THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master In Equity
Case No 2013-CP-10-1404

Appellate Case No. 2016-000910

Ten State Street, LLP, Appellant,

v.

William E. Danielson and Carol Danielson, Respondents.

William E. Danielson and Carol Danielson, Respondents,

v.

Timothy Scrantom, Appellant.

INITIAL BRIEF OF APPELLANT TEN STATE STREET, LLP

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STATEMENT OF CASE

Appellant Ten State Street, LLP ("Ten State" or "Appellant") files this appeal against the Order of the Trial Court where all of Appellant's claims were denied and the Respondent's counterclaim was granted in the amount of $8,000.00. A trial was held over two days, January 13 and February 10, 2016. The parties and their agents and employees testified at trial, and substantial documentary evidence was submitted. A Transcript of these proceedings was made. ("Record on Appeal" or "T"). The Trial Court ruled on March 18, 2016 in a written Order and Judgment consisting of 17 pages. ("Order" or "O"). Judgement was ordered in favor of the Respondents in the amount of $8,000.00. This is an Appeal from that Order and Judgment.

FACTS

The following facts are uncontroverted and are supported by citations set forth in the Argument.

In mid-April, 2012, Ten State, along with Respondents Bill and Carol Danielson, signed a Purchase Option Lease Agreement ("Agreement," Exhibit 7A) under which Ten State agreed to lease property at 2302 Atlantic Avenue, Sullivan's Island ("Property") for three years with an option to purchase it at any time. For the two years before the Agreement was signed, Scrantom had been leasing the main house on the Property ("Main House") under a standard residential lease ("Original Lease").

The parties' testimony concerning the genesis of the Agreement was inconsistent. Bill Danielson claimed that Scrantom "chased him" over a period of years to enter into a lease-purchase agreement. Scrantom's testimony was the opposite of Bill Danielson's, but Scrantom's testimony

was supported by numerous e-mails introduced by him at trial that clearly supported Scrantom's position.

After almost two months of negotiations, in April 2012, the parties agreed that Ten State would enter into a new lease agreement for the Main House containing an option to buy the entire Property, including the Cottage, which Respondents would continue to lease to others. Scrantom and Wilkes both testified that it was their intent for Appellant to rent the Main House to third parties during the summer months. Scrantom testified that renting the Main House out during the three summer months could produce substantial rental income during the summer. Scrantom testified that renovations could be completed before the summer, 2013. Neither of the Respondents refuted this testimony or challenged the potential rental income potential.

Both of the Respondents and Scrantom negotiated and contributed to the drafting of the Agreement. Bill Danielson testified that Scrantom and his lawyer prepared the first draft of the Agreement, but there was substantial evidence and admissions that all of the parties negotiated and contributed to what became the final draft of the Agreement that was executed.

Scrantom testified that Ten State wanted to purchase the Property for investment and business (rental) purposes. Scrantom testified that Ten State had access to the money to be able to make the necessary improvements to the Main House and that Ten State had paid architects, engineers, contractors and others, and had obtained the necessary permits, to begin the renovation when the Agreement was terminated in March-April, 2013. Wilkes' testimony confirmed these assertions.

Scrantom testified at trial that Bill Danielson told him on many occasions that the first mortgage loan on the Property was assumable. That mortgage loan, managed by Select Servicing, Inc. ("Select") as a servicing company for the actual lender, was in the principal amount of

$1,499,000 and was a very low interest rate-"interest only" loan ("Select Loan"). The value of the Property was approximately $2.1 million, so the debt comprised about 75% of the value of the Property. Scrantom testified that the assumability of the low-interest-only Select Loan was a crucial part of the decision for Ten State to enter into the Agreement. He testified it was "a valuable asset" that he considered Appellant was acquiring through the Agreement.

The Select Loan was owed by Mrs. Danielson, alone, in her name. Mrs. Danielson testified that she did not know whether the Select Loan was assumable, but thought it probably was. Mr. Danielson testified that the Select Loan was assumable. Regardless of whether the Select Loan was in fact assumable,[1] it would appear that Scrantom and Ten State believed it was and that the Respondents believed the same.

Scrantom and Wilkes (also an employee of Appellant) worked for ten months on the planned renovation of the Main House. In mid-February, 2013, eleven months into the three-year Agreement, Scrantom, as the manager of Appellant, informed Bill Danielson that Appellant wanted to immediately proceed with the closing of the purchase of the Property pursuant to the option in the Agreement.

Scrantom testified that he simultaneously notified the Respondents that Appellant wanted to move forward with the immediate assumption of the Select Loan, as contemplated by Section 19.07 the Agreement. Wilkes also testified that she attended a conference call with Scrantom and the Danielsons where the assumption of that loan and mortgage was discussed. Scrantom testified that he fully expected the Respondents to proceed to use their best efforts to bring about the assumption of the Select Loan by Respondents under the Agreement, which provides:

[1] The Mortgage Rider for the Select Loan Mortgage provides that the Mortgage can be readily assumed by another if the Mortgagors [Danielsons] provide information about the assignee (in this case, Ten State) and the lender determines that the collateral [the Property] will not be impaired.

> **19.07 Owner Best Efforts to Procure Assumption of Mortgages by Buyer**. Owner agrees to use its best efforts, upon request by Buyer, to obtain the consent of the Mortgage holders to the assumption of the Mortgage Debt by Buyer under the terms of the existing Mortgage Debt instruments.

It is clear that the request was made to the Respondents to move forward with the assumption. It is not only axiomatic, but clear from the terms of the Select Loan documents, that it was up to Carol Danielson to pursue the assumption for Appellant since she was the one with the contractual relationship with Select. The terms of the Mortgage Rider provides the borrower, Carol Danielson, was responsible for providing information to Select regarding the assumption.

Carol Danielson testified that, even though she was aware of Ten State's intention to assume the Select Loan, she took no action whatsoever to bring it about. (It is noteworthy that Carol Danielson is the sole obligor under the Mortgages, but she professed to be totally ignorant of any dealings with the Mortgagees or their scores of communications to her. Indeed, Carol Danielson's deposition testimony as to her understanding of the status of the Select Loan was identical to Scrantom's—that a small amount may have been in arrears, but it was not in default.)

Bill Danielson testified he made one phone call to Select concerning the requested assumption of the Select Loan, but it was unclear whether that call was made before or after Scrantom made the assumption request. Bill Danielson admitted he submitted nothing to Select concerning the assumption, and that he had no writings to establish the existence or substance of the phone call. Conversely, Bill Danielson testified Scrantom was responsible for the assumption process and he did not submit any documents to Select to bring about the assumption. Danielson later testified that within a day or two of notifying Danielson Scrantom wanted to proceed with the assumption that he (Scrantom) had arranged a "mortgage loan on the property" for the Option price and did not need to assume the Select Loan at all. It is more than nuance in this context that Mr. Danielson testified on direct examination several times that the phone call he professes to have

made to Select was to ask whether Mr. Scrantom, rather than Appellant, could assume the Select Loan. His duty, though, under the Agreement, was to pursue approval by Select Loan of an assumption by Appellant. Scrantom testified unequivocally that he never told Danielson to call off the assumption process and that it was absurd to think he could have arranged an alternative mortgage loan within those two days.

Scrantom's testimony about the assumption was that as Ten State was working toward closing the purchase, on about February 21, 2013, Bill Danielson told him that Danielson had been in contact with the Mortgage companies and neither Mortgage company would permit an assumption at all. Danielson indicated Select, with whom he had spoken many times for years, had denied any assumption of their loan to Carol Danielson. Danielson then told Scrantom "they said you will have to apply for a new loan with them."[2]

In short, Scrantom testified that within two days after Scrantom asked Bill Danielson (from the Lender's standpoint, Carol Danielson's agent) to pursue assumption of the Mortgages, the purchase by Appellant began to fall apart with Bill Danielson's news that the Select Loan was not assumable.

Appellant rescinded the Agreement and subsequently initiated suit against Respondents for equitable relief, including mistake, unjust enrichment and rescission. In discovery, Appellant learned (through a subpoena to Select) that Respondents were in default of the Select Loan even before the Agreement was signed. This was unknown to Appellant until that time. The complaint was amended to add claims for breach of contract.

[2] According to Bill Danielson's testimony, Select is only a loan servicing company, so the Court would doubt they would entertain, much less request, an application by Ten State for a new mortgage with them.

ARGUMENT

I. STANDARD OF REVIEW

The issues alleged in the Amended Complaint include claims for equitable relief and for legal relief, including breach of contract. In an action in equity, tried by a master, the appellate court has jurisdiction to find facts in accordance with its views of the preponderance of the evidence. *Fox v. Moultrie,* 379 S.C. 609, 613, 666 S.E.2d 915, 917 (2008). This Court should review the trial court's legal conclusions *de novo*. See *Simmons v. Simmons*, 392 S.C. 412, 414 (2011) and *Lewis v. Lewis* (2011). In appeals from decisions in equity, an appellate court reviews factual and legal issues de novo. *Simmons v. Simmons,* 392 S.C. 412, 414, 709 S.E.2d 666, 667 (2011). "De novo review permits appellate court fact-finding, notwithstanding the presence of evidence supporting the trial court's findings." *Lewis v. Lewis,* 392 S.C. 381, 390, 709 S.E.2d 650, 654-55 (2011). However, de novo review does not relieve an appellant of his burden to "demonstrate error in the [family] court's findings of fact." *Id.* "Consequently, the family court's factual findings will be affirmed unless appellant satisfies this court that the preponderance of the evidence is against the finding of the court." *Id.* See *ZAN, LLC v. Ripley Cove, LLC*, 406 S.C. 404 (2013) (Real estate purchaser's action seeking damages and rescission of real estate purchase agreement was equitable action, not legal action; main purpose in instituting action was to rescind agreement.).

This Court has the authority to find facts in congruence with its own view of a preponderance of the evidence despite evidence supporting the trial court's findings. *Id.* Because the Trial Court's erroneous findings of fact informed its conclusions of law, they should be reviewed de novo. This is true notwithstanding that some of the alternative bases for relief sought are at law.

"An action for breach of contract seeking money damages is an action at law." *R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 430, 540 S.E.2d 113, 117 (2000); accord *Sterling Dev. Co. v. Collins,* 309 S.C. 237, 240, 421 S.E.2d 402, 404 (1992). "In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings.... The judge's findings are equivalent to a jury's findings in a law action." *Townes Assocs. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976); accord *Cohens v. Atkins*, 333 S.C. 345, 347, 509 S.E.2d 286, 288 (1998).

"When legal and equitable actions are maintained in one suit, each retains its own identity as legal or equitable for purposes of the applicable standard of review on appeal." *Corley v. Ott,* 326 S.C. 89, 92 n. 1, 485 S.E.2d 97, 99 n. 1 (1997). The reviewing court should "view the actions separately for the purpose of determining the appropriate standard of review." *Jordan v. Holt,* 362 S.C. 201, 205, 608 S.E.2d 129, 131 (2005). Similarly, the judge may grant a new trial if the verdict is inconsistent and reflects the jury's confusion. *Johnson v. Parker,* 279 S.C. 132, 303 S.E.2d 95 (1983). See also *Johnson v. Hoechst Celanese Corp.,* 317 S.C. 415, 453 S.E.2d 908 (Ct.App.1995). "Where mixed questions of fact and law are presented, the legal conclusions to be drawn are not entitled to the same deference." *Springs & Davenport, Inc.,* 385 S.C. at 325, 683 S.E.2d at 816. Finally, it is relevant that in interpreting contracts, parties are governed by their outward expressions and the court is not at liberty to consider their secret intentions. *Blakeley,* 266 S.C. at 73, 221 S.E.2d at 769; *accord Kable v. Simmons,* 217 S.C. 161, 166, 60 S.E.2d 79, 81 (1950).

II. WHETHER THE TRIAL COURT ERRED IN FINDING NUMEROUS MATERIAL FACTS AND CONCLUSIONS OF LAW THAT NOT ONLY WERE UNSUPPORTED BY EVIDENCE ADDUCED AT TRIAL, BUT WERE CONTRARY TO SOME OR ALL EVIDENCE ADDUCED AT TRIAL.

1. The Trial Court utterly confused the roles and identities of the parties, leading to numerous material errors in its Findings of Fact. The Trial Court was obviously confused about the respective roles and identities of the Appellant ("Buyer") and the "guarantor" under the Agreement and the roles of that Buyer and the "Borrower" under the applicable loan mortgage documents that lay at the heart of the Agreement. At the outset, in the Order the Court recognizes "Ten State Street, LLP (hereafter as "Buyer" or "Ten State") entered into the Agreement with the Owner, and Timothy D. Scrantom personally guaranteed the payments due under the Agreement." (Order, 1). Ten State Street, LLP IS the only Appellant in this case AND WAS THE ONLY Plaintiff at trial. Nevertheless, the Trial Court goes on in the Order to conflate Scrantom and Ten State Street, LLP even though there is no evidence whatsoever in the Trial record that Scrantom was a/the Appellant, that the Appellant and Scrantom are one and the same, or that the juridical personality of Ten State Street, LLP should be disregarded or attributed to Scrantom.

The following quotes from the Trial Court's Order are illustrative of its confusion between the Appellant, a South Carolina Limited Liability Partnership registered in 1996, and the third-party defendant in this case (underlining supplied for emphasis):

- "The Court finds the most significant fact in this case is that π [the Appellant] Scrantom found a home he preferred (200 Bank Street) and proceeded with the closing on that property." (O 14)
- "At the time Buyer entered the Agreement, Scrantom was not in a financial position to purchase the Property because of credit issues arising out of his recent divorce." (O2)
- "The Agreement provided Buyer with beneficial ownership while he lived in the home..." (O2)

- "Buyer agreed to keep the main house in good working order, at his cost." (O3)

- "The Agreement states that if the Buyer remained in the Property past the last day of the term of the Agreement, he would become a tenant at will and shall pay rent of $8,000 per month." (O7)

- "In February 2013, the Buyer notified the Danielsons that he wanted to accelerate the closing date and close in April 2013" (O4)

- "Then, only after a contract to purchase another house was finalized, did Scrantom attempt to rescind the Agreement." (O6)

- "Buyers' (*sic*) damage demand is for the return of all monies paid pursuant to the Agreement minus what he deems to be fair market rent." (O8)

- "At trial I limited the Appellant's damages claim to only those monies claimed owed that he paid to the Danielsons." (O15)

- "It provided the Buyer with beneficial ownership and use of the property during the time period the Buyer lived in the property." (O5)

- "To the extent that Buyer did not fully investigate the impact of the arrearage with the Lender, he proceeded at his own peril." (O15)

- "Additionally, since the Lender took no steps to foreclose on the property there is no harm to Scrantom as a result of the Danielsons (*sic*) continued arrearage." (O13)

- "The evidence does shows that he would only consider assuming the Note if the Lender actually renegotiated to allow for a lower interest rate. Regardless, it does not appear Mr. Scrantom moved forward on this process and cannot now claim a breach. (O12)

- "The Buyer negotiated and contracted for an option on the Property. He wanted beneficial ownership during the time period where he could live in the home and plan for a renovation project." (O13)

- "By his own testimony he [Scrantom] could not qualify for financing in 2012 due to his poor credit." (O13)

- "The Agreement allowed him to live in the house and move forward with the remodel prior to purchase." (O11)

- "He received what he bargained for – beneficial ownership of the property." (O12)

- "It appears he found a home he preferred (200 Bank Street) and proceeded with the closing on that property." (O14)

- "As such, it appears that the March 2015 (sic) would be the expiration period by which Scrantom would have to pay the interest carry. Here again, I find no breach." (O 14)

- "He is not entitled to recoup money paid pursuant to his option contract." (O15)

- "I conclude the Buyer was negligent in his failure to investigate the issues he is now relying upon for rescission." (O 15)

These near-continuous errors in Findings of Fact by the Trial Court are pervasive throughout the Order. They are material to the issues before the Trial Court, to wit: the witnesses for the Appellant, both individual employees of the Appellant, testified that the purpose of the acquisition of the Property pursuant to the Agreement was to develop it in large part for commercial rental purposes. (T. 62). One of the most central issues in the case was whether the Respondents used their "best efforts" to obtain the consent of one of the Mortgagees of the Property to an assumption of their mortgage loan by the Buyer (Ten State Street). ("The Agreement provides that the Danielsons will "use its best efforts" to obtain the consent of the Mortgage holders to the assumption of the Mortgage Debt by Buyer under the terms of the existing debt instruments." [O 12] "Appellant's claims for breach of contract and rescission are based on three primary issues: ... 2) The purported failure to take reasonable steps to allow the Appellant/Buyer to assume the applicable mortgage;...". (O 14) In light of this finding—that Ten State Street desired to assume the subject mortgage—it is a clear error in a material finding of fact by the Trial Court to hold that the Respondents met this duty by alleging that they attempted to bring about an assumption of the mortgage loan by Mr. Scrantom, personally. This was made clear to the Trial Court in the following colloquy where Mr. Scrantom was cross examined by Respondent's counsel:

A. Well, first I don't known (sic) why he was asking
for me to assume the mortgage. I wasn't going to

assume the mortgage.
Q. Did you know that Mr. Danielson called the servicer during the time period that we're talking about to talk to them about what needed to occur for you to be the transferee to assume the mortgage as outlined in that?
A. And I'm trying to say that I don't know why he would have asked for me to be because I'm not on the contract.
Q. Ten State Street?
A. Well, I don't consider they're one and the same.
Q. Excuse me.
A. So did he call and ask for me to assume, or did he call and ask for Ten State Street to assume it? That's a huge difference.
Q. All right. Ten State Street.
A. Well, which was it?
Q. Ten State Street? (T. p. 106, line 20 *et seq.*)

Nevertheless, the Trial Court found as fact that "Ten State Street is an entity controlled by Scrantom." (O 2) There is no testimony in the record to support such a finding, and no other evidence whatsoever was introduced at trial to support this contention, other than the Respondents' lawyer's own bald assertions in his closing argument.

2. The Trial Court made numerous other material errors in Findings of Fact that confused the roles of other key players in the transactions contemplated by the Agreement. The Trial Court's confusion lapped over into other similar errors as to the roles and responsibilities of key players under the Agreement—including the senior mortgage lender. In light of the purposes of the Agreement and the findings of the Trial Court supporting its conclusion that the Respondents did not breach the Agreement (see, *e.g.*, "The Court finds the most significant fact in this case is that π [the Appellant] Scrantom found a home he preferred (200 Bank Street) [to the Agreement Property])" these errors in Findings of Fact went to the heart of the Trial Court's Conclusions of Law. Several examples are illustrative (underlining supplied for emphasis):

- "Mr. Scrantom and his wife Leigh Wilkes Scrantom went over to view the home [200 Bank Street] on or about Friday, February 22, 2013."(O 5)

- "He testified that he always makes a payment (sic) and continues to communicate with the lender." (O 8).

- "The debt instruments provide the conditions outlined above requiring the Borrower (Buyer) (sic) to submit normal underwriting information to the Lender for its determination as to whether it would allow the assumption." (O 9)

- "To the extent that Buyer did not fully investigate the impact of the arrearage with the Lender, he proceeded at his own peril." (O 12)

- "The Buyer was either aware, or should have been aware, of the Lender's position related to the arrears." (O 13)

- "Furthermore, the rider quite clearly specifies that the Buyer would have to provide the necessary information so that the Lender could appropriately underwrite the loan." (O 13)

It is material that at all times relevant to the performance of the Agreement, Leigh Wilkes was not married to Scrantom, but she was an employee of Respondent Ten State Street. (T 150). They were married on December 13, 2013, almost eight months after the events alleged in the Amended Complaint. (T p. 137, L. 13-14). She was sworn in to testify in this case as "Leigh Ellen Wilkes" (T p. 135, L 3). There is no evidence in the record that her name is or ever was "Scrantom", as the Trial Court found in the Order. There is no evidence in any public record that her name is or was ever "Scrantom". Yet the Trial Court found that third party defendant Scrantom and "his wife Leigh Scrantom" found a house they "liked better" than the Property described in the Agreement and therefore the Respondents could not have breached the Agreement.

Equally relevant is the Trial Court's continuous conflation of "the Lender" and the "loan servicer" in its findings of fact and conclusions of law. The materiality of this distinction lies in the fact that in the Agreement the Appellant bargained for the right to assume a very low-interest mortgage loan on the Property that comprised the majority of the Property's value. The Court

found that the loan was assumable (O 14). Furthermore, the Court found that "Mr. Danielson made multiple enquiries with the Lender and provided information to the Lender in response to Mr. Scrantom's request [that Appellant Ten State Street be allowed to assume the Mortgage]." (O 9) Finally, the Trial Court concluded that it was up to the Buyer (Ten State Street) rather than the Borrower (Carol Danielson, in her sole name) to provide the relevant information to the Lender to approve the assumption. Based on these erroneous findings, the Court concluded that the Respondents met their duty under the Agreement to use their "best efforts" to bring about assumption of the mortgage by Ten State Street LLP.

In fact, the relevant portion of the Interest Rate Rider in the Mortgage Documents (quoted in full in the Order, page 8) clearly provides it is up to the Borrower (Carol Danielson, alone), not the Buyer (Ten State Street), to submit documents to the Lender; the latter would be illogical, since the Buyer has no contractual relationship with the Lender and could be said to interfere with the loan relationship if it had attempted to deal directly with the Lender. Carol Danielson testified she did nothing whatsoever to bring about the assumption. William Danielson testified he was in regular contact with the "loan servicer", but not the lender. There was no testimony at trial that either Defendant ever contacted the Lender itself in response to Ten State Street's request to assume the mortgage. Yet the Trial Court conflates "Scrantom" and "Ten State Street, LLP"; "Lender" and "loan servicer"; and "Buyer" and "Borrower" in reaching the flawed conclusion of law that the Respondents met their duty to use "best efforts" under the Agreement to bring about the assumption of this key mortgage loan and that, the "Scrantom family" found a house they liked better—a fact both Leigh Wilkes and Tim Scrantom vehemently denied at trial. In fact, there is no evidence in the trial transcript whatsoever that (i) either Defendant contacted the Lender about any assumption by anyone; (ii) the loan servicer was the same as the "Lender"; (iii) that anything

was submitted to anyone as contemplated by the Interest Rate rider as quoted in the Order; or (iv) any Defendant ever communicated with the Lender itself. Accordingly, the Trial Court's findings of fact and corresponding conclusions of law (see O, 13) that the Respondents met their duties to use "best efforts" to bring about assumption of the mortgage loan by Ten State Street LLP constitute material errors of both fact and law.[3] In fact, Ten State Street's position concerning the assumption of the loan was stated by Scrantom as follows:

> Q. Were you able to assume the mortgages?
> A. No.
> Q. Why not?
> A. I don't know.
> Q. What did Mr. Danielson say to you about it?
> A. He came back to me two or three days after that conference call that I talked about, and he said, You can't assume the mortgages. All you can do is make application for a new loan, which I have to tell you -- did I Cross-Examine him on that? No. I was just so completely flummoxed by it.
> Q. Did you expect that you were going to have to apply for a new loan with Select Portfolio Servicing?
> A. Absolutely not. No. I wanted this loan. This was an interest-only, low-interest loan that was a material asset in the deal I was trying to do. Now, did I expect I would have to give documentation? Sure.
>
> Q. Were you are asked for any documentation?
> A. No. He told me I couldn't assume it. He said, No can do.
> Q. Without getting any financial information at all?
> A. No. He never asked me. He told me it wasn't assumable. He didn't say give me an application, or here's an application, or here's what the mortgage company wants, or here's what they sent me to give

[3] Testimony for Ten State Street by both Mr. Scrantom and Ms. Wilkes was clear and regarding the assumption of the subject loan: Assumption of the low-interest loan was essential to Ten State Street's investments under the Agreement; Ten State Street requested that Carol Danielson communicate Ten State Street's desire to assume with the lender; Ten State Street was told that Defendant Danielson contacted the loan servicer who told him the loan was not assumable. This was a matter of days before third party defendant Scrantom, left with the reality of having to vacate the Property or pay another $50,000 to the Respondents, moved to purchase the 200 Bank Street property.

you or anything like that. He just said no. (T. p. 52-53, L. 22 *et seq.*)

It is worth mentioning the impact of the Trial Court's erroneous finding that "the Buyer was negligent in *his* failure to investigate the issues [relating to the assumability of the large mortgage loan on the Property]." (O 15). Relying on *King v. Oxford*, the Trial Court effectively concluded that the Appellant had a duty to circumvent the relationship between a borrower and its mortgagee and the mortgagee's agent (loan servicer) to contact the mortgager directly to verify the status of a loan even where, as here, the borrower warned the Appellant in writing not to do so. This cannot be a proper interpretation and application of the law of this State.

On the other hand, Defendant Danielson prevaricated about whether he ever contacted the loan servicer or the Lender itself about modification or assumption by Ten State Street or Scrantom. It seems clear he never mentioned either by name. It also appears that he probably could have brought about the very loan modification Scrantom suggested he attempt to pursue—the same modification the Trial Court says was "beyond the scope of the Agreement promises concerning assumption.

> Q. Did you, in fact, make those calls to make the requests that he [Scrantom] asked you to do?
> A. Yes.
> Q. Did you inform him of the outcome of those calls?
> A. Yes.
> Q. Did you tell him what the bank said?
> A. Yes. I told him that they weren't prepared to modify the loan for him. (T. p. 269)

> Q. Why would they not allow him to modify it?
> A. They had no obligation to do so, and he wasn't the borrower.
> Q. You were the borrower. Could you have modified it?

A. Carol was the borrower, and yes, I think we could modify it. Well, I'm not sure I would have qualified. I'm not sure if financially at that time if we would have qualified to modify it.
Q. Did you ask?
A. I have asked on several occasions.
Q. Did you ask as a result of Mr. Scrantom's request?
A. I asked if they would be willing to modify it for the prospective buyer who wanted to assume it. (T. p. 310)

2. The Trial Court made numerous material Findings of Fact that were unsupported by any evidence adduced at Trial. These errors include:

- "The Agreement was drafted by Mr. Scrantom and his attorney, John B. Hagerty of Nelson Mullins Riley & Scarborough, LLP." (O 4)
- "Also during this time period a house came on the market located at 200 Bank Street on the harbor in the Old Village, Mount Pleasant SC." (O 5)
- "Mr. Scrantom and his wife Leigh Wilkes Scrantom went to view the home on or about Friday, February 22, 2013." (O 5)
- "Mr. Scrantom also testified that when he purchased the Old Village house in April 2013 he paid cash for the property using the same type of alternative financing Danielson testified he was told Scrantom had obtained to exercise the option." (O 12)

Based upon the finding that Mr. Scrantom drafted the Agreement, the Trial Court concluded it should be "viewed against" "Scrantom/Ten State Street, LLP". Leaving aside the Trial Court's mis-quoting of the law on this subject,[4] the transcript does not support this conclusion or other so-called "Conclusions of Law," including that "Timothy D. Scrantom is an expert in the

[4] Under "Applicable Law", the Order states: "A court will construe any doubt and ambiguities in an agreement between the drafter of the agreement." Mathis v. Brown & Brown of S.C., Inc., 389 S.C. 299, 698 S.E.2d 773 (2010). (O 10-11). The actual citation in Mathis is materially different: "Moreover, even if the language creates an ambiguity, a court will construe any doubts and ambiguities in an agreement against the drafter of the agreement. See Duncan v. Little, 384 S.C. 420, 425, 682 S.E.2d 788, 790 (2009)." It is evident that the Trial Court awkwardly sought to use this principle of contractual construction to find against the Appellant even though there was no corresponding finding that there was an ambiguity in the Agreement to begin with that would trigger its application.

field of business contracts." (O 11).[5] To the point, however, the *only* evidence adduced at trial as to the origins of the Agreement were Tim Scrantom's testimony, as follows:

> 3. A. Well, I asked John for a couple of forms.
> 4. Q. And those forms included a go-by on an option
> 5. purchase agreement, correct?
> 6. A. I'm not sure.
> 7. Q. Yes, sir. He e-mailed documentation, which
> 8. you used as the basis for creating this
> 9. option purchase agreement with Mr. Danielson, correct?
> 10. A. He e-mailed a couple of sample documents.
> 11. Q. And then he reviewed drafts of those
> 12. documents?
> 13. A. He reviewed one draft.
> 14. Q. On your behalf as an attorney at Nelson,
> 15. Mullins, Riley and Scarborough, correct?
> 16 A. Yes. (T. p. 87)

Since the Trial Court found that the "most significant fact in this case" related to "Mr. and Mrs. Scrantom's" decision they found a house they liked better, the court's other findings of fact regarding it are material, *viz.* "Also during this time period a house came on the market located at 200 Bank Street on the harbor in the Old Village, Mount Pleasant SC." There is no evidence in the transcript whatsoever for this finding of fact. And as a matter of fact, it is incorrect. This Court will accept under judicial notice the widely publicized public record that, in fact, the property at 200 Bank Street was listed for sale in January, 2013, a month before Ten State gave notice of its intent to close the purchase of the Property early under the Agreement.[6] Therefore, at a minimum, the so-called and supposed "Scrantom family" could have examined this alternative for purchase *even before* Ten State Street gave notice of its intent to close the purchase the Property.

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[5] The only evidence to support this finding of fact are pages from an old website for Mr. Scrantom's former law firm that were introduced as Exhibits. Nowhere is Mr. Scrantom's so-called "expertise in business contracts" mentioned.
[6] See Zillow.com, http://www.zillow.com/homedetails/200-Bank-St-Mt-Pleasant-SC-29464/10924371_zpid/, last visited on August 24, 2016.

As discussed above, the Trial Court's finding of fact that Mr. Scrantom and Leigh Wilkes were married (or that her name was "Scrantom") when they saw the house at 200 Bank Street is not only without evidence in the record, it is contrary to evidence in the record and patently false. Still, the erroneous finding was material to the Trial Court since it concluded that their desire to purchase the house for their residence (instead of as a business investment) was, to the Trial Court, the "most significant fact in this case." (O 14). This Court will no doubt consider their testimony, for example Ms. Wilkes' testimony, that the purchase of 200 Bank Street had nothing to do with Ten State Street rescinding the Agreement to purchase the Property at Atlantic Avenue (T 164):

1 Q. Is that because you wanted the Atlantic Avenue
2 property to workout for you?
3. A. Yes. Absolutely.
4. Q. Did you prefer to be in the Atlantic Avenue
5 property rather than the Bank Street property?
6 A. Absolutely.

Finally, it is true that the trial Court made other erroneous findings of fact that influenced the context, if not the substance, of his incorrect conclusions of law. For example, the Trial Court found "he [Scrantom] paid cash for the property using the same type of alternative financing Danielson testified he was told Scrantom had obtained to exercise the option." (O 13). Indeed, had Mr. Scrantom arranged financing, he would not have paid cash. In any event, Mr. Danielson testified that Mr. Scrantom told him he had arranged a "mortgage loan" to buy the Property, which is implausible under any circumstances and not supported by any evidence adduced at trial.[7]

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[7] On direct examination by his lawyer, Mr. Danielson testified as to why Scrantom/Ten State were not interested in assuming the loan, even though Scrantom had testified it was the essence of the transaction under the Agreement:

18 Q. Did he tell you that? Did Mr. Scrantom say I
19 am not interested in this mortgage as it stands?
20. A. Absolutely.
21. Q. He told you that?
22. A. Yes, he did. He already had his own mortgage.
23. Q. He already had his own mortgage? (T p. 271).

3. The Trial Court made numerous material Findings of Fact that were completely contrary to the evidence adduced at Trial. Not only did the Trial Court make findings that were not supported by any evidence adduced at trial, it also made material findings of fact and resulting conclusions of law that were completely contrary to evidence adduced at trial. These include the following:

- "First, I find that the Danielsons are not in default of their loan."
- "The debt instruments provide the conditions outlined above requiring the Borrower (Buyer) to submit normal underwriting information to the Lender for its determination as to whether it would allow the assumption."
- "Mr. Danielson testified that he made multiple inquiries with the Lender and provided information to the Lender in response to Mr. Scrantom's request."[8]
- "Thereafter, Buyer remained in the house through March and almost a week into April 2013 and never returned the keys to the home."[9]
- "The evidence also shows Mr. Scrantom stated he "could be happy", but only if the Lender modified the loan to a fixed rate, interest only, at a reduced interest rate at 2.5%."[10]
- "Mr. Danielson testified Mr. Scrantom had alternative financing available and was unwilling to provide the necessary information to the Lender for them to perform the necessary underwriting spelled out in the loan documents."[11]
- "There was no evidence presented at trial showing the condition of the loan negatively affected the Buyer's ability to assume it."

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[8] See discussion at page 9, *supra* and Scrantom testimony at T 99-100.

[9] In fact, Mr. Danielson testified to the contrary that "He [Scrantom] left keys on the counter for me." (T 304, 9-10) This is material to the fact that the Trial Court ordered damages for hold-over rent against Scrantom and Ten State of $8,000.00.

[10] This finding of fact contains a false and highly material misstatement of the e mail at issue. In fact, the e-mail actually says: "I think I could be happy enough if I could assume the debt at 2.5 percent fixed interest only for the remaining three years. Timothy Scrantom". (T 103 12-13). The words "but only if" are fabricated. They lead the reader to believe that the loan modification was an absolute condition for Ten State's assumption of the loan, which it was not. Moreover, the errant finding of fact completely disregards testimony and documentary evidence that Bill Danielson was the one who actually suggested to Scrantom that "they" should play "hardball" with the lender to get the lender to modify the loan in exactly the same way that Scrantom was suggesting in the very e-mail the Trial Court misquotes. See Scrantom testimony at T 294, 13-25

[11] The issue of who was to assume the loan, and whether there was an opportunity to do so, are discussed elsewhere in this Brief. See also Scrantom testimony at T 339-330.

The most startling finding of fact in the Order is "that the Danielsons are not in default of their loan." The Transcript is replete with hundreds of exhibits produced at trial and confirming testimony by both Respondents that they regularly received notices from the mortgage loan servicing company that Mrs. Danielson was in default under the principal mortgage loan Ten State sought to assume. Each of these contained the legend "NOTICE OF DEFAULT". Nevertheless, Mrs. Danielson testified under cross examination:

> Q. Is the SPS loan in default?
> A. I don't believe so. (T 168)

Likewise, Mr. Danielson gave similar testimony at trial. (See T 219, p. 9 and *passim*) The relevance of the Trial Court's finding goes directly to the question whether there was a breach of the Agreement: there are seven (7) different covenants and warranties in the Agreement where the Danielsons promised the mortgage loans on the Property were not in default and would not be permitted to be in Default. (Exhibit 7 A). The Trial Court apparently considers the term "default" to be synonymous with "arrearage", as it was admitted at trial that the parties knew there was an arrearage, but that they all believed there was no "default". This mutual mistake of fact was consistent and pervasive, but it was not true; an *arrearage* is not tantamount to a *default*, and the law of this State will be severely eroded were this honorable Court to not agree.

According to Black's Law Dictionary[12], "default" is defined as follows: "The omission or failure to fulfill a duty, observe a promise, discharge an obligation, or perform an agreement." Granted, an arrearage might be a "default" depending on the circumstances. But in the clear face of uncontroverted testimony and evidence, the Trail Court erred in finding that an arrearage was not a default even though the loan servicing company said so to the Respondents in BOLD FACED

[12] http://thelawdictionary.org/search2/?cx=partner-pub-2225482417208543%3A5634069718&cof=FORID%3A11&ie=UTF-8&q=default&x=8&y=10, last visited on August 24, 2016.

TYPE on over a hundred occasions. The relevance to the instant appeal is not only that the Respondents *did* in fact patently and repeatedly breach the Agreement (contrary to the Trial Court's findings of fact and conclusions of law: "I find that there has been no breach of contract in this matter." (O 12)), but this breach was also material to other duties under the agreement, including their duty to bring about the assumption of the mortgage by Ten State Street.

The Trial Court's finding of fact that "The debt instruments provide the conditions outlined above requiring the Borrower (Buyer) to submit normal underwriting information to the Lender for its determination as to whether it would allow the assumption..." is highly material to the court's conclusions of law: in fact, the Interest Rate Rider in language quoted in the Order (*supra*) clearly states that the Borrower (Carol Danielson, alone) must submit the underwriting information to the Lender (not the loan servicing company), not the Buyer (Ten State Street). This is both logical and consistent with the parties testimony at trial, since a non-party to a loan transaction would have no standing to communicate with the lender; only the borrower would be authorized to do so.

Finally, it is very relevant that the Trial Court states in the order that "There was no evidence presented at trial showing the condition of the loan negatively affected the Buyer's ability to assume it." In fact, there was copious evidence presented at trial to that effect, including the fact that the Respondents encouraged Ten State to enter into the Agreement based on the fact that their arrearage would give then leverage over the lender. Moreover, the Trial Court's random statement is illogical and lacks common sense: of course the status of a loan (default or good standing) will affect a lender's exercise of discretion in determining whether to permit assumption of its loan. This Court may take judicial notice of this "fact".

4. The Trial Court committed numerous errors of mixed findings of fact and conclusions of law in the Order. As the Court will appreciate, the Order randomly sprinkles conclusions of law in its so-called

"Findings of Fact" and *vice versa* (*e.g.*, "Conclusions of Law. Timothy D. Scrantom is an expert in the field of business contracts." O. 11). Several of the more noxious mixed findings of fact and conclusions of law are highlighted below:

- "Furthermore, any default on the note cannot be the basis of a breach of contract claim in favor of the Appellant because the Appellant was on notice of the arreage (*sic*) at the time the Appellant entered into the Agreement."
- He, together with his attorney, drafted the Purchase Option Lease Agreement. As such, any ambiguity will be viewed against Scrantom/Ten State Street, LLP.[13]
- "I find that there has been no breach of contract in this matter."[14]
- "Additionally, since the Lender took no steps to foreclose on the property there is no harm *to Scrantom* as a result of the Danielsons continued arrearage."[15]
- "Furthermore, any default on the note cannot be the basis of a breach of contract claim in favor of the Appellant because the Appellant was on notice of the arreage (*sic*) at the time the Appellant entered into the Agreement." [16]
- "The Court finds that the most significant fact in this case is that π Scrantom (sic) found a home he preferred (200 Bank Street) and proceeded with the closing on that property." (O 14).
- "Mr. Danielson testified that based on the way Mr. Scrantom vacated the property it was both damaged and he was unable to rent the property for at least several months based on his prior belief that the property had been sold."[17]

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[13] This alleged error is discussed above at p. , *supra*. It bears no further elaboration, except to point out that the Trial Court must have relied heavily on this finding notwithstanding the evidence the Danielsons are professional real estate developers and Certified Public Accountants. See testimony of Carol Danielson at T 165 17-21.

[14] The Trial Court makes this curious mis-statement even though he found that Ten State had breached the Agreement and was liable for damages attendant thereto.

[15] This patently erroneous conclusion of law is more than curious. As discussed at length above, "harm to Scrantom" is not relevant in the case filed by Ten State Street LLP. Arguendo, had the Trial Court gotten the parties correct in its Order, the conclusion of law is illogical on its face. The Agreement was a contract contemplating the assumption of a mortgage loan equal to almost the full value of the underlying Property. Had the Lender foreclosed on that Property, the opportunity to assume the underlying loan would likely be impossible in any commercial scenario. To equate "foreclosure" with "default" is an obvious material error of law, as discussed above with respect to the difference between an arrearage and a default.

[16] This purported conclusion of law is so illogical as to merit no attempted explanation.

[17] This conclusion is one of mixed fact and law since it underpins the Trial Court's conclusion that the Danielsons could not be returned to the status quo ante, contrary to mistake doctrines in equity. It craves common sense to imagine that a real estate expert who enters into a highly complex Lease Purchase Option Agreement could be said to have rightly thought his property "had been sold" even though the option was never exercised.

- "Mr. Scrantom offered a number of mistakes that he is relying on for unilateral rescission. These include the ones listed above as well as others associated with what he could or could not do with the cottage, the various aspects to how the cottage could be rented, use of the cottage as a business, and other similar complaints. I find that none of these were the primary focus of the Agreement...[18]

- "At trial I limited the Appellant's damages claim to only those monies claimed owed that he paid to the Danielsons. I did not allow evidence about other purported damages as they lacked the necessary foundation and legal support."

It is difficult to discern whether the Trial Court's key finding/conclusion is one of law or fact: "The Court finds that the most significant fact in this case is that π Scrantom (sic) found a home he preferred (200 Bank Street) and proceeded with the closing on that property." This observation, whether a conclusion of fact or law or both, is patently incorrect, as discussed above, and it is based on innuendo that is likewise false and inaccurate (*e.g.*, that Scrantom was married; what Ms. Wilkes' name was; that the Agreement was not a business investment, as recognized by all the parties at trial; that Scrantom was not the Appellant; etc.). That this key conclusion was in error cannot be disputed—although its operation as a conclusion of law could be. That said, it is evident that the Trial Court took pains to casually edit the Defendant's proposed Findings and Conclusions to add this as "the" key element in his decision. It must go to the heart of his conclusions. And it is simply incorrect. There is no evidence in the record to support this conclusion other than Respondent's counsel's speculation in closing arguments, and all of Appellant's evidence is stridently contrary.

[18] Both Mr. Scrantom's and Ms. Wilkes testimony that they intended to renovate the Property so it could be leased during the key Summer months on Sullivan's Island (a characteristic they likewise testified the 200 Bank Street Property does not share, as the Court will notice under the published Ordinances of the "Old Village" of Mt. Pleasant) was clearly stated to the court and not controverted by either Defendant's testimony. For the Trial Court to conclude that these business motives were not a "primary focus" of the Agreement is probative of the Appellant's theme in this brief: that either the Trial Court did not listen to the corroborating testimony, or it materially erred in its Findings of Fact and Conclusions of law.

As stated in the Order, the Trial Court "limited the Appellant's damages claim to only those monies claimed owed that *he* paid to the Danielsons. I did not allow evidence about other purported damages as they lacked the necessary foundation and legal support." This finding involves a mixed question of fact and law which is erroneous and ignores one of the Appellant's core breach of contract claims under the Agreement.

The Agreement (Ex. 7A) clearly provides that in the event the Agreement is terminated, the Owners will refund money for taxes and insurance paid by the Buyer for a period after the termination date. This duty was explained by Mr. Scrantom in his testimony—both to the contract right and the amount—but was apparently ignored by the Trial Court in its findings, to wit:

> Q. (BY MR. GOWDER) What is your understanding about the duty to pay expenses and the provision regarding refund to buyer?
>
> A. Well, specifically, the agreement says that the buyer, which is Ten State Street, is only obligated to pay expenses, which is a defined term, relating to the property while the agreement is in effect. Then it goes on to say that any expenses paid beyond such date shall be refunded to the buyer, which is Ten State. So I heard the testimony and obviously there is evidence that expenses were paid for a period or periods after the agreement was in effect, specifically the insurance was paid on an annual basis, property taxes were paid on an annual basis, so I think the very clear intent of Section 2.04 is that that money had to be refunded, and I believe a fairer calculation of it on a prorated basis -- given that $14,000 in taxes were paid, for example in January -- they got the benefit of that for the following year. I think the average between those was about $15,000 to $18,000 which has not been refunded. (R. 325)

Indeed, nowhere does the Order mention Ten State Street's right under the Agreement to receive a refund to Ten State Street of monies paid for taxes and insurance to third parties.

III. CONCLUSION

Even a few of the errors made by the Trial Court would give rise to a patent miscarriage of justice; taken in the aggregate, they are breathtaking to any lawyer. Based on a de novo review of these errors, this Court should reverse the Judgement and Order of the Trial Court based on the erroneous findings of fact and conclusions of law contained in the Order. In so doing, it should apply the standard of review for cases in equity, as cited above. Further, the Court should enter judgment in favor of Appellant and remand the case for a hearing to determine the amount of damages to be awarded to Appellant.

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September 15, 2016

VIA EXPRESS MAIL
Ms. V. Claire Allen, Deputy Clerk
1220 Senate Street
Columbia, South Carolina 29211

Re: Ten State Street, LLP v. William E. Danielson
Appellate Case No. 2016-000910

Dear Ms. Allen:

This letter responds to your letter dated September 12, 2016. The deficiencies noted have been corrected, and the revised Brief is attached.

Kind regards,

Timothy D. Scrantom

cc: Clayton B. McCullough, Esquire (w/ encl.)
Jamie A. Khan, Esquire
W. Andrew Gowder, Jr., Esquire (w/ encl.)

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