Adams*, 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995) (holding "there is no breach of an implied covenant of good faith where a party to a contract has done what provisions of the contract expressly gave him the right to do").

Appellants testified that their defenses and Counterclaims primarily concern (i) an alleged inconsistency in the Contract 5 figures and (ii) an alleged failure to provide a six month extension on the Contracts. (R. p. 293, line 9-p. 294, line 4; R. p. 295, line 16-p. 296, line 18; R. p. 297, lines 8-16; R. p. 310, lines 7-16; R. p. 323, line 14-p. 325, line 4). As described more fully herein in Section (V)(C), both of these positions lack merit.

Moreover, the only documentary support provided for Appellants' allegations are documents that are entirely unrelated to the Contracts at issue in this case, which Appellants claim purportedly evidence the alleged discrepancies. (Answ. ¶ 43, Exs. A, B; R. p. 36). While those documents appear to evidence a transaction involving the purchase of a John Deere 843L Wheel Feller Buncher bearing S/N 1DW843LXCFF668472, that particular equipment is not a part of Respondent's Collateral described in the Complaint and is unrelated to the transactions directly at issue in this lawsuit. (*Id.*).

When pressed to explain any apparent damages suffered as a result of Respondent's alleged actions or inactions, Appellants were unable to do so, admitting they had never even discussed the amount of alleged damages with their attorney or amongst themselves. (R. p. 315, line 18-p. 316, line 18). In light of Appellants' failure to provide any evidentiary support that they have suffered any damages related to their alleged Counterclaims – an essential element of their case – summary judgment was properly granted by the Trial Court in Respondent's favor.

4. **The Trial Court did not rely on the Order for Immediate Dispossession of Collateral as the sole basis for granting summary judgment to Respondent on Appellants' First Counterclaim for breach of the implied covenant of good faith and fair dealing.**

Appellants have failed to present any evidence to support their First Counterclaim, and have not properly preserved their right to challenge the Dispossession Order, by failing to seek reconsideration or an appeal of said Order. In their Initial Brief, Appellants claim that the Trial Court's reference to the Dispossession Order misconstrues the statutory purpose of the claim and delivery statute pursuant to S.C. Code Ann. § 15-69-70. In short, that statute allows a judge to enter an order for immediate possession if the plaintiff's claim is probably valid. S.C. Code Ann. § 15-69-70 (1976). But, while the statute may not present a final determination of the issue of possession, there is no evidence in the Summary Judgment Order that purports to show that the Trial Court relied on the ruling from the pre-seizure hearing as the basis for granting Respondent's Motion for Summary Judgment. In pertinent part, the Summary Judgment Order states:

> Defendants' counterclaim for breach of the covenant of good faith and fair dealing fails to state a claim, as it lacks any allegation of their own contractual performance. Additionally, there is no independent cause of action for the implied covenant of good faith and fair dealing under South Carolina law, and even if there was, there is no issue of fact on the record to establish the elements of breach of the covenant of good faith and fair dealing.

(SJ Order p. 4; R. p. 4) (emphasis added).

The Trial Court's ruling is clear that it granted summary judgment to Respondent on Appellants' Counterclaim based on Appellants' failure to properly plead their cause of action and the fact that their purported action did not constitute a cognizable claim under South Carolina law. (*Id.*). In addition, the Trial Court determined that Appellants failed to establish any genuine issue of fact sufficient to defeat Respondent's motion for summary judgment - which does not meet Appellants' burden of presenting a scintilla of evidence. (SJ Order p. 6; R. p. 6; *see Gecy v. S.C.*

Bank & Tr., 422 S.C. 509, 516, 812 S.E.2d 750, 754 (S.C. Ct. App. 2018). While the Trial Court stated that "[i]t should be noted that Defendants neither sought reconsideration nor appeal of the subject Order of Immediate Dispossession on which they base their purported claims here," such language is merely explanatory, pointing out Appellants' misstep in preserving a right to object to the appropriateness of the Dispossession Order. (SJ Order pp. 4-5; R. pp. 4-5). In short, the Trial Court's ruling does not rely on the ruling from the pre-seizure hearing as the basis for granting Respondent's Motion for Summary Judgment.

B. The Trial Court properly granted summary judgment to Respondent on Appellants' Second Counterclaim for negligent supervision of the claim and delivery proceeding.

Appellants' argument that the Claim and Delivery Affidavit was defective in some way is without basis. It has long been held that "[t]he offices of the complaint and the affidavit in claim and delivery are entirely separate and distinct." *Adeimy v. Dleykan*, 116 S.C. 159, 107 S.E. 35, 36 (S.C. 1921). "The affidavit in an action for claim and delivery is not the basis of plaintiff's cause of action but is merely the means of obtaining immediate possession of the property," while the complaint's function is to state a cause of action. *Middleton v. Robinson*, 202 S.C. 418, 25 S.E.2d 474, 475 (S.C. 1943) (citation omitted). Importantly, "[i]f the defendant should desire to contest the right of the plaintiff to claim the immediate delivery of the property, by reason of the omission of some essential element in the affidavit required by section 258 of the Code, he should move to set aside the proceedings so far as the immediate delivery of the property is concerned, which motion should, of course, be made after due notice, which should specify the alleged grounds of insufficiency." *Adeimy*, 116 S.C. 159, 107 S.E. at 36 (emphasis added).

As the Trial Court pointed out, the sufficiency of the Claim and Delivery Affidavit and Appellants' objection thereto were considered by the Trial Court before entering the Dispossession Order in Respondent's favor. (SJ Order p. 5; R. p. 5). Critically, the Dispossession Order was not

reconsidered or appealed by Appellants. (*Id.*). The proper procedure for opposing Respondent's Claim and Delivery Affidavit is to move to set aside the Claim and Delivery proceedings, which are separate and distinct from Respondent's causes of action contained in the Complaint. *Adeimy*, 116 S.C.159, 107 S.E. at 36. However, rather than comply with those procedures, Appellants chose to file a Counterclaim for negligent supervision, for which claim the Trial Court found "no evidence on the record to establish the elements." (SJ Order p. 5; R. p. 5). Appellants' complete lack of evidence alone justifies the Trial Court's ruling in Respondent's favor.

Further, in granting Respondent's Motion for Summary Judgment on all claims, the Trial Court necessarily granted Respondent's Sixth Claim for Relief, for immediate possession of the collateral. (SJ Order p. 6; Compl. ¶¶ 82-86; Mtn. for SJ pp. 1-2; R. pp. 6, 64-65, 21). The Trial Court specifically found that each of the Contracts and corresponding security agreements were valid and enforceable, Appellants were in default under each of the Contracts, and it was undisputed that Appellants owed some money to Respondent under the Contracts – all of which findings support Respondent's claim for possession. (SJ Order pp. 2-3; R. pp. 2-3). In addition, following entry of the Dispossession Order, Respondent's repossession of the Collateral, and Appellants' notification of their right to redeem, the Collateral was sold with the proceeds applied to the balances on the Contracts. (SJ Order p. 3; Banks Aff. ¶¶ 20-21, Ex. 8; R. pp. 3, 73, 150-65).

In light of: (i) Appellants' failure to move to set aside the Claim and Delivery proceeding; (ii) Appellants' failure to object to or appeal the Dispossession Order; (iii) Appellants' failure to respond to the notice of their right to redeem; (iv) the subsequent sale of the Collateral; and (v) the Trial Court granting Respondent with possession on its Claims, Appellants' argument that the Claim and Delivery Affidavit was defective in some way is effectively moot and without basis.

Accordingly, the Trial Court did not err in granting summary judgment to Respondent on Appellants' Second Counterclaim.

C. The Trial Court properly granted summary judgment to Respondent on Appellants' Third Counterclaim for negligent supervision of the loan origination based on Respondent's actions surrounding the loan origination.

The Trial Court properly granted summary judgment to Respondent on Appellants' Third Counterclaim for negligent supervision of the loan origination based on the complete lack of evidence or allegations of damages suffered to support the Counterclaim. In the Summary Judgment Order, the Trial Court specifically refers to its grant of summary judgment to Respondent on Appellants' First Counterclaim for breach of the implied duty of good faith and fair dealing. (SJ Order p. 5; R. p. 5). As Appellants testified, this Third Counterclaim is essentially a restatement of their First Counterclaim alleging inconsistent figures. (R. p. 324, line 21-p. 325, line 4).

The Trial Court correctly deduced that Appellants' Counterclaims for negligent supervision and breach of the implied duty of good faith and fair dealing centered on only one of the five Contracts at issue in the action – Contract 5 – and the accompanying Warranty Plan. (SJ Order pp. 3-4; R. pp. 3-4). As the Trial Court summarized, the entirety of Appellants' allegations on their Counterclaims surrounded the apparent variance in (i) the amounts appearing on an original equipment invoice, and (ii) the purchase price included on Contract 5. (SJ Order p. 4; R. p. 4). The alleged discrepancy appears to simply be how the purchase price for the Warranty Plan was broken down in each of the Contract 5 documents. (*Id.*).

However, Appellants admit they agreed to pay the full purchase price showing on Contract 5, that they received the Contract 5 Collateral along with the Warranty Plan (which they also agreed to purchase), and that there was no issue concerning the receipt of either of those items. (SJ Order p. 4; R. p. 4; R. p. 295, line 16-p.296, line 18). In addition, the Record reflects that

Appellants received service on the Contract 5 Collateral as required under the Warranty Plan. (SJ Order p. 4; Banks Aff. ¶¶ 40-41, Ex. 11; R. p. 4, 75, 175-80).

Despite Appellants' unsupported Counterclaim, the total purchase price for the Contract 5 Collateral and the Warranty Plan is the exact same amount as indicated on Contract 5 and its respective purchase order and equipment invoice. (R. p. 293, line 9-p. 294, line 4; R. p. 295, line 7-p. 296, line 18; R. p. 297, lines 8-16; Compl. Ex. I; Banks Aff. Exs. 9, 10; R. pp. 119-23, 166-74). Respondent's evidence is uncontroverted, and Appellants have failed to provide any factual support that any alleged "inconsistent figure" resulted in any damages whatsoever. (SJ Order p. 4; R. p. 4). In fact, when pressed on what damages were suffered, Appellants testified that they did not have a dollar figure for any alleged damages suffered in connection with any of their Counterclaims and had not even discussed the amount of alleged damages with their attorney, or amongst themselves. (R. p. 315, line 18-p. 317, line 5).

Finally, Appellants would have this Court overturn the Trial Court's decision based solely on an unsupported assertion that the lower court erred. In their Initial Brief, Appellants claim Respondent violated a duty of good faith and fair dealing, and the Trial Court's ruling was "clearly controlled by its erroneous construction" of that duty. (Appellant Brief p. 8). However, Appellants fail to provide any legal support for their position that there was a "clearly" erroneous decision by the Trial Court, or even a discussion on what a "proper construction" of the duty would entail. (Appellant Brief p. 8). Without providing any legal support for their charges against the Trial Court's decision, Appellants ask this Court to simply take them at their word and on their self-serving, conclusory characterization of the Trial Court's ruling.

In the absence of any genuine dispute of material fact, and in light of Appellants' failure to provide any factual support for their Counterclaims or even allege any damages suffered, the Trial Court properly granted summary judgment to Respondent on Appellants' Third Counterclaim.

D. The Trial Court properly awarded summary judgment in Respondent's favor on its monetary claims in the amount of $946,378.65, together with interest and attorneys' fees.

1. Appellants admitted the essential elements of a breach of contract action.

Summary judgment was properly granted in Respondent's favor on the claims in the verified Complaint, as Appellants admitted the essential elements of Respondent's claims and no genuine issue of material fact remained.

"The elements for a breach of contract are the existence of a contract, its breach, and damages caused by such breach." *Hotel & Motel Holdings, LLC v. BJC Enterprises, LLC*, 414 S.C. 635, 652, 780 S.E.2d 263, 272 (S.C. Ct. App. 2015). Here, Appellants do not dispute that the Contracts were properly executed for the benefit of Respondent, nor do they dispute the validity of those Contracts. (Answ. ¶¶ 3, 5, 7, 9, 11, 16, 20, 24, 28, and 32; R. pp. 32-34). It is also uncontroverted that Appellants were in default under the terms of the Contracts, and that the express terms of the Contracts hold them responsible for their defaults. (R. p. 301, lines 8-13; R. p. 309, lines 3-22; SJ Order p. 2; Compl. Exs. A, C, E, G, I; R. pp. 4, 93-97, 101-05, 107-11, 113-17, 119-23). Appellants even admit that the Transaction Histories associated with each Contract were complete and accurate accounting of all payments made, and represented that no payments had been made on each Contract since January 13, 2017. (R. p. 301, lines 8-13). In light of the Record before this Court, Appellants have admitted each essential element of a breach of contract, and there exists no indisputable fact on which reasonable minds can differ. *See Moore*, 382 S.C. at 40, 674 S.E.2d at 503.

The evidence offered by Appellants in opposing summary judgment, the Gunter Affidavit, does not change this conclusion. In that affidavit, Appellants assert, without any factual basis, that they "categorically disagree" that the sale of the Collateral was done in a commercially reasonable manner, the sale of the Collateral was "unreasonably delayed," and the proceeds received were "inadequate." (Gunter Aff. ¶¶ 5-6; R. p. 68). The Trial Court properly considered and rejected these generalized and unsupported statements before ruling in Respondent's favor. (R. p. 220, lines 9-22; R. p. 233, lines 6-7).

Moreover, while Appellants' Answer and the Gunter Affidavit flatly deny the amount due to Respondent under the Contracts, Appellants' own testimony makes clear that Respondent's position, and the amounts due and owing under each individual Contract, are not in dispute. (R. p. 301, lines 8-13). Appellants' mere self-serving allegations are wholly unsupported, and Appellants failed to come forth with any evidence at all, in the form of affidavits or otherwise, showing there was a genuine dispute as to the amounts they owe on the Contracts. Appellants' conclusory statements contained in the Gunter Affidavit are simply not sufficient to generate a genuine issue of material fact for trial. Thus, there was no genuine issue of fact for the Trial Court to consider as to Appellants' liability for the unpaid balances of the Contracts, nor the amounts due and owing to Respondent under the Contracts. Accordingly, the Trial Court properly granted summary judgment to Respondent on its contract claims.

2. **Appellants failed to raise any valid defense to the enforceability of the Contracts.**

As set forth above, Appellants did not provide any evidentiary support for their mere denials as to the material allegations in the Complaint. And, although they raised a number of defenses in their Answer, they failed to provide any evidence, through affidavits or discovery, to support these affirmative defenses. Thus, they have not met their burden of setting forth "specific

facts in the record showing that there is a genuine issue of material fact." *Strickland*, 323 S.C. at 67–68, 448 S.E.2d at 584. These defenses are factually and legally unsupportable in this case, and Appellants did not show any genuine dispute of material fact for trial in opposing summary judgment.

a. **Respondent has shown that there is an amount due, and that the charges are not inflated or improper.**

Appellants did not provide any evidentiary support for their mere denials as to the amounts Respondent is owed under the Contracts. Appellants "deny that any amount is due," allege that "the amount stated contains charges that are inflated and improper," and that "no payment history or breakdown of [the] amount has been provided." (Answ. ¶ 4; R. p. 32). But these allegations are wholly unsupported by the Record in this case and were directly controverted by Appellants' own testimony. (R. p. 301, lines 8-13; R. p. 224, lines 18-21). At her deposition, Paula Gunter specifically testified that the Transaction Histories relative to each individual Contract were "in order." (R. p. 301, lines 8-13). She also testified that the last payment dates for each Contract were accurate, establishing that no payments were made to Respondent on account of the Contracts since at least January 13, 2017. (R. p. 309, lines 3-22). Thus, there was no genuine dispute over the amounts Respondent is owed under each Contract.

b. **Respondent has at all times acted in good faith.**

Although Appellants assert an affirmative defense of unclean hands as a result of alleged conduct by Respondent, they submitted no evidence to support such a defense. (Answ. ¶ 45; R. p. 36). Appellants' Answer primarily asserts that (i) inconsistent sets of figures were submitted to Appellants and Respondent by Flint Equipment and (ii) Respondent failed to provide an agreed upon six month extension of the Contracts. (Answ. ¶¶ 42-44; R. pp. 35-36). As discussed in

greater depth in Section (V)(C) above, and as Appellants' testimony shows, neither of these positions is tenable.

First, in her deposition, Paula Gunter confirmed that the allegations concerning an "inconsistent set of figures" were solely in relation to Contract 5. (R. p. 310, lines 7-16; R. p. 323, line 14-p. 325, line 4). However, when asked to explain this vague allegation, she admitted that there was no difference in the price paid for the Contract 5 Collateral and that the numbers contained on the equipment invoice and the Contract itself did in fact match what Appellants agreed to pay Respondent. (R. p. 293, line 9-p. 294, line 4). The only discrepancy identified by Ms. Gunter was in "the *way* [the Warranty Plan was] described." (*Id.*) (emphasis added). While the Warranty Plan may not have been specifically itemized in Contract 5, it was clearly listed and itemized in the Equipment Invoice and Purchase Order approved by Appellants, reflecting an added cost of $59,263.00. (R. p. 293, lines 9-17; Banks Aff. Exs. 9-10; R. pp. 166-74). In addition, Ms. Gunter acknowledged that the price paid for the Warranty Plan was included in the total cash price of $459,263.00. (R. p. 293, line 15-17; R. p. 295, lines 16-20). There was never any dispute that Appellants received the benefit of their bargain, as Ms. Gunter testified that they received the Contract 5 Collateral and the Warranty Plan and that those items were financed by Respondent and included in the Contract 5 purchase price. (R. p. 295, line 16-p. 296, line 5; R. p. 296, lines 15-18; R. p. 297, lines 8-16). In light of Appellants' testimony, it is clear that there was no genuine issue of fact for the Trial Court to consider concerning the figures included in the Contracts, and the fact that Appellants received exactly what was financed through Respondent.

Second, Appellants acknowledge that Respondent was under no obligation to modify any of the Contracts. (R. p. 321, lines 19-21). In addition, the Trial Court noted that Appellants failed to produce any request for a modification or extension of any of the Contracts, or any agreement

by Respondent to modify the Contracts. (SJ Order p. 4; R. p. 4). Despite that fact, on October 25, 2016, Respondent nonetheless provided a payment extension/deferral on Contract 1, and extended the maturity date by five months. (Banks Aff. ¶ 14, Ex. 2; R. pp. 2, 128-30). Thus, Appellants' contention that Respondent has unclean hands as a result of a failure to provide an extension on the other four Contracts is meritless.

3. **Respondent made proper demand on Appellants and, therefore, Appellants are liable for attorneys' fees and costs by virtue of their failure to pay the amounts due and owing.**

The Trial Court properly determined that Respondent was entitled to an award of its reasonable attorneys' fees and costs as authorized by the language of the Contracts and by South Carolina Law. In South Carolina, the general rule is that "attorney's fees are not recoverable unless authorized by contract or statute." *Baron Data Sys., Inc. v. Loter*, 297 S.C. at 383–84, 377 S.E.2d at 297 (citation omitted) (emphasis added); *see also Laser Supply & Servs., Inc.*, 382 S.C. at 340-43, 676 S.E.2d at 147-48; *U.S. Bank Tr. Nat. Ass'n v. Bell*, 385 S.C. 364, 379–80, 684 S.E.2d 199, 207–08 (S.C. Ct. App. 2009) (reversing a denial of attorneys' fees and holding that "[w]here there is a contract, the award of attorney's fees is left to the discretion of the trial judge and will not be disturbed unless an abuse of discretion is shown").

Here, the Contracts executed by Appellants contain clear language providing that if Appellants are in default, Respondent may "require [Appellants] to reimburse and indemnify [Respondent] for all losses, claims, damages and expense of any kind or nature whatsoever incurred in connection with the [e]quipment and/or the enforcement of [Respondent's] remedies hereunder including . . . attorneys' fees and court . . . fees and costs." (Compl. Exs. A, C, E, G, I; R. pp. 93-97, 101-05, 107-11, 113-17, 119-23) (emphasis added). Thus, Appellants contractually agreed to pay the attorneys' fees and other legal expenses incurred by Respondent in collecting on the Contracts.

Respondent also provided Appellants written notice of its intent to seek recovery of its reasonable attorneys' fees and court costs. (Compl. ¶¶34-35, Ex. K; R. pp. 16-17, 125-27). By letter dated December 10, 2018, and again in the verified Complaint, Respondent notified Appellants of: (i) Appellants' default under the Contracts; (ii) the balance due and owing under the Contracts; (iii) Respondent's intention to seek attorneys' fees and court costs; and (iv) the remedy of paying the outstanding balances in full within five days to avoid payment of attorneys' fees. (*Id.*). Despite this notice, Appellants did not, and have not, paid the outstanding balances. Thus, the Trial Court properly granted summary judgment as to Respondent's claim for attorneys' fees and court costs.

E. The Trial Court properly granted summary judgment for Respondent on Appellants' Fourth Counterclaim for class action before a motion for class certification was before the Court.

1. Appellants state no cause of action for a class action.

Appellants' Fourth Counterclaim purports to state a claim for "Class Action"; however, this is not a cognizable cause of action. A class action is not itself a cause of action. A class action must state an underlying cause of action, which is the basis of the Class Action. Because Appellants' Fourth Counterclaim lacked any such cause of action, and because there was no factual evidence in the Trial Court's record to support Appellants' allegations, summary judgment was properly granted in Respondent's favor.

2. Breach of the implied duty of good faith and fair dealing is not a basis for the class action.

As set forth in Section (V)(A) above, the Trial Court properly granted summary judgment to Respondent on Appellants' claim based on the implied duty of good faith and fair dealing. Thus, this claim could not serve as the cause of action for the Class Action.

3. **Negligent Supervision is not a basis for the class action**.

As set forth in Sections (V)(B) and (V)(C) above, under South Carolina law, there is no cognizable claim for negligent supervision under these facts. Thus, this claim could not serve as the cause of action for the Class Action.

4. **Appellants failed to state sufficient facts to state a claim that meets the five prerequisites of Rule 23.**

Appellants failed to carry their burden of proving the existence of each required element of a class action. Rule 23, SCRCP provides the following prerequisites for a class action:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if the court finds (1) the class is so numerous that joinder of all members is impracticable [Numerosity], (2) there are questions of law or fact common to the class [Commonality], (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class [Typicality], (4) the representative parties will fairly and adequately protect the interests of the class [Adequacy], and (5) in cases in which the relief primarily sought is not injunctive or declaratory with respect to the class as a whole, the amount in controversy exceeds one hundred dollars for each member of the class.

Rule 23, SCRCP. The proponent of a class action bears the burden of proving the existence of each prerequisite. *Gardner v. S.C. Dep't of Revenue*, 353 S.C. 1, 20, 577 S.E.2d 190, 200 (S.C. 2003). The failure to satisfy even one prerequisite is fatal. *Id.*

To establish **Numerosity**, a party must show that "the class is so numerous that joinder of all members is impracticable." Rule 23(a), SCRCP. Appellants' Counterclaims contain no such allegation. Appellants did not plead the identity of any other potential class member; rather, they stated that they need "extensive discovery to identify potential members." (Answ. ¶ 58; R. p. 38). At the time the Summary Judgment Order was entered, the case had been pending for almost two years, and other than Appellants' short written discovery issued, Respondent is unaware of any additional discovery efforts taken by Appellants to identify even a single member of a potential class. In fact, Appellants testified that: (i) they are unaware of any other similar

complaints by other customers of Respondent, (ii) have not talked to any other customers of Respondent about the Counterclaims, or (iii) discussed the alleged facts that give rise to their Counterclaims with any other customers. (R. p. 325, lines 1-22). The failure to satisfy the numerosity prerequisite is fatal to the cause of action for a class action. *Gardner,* 353 S.C. at 21, 577 S.E.2d at 200.

"To establish [**C]ommonality**, a party must show that there are questions of law or fact common to the class ... [which] means the party must articulate the existence of significant common, legal, or factual issues which bind the proposed class together." *Id.* (citations and quotations omitted). But Appellants' Counterclaims show no questions of law at all and Appellants have failed to allege any law or facts common to a potential class. This lawsuit arises out of Appellants' default and subsequent failure to pay Respondent under five separate Contracts, and Respondent's right to immediately repossess the Collateral used to secure those obligations. (Comp. ¶¶ 36-86; R. pp. 17-21). There is certainly no commonality as to that central issue, and the Counterclaims assert no common issues binding any proposed class together.

The predominant issue in this case is analysis of the individual Contracts between Appellants and Respondent. This case does not arise out of the equipment invoice provided to Appellants by Flint Equipment, which is entirely unrelated to the Contracts and the collateral used to secure those obligations. (Answ. ¶ 43, Exs. A, B; R. p. 36). By introducing these issues into the case, Appellants destroyed any basis for commonality. The Contracts between Respondent and Appellants have no bearing on whether Flint Equipment used inconsistent figures in its equipment invoice. And any alleged "scheme" whereby Flint Equipment purportedly submitted inconsistent figures to Respondent and Appellants was alleged to be carried out by Flint Equipment in its own equipment invoice – Respondent is not even a party to that invoice. Finally, Appellants have not

been able to point to more than a single instance where an alleged inconsistency was involved, nor have they taken any efforts to determine any other instances where a similar invoice was provided. The failure to satisfy the commonality prerequisite is fatal to the cause of action for a class action. *Gardner*, 353 S.C. at 21, 577 S.E.2d at 200.

There is no **Typicality**. The Counterclaim contains no allegations that Appellants' claims or defenses are typical of the claims or defenses of the purported class. Because the case arises out of Appellants' default under five distinct Contracts, and Respondent's right to immediately repossess the Collateral used to secure those obligations, the case will focus on that individualized proof, and typicality is not present. Appellants have not pleaded any relationship between their defenses to payment of their obligations to Respondent, and their alleged class action claims. The same arguments that show no commonality also show no typicality. The failure to satisfy this prerequisite is fatal to the cause of action for a class action. *Gardner*, 353 S.C. at 21, 577 S.E.2d at 200.

There is no **Adequacy**. Appellants have not shown that the representative parties will fairly and adequately protect the interests of the class. Appellants are not ideal class representatives. They are Respondent's debtors and currently owe Respondent the total aggregate sum of $946,378.65 as of August 10, 2020, with interest continuing to accrue at the applicable contract rates. Appellants' interest is solely in avoiding payment of legitimate debts, which is not a dispute common to any other prospective class member. The Answer and Counterclaims appear to be an attempt to make the litigation so costly that Respondent gives up on its legal rights against Appellants. Further, as discussed above, the equipment invoices complained of, which were submitted by Flint Equipment, do not even reference any contractual obligations or collateral

which may be subject to this action. Therefore, because Appellants have no legal basis for recovery, they are not adequate class representatives.

Further, Appellants failed to allege facts to support **Damages**. Rule 23(a), SCRCP states that "in cases in which the relief primarily sought is not injunctive or declaratory with respect to the class as a whole, the amount in controversy exceeds one hundred dollars for each member of the class." Rule 23(a), SCRCP. The amount in controversy means "the value of the object to be gained by the suit." *Gardner v. Newsome Chevrolet-Buick, Inc.*, 304 S.C. 328, 331, 404 S.E.2d 200, 202 (S.C. 1991). In the absence of alleging or providing any factual support for damages, Appellants failed to state a cognizable claim at law. What is more, Rule 23, SCRCP requires that the amount in controversy exceed $100.00 per member of a class or a damage amount; Appellants failed to satisfy their burden. The failure to satisfy the amount in controversy prerequisite is fatal to the cause of action for a class action. Therefore, the Trial Court properly granted summary judgment to Respondent on this counterclaim. *Gardner*, 353 S.C. at 21.

5. **Granting summary judgment to Respondent on Appellants' Class Action claim was not premature.**

Appellants' argument that it is premature to deny their class action claim fails on several fronts. In their Initial Brief, Appellants claim their insufficient allegations were due to their lack of access to records that would allow them to make precise allegations as to the elements for a class action. (Appellant Brief p. 9). In addition, Appellants claim the Trial Court's ruling was premature due to the fact that no motion for class certification was before the Court and controlled by the Trial Court's decision on their first counterclaim. (Appellant Brief p. 9).

Appellant's position that its class action claim cannot be denied unless there is a motion before the Trial Court for certification is without merit. "[A] trial judge's ruling on whether an action is properly maintainable as a class action is within his discretion." *Waller v. Seabrook*

Island Property Owners Ass'n, 300 S.C. 465, 468, 388 S.E.2d 799, 801 (S.C. 1990). This Court has upheld the dismissal or striking of Class Action claims which were not before the Trial Court on a motion for certification. *See Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 300, 705 S.E.2d 475, 477 (S.C. Ct. App. 2011) (upholding lower court's decision to strike class action claims under Rule 12(f) for failure to establish the requisite elements required for certification).

Where there is no South Carolina law as to a specific procedural issue, "we look to the construction placed on the Federal Rules of Civil Procedure" since South Carolina's "Rules of Procedure are based on the Federal Rules." *Gardner*, 304 S.C. at 330. Appellants' position ignores the decisions of other jurisdictions that declare class allegations may be dismissed even prior to discovery when it will not "alter the central defect in th[e] class claim." *Pilgrim v. Universal Health Card, LLC,* 660 F.3d 943, 949 (6th Cir. 2011); *see also Fejzulai v. Sam's West, Inc.,* 205 F.Supp. 3d 723 (D.S.C. 2016) (granting motion to dismiss of class action claim for lack of cause of action); *Rikos v. Proctor & Gamble Co.*, 2012 WL641946, at *4 (S.D. Ohio Feb 28, 2012); *Sanders v. Apple, Inc.*, 672 F. Supp. 2d 978, 990 (N.D. Cal. 2009).

Consistent with these holdings, no amount of discovery can remedy Appellants' failure to state a claim that would form the basis of their class action, or their failure to plead facts necessary to pursue a class action under Rule 23, SCRCP. Appellants issued written discovery on Respondent on June 29, 2020, but despite the underlying lawsuit pending for over two years, they have not conducted any additional efforts to uncover evidence to support their claims. (R. p. 325, lines 5-22). Regardless, no amount of additional discovery will alter these central defects in Appellants' claims here. In short, there is nothing improper about the granting of summary judgment to Respondent on Appellants' class action claims prior to any motion for certification, when the purported class action so plainly lacks any one essential element as plead. *Gardner*, 353

S.C. at 20-21. As such, the Trial Court properly granted summary judgment to Respondent on Appellants' Fourth Counterclaim for a class action.

6. **Appellants have failed to identify even a single instance that would support a certification of any class**.

This issue is not merely academic. Absent a denial of Appellants' Class Action Counterclaim, the parties and Trial Court would be compelled to devote significant time and expense before trial on the legitimate legal issues involved in this case. Despite issuing written discovery during the pendency of the underlying lawsuit, Respondent is unaware of any actions taken or any discovery conducted (extensive or otherwise) by Appellants to identify other potential members of a class. As discussed in greater detail above, Appellants have no basis for their assertion for a class action, as they are completely unaware of, nor have they undertaken efforts to identify, any other similar situations where other customers of Respondent had similar complaints. (R. p. 325, lines 5-22). Because Appellants failed to present any legal or factual support for their claim of Class Action, and therefore failed to carry their burden of showing a genuine issue of material fact exists, the Trial Court properly granted summary judgment to Respondent on Appellants' Fourth Counterclaim.

F. **An Additional Response to Appellants' Arguments**.

Should this Court find Respondent's foregoing arguments are not conclusive as to these issues, Respondent respectfully requests this Court to affirm the Trial Court's ruling on any ground appearing on the record as provided by Rule 220(c), SCACR.

VI. CONCLUSION

For these reasons, Respondent respectfully requests that the Court affirm the Trial Court's Summary Judgment Order in its entirety.

Respectfully submitted, this the 2nd day of July, 2021.

Ward and Smith, P.A.

/s/ Amy H. Wooten, Esq.
Amy H. Wooten, Esq.
S.C. State Bar I.D. No.: 100128
N.C. State Bar I.D. No.: 39762
For the firm of Ward and Smith, P.A.
Post Office Box 33009
Raleigh, NC 27636-3009
Telephone: 919.277.9100
Facsimile: 919.277.9177
E-mail: ahwooten@wardandsmith.com

Paul A. Fanning
N.C. State Bar I.D. No.: 25477
Admitted *Pro Hac Vice*
email: paf@wardandsmith.com
For the firm of Ward and Smith, P.A.
Post Office Box 33009
Raleigh, NC 27636-3009
Telephone: 919.277.9100
Facsimile: 919.277.9177
Attorneys for Respondent-Plaintiff

Raleigh, North Carolina
July 2, 2021.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Walton J. McLeod, Circuit Judge

Appellate Case 2021-000033
Case No. 2018-CP-32-04329

John Deere Construction & Forestry Company,
Plaintiff-Respondent,

v.

North Edisto Logging, Inc. and Paul Gunter,
Defendants-Appellants.

CERTIFICATE OF COMPLIANCE

I hereby certify that this Final Brief of Respondent complies with Rule 211(b) of the South Carolina Appellate Court Rules.

Respectfully submitted, this the 2nd day of July, 2021.

Ward and Smith, P.A.

/s/ Amy H. Wooten
Amy H. Wooten, Esq.
S.C. State Bar I.D. No.: 100128
N.C. State Bar I.D. No.: 39762
For the firm of Ward and Smith, P.A.
Post Office Box 33009
Raleigh, NC 27636-3009
Telephone: 919.277.9100
Facsimile: 919.277.9177
E-mail: ahwooten@wardandsmith.com
Attorneys for Respondent-Plaintiff

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Walton J. McLeod, Circuit Judge

Appellate Case 2021-000033
Case No. 2018-CP-32-04329

John Deere Construction & Forestry Company,
Plaintiff-Respondent,

v.

North Edisto Logging, Inc. and Paul Gunter,
Defendants-Appellants.

PROOF OF SERVICE

I hereby certify that on July 2nd, 2021 the foregoing FINAL BRIEF OF RESPONDENT was served on the following person by depositing a copy thereof in an envelope bearing sufficient postage in the United States mail, addressed to the following person at the following address which is the last addresses known to me:

D. Randolph Whitt, Esq.
Fleming & Witt, P.A.
344 Blossom View Court
West Columbia, SC 29170
Counsel for Appellants-Defendants

/s/ Amy H. Wooten
Amy H. Wooten, Esq.
S.C. State Bar I.D. No.: 100128
N.C. State Bar I.D. No.: 39762
For the firm of Ward and Smith, P.A.
Post Office Box 33009
Raleigh, NC 27636-3009
Telephone: 919.277.9100
Facsimile: 919.277.9177
E-mail: ahwooten@wardandsmith.com
Attorneys for Respondent-Plaintiff

Raleigh, North Carolina
July 2nd, 2021.

070644-00226
ND: 4846-7580-1327, v. 3