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SUPREME COURT
OF GUAM

IN THE SUPREME COURT OF GUAM

JWS REFRIGERATION & AIR CONDITIONING, LTD.,
Plaintiff-Appellee,

v.

MALCOLM CAIN,
Defendant-Appellant.

Supreme Court Case No. CVA12-035
Superior Court Case No. CV1506-07

OPINION

Cite as: 2013 Guam 19

Appeal from the Superior Court of Guam
Argued and submitted on May 24, 2013
Hagåtña, Guam

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BEFORE: F. PHILIP CARBULLIDO, Chief Justice; ROBERT J. TORRES, Associate Justice; KATHERINE A. MARAMAN, Associate Justice.

CARBULLIDO, C.J.:

[1] This appeal arises from a dispute between Plaintiff-Appellee JWS Refrigeration & Air Conditioning, Ltd. (“JWS”) and several parties, including Defendant-Appellant Malcolm Cain (“Cain”), over a heating, ventilation, and air conditioning (“HVAC”) contract bid for the Guam Schools Project. In its decision and order, the trial court awarded JWS damages against Cain for breaching his duty of confidentiality, committing the tort of intentional interference with prospective economic advantage, breaching fiduciary duties, engaging in unfair competition, and misappropriating trade secrets, among other things. Cain appeals from that decision and order.

[2] We dismiss the appeal because we are unable to conduct meaningful review of the issues due to Cain’s failure to include in the record a transcript of all evidence material to the points he raises herein.

I. FACTUAL AND PROCEDURAL BACKGROUND

[3] The Guam Schools Project was a design-and-build project owned by the Guam Educational Financing Foundation (“GEFF”) for the construction of five public schools on Guam. JWS, a company that specializes in refrigeration and air conditioning products and systems, submitted a bid to provide HVAC products for the Guam Schools Project (specifically for the Adacao and Liguán schools) but it did not get the HVAC contract. Cain, JWS’ former general manager, formed a company called Simpson Air Conditioning (“Simpson Air”), which was awarded the HVAC contract for the Adacao and Liguán schools.

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A. Guam Schools Project Design Phase

[4] For over two years, JWS worked with Facility Group, the design developer for the Guam Schools Project, to develop an HVAC design for the schools. Specifically, JWS worked to incorporate AAON and Goodman HVAC equipment and products into that design.¹

[5] Cain, in his capacity as the general manager of JWS, represented JWS at the Facility Group's design and development meetings. Cain was made privy to JWS' HVAC material and installation pricing practices, which JWS deemed confidential under its employee handbook. After completing his work on the design phase in September 2006, Cain resigned from JWS. He then left Guam and went on to form Simpson Air, which the trial court found to be a foreign corporation organized under the laws of Australia.

B. Guam Schools Project Build Phase and Beyond

[6] With the design of the Guam Schools Project complete, GEFf next moved on to the build phase. GEFf awarded the Guam Schools Project construction contract to Core Tech International ("Core Tech"), a general contractor. Core Tech used the Facility Group's HVAC design and solicited bids for HVAC products that fit the Facility Group's design specifications.

[7] Core Tech received bids from a number of companies, including JWS and Simpson Air. JWS submitted its HVAC bid on October 3, 2006, and Simpson Air submitted its bid on October 31, 2006. Cain informed Core Tech that Simpson Air's bid was based on a special price factor that it received from AJB Associates, Inc. ("AJB"), the company that had previously appointed JWS as the authorized exclusive dealer of AAON products in Guam.² Instead of using the normal distributor price factor of .420% for AAON HVAC products, Cain indicated that

¹ JWS was an authorized, exclusive dealer of AAON products in Guam.

² The trial court's Findings of Fact and Conclusions of Law indicate that AAON International, Inc. does business as AJB Associates, Inc.

Simpson Air used a special price factor of .385% -- the same price factor that JWS used as AAON's exclusive dealer in Guam.

[8] After receiving all the bids, GEFf instructed Core Tech to reduce overall construction costs. To achieve that end, Core Tech considered substituting AAON HVAC products with a less expensive foreign-made product. JWS, however, convinced Core Tech to stick to the original design specifications that called for AAON and Goodman products.

[9] On November 16, 2006, Core Tech awarded Simpson Air the HVAC contract for the Adacao and Liguán schools and issued a purchase order in the amount of \$359,593.60.³ According to the testimony of Mr. Ho Eun, Core Tech's general manager, Core Tech did not award JWS the contract because JWS' bid was the highest bid submitted. Yet at the time that Core Tech awarded Simpson Air the HVAC contract, Core Tech was unaware that JWS was the exclusive dealer of AAON products in Guam. Mr. Eun later testified that if he knew of JWS' exclusive dealership, he would have honored the distributorship as a good businessman.

[10] Around the time that Core Tech awarded Simpson Air the HVAC contract, JWS informed Andrew Billok, the president of AAON International, Inc., that Core Tech intended to purchase HVAC AAON products from Simpson Air. JWS reminded Billok that it was the authorized AAON dealer in Guam pursuant to an exclusive distributorship agreement with AJB and that allowing Simpson Air to buy and bring AAON equipment to Guam "would not bode well for their business relationship." Record on Appeal ("RA"), tab 287 at 5-6 (Finds. Fact & Concl. L., July 24, 2012).

[11] While the relationship between Billok and JWS soured, Billok's relationship with Simpson Air seemed to flourish. Cain built upon the personal and professional relationship that

³ This figure was revised to \$354,030.00 on May 2, 2007.

he initially established with Billok during Cain's time as JWS' general manager. In the summer of 2006, AJB made Cain an AAON products representative in Australia. In April 2007, Billok wrote to Cain, asking Cain not to publicize their business dealings. Cain responded by informing Billok that Cain would be placing an order for AAON products to fulfill a revised purchase order Simpson Air received from Core Tech relating to the Adacao and Ligan schools.

[12] Meanwhile, Cain also established a relationship between Simpson Air and Thermal Supply Inc. ("TSI"). TSI is a Washington-based corporation that supplied Goodman products in Guam through Randy Asa, TSI's on-island representative. TSI distributed Goodman products in Guam through JWS, one of TSI's non-exclusive associate distributors. Cain asked Asa for price quotations on Goodman products that Cain needed for the Guam Schools Project. Asa gave Cain a pricing rebate for the Goodman products. This rebate was identical to the pricing rebate TSI gave to JWS after JWS had "successfully negotiated" for this particular rebate. *Id.* at 8, 10.

[13] This turn of events eventually led JWS to file its complaint against Cain, Asa, Billok, Simpson Air, TSI, AAON International, Inc., and others. In its complaint, JWS alleged that Cain had breached his duty of confidentiality, committed the tort of intentional interference with prospective economic advantage, breached his fiduciary duties, engaged in unfair competition, and misappropriated trade secrets.

[14] The matter came on for bench trial in the Superior Court. Thereafter, the trial court issued its Findings of Fact and Conclusions of Law, finding that Cain had breached his duty of confidentiality, tortiously interfered with the prospective economic advantage with Core Tech as to JWS' bid for Adacao and Ligan Elementary Schools, breached his fiduciary duties to JWS, engaged in unfair competition, and misappropriated trade secrets. *See id.* at 8-21.

[15] Cain timely appealed the amended judgment entered on October 15, 2012. He also filed a certificate stating that no transcript will be ordered.

[16] JWS subsequently filed a motion to strike and for sanctions against Cain, asserting that some of Cain's arguments in his opening brief relied on exhibits (specifically, exhibits U, RR, SS, QQQ, and RRR) that have not been admitted into evidence. JWS argued that these exhibits must be stricken where referenced in Cain's opening brief and from his excerpts of record because these non-admitted exhibits were not properly part of the record on appeal. We granted JWS' motion in part, ordering Cain to strike the relevant portions of his opening brief and excerpts of record that relied upon the improperly included material.

II. JURISDICTION

[17] This court has jurisdiction over appeals from final judgments of the trial court. 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 113-31 (2013)); 7 GCA §§ 3107(b), 3108(a) (2005).

III. STANDARD OF REVIEW

[18] As a question of law, we conduct a *de novo* review to determine whether Cain's appeal should be dismissed under Rules 15(c)(1)(H) and 7(b)(2) of the Guam Rules of Appellate Procedure ("GRAP"). See *Gutierrez v. Guam Power Auth.*, 2013 Guam 1 ¶ 8 (recognizing that questions of law are reviewed *de novo*).

IV. ANALYSIS

[19] This case presents a threshold issue of whether we should dismiss this appeal for Cain's failure to include in the record a transcript of all evidence material to the points Cain raises herein. In his opening brief, Cain addresses five issues on appeal: (1) whether the trial court erred in finding Cain financially liable to JWS; (2) whether the trial court erred when it found

that Simpson Air was a foreign corporation organized and existing under the laws of Australia; (3) whether the trial court erred when it found that Cain tortiously engaged in wrongful conduct; (4) whether the trial court erred when it found that Cain's wrongful act of submitting a bid that undercut prices for AAON products based on confidential information attained while in the employment of JWS caused JWS financial harm; and (5) whether the trial court erred when it found that JWS' pricing practices and procedures constitute trade secrets. *See* Appellant's Br. at 1-14 (Jan. 3, 2013).

[20] In its opposition brief, JWS argues that we should dismiss, without addressing the merits of Cain's issues, pursuant to GRAP Rules 15(c)(1)(H)⁴ and 7(b)(2) for our inability to conduct meaningful review without a transcript. *See* Appellee's Br. at 18-25. We address the requirements and applicability of each rule in turn.

A. GRAP 15(c)(1)(H)

[21] GRAP 15(c) governs the contents required for the excerpts of record submitted in all appeals. Specifically, GRAP 15(c)(1)(H) provides that:

where an issue on appeal is based upon a challenge to any other ruling, order, finding of fact, or conclusion of law, *and that ruling, order, finding or conclusion was delivered orally*, that specific portion of the reporter's transcript recording any discussion by court or counsel in which the assignment of error is alleged to rest [must be included.]

GRAP 15(c)(1)(H) (emphasis added). Rule 15(c)(1)(H) does not require a transcript in this instance because it applies only to situations where the trial court made an *oral* ruling, order, finding or conclusion. Here, the findings of fact and conclusions of law Cain challenges was not delivered orally; rather, it was reduced to writing. *See* RA, tab 287 at 1-25 (Finds. Fact & Concl.

⁴ JWS' counsel later conceded at oral argument that GRAP 15(c)(1)(H), which governs transcripts for any other ruling, order, finding or conclusion that was delivered orally, does not apply to this case. Digital Recording at 30:56-33:25 (Oral Argument, May 24, 2013).

L.). Because GRAP 15(c)(1)(H) does not apply here, we need not reach whether Cain’s failure to order a transcript under this rule requires dismissal of the appeal.

B. GRAP 7(b)(2)

[22] GRAP 7(b)(2)⁵ states: “If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant must include in the record a transcript of all evidence relevant to that finding or conclusion.” GRAP 7(b)(2). It is the appellant’s burden under this rule to provide transcripts of all the evidence, whether good or bad, which is material to the factual points the appellant wishes to raise on appeal. *J.J. Moving Servs., Inc. v. Sanko Bussan (Guam) Co.*, 1998 Guam 19 ¶ 10.

[23] Failure to provide relevant portions of a transcript under GRAP 7(b)(2) may require dismissal of the appeal. *See Lamb v. Hoffman*, 2008 Guam 2 ¶ 57 (quoting *Syncom Capital Corp. v. Wade*, 924 F.2d 167, 169 (9th Cir. 1991)). If the lack of a transcript precludes meaningful review, “an appellate court has no alternative but to dismiss an appeal.” *McGhee v. McGhee*, 2008 Guam 17 ¶ 12 (citing *Birchler v. Gell Co.*, 88 F.3d 518, 520 (7th Cir. 1996)); *Lamb*, 2008 Guam 2 ¶ 57. If, however, meaningful review is possible despite the absence of a transcript, an appellate court has the discretion to disregard the failure and decide the appeal on its merits to the extent the record allows. *McGhee*, 2008 Guam 17 ¶ 12 (citing *Lamb*, 2008 Guam 2 ¶ 57).

[24] Appellate courts have found meaningful review possible despite the absence of a transcript where the review required was limited to whether the trial court’s conclusions of law

⁵ GRAP 7(b)(2) is identical to Rule 10(b)(2) of the Federal Rules of Appellate Procedure (“FRAP”). Compare GRAP 7(b)(2), with FRAP 10(b)(2). When addressing GRAP 7(b)(2) issues in the past, this court has looked to federal case law interpreting FRAP 10(b)(2) for guidance. *See McGhee v. McGhee*, 2008 Guam 17 ¶ 12 (“Because the Guam Rules of Appellate Procedure are substantially similar to the Federal Rules of Appellate Procedure, we look to federal case law for guidance.” (citing *Sananap v. Cyfred, Ltd.*, 2008 Guam 10 ¶ 8 n. 2)); *Lamb v. Hoffman*, 2008 Guam 2 ¶ 57 (citing 7th Circuit and 9th Circuit cases construing FRAP 10(b)(2)).

followed from its findings of fact. *See* 2A Fed. Proc. L. Ed. § 3:662; *Trujillo v. Grand Junction Reg'l Ctr.*, 928 F.2d 973, 976 (10th Cir. 1991) (limiting review to whether the district court properly applied the law to the facts). But where review required an examination of facts elicited at trial, appellate courts have found that it cannot conduct meaningful review in the absence of a transcript. *See, e.g., Syncom Capital Corp.*, 924 F.2d at 169-70 (“[B]oth . . . contentions on appeal depend . . . on an examination of the facts elicited at trial. Because we lack a transcript detailing what these fact might be, we are not in a position to review this appeal.”); *Sw. Adm’rs, Inc. v. Lopez*, 781 F.2d 1378, 1380 (9th Cir. 1986) (concluding it could not meaningfully review the district court decision without a record of proceedings from below because questions presented raised, *inter alia*, factual issues as to what the parties intended and what they did).

[25] Here, Cain’s contentions depend on for their resolution an examination of the facts elicited at trial, precluding our ability to conduct meaningful review without a transcript.

C. Inability to Conduct Meaningful Review Under GRAP 7(b)(2)

[26] Although engaging in a review as the record allows may be permissible in some instances, such limited review is not warranted here. This is not a case where we could limit review to whether the trial court’s conclusions of law follow from its undisputed findings of fact. As we detail below, each issue that Cain raises requires an inquiry that is essentially factual, subject to a clearly erroneous standard of review.⁶ *See Yoshida v. Guam Transp. & Warehouse*,

⁶ We have previously held:

A finding is clearly erroneous when, even though some evidence supports it, the entire record produces the definite and firm conviction that the court below committed a mistake. The appellate court accords particular weight to the trial judge’s assessment of conflicting or ambiguous evidence. The applicable standard of appellate review is narrow; the test is whether the lower court rationally could have found as it did, rather than whether the reviewing court would have ruled differently.

Yang v. Hang, 1998 Guam 9 ¶ 7 (citation omitted).

Inc., 2013 Guam 5 (acknowledging that setting aside the trial court's factual findings require the application of the clearly erroneous standard of review (citing *Town House Dep't Stores, Inc. v. Ahn*, 2000 Guam 32 ¶ 13)).

[27] First, Cain challenges whether the trial court erred in finding Cain financially liable to JWS. *See* Appellant's Br. at 6-7. Although Cain does not clearly indicate the trial court's precise point of error, Cain appears to more specifically argue that the trial court erred when it made this factual determination:

It is this Court's opinion, based on the testimony of CORE TECH, that there was a possibility that CORE TECH would not have summarily rejected JWS' bid, and based on the exclusive distributorship would have communicated with JWS for possible award. JWS' bid was not the cause of its losses.

Id. at 6 (citing RA, tab 287 at 16 (Finds. Fact & Concl. L.). Cain asserts that, contrary to the trial court's findings, "Core Tech rejected JWS['] bid because it was too high[,], JWS wanted too much money for his AAON products[, and] no activities or actions by [Cain] caused JWS to lose the contract." *Id.* at 7.

[28] Cain presents us with one exhibit (i.e., exhibit KK) to review in support of his argument. *See id.* at 6 (citing RA, Pl.'s Trial Exs., tab KK at 2 (Document Route Slip)) (indicating three bids for the Adacao and Liguán schools HVAC contract, submitted by JWS (\$441,072.00), Simpson Air (\$354,030.00), and Carrier (\$349,344.00)). However, resolving this issue requires further examination into the facts beyond exhibit KK to determine whether the trial court committed a mistake when it found that JWS' high bid was not the cause of its losses and that there was a possibility Core Tech would not have summarily rejected JWS' bid had it known of its exclusive distributorship of AAON products in Guam. Such an examination requires a review

of the transcripts presenting this court with the oral testimony regarding this issue; without it, we cannot determine whether the trial court's findings were clearly erroneous.

[29] Second, Cain raises the issue of whether the trial court erred when it found that Simpson Air was a foreign corporation organized and existing under the laws of Australia. *See id.* at 7-9. The trial court specifically found Simpson Air to be “a foreign corporation organized and existing under the laws of Australia, formed on or about September of 2006 [and] not licensed to do business on Guam.” RA, tab 287 at 3 (Finds. Fact & Concl. L.). In disputing this finding, Cain asserts that there is nothing in the record showing that a corporate entity was involved or created. Appellant's Br. at 8.

[30] Cain cites to one document in support of his assertion, namely, his answer to JWS' first amended complaint, wherein he denied JWS' allegation that Simpson Air was a corporation that was organized and existed under the laws of Australia. RA, tab 38 at 1 (Answer of Def. Malcolm Cain to Pl.'s First Am. Compl., Dec. 31, 2008); RA, tab 33 at 2 (First Am. Compl.). Resolution of this issue requires an examination of the facts elicited at trial beyond the pleadings, and without the transcripts, we cannot determine whether the trial court's factual findings regarding Simpson Air were clearly erroneous.

[31] Third, Cain raises the issue of whether the trial court erred when it found that Cain tortiously engaged in wrongful conduct, a necessary component of the tort of intentional interference with prospective economic advantage. *See Korea Supply Co. v. Lockheed Martin Corp.*, 63 P.3d 937, 950 (Cal. 2003) (indicating that the tort of intentional interference with prospective economic advantage requires the defendant to have “intentionally engaged in [*wrongful*] acts or conduct designed to interfere with or disrupt the relationship.” (alteration in original) (quoting *Della Penna v. Toyota Motor Sales, U.S.A., Inc.*, 902 P.2d 740, 743 n.1 (Cal.

1995)) (internal quotation marks omitted)). Specifically, the trial court found that Cain acted wrongfully by “submitting a bid which undercut prices for AAON products based on prior confidential information attained while in the employment of JWS[.]” RA, tab 287 at 15 (Finds. Fact & Concl. L.).

[32] Cain argues that the trial court’s findings are not supported by the facts. Appellant’s Br. at 10. He asserts that he did not wrongfully use any of JWS’ confidential information, as he did not rely on his prior knowledge of JWS’ confidential pricing practices when formulating his bid. *See id.* Moreover, Cain contends that JWS’ information was not, in fact, confidential because information regarding the original design specifications for the bid was provided to all bidders and was public knowledge well before he submitted his bid. *See id.*

[33] This issue, similar to the issues raised earlier, involves an inquiry that is essentially factual, and absent the trial transcripts detailing what the facts might be, we cannot determine whether the trial court committed clear error in determining that Cain engaged in wrongful conduct by using JWS’ confidential information.

[34] Fourth, Cain raises the issue of whether the trial court erred when it found that Cain’s wrongful act of “submitting a bid which undercut prices for AAON products based on confidential information attained while in the employment of JWS” caused JWS financial harm. RA, tab 287 at 15 (Finds. Fact & Concl. L.); *see also* Appellant’s Br. at 11-13. The trial court specifically found that Cain’s wrongful act was a cause of JWS’ financial harm and that JWS’ high bid was not the cause of its losses. *See* RA, tab 287 at 15-16 (Finds. Fact & Concl. L.). It made this finding when analyzing whether Cain committed the tort of intentional interference with prospective economic advantage, as this tort requires that the defendant’s interference proximately caused economic harm to the plaintiff. *See Korea Supply Co.*, 63 P.3d at 950.

[35] Cain challenges the trial court's finding, arguing that, instead, JWS' high bid was the cause of JWS' losses. Appellant's Br. at 13-14 (citing RA, Pl.'s Trial Exs., tab KK at 2 (Document Route Slip)) (highlighting the following bids: "SIMPSON bid \$354,030; JWS bid \$441,072 and CARRIER Bid \$349,344"). Cain contends that the testimony of Mr. Jong Wong, a Core Tech technician, should be dispositive of the issue. *Id.* at 13. Yet, Cain has not provided us with the relevant transcripts to make this evaluation. As such, without the transcripts we are unable to consider whether the trial court made a clearly erroneous finding as to this matter.

[36] Finally, Cain raises the issue of whether the trial court erred when it found that JWS' pricing practices and procedures constitute trade secrets. *See id.* at 9. Without citing to anything in the record, Cain asserts that JWS' pricing practices and procedures could not be trade secrets because this information was general knowledge and was disclosed to Facility Group and Core Tech before he formulated Simpson Air's bid. *See id.* at 11 (arguing that "[m]atters of public knowledge or of general knowledge in an industry cannot be appropriated by one as his secret."). Resolution of this issue, too, requires an examination of the facts elicited at trial regarding the public knowledge or general knowledge of JWS' pricing practices and procedures, and without the transcripts detailing what those facts are, we cannot determine whether the trial court's findings were clearly erroneous.

[37] In sum, it is impossible for us to determine whether the trial court's factual findings as to each issue were clearly erroneous, giving due regard to the trial court's judgment about the credibility of witnesses, without a transcript in this instance. Because a transcript is essential for providing meaningful review in this particular case, its absence precludes our meaningful review.

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V. CONCLUSION

[38] Although we recognize that dismissal is a drastic remedy, the issues before us require an examination of the facts elicited at trial, and we are without a transcript needed to conduct a meaningful review. As such, we are not in a position to review this appeal on its merits and have no alternative but to **DISMISS** the appeal due to Cain's failure to include in the record a transcript of all evidence material to the points he raises herein.

Original Signed : Robert J. Torres

ROBERT J. TORRES
Associate Justice

Original Signed : Katherine A. Maraman
By

KATHERINE A. MARAMAN
Associate Justice

Original Signed : F. Philip Carbullido
By

F. PHILIP CARBULLIDO
Chief Justice