THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

R. Ferrell Cothran, Circuit Court Judge

Civil Action No. 2015-CP-43-596
Court of Appeals Case No. 2017-000998
Appellate Case No. 2021-000233

Paul Branco and Branco Investments, Inc., d/b/a Great American Cookie Co., ... Petitioners,

v.

Hull Storey Retail Group, LLC, and Sumter Mall, LLC ..... Respondents.

BRIEF OF RESPONDENTS

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INTRODUCTION

This appeal raises a simple question of law: can one be liable for tortious interference with contract when there is no *valid and enforceable* contract with which to interfere? The enforceability and validity of a contract is a question of law for the trial court to decide and for the Court of Appeals (and now this Court) to review *de novo*. Plaintiffs Paul Branco and Branco Investments, Inc., (collectively "Branco," unless otherwise specified) alleged that Sumter Mall, LLC, and Hull Storey Retail Group, LLC ("HSRG"), tortiously interfered with Branco Investments' contract with a third party—Brooktenn, LLC—for the sale of Branco's cookie-baking equipment and operation located in two stores: one in a leased storefront in the Sumter Mall (a mall managed by HSRG), and the other in a leased storefront in the Florence, South Carolina mall (a mall managed by a separate commercial landlord).

The "contract" between Branco Investments and Brooktenn, however, was a conditional purchase agreement that Branco expressly made contingent on the satisfaction of conditions listed therein, including that within 90 days Brooktenn must obtain satisfactory leases from both HSRG and from the landlord of the Florence Mall. Neither contingency was satisfied. Lease negotiations with HSRG broke down after about 60 days when Brooktenn refused to sign the lease agreement that Hull Storey proffered. It is undisputed that no written document was ever executed to establish a lease agreement. It is likewise undisputed that Brooktenn never even *attempted* to obtain a lease from the landlord of the Florence Mall.

Because these contingencies were never satisfied, the conditional proposal for purchase never became a valid and enforceable contract. Furthermore, at the time Branco Investments purported to enter the conditional agreement (and at the time it filed this lawsuit), its corporate registration had lapsed, and it lacked capacity to enter valid and enforceable contracts. Nor can

these shortcomings be blamed on Sumter Mall or HSRG. Brooktenn's failure even to seek (much less obtain) a lease from the landlord of the Florence Mall, and Branco Investment's inability to contract, are entirely separate from and independent of Sumter Mall's or HSRG's actions. Because there was no valid and enforceable contract between Branco and Brooktenn, Sumter Mall and HSRG could not, as a matter of law, be liable for tortious interference with contract.

The trial court erred by ruling otherwise. The trial court's erroneous conclusion of law that Branco and Brooktenn entered into a valid contract is contrary to its earlier finding of fact that no lease agreement was signed—which would be required to satisfy the lease contingency in the Proposal for Purchase. The trial court incorrectly stated, based on testimony about alleged discussions between HSRG's employee and Brooktenn, that "Hull Storey approved Brooktenn's lease application to operate a GAC franchise in Sumter Mall." Amend. Order of J. at 2 (R. 2). The trial court conceded that the proposed "lease agreement between Hull Storey and Brooktenn was never executed," but nevertheless erroneously ruled that despite this unfulfilled contingency the conditional agreement between Branco and Brooktenn was an enforceable contract that could be subject to interference. *Id*. Contrary to the trial court's erroneous conclusion of law, the Court of Appeals correctly held that the Proposal for Purchase never became a valid and enforceable contract because the contingencies were not satisfied, and without a valid contract, Sumter Mall and HSRG could not have tortiously interfered. The Court of Appeals correctly applied this Court's precedents and reversed the trial court's judgment, and there is no conflict with this Court's precedents.

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

1. Is the Court of Appeals' opinion consistent with this Court's precedents in determining that, in the absence of a valid and enforceable contract, there can be no claim for interference with contract?

2. Did the Court of Appeals correctly determine from the undisputed facts that the lease contingencies in the Proposal for Purchase were never satisfied, and thus, as a matter of law, the contingent Proposal for Purchase never became a valid and enforceable contract with which anyone could interfere?

3. Did the Court of Appeals properly interpret and appropriately rely upon *Chitwood v. McMillan*, 189 S.C. 262, 1 S.E.2d 162 (1939)?

4. Did the Court of Appeals correctly conclude that the Statute of Frauds issue was preserved for appellate review because it had been raised to and ruled upon by the trial court?

5. Should this Court affirm the Court of Appeals because Branco Investments lacked capacity to contract at the time it purported to enter the Proposal for Purchase with Brooktenn, and there was, therefore, no valid contract between Branco Investments and Brooktenn with which anyone could interfere?

6. Should this Court affirm the Court of Appeals because an entity that is a necessary and essential part of the business opportunity contemplated by a contract cannot be liable for tortious interference with that contract?

COUNTER STATEMENT OF THE FACTS

Sumter Mall, LLC, owns the Sumter Mall, which is a retail shopping mall in Sumter, South Carolina. *See* Complaint at ¶¶ 3–4 (R. 21). HSRG manages the mall on behalf of Sumter Mall, LLC. *See* Trial Tr. at 9:8–15 (R. 78); Pl.'s Trial Ex. 10 at p.1 (R. 374). Both Sumter Mall and HSRG (collectively, "Respondents") are Georgia limited liability companies authorized to conduct business in South Carolina. *See* Answer at ¶¶ 2–3 (R. 28). The dispute underlying this appeal arises in part from the lease of a retail space in the Sumter Mall.

I. The Brancos' 2002 lease and their efforts in 2012–13 to extend or transfer the lease.

On or about December 30, 2002, Paul Branco and Anne Branco entered into a lease with Sumter Mall, LLC, to operate a Great American Cookie ("GAC") franchise store and a Pretzel Time store in Unit 55 of the Sumter Mall. *See* Trial Tr. at 10:25 to 11:1–8 and 12:23–25 (R. 79–81); Pl.'s Trial Ex. 1 at p.1 (R. 321). The Brancos operated the GAC store in the Sumter Mall from December 30, 2002, until May 15, 2013. *Id*.; *see also* Amend. Order of J. at 2 and 4 (R. 2 and 4). The Brancos also operated a second GAC store at the Magnolia Mall in Florence, South Carolina. *See* Trial Tr. 8:22–24 (R. 77).

As the end of the Brancos' lease term drew near, Paul Branco engaged in discussions with HSRG's leasing representative, Lewis White, regarding the potential renewal or extension of the Sumter Mall lease. *See* Trial Tr. at 118:10–20, 119:23–25, 120:1–15, 121:12–17, 175:14–19, 177:11–13, and 177:18–20 (R. 187–90, 244 and 246); Pl.'s Trial Ex. 2 at pp. 1–2 (R. 347–48). By early 2013, White was also contemplating marketing Unit 55 to other potential tenants. *See* Trial Tr. at 180:25 and 181:1–3 (R. 249–50). Although White and Branco appeared to be close to reaching an agreement on terms that HSRG's real estate committee could authorize, the parties did not have a "legal document or lease amendment memorializing the terms" to extend the lease. *Id*. at 180:1–3 (R. 249).

II. Branco Investments, LLC's negotiation and execution of a contingent Proposal for Purchase with Brooktenn, LLC.

In January of 2013, Mr. Branco—without disclosing it to White or HSRG—engaged in discussions with Brooktenn, LLC, a Georgia limited liability company owned by Stewart Applebaum, about a possible transaction whereby Brooktenn would purchase Branco

Investment's assets located in the Florence and Sumter GAC stores. *Id*. at 20:24–21:16 (R. 89–90); *see also id*. at 180:14–20, 182:4–6, and 183:15–24 (R. 249, 251, and 252) (noting that as of January 31, 2013, HSRG was still negotiating with Branco and was planning on him renewing the lease, and that Branco had not yet informed HSRG he was negotiating with a third party to purchase and take over the store). While simultaneously negotiating a lease renewal with Hull Storey and a possible sale to Applebaum, Branco and Applebaum did not disclose to HSRG their intention for Brooktenn to operate the store in the Sumter Mall. *See id*. at 105:7–11, 180:14–20, 182:4–6, and 183:15–24 (R. 174, 249, 251, and 252). Indeed, Branco deliberately refrained from informing White until sometime late in the first quarter of 2013 that Branco was in discussions with another operator about possibly taking over his operation in the space. *Id.* at 105:7–11 and 183:14–24 (R. 174 and 252). White testified that based on the limited information Branco eventually gave him and based on Branco's strategy of simultaneously negotiating a lease renewal and a potential sale of the franchise, HSRG's understanding was that any potential new GAC operator would come in via a lease assignment in the future. Trial Tr. at 186:20–187:6 (R. 255–56).

On March 1, 2013, Branco Investments and Brooktenn entered into a conditional agreement titled "Proposal for Purchase" for the purchase of Branco's equipment and other assets located in the GAC stores in the Sumter Mall and Florence Mall. *See* Trial Tr. at 20:24–25, 21:1–4, 21:21–25, 22:1–6, 22:22–25, and 23:1–8 (R. 89–92); Pl.'s Trial Ex. 4 (R. 359). The Proposal for Purchase (including the ability to enforce the sale provisions against Brooktenn) was ***expressly conditioned*** upon Brooktenn obtaining a satisfactory lease from HSRG for the Sumter Mall within 90 days after the proposed agreement was signed. *See* Pl.'s Trial Ex. 4 (R. 359) ("This proposal is contingent upon Buyers getting a satisfactory lease from Hull Storey

Gibson within 90 days of signed proposal."); *see also* Trial Tr. at 27:1–8 (R. 96). The Proposal for Purchase is *also* ***expressly conditioned*** on Brooktenn obtaining a lease from the lessor of the Florence Mall within 90 days. *See* Pl.'s Trial Ex. 4 (R. 359) ("This proposal is contingent upon Buyers getting a satisfactory lease from PREIT within 90 days of signed proposal."). Applebaum admitted that Brooktenn never even sought (much less obtained) a lease in the Florence Mall. *See* Trial Tr. at 96:5–7, 96:23–25, 99:5–7 (R. 165 and 167).

III. HSRG's understanding of and response to the Proposal for Purchase.

As noted above, based on the limited information Branco disclosed to White about his potential sale to Brooktenn, and based on the fact that Branco continued negotiating a lease renewal even *after* disclosing that information to White, HSRG understood that the Proposal for Purchase contemplating Brooktenn's occupancy and operation of the GAC store in the Sumter Mall would be an extension of Branco's lease and an assignment of that lease of the existing premises. *See* Trial Tr. at 185:3 to 187:6 and 190:13–25 (R. 254–56 and 259); *see also id*. at 104:20–106:19 (R. 173–75) (Applebaum admitted that months prior to HSRG's awareness of Applebaum's involvement and while Mr. Branco was negotiating his lease renewal with HSRG, Mr. Branco had shared with Applebaum the lease renewal proposal he planned to send HSRG and asked Applebaum to review and provide feedback on it).

Shortly after learning of the proposed transaction, White sought more information about it from Branco. *See id*. at 185:3 to 186:19 (R. 254–55); Pl.'s Trial Ex. 7 (R. 365). In response, Branco informed White that in the contingent Proposal for Purchase he had offered to sell his Sumter Mall store to Brooktenn for $70,000, of which he claimed $45,000 was for Branco's interest in the leasehold, the $25,000 balance was for Branco Investment's equipment, and the Proposal for Purchase also provided for a related sale of the inventory. *See* Trial Tr. at 198:4–9

(R. 267). HSRG believed the proposed transaction amounted to Branco selling the leasehold interest at the Sumter Mall to Brooktenn for $70,000. *See* Trial Tr. at 192:2–11 (R. 261). Accordingly, HSRG informed both Branco and Applebaum that the proposed arrangement between Branco Investments and Brooktenn amounted to a lease assignment that would trigger a payment to HSRG by either Branco or Brooktenn pursuant to section 16.2 of the lease. *Id*. at 86:24–87:7, 87:25–88:9, and 192:2–8 (R. 155–57 and 261).

On April 30, 2013, White emailed Branco and Applebaum a draft document to extend Branco's lease until May 15, 2015, and attached a draft assignment and assumption of the subject lease. *Id*. at 46:6–13, 51:2–9, and 189:10–23 (R. 115, 120, and 258); Pl.'s Trial Ex. 8 at p.1 (R. 366). Neither Branco, Applebaum, nor Brooktenn executed the draft lease extension and assignment agreement provided by White.[1] *See* Trial Tr. at 190:16–17 (R. 259). Furthermore, Brooktenn never executed a lease with Sumter Mall and/or HSRG. *See* Amend. Order of J. at 2 (R. 2) (noting that a "lease agreement between Hull Storey and Brooktenn was never executed"). Several days before sending this draft assignment and assumption, White told Branco that HSRG's real estate committee had conditionally approved this proposal, and consistent with the document he subsequently sent noted, "Stewart's deal has been approved ***if*** *we can determine a way to come up with $20,000*." *See* Trial Tr. at 195:1–25 (R. 264) (emphasis added); Pl.'s Trial Ex. 5 at 2 (R. 361).

[1] The record confirms that this draft "Assignment, Assumption, Amendment and Ratification of Lease Agreement," which was admitted into evidence at trial as Plaintiffs' Exhibit 8, is the only written (but unexecuted) document drafted between Sumter Mall, LLC, and Brooktenn. No other written document purporting to be a lease between HSRG or Sumter Mall, LLC, and Brooktenn has been proffered at any time.

Both Branco and Brooktenn rejected HSRG's and Sumter Mall's proposal including the required payment of $20,000.00 for Brooktenn to assume the lease and operate a GAC store at Sumter Mall. *See* Compl. at ¶ 10 (R. 22); Trial Tr. at 87:25 and 88:1–11 (R. 156–57); Pl.'s Trial Ex. 12 (R. 378). Brooktenn never entered *any* lease agreement with Sumter Mall and/or HSRG as required by the contingent Proposal for Purchase. *See* Trial Tr. at 190:5–8, 191:22–24, and 193:2–6 (R. 260 and 262); Amend. Order of J. at 2 (R. 2) (noting a "lease agreement between Hull Storey and Brooktenn was never executed"). Similarly, Brooktenn never secured (or even *attempted* to secure) a lease of the GAC store at the Florence Mall as required by the contingent Proposal for Purchase to become enforceable. *See id*. at 96:23–25, 97:4–8, and 99:5–10 (R. 165–166 and 168); Pl.'s Trial Ex. 4 (R. 359).

COUNTER-STATEMENT OF THE CASE

Branco commenced this action on March 5, 2015, by filing a complaint against Respondents alleging claims for (i) Breach of Contract with Fraudulent Intent, (ii) Tortious Interference with a Contract, (iii) Fraud, and (iv) Constructive Fraud. *See* Complaint (R. p. 21–24 at ¶¶ 12–27). Respondents each filed an Answer. *See* Answers (R. 27 and 34). Branco's Brief incorrectly asserts that Respondents' Answers "admit[ed] that the asset purchase agreement at issue was a valid contract." *See* Petitioners' Brief at 2 (citing R. 30 at ¶¶ 17–18; R. 37 at ¶¶ 17–18). Not so. Paragraph 17 of Plaintiff's Complaint alleges: "Plaintiff and Brooktenn, LLC entered into a contract for the purchase of certain assets and inventory." *See* Complaint at ¶ 17 (R. 21). There is no allegation of validity or enforceability—merely the allegation of the existence of an agreement. In their respective Answers, each of the Respondents answered: " Upon information and belief, Plaintiff or an affiliated entity, entered into a contract with Brooktenn, LLC, which was to include Plaintiff's purported leasehold interest at Sumter Mall. The contract speaks for itself."

See Answers at ¶ 17 (R. 30) and ¶ 17 (R. 37). There is no allegation or admission that the Proposal for purchase is enforceable or valid.[2] To the contrary, the first full sentence of Hull Storey's and of HSRG's Answers is that "Plaintiff's claims are barred, in whole or in part, by the Statute of Frauds." *See* Answers (R. 27 and 34). The Answers likewise assert, on the very first page of each, that "Plaintiff's claims are barred because certain conditions precedent were not met in order for its claims to ripen." *Id*. The Answers further state that "Branco Investments, Inc. was administratively dissolved on March 7, 2012"—nearly a year before it purported to enter the conditional Proposal for Purchase. *See* Answers at ¶ 1 (R. 28) and ¶ 1 (R. 35).

On February 28, 2017, the case proceeded to trial before the Honorable R. Ferrell Cothran, Jr. in the Sumter County Court of Common Pleas. *See* Trial Tr. at 1–219 (R. 70–288). After the trial, the trial court circulated a draft order of judgment. Respondents filed their SCRP Rule 52(b) Motion to Amend Judgment requesting the trial court to change a number of its findings. *See* Mot. to Amend at 1–8 (R. 46–53). Without ruling on the motion, the trial court issued an order of judgment ruling in Respondents' favor as to counts one, three, and four of the Complaint (breach of contract with fraudulent intent, fraud, and constructive Fraud) and in Branco's favor as to count two of the Complaint (tortious interference with a contract). *See* Order of Judgment at 4, 5 (R. 13–14). The Motion to Amend Judgment was still pending at the time the trial court issued the Order of Judgment. HSRG subsequently retained appellate counsel, who, out of an abundance of caution and to avoid missing the 30-day appeal deadline, timely filed a Notice of Appeal. HSRG then

[2] This Court has employed similar reasoning and terminology when discussing an agreement that was unenforceable under the Statute of Frauds because it contemplated a future occurrence that never materialized. *See Fici v. Koon*, 372 S.C. 341, 347, 642 S.E.2d 602, 605 (2007) (using the term "contract" more than 30 times to describe a written agreement but nevertheless concluding that the "contract dated February 27 is nothing more than an agreement to agree which is unenforceable under the Statute of Frauds").

requested the Court of Appeals stay the appeal and remand to have their Rule 52(b) Motion heard by the trial court. The Court of Appeals stayed the appeal and remanded. After holding a hearing on the Motion, the trial court issued an Amended Order of Judgment on March 2, 2018, that changed numerous of the findings of fact and conclusions of law and again ruled for Respondents on counts one, three and four and ruled for Petitioners on count two. *See* Amend. Order of J. at 4, 5, 7 (R. 4–5 and 7).

STANDARD OF REVIEW

On appeal from a bench trial, "a reviewing court is free to decide questions of law with no particular deference to the trial court." *Hunt v. Forestry Comm'n*, 358 S.C. 564, 569, 595 S.E.2d 846, 848–49 (Ct. App. 2004) (citations omitted); *see also Okatie River, LLC v. Se. Site Prep*, *LLC*, 353 S.C. 327, 334, 588 S.E.2d 327, 334 (2003) ("In an action at law, tried without a jury, the appellate court standard of review extends only to the correction of errors of law.") (citations omitted). The determination whether a contract is enforceable or valid is a question of law that the appellate courts review *de novo*. *Milliken & Co. v. Morin*, 399 S.C. 23, 30, 731 S.E.2d 288, 291 (2012). "The construction of a clear and unambiguous contract is a question of law for the court to determine." *Williams v. Gov't Emps. Ins. Co. (GEICO)*, 409 S.C. 586, 594, 762 S.E.2d 705, 710 (2014) (citations and emphasis omitted). The trial court's findings of fact should not be disturbed unless they were "without evidentiary support." *Hunt*, 358 S.C. at 569, 595 S.E.2d at 848.

ARGUMENT

I. The Court of Appeals' opinion is consistent with and correctly applied this Court's precedents in determining that, in the absence of a valid and enforceable contract, there can be no tortious interference with contract.

It is axiomatic that there can be no tortious interference with a contract unless there is a viable contract with which to interfere. Tortious interference is expressly predicated on the

existence of a valid, enforceable contract:

> The elements of a cause of action for tortious interference with contract are: (1) ***existence of a valid contract****;* (2) the wrongdoer's knowledge thereof; (3) his intentional procurement of its breach; (4) the absence of justification; and (5) resulting damages. (emphasis added)

Dutch Fork Dev. Group 11, LLC v. SEL Properties, LLC, 406 S.C. 596, 604, 753 S.E.2d 840, 844 (2012) (citing *Camp v. Springs Mortgage Corp.*, 310 S.C. 514, 517, 426 S.E.2d 304, 305 (1993)); *see also Jackson v. Bi-Lo Stores, Inc.,* 313 S.C. 272, 277, 437 S.E.2d 168, 171 (Ct. App. 1993) ("The right to recover for the unlawful interference with the performance of a contract presupposes the existence of a *valid, enforceable* contract") (emphasis added).[3]

In this instance, the Court of Appeals correctly articulated the elements of a claim for tortious interference stating,

> "The elements of a cause of action for tortious interference with contract are: (1) existence of a valid contract; (2) the wrongdoer's knowledge thereof; (3) his intentional procurement of its breach; (4) the absence of justification; and (5) resulting damages." *Dutch Fork Dev. Group 11, LLC v. SEL Properties, LLC,* 406 S.C. 596, 604, 753 S.E.2d 840, 844 (2012) (citing *Camp v. Springs Mortgage Corp.*, 310 S.C. 514, 517, 426 S.E.2d 304, 305 (1993)). "The right to recover for the unlawful interference with the performance of a contract presupposes the existence of a valid, enforceable contract." *Jackson v. Bi-Lo Stores, Inc.,* 313 S.C. 272, 277, 437 S.E.2d 168, 171 (Ct. App. 1993).

Branco v. Hull Storey Retail Group; 2021 S.C. App. Unpub. LEXIS 9, 10; 2021 WL 118536 (Ct. App. 2021). This language used by the Court of Appeals setting out the elements of

[3] Branco's argument belabors the "existence" of a contract—*e.g.*, the Proposal for Purchase—but, in so doing, misses the point. *See* Petitioners' Brief at 1, 7–9. No one disputes that the Proposal for Purchase "existed," and the Court of Appeals did not rule otherwise. The critical point, however, is that a claim for tortious interference requires the plaintiff to prove not merely that a contract "existed," but that it was a valid and enforceable one. *That* is what Branco failed to do.

tortious interference with a contract is consistent with the language found in this Court's existing body of case law on the topic. In fact, the Court of Appeals in *Branco* relied expressly upon the exact language found in *Dutch Fork Dev. Grp. II, LLC v. SEL Props., LLC*, 406 S.C. 596, 604, 753 S.E.2d 840, 844 (2012) and *Camp v. Springs Mortg. Corp.*, 310 S.C. 514, 517, 426 S.E.2d 304, 305 (1993). *Id*. As explained by this Court in *Love v. Gamble*, "[t]he contract that is caused to be breached ***must be valid and enforceable***." *Love*, 316 S.C. 203, 214, 448 S.E.2d 876, 882 (1994) (internal citations omitted) (emphasis added).[4]

In its opinion, the Court of Appeals set forth and correctly applied this Court's precedents in determining that, Respondents cannot have tortiously interfered with the Proposal for Purchase between Branco Investments, Inc., and Brooktenn "[b]ecause the Agreement was contingent upon Brooktenn 'getting a satisfactory lease' and because no such lease was ever obtained, Respondents failed to meet the first element of 'existence of a valid contract' with which Appellants could have interfered." *Branco v. Hull Storey Retail Group*; 2021 S.C. App. Unpub. LEXIS 9, 12; 2021 WL 118536.

[4] *See also Barnes Group, Inc. v. C & C Products, Inc.*, 716 F.2d 1023, 1027 (1983) ("As the parties concede, a necessary element of the tort of intentional interference with contract is that the contract at issue be valid and enforceable as between the parties to it.") (citations omitted); *Blanton Enterprises, Inc. v. Burger King Corp.*, 680 F. Supp. 753, 777 (D.S.C. 1988) (ruling there could be no tortious interference with contract because the alleged oral agreement was never reduced to writing and, therefore, the plaintiff could not show that "there was a valid and enforceable contract"); *Hughes v. United States Bank N.A.* (*In re Hughes*), 627 B.R. 327, 336 (Bankr. D.S.C. 2021) ("There must be a valid and enforceable contract for a cause of action for tortious interference with an existing contractual relationship to exist.") (citing numerous South Carolina cases).

II. The Court of Appeals correctly held that the trial court's finding that no lease agreement was signed meant that the contingency in the Proposal for Purchase was never satisfied, and thus the contingent agreement never became an enforceable, valid contract.

In the instant lawsuit, Respondents cannot have interfered with a contract between Branco Investments, Inc., and Brooktenn because there was no valid, enforceable contract with which to interfere. The contingent Proposal for Purchase between Branco Investments, Inc., and Brooktenn contained multiple conditions precedent—some of which were entirely outside of Sumter Mall's and HSRG's control or influence—including that the agreement's validity and enforceability was dependent on Brooktenn obtaining a lease, within 90 days, for the Florence Mall location from a commercial landlord who is not a party to this suit and is unrelated to HSRG, and that Brooktenn obtain a lease for the Sumter Mall location from Hull Storey within 90 days. *See* Pl.'s Trial Ex. 4 ("Proposal for Purchase") (R. 359).

It is undisputed that Brooktenn never even initiated (much less completed) the process of seeking a lease from the landlord of the Florence Mall. *See* Trial Tr. at 96:5–7, 96:23–25, and 99:5–7 (R. 165 and 168). That failure—separate and apart from any action by Sumter Mall or HSRG—standing alone, demonstrates that the conditional Proposal for Purchase never became an enforceable contract with which anyone could interfere. Stewart Applebaum, the owner of Brooktenn, admitted at trial that the Proposal for Purchase contemplated two separate store locations but was a single, unified agreement, that was conditioned on *both* contingencies being satisfied:

> Q: So you never tried to get a lease with Magnolia; is that correct?
>
> A: That's correct.
>
> Q: And you would agree that this is one deal, correct, with two different properties?

A: That's correct.

Q: And so you never even tried to get a lease on the second property so even if my clients had entered into a lease with you, it's still possible this would have fallen through?

A: Yes.

Trial Tr. 96:23 to 97:8 (R. 165–66);[5] *see also* Trial Ex. 1 (R. 380–85) (multiple emails and drafts of the contract in which Branco and Applebaum discuss the proposed transaction as a single, integrated deal, despite the fact that it involved two locations and two different lease contingencies).

Even apart from Brooktenn's failure to seek a lease for the Florence Mall store, the Proposal for Purchase never became an enforceable contract because Brooktenn never obtained a lease for the Sumter Mall store. The only lease ever proposed between HSRG and Brooktenn was multi-year. *See* Trial Tr. at 85:9–15 (R. 154); *id*. at 178:25 to 180:3 (R. 247–49); Pl.'s Trial Ex. 8 at 2 (R. 368); *see also* Pl.'s Trial Ex. 3 at p.1 (R. 357). As a matter of law, therefore, there was no lease agreement unless it was in writing. *See* S.C. Code Ann. § 27-35-20 ("Any agreement for the use or occupation of real estate for more than one year shall be void unless in writing."); *id.* § 32-3-10 ("No action shall be brought whereby . . . to charge any person upon any contract or sale of lands . . . or any interest in or concerning them . . . unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith"); *Player v. Chandler,* 299 S.C. 101, 105, 382 S.E.2d 891, 894 (1989) (holding a supposed oral modification to a retail property lease agreement was void because "[a]ny contract for an

[5] Branco's counsel subsequently plied Mr. Applebaum with leading questions in an effort to elicit testimony that would contradict this admission and would establish that the one-page Proposal for Purchase was *really* two separate and independent agreements. *See* Trial Tr. 109:4–12 (R. 109).

interest in land or any agreement that is not to be performed within one year must be in writing and signed by the party against whom it is seeking to be enforced" and the "[*f*]*ailure to put such a contract in writing renders it void*") (emphasis added); *In re Camelot Casino Cruises, Inc.,* 330 B.R. 263 (Bankr. M.D. Fla. 2005) (applying South Carolina law and holding proposed commercial lease agreement void because it was not signed by both parties, and there was no "meeting of the minds" between them as to all terms and conditions).

The contingency in the Proposal for Purchase agreement between Branco Investments, Inc., and Brooktenn could be satisfied *only* by Brooktenn obtaining a written, signed lease agreement for the Sumter Mall property (and, separately, for the Florence Mall property). The trial court made a specific finding of fact—not to be disturbed if there was any evidence to support it—that a "lease agreement between Hull Storey and Brooktenn was never signed." *See* Amend. Order of J. at 2 (R. 2). Accordingly, the contingency (or condition precedent) was never satisfied.

A condition precedent is an act which must occur before performance by the other party is due or required. *Alexander's Land Co., L.L.C. v. M&M&K Corp.*, 390 S.C. 582, 596, 703 S.E.2d 207 (2010). If a contract contains a condition precedent, that condition must either occur or it must be excused before a party's duty to perform arises. *Id*.[6] Brooktenn purportedly *applied* for a multi-year lease for the Sumter Mall location, but the record before the trial court is entirely bereft of any document indicating Hull Storey ever entered a lease agreement with

[6] Even an otherwise valid contract is unenforceable in the absence of evidence of the satisfaction of conditions precedent to performance. *See Worley v. Yarborough Ford*, 317 S.C. 206, 210, 452 S.E.2d 622 (Ct. App. 1994); *Miller v. Dillon*, 432 S.C. 197, 210, 851 S.E.2d 462, 469 (Ct. App. 2020); *Gecy v. S.C. Bank & Trust*, 422 S.C. 509, 522, 812 S.E.2d 750 (Ct. App. 2018); *McGill v. Moore*, 381 S.C. 179, 187, 672 S.E.2d 571, 575 (2009).

Brooktenn thus satisfying the Proposal for Purchase's contingency. Because the evidence and the trial court's findings of fact make clear that the lease contingency was never satisfied, Brooktenn and Branco were not and have never been subject to a duty to perform under the terms of the contingent Proposal for Purchase which would be required for that agreement to ripen into a valid and enforceable contract on which a claim for tortious interference could be brought.

It is clear that Brooktenn never satisfied the contingency in the Proposal for Purchase of "getting a satisfactory lease" for the Sumter Mall. Even assuming Brooktenn and Mr. White informally agreed orally to some of the terms of a multi-year lease, the contingency of "getting a satisfactory lease" could not be satisfied as a matter of law without a written lease signed by the parties. The only written document exchanged between Sumter Mall, LLC, and Brooktenn was a draft "ASSIGNMENT, ASSUMPTION, AMENDMENT AND RATIFICATION OF LEASE AGREEMENT" (the "Draft Assignment") emailed to both Branco and Applebaum on April 30, 2013. *See* Pl.'s Trial Ex. 8 (R. 366–72). It was never signed by anyone. *See* Amend. Order at 2 (R. 2); *see also* Mot. to Amend at 2 (R. 47).

No other written document purporting to be a Brooktenn lease for the Sumter Mall has been proffered, and none exists. No evidence was presented establishing a meeting of the minds with respect to lease terms between Brooktenn and Sumter Mall, LLC. In this context, any valid lease agreement of a storefront at Sumter Mall to Brooktenn for the ten year term requested would have to be in writing and signed by the patties. That did not occur, and in the absence of an enforceable lease between HSRG and Brooktenn, the contingency in the Proposal for Purchase between Branco Investments, Inc., and Brooktenn was not satisfied, and thus there was no valid and enforceable contract with which Respondents could interfere. *See Dutch Fork Dev. Group II,*

LLC, 406 S.C. at 604, 753 S.E.2d at 844 (noting a claim for tortious interference with contract is predicated on the existence of a valid, enforceable contract); *Jackson v. Bi-Lo Stores, Inc.*, 313 S.C. 272, 277, 437 S.E.2d 168, 171 (Ct. App. 1993); *see also BCD LLC v. BMW Mfg. Co., LLC*, 360 Fed. Appx. 428, 434 (4th Cir. 2010) (applying South Carolina law and holding there was no tortious interference with contract where the contract at issue contained requirements and contingencies that had not been satisfied because "[t]here can be no contract so long as, in the contemplation of the parties thereto, something remains to be done to establish contract relations").[7] The trial court's conclusion of law that "Branco Investments had a valid contract with Brooktenn for the asset sale" was an error of law that was correctly reversed by the Court of Appeals. Amend. *See* Order of J. at 5 (R. 5); *Branco v. Hull Storey Retail Group*; 2021 S.C. App. Unpub. LEXIS 9, 6-12; 2021 WL 118536. The agreement between Brooktenn and Branco Investments was and remains unenforceable. Branco was and is incapable of establishing a required element of a claim for tortious interference with a contract: the existence of an enforceable, valid contract.

[7] South Carolina's courts are not alone in holding that where an agreement is contingent on a condition that is unsatisfied, there can be no tortious interference with contract because there was never an enforceable contract with which to interfere. *See R.A., Inc. v. Anheuser-Busch, Inc*., 556 N.W.2d 567 (Minn. Ct. App. 1996) (holding Anheuser-Busch could not be liable for tortiously interfering with a contract between a beer distributorship and a prospective buyer of the distributorship because the contract was expressly made contingent on Anheuser-Bush's approval, and, when that approval was not granted, there was thus no enforceable contract that could be breached or interfered with); *Aslakson v. Home Sav. Ass'n*, 416 N.W.2d 786 (Minn. Ct. App. 1987) (holding the defendant credit checking company could not be liable for tortiously interfering with a contract that was expressly made contingent on the buyer obtaining credit approval, and, therefore, when the credit checking company denied the approval, the condition precedent was not satisfied and there was no valid contract that could be interfered with).

III. The Court of Appeals properly interpreted and appropriately relied upon *Chitwood v. McMillian*, 189 S.C. 262, 1 S.E.2d 162 (1939).

As previously noted, tortious interference with a contract is, in part, expressly predicated on the existence of a valid, enforceable contract. *Dutch Fork Dev. Group 11, LLC v. SEL Properties, LLC*, 406 S.C. 596, 604, 753 S.E.2d 840, 844 (2012); *Camp v. Springs Mortgage Corp*., 310 S.C. 514, 517, 426 S.E.2d 304, 305 (1993). This Court's older holding in *Chitwood v. McMillan,* 189 S.C. 262, 265, 1 S.E.2d 162 (1939) is consistent with those holdings, and the Court of Appeals did not err by citing to and relying on *Chitwood's* holding.

Branco maintains that the Court of Appeals' reliance on *Chitwood v. McMillan*, 189 S.C. 262, 1 S.E.2d 162 (1939) is "misplaced" because the subcontract found to be unenforceable (and thus incapable of interference) in *Chitwood* was specifically prohibited by the prime contract between SCDOT and the general contractor, whereas in this case Branco was not (according to Branco) trying to assign or sublet its lease in violation of the existing lease agreement. *See* Petitioners' Brief at 9. Branco argues that because the expiring Lease Agreement here contained no prohibition against Branco entering into a contract to sell certain assets of his business, *Chitwood* is distinguishable and the Court of Appeals erred in relying on it. *Id*. at 10–11). In effect, Branco would limit the *Chitwood* Court's holding on the type of "valid contract" that is subject to a claim of tortious interference only to subcontracts specifically prohibited by a prime contract. The discussion and applicability of the holding in *Chitwood* are far broader.

Branco's arguments attempting to distinguish this matter from the *Chitwood* case miss the mark. For example, Branco's contention that "Hull-Storey's sole involvement in the asset purchase transaction could have *only* occurred if Branco elected to try to assign or sublet the lease," *see* Petitioners' Brief at 11 (emphasis added), ignores the express language of the Proposal for

Purchase. As previously noted, Branco Investments and Brooktenn self-imposed contingencies on their Proposal for Purchase. *See* Pl.'s Trial Ex. 4 (R. 359). HSRG would *necessarily* be involved as the counterparty in a "satisfactory lease from Hull Storey." In view of this unambiguous language, Petitioner's suggestion that only an attempted lease assignment by Petitioner would trigger HSRG's involvement in the purported asset purchase agreement is baseless. Petitioner's assertion wholly ignores HSRG's ability (and more importantly, its right as the landowner and counterparty in any lease) to control whether or not Brooktenn could in fact obtain a "satisfactory lease." By definition as the landowner, HSRG's involvement and agreement is an intrinsic and necessary component of the process of satisfying the conditions of and fulfilling the terms of the contingencies imposed by Petitioners and Brooktenn in the Proposal for Purchase.

Branco's second argument seeking to distinguish *Chitwood* fares no better. Specifically, Branco asserts that the *Chitwood* case is inapplicable in this matter because in *Chitwood*, Bowe's contract with the SCDOT prohibited any sort of subcontracting of the work without the consent of the SCDOT while, conversely, Branco's lease agreement with Respondents did not prohibit Branco from selling its assets to a third party. *See* Petitioner's Brief at 10. The holding in *Chitwood*, however, is not limited solely to cases in which that specific provision renders the disputed contract unenforceable; rather, the holding of *Chitwood* (or, at least, the proposition on which the Court of Appeals relied in this proceeding) is relevant and applicable when there is any requirement or condition that renders a contract unenforceable. In *Chitwood*, the condition was a prohibition on subcontracts that the SCDOT did not have to waive—and did not waive. Here, the requirement that rendered the Proposal for Purchase unenforceable was the requirement that Brooktenn obtain a "satisfactory lease" from HSRG; a requirement that HSRG was under no obligation to grant—and did not grant. The fact that *Chitwood* involved a subcontract and this case

involves a lease is a distinction without a difference. Branco's assertion that his lease does not prohibit such a sale of Branco's assets demonstrates a failure to either recognize or acknowledge the significance of the express contingency in the Proposal for Purchase (the acquisition of a "satisfactory lease") that must be satisfied in order to render the agreement between Brooktenn and Branco valid and enforceable. *See* Petitioners' Brief at 10; Pl.'s Trial Ex. 4 (R. 359). Simply put, the absence of any language in the Branco-HSRG lease regarding Branco's ability to sell its own assets is irrelevant to and has no bearing upon the determination of whether or not the Proposal for Purchase agreement between Branco and Brooktenn is valid and enforceable.

The *Chitwood* Court instructs that there must be evidence of the satisfaction of the contingencies in a contract being satisfied in order for the contract to be valid and enforceable. *Chitwood*, 189 S.C. at 265, 1 S.E.2d at 162. The trial court here made a specific finding of fact that no lease with Brooktenn was ever signed. *See* Amend. Order of J. at 2 (R. 2). Therefore, the contingency in the Proposal for Purchase was not met. Branco misses the relevance of this situation and instead fixates on the fact that *Chitwood* involved a different type of contract and a different contingency than the one in the instant proceeding:

> Accordingly, the Court of Appeals' reliance upon *Chitwood* is wholly inapposite, as *Chitwood* involved an underlying contract that contained express terms forbidding subcontracts without prior approval. Here, there was no subcontract, nor did the mall's lease contain any prohibition against the sale of the assets of a privately-held business.

Brief at 10. Branco seemingly argues that the distinct nature of the contracts and contingencies in the present case and *Chitwood* renders the *Chitwood* opinion inapplicable to the current case. However, *Chitwood's* holding (and its applicability here) is not dependent on the specific *nature* of the underlying contingency. Instead, the *Chitwood* Court's analysis focused on the more

fundamental point that the underlying contingencies were not satisfied.[8] Similarly, when the Court of Appeals noted that "Respondents failed to demonstrate the existence of a valid and enforceable contract that is necessary for a tortious interference with contract claim," the Court of Appeals demonstrated that it, like the *Chitwood* Court, focused on whether or not there was evidence supporting the satisfaction of a contingency to the efficacy of the contract of which tortious interference was claimed. *Branco v. Hull Storey Retail Group*, 2021 S.C. App. Unpub. LEXIS 9 at 6, 2021 WL 118536. The trial court's finding of fact that the lease was not signed, and the statutory requirement that the only lease proposed—a multi-year lease—must be in writing and signed results in an incontrovertible conclusion that the contingency in the Proposal for Purchase was not met, and the Proposal for Purchase is not an enforceable, valid contract. The *Chitwood* Court's opinion and this Court's body of authority relating to contingent contracts validates the interpretation of and reliance upon the *Chitwood* Court by the Court of Appeals in this matter.

IV. The issues considered by the Court of Appeals were unquestionably preserved for appellate review.

A. The statute of frauds issue was properly raised to and ruled upon by the trial court.

Branco inaccurately argues that, "as to the Statute of Frauds" argument, Respondents "raised this argument for the first time in its post-trial motion for reconsideration." *See* Petitioners' Brief at 12. Branco's assertion is wholly inaccurate.[9] Both HSRG and Sumter Mall timely raised

[8] "Knowing this, he offered no testimony either that the Chief Highway Commissioner had approved the sub-contract in writing or that Bowe had submitted satisfactory evidence of the competency and responsibility of A. B. Chitwood & Son, or that Bowe had filed a statement from his surety extending the bond coverage to A. B. Chitwood & Son." *Chitwood v. McMillan* 189 S.C. 262, 265, 1 S.E.2d 162 (1939).

[9] Branco already raised this baseless argument to the Court of Appeals, and HSRG thoroughly rebutted it. *See* Branco's Final Brief at 6–9 (filed October 26, 2018); HSRG's Final Reply Brief

the statute of frauds issue and the resulting unenforceability of the Proposal for Purchase multiple times before, during, and after trial. For example, as required by SCRCP 8(c), Sumter Mall, LLC, raised the statute of frauds issue in its Answer and Counterclaim. (R. 27). Likewise, HSRG raised the statute of frauds issue in its Answer and Counterclaim. (R. 34). Indeed, the statute of frauds component of this dispute is literally the very first full sentence in both Answers and is the first issue identified in and memorialized by Respondents' Answers. (R. 27 and R. 34). The Answers likewise assert, on the very first page of each, that "Plaintiff's claims are barred because certain conditions precedent were not met . . . ." *Id*.

Further, Branco's and Brooktenn's related failure to obtain any executed document or lease memorializing any purported Lease between Brooktenn and HSRG was raised and confirmed on numerous occasions during pre-trial proceedings and during trial, including the following instances:

(1) Multiple times before trial during the hearing on the Motion for Summary Judgment. *See* Tr. at 5:14–25 (R. 58) (trial counsel for Sumter Mall and HSRG noting the Brooktenn-Branco agreement required the acquisition of a Lease, and that there had been a failure to obtain a signed Lease); *id*. at 9:14–17 (R. 62) (trial counsel for Branco acknowledging that the lease document proffered by HSRG was never signed); *id*. at 14:17–23 (R. 67) (trial counsel for Branco confirming that neither Petitioners nor Brooktenn signed a lease document);

(2) Multiple times during the trial. *See* Trial Tr. at 141:19–23 (R. 210) (Paul Branco's testimony that Applebaum never signed a lease or lease assignment with Respondents); *id*. at 167:18 to 168:17 (R. 236 –37) (Respondents' oral motion for directed verdict arguing that "Regarding the tortious interference with contract claim, there must be existence of a valid contract, . . . [and] the contract that I believe the plaintiff is alleging was tortiously interfered with had multiple contingencies . . . [and Brooktenn] never entered into a lease and that contingency was never met . . . nor did the lease at the Florence Mall occur. So there was not a valid contract in that regard."); *id*. at 190:2–17, 191:20–24, 191:20–24, and 192:19–20 (R. 259–61) (Lewis White's testimony that Applebaum and Branco did not sign any lease or any assignment of a

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at 2–5 (filed November 7, 2018). It is unclear why the argument has been recycled here even after it has been shown to be inaccurate.

Lease); *id*. at 195:1–5 (R. 264) (discussing the agreement's contingencies and explaining that leases are "not valid deals until you have a legal document signed by both parties"); and

(3) In exhibits introduced at trial. *See*, *e.g*., Pl.'s Trial Ex. 12 (R. 378) (email from Applebaum to Lewis White wherein Applebaum indicates that Applebaum will not enter into the proposed the lease assignment agreement requiring a "$20,000.00" assignment cost).

Not only was the issue raised to the trial court, it was also ruled upon by the trial court. *See* changes between Order of Judgment at 2 (R.11) and Amend. Order of J. at 2 (R. 2). In its Amended Order of Judgment, the trial court acknowledged and confirmed that Defendants raised the statute of frauds issue by amending its initial Order of Judgment to note that "[t]his Lease Agreement between Hull Storey and Brooktenn was never executed." *Id*. The statute of frauds requires a lease for more than one year to be in writing and to be signed by the parties, and prior to and during trial Respondents repeatedly raised the Petitioner's shortcomings on these statute of frauds issues relative to any purported lease between Respondents and Brooktenn with the result that the lease contingency was unsatisfied, and the Proposal for Purchase between Brooktenn and Branco was unenforceable.

Given these factors, Branco is simply incorrect when it asserts that "[t]he Court of Appeals addressed an issue that the trial court did not address—namely, that because there was no written lease agreement entered into between Brooktenn and Hull-Storey, allegedly in violation of the statute of frauds, the underlying asset purchase agreement was a nullity." *See* Petitioners' Brief at 11–12. The reality is that, as required by the body of South Carolina law on the preservation of issues, Respondents repeatedly raised the issues of the statute of frauds and the unenforceability of the Proposal for Purchase prior to and during trial, and the trial court ruled upon and rejected that argument (a conclusion of law) by first making an accurate finding of fact that "this lease

agreement between Hull Storey and Brooktenn was never executed"; and by making the incorrect conclusion of law that Brooktenn and Branco had a valid and enforceable agreement. Respondents raised the issue to the trial court, and the trial court ruled on it. The issue was properly preserved for appeal.

B. The Respondents further preserved the statute of frauds issue for appeal by timely filing its Motion to Amend Judgment.

Even assuming the trial court's initial Order of Judgment did not sufficiently rule on the argument that the lack of a written lease agreement made the Proposal for Purchase unenforceable, the argument was nevertheless preserved for appellate review by Sumter Mall's and HSRG's Motion to Amend. In *City of Rock Hill v. Suchenski*, 374 S.C. 12,16, 646 S.E.2d 879 (2007), this Court instructs that even if an issue is not initially ruled upon by the trial court, motions to alter or amend the judgment preserve issues for "further review by the Court of Appeals or the Supreme Court in cases where the circuit court fails to address an issue raised by a party." *See also Elam v. S.C. DOT*, 361 S.C. 9, 602 S.E.2d 772 (2004) ("A party may wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party must file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review."); *Wilder Corp. v. Wilke,* 330 S.C. 71, 77; 497 S.E.2d 731, 734 (1998) ("Post-trial motions are not necessary to preserve issues that have been ruled upon at trial; they are used to preserve those that have been raised to the trial court but not yet ruled upon by it.") (citation omitted).

Branco's assertion that the trial court did not rule upon the statute of frauds issue is without merit. The trial court's initial order of judgment amounted to a ruling on the statute of frauds issue

by adopting the Petitioner's position and stating that "Brooktenn applied to Hull Storey, and was approved for, a lease . . . ." Order of J. at 2 (R. 2). The trial court's amended order of judgment addressed and ruled on the statute of frauds issue with greater clarity by explicitly noting, "[t]his lease agreement between Hull Storey and Brooktenn was never executed." Amend. Order of J. at 2 (R. 2).

In this case, even if the trial court had not ruled upon the statute of frauds issues in its initial and amended orders of judgment (which it did), Petitioners' timely Motion to Amend Judgment with the trial court preserved for appeal the statute of frauds issues initially raised in their respective answers. *See* Ans. (R. 27, 34); *see also* Respondents' SCRP Rule 52(b) Mot. to Amend J. at 1–3 (R. 46–48) (specifically quoting the statute of frauds and noting that, to satisfy the contingency in the Proposal for Purchase, "the Brooktenn lease would have to be a written expression of agreement and signed by both Brooktenn and Sumter Mall, LLC," and that "no [such] written document . . . has been proffered"). In view of the referenced body of authority, the statute of frauds issue was clearly preserved for appeal.

V. The Court of Appeals' ruling is likewise proper because Branco Investments, Inc., was a non-existent corporation at the time it purported to enter the Proposal for Purchase.

The Court of Appeals' ruling should be affirmed for an additional, independent reason, namely that the Proposal for Purchase was not a valid and enforceable contract because one of the two contracting parties—Branco Investments, Inc.—had been administratively dissolved prior to the time the Proposal for Purchase was created and signed, and Branco Investments, Inc., was,

therefore, incapable of contracting at that time. Branco Investments was still dissolved at the time it purported to file this suit.[10]

The Proposal for Purchase was between Brooktenn and *Branco Investments, Inc*. (not Paul Branco himself). *See* Pl.'s Trial Ex. 4 (R. 359); *see also* Trial Tr. at 21:23–22:6 (R. 90–91); *see id*. at 22:25–23:1 (R. 91–92) (describing the Proposal for Purchase as "the agreement between Brooktenn, LLC, and Branco Investments"); *id*. at 23:22–24 (R. 92) (same); *id*. at 64:2–5 (R. 133) ("Q: Plaintiff's Exhibit Number 4 is the deal between you and Brooktenn. That document is the deal between Brooktenn, LLC, and Branco Investments, Inc., correct? A: That is correct.").

Further, the assets and equipment that Brooktenn proposed to buy were owned by Branco Investments, not by Mr. Branco individually. *See id*. at 64:7–11 (R. 133) ("Q: The equipment at the mall that you took out of there in the middle of May, all that equipment was ordered by Branco Investments Company, Inc., correct? A: Correct."); *id*. at 65:2–5 (R. 134) ("Q: Just to be clear, your deal with Mr. Applebaum for 100,000-dollars is Branco Investments selling assets to Brooktenn, LLC? A: That is correct.").

Accordingly, the party allegedly injured by Hull Storey's conduct was Branco Investments, Inc., not Mr. Branco individually. Branco Investments, however, was in forfeiture of its corporate status from March 7, 2012, to July 1, 2015, a period that encompasses all of the acts and communications giving rise to the allegations of this lawsuit. *See* S.C. Sec. of State "Business

[10] This issue was appropriately raised to the Court of Appeals and now to this Court because it implicates subject matter jurisdiction and thus may be raised at any time, even if not raised to the trial court. *Arnal v. Fraser*, 371 S.C. 512, 517 n.2, 641 S.E.2d 419, 421 n.2 (2007) ("Subject matter jurisdiction may be raised at any time, including on appeal."); *Commercial & Savings Bank of Lake City v. Ward*, 146 S.C. 77, 143 S.E. 546, 548 (1928) (holding that an argument that the action was instituted by a legal non-entity can be raised at any time).

Name Search," *available at* https://businessfilings.sc.gov/BusinessFiling/Entity/Search (search for Branco Investments).[11] Accordingly, the "contract" at issue was entered by an entity that lacked legal capacity to enter the transaction, and this lawsuit was filed by a party without the legal ability to carry on any business, both of which are contrary to the South Carolina Code. *See* S.C. Code Ann. § 33-14-210(d) ("A corporation dissolved administratively continues its corporate existence *but may not carry on any business* except that necessary to wind up and liquidate its business and affairs . . . .") (emphasis added).[12]

Accordingly, the trial court erred by awarding damages arising from a supposed contract entered by an entity without capacity to do so.

VI. The Court of Appeals' ruling is likewise proper because an entity that is a necessary and essential part of a contract—even if not a party to the contract—cannot be liable for tortious interference with the contract.

The Court of Appeals' ruling should be affirmed for an additional, independent reason that can be discerned from this Court's precedent, namely the rule that an entity that is an essential and necessary part of the business opportunity contemplated by a contract cannot be liable for tortious interference with that contract.

South Carolina courts have held that a party to a contract cannot be liable for tortious interference with the contract. *See*, *e.g.*, *Dutch Fork Dev. Group 11, LLC v. SEL Properties, LLC,* 406 S.C. 596, 604, 753 S.E.2d 840, 844 (2012) (noting "the general rule that a claim for tortious interference with a contract cannot be made against one who is a party to the contract at

[11] By the time of trial and the Order of Judgment, Branco Investments had sought and received reinstatement of its corporate status.

[12] Branco Investments was administratively dissolved as a result of its forfeiture. *See* S.C. Sec. of State, Business Filings FAQs, *available at* http://www.sos.sc.gov/Business_Filings_FAQs (stating when a business is in forfeiture, "the Secretary of State's Office has administratively dissolved the entity").

issue"); *Ross v. Life Ins. Co. of Virginia*, 273 S.C. 764, 766, 259 S.E.2d 814, 815 (1979) ("Moreover, the South Carolina cases recognizing a cause of action for tortious interference with a contract have been limited to situations where an action was brought against third persons rather than parties to the contract.") (citations omitted).

Nor can a person be liable for tortious interference when the contract expressly contemplates or is contingent upon receiving his approval of the business opportunity proposed by the contract. *See Chitwood v. McMillian*, 189 S.C. 262, 1 S.E.2d 162 (1939); *see also Callum v. CVS Health Corp*., 137 F. Supp. 3d 817, 861 (D.S.C. 2015) (ruling that a claim for intentional interference with contract "require[s] a plaintiff to show the defendant was a stranger to both the contract at issue *and the business relationship giving rise to and underpinning the contract*") (citing *Dutch Fork*, 406 S.C. at 604, 753 S.E.2d at 844; *Santoro v. Schulthess*, 384 S.C. 250, 262, 681 S.E.2d 897, 903 (Ct. App. 2009)) (emphasis added).

In *Santoro v, Schulthess*, for example, the owner of a pond insisted that adjacent property owners and their realtor revise the listing of their property to remove any statement or implication that the property included any rights to use the pond. 384 S.C. 250, 256, 681 S.E.2d 897, 900 (Ct. App. 2009). These revisions to the property description hindered the sale of the adjacent property. *Id*. at 256–57, 681 S.E.2d at 900–01. The adjacent property owners subsequently sued the pond owner, alleging interference with prospective contractual relations. After trial, the master found the pond owner liable. *Id*. at 258, 681 S.E.2d at 901. The Court of Appeals, however, reversed because the pond owner did, in fact, control the littoral rights to the pond and, therefore, he was not a "stranger" to the contract who could be liable for tortiously interfering:

> [The pond owner] is not a stranger to any relationship that the [adjacent property owners] would have with a prospective buyer because any littoral rights or privileges that the prospective buyer

> could expect would depend on [the pond owner's] rights as the pond owner. [The pond owner] would play an essential role in the designation of any rights or privileges that future abutting owners have in the pond. Therefore, it is doubtful that the actions of [the pond owner] could conceptually fall within the scope of the term "interference." *Cf*. *Renden, Inc. v. Liberty Real Estate Ltd. P'ship III*, 444 S.E.2d 814, 818 (Ga. Ct. App. 1994) (holding that to sustain a claim for intentional interference with business relations, the tortfeasor must be a "stranger" to the business relationship at issue).[7]
>
> [7]In *Renden*, the Georgia Court of Appeals explained that under appropriate circumstances, a party can be a nonsigner of a particular contract and yet not be a stranger to the contract itself or to the underlying business relationship. *Id*. The court concluded that the defendant in that case was not a stranger to the business relationship at issue, but rather, as a lessor, was an essential entity in a prospective lessor/lessee/sublessee relationship. *Id*. Here, [the pond owner] would be an essential player in the designation of any rights or privileges that abutting owners would have in the pond.

Id. at 262, 681 S.E.2d at 903.

Accordingly, when a contract is contingent on a non-signatory's approval or authorization of the business contemplated by the contract, the non-signatory is a necessary party to the proposed agreement, and cannot, as a matter of law, be liable for tortious interference with the contract for withholding that approval or authorization. *See*, *e.g.*, *id*. at 266, 681 S.E.2d at 905; *see also Glenn Const. Co., LLC v. Bell Aerospace Servs., Inc*., 785 F.Supp.2d 1258 (M.D. Ala. 2011) (interpreting Alabama law and ruling that a project engineer could not be liable for tortious interference with construction contract between a construction company and Bell Aerospace because the contract contemplated the engineer's involvement, thus the engineer was not a stranger to the contract and, therefore, could not be liable for tortious interference); *J.K.P. Foods, Inc. v. McDonald's Corporation*, 420 F.Supp.2d 966, 969–70 (E.D. Ark. 2006) (ruling McDonalds could not be liable for tortious interference with a contract between franchisee and potential buyer of the franchise because McDonald's approval of the transaction was a condition precedent to the sales contract,

therefore, "McDonald's was a necessary party to the agreement between plaintiffs and Johnson to sell the Jacksonville franchises, not a stranger to the agreement. Every case that this Court has found that has addressed the issue has held that the franchisor is not a stranger to a contract to sell the franchise and therefore cannot be liable for tortious interference with a contract to sell the franchise") (citing 15 cases from various state and federal jurisdictions in support of same); *see also* n.7, *supra* (citing cases); *Genet Co. v. Annheuser–Busch, Inc*., 498 So.2d 683, 684 (Fla. Dist. Ct. App. 1986) ("The tort of willful interference with a business relationship does not exist where the defendant was the source of the business opportunity allegedly interfered with. . . . Because plaintiffs' agreement with Lopez was specifically conditioned upon A–B's approval, as a matter of law, A–B cannot be liable for tortious interference with their agreement.") (citation omitted).

Here, the Proposal for Purchase expressly contemplated and was made contingent on HSRG's (and the landlord of the Florence Mall's) approval of a satisfactory lease. HSRG was, therefore, a necessary and essential party to the agreement, even if not a signatory or a party to the Proposal for Purchase itself. Because HSRG was not a stranger to the contract, the Court of Appeals thus did not err by holding HSRG could not be liable for tortious interference with the contract.

CONCLUSION

The Court of Appeals relied on the trial court's finding of fact that no lease was signed to preclude any conclusion that (i) Brooktenn obtained a lease or that (ii) the contingencies in the Proposal for Purchase were satisfied—which rendered unenforceable and invalid the Proposal for Purchase. Branco and Branco Investments failed to present any evidence of an enforceable contract necessary to support their claim for tortious interference with contractual relations, and the Court of Appeals opinion correctly reversed the judgment of the trial court. Because the Court of

Appeals' opinion is consistent with existing law, the appeal does not set forth any grounds warranting a reversal. Accordingly, the Court of Appeals judgment should be affirmed.

Respectfully submitted,

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