THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Case No.: 2013-CP-10-1647
Appellate Case No.: 2015-000044

Virgil "Ray" Passailaigue — Appellant

v.

Henry Kuznik, Alfred L. Saad, III, Paul D. Hollen, III, and Thornwell Partners, LLC — Respondents

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Appellant Virgil "Ray" Passailaigue ("Passailiague" and/or "Appellant") filed his Amended Complaint against Henry Kuznik ("Kuznik"), Alfred L. Saad, III ("Saad"), Pauld D. Hollen, III ("Hollen"), and Thornwell Partners, LLC ("Thornwell") on March 17, 2014. (R. p. 14).

The Complaint arose out of a promissory note and unconditional guarantees signed by Respondents Kuznik, Saad, and Hollen in 2008. (R. pp. 649-51, 652-54, 656-63). Passailaigue and the individual Respondents were one time business associates.

Passailaigue asserted claims against Kuznik, Saad, Hollen, and Thornwell for breach of promissory note as it relates to the promissory notes and unconditional guarantees. (R. pp. 14-18).

In response to the allegations made by Passailaigue, the Respondents denied the breach of contract as it relates to the promissory notes and unconditional guarantees and put forth a defense that there were no net proceeds from the sale of the subject property and that Passailaigue was not entitled to enforce the promissory note or unconditional guarantees. (R. p. 47, lines 9-11) (R. pp. 490-93, 494-99, 500-04).

Respondents filed Motions for Summary Judgment which were heard on September 10, 2014. (R. pp. 490-93, 494-99, 500-04). On September 16, 2014, by way of form order, without any findings of fact or basis in law, the circuit court filed its Order granting summary judgment in favor of Kuznik, Saad, Hollen, and Thornwell. (R. p. 11). Appellant received notice of the same on September 19, 2014.

Appellant filed his Motion to Alter or Amend on September 29, 2014. (R. p. 638).

On December 9, 2014, the circuit court denied Appellant's Motion to Alter or Amend by way of an order lacking any findings of fact or basis in law. (R. p. 12).

Appellant timely filed and served the Notice of Appeal on Respondents and this Court on January 7, 2015. (R. p. 664). A transcript of the hearing granting Respondents' motions for summary judgment was ordered on January 7, 2014 and received from the court reporter on March 16, 2015. (R. p. 478).

FACTUAL BACKGROUND

On February 16, 2006, Passailaigue obtained a contract from William and Maxine Dassinger to develop a parcel of property in North Charleston, South Carolina. About that same time, Passailaigue also obtained a contract from Harold and Loraine Dassinger to develop a parcel of property in North Charleston, South Carolina. Together these properties are known as the "Dassinger Tract." (R. p. 580, lines 1-5).

Kuznik, Saad, and Hollen then entered into an agreement to purchase the aforementioned contracts from Plaintiff. (R. p. 83, line 1 – p. 84, line 9). The parties agreed to a purchase price of $1 million. (R. p. 83, lines 1-2). On or about April 11, 2007, Plaintiff received a promissory note in the amount of $1,022,900.00 from Thornwell Partners, LLC in exchange for his assignment of the contract to the aforementioned parcels of land in North Charleston, South Carolina. (R. p. 264, line 25 – p. 265, line 19).

Thornwell Partners, LLC paid the $1,022,900.00 promissory note in four separate installments, the final installment was paid on November 7, 2008 in the amount of $262,900.00. (R. pp. 592-93).

In approximately May 2008, Hollen approached Passailaigue informing him that Passailaigue was a financial liability to Thornwell Partners, LLC and that Thornwelll Partners, LLC would purchase Passailaigue's membership interest so that Thornwell Partners, LLC may obtain additional financing on the North Charleston parcels. (R. pp. 592-93).

On November 7, 2008, in exchange for his interest in Thornwell Partners, LLC, Kuznik, Saad, and Hollen executed a promissory note in the amount of $130,000.00. (R. pp. 649-54). In addition, the members of Thornwell Partners, LLC, Kuznik, Saad, and Hollen each signed an unconditional guarantee guaranteeing payment of the Promissory Note. (R. pp. 655-63).

Respondents have breached their obligations under the promissory note and unconditional guarantees by failing to pay Passailaigue the $130,000.00 promised and guaranteed by the same documents.

ARGUMENT

I. THE COURT ERRED IN FAILING TO PROVIDE AN ORDER DETAILING RELEVANT FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Order granting Respondents' Motions for Summary Judgment must be vacated and remanded based on the circuit court's failure to provide a detailed order articulating the circuit court's relevant findings and conclusions of law. "[I]t is better practice – and in most cases common practice as well as beneficial to the judicial process for a trial judge to articulate relevant findings and conclusions of law in an order granting summary judgment." Woodson v. DLI Properties, LLC, 406 S.C. 517, 527, 753 S.E.2d 428, 433 (2014). The Supreme Court of South Carolina in *Woodson* overruled fourteen years of precedent set in Bowen v. Lee Process Systems Co., 342 S.C. 232, 536 S.E.2d 86 (2000) which held the circuit court was required to set out findings of facts and accompanying legal analysis sufficient to permit meaningful appellate

review of its grant of summary judgment. Bowen v. Lee Process Systems Co., 342 S.C. 232, 536 S.E.2d 86.

In a footnote in *Bowen*, this Court directs the reader to several jurisdictions that have adopted the better practice of setting out facts and legal authority in orders granting summary judgment. See Jovine v. FHP, Inc., 64 Cal.App.4th 1506, 76 Cal. Rptr.2d 322, 337 n. 22 (1998) (noting that the proper trial court order granting summary judgment would fully comply with California rule section 437c(g), which states in relevant part: Upon the grant of a motion for summary judgment . . . the court shall, by written or oral order, specify the reasons for its determination. The order shall specifically refer to the evidence proffered in support of, and if applicable in opposition to, the motion which indicated that no triable issue exists. . .); Masters v. Worsley, 777 P.2d 499, 501 (Utah Ct. App. 1989) (explaining that Utah R. Civ. P. 52(a) requires a trial court to "issue a brief written statement of the ground for its decision on all motions granted under [the summary judgment rule] when the motion is based on more than one ground." The court then notes, "a statement of grounds found by the trial court to justify summary judgment would be of great assistance [to the appellate court], and in an appropriate case, failure to do so may justify remand to the trial court."). This Court's footnote in *Bowen* goes on to cite the United States Supreme Court and several federal circuits which have held similarly. See Carter v. Stanton, 405 U.S. 669, 671, 92 S. Ct. 1232, 31 L.ed2d 569 (1972) (vacating summary judgment and remanding the case to the district court where the court's order was "opaque and unilluminating as to either the relevant facts or the law with respect to the merits" of the claim); Pasquino v. Prather, 13 F.3d 1049, 1050-51 (7th Cir. 1994) (remanding the case where the district court's denial of summary judgment was "too cursory to permit proper appellate review" because it neither identified the facts determined to be disputed nor discussed

why the disputed facts were material to the issue at hand; the court states that "[c]onclusory rulings are inadequate material for the tools of the appellate bench").

In *Woodson*, the Supreme Court of South Carolina concluded,

> Rule 52, SCRCP, provides that '[f]indings of facts and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 . . . ' Thus, such findings and conclusion are not required for appellate review, and for this reason, we overrule *Bowen* to the extent it is relied upon to vacate and remand orders granting summary judgment.
>
> Nevertheless, here, the circuit court's reasoning is clear from the order, as it plainly referenced the evidence the circuit court considered in making its decision. See Porter, 372 S.C. at 568, 643 S.E.2d at 100 (stating that "not all situations require a detailed order, and the circuit court's form order may be sufficient if the appellate court can ascertain the basis for the circuit court's ruling from the record on appeal.")
>
> Further, a decision on a motion for summary judgment is based on depositions, interrogatories, affidavits, and other evidentiary material provided by the parties See Rule 56 (c), SCRCP, see also Quail Hill, L.L.C. v. Cnty of Richland, 387 S.C. 223, 234, 692 S.E.2d 499, 505 (2010) (stating appellate courts apply the same standard as the trial court under Rule 56(c), SCRCP). Here, Petitioners provided the requisite evidentiary material to the court of appeals. Therefore, we find the court of appeals did have a sufficient record before it to permit meaningful appellate review and make a decision on the merits. See Quail Hill, 387 S.C. at 234, 692 S.E.2d at 505; Hamilton v. Greyhound Lines E., 281 S.C. 442, 444, 316 S.E.2d 368, 369 (1984) (stating the appealing party has the burden of providing a sufficient record such that the appellate court can make an intelligent review.)

Woodson, 406 at 527, 753 S.E.2d at 433 (citations in the original).

This Court must refrain from following *Woodson* for fear of receiving a plethora of appellant briefs and designation of matter to be included in the record on appeal lacking any

evidentiary material[1]. Following the Supreme Court of South Carolina's decision and the facts in *Woodson* would benefit the appellant in that if a party were to receive a form order granting the opposing party's motion for summary judgment, Appellant simply must submit a brief a record on appeal. Upon the *Woodson* reasoning, this would force the Court of Appeals of South Carolina to vacate and remand the circuit court's decision as it is unable to ascertain the basis for the circuit court's decision. This would be a waste of this Court's valuable time and resources. In order to avoid the proverbial slippery slope, Appellant asks this Court to vacate and remand this matter to the circuit court for detailed orders.

In the case at bar, the parties received a Form 4 order from the circuit court stating as follows:

> IT IS SO ORDERED AND ADJUDGED: Statement of Judgment by the Court: All 3 motions for Summary Judgment by Defendant, filed on 6/30/2014, 7/1/2014, and 7/2/2014, are GRANTED.

(R. p. 11).

In addition, the circuit court's denial of Passailaigue's motion to alter or amend the circuit court's order granting motions for summary judgment was also a cursory form order, written as follows:

> This matter comes before me upon Motion for to Alter/Amend Order Granting Defendants' Motions for Summary Judgment, filed September 29, 2014 by Plaintiff, Virgil "Ray" Passailaigue, by and through his counsel. After fully considering said Motion, this Court finds no need for oral arguments in this matter and, therefore, the Motion is DENIED. AND IT IS SO ORDERED!

(R. p. 12). A plain reading of the above orders evidences their lack of findings of fact and conclusions of law.

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[1] Appellant believes it is better practice to include in the record on appeal all information which will assist the Court of Appeals of South Carolina in reaching a decision and thus intends to submit the same.

Thus, because the circuit court failed to articulate relevant findings and conclusions of law in its order granting Respondents' motions for summary judgment, despite the *Woodson* court's advice that the better practice was to include the same, this matter must be vacated and remanded for a written order identifying the facts and accompanying legal analysis upon which the circuit court relied.

II. THE COURT MISTAKENLY HELD THERE WAS NO ISSUE OF MATERIAL FACT AND IMPROPERLY GRANTED SUMMARY JUDGMENT

In order to grant a motion for summary judgment, the court must be convinced that the moving party has been able to "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) S.C.R. Civ. P. Accordingly, to prevail on a motion for summary judgment, the movant must demonstrate that (1) there is no genuine issue as to any material fact; and (2) he is entitled to judgment as a matter of law. As to the first of these determinations, a fact is deemed "material" if proof of its existence or nonexistence would affect disposition of the case under applicable law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505 (1986). In passing upon a motion for summary judgment, the Court must view the facts in a light most favorable to the non-moving party and to construe ail inferences against the movant. United State v. Diebold, 369 U.S. 654, 82 S. Ct. 993 (1962). The judge is not to weigh the evidence, but rather to determine if there is a genuine issue of fact for trial. Anderson, 477 U.S. 242, 249 (1986).

a. There is a Genuine Issue of Material Fact as to the Definition of "Net Proceeds" in the Promissory Note

An action to construe a written contract is an action at law. Southern Atlantic Financial Services, Inc. v. Middleton, 349 S.C. 77, 80, 662 S.E.2d 482, 484 (2002). In construing a contract, the primary objective is to ascertain and give effect to the intention of the parties. Id. at

80, 662 S.E.2d 482, 484. The parties' intention must, in the first instance, be derived from the language of the contract. Id. If its language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and the contract's language determines the instrument's force and effect. Id. A contract is ambiguous when its terms are reasonably susceptible to more than one interpretation. Id. at 81, 662, S.E.2d 482, 484. An ambiguous contract is capable of being understood by the parties as having more than a single meaning. See Carolina Ceramics, Inc. v. Carolina Pipeline Co., 251 S.C. 151, 156, 161 S.E.2d 179, 180 (1968).

The promissory note in this matter states in relevant part as follows:

> FOR VALUE RECEIVED, THORNWELL PARTENERS, LLC, a South Carolina limited liability company (the "Borrower"), promises to pay to the order of Passailaigue Homes, a South Carolina Corporation (the "Lender") the principal sum of $130,000.00. This sum is to be repaid in its entirety from the net proceeds from the future sales of the property known as the Dassinger tract and consisting of two parcel further identified as Lot A 17 acres TMS No. 395-00-00-001 and Lot B 28.15 acres TMS No. 395-00-00-003, Charleston County, South Carolina.

(R. pp. 649-54). The term "net proceeds" is undefined in the above section of the promissory note and is not defined anywhere in the remainder of the promissory note. Thus, it follows that the term "net proceeds" is an ambiguous term.

Regarding Respondents' arguments as to the term "net proceeds" during the hearing on their motions for summary judgment, Respondents argued:

> [B]ut it comes down to this simple fact, there was a one term joint venture, and LLC created to develop property on the Commerce Parkway in north [sic] Charleston. It came at a [sic] inauspicious time in our economy, and there was a lot of struggling to get through and finish it and pay off the bank loans and whatnot. We filed a motion for summary judgment because one of the parties to this action, Virgil Passailaigue, the plaintiff, received a note and that note called for the payment of $130,000-dollars. And if you read the note it says from the net proceeds of future sales. Our position is that there have been no net proceeds.

(R. p. 480, line 18 – p. 481, line 5).

Respondents go on to explain their interpretation and definition of "net proceeds" as follows:

> [Y]ou'll have to determine what net proceeds are, but everything I've seen in the dictionary is net proceeds means what you walk away with after you pay the costs and expenses of transaction. And that's where we get to and the bottom line.

(R. p. 481, lines 13-18).

However, Passailaigue argued that there is a genuine issue of material fact that needs to be resolved by a trier of fact as to the definition of "net proceeds":

> [Respondents] say[] that net is in the note, that net proceeds is discussed in the note, but proceeds or net isn't defined in the note. Net can have several meanings if it is not defined. Net proceeds can be net proceeds above the line accounting. Net proceeds can be net proceeds below the line accounting. It can have several meanings. The fact that the term net isn't defined in the note show that there's, there's a huge questions of fact as to what the parties thought that net proceeds meant. My client is of the position that net proceeds is, that property sold whether or not there's a profit made at the end, he's still entitled to his –

(R. p. 482, line 22 – p. 483, line 10).

In accounting, the "line" refers to gross profit. Above the line on an income statement consists of sales, costs of goods sold and costs of sale. Below the line items, or items subtracted from the gross profit, are operating expenses, interest, and taxes. Here, Respondents' position is that they lost money on the transaction and thus are not obligated to pay Appellant. However, "net proceeds" is undefined in the promissory note and open for interpretation. As argued by Appellant, net proceeds can apply to above the line accounting or below the line accounting. There can be a situation where nothing remains in the net profit below the line, yet there was a

gross profit. If there is a gross profit, nothing in the promissory note prohibits Passailaigue from enforcing the promissory note and unconditional guarantees.

Further evidencing Plaintiff's understanding as to the meaning of "net proceeds", Passailaigue testified at his deposition as follows:

> Q. Exhibit 1 and Exhibit 2. All right. Now, you'll see the term net proceeds written, is that correct? This note is payable --
>
> A. On 1 or 2?
>
> Q. On both of them. Either one.
>
> A. Net proceeds. Yes, I see that. Yes.
>
> Q. Net proceeds from what?
>
> A. From the future sales of the property known as the Dassinger tract.
>
> Q. All right. So what does net proceeds mean to you?
>
> A. When they sell it.
>
> Q. When they sell it. All right.
>
> A. Then they're due to be – they're due to pay the note.
>
> Q. All right. Net proceeds. What does the word net mean to you?
>
> A. Whether it be a negative net or a plus net, it's from the proceeds, the net proceeds. That's what it means to me.

(R. p. 261, line 15 – p. 262, line 12).

Passailaigue understood net proceeds to be the amount remaining after all costs and expenses are deducted after the sale of an asset including the money he was owed, whether there is a loss on the sale or not. It is reasonable to believe that all parties understood "net proceeds" the same way as evidenced by the signing of unconditional guarantees. (R. pp. 655-63). As

demonstrated below, Respondent Hollen had a different understanding of the term "net proceeds."

> Q. Can you be – you're welcome to refer to any documents as you might need. Can you be specific as to what you claim might be a flaw to the document?
>
> A. The -- the first thing is that the document specifically states that the sum of money is to be repaid from the net proceeds of any future sale. To the best of my knowledge, there never were any.

(R. p. 108, lines 16-24).

Hollen arguably understood "net proceeds" to be the amount after all costs and expenses are deducted after the sale of an asset only when there is a net gain on the sale. Respondent Saad appears to have a similar understanding as to the meaning of "net proceeds" as Hollen:

> Q. Can you tell me, were there any net proceeds of the sale of the land in question?
>
> A. You mean between the two of us or three of us of what?
>
> Mr. Richter: She means did you really lose that 300 dollars that you --
>
> A. Oh, absolutely. I got a check for 300 dollars less than I had in it; and I assume that Henry did as well.

(R. p. 241, line 21 – p. 242, line 4).

Given the above, there is an ambiguity in the promissory note as to the definition of "net proceeds." The definition of net proceeds is a material fact, one in which there is question. The question needs to be decided by a trier of fact. Thus it was improper for the circuit court to grant Respondents' Motions for Summary Judgment. (R. p. 11). It appears from a reading of the transcript that the circuit court granted summary judgment to the Respondents while construing this factual inference in favor of the Respondents rather than Appellant.

b. There is a Genuine Issue of Material Fact as to Which Promissory Note Controls

On or about November 7, 2008, Appellant and Respondents executed two similar, but different, promissory notes for the sum of $130,000.00. (R. pp. 649-51, 652-54). The first copy of the promissory note states, "[t]his sum is to be repaid in its entirety from the net proceeds from the future sales of the property known as the Dassinger Tract. . ." (R. p. 649-51). The word "net" was hand –written into the first copy of the promissory note and **not** initialed. The second copy of the promissory note contains the same obligation to pay, however, the word "net" was typed into the promissory note. (R. p. 652-54). Additionally, the second copy of the note states, "The loan period is to be 24 months. The lender grants the irrevocable [struck] right to one extension of 24 months, if property remains unsold." (R. pp. 652-54).

It is question of fact as to which copy of the aforementioned promissory note is at issue in this matter. The Respondents have been unable to identify which promissory note preceded the other.

Respondent Hollen testified in his deposition that he was unsure whether one copy of the subject promissory note was an earlier or draft version of the second copy of the promissory note. Respondent Hollen testified in relevant part:

> Q. Mr. Hollen, do you see what's been marked as Plaintiff's Exhibit No. 1 to this deposition?
>
> A. I do.
>
> . . .
>
> Q. Now, is this exhibit, Plaintiff's Exhibit No. 1, is this the note which is the subject of this lawsuit?
>
> MR. BARKER: Object to form.
>
> Q. To the best of your knowledge?

A. To the best of my knowledge.

Q. Okay. Any I'd like to know [sic] show you what has been marked as Plaintiff's Exhibit No. 2.

. . .

Q. Okay. Do you recall whether two was a first draft or first round of No. 1 and was succeeded by No. 1 as being the operative notice in this transaction?

A. Do I know what for sure? No.

Q. Well, if you don't know --

A. It appears to be, yes.

(R. p. 89, lines 9-11, p. 91, lines 5-11, R. p. 93, lines 7-13).

Further, Respondent Kuznik also appeared unsure as to whether the first note was a draft or earlier version of the second note. Respondent Kuznik testified:

Q. So I asked Mr. Hollen, and I'll ask you the same thing. Wasn't two the earlier version of No. 1 which became the final version of -- of that 130,000 dollar note?

Mr. Cooper: Objection to form.

Mr. Bleecker: Objection too.

A. I -- I wouldn't know.

(R. p. 177, lines 11-17).

Appellant expects Respondents to direct this Court to its decision in Moshtaghi v. The Citadel, 314 S.C. 316, 443 S.E.2d 915 (Ct. App. 1994) or its progeny for the purpose of arguing that two or more contracts entered into by the same parties are to be construed as one contract and considered as a whole. Moshtaghi v. The Citadel, 314 S.C. 316, 321, 443 S.E.2d 915, 918 (Ct. App. 1994). However, a plain reading of the promissory notes in this matter evidences an

ambiguity as the first copy contains the term "net" handwritten but uninitialed by the parties, whereas "net" is typed into the second copy of the promissory note. (R. pp. 649-51, 652-54).

Thus, based on the sworn testimony of two of the Respondents, there is a question of fact as to whether the first note was an earlier version of the second note and whether the handwriting was intended and/or effective. This question must be resolved by a trier of fact.

The circuit court improperly granted Respondents' Motions for Summary Judgment by ignoring questions of fact as well as construing the facts before it in a light more favorable to Respondents than Appellant. For these reasons, the Order Granting Respondents' Motions for Summary Judgment must be reversed and remanded.

c. There is a Genuine Issue of Material Fact as to Whether Respondents Met Their Obligations Under the Promissory Note and Unconditional Guarantees

Respondents Saad and Thornwell Partners, LLC argue that there were no "net proceeds" on the sale of the Dassinger Tract and thus Passailaigue is unable to recover the amount owed to him under the Promissory Note. However, Respondents' analysis is flawed for several reasons as explained more fully below.

In his deposition, Saad testified that both he and Kuznik ultimately sold the Dassinger Tracts. Saad testified in relevant part as follows:

> Q. All right. What is happening with the property that was involved in the transaction we're talking about?
>
> A. Well, I've sold my piece, which was -- well, back up a second.
>
> We -- we all owned the land together. Ray got out at some point. Paul got out at some point. Henry and I ended up with the land. We struggled with it for four or five years. I sold -- ultimately sold mine for about 300,000 dollars less than I had in it; and I think Henry did the same, sold his about the same time or shortly thereafter.

(R. p. 204, lines 7-19).

. . .

Q. How about the land? What has happened with it?

A. Well, as I said, we sold both tracts.

Q. Who did you sell yours to?

A. Trucking company. Averitt Trucking.

Q. Okay. Do you know who Mr. Kuznik sold his part to?

A. No, I don't know.

(R. p. 205, lines 17-24).

In addition, Henry Kuznik testified as to the sale of the portion of the Dassinger Tract he acquired as follows:

> Q. What happened to the land that was the subject of this transaction?
>
> A. I mean, the – the bank being pressuring us to pay that loan off, and they said they would foreclose.
>
> Q. So is your answer that the land was foreclosed upon?
>
> A. No. But they would foreclose if we don't pay at least couple million dollars down, and I haven't had the money; and Mr. Saad didn't have the money. So I went and mortgaged two dealerships, which I had to get flood insurance, appraisals, and was lot of cost involved; and paid then the 2 million dollars to the bank.
>
> Q. And did you, then, end up owning the property?
>
> A. No, sir. I only -- I been on the original mortgage on it, and what we did was split the property. The Highway Department took approximately 5 --5 -- between 5 and 6 acres because the right-of-way of the road. We didn't get anything paid for it. Zero.
>
> Q. The Highway Department took the property and did not pay you for it?

A. Right. They did not pay us for it, and the [sic] they more or less said the benefits exceed the damages. And so we, then, split up the property. I took the 21 acres; and Mr. Saad took the 16 acres, I mean. But prior to it we paid 400,000 dollars to the bank to release 3 acres, which we built a building on it.

So then was just 16 acres left on the one side and approximately 21 on the other, and so I stayed on -- on -- on both parcels. My name was on it, and so then we -- we had negotiating for a long time. We finally sold both parcels; but we had to invest the infrastructure, which was very close to a million dollars plus all the interest we pad. So we both lost money.

Q. When you say "we both," you're referring to yourself and who else?

A. Haad.

Q. Paul Hollen?

A. No, no.

Q. Mr. Saad?

A. Saad.

Q. You call him Haad?

A. Yeah.

(R. p. 181, line 1 – p. 182, line 23).

Thus, as is evidenced by both Saad and Kuznik's testimony, each part of the Dassinger Tract they controlled was eventually sold. Both parties apparently received less from these sales as they would have liked or originally intended.

Although each of the Respondents base their motion for summary judgment at least partially on the "net proceeds" argument, the promissory note is not the only document involved in this matter. The unconditional guarantees signed by Kuznik, Saad, and Hollen, state in relevant part as follows:

> NOW, THEREFORE, in consideration of the premises and of other good and valuable consideration, Guarantor (jointly and severally, if more than one) hereby absolutely and unconditionally guarantees to Lender and its successors and assigns the due and punctual payment of all principal, interest and any other amounts due or to become due whether by acceleration or otherwise, under the Note, or the Loan Agreement and the performance of any and all obligations of Borrower under the Loan Agreement, the Note, and all other documents executed by Borrower securing or relating to the Note (the Note, the Loan Agreement, and all such other documents are sometimes referred to collectively herein as the "Loan Documents"), and including all renewals, extensions and/or modifications thereof, plus all interest, costs and reasonable attorneys' fees of Lender (all of such liabilities and obligations of Borrower to Lender being hereinafter collectively termed "Obligations of Borrower").

(R. p. 655, 658, 661).

The unconditional guarantees go on to state that the, "Guarantee is and shall remain an unconditional and continuing guaranty of payment[.]" Finally, the Unconditional Guarantees lists the following, among others, as "Events of Default":

> a) Failure of Guarantor to pay its obligations hereunder immediately upon demand after a default in the payment of the Obligations of Borrower or in the payment or performance of any other obligations or of any covenant, warranty or liability contained or referred to herein, or contained or referred to in the Loan Agreement, the Mortgage or any other Loan Document; or
>
> b) Any warranty, representation or statement made or furnished to Lender by or on behalf of Guarantor in connection with the Guarantee Agreement or to induce Lender to extend credit or otherwise deal with either Borrower or Guarantor proving to have been false in any material respect when made or finished; or
>
> e) Material adverse change in the financial position of Guarantor (unless Lender, in its reasonable discretion, accepts a substitute guarantor).

(R. pp. 656-57, 659-60, 662-63).

Respondents Hollen, Saad, and Kuznik each identified their signatures on the subject unconditional guarantees. (R. p. 93, line 24 – p. 92, line 12) (R. p. 210, lines 20-24) (R. p. 180, lines 5-9), Saad Dep. 21:20-24, Kuznik Dep. 15:5-9. As mentioned *supra*, these same Defendants also identified each of their signatures on the promissory note.

Summary judgment was inappropriate at the time the circuit court granted Respondents' motions, as there remained questions of fact as to whether Respondents had satisfied their obligations under the promissory note and the unconditional guarantees. Specifically, there remain questions of fact as to whether Respondents represented to Appellant that the promissory note was given to him in exchange for his membership interest in Thornwell Partners, LLC. Appellant testified as to the same as follows:

> Q. And tell us about how that figure - - how you got that figure, the 130,000 dollars. Why do you claim that figure?
>
> A. I was approached by Mr. Hollen because we were - - as a partnership we were running out of money and we needed to get another loan set up from a bank out of Columbia I was told.
>
> Q. When you say we, you mean Thornwell Partners?
>
> A. Yes. And what I was told was that because of my financial instability that I was a detriment and they could not move forward getting a loan to have more money to pay expenses. And so I said, just - -

(R. p. 277, line 21 – p. 278, line 9).

. . .

> Q. Okay. And so you were told you were a financial liability to Thornwell?
>
> A. That we could not borrow money if I was involved.

(R. p. 278, lines 19-22).

. . .

> Q. And you received all your money and now you're claiming 130,000 dollars from the entity. Explain that.
>
> A. The 130,000 dollars was to get me out of the partnership so they could move forward with the loan and I - - that's what it was for.

(R. p. 280, lines 8-13).

If the representations made to Appellant regarding the need for him to exit the LLC as well as representations as to the purchase of Appellant's membership were false, then the same would be considered an "Event of Default" under the unconditional guarantee and Respondents would be obligated to perform under the requirements of the promissory note and unconditional guarantee. It appears from the overall testimony of Respondents, that they deny remembering the conversations and agreements the same way as Plaintiff. Thus, this creates a significant question to be determined by the trier of fact.

In addition, the Unconditional Guarantees state that a "material adverse change in the financial position of Guarantor" would be considered an "Event of Default" as well. (R. pp. 655-63).

It appears from some of the Respondents' testimony that there has been a material adverse change in their financial position, none of which is the fault of Appellant, thus triggering an "Event of Default." Specifically, Respondents claim that because they suffered a financial loss on the Dassinger Tracts, they should not have had to pay Appellant. Respondents not receiving what they had anticipated in no way should influence the payment due Appellant.

Because the aforementioned questions of fact remain to be determined by the circuit court, this matter should be remanded.

III. APPELLANT IS A THIRD PARTY BENEFICIARY OF THE PROMISSORY NOTE AND UNCONDITIONAL GUARANTEES AND THUS IN A POSITION TO ENFORCE THE SAME

In their motions for summary judgment, Respondents argue that Appellant was not in privity of contract with Respondents and that he is not a third party beneficiary under the promissory note, thus unable to enforce the promissory note. (R. pp. 490-93, 494-499, 500-504).

A contract between two persons for the benefit of a third person can be enforced by the third person, even if he or she is not named in the contract. See Svenningsen v. Knight, 286 S.C. 299, 33 S.E.2d 78 (Ct. App. 1985). Third person may enforce the contract if the contracting parties intended to create a direct, rather than an incidental or consequential, benefit to the third person. See Bob Hammond Const. Co., Inc. v. Banks Const. Co., 312 S.C. 422, 440 S.E.2d 890 (Ct. App. 1994), reh'g denied, (Mar. 8, 1994). "A third-party beneficiary is a party that the contracting parties intend to directly benefit." Helms Realty, Inc. v. Gibson-Wall Co., 363 S.C. 334, 340, 611 S.E.2d 485, 488 (2005) (citing Touchberry v. City of Florence, 295 S.C. 47, 48-49, 367 S.E.2d 149, 150 (1988)). Traditional principles of state law allow contracts to be enforced by or against nonparties to contract through assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppels. See Arthur Anderson LLP v. Carlisle, 556 U.S. 624, 631, 129 S. Ct. 1896, 1902 (2009). Generally, third person not in privity of contract with contracting parties has no right to enforce contract; however, when contract is made for benefit of third person, that person may enforce contract if contracting parties intended to create direct, rather than incidental or consequential, benefit to such third person. See R.J. Griffin & Co. v. Beach Club II Homeowners Ass'n, 384 F.3d 157, 162 (4th Cir. 2004).

Appellant's deposition creates a question of fact as to whether he was a third-party beneficiary under the promissory note. The testimony below demonstrates that Appellant was to benefit directly from the promissory note and unconditional guarantees.

> Q. You were paid -- you were paid the full amount of the --
>
> A. 1,022,900.
>
> Q. 1,022, 900. And that payment if I'm correct, I think that payment was on November 7 –
>
> A. Correct.
>
> Q. -- 2008?
>
> A. That is correct.
>
> Q. Okay. But on that date why would you have any further membership if you were paid the full amount?
>
> A. It was for the assignment of the contract. And in order to get me out of the partnership 100 percent to not have any claims or anything, I accepted. We talked at the Harbour Club, we went to the Harbour Club, the four of us, and sat down and talked and they laid it out for me. And then subsequently Mr. Hollen by e-mail sent me over the personal guarantee and the promissory note for the 130,000 dollars. And if memory serves me correct, this 262,900 dollars was my final installment on 1,022,900.
>
> Q. That's correct. Okay.
>
> A. And we talked about it at the Harbour -- we talked about it was at the Harbour Club that in order for me to get out of the partnership 100 percent, I would -- they didn't have 130,000 dollars between them and we talked about it and they agreed that they would pay me 130,000 dollars. And that e-mail came from Mr. Hollen to **me** saying here is your personal guarantee which I required and here's your note signed by everyone. That's where it came from.
>
> Q. Now, when you went to the Harbour Club, I'm assuming that you're talking about Mr. Saad was present?
>
> A. Yes, sir, he was.

Q. And Mr. Hollen was present?

A. He was there and Mr. Kuznik.

(R. p. 281, line 14 – p. 283, line 2).

Despite the argument made in Respondents' motion for summary judgment that Passailaigue is not a third-party beneficiary, Appellant's testimony demonstrates otherwise as it is apparent Respondents sat down with Appellant and drafted a deal to purchase Appellant's membership interest in Thornwell Partners, LLC. The above testimony at least creates a question of fact as to whether Respondents intended for Appellant to benefit from the agreement that he part with his membership interest in Thornwell Partners, LLC.

Because the record demonstrates a question of fact as to whether Passailaigue was a third-party beneficiary to the promissory note and unconditional guarantees, the circuit court should have denied Respondents' motions for summary judgment.

CONCLUSION

For the foregoing reasons, the order granting summary judgment in favor of the Respondents should be reversed.

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Dated: July 1, 2015
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2013-CP-10-1647
Appellate Case No. 2015-000044

Virgil "Ray" Passailaigue — Appellant,

v.

Henry Kuznik, Alfred L. Saad, III, Paul D. Hollen, III, and Thornwell Partners, LLC — Respondents,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the Final Brief of the Appellant Complies with Rule 211(b) of the South Carolina Appellate Court Rules.

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PROOF OF SERVICE

I certify that I have served the Final Brief of Appellant by depositing a copy of it in the United State Mail, postage prepaid, on 7/1/15, addressed to the attorneys of record, as follows:

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Re: Virgil Passailaigue v. Henry Kuznik, et al.
Appellate Case No.: 2015-000044

Dear Madam Clerk,

Enclosed for filing please find the original, unbound Final Brief of Appellant and 15 bound copies in the above referenced matter. Also enclosed please find the Proof of Service, Certificate of Counsel, and on additional copy of the Final Brief of Appellant to be clocked in and returned to our office in the self-addresses, stamped envelope enclosed. Please do not hesitate to contact our office with any questions or concerns.

By copy of this letter to attorneys for the Respondents, I am serving them with a copy of the same.

With kindest regards, I am,

Very truly yours,

Patrick T. Napolski

Enclosures

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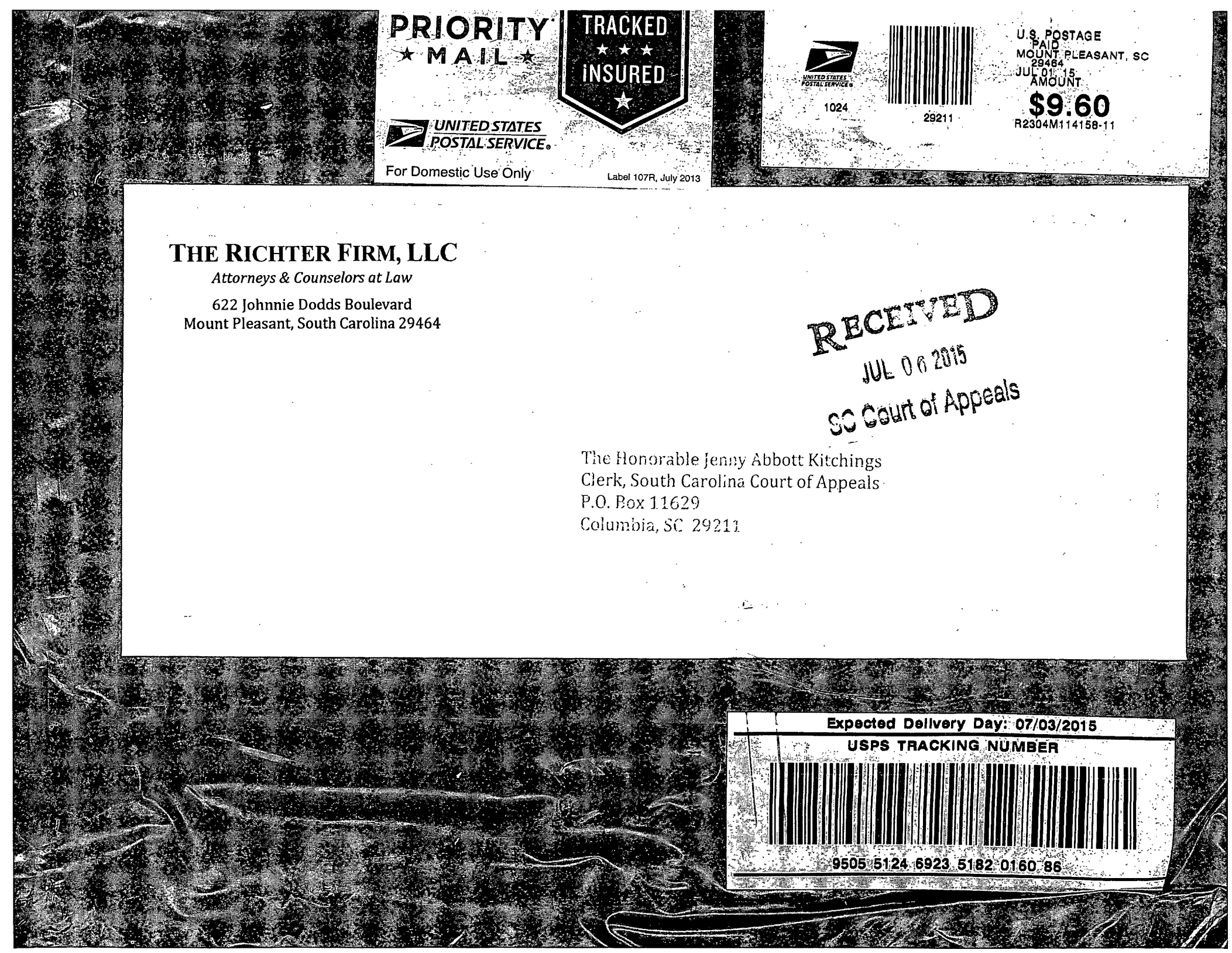

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