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.

REPLY BRIEF OF APPELLANT

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January 27, 2020

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STATEMENT OF THE CASE

Petitioner incorporates the Statement of the Case as set forth in his principal Brief.

STATEMENT OF FACTS

Petitioner incorporates the Statement of Facts as set forth in his principal Brief.

STANDARD OF REVIEW

Petitioner incorporates the Standard of Review set forth in his principal Brief.

Respondent argues that Appellant suggests a "new and dramatically more stringent standard" of review with reference to Appellant's arguments citing the case of *In Re Treatment and Care of Luckabaugh*, 351 SC 122, 568 S.E.2d 338 (S.Ct. 2002).

Respondent's argument is misguided. The *Luckabaugh* case does not introduce a new "standard of review". Rather, *Luckabaugh* articulates the requirement that the trial court must make complete findings of fact, where a case is tried before the court without a jury, to enable appellate review to accordance with Rule 52, SCRCP.

Otherwise, the standard of review articulated in the case of *Townes Associates, Ltd. v. The City of Greenville,* 266 S.C. 81, 221 S.E.2d 773 (1976), applies, as is argued in Appellant's principal Brief.

ARGUMENT I

NEITHER THE TRIAL COURT'S ORDER NOR THE EVIDENCE AT TRIAL SUPPORT A FINDING THAT APPELLANT'S PROMISE OF GUARANTEE WAS SUPPORTED BY GOOD CONSIDERATION

Appellant's central argument in his appeal from the trial court's finding that he is liable as personal guarantor of the promissory note is that no evidence was offered at trial to support a finding of a "bargained for consideration", in exchange for his gratuitous promise to guarantee the promissory note of ISL Development, LLC to the Respondent. Appellant also argues that the trial court erred by failing to express in her order the reasons underlying her fact conclusion that there was bargained for consideration. *In Re Treatment and Care of Luckabaugh*, 351 SC 122, 568 S.E.2d 338 (S.Ct. 2002).

Appellant does not dispute that in his email of January 16, 2013 he promised to guarantee the ISL promissory note. (R.p.344,345). Therefore, the central issue at trial and in this appeal is whether there is evidence in the record of a promise by Respondent to extend the due date of the note, in exchange for Appellant's promise to guarantee its

payment. That is to say, there was no evidence of the requisite "bargained for exchange" of promises. *Steiner vs. Thexton*, 48 Cal 4th 411, 226 P3d359, 106 Cal.Rptr.3d 252 (Cal. 2010). Where is the evidence that Appellant's promise was given in exchange for a promise by Respondent?

Respondent's central argument is that the trial court's order adequately states the basis for the result she reached; and that notwithstanding the findings in the order, the evidence at trial supports a finding of a bargained for exchange. In her Brief, Respondent cites the evidence that she contends supports these arguments. None are viable.

The Trial Court's Order.

As for the trial court's findings, Respondent argues that Section "D" of the court's conclusions of law makes the finding that satisfies the requisite "bargained for exchange" of promises, and at the same time the requirements of Rule 52, SCRCP that the trial court's order must make findings of fact. That paragraph states the following:

> "The Plaintiff's agreement to extend the due date of the note was supported by Stewart's promise and acceptance of the personal guarantee of repayment of the note to Plaintiff, and Stewart received sufficient consideration to support his personal guarantee of repayment to Plaintiff in that both Stewart and ISL received actual use and substantial benefit of the borrowed funds beyond the Note's original repayment date of March 31, 2013." (R.p.021; para. "D")

The problem with the trial court's finding "D" is that it states only an ultimate finding, with no reference to the evidence or to any reasoning that leads to the court's conclusions. More importantly, the trial court does not refer to any evidence, or any circumstantial reasoning by which the court concludes that the Plaintiff agreed to extend the term of the note. Rather, as if picking up the thought in mid-stream, the order refers only to "(T)he Plaintiff's agreement to extend the due date of the note..." What is lacking is the trial court's independent, predicate finding that Plaintiff/Respondent did agree to

extend the term of the note, that she communicated that promise to Appellant, and some evidentiary basis or deductive reasoning to support such a conclusion. Respondent, Ms. Griffith, never testified that she made such a promise in exchange for Mr. Stewart's. Appellant Stewart testified, with respect to whether he realized a benefit from his promise of guarantee that "None was offered and I received none." (Rp.256: Line 22).

The issue whether Respondent promised to extend the term of the note in exchange for Appellant's promise to guarantee it was, after all, the central issue in dispute in the case. How, where and why did the court reach the conclusion that Respondent ever made such a promise to extend the term? The court's order surely does not answer that question. Instead, the Court addresses the point in mid-stream by referring to "(T)he Plaintiff's agreement to extend the due date..."; as if, elsewhere in her order, the court had independently found as a fact the existence of Respondent's promise to extend the term. However, there is no such independent finding.

Neither does the court's finding attempt to reconcile this mid-stream conclusion with Respondent's other trial testimony.

The circumstances invoke the articulation of the *Luckabough* court that "The absence of factual findings makes our task of reviewing the court order impossible because the reasons underlying the decision are left to speculation." *Luckabaugh, supra*, 351 SC at 133. (Emphasis added.)

Respondent's Trial Testimony.

As discussed in Appellant's principal brief, Respondent did not testify that she did not call the note on its due date because Steve Stewart had promised to guarantee payment. Rather, she testified that she did not call the note because ISL continued to pay interest

(R.p.164: Line 25 to p.165: Line 19); she further testified that she submitted a written guarantee for Mr. Stewart to sign a year later, that he would not sign (R.p. 196: Line 21 to R.p. 197: Line 7), a circumstance inconsistent with the existence of a prior binding agreement to guarantee it; and Respondent testified that she knew at the time of the January 16, 2013 email that ISL was unable to repay the note (R.p. 192: Line 17,18), meaning that she understood an expectation of timely payment under the note term was a futile one (Also see Appellant's arguments to these points in his principal Brief at pp. 11-15.)

Although Respondent seeks to minimize the import of the *Luckabaugh* case by arguing that in that case there were no findings of fact, whereas in this case there were nine findings of fact, Respondent's argument misses the point of *Luckabaugh's* holding. In that case the Supreme Court focused on the importance of fact findings that clarify the trial court's reasons for its ruling. Without such reasons the appellate courts must either undertake "the chore of sorting through the record" to search for reasons, or the appellate court must remand the case to the trial court to make such findings.

This record lacks an articulation of the reasoning that leads to the trial court's findings. That is where the parties in this case find themselves, given the paucity of findings in the trial court's order.

The Evidence at Trial.

Respondent has had ample time – more than sixty days - to parse through the record of this trial, including a verbatim transcript, to identify evidence that supports the trial court's conclusion that there was a bargained for exchange between the parties. Respondent's best argument, made in pages 8-10 of her brief, centers only on an analysis of the January 16, 2013 email exchange.

Respondent argues that in that email exchange she stated her position that she did not want to wait "two years in the future" for a return on her $750,000.00 investment as originally contemplated in the Memorandum of Understanding between the parties. From a reading of the complete email, this was obviously context for her explanation why she decided not to go forward with the $750,000 investment.

However, Respondent now argues that phrase in her email is somehow evidence in support of the proposition that by her email she offered to extend the term of the Note. Respondent now argues the email meant, "...she is only willing to accept the risks of an extended repayment date for the note if Appellant personally guaranteed that ISL would pay the debt." (Respondent's brief p. 9). This is an argument never before offered in this case.

It is a conflated argument. It is clear from the context of the e-mail that the "two years in the future" phrase there refers to the terms of the originally contemplated equity investment of $750,000.00 and to nothing else. (R.p.344; copy of email) The phrase bears no relationship to Respondent's trial position that she agreed to extend the term of the note in consideration for Appellant's personal guarantee. It cannot be construed in any other way. Moreover, the trial court did not discuss this evidence and neither did Respondent make this argument to the trial court.

As discussed below, therefore, not only does the trial court's order fail to cite any evidence or reasoning in support of its finding that promises were exchanged amounting to consideration, but Respondent herself cannot cite any such supporting evidence in this record. This is so, even after Respondent's advantage of time, hindsight, and a verbatim trial transcript to search for the evidence.

This is the best evidence Respondent can find in the record, and it fails to make her case for the existence of evidence of good consideration. The evidence of Respondent's promise to extend the term of the note in exchange for Appellant's promise to guarantee it does not exist.

Furthermore, Respondent does not even attempt to rebut the three overwhelming arguments by Appellant in his principal Brief that there was no evidence at trial of an exchange of mutual promises, and that Respondent's own testimony contradicts her present position. First, Appellant's explanation for not calling the note on its due date was not because Steve Stewart promised to guarantee it. Rather, she testified it was because ISL would continue to pay interest. (R.p.164: Line 25 to p.165: Line 19). Secondly, notwithstanding Appellant's present argument that Appellant's personal guarantee was supported by her promise to extend the note, she nevertheless sent a proposed personal guarantee to Appellant on January 12, 2016, two years after ISL's last tender of payment and almost three years after their e-mail exchange. The January, 2016 tender of the proposed guarantee is inconsistent with the Respondent's position at trial that there was an enforceable agreement to extend the note in consideration for Appellant's guarantee. Finally, Respondent testified she knew ISL could not repay the loan at the time of the January 16, 2013 e-mail. Therefore, Appellant's promise to guarantee the note was entirely gratuitous.

Respondent did not call the note on its due date because she knew the promisor could not pay it. Neither party realized a benefit from the January 16, 2013 email conversation; and neither party suffered a detriment. In the words of Steve Stewart when

asked if he realized any benefit from his promise of guarantee, "None was offered and I received none" (R.p.256: Line 22).

It is noteworthy that as to these three points, Respondent has made no reply in her Brief.

As argued in Appellant's principal Brief, the finding of good consideration must be reversed. At the least, the case must be remanded with instructions to the trial court to articulate her findings in a manner so as to permit appellate review.

ARGUMENT II

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

Appellant's principal argument on this issue is that the trial court erred by not articulating her reasoning for the attorney fee award, as is required under South Carolina law, in the line of cases including *Baron Data Systems, Inc. v. Loter*, 297 S.C, 382, 377 S.E.2d 296 (S.Ct. 1989), and under California law, in the line of cases including *PLCM Group, Inc. v. Drexler*, 22 Cal.4th, 1084, 997 P.2d 511 (S.Ct. Cal. 2000); and the other cases cited in Appellant's principal brief.

Respondent does not, because she cannot, dispute the argument that the trial court failed to make the necessary findings. Rather, Respondent argues that the court's order should be affirmed because of evidence in the record. Notwithstanding Respondent's arguments that there is record evidence to support an enhanced attorney fee award, Respondent does not dispute that the trial court's order makes no findings at all to justify the attorney fee award.

Therefore, for the reasons further argued in Appellant's principal brief, the lack of findings by the trial court requires that the issue be remanded to make the necessary findings. *Burton v. York County Sheriff's Department*, 358 S.C. 339, 594 S.E.2d 888 (Ct. App.2004), *Horton v. Jasper County School District*, 423 S.C. 325, 815 S.E.2d 442 (S.Ct. 2018), *PLCM Group, Inc. v. Drexler*, 22 Cal.4th, 1084, 997 P.2d 511 (S.Ct. Cal. 2000), *Syers Property III, Inc. v. Rankin*, 226 Cal.App.4th 691, 172 Cal.Rptr.3rd 456 (Ct. App. CA 2014).

Respondent's argument that the trial record supports the award is to no avail because the case law clearly requires the court to make findings.

However, Appellant is compelled to comment further about Respondent's arguments relating to the record on this issue. Respondent argues in her brief, incorrectly, that during trial examination of Respondent, counsel for Appellant, counsel for Respondent, and the court all followed the *Baron Data* factors (Respondent's Brief at P.15). A review of the trial record does not support Respondent's contention.

Respondent's testimony at the January 25, 2019 hearing on damages consists of only 8 pages (R.p.284: Line 9 to p.291: Line 23). Respondent was not asked a single question about any of the necessary *Baron Data* factors. Arguments by counsel consisted of 8 pages (R.p.292: Line 9 to p.299: Line 19). Not a word is exchanged in that colloquy between counsel and the court about the *Baron Data* factors.

Admittedly, Respondent's brief to the court lists attorney fee factors articulated in the California case of *Fergus v. Songer*, 150 Cal.App.4th 552, 59 Cal.Rptr.3rd 273 (Court of Appeals, Second District, Div. 6, Cal. 2007). However, those factors were not discussed by Respondent in her Brief to the trial court. They were merely stated. Neither were they

addressed in testimony or orally argued. Instead, Respondent argued for an award of a 1/3 contingency fee.

Respondent's arguments that the trial court had opportunity to observe counsel at trial, and the skills applied there, may well be correct. But the failure of the trial court to make any findings to support the attorney fee award is fatal. The award of attorney fees should be reversed and the issue remanded to the trial court to make necessary findings.

ARGUMENT III

RESPONDENT APPEARS TO CONCEDE THAT THE AWARD OF JUDGMENT INTEREST MUST BE REVERSED

Respondent's Brief on the judgment interest rate issue appears to concede Appellant's argument that the rate is a variable one, set by Supreme Court order annually in accordance with Code Section 34-31-20. Accordingly, it was error for the trial court to set a fixed interest rate in her Order. The trial court's Order of a fixed judgment interest rate must be reversed.

ARGUMENT IV

RESPONDENT'S ARGUMENT THAT THE APPELLATE COURT SHOULD AFFIRM THE TRIAL COURT ON ANY GROUND APPEARING ON THE RECORD MUST BE DENIED BECAUSE RESPONDENT FAILS TO INVITE THE COURT'S ATTENTION TO ANY SUCH GROUND

Without citing any authority other than Rule 208(b)(2), South Carolina Appellate Court Rules, Respondent requests in her Fourth Argument that this Court affirm the trial court on any ground appearing in the record. However, Respondent fails to invite the Court's, or Appellant's, attention to any such additional ground.

Appellant suggests that it is incumbent upon Respondent to invite this Court's attention to any such additional sustaining grounds. Indeed, the very language of Rule 208(b)(2) reads: "Respondent's Brief may also contain argument asking the Court to affirm for any ground appearing on the record as provided by Rule 220(c)." (Emphasis added.) Here, the operative word in the rule is "argument". Respondent fails to suggest any such argument, which places Appellant in the impossible position of responding to an argument not made.

Rule 208(b)(2) is discussed in the case of *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C.406; 526 S.E.2d 716 (S.Ct. 2000) in which the Supreme Court stated: "Under the present rules, a respondent - the "winner" in the lower court – may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court." 338 S.C. at 419. This language in the *I'On* case supports Appellant's position that a Respondent must articulate any additional reasons for affirming the lower court's ruling, rather than arguing, without specifics, that the Appellate Court should itself search the record for a basis to affirm the trial court's decision.

ARGUMENT V

BECAUSE RESPONDENT'S STATEMENT OF THE CASE AND STATEMENT OF FACTS MAKE ARGUMENTS THAT ARE NEITHER SUPPORTED BY THE RECORD, NOR DO THEY CITE TO THE RECORD, THEY MUST BE DISREGARDED BY THE APPELLATE COURT

Respondent's Statement of the Case in her Brief is argumentative in tone, contrary to the requirements of Rule 208(b)(1)(C) that it not contain any contested matters.

Therefore the gratuitous arguments made in the Statement of the Case must not be regarded by this Court.

Likewise, Respondent's Statement of Facts, although a proper section of her Brief for argument, makes no reference to the Record on Appeal. This is contrary to Rule 208(b)(1)(D), SCACR. Moreover, in her Statement of Facts, Respondent injects characterizations of the evidence that are not supported by any evidence in the record. For example, Respondent writes that Appellant "desperately needed $200,000.00"; and that "Appellant implored Ms. Griffith to become an investor in ISL", without reference to any page of the Record on Appeal. In fact this characterization turns the true facts on their head, because Respondent testified that her relationship with Appellant was amiable, that upon learning of his California project she became interested in it because she was interested in expanding her investment portfolio. (R.p.145: Lines 12-17; R.p.174: Lines 11-20). She was impressed with Appellant's pre-development work in procuring the entitlements for the property, which she characterized as "professional". (R.p.145: Line 23 to p.146: Line 13)

Respondent further miscasts the facts by stating that "Ms. Griffith refused to convert her loan to an investment in ISL, but proposed to Appellant that if he would personally guarantee that ISL's promissory note would be repaid in principal and interest she would extent the repayment date of the promissory note." (Respondent's Brief, Pg. 2). There is no such evidence in the Record of this case, and Respondent fails to refer to any.

Respondent further argues that "Appellant agreed with her proposal, thereby establishing that the loan repayment date was extended. ISL did not need to repay the principal and interest on March 31, 2013; and that Appellant would personally guarantee that Ms. Griffith would have the ISL note's principal and interest repaid to her."

(Respondent's Brief, Pg. 3). Although this latter quote does contain a purported reference to the record as "(Rp.___).", Respondent has not suggested in her Initial Brief where the evidence to support her factual contention is contained in the record. In the circumstances, Appellant is helpless to further respond to an undisclosed reference to the record.

Respondent's failure to cite to the Record on Appeal denies Appellant a fair opportunity to respond, and puts this Court in the position of being unable to evaluate Respondent's appeal contentions.

Accordingly, Respondent's Statement of the Case and her Statement of Facts must be disregarded by the Court.

CONCLUSION

Even with a sixty-day time to carefully examine the verbatim record in this case, Respondent was unable to point to evidence in the record that makes a credible, direct or circumstantial case that there was a bargained for exchange of promises to make out good consideration for Appellant's promise to guarantee the ISL Promissory Note to Respondent. The trial court's ruling should be reversed. The result may seem harsh, but Appellant himself lost funds in the venture, as did his wife's family to a degree even greater than Respondent.

Respondent is a sophisticated, professional, businesswoman. There was no evidence that she was misled, or that she did not understand the risks that she was taking. Moreover, the high rate of return, twelve percent (12%) on the promissory note at issue, signified that there was a high risk, going in.

For the reasons argued in Appellant's principal Brief, and in this Reply Brief, the decision of the trial court should be reversed.

Alternatively, the case should be remanded to the trial court, requiring that the court articulate her findings in a form and manner so as to be reviewable by Appellant and by this Court.

Respectfully,

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CERTIFICATE OF COUNSEL

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

January 29, 2020

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