THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Larry B. Hyman, Circuit Court Judge

Case No: 2016-CP-26-1961

S. Scott Porter, Individually and as Co-Trustee of The Stanley Scott Porter Trust UA dated January 2, 1991, a member of Peaceful Lane MHP, LLC ..... Respondent,

v.

Kenneth Hucks, Individually and as a member and formerly designated manager of Peaceful Lane MHP, LLC ..... Appellant

REPLY BRIEF OF APPELLANT

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LEGAL ARGUMENT IN REPLY

The Respondent relies upon erroneous statements of fact and law as well as sweeping and unfounded statements to refute the errors committed by the trial court in not granting the Appellant either a judgment notwithstanding the verdict or a new trial. The statute of limitations as to the Respondent's action was not tolled by the involuntary repossession of collateral securing the obligation. Similarly, the law established by the uniform commercial code cannot be waived or somehow found to not be controlling by nature of a party failing to appreciate its existence. Finally, the evidence relied upon by the jury in making its determination of damages was inadmissable and grounds for new trial. Therefore, the trial court's Order denying the Appellant judgment notwithstanding the verdict or, in the alternative, a new trial should be reversed.

A. The Statute of Limitations Barred the Respondent's Claim

The Respondent erroneously asserts that the trial court was correct in directing the jury to consider whether the statute of limitations barring Respondent's action was tolled without appropriate evidence. The Respondent agrees that the statute of limitations, S.C. Code Ann. § 15-3-530, would bar his claims without some grounds for the tolling of the statute of limitations. The Respondent asserts, however and without citation, that "[c]learly, there is sufficient evidence in the record to support the lower court's decision to allow the issue of the tolling of the statute of limitations to be decided upon by the jury." *Respondent's Brief Ps. 9-10.* The "clearly sufficient evidence" Respondent relies upon is inadequate as a matter of law. The claims based upon breach of contract by the Respondent were barred by the applicable statute of limitations and judgment should have been given to Appellant upon the Respondent's claims.

The law is settled in relation to when and how the statute of limitations for an action for breach of contract may be tolled. An acknowledgment or promise contained in a writing signed by the party to be charged is considered sufficient evidence of a new or continuing contract so as to remove the case from the operation of the statute of limitations. S.C. Code Ann. § 15-3-120. Further, any payment of principal or interest is considered equivalent to a written promise. Id. While such a payment need not be in actual money, see *Wolfe v. Brannon*, 211 S.C. 282, 287, 44 S.E.2d 833, 835 (1947), an agreement to credit the note on account of property delivered must be established by evidence that "is unambiguous and full." *Black v. White*, 13 S.C. 37, 40 (S.C.1880); See also *Hill v. Hill*, 51 S.C. 134, 28 S.E. 309, 312 (1897)(Reviving a stale debt requires "an express promise to pay, or such unqualified and unequivocal admission that the debt is still due, unaccompanied by any expression indicative of an intention not to pay").

The Respondent erroneously asserts, without citation to the record, that such evidence was presented. In the only reference in Respondent's brief that asserts what this clear evidence is, the Respondent states:

> The Respondent testified about the continuing nature of Appellant's promise to pay, about their agreement that Respondent would relieve Appellant of his debt obligations to Conway National bank in exchange for 50% interest in PLMHP company, and an e-mail signifying this agreement.

Respondent's Brief Ps. 10-11. The first two referenced types of evidence are the very types of oral testimony statutorily prohibited from supporting a tolling of the statute of limitations. See S.C. Code Ann. § 15-3-120(requiring a "writing signed by the party to be charged thereby"); see also *In re Vaughn*, 536 B.R. 670, 678 (Bankr. D.S.C. 2015)("The main purpose of enacting the statute was to require the new promise to be in writing, as previous common law would

sometimes permit revival upon an oral promise."). Thus, these two types of evidence cannot, as a matter of law, provide the support Respondent seeks. Similarly, the oral testimony does not provide for an unambiguous and full agreement. They only vaguely reference an oral promise to pay in the future and an oral promise to relieve the Appellant of an obligation to a third party in the possible event the property of Appellant is transferred. Thus, neither of these provide the necessary evidence to toll the statute of limitations as a matter of law.

Further, the third type of evidence alleged by the Respondent to provide the clear support, an email, was neither admissible, nor does it support the necessary consent by the Appellant to the alleged agreement. According to the Respondent's testimony the email was "about [Respondent's] efforts to collect the balance." *Trial Transcript of Trial dated February 20-21, p 63, l. 18-19.* The Respondent goes on in his description of the email to testify that:

> 19 [...]It is not the notice that I took it.
> 20 This is a notice that says [Appellant] forfeited on March 31,
> 21 which I already informed him about, as it says in the
> 22 first sentence. And then it goes on to say we've been
> 23 trying to sort out what happened to all of these
> 24 missing funds and you owe us money, I would like to be
> 25. Paid.

Trial Transcript of Trial dated February 20-21, p 63, l. 19-25. Not only does this email not provide a statement by the Appellant agreeing to the obligation or the arrangement described by the Respondent, it uses language indicative of a finding of the opposite being true. See *Plaintiff's Ex. 2. To the trial dated February 20-21* ("In summary, on 3/31/14 ***I took*** your interest in PLMHP which you had pledged to secure the $155,000 N/P to my trust")(emphasis added). The only evidence presented supports that the property of the Appellant securing the obligation was "taken" by Respondent, not voluntarily "delivered" in "an agreement to credit the note on

account," as required as a matter of law to toll the statute. See *Black,* 13 S.C. at 40. Thus, neither the alleged oral testimony, nor the email provides what is required by law to toll the statute of limitations.

The final two arguments in support of the tolling of the statute of limitations provided by Respondent are that (1) the Appellant failed to cite to specific language of the cases relied upon in Appellant's Initial Brief in his motion for directed verdict at trial, and that (2) by agreeing to the jury charge relating to the statement of law, the Respondent waived his previous motion for directed verdict and right to later raise the issue in a motion for judgment notwithstanding the verdict. The second argument is erroneous on its face. The argument that a party must object to an accurate statement of the law regarding the tolling of the statute in order to preserve the right to later argue that no evidence was presented in support of that legal position defeats the very purpose of a motion for judgment notwithstanding a verdict. See *Strange v. S.C. Dep't of Highways & Pub. Transp.*, 314 S.C. 427, 429–30, 445 S.E.2d 439, 440 (1994)("Motions for directed verdict or JNOV should be denied if the evidence yields more than one reasonable inference or its inference is in doubt); *Gastineau v. Murphy*, 331 S.C. 565, 568, 503 S.E.2d 712, 713 (1998)(Further, "[a] motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict"). Such an argument is not supported by the law.

Similarly, the first argument concerning citations to language within authority being cited at the initial motion should be disregarded. As a factual matter the authority cited in the Appellant's renewed motion for directed verdict were the very ones cited in the Initial Brief of the Appellant. See *Appellant's Motion for New Trial and Judgment Notwithstanding the Verdict dated March 2, 2018, Ps. 10-13.* Further, the law of South Carolina does not require that specific

language within authority be cited in a motion in order to preserve an issue for appeal. It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review. E.g., *Creech v. South Carolina Wildlife and Marine Resources Dep't*, 328 S.C. 24, 491 S.E.2d 571 (1997). Error preservation requirements are intended "to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments." *I'On v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000); see also *State v. Nelson*, 331 S.C. 1, 5 n. 6, 501 S.E.2d 716, 718 n. 6 (1998) ("the ultimate goal behind preservation of error rules is to insure that an issue raised on appeal has first been addressed to and ruled on by the trial court."); 4 C.J.S. Appeal and Error § 213 (1993) ("At the very least, the matter must have definitely been called to the attention of the trial court sufficiently to obtain a ruling thereon."). "Without an initial ruling by the trial court, a reviewing court simply would not be able to evaluate whether the trial court committed error." *Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000). Not only did the Appellant contemporaneously raise the exact issue of the tolling of the statute of limitations, see *Trial Transcript of Trial dated February 20-21, p 77-80*, but the Appellant references several of the authority now cited in the Appellant's Initial Brief. Plainly, the argument concerning the preservation of this issue for appeal is erroneous and should be ignored.[1]

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[1] The Respondent erroneously asserts that the Appellant's attorney "seems to concede that the jury is not likely to find that the statute of limitations had run, citing the Trial Transcript at page 115. See *Respondent's Initial Brief p. 12*. For clarity, reading pages 114 through 116 of the Trial Transcript will dispel any thought that such an assertion is even remotely true. The Appellant's counsel is simply clarifying for the judge how the law ordinarily works in reference to application of credits for collateral taken by lender's. *Trial Transcript of Trial dated February 20-21, p 114-116.*

B. The Application Of The Uniform Commercial Code Is Not Contingent Upon The Respondents Appreciation For Its Relevance

The Respondent relies primarily upon the same erroneous logic asserted by the trial court when it erroneously held that the uniform commercial code did not apply to the matters before the jury because the Appellant did not specifically plead that the uniform commercial code applied to the matter in his Answer. The Respondent adds some assertions regarding his not having contemplated whether the South Carolina Uniform Commercial Code, S.C. Code Ann. § 36-9-101 et. seq. (the "UCC"), would apply and the fact that the Respondent followed no "legal process" in taking the collateral securing the obligation, but neither of these assertions change the erroneous nature of the trial court's ruling. See *Respondent's Initial Brief p. 13*. South Carolina law does not provide for such a waiver of legal principals. The trial court had the responsibility to charge the jury with the complete law applicable to the matter, irregardless of whether the Appellant directly cited to that law in his Answer. This erroneous decision by the trial court precluded the jury from hearing a charge of the law that the actions of the Respondent precluded his recovery under the loan. Thus, the Appellant should be granted a new trial.

The Respondent asserts that by (1) not specifically citing to the UCC in the agreement, (2) not citing the UCC in the initial pleadings,[2] (3) not following any of the UCC's requirements regarding transfers of collateral, and (4) the Appellant not suing the Respondent initially upon being informed of the taking of his property, the Appellant waived any right to have the UCC

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[2] The Respondent falsely asserts that he filed his action seeking, in addition to the money owed under the obligation, only that which remained owing after a valuation of the property taken and credit given to the Appellant. See *Respondent's Initial Brief p. 5*. The Respondent's Complaint contained solely a suit on note seeking the full amount allegedly owed with no credit or reference to the property taken from Appellant. See *Respondent's Summons and Complaint dated March 21, 2016.*

provide him the legally afforded protections. To hold these arguments persuasive would be to rewrite South Carolina law. S.C. Code Ann. § 36-9-109 specifically provides that "(a) Except as otherwise provided in subsections (c) and (d), this chapter applies to: (1) a transaction, regardless of its form, that creates a security interest in personal property or fixtures by contract." The UCC applies to the Respondent's note and agreement establishing a security interest regardless of whether he knew it did, regardless of whether he followed the steps required therein, and regardless of whether the Appellant initiates an action arising from these rights. To hold otherwise is contrary to South Carolina law. See *Smothers v. U.S. Fid. & Guar. Co.*, 322 S.C. 207, 210–11, 470 S.E.2d 858, 860 (Ct. App. 1996)("Everyone is presumed to have knowledge of the law and must exercise reasonable care to protect his interests."). Therefore, the trial court's erroneous decision regarding the application of the UCC should be reversed.

C. The Admission of the Hearsay Evidence was Erroneous and Prejudicial.

The Respondent makes gross misstatements of the facts and law in disputing that the trial court erroneously allowed the Respondent to put into evidence hearsay that was contained within hearsay. The Respondent erroneously asserts (1) that the email was introduced into evidence by Appellant; (2) it was not offered to prove the truth of the matter asserted, (3) it fell within the business exception of hearsay, and (4) it was merely cumulative evidence. See *Respondent's Initial Brief p. 16-17.* These assertions are factually inaccurate and those that posit some legal support are legally inaccurate. The email, introduced into evidence by the Respondent as evidence of the truth of the information contained therein, did not fall within any exception to hearsay under the Rules of Evidence and was not cumulative. Therefore, the assertions of Respondent should be disregarded.

Respondent appears to have confused two pieces of evidence introduced into the record when asserting that the email in question was introduced into evidence by the Appellant. The email referenced in the Appellant's objection to admitting the email into evidence, his motion for new trial based upon the allowance of the inadmissable evidence, and his Initial Brief is the Respondent's second exhibit admitted into evidence (the "Email"). *Trial Transcript of Trial dated February 20-21, p 74 l. 18-19.* The Respondent's Initial Brief spends a great deal of time conflating the Email with the other email Appellant's introduced into evidence as his Exhibit 1 (the "other email"). See *Respondent's Initial Brief p. 16.* The facts concerning the Email and its introduction into evidence above Appellant's objection were outlined in Appellant's Initial Brief and so will not be repeated herein. The Email was erroneously admitted into evidence over the Appellant's objection by the Respondent. The Appellant does not contest whether the other email was erroneously admitted into evidence.

The Respondent then asserts that the Email was not introduced to prove the truth of the matter asserted. The Respondent states:

> The document is not hearsay because it was not introduced by Respondent for the truth of the matter asserted; rather, it was offered on re-direct to establish how respondent reached his number of what the property was worth, how much credit Appellant was due, and what the balance was.

Respondent's Initial Brief, P. 18. "The rule against hearsay prohibits the admission of evidence of an out-of-court statement to prove the truth of the matter asserted unless an exception to the rule applies." *Fowler v. Nationwide Mut. Fire Ins. Co.*, 410 S.C. 403, 411, 764 S.E.2d 249, 253 (Ct.App.2014); see also Rule 802, SCRE ("Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court of this State or by statute."). However,

"[a] statement that is not offered to prove the truth of the matter asserted should not be excluded as hearsay." *R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 439, 540 S.E.2d 113, 121 (Ct.App.2000). Here, the Respondent acknowledges the only probative value of the Email was the figures, all derived from other evidence not before the court, included therein. Thus, the Email is evidence of an out-of-court statement introduced into evidence by the Respondent with the sole purpose to prove the truth of the matter asserted, namely how much the property was appraised for, and is hearsay.

The Respondent then relies upon the same erroneous assertion of the trial court that the Email qualifies as a business record for purposes of not being excluded as hearsay. As previously argued in the Appellant's Initial Brief, even if the court were to assume the Email could fall within such an exception, the truth relied upon in the Email related to an amount determined by an appraisal, another out of court statement introduced through the email to prove the truth of the matter asserted. Thus, such an exception would need to apply to both the Email, and the appraisal cited therein. Neither meet the requirements of the business record exception and so the Email was erroneously admitted. According to Rule 803(6), the following is not excluded by the rule against hearsay:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness....

See also *Ex parte Dep't of Health & Envtl. Control*, 350 S.C. 243, 249–50, 565 S.E.2d 293, 297 (2002) (explaining business records are admissible under Rule 803(6) and section 19–5–510 "as

long[ ] as they are (1) prepared near the time of the event recorded; (2) prepared by someone with or from information transmitted by a person with knowledge; (3) prepared in the regular course of business; (4) identified by a qualified witness who can testify regarding the mode of preparation of the record; and (5) found to be trustworthy by the court"). While the Respondent may qualify as a witness that can testify as to the mode of preparation and very well may have been found to be trustworthy by the court, the other three requirements are absent from the record. Further, "[w]hile the business-records exception to the hearsay rule allows the admission of '[a] memorandum, report, record, or data compilation,' it does not authorize hearsay testimony concerning the contents of business records which have not been admitted into evidence." *Deep Keel, LLC v. Atl. Private Equity Grp., LLC*, 413 S.C. 58, 72, 773 S.E.2d 607, 614 (Ct. App. 2015)(citations omitted). No evidence was presented regarding these five necessary elements regarding the appraisal contained in the email. Neither the Email, nor the amount of the appraisal contained therein meet the requirements to meet the business records exception to hearsay. Thus, the Email should not have been allowed into evidence as a matter of law.

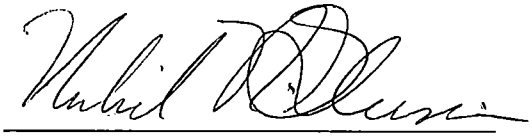
Finally, Respondent surmises that the admission of the Email into evidence was not prejudicial as it was cumulative of "plenty of evidence in the record." *Respondent's Initial Brief P. 18*. Notably, the Respondent does not cite to a single instance of testimony or evidence that is cumulative to the values derived from the Email. The only basis for Mr. Porter's valuation of the collateral was an appraisal. *Trial Transcript of Trial dated February 20-21, p 55 l. 20-21*. No other testimony supporting the valuation of the Collateral was given by Mr. Porter, nor was any testimony concerning the amount alleged to have been owed to the Respondent. The trial court impermissibly allowed the jury to rely upon several figures included in the Email to determine

the issue of fact and the verdict should be reversed.

CONCLUSION

The trial court made clear legal error in finding that the statute of limitations had been tolled through an oral understanding of the parties as evidenced by mere testimony of a party. Similarly the trial court made clear legal error when it found the Appellant had some how waived the right to have the UCC control the actions of the Respondent in its taking of the Collateral. Finally, the trial court made clear error when it allowed the jury to rely upon impermissible hearsay evidence in determining the amount of the debt owed. Respectfully, the misrepresentations of the facts and erroneous statements of the law by Respondent in its Initial Brief should not change this Court's analysis and finding. The trial court's order must be reversed.

Respectfully submitted,

By: 

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PROOF OF SERVICE

I certify that I have served the Appellant's Reply Brief on the Respondent by depositing a copy of it in the United States Mail, postage prepaid, on February 15, 2019, addressed to its attorneys of record as follows:

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