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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Perry H. Gravely, Circuit Court Judge

Appellate Case No. 2021-000851

ARO-D Enterprises, LLC . . . . . Respondent,

v.

Tiger Enterprises & Trading, Inc., Bonnie Walker and
Dwight Walker . . . . . Appellants,

Tiger Enterprises & Trading, Inc., ...Third-Party Plaintiff / Appellant,

v.

Rudy A. Dixon, Frank T. Gangi, and
T3 Aviation, LLC . . . . . . Third-Party Defendants / Respondents.

INITIAL OPENING BRIEF OF RESPONDENTS

J.J. Andrighetti (S.C. Bar No. 0072741)
Culbertson Andrighetti, LLC
10 Williams Street
Greenville, South Carolina 29601
(o) 864.370.8222
(e) jj@palmettolawfirm.com

Attorney for Respondent ARO-D Enterprises, LLC and Respondent Rudy A. Dixon

Steven Edward Buckingham (S.C. Bar No. 0075089)
The Law Office of Steven Edward Buckingham
16 Wellington Avenue
Greenville, South Carolina 29609
(o) 864.735.0832
(e) seb@buckingham.legal

Attorney for Respondent T3 Aviation, Inc. and Respondent Frank T. Gangi

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STATEMENT OF ISSUES ON APPEAL

I. Whether and to what extent any of the issues raised by Appellants in these appellate proceedings are preserved for this Court's review, and relatedly, whether even sufficiently preserved claims have been otherwise abandoned.

II. Whether the trial court properly granted summary judgment in favor of Respondents T3 Aviation, Inc. and Frank T. Gangi against Appellants' action for violation of the South Carolina Unfair Trade Practices Act, under circumstances where Appellants failed to articulate any evidence at the summary judgment stage to substantiate multiple elements of the cause of action, and where Appellants have failed to present any argument in connection therewith in their appellate brief.

III. Whether the trial court properly granted summary judgment in favor of Respondent ARO-D Enterprises, LLC against Appellants as to Respondent's action for claim and delivery, under circumstances where it was undisputed that Respondent is the rightful owner of the property at issue.

IV. Whether the trial court properly granted summary judgment in favor of Respondent T3 Aviation, Inc. and Frank T. Gangi as to their action for declaratory judgment, to establish that no valid, enforceable agreement existed between Appellant Tiger Enterprises & Trading, Inc. and Respondent ARO-D Enterprises, LLC sufficient to sustain an action for tortious interference with contract, under circumstances where it was undisputed that no such contract existed.

V. Whether the trial court properly granted summary judgment in favor of Respondents, despite Appellants' protestations that more discovery is necessary, under circumstances where, by the very nature of Appellants' allegations, additional discovery would be fruitless, and where Appellants have failed to articulate what information additional discovery is likely to yield or how that information would be pertinent to the matters for which summary judgment was granted.

STATEMENT OF THE CASE

This appeal arises from a commercial dispute regarding aircraft parts. As explained below in the Statement of Facts, Respondent ARO-D Enterprises, LLC acquired the rights to an inoperable luxury business jet from the government of a foreign country. In 2019, Respondent began removing parts from the aircraft at issue, and sending those parts stateside to the warehouse of Appellant Tiger Enterprises & Trading, Inc., which is located in South Carolina. Initially, Appellant and Respondent were discussing the possibility of Appellant purchasing the entirety of the inventory of aircraft parts being sent to their warehouse, but the parties could never reach mutually agreeable terms. Later, Appellant began presenting Respondent with various proposals for a consignment agreement, by which Respondent would allow Appellant to market and sell the inventory of aircraft parts on behalf of Appellant. Here, too, the parties were never able to achieve a set of mutually agreeable terms.

Later in 2019, Respondent met the acquaintance of a third-party—Respondent T3 Aviation, Inc.—who was interested in acquiring the inventory of aircraft parts. To facilitate this potential transaction, Respondent ARO-D Enterprises, LLC instructed Appellant to release the inventory of aircraft parts they were then holding. Appellant refused, ultimately forcing Respondent to file a civil action seeking the release of the inventory being wrongfully withheld.

After the commencement of this action, Appellant elected to dramatically expand the scope of conflict, suing Respondent's owner, as well as T3 Aviation, Inc. and its principal operator. This yielded counterclaims through which the trial court was asked to issue, among other things, a declaratory judgment that a valid, enforceable contract with respect to the inventory at issue never existed between Appellant and Respondent.

In December 2020 and February 2021, Respondents separately filed two Motions for Partial Summary Judgment. These Motions were granted, resulting in, among other things, an order instructing Appellant to remand the inventory at issue to Respondent, and a separate order finding that Appellant and Respondent were not parties to a valid, enforceable contract regarding the inventory at issue. Appellants filed a motion to alter or amend these decisions under Rule 59(e), SCRCP, which was denied in July 2021. It is from these adverse decisions that this appeal was taken.

STATEMENT OF FACTS

The facts of this dispute are unusual, but not complicated. Respondent ARO-D Enterprises, LLC ("**ARO-D**") is engaged in the business of buying and deconstructing damaged or inoperable aircraft for the purpose of selling parts to third-party aircraft operators and parts suppliers. In the instant case, ARO-D purchased the rights to an inoperable Hawker 4000 business jet from the Nigerian government. ARO-D, through its sole member, Respondent Rudy A. Dixon, traveled to Nigeria in the summer of 2019 to begin deconstructing the Hawker 4000. As ARO-D was able to remove parts from the Hawker 4000, ARO-D would ship the parts removed from the Hawker 4000 (hereinafter referred to as "**the Hawker Inventory**") to Appellant Tiger Enterprises & Trading, Inc. ("**TET**") at TET's warehouse in Greenville County.

Despite the fact that TET was allowing ARO-D to ship the Hawker Inventory to TET's warehouse, neither ARO-D nor TET ever came to an agreement as to what, if anything, TET would do with the Inventory once it was received. Early on in this business relationship, there were discussions between the parties about TET buying certain parts from ARO-D, or perhaps the Hawker Inventory as a whole. However, an agreement along these was never consummated, and TET began presenting various proposals to ARO-D by which ARO-D would sign a consignment agreement with TET that would allow TET to market and sell the Hawker Inventory. The parties engaged in extensive discussions about the entry into a consignment agreement, but ultimately, this was not consummated, either.

During the summer of 2019, ARO-D became acquainted with Respondent T3 Aviation, Inc. (referred to hereinafter as "**T3**," which has been misidentified as T3 Aviation, LLC) and its principal operator, Respondent Frank T. Gangi. T3 was interested

in purchasing the Hawker Inventory from ARO-D, and ARO-D was motivated to sell the Hawker Inventory to T3.

In furtherance of consummating a sales transaction with T3, in September 2019, ARO-D instructed TET to release the Hawker Inventory to T3. TET, through its principal officers and owners Appellants Dwight and Bonnie Walker, refused. TET then continued to hold the Hawker Inventory against ARO-D's objections.

In March 2020, ARO-D commenced a lawsuit against TET and Bonnie and Dwight Walker seeking, among various other forms of relief, an order compelling Appellants to dispossess themselves of the Hawker Inventory. This was sought through an action for claim and delivery.

In April 2020, Appellants filed a counterclaim against ARO-D, and then, by way of third-party complaint, TET brought claims against Dixon individually, T3, and Gangi individually. In relevant part, the actions against Respondents were for breach of contract, tortious interference with contract, and violation of the South Carolina Unfair Trade Practices Act. According to Appellants' pleadings, the contract sued upon was a consignment agreement that TET had with ARO-D, despite the fact that no such agreement was ever consummated.

In September 2020, Respondents T3 and Gangi filed a counterclaim against TET seeking, among other things, a declaratory judgment that TET did not have any legally enforceable agreement with ARO-D, and certainly not one that could sustain an action against T3 and Gangi for tortious interference.

During December 2020 and February 2021, Respondents filed Motions for Partial Summary Judgment against Appellants' claim. More specifically, ARO-D filed a Motion

for Partial Summary Judgment on its claim and delivery action, seeking an order from the trial court that would compel Appellants to release the Hawker Inventory from their wrongful possession, which was continuing. Respondents T3 and Gangi filed a Motion for Partial Summary Judgment seeking: (1) dismissal of the action for violation of the South Carolina Unfair Trade Practices Act; (2) a declaratory judgment that TET did not have a legally enforceable agreement regarding the Hawker Inventory with ARO-D; and (3) in the event that the trial court found no such agreement to exist, dismissal of TET's action against T3 and Gangi as to the action for tortious interference with contract.

A hearing on Respondents' Motions was held on March 9, 2021. Importantly, Respondents' Motions were supported by an affidavit given by Respondent Dixon, as well as certain other documents and testimony, including excerpts of the deposition of TET's vice president. Appellants, for whatever reason, did not oppose Respondents' Motions with any memorandum in opposition, affidavits, or exhibits. After receiving the arguments of counsel, the trial court took the disposition of the Motions under advisement. However, on April 16, 2021, the trial court issued two orders addressing each of the Motions for Partial Summary Judgment. With respect to ARO-D's Motion, the court found that ARO-D was the rightful owner of the Hawker Inventory, that Appellants were withholding the Inventory without authority or justification, and that the Inventory must be remanded to ARO-D's control. With respect to the Motion of T3 and Gangi, the court held that the action for violation of the Unfair Trade Practices Act must be dismissed, that TET did not have a legally cognizable contract with ARO-D, and that—in the absence of such a contract—neither T3 nor Gangi could be liable for tortious interference of a non-existent contract as a matter of law.

Later in April 2021, Appellants filed a motion to alter or amend the orders of April 16, 2021 pursuant to Rule 59(e), SCRCP. Respondents filed a memorandum in opposition thereto, and Appellants filed a reply in support thereof. However, by decision dated July 6, 2021, the trial court held that a hearing on Appellants' Rule 59 motion was unnecessary, and that the court had not been presented with any basis for altering or amending its prior decisions.

Appellants filed their notice of appeal on August 3, 2021. The notice seeks review of the orders of April 16, 2021 granting partial summary judgment, (referred to hereinafter as "**the Orders**"), as well as the order of July 6, 2021 declining the invitation to alter or amend the judgment established by the Orders.

ARGUMENT

Despite the fact that Appellants have asserted six (6) issues which are allegedly presented in this appeal, Appellants' brief is not organized around those topics. Accordingly, for the sake of clarity, Respondents' brief is structured around four (4) discrete Sections, intended to touch upon all issues raised by Appellants' brief and the Statement of Issues presented by Respondents in this brief. Those Sections are addressed in turn, and are as follows: (1) regarding the affirmation of the trial court's decision as to the Motion for Partial Summary Judgment in favor of Respondents T3 and Gangi with respect to Appellants' action for violation of the Unfair Trade Practices Act; (2) regarding the affirmation of the trial court's decision as to Respondent ARO-D's Motion for Partial Summary Judgment on its claim and delivery action; (3) regarding the affirmation of the trial court's decision regarding the lack of utility as to the impact of further discovery on the matters for which summary judgment was granted; and (4) a general request for affirmation of the trial court's decision for any reason that may appear in the record.

I. THE TRIAL COURT'S DECISION TO GRANT SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS T3 AND GANGI WITH RESPECT TO APPELLANTS' ACTION FOR VIOLATION OF THE UNFAIR TRADE PRACTICES ACT MUST BE AFFIRMED.

As part of their Motion for Partial Summary Judgment, Respondents T3 and Gangi requested that summary judgment be granted in their favor as to Appellants' action for violation of the South Carolina Unfair Trade Practices Act, S.C. Code § 39-5-10 et seq. ("**SCUTPA**"). The basis for their request was predicated on the perception that Appellants were incapable of producing any evidence—by a mere scintilla or otherwise—to substantiate material elements of the action; more precisely, that Appellants had no evidence to support the proposition that either Respondent had engaged in unfair or

deceptive practices related to trade or commerce, that either had made false statements of material fact to Appellants, that any Appellant had relied on any statements attributable to either Respondent—much less to any Appellant's detriment, or that there was any adverse impact to the public interest. This, of course, was a permissible use of summary judgment. Rule 56(e), SCRCP ("When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.").

In response to this frontal attack on the evidentiary sufficiency of Appellants' SCUTPA action, they did nothing. The Motion for Partial Summary Judgment filed by Respondents T3 and Gangi was docketed on February 12, 2021; a hearing on the Motion did not occur until March 9, 2021. At no time during the intervening month did Appellants file a memorandum in opposition to Respondents' Motion.

Moreover, at the hearing on the Motions for Summary Judgment, Appellants made no effort to address—in any fashion—the challenge to their SCUTPA action. In fact, even a cursory review of the hearing transcript reveals that the only person who mentioned SCUTPA at all was the undersigned counsel for Respondents T3 and Gangi. Appellants did not offer even a perfunctory defense of their SCUTPA action. Consequently, at the hearing on the Motions for Summary Judgment, the trial judge was not presented with any argument—written or oral—to rebut the facial attack to the sufficiency of Appellants' SCUPTA action; in that same connection, the trial judge was not presented with any rebuttal evidence or testimony, either.

These circumstances present Appellants with their first problem on this issue. The fact that Appellants failed to contest the basis for the entry of summary judgment against their SCUTPA action before the trial judge at the Motions hearing means that this issue is not preserved for appellate review. See, e.g., Peterson v. Porter, 389 S.C. 148, 152, 697 S.E.2d 656, 658 (Ct. App. 2010).

Even if it were the case that Appellants did not have the opportunity to address the merits of their SCUTPA action at the hearing on the Motions for Partial Summary Judgment, the issue would still not be preserved for review, since Appellants did not address their SCUTPA action—at all—in their Rule 59 motion. Accordingly, there is no question but that the grant of summary judgment against Appellants' SCUTPA action is presently beyond appellate review.

And, even if there were lingering doubt about Appellants' SCUTPA action and issue preservation, that doubt would be resolved by the quick observation that nowhere in Appellants' brief before this Court is the dismissal of their SCUTPA action addressed, much less challenged. Therefore, even if the dismissal of the SCUTPA action had been preserved, it has nonetheless been abandoned. See, e.g., First Sav. Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994).

For these reasons, the decision of the trial court to dismiss Appellants' SCUTPA action at summary judgment must be affirmed.

II. THE TRIAL COURT'S DECISION TO GRANT SUMMARY JUDGMENT IN FAVOR OF RESPONDENT ARO-D AS TO ITS ACTION FOR CLAIM AND DELIVERY SHOULD BE AFFIRMED.

Respondent ARO-D's Motion for Partial Summary Judgment was very narrowly targeted. It was addressed solely and exclusively to Respondent ARO-D's action for claim

and delivery, and the only relief sought was an order requiring Appellants to dispossess themselves of all parts of the Hawker Inventory, which belong to ARO-D.

Appellants' position on this issue also seems narrowly targeted. To the best of Respondent's reckoning, the only complaint that Appellants seem to have with the trial court's order is that it "fails to set forth the legal basis for granting the claim and delivery remedy to ARO-D." (Appellants' Opening Br. at 10.)

Respondent will address this specific argument in due course. First, however, it is appropriate to question whether this issue is even preserved for appellate review.

A. Appellants failed to preserve claim and delivery issues for appellate review.

As discussed in the preceding Section I, above, it is necessary for purposes of issue preservation that the appellant present all issues that could have been considered at the summary judgment stage to the trial court at the time the court undertakes adjudication of the summary judgment motion. See, e.g., Peterson v. Porter, 389 S.C. 148, 152, 697 S.E.2d 656, 658 (Ct. App. 2010). An issue that was capable of consideration at summary judgment—but was not presented to the trial court—cannot be later resurrected through a motion to alter or amend. See, e.g., Patterson v. Reid, 318 S.C. 183, 456 S.E.2d 436 (Ct. App. 1995).

In the instant case, Appellants elected to present no opposition to Respondent ARO-D's Motion for Partial Summary Judgment on the claim and delivery action when the matter was pending before the trial judge. Respondent filed its Motion on December 30, 2020; the hearing on Respondent's Motion occurred on March 9, 2021. Appellants had more than two months to prepare some written argument contesting the propriety—factual, procedural, or otherwise—of the court granting judgment as a matter of law to Respondent

on its claim and delivery action. Yet they did nothing. Appellants filed no memorandum, nor any supporting affidavits or documents.

Then, when the hearing on Respondent's Motion for Partial Summary Judgment occurred, Appellants continued to maintain their silence on any issues regarding claim and delivery. As reflected in the hearing transcript, the undersigned counsel for Respondent ARO-D made the initial argument to the trial court as to why claim and delivery was appropriate; Appellants were provided the opportunity to make an immediate rebuttal. Not once during this rebuttal—or at any other time during the hearing on the Motions for Summary Judgment, for that matter—did Appellants address, much less defend against, Respondent's request for entry of judgment as a matter of law as to the claim and delivery action.

The first time that Appellants ever took issue with the fact that Respondent had requested relief in the form of claim and delivery with respect to the Hawker Inventory was on April 26, 2021, through their motion to alter or amend the trial court's decision granting Respondent relief through claim and delivery.

For purposes of appellate review, though, the ship had already sailed; Appellants' failure to address claim and delivery at all at the hearing on Respondent's Motion for Partial Summary Judgment—when the only issue raised by Respondent ARO-D at this hearing was claim and delivery—means that the issues regarding claim and delivery presented in these appellate proceedings are not preserved for review.

B. The relief sought by Appellants on this issue is not clear.

As noted above, it is Appellants' contention that an appeal of the claim and delivery issue is necessary because the trial court's order "fails to set forth the legal basis for

granting the claim and delivery remedy to ARO-D." (Appellants' Opening Br. at 10.) Importantly, it is apparently not Appellants' contention that the trial court's decision was legally or factually wrong; if that is Appellants' contention, they haven't said so. Instead, their complaint seems to be that the trial court simply failed to state the legal authority for the relief afforded.

If this is an accurate statement of Appellants' contention, then it would seem that their complaint on this issue—even if adequately preserved for appellate review—would constitute the very type of academic question which the courts eschew. See, e.g., Curtis v. State, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001) ("An appellate court will not pass judgment on moot and academic questions . . . .) (citations omitted).

Alternatively, if it is Appellants' position that the trial court's decision on this issue ought to be reversed, then Appellants should ask for that specific relief. And, in doing so, Appellants ought to provide legal authority for the proposition that the trial court's order constitutes error and must be overturned. Otherwise, it would seem that, consistent with the precedents of the State's appellate courts, Appellants' position on this issue would constitute the very type of cursory, unsupported assertions which militate in favor of abandonment. See, e.g., State v. Lindsey, 394 S.C. 354, 363, 714 S.E.2d 554, 558 (Ct. App. 2011) (citations omitted).

C. The trial court is statutorily authorized to award the type of relief provided to Respondent ARO-D.

There is a tone of incredulity in Appellants' Opening Brief, or perhaps perplexion, as to how the trial court could possibly have ordered a return of the Hawker Inventory to Respondent through a claim and delivery action. This, itself, is bewildering.

Long before any of us became lawyers, we were ordinary human beings, with ordinary sensibilities of how we ought to behave in a civilized society. And, once upon a time, it used to be common sense that you can't take someone else's property without their permission. Now, of course, common sense seems to have become the least common of all senses. And we find ourselves litigating zealously—first through the trial court, and now the Court of Appeals—the question of whether the law will allow someone who is in possession of another's property without their permission the power to keep it, or whether the law compels the return of the property to its owner.

This question, of course, is the thing furthest from a case of first impression. In fact, we can trace the answer to this question back to the earliest origins of a codified system of justice, finding that every organized legal code along the way provides the same answer: it is wrongful to take someone else's property without their permission; in similar fashion, it is wrongful to keep someone else's property after a demand for its return. It's that simple. And, in the cases where judicial intervention has become necessary, it has been historically common for courts to adjudicate relative property rights, and to order the return of property to its rightful owner when it is reasonably capable of being returned.

It is not hyperbole to say that these basic tenets of law are as old as civilization. Consider the following from the Code of Hammurabi:[1]

> 6. If anyone steal the property of a temple or of the court, he shall be put to death, and also the one who receives the stolen thing from him shall be put to death.

[1] Fortunately, Western Civilization has not strictly inherited the Code of Hammurabi: "If a judge try a case, reach a decision, and present his judgment in writing, if later error shall appear in his decision, and it be through his own fault, then he shall pay twelve times the fine set by him in the case, and he shall be publicly removed from the judge's bench, and never again shall he sit there to render judgment." (Code of Hammurabi ¶ 5.)

> 25. If fire break out in a house, and someone who comes to put it out cast his eye upon the property of the owner of the house, and take the property of the master of the house, he shall be thrown into that self-same fire.
>
> 112. If anyone be on a journey and entrust silver, gold, precious stones, or any moveable property to another, and wish to recover it from him, if the latter do not bring all of the property to the appointed place, but appropriate it to his own use, then shall this man, who did not bring the property to hand it over, be convicted, and he shall pay fivefold for all that had been entrusted to him.
>
> 253. If anyone agree with another to tend his field, give him seed, entrust a yoke of oxen to him, and bind him to cultivate the field, if he steal the corn or plants, and take them for himself, his hands shall be hewn off.

Centuries later, the same punitive philosophy regarding theft and misappropriation of another's property is recorded in the Pentateuch. This is found not just in the Ten Commandments, which plainly direct that "Thou shalt not steal." Exodus 20:15; Deuteronomy 5:19 (King James). Instead, the moral imperative against theft and misappropriation is found peppered throughout the Torah. See, e.g., Exodus 20:17; Deuteronomy 5:21 ("Thou shalt not covet thy neighbor's house . . . nor any thing that is thy neighbor's.") (King James); Exodus 22:7-8; Leviticus 19:11 & 13 (King James).

The proposition that property of another should not be taken or retained without the owner's permission is not limited to these religious traditions. Hinduism teaches the virtue of "asteya," which is the directive that one must not steal the property of another, or have the intent to steal the property of another, through action, speech, or thought. In Buddhism, one of the five precepts for moral conduct is the vow "to abstain from taking what is not given."

These same, basic principles were reflected in English common law. Historically, the remedy for the wrongful taking or withholding of the property of another without authorization was provided for by the actions of replevin or trover—replevin when the property was capable of being returned; and trover when it was not, and instead, value must be given. See, e.g., Reynolds v. Philips, 72 S.C. 32, 51 S.E. 523 (1905). Now, in South Carolina, the ancient actions of replevin and trover are codified in the statutes for claim and delivery. Id. Accordingly, Appellants' apparent proposition—that the court has no authority to do anything about the property of another being wrongfully withheld—is simply indefensible. Instead, the trial judge in this action was doing nothing more than what judges throughout the entirety of human history, in a myriad of legal, philosophical, and religious traditions, have historically done: determine who is the rightful owner of property, and order the restoration of that property to them.

Furthermore, the trial judge in this action provided the very relief contemplated by the pertinent provisions of the South Carolina Code. Section 15-69-210—which is entitled "Judgment"—states that, "[i]n an action to recover the possession of personal property[,] judgment for the plaintiff may be for the possession, for the recovery of possession, or for the value thereof in case a delivery cannot be had and for damages, both punitive and actual, for the detention. . . ." In the instant case, the trial judge determined that Respondent ARO-D was the rightful owner of the Hawker Inventory, and directed Appellants to remand such Inventory into ARO-D's possession. In light of these circumstances, one has to wonder what Appellants believe the trial judge should have done, or how they reasonably contend the Court's decision was error.

To these questions, Appellants' Brief is less than clear. Perhaps it is Appellants' position that, somehow, the trial judge failed to observe the claim-and-delivery procedures set out in Title 15, Chapter 69. If this is the case, their position is unavailing. Section 15-69-10 addresses the procedure for when "immediate delivery may be claimed." As established by this Section, the Code contemplates that "immediate delivery" may be sought "at the time of issuing the summons, or at any time before answer." Quite clearly, § 15-69-10 is addressed to a form of relief through claim-and-delivery that is effective pendente lite, before the merits of ownership and possession have been adjudicated. That is not the procedural posture with which the trial judge in the instant action was presented. Instead, the judge was presented with the opportunity to rule—as a matter of a final determination on the merits—whether Respondent ARO-D was the rightful owner of the Hawker Inventory. It found that Respondent was the rightful owner, and accordingly, pursuant to S.C. Code § 15-69-210, entered judgment in favor of Respondent on that issue.

Importantly, Appellants do not seem to have taken exception to this decision. None of the six (6) issues identified by Appellants in their Statement of Issue(s) on Appeal challenges the factual determination by the trial judge that Respondent ARO-D was the rightful owner of the Hawker Inventory. Certainly, Appellants have taken the position that the trial judge erred in concluding that no contract existed between TET and ARO-D (which is addressed in the following Section). But the contract whose existence Appellants have asserted is a contract for the consignment of the Hawker Inventory—not ownership of the Inventory.

To the contrary, at the hearing on the Motions for Summary Judgment, the undisputed evidence presented to the trial judge was that Respondent ARO-D was the sole

and exclusive owner of the Hawker Inventory. These circumstances were affirmed by the affidavit of Respondent Dixon, filed on April 9, 2020, and resubmitted with Respondent ARO-D's Motion for Partial Summary Judgment. Appellant TET did not offer any evidence to dispute this fact. Instead, it was the uncontroverted testimony of TET's vice president that Respondent owned the parts at issue. In relevant part, TET's vice president testified as follows:

> Q: Who is the owner of these parts as we speak today?
>
> A: Which parts?
>
> Q: The Hawker 4000 inventory.
>
> A: Rudy Dixon.
>
> Q: Why—if Rudy owns them, why are you retaining them?
>
> [Appellants' Counsel Objects to the Form of the Question]
>
> A: We had entered in good faith into an agreement with Rudy, spent money and many hours of work of logistics and trying to get the material here, trying to finalize a transaction with Rudy on the promise of hundreds of thousands of dollars of revenue for Tiger and profits, you know, with Rudy as well.
>
> And when he came to our facility and decided not to sign the consignment agreement and to pull all of the material back when we had already incurred debt to him, the material is collateral now against the debts owed to Tiger.

(Hansen Dep. Tr., Ex. C, 149:6-25.)

In short: (1) the Hawker Inventory is Respondent's property; (2) TET was in possession of those parts; and (3) TET was holding those parts as "collateral."

To be clear, the word "collateral," here, as used by TET's vice president, means "hostage." According to another excerpt of his testimony, which was presented to the trial judge:

> There was no—there was never a signed consignment agreement by Rudy Dixon. He intended to—he told us on multiple occasions, told me myself personally, that he was going to sign the consignment agreement, which was how this program came to be, and when he defaulted on signing it and changed his tune on how this was going to go, ***we had to come up with alternatives on how we could be compensated***. . . .

(Hansen Dep., Ex. C, 59:15-25 (emphasis added).)

The "alternative" that TET came up with was to hold Respondent's property as security for some payment that TET believed it was owed. But, to be clear, not only is there no consignment agreement between Respondent and TET regarding the aircraft parts at issue, there is no written agreement whatsoever that allows TET to hold Respondent's property as security for any reason.

This observation was specifically addressed by the trial judge. As presented in the trial court's order granting Respondent ARO-D's Motion for Partial Summary Judgment, the court examined whether—under pertinent provisions of the South Carolina Uniform Commercial Code—TET had a security interest in the Hawker Inventory that would allow it to continue holding Respondent's parts even after Respondent had demanded their return. The court observed that S.C. Code § 36-9-203(b)(3)(A) allows the enforcement of a security interest with respect to collateral only if "the debtor has authenticated a security agreement that provides a description of the collateral." Moreover, the authentication requirement of the Uniform Commercial Code requires a signature from the bound party. S.C. Code § 36-9-102(7)(A). The court found that no such authenticated agreement ever existed, and the non-existence of such an agreement has never been disputed—not before the trial court, and not in the course of these appellate proceedings.

In light of all these facts and circumstances—which were left undisputed by Appellants at the hearing on Respondent's Motion for Summary Judgment—*what other conclusion could the trial court have reasonably reached?* Despite Appellants' unsupported assertions about the existence of an agreement with Respondent ARO-D regarding the Hawker Inventory, Appellants have never produced an agreement that is actually capable of binding ARO-D; TET's vice president admitted under oath that no such agreement ever existed; Appellants have never disputed ARO-D's ownership of the Hawker Inventory; TET's vice president admitted under oath that ARO-D is the rightful owner of the parts; TET's vice president further admitted that the Hawker Inventory was being held as collateral for the payment of some uncertain amount of debt that Appellants were claiming ARO-D owed; and Appellants have never produced any document that would evidence the authority to withhold the Hawker Inventory from ARO-D as collateral, particularly after ARO-D had demanded the return of such Inventory.

The simple truth is this: the trial judge did the right thing in ordering the return of the Hawker Inventory to ARO-D. It was the right thing from the perspective of the undisputed facts presented to the judge; it was the right thing from the perspective of what relief South Carolina law affords; and it was the right thing from the perspective of reason and morality.

D. Section Concluding Statement

For these reasons, even if Appellants have sufficiently preserved any issues regarding the grant of summary judgment in favor of ARO-D with respect to the claim-and-delivery action, the undisputed, material facts—when applied to the law—yield the conclusion that the trial court's decision must be affirmed.

III. THE TRIAL COURT'S DECISION TO GRANT SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS' CONTENTION THAT NO VALID, ENFORCEABLE AGREEMENT BETWEEN TET AND ARO-D EXISTED MUST BE AFFIRMED.

In the preceding argument Section, Respondents have already thoroughly addressed the trial court's conclusion that no valid, enforceable agreement existed between Respondent ARO-D and Appellant TET. Respondents incorporate that argument into this Section, and will not rehash the same discussion. However, for purposes of this argument Section, it is important to note that the trial court's conclusion of the non-existence of a valid and enforceable agreement must necessarily result in the dismissal of the action for tortious interference with a contract against Respondents T3 and Gangi, and the granting of summary judgment with respect to those Respondents' action for declaratory relief on the same issue.

For their part, Appellants have asserted that the trial court's decision with respect to summary judgment on the tortious interference and declaratory judgment actions was error. This is so, they contend, for three reasons: (1) that the trial court applied the wrong standard of review; (2) that the application of the South Carolina Uniform Electronic Transactions Act creates a disputed issue of fact which compelled the denial of summary judgment; and (3) that more discovery was necessary. Each of these contentions is addressed in turn.

A. The trial court applied the correct standard of review.

Despite the fact that Appellants have made this matter a discrete question for purposes of these appellate proceedings, it is not clear from Appellants' Brief where—if ever—they are serious about challenging the standard of review applied by the trial court. As set out in both Orders regarding Respondents' Motions for Partial Summary Judgment,

the trial court was mindful of the familiar standards regarding the consideration of motions under Rule 56, SCRCP. It is also worth noting that the trial judge—the Honorable Perry H. Gravely—is no novice to this standard, either in his present capacity as a judicial officer, or his prior capacity as an excellent trial lawyer.

Regardless, Appellants have predicated a great deal of their case on the proposition that a valid, enforceable agreement existed between Respondent ARO-D and Appellant TET which was capable of sustaining an action against Respondents T3 and Gangi for tortious interference. Appellants put this issue into dispute, and they alleged throughout their counterclaim and third-party complaint that just such a contract existed. This was consistently denied by Respondents.

Accordingly, Respondents filed a Motion for Partial Summary Judgment under Rule 56 to test the factual sufficiency of Appellants' contention. This use of Rule 56 is expressly contemplated by the plain text of the rule, which provides that "[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." Rule 56(e), SCRCP.

In the instant case, Respondents' Motion for Partial Summary Judgment presented a direct attack to Appellants' contention of the existence of a valid, enforceable agreement with ARO-D. To survive summary judgment, all Appellants had to do was present a mere scintilla of evidence that a contract with ARO-D regarding the Hawker Inventory existed. See, e.g., Hancock v. Mid–South Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803

(2009). In response, and as noted throughout this brief, Appellants elected to provide the trial judge with nothing: no affidavits, no discovery responses, not even a memorandum in opposition.

Accordingly, at the hearing on the Motions for Partial Summary Judgment, Respondents explicitly invited the trial judge to examine what evidence there was that a valid, enforceable agreement existed between TET and ARO-D. This was the perfect opportunity for Appellants to educate the court as to what competent evidence there was to sustain the assertion that a contract existed. No such information was provided. To be clear, Appellants failed to provide the court with any competent direct information about the existence of an agreement—such as a document signed by both parties, which, by Appellants' own admission, did not exist—as well as any competent indirect information about the existence of an agreement. The record betrays only Appellants' general references to the proposition that a legally enforceable agreement must have existed; but this was in direct contravention of the affidavit of Respondent Dixon and the testimony of Appellant TET's vice president, both of whom affirmed that no contract ever existed between ARO-D and TET with respect to the Hawker Inventory. Accordingly, the trial court necessarily found that Appellants had failed to present competent evidence from which credible inferences of the existence of an agreement could have been drawn.

Certainly, it is true that the standard of review to be applied to Rule 56 motions contains a fair amount of deference to the non-moving party. But that deference is not without limits. It was Appellants' burden, as the non-moving party, to present the court with even minimally sufficient articulable facts to support the plausibility of the action upon which they've sued. And they could not. Accordingly, consistent with the well-trod

standards for the entry of summary judgment, the trial court directed judgment as a matter of law in Respondents' favor as to whether there was a legally valid and enforceable contract between ARO-D and TET.

In their Rule 59 motion, Appellants tried to salvage their contract action by submitting additional materials by way of attachment for the court's consideration. The court was unmoved by these additional materials. And, in truth, they ought not have been considered in the first place. With the exception of certain discovery requests (which Appellants propounded after the summary judgment hearing), each and every of the documents presented to the trial court for reconsideration of the prior decision could have been presented to the court before the hearing on the Motions. Consequently, such pre-existing information was not suitable for consideration of a Rule 59 motion, nor is it suitable for consideration in these appellate proceedings.

In any event, for the foregoing reasons, the trial court applied the correct standard of review, and Appellants' assignment of error on this issue should be found to be without merit.

B. The trial court correctly held that Appellants' attempt to invoke the South Carolina Uniform Electronic Transactions Act was an irrelevant distraction.

Appellants contend that the South Carolina Uniform Electronic Transactions Act, S.C. Code § 26-6-10 et seq., could provide an avenue through which a valid, enforceable agreement between ARO-D and TET may be found to have existed. This is an outright Hail-Mary. The fundamental problem with this argument is that it is in direct contradiction to the undisputed testimony of Respondent Dixon and TET's vice president, both of whom affirmed that there was never any valid, enforceable agreement between ARO-D and TET. It is exceedingly frustrating when, during the course of litigation, the existence of a contract

between representatives of the parties who allegedly formed the very agreement at issue is denied, yet the issue continues to be litigated under specious legal pretense.

Fortunately, the trial judge saw through this ruse. It is axiomatic that the existence of a legally enforceable contract depends on the mutual assent of the parties to the agreement. Here, and as noted throughout this brief, Respondent Dixon denied the existence of an agreement with TET, and TET's own vice president denied the existence of an agreement with ARO-D. It is hard to fathom how the South Carolina Uniform Electronic Transactions Act could possibly create a valid, enforceable contract between parties who themselves did not believe that a contract existed between them.

Moreover, the first time that Appellants presented any documentary information to the trial court in connection with the Motions for Partial Summary Judgment was in furtherance of their Rule 59 motion. As discussed in the immediately preceding argument Section, pre-existing materials that Appellants elected not to file to oppose the summary judgment motions are not suitable for consideration for the first time in a Rule 59 motion, and certainly not in appellate proceedings.

C. The trial court correctly found that additional discovery was unnecessary.

Throughout the hearing on the Motions for Partial Summary Judgment, and then after, in connection with the Rule 59 motion, Appellants have argued that they needed more time to conduct discovery, in order to mount an appropriate opposition to the summary judgment motions. In support of this argument, Appellants have relied upon the Supreme Court's decision in Baughman v. AT&T, 306 S.C. 101, 410 S.E.2d 537 (1991). The language that Appellants continue to fall back upon is the Court's observation that "[s]ummary judgment is a drastic remedy and must not be granted until the opposing party

has had a full and fair opportunity to complete discovery." Id. at 112, 410 S.E.2d at 543. Appellants have neglected, however, to quote some clarifying language found in Baughman and its progeny. "Nonetheless, the nonmoving party must demonstrate the likelihood that further discovery will uncover additional relevant evidence and that the party is 'not merely engaged in a 'fishing expedition.'" Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003) (citing Baughman, 306 S.C. at 112, 410 S.E.2d at 544).

This paradigm quite clearly establishes an obligation on the party seeking to avoid summary judgment by complaining of an insufficient opportunity to conduct discovery to demonstrate how, if at all, additional discovery is likely to yield pertinent information. And that is exactly where Appellants have failed.

In proceedings below, just as in these appellate proceedings, Appellants have argued that they need more time to conduct discovery. This leads to the obvious question: *For what?* The scope of the issues presented in the Motions for Partial Summary Judgment were exceedingly narrow. The first issue was whether Appellants had any right to continue withholding the Hawker Inventory despite Respondent ARO-D's demands to the contrary. The fact of ARO-D's ownership of the Hawker Inventory was undisputed, and Appellants never produced a written agreement that gave TET the power to withhold ARO-D's property over its objection. It is not clear what additional discovery could salvage Appellants' position on this issue, and certainly, Appellants have never articulated what that additional information may be.

The second issue was whether Appellants may maintain their action for violation of the Unfair Trade Practices Act. As discussed above, it was Appellants' contention that Respondents T3 and Gangi had made false statements of fact to Appellants, on which

Appellants relied, which caused them damages and which adversely affected the public interest. However, at the hearing on the Motions for Partial Summary Judgment, Appellants never identified any false statements made to Appellants, how they were relied upon, how they were damaged, or how the public interest was affected. Each of these present matters of fact that Appellants ought to have been in possession of already. After all, it was false statements allegedly made *to them*; it was *their* reliance; *they* claim to have sustained damages. It is incredible that, at the summary judgment stage, Appellants could offer no facts or circumstances in support of this action. Ostensibly, when Appellants filed their claim against Respondents T3 and Gangi, they had a good-faith basis upon which to sue for violation of the Unfair Trade Practices Act. However, in light of the fact that, at summary judgment, no Appellant could offer any fact to sustain any element of the action, it truly makes one wonder whether there was ever any good-faith basis to support the allegation, even from the outset of the litigation.

In any event, with respect to the Unfair Trade Practices action, it is not clear what additional discovery Appellants need in order to substantiate the elements of an action that Appellants already ought to know. Appellants have never articulated an answer to this question; not at the summary judgment hearing, not in their Rule 59 motion, and not in their appellate brief.

The third issue was whether TET has a valid, enforceable agreement with ARO-D that would support an action for tortious interference with contract. Appellants' position on this issue suffers from the same deficiencies as the others. Despite asserting in their pleadings that TET has an agreement with ARO-D, TET has never produced a document evidencing the existence of such a binding agreement, and TET's own vice president has

explicitly denied that such an agreement ever existed. In light of these circumstances, it is hard to imagine how additional discovery is going to improve TET's position.

The South Carolina Uniform Electronic Transactions Act will not provide Appellants with that salvation. There is no way that the Electronic Transactions Act could affect Appellants' position on the existence of an agreement unless Appellants were in possession of electronic documents sent to them by ARO-D; and if that were the case, Appellants would already be in possession of those documents. On this matter, then, additional discovery would be useless. And, if there were some other legal avenue of relief through which Appellants could establish the existence of a contract, Appellants have not articulated what that would be, or how additional discovery may prove fruitful.

Ultimately, it is the obligation of neither Respondents nor any court to have the clairvoyance to identify how additional discovery may benefit Appellants' case. It is solely and exclusively Appellants' obligation to do so. And thus far, they have failed to advise any court of how additional discovery may yield relevant information capable of avoiding summary judgment on the issues presented; Appellants failed to do so at the summary judgment hearing, and they failed to do so in their Rule 59 motion. Their initial brief to this Court is also silent on the matter.

D. Section Concluding Statement

For the foregoing reasons, and in light of Appellants' failure to identify how additional discovery is reasonably likely to yield relevant information capable of salvaging the actions for which summary judgment was granted, the Court is encouraged to affirm the decision of the trial court.

IV. GENERAL PRAYER FOR RELIEF

In addition to the bases presented in the foregoing arguments, Respondents respectfully request affirmation of the trial court's Orders at issue in these proceedings on any basis which this Court may determine appears in the record.

CONCLUDING STATEMENT

Consistent with the foregoing discussion, Respondents respectfully request a decision from this Court which affirms the entirety of the Orders at issue in these proceedings, remands the matter to the trial court for further proceedings consistent with the decision of this Court, and provides such other and further relief as the Court deems just and proper.

Respectfully,

s/ J.J. Andrighetti

J.J. Andrighetti (S.C. Bar No. 0072741)
Culbertson Andrighetti, LLC
10 Williams Street
Greenville, South Carolina 29601
(o) 864.370.8222
(e) jj@palmettolawfirm.com

Attorney for Respondent ARO-D Enterprises, LLC and Respondent Rudy A. Dixon

s/ Steven Edward Buckingham

Steven Edward Buckingham (S.C. Bar No. 0075089)
The Law Office of Steven Edward Buckingham
16 Wellington Avenue
Greenville, South Carolina 29609
(o) 864.735.0832
(e) seb@buckingham.legal

Attorney for Respondent T3 Aviation, Inc. and Respondent Frank T. Gangi

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