THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge

Case No. 2016-CP-10-5773

Amanda Griffith.....Respondent,

vs.

ISL Development, LLC and Steven
Stewart, Individually, of whom
Steven Stewart is.....Appellant.

BRIEF OF APPELLANT

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January 27, 2020

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STATEMENT OF THE CASE

This appeal arises from a non-jury trial in which the trial judge found Appellant Steve Stewart to be personally liable as guarantor on a promissory note from the Defendant ISL Development LLC ("ISL") to Respondent Amanda Griffith.

Respondent Griffith filed her Summons and Complaint in the Charleston County Court of Common Pleas on October 27, 2016 against Defendant ISL and Appellant Steven Stewart individually, seeking judgment against the Defendants on a promissory note signed by Defendant ISL on December 27, 2012 for the principal sum of $200,000. (R.p.001)

Appellant Stewart and Defendant ISL filed their Amended Answer on January 11, 2017, wherein Defendant ISL admitted that it was in default under the note; and Appellant/Defendant Stewart denied that he was personally liable on the note. (R.p.011)

The case was tried before Hon. Jennifer B. McCoy, without a jury. Judge McCoy bifurcated the trial of the case into a liability phase and a damages/attorney fee phase. The liability phase was tried before Judge McCoy on August 29, 2018, and the damages phase was tried on January 25, 2019.

As for the first, liability phase of the trial, Judge McCoy filed her Order on December 12, 2018 finding Defendant ISL and Appellant Stewart, individually, liable on

the promissory note. (R.p.016) Appellant Stewart filed his Motion to Alter, Amend or Reconsider Judge McCoy's liability Order on December 27, 2018. (R.p.125) The second phase of the trial on damages and attorney fees was heard before Judge McCoy on January 25, 2019.

On March 5, 2019, Judge McCoy filed her Order awarding damages under the promissory note in the amount of $330,000, principal and interest, and awarding attorney fees in the amount of $89,160.54. The Court's Order additionally fixed interest on the Judgment at 9.5% per annum. (R.p.025)

Appellant Stewart had filed his motion to reconsider the Court's Order on liability on December 27, 2018, and he filed his motion to alter, amend or reconsider the Order on damages and attorney fees on March 15, 2019. (R.p.113) The Trial Court denied Appellant Stewart's motions to alter or amend, without hearing, by form order filed April 4, 2019. (R.p.028,029)

Appellant Stewart filed his Notice of Appeal with the Court of Appeals on May 3, 2019.

STATEMENT OF FACTS

Respondent Amanda Griffith, a Charleston architect, met Appellant Steve Stewart through a mutual friend in the summer of 2012. (R.p.141: lines 14-17) She learned that Stewart had recently moved to Charleston, had renovated an historic home, and that he was a land developer in California. Stewart was then working on a California project, a nursing home in Whittier (the "Whittier Project"). Griffith had been seeking to expand her investment portfolio and became interested in investing in the Whittier Project. (R.p.145: lines 12-17; R.p.174: 11-20)

The California entity that was developing the Whittier Project was ISL Land Development, LLC, ("ISL") a party Defendant in this case. ISL was a California LLC, the members of which were Mr. Stewart and Adam Salis, a California lawyer. The role of Stewart in the LLC was to "entitle" it, meaning to obtain all necessary governmental approvals. Mr. Salis's role was to raise the necessary capital to fund the land acquisition and development costs. Ms. Griffith, who at one time had also been architect for the City of Charleston, was familiar with land development and the complexities of obtaining entitlement approvals. (R.p.173: lines 8-19) She was impressed by the scope of the planning for the Whittier Project and described ISL's, and Stewart's, work as "professional". (R.p. 145: line 23 to p.146: line 13) She acknowledged that Mr. Stewart's work had added value to the land. (R.p. 177: lines 19-21)

Prior to signing a Memorandum of Understanding ("MOU") and making a loan to ISL, and as a part of her due diligence, Ms. Griffith learned that Henderson Family Trust, a trust in Mrs. Stewart's family of which she was one of two trustees, had previously loaned $450,000 to ISL for the Whittier Project. Ms. Griffith was provided with a copy of the promissory note from ISL to the Trust, prior to her own investment. (R.p.180: line 18 to p. 181: line 8) Ms. Griffith also understood that ISL needed immediate cash to pay remaining invoices owed to the architect, engineers and land planners who had performed the studies necessary to obtain the entitlements, and that Mr. Stewart was paid a salary of $15,000 per month, on which payments were also owed. (R.p. 149: lines 3-8)

By late December 2012 Ms. Griffith and ISL had agreed to enter into an MOU under which she and ISL would agree to an amended operating agreement bringing her into the LLC as a member, with a $750,000 equity contribution. Because of the payables

that were immediately due, the parties agreed that Ms. Griffith would make a short term loan to ISL of $200,000 repayable in ninety days, during which time they intended to finalize the terms of the amended LLC operating agreement. At such time as the amended operating agreement was finalized, Ms. Griffith's $200,000 loan to ISL would be converted to equity, to which Ms. Griffith would add another $550,000 as agreed in the MOU. (R.p. 179: lines 2-23; R.p. 312 -315)

Accordingly, on December 27, 2012 the MOU was signed by Ms. Griffith, and by Mr. Stewart for ISL (R.p. 312; Ex."1"); and a 90 day promissory note for $200,000, repayable on March 31, 2013 with 12% interest was signed by Mr. Stewart for ISL (Ex."2"). Ms. Griffith wired $200,000 to ISL's California checking account with Wells Fargo Bank, where it was deposited on December 28, 2012. (R.p.408; R.p. 464, bank statement).

As agreed between Ms. Griffith and ISL, ISL disbursed funds to its architects, engineers, land planners and consultants. Payments were also made to Mr. Stewart and to Henderson Family Trust. Between December 28, 2012 and January 10, 2013 a total of $183,013.46 was disbursed from ISL's checking account with Wells Fargo, leaving a balance of $17,386.92. (R.p.408-412; check #s 1050-1063; R.p. 464)

Ms. Griffith agreed that the promissory note to her obligated only ISL and not Mr. Stewart individually, and that Mr. Stewart was not individually obligated on the note. (R.p. 184: lines 9-17) The terms of the note provide that it would be construed and enforced under the laws of California.

Although Ms. Griffith had been encouraged by Adam Salis to consult with an attorney before signing the MOU and making the $200,000 loan, she did not do so. (R.p.

318, email; R.p.181: lines 14-24)

On January 15, 2013 Ms. Griffith, her accountant, Mr. Salis and Mr. Stewart held a conference call. (R.p.338, email). The following day, January 16, 2013, Ms. Griffith sent an email to Mr. Stewart informing him that she had decided not to consummate the agreement contemplated by the MOU based upon the advice of her CPA. In her email Ms. Griffith wrote: "...I am happy to lend the $200,000 to you if you will personally guarantee the loan." (R.p. 344,email)

Mr. Stewart responded by lengthy email in which he discussed methodologies for developer/investor sharing of profits. As for Ms. Griffith's request that he personally guarantee the note Mr. Stewart wrote: "...I can certainly appreciate your concerns and I respect your decision. Of course I will personally guarantee the $200,000 and I appreciate your help and consideration..." (R.p. 344, email); and "As I have said I respect your decision regarding the Whittier Project and will personally guarantee the $200,000 note for funds already advanced by you. I would like you to still consider the opportunity to invest in future projects as we discussed when we met at Folly Beach." (R.p. 344, email).

The email exchange of January 16, 2013 occurred even before Ms. Griffith had been paid her first monthly interest payment. The first monthly interest payment was made to her on or about January 30, 2013 (R.p.413, check #1064). Interest payments were made thereafter until July 2013, totaling $14,000. (R.p.389-419; check registers; Ex."5")

It was Mr. Stewart's position at trial, and the central issue in this appeal, that his promise made in the January 16, 2013 email exchange was gratuitous, and unsupported by consideration. (R.p.044, Supplemental Trial Brief filed 9/10/2018.)

As discussed below under Argument I in greater detail, when asked why she agreed

to extend the term of the note, Ms. Griffith testified that she realized ISL could not repay it (R.p.192: line 17), and that ISL would continue to make interest payments to her. (R.p.164: line 25 to p.165: line 19) She never testified that an extension was agreed upon in exchange for the guarantee, although she did testify, "It was implied." (R.p.195: line 22) As for the same issue, whether any benefit was obtained from his promise of guarantee, Mr. Stewart testified, "None was offered and I received none." (R.p.256: lines 19-22)

Notwithstanding Ms. Griffith's assertion at trial that she holds an enforceable personal guarantee by Mr. Stewart of the ISL promissory note by virtue of the email exchange on January 16, 2013, after that date there was no further communication between Ms. Griffith and Mr. Stewart about a personal guarantee from Mr. Stewart until January of 2016. On January 12, 2016, Ms. Griffith wrote a letter to Mr. Stewart enclosing a proposed promissory note and personal guarantee of the payment of $200,000.00, the terms of which provided for interest calculated at 12% per annum, and payable on or before December 28, 2017. Mr. Stewart refused to sign the tendered personal guarantee, or the promissory note. (R.p. 730-734).

As for the Whittier project, it failed because of the inability of ISL to fund it. The principal funding mechanisms were intended to be private investment capital, or funding through the United States Customs & Immigration Service, "EB-5" Visa Classification Program, enacted by Congress to stimulate foreign investment in eligible population areas of the United States. Eligibility of a population area is determined largely by its unemployment rate. As explained by Mr. Stewart, the eligibility criteria were changed so that the Whittier project site no longer fell within the eligible target area for EB-5 Funding. (R.p.219: line 6 to p.220: line 12; R.p.259: lines 1-15). Thus the EB-5 funding alternative

did not materialize.

At the same time, Mr. Salis was attempting to seek private capital by soliciting investment brokers and private investors (R.p.257: line 2 to p.265: line 1) (R.pp. 510-683; Exs. 10 - 20). Efforts to raise capital to meet the obligations of ISL continued into September of 2013. By that date, ISL's bank account was "dry" (R.p.266: lines 5-12), and it was unable to pay Ms. Griffith or the Henderson Family Trust. Even after September, 2013, Mr. Stewart made continuing efforts to raise capital. ISL wrote a check to Ms. Griffith in November of 2013 for $6,000, but asked her to hold it until the first of 2014. Mr. Stewart had hoped another funding source would materialize by that date, but it did not. (R.p.229: lines 11-21).

At the end of the day, despite valiant efforts to raise the funds, ISL was unable to repay Ms. Griffith or Henderson Family Trust. Both Ms. Griffith and Mr. Stewart's wife's family trust lost the funds they had loaned to ISL. (R.p.266: lines 5-14).

STANDARD OF REVIEW

On appeal of an action at law tried without a jury, the appellate court will correct any error of law. The findings of fact of the trial judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings. *Townes Associates Limited, Ltd. vs. Greenville,* 266 SC 81, 221 S.E.2d 773 (S.Ct. 1976);

ARGUMENT I

THE EVIDENCE AT TRIAL DOES NOT REASONABLY SUPPORT A FINDING THAT THERE WAS A BARGAINED-FOR EXCHANGE OF PROMISES FOR GOOD CONSIDERATION, TO SUPPORT APPELLANT'S GRATUITOUS PROMISE.

Appellant and Respondent agree that the determination whether good consideration supported Steve Stewart's promise to guarantee the note must be based upon California law. The terms of the note so provide. In her Order, the trial judge concluded that "pursuant to California law and alternatively under South Carolina law, the use of the loaned funds by ISL and the substantial personal benefit which Stewart admitted to receiving from those loaned funds beyond March 31, 2013, represented sufficient consideration actually received by Stewart in exchange for his agreement to personally guarantee repayment of the note to Plaintiff." (R.p. 019; Order, Page 4 Paragraph II).

Citing the California case of *Steiner vs. Thexton,* 48 Cal 4th 411, 226 P3rd 359, 106 Cal.Rptr.3rd 252 (Cal 2010), the trial court held that Plaintiff's promise to extend repayment terms of the note, "was not illusory", but even if it were illusory that it was cured by her part performance by extending its term.

Aside from the fact that no illusory promise is present in this case, the trial court's order fails to address the central, predicate issue that should have been decided and was not: was there a bargain or exchange between Griffith and Stewart to personally guarantee the note in exchange for an extension of its term, that would constitute an "agreement", in the first place? The trial court's order does not meet the issue.

Steiner vs. Thexton, supra, was first cited to the trial court by Appellant in his Supplemental Trial Brief (R.p.044), but not because of the California court's treatment of the "illusory" issue presented there. Rather, *Steiner* presents an articulation by the Supreme Court of California of the California law of consideration. In *Steiner*, because the "bargained-for consideration (was) present", the contract in the case was enforceable. *Steiner* enlightens us as to the law of consideration in California.

As cited in *Steiner*, consideration is statutorily defined. The California statute, enacted in 1872, is Section 1605 of the California Codes, which provides:

> "GOOD CONSIDERATION, WHAT. Any benefit conferred, or agreed to be conferred, upon the promisor, by any other person, to which promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered, by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor, is a good consideration for a promise."

The *Steiner* suit sought specific performance of a contract to buy land. Steiner had entered into a contract to buy land from Thexton. Because the contract terms enabled Steiner to avoid performance for any reason, the California Court of Appeals, affirmed by the California Supreme Court, held the contract was nothing more than an option to buy the land. Steiner's promise to buy was therefore regarded by the Courts as "illusory", because notwithstanding Steiner's promise to perform, the contract did not require him to do so. Although Steiner, the buyer, had not unconditionally accepted Thexton's offer to sell, which would have converted Steiner's "illusory" promise to buy into an enforceable contract, the California Supreme Court held that even if the option had not yet ripened into a purchase contract, it may nonetheless be enforceable "if sufficient bargained-for consideration is present." (106 Cal.Rptr 3rd at 260) (emphasis added). It is therefore *Steiner's* holding regarding the California law of consideration that is relevant to this case.

After citing California Code Section 1605, the *Steiner* Court concluded that:

"(T)hus there are two requirements in order to find consideration. The promisee must confer (or agree to confer) a benefit or must suffer (or agree to suffer) prejudice. We emphasize that either alone is sufficient to constitute consideration: 'it is not necessary to the existence of good consideration that a benefit should be conferred upon the promisor. It is enough that a prejudice be suffered or agreed to be suffered by the promisee…' It is

not enough, however, to confer a benefit or suffer prejudice for there to be consideration. As we held in *Bard vs. Kent*, supra, 19 Cal.2d at Page 452, 122 P2d 8, the second requirement is that the benefit or prejudice 'must actually be bargained for as the exchange for the promise.'. Put another way, the benefit or prejudice must have induced the promisor's promise". 48 Cal.4th at 420, 421. (Emphasis added.)

Put another way in this case, Steve Stewart's promise to guarantee the note must have been induced by Amanda Griffith's promise to extend its term, in order for there to be a finding of good consideration. There is simply no evidence of any such bargained-for exchange. Thus, the principal ground of this appeal is that the Trial Court did not find, nor does the evidence in the case reasonably support, the conclusion that Steve Stewart's promise to guarantee the ISL promissory note was actually bargained for with Amanda Griffith, in exchange for an extension of the term of the note, as Ms. Griffith now contends.

The evidence in the record shows that Mr. Stewart and Ms. Griffith exchanged emails on January 16, 2013, as discussed in the Statement of Facts above. The email (R. p.343-344) clearly contains no offer by Ms. Griffith to extend the term of the note in exchange for Mr. Stewart's personal guarantee. Beyond those undisputed facts, Ms. Griffith testified only that "we had talked about a personal guarantee all along. He was involved and would cover my expenses". (R.p. 164: line 1). Mr. Stewart contradicted this testimony: "I don't recall any conversation prior to (the email of January 16, 2013) about a personal guarantee of the $200,000. First mention of it was this email." (R.p.225: lines 3-13). Never, however, did Ms. Griffith testify that she and Steve Stewart agreed to extend the term of the note in exchange for Steve Stewart's promise to guarantee it. Indeed, the context of her testimony that they had talked about a personal guarantee "all along"

strongly infers that even if such a conversation had occurred, it pre-dated the January 16, 2013 emails. Her testimony, even if found to be credible, does not connect a conversation about a personal guarantee with an extension of the term of the note.

Admittedly, the contradictory testimony between Ms. Griffith and Mr. Stewart presented an issue for determination by the Trial Judge as finder of fact. However, because the Trial Judge did not specifically address this fact issue (as further discussed below); and because Ms. Griffith never testified that there was a "bargained-for exchange"; and because other evidence in the record squarely contradicts any suggestion that a "bargained-for exchange" ever occurred between Griffith and Stewart, the Trial Court's reference to "that agreement" (*c.f.* Court's order at Fact Finding "C", R.p.017) cannot be upheld.

Consider the Other Evidence: The Testimony of Ms. Griffith is Inconsistent with a Finding or Conclusion That There Was a Bargained-For Exchange With Mr. Stewart That Was Supported By Good Consideration. Three Points for Consideration.

In addition to the fact that Ms. Griffith never testified there was a bargained-for exchange, three points of her testimony contradict any notion that the evidence reasonably supports a conclusion that there was an agreement to exchange an extension of the note in consideration for Mr. Stewart's promise to personally guarantee the note.

1. The First Point.

First, Ms. Griffith testified that the reason for the "note extension" was because ISL would continue to pay interest. She was asked by her own lawyer in direct examination:

Q: So the initial note was to be repaid on March 31, 2013. Did you have any problem extending the terms of that personal guarantee (sic)?

(Objection colloquy here, omitted)

A: No.

Q: Tell the Court why.

A: Because they were going to continue to pay me.

Q: Pay you?

A: Interest on my loan.

(Four lines of testimony not reprinted here.)

Q: And how long did you intend for that loan to continue?

A: Until they repaid me.

(R.p.164: line 25 to p.165: line 19)

Although the question on line 1 of page 30 (R.p.165: line 1) was whether Ms. Griffith had a problem extending the term of the *personal guarantee* it is obvious from the context of the colloquy that the examiner, and Ms. Griffith, understood the question to be whether she "had any problem" extending the term of the note. The term, or time, of an obligation refers to the time it becomes due, and the clear context of the colloquy refers to the payment term of the note. A personal guarantee would have no term, or time element, independently of the note; whereas a note contains a time or term element to describe when it must be repaid. Thus it is clear that the question-answer exchange between Ms. Stewart and her own lawyer referred to extending the term of the note, not the guarantee.

As for the question why she agreed to extend the term of the obligation, it was not Ms. Griffith's testimony that it was because Mr. Stewart would personally guarantee it. Rather, she testified it was because ISL would continue to make interest payments. In fact, ISL did make interest payments until the check sent from ISL for $6,000 in November, 2013, which she was asked to hold until January, 2014. (R.p.167: lines 3-19) However,

when deposited in January, 2014, the check was returned because of insufficient funds. (R.p.167: line 24 to p.168: line 11)

And when asked how she expected to be repaid in January, 2014, Ms. Griffith answered, "Future development projects. (R.p.168: lines 23-25) Notably, she did not testify, "from Mr. Stewart." She was then asked at R.p.169: line 1: "Q: And from ISL or from Mr. Stewart?" Her answer: "ISL was disbanded. And there were new LLC's formed for their future development" (R.p.:169: line 2) Once again, although invited by her lawyer's question to do so, Ms. Griffith did not answer, "I expected Steve Stewart to repay me."

2. The Second Point.

Ms. Griffith's actions on January 12, 2016. On that date, two years after the last interest check from ISL had been dishonored, and almost three years after their email exchange about a personal guarantee, Ms. Griffith had her lawyer prepare a note and personal guarantee for Mr. Stewart, which she sent to him for his signature. (R.p. 196: line 21 to p.197: line 7; R.p.730-734). Notably, in her letter to Mr. Stewart she makes no mention of the email exchange that she now claims to be a personal guarantee. Neither does she there contend that he should sign it in exchange for any extension of the term of the promissory note.

Mr. Stewart did not sign the guarantee tendered by Ms. Griffith in January, 2016. That Ms. Griffith had it prepared and tendered it is inconsistent with her trial position that the email exchange makes out an enforceable agreement. That she tendered it without making reference to the email exchange she now contends to be an enforceable guarantee is inconsistent with her trial position. That she tendered it without alluding to the fact of

any "extension" of the term of the promissory note, is inconsistent with her trial position that the email exchange and her subsequent "performance" by extending the term of the note constitute an enforceable exchange of promises supported by good consideration.

3. The Third Point.

Finally, Ms. Griffith testified that at the time of the January 16, 2013 email exchange she knew that the maker, ISL, could not pay it. (R.p.192: lines 17-18). Therefore, and in that case, Mr. Stewart's gratuitous promise to guarantee the note could not possibly have prejudiced Ms. Griffith; nor could she say it influenced her not to take action. By her own testimony, she knew that it would have been a futile and fruitless act to pursue ISL.

Although Mr. Stewart did testify that he continued to derive a benefit from Ms. Griffith's loan after its due date (R.p.246: line 25 to p.247: line 3), that testimony was merely an admission that Ms. Griffith's loan had assisted ISL, and Mr. Stewart, in the first place, as had been originally intended by the parties. There was no testimony that the benefit derived by Mr. Stewart or by ISL after the due date of the note was anything new or in addition to the benefits originally contemplated and intended by Ms. Griffith's original loan. Moreover, as first argued by Appellant, there was no bargained-for exchange between Ms. Griffith and Mr. Stewart individually, in the first place.

In several paragraphs of her order the trial judge states that Appellant Stewart "admitted that the extension of that repayment term and his use of the funds beyond March 31, 2013, were a substantial personal benefit to him". (R.p. 17, p. 21). The record does not support this finding. Admittedly, Mr. Stewart testified that he derived substantial personal benefit "from Amanda's $200,000 in this account, what remained of it after April 1st (2013)" (R.p. 246: line 25 to p.247: line 3) But this "benefit" is no more than what was

contemplated at the time of the original loan, and had nothing to do with a personal guarantee. Whether ISL repaid the loan to Ms. Griffith or did not repay it, the "benefit" originally contemplated to be realized by Mr. Stewart would remain the same. It was not his testimony that any "extension" benefitted him but only that the original loan benefitted him.

Moreover, on the date of the email exchange, January 16, 2013, ISL's bank account balance was only $17,386.92. (Ex. 5, R.p. 408-412, check numbers 1050-1063)

The trial court's finding to the contrary is not supported by the evidence.

The Trial Court's Findings are Inadequate to Provide For Meaningful Review.

In this case the parties and the appellate court are left with no appreciation for any discrete findings and inferences that led the trial judge to conclude that there was "an agreement", at all. The trial judge never found and concluded there was an agreement in any direct sense; and neither did the court cite to or find that there was indirect or circumstantial evidence to support any such conclusion.

Rule 52(a) of the South Carolina Rules of Civil Procedure requires, *inter alia,* "in all actions tried upon the facts without a jury or an advisory jury, the Court shall find the facts specially and state separately its conclusions of law thereon..."

The rule is directorial in nature so "where a trial court substantially complies with Rule 52(a) and adequately states the basis for the result it reaches, the appellate court should not vacate the trial court's judgment for lack of an explicit or specific factual finding." *Noisette vs Ismail,* 304 S.C. 56, 58, 403 S.E.2d 122, 123 (1991).

However, the South Carolina Supreme Court has held that trial courts, sitting without juries in an action at law, shall write their findings specially and separately to allow

a reviewing court to determine from the record whether the judgment – and the legal conclusions which underlie it – represent a correct application of the law. The requirement for appropriately detailed findings is thus not a mere formality or a rule of empty ritual; it is designed instead to dispose of the issues raised by the pleadings and to allow the appellate courts to perform their proper function in the judicial system...the findings must be sufficient to allow the appellate courts, sitting in their appellate capacity, to insure the law is faithfully executed below. The absence of factual findings makes the appellate court's task of reviewing the court order impossible because the reasons underlying the decision are left to speculation. To leave the chore of sorting through the record to review contradictory testimony taxes the judicial system and is unfair to the litigants as well as the lower court to whose factual determinations the appellate courts give deference. *In re Treatment and Care of Luckabaugh* 351 SC 122, 568 S.E.2d 338 (S.Ct. 2002).

The failure of the trial court to make findings, leading to the ultimate conclusion that there was an agreement, a "bargained-for exchange", relates directly to Appellant's principal appeal ground that Steve Stewart's promise to guarantee the note was gratuitous, was not the result of a bargained-for exchange, and that it was unsupported by "good consideration". The trial judge made no such finding; the evidence cannot support such a finding.

Notwithstanding the Trial Judge's Lack of Findings, the Record Demonstrates the Lack of Evidence to Support the Conclusion That Good Consideration Was Exchanged.

Regardless, however, of the inadequacy of the trial court's findings, there are two incontrovertible truths to be gleaned from the record. The first is that neither Ms. Griffith nor Mr. Stewart testified that Stewart's promise to guarantee the ISL note was made in

exchange for extending its term. The closest Ms. Griffith could come to that testimony, in honesty, is that it was "implied". (R.p.195: line 22) That an intent was "implied" is necessarily a unilateral thought process on the part of Ms. Griffith, alone. There was no evidence of a bilateral, mutual intent to exchange promise for promise. To the contrary, as to whether he received any benefit from his promise of guarantee, Mr. Stewart testified, "None was offered and I received none." (R.p.256: line 22)

The second truth is stronger. When asked by her own lawyer why she agreed to extend the term of the note, Ms. Griffith's testimony, in honesty, was to say that it was because ISL would continue to pay interest. Given the open ended, non-leading question, and the opportunity to lay the extension at the feet of Mr. Stewart's guarantee, Ms. Griffith could not, in honesty, do that.

Accordingly, by Ms. Griffith's own testimony it is manifest that the evidence does not reasonably support the conclusion that there was a bargained-for exchange of promises for good consideration.

The trial court's finding that Steve Stewart is personally liable for ISL's promissory note to Ms. Griffith must be reversed. At the very least the case should be remanded to the trial court with instructions to make adequate findings.

ARGUMENT II

THE TRIAL COURT ERRED BY FAILING TO MAKE NECESSARY FINDINGS TO SUPPORT THE AWARD OF ATTORNEY FEES

South Carolina Law. In the seminal case of *Baron Data Systems, Inc. v. Loter*, 297 SC 382, 377 S.E.2d 296 (S.Ct. 1989), our Supreme Court restated the general rule in South Carolina that attorney fees are not recoverable unless authorized by contract or statute; and

that when there is a contract, the award of attorney's fees is left to the discretion of the trial judge, which will not be disturbed unless an abuse of discretion is shown. 297 SC at 383, 384.

The *Baron Data* court restated the six factors to be considered by a trial court in awarding a reasonable attorney fee in South Carolina, specifically concluding that "consideration should be given to all six criteria in establishing reasonable attorney fees; none of these six factors is controlling." 297 SC at 384. The six factors are:

(1) The nature, extent and difficulty of the legal services rendered;

(2) The time and labor necessarily devoted to the case;

(3) The professional standing of counsel;

(4) The contingency of compensation;

(5) The fee customarily charged in the locality for similar legal services;

(6) The beneficial results obtained.

The factors set forth in *Baron Data* have been consistently applied in South Carolina decisions addressing the award of a reasonable attorney fee. See, for example, *Burton v. York County Sheriff's Department*, 358 SC 339. 594 S.E.2d 888 (Ct. App.2004); *Horton v. Jasper County School District*, 423 SC 325, 815 S.E.2d 442 (S.Ct. 2018). In the last cited cases, *Burton* and *Horton*, the Court of Appeals and Supreme Court, respectively, emphasized in their holdings that "the trial court should make specific findings of fact on the record for each of these factors." See, *Burton,* 358 SC at 358; *Horton*, 423 SC at 330.

The trial court's order awarding attorney fees contains only a single sentence awarding an attorney fee of $89,160.54, without any factual findings or any explanation of the rationale by which the figure was calculated. Notably, the time and billing statement

filed by Plaintiff's attorneys at trial shows a total of fees and expenses, calculated at the prevailing rate charged by Plaintiff's attorneys, to be $68,160.54. (R.p.301) The Court's Order does not address the *Baron Data* factors, and provides no basis upon which Appellant or this Court might review, understand, and evaluate the trial judge's rationale for the award.

Moreover, there is no basis in the record of this case for any award of fees other than the "lodestar", calculated by multiplying a reasonable hourly fee by the number of hours expended in the case. A careful review of the *Baron Data* factors should reveal that there is no basis for an enhancement beyond the lodestar calculation.

California Law. California law is not dissimilar to that of South Carolina. California has codified its policy regarding attorney fee provisions provided by contract, in *California Civil Code* §1717, to provide for reciprocity between contract parties. "The sole purpose of Section 1717 was to transform any unilateral provision in a contract to a reciprocal one, giving the right to fee to whichever party prevails in an action on a contract providing for attorney fees." *Associated Convalescent Enterprises vs. Carl Marks & Co., Inc.*, 33 Cal.App.3rd 16, 108 Cal.Rptr. 782 (Cal. App.1973). Reference to the Code Section becomes, as well, a repository of research references involving attorney fee disputes arising from contract provisions in the State of California.

The case of *PLCM Group, Inc. v. Drexler*, 22 Cal.4th 1084, 997 P.2d 511 (S.Ct. Cal. 2000) involved a dispute between a legal malpractice carrier and its insured attorney over the attorney's refusal to pay the policy deductible amount. A jury found for the insurer on the liability question, and the trial court ordered the insured attorney to pay the insurer's legal fees. The trial court awarded attorney fees based on the reasonable hours expended

by counsel for the insurer, multiplied by the prevailing hourly rate in the community for comparable legal services.

The California Supreme Court there stated: "As the Court of Appeals herein observed, the fee setting inquiry in California ordinarily begins with the 'lodestar,' i.e., the number of hours reasonably expended multiplied by the reasonable hourly rate.' 'California courts have consistently held that a computation of time spent on a case and the reasonable value of that time is fundamental to a determination of an appropriate attorney fee award.'...The lodestar figure may then be adjusted, based on consideration of factors specific to the case, in order to fix the fee at the fair market value for the legal services provided." 22 Cal.4th at 1095.

The *PLCM* court further held: "After the trial court has performed the calculations of the lodestar, it shall consider whether the total award so calculated under all of the circumstances of the case is more than a reasonable amount and, if so, shall reduce the §1717 award so that it is a reasonable figure." ..."The value of legal services performed in a case is a matter in which the trial court has its own expertise...the trial court makes its determination after consideration of a number of factors, including the nature of the litigation, its difficulty, the amount involved, the skill required in its handling, the skill employed, the attention given, the success or failure, and other circumstances in the case."... "In the present matter, the Superior Court based the award of attorney fees to the prevailing party, PLCM, on the number of hours expended by counsel multiplied by the prevailing market rate for comparable legal services in San Francisco where counsel is located. No error appears. The Superior Court used a proper standard in calculating the fees." 22 Cal.4th at 1096. (Emphasis added.)

The California case of *Syers Properties III, Inc. vs. Rankin*, 226 Cal.App.4th 691, 172 Cal.Rptr.3rd 456 (Ct. Appt. CA 2014), involved the challenge to an attorney fee award, also arising from an underlying attorney malpractice defense verdict, where the trial court had ordered the Plaintiff to pay attorney fees.

Just as had the California Supreme Court in *PLCM* fourteen years earlier, the Court of Appeals in *Syers* held: "Our Supreme Court has recognized the lodestar is the basic fee for comparable legal services in the community and that it may be adjusted by the court based on a number of factors in order to fix a fee at the fair market value for the particular action. In effect, the Court determines, retrospectively, whether the litigation involved a contingent risk or required extraordinary legal skill justifying augmentation of the unadorned lodestar in order to approximate the fair market value for such services." 226 Cal.App.4th at 697-698.

"Here, as appropriate in this type of case, counsel were compensated based on the lodestar calculated by the court, without adjustment." *Syers Properties,* 226 Cal.App.4th at 698.

Based upon the trial record, the "lodestar" in this case is set by the billing record from Respondent's attorneys, calculated at their usual billing rates, for a total amount of $68,160.54 including paralegal fees, and costs. (R.p.301). The Court's award of $89,160.54 increases the lodestar by approximately one-third, but without any findings by the Court to justify either the lodestar to begin with, or any enhancement.

It is clear that under both South Carolina and California law, it is necessary for the trial court to make findings in support of its award of attorney fees. This Court should

reverse and remand the trial court's award of attorney fees, to require the trial judge to make the findings required by California and South Carolina case law.

ARGUMENT III

THE TRIAL COURT ERRED BY AWARDING INTEREST IN HER ORDER; INTEREST IS SET BY STATUTE AND SUPREME COURT ORDER

Judgment interest attaches to any money judgment filed in the Circuit Courts, as a matter of law. South Carolina Code §34-31-20.

Moreover, the judgment interest rate is variable, and changes from year to year, based upon the published interest rate in the *Wall Street Journal*, plus a statutory additive as decreed by order of the South Carolina Supreme Court, published and filed by January 15th of each year. Therefore, the interest rate being variable, the rate fluctuates on any judgment, from year to year.

It was therefore error for the trial court to affix in any permanent sense, by court order, a judgment interest rate. That issue is otherwise fixed by South Carolina Code Section §34-31-20, and by the annual orders filed by the South Carolina Supreme Court.

The trial court's order should be reversed as to its fixing of a judgment interest rate.

CONCLUSION

Because the evidence at trial does not reasonably support a conclusion that good consideration was exchanged for Appellant Steve Stewart's promise of guarantee, the order of the trial judge must be reversed. Alternatively, the case must be remanded to the trial court with instructions to make adequate findings of fact to support a conclusion that there was a bargained-for exchange of promises for good consideration.

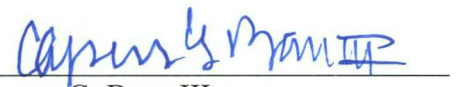
A reversal of the trial judge's finding that Appellant Steve Stewart is personally liable on the note would necessarily also reverse the award of attorney fees. However, even

if this court affirms the trial judge as to Appellant Stewart's liability on the note, the case must be remanded to require the trial court to make the necessary findings to support the award of attorney fees, as required by the South Carolina decisions of *Burton vs. York County Sheriff's Department, supra, Horton vs. Jasper County School District, supra*, and the California decisions of *PLCM Group vs. Drexler, supra* and *Syers Properties III vs Rankin, supra.*

Finally, and notwithstanding this court's treatment of Issues I and II, above, this court must reverse so much of the trial court's order that sets a judgment interest rate. The judgment interest rate is statutorily set and is variable, as declared by the South Carolina Supreme Court annually, as required by the statute, and cannot be fixed by trial court order.

Respectfully Submitted,

BARR, UNGER & McINTOSH, LLC



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January 27, 2020

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge

Case No. 2016-CP-10-5773

Amanda Griffith.....Respondent,

vs.

ISL Development, LLC and
Steven Stewart, of whom
Steven Stewart is.....Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

January 29, 2020

Charleston, SC

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