THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Mikell R. Scarborough, Master-in-Equity

Appellate Case No. 2022-001359
Case No. 2017-CP-10-06111

Maybank Holding's, LLC, Appellant,

v.

James Island Center, LLC, Respondent,

AND

James Island Center, LLC, Respondent,

v.

Richard D. Tuorto, Chandler Frierson, Natalie Myers, John R. Hibbits, Jr. and Elizabeth A. Hibbits, Appellants.

INITIAL BRIEF OF APPELLANTS MAYBANK HOLDING'S, LLC, RICHARD D. TUORTO, CHANDLER FRIERSON, NATALIE MYERS, JOHN R. HIBBITS, JR., AND ELIZABETH A. HIBBITS

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July 5, 2023

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STATEMENT OF ISSUES ON APPEAL

1. **Whether the Master-in-Equity erred in granting summary judgment in favor of Respondent as to Appellant's causes of action for fraud, breach of contract accompanied by a fraudulent act, and fraud in the inducement upon the determination that the terms of the assignment of the subject lease to Appellant extinguished the previous tenant's exercise of its unilateral right to renew the terms of the lease for an additional five-year period where the assignment does not expressly extinguish the exercise of the option and conveyed all of the assignor's rights to Appellant.**

2. **Whether the Master-in-Equity erred in granting summary judgment in favor of Respondent as to Appellant's causes of action for fraud, breach of contract accompanied by a fraudulent act, and fraud in the inducement predicated upon the determination that that the grinder pump failures had been distinct and, therefore, Respondent could not have falsely represented that the grinder pumps had been fixed where the grinder pumps continued to fail without preventative maintenance.**

3. **Whether the Master-in-Equity erred in granting summary judgment in favor of Respondent as to Appellant's causes of action for fraud, breach of contract accompanied by a fraudulent act, and fraud in the inducement predicated upon the determination that Respondent did not falsely represent that the construction laydown yard for the renovation of the anchor tenant would not be in the shopping center parking lot and that the restaurant could open within 90 days where the construction plans approved by Respondent depicted the construction laydown yard in the shopping center parking lot, Respondent expressly represented to Appellant that all construction and the laydown yard for the construction would not be in the shopping center parking lot, and Respondent did not correct the false impression that the restaurant could open within 90 days.**

4. **Whether the Master-in-Equity erred in granting summary judgment in favor of Respondent as to Appellant's causes of action for fraud, breach of contract accompanied by a fraudulent act, and fraud in the inducement predicated upon the determination that Respondent did not falsely represent that Appellant was in default for failing to pay rent and continuously operate where the lease entitled Appellant to an abatement of rent, Respondent represented that Appellant's rent would be prorated, and Respondent conceded that Appellant could not operate during the performance of repairs before ceasing communications with Appellant.**

5. **Whether the Master-in-Equity erred in determining that the "as-is" clause in the lease did not require Respondent to maintain the preventative maintenance agreement in effect at the time the parties executed the lease where the lease expressly obligated Respondent to maintain the grinder pumps, the grinder pumps required regular maintenance to prevent catastrophic failure, and Respondent maintained the grinder pumps through a preventative maintenance agreement in effect at the time the parties executed the lease.**

6. **Whether the Master-in-Equity erred in determining that Respondent did not allow cancellation of the preventative maintenance agreement for the grinder pumps where Respondent did not take any action to maintain the grinder pumps after the vendor performing the service ceased both performing and sending invoices to Respondent for the performance of the preventative maintenance for the grinder pumps.**

7. **Whether the Master-in-Equity erred in determining that Appellant's failure to maintain the restaurant's grease trap caused the failure of the restaurant grinder pumps where Respondent's expert could only speculate as to how grease entered the grinder pumps, a vendor hired by Appellant performed regular maintenance on the grease trap including by removing its grease after Appellant's restaurant ceased operating, and Respondent did not observe any grease in the grinder pumps after Appellant's restaurant ceased producing grease.**

8. **Whether the Master-in-Equity erred in excluding from evidence the manifests documenting Appellant's maintenance of the grease traps upon determining that the manifests contained subjective opinions from individuals not available to testify where the manifests contained only statements of observed, measurable facts and any subjective opinions could have been redacted.**

9. **Whether the Master-in-Equity erred in determining that Respondent's efforts to mitigate its damages were reasonable where Respondent failed to respond to offers to release the premises, including an offer described by its leasing agent as a "home run", considered how to gain value in the litigation when determining whether to re-lease the premises, and incurred additional claimed damages after failing to accept reasonable offers to re-lease the premises.**

10. **Whether the Master-in-Equity erred in determining that the members of Appellant owned and operated the entity as a general partnership where such a finding was not necessary to the determination of any cause of action before the Master-in-Equity, the Master-in-Equity failed to conduct the factual analysis required to make such a finding, and the evidence presented demonstrated that the members did not operate the entity as a general partnership.**

11. **Whether the Master-in-Equity erred in granting Respondent's request for an award of attorney's fees absent the production to Appellant of a copy of its billing records and transaction entries that redacted only privileged information and included the identity of the client for whom the work had been performed and the purpose and type of work performed.**

12. **Whether the Master-in-Equity erred in awarding interest on the damages claimed by Respondent where the contractual amount of interest was not based upon any actual damages in the contemplation of the parties, disproportionate to any probable damage resulting from any breach, and intended to serve as punishment for breach of the lease.**

STATEMENT OF THE CASE

This appeal arises from a dispute between a commercial tenant and landlord. Respondent James Island Center, LLC ("James Island Center") is a single purpose limited liability company that owns a shopping center located at the intersection of Maybank Highway and Folly Road in Charleston, South Carolina. The shopping center includes an anchor tenant grocery store, numerous store fronts, and an outparcel building containing a restaurant and coffee shop. The shopping center is operated by an asset management company—Beatty Management Company ("Beatty Management"). Beatty Management operates three shopping centers in the Charleston area, as well as a portfolio of shopping centers in other states. Appellant Maybank Holding's, LLC ("Maybank Holdings") is a single purpose limited liability company incorporated to operate a restaurant within the outparcel building pursuant to a lease entered with James Island Center and Beatty Management. Appellants Richard D. Tuorto, Chandler Frierson, Natalie Myers, John R. Hibbits, Jr. and Elizabeth A. Hibbits executed guarantees of the leases entered between Maybank Holdings, James Island Center, and Beatty Management.

Maybank Holdings filed the Summons and Complaint in this civil action on November 29, 2017. In the Complaint, Maybank Holdings alleged causes of action against its landlord James Island Center for breach of lease, trespass, nuisance, and constructive eviction arising from allegations that the landlord's failure to maintain the leased premises caused sewage backups and mold growth in the premises and prevented the operation of the restaurant. On February 7, 2018, James Island Center filed an Answer and Counterclaim asserting causes of action against Maybank Holdings for breach of lease, waste, and foreclosure of a contractual lien and security interest on any personal property contained within the restaurant. On March 22, 2018, James Island Center also filed a civil action seeking to enforce the lease guarantees. On July 18, 2018, the Honorable

Diane Goodstein referred the matter to the Master-in-Equity for Charleston County with appeal to the South Carolina Court of Appeals.[1]

On August 9, 2018, Maybank Holdings filed an Amended Complaint alleging additional causes of action against James Island Center for breach of implied covenant of good faith and fair dealing, fraud, breach of lease accompanied by fraudulent act, fraud in the inducement, negligent misrepresentation, violation of the South Carolina Unfair Trade Practices Act, unjust enrichment, and restitution arising from additional allegations that the landlord had fraudulently concealed material defects in the leased premises and shopping center prior to execution of the lease, refused to allow the tenant to exercise its option to renew the terms of its lease, and induced the tenant into entering both the original lease and a second lease. On September 17, 2018, James Island Center filed an Answer to Plaintiff's First Amended Complaint and Counterclaims alleging causes of action against Maybank Holdings for breach of lease, ejectment, and foreclosure of the contractual lien and security interest.[2]

On July 22, 2018, James Island Center filed a Motion for Order of Ejectment. On September 19, 2018, the Master-in-Equity ordered Maybank Holdings to pay any rent arrearage due on or before September 30, 2018, and instructed that the failure to continue to pay monthly rent would be grounds for the landlord to file a Rule to Vacate the Property. On September 28, 2018, Maybank Holdings notified James Island Center of its rescission of the second lease and returned the keys to the building on or about October 9, 2018.

On December 30, 2021, the Master-in-Equity filed an Order Granting Partial Summary Judgment to James Island Center, LLC, as to Maybank Holdings' causes of action for breach of

[1] On July 16, 2020, the parties filed a Consent Order to Consolidate the two civil actions.

[2] In the Answer to Plaintiff's First Amended Complaint and Counterclaims, James Island Center abandoned its cause of action for waste.

implied covenant of good faith and fair dealing, nuisance, constructive eviction, and violation of the South Carolina Unfair Trade Practices Act.[3] On February 2, 2022, the Master-in-Equity also filed an Order Granting Partial Summary Judgment to James Island Center, LLC on Fraud Causes of Action granting summary judgment in favor of James Island Center as to Maybank Holdings causes of action for fraud, breach of lease accompanied by fraudulent act, and fraud in the inducement.[4]

The remaining causes of action came before the Master-in-Equity for a non-jury trial on the merits on February 23-25, 2022, April 14-15, 2022, and May 8-9, 2022. These included Maybank Holdings' causes of action for breach of lease, negligent misrepresentation, trespass, unjust enrichment, and restitution and James Island Center's causes of action for breach of lease and to enforce the lease guarantees. At the close of the plaintiff's case at trial, the Master-in-Equity granted a motion for nonsuit in favor of James Island Center as to the negligent misrepresentation, trespass, unjust enrichment, and restitution causes of action. Upon the conclusion of trial testimony, the Master-in-Equity took the matter of the remaining breach of contract and guarantor enforcement claims under advisement.

On July 27, 2022, the Master-in-Equity filed an Order of Judgment Against Maybank Holding's LLC, Richard D. Tuorto, Jr., Chandler Frierson, Natalie Myers n/k/a Natalie Frierson, John Hibbits, Jr., and Elizabeth A. Hibbits granting judgment in favor of Respondent as to both breach of contract claims and ordering a judgment to be entered in favor of Respondent as to all Appellants in the amount of $1,361,164.90, jointly and severally. In the Order of Judgment, the

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[3] On January 10, 2022, Maybank Holdings filed Plaintiff Maybank Holding's LLC's Motion to Alter, Amend, Modify, and Correct the Order Granting Partial Summary Judgment to Defendant filed on December 30, 2021.

[4] On February 14, 2022, Maybank Holdings filed Plaintiff's Motion to Alter, Amend, and Reconsider Order Granting Partial Summary Judgment to Defendant on Plaintiff's Fraud Causes of Action.

Master-in-Equity also instructed James Island Center to submit an affidavit in support of its claim for attorney's fees, costs, and expenses. On August 1, 2022, the Master-in-Equity filed a Form 4 Order entering judgment against Appellants.[5]

On August 5, 2022, James Island Center filed the Affidavit of Attorney's Fees of Edward D. Buckley, Jr., seeking an award of attorney's fees and expenses in the amount of $1,099,944.05. On September 6, 2022, Maybank Holdings filed Plaintiff's Objections to Defendant's Request for an Award of Attorney's Fees and Affidavit of Attorneys' Fees and Motion to Compel seeking the production of the billing entries submitted to the Master-in-Equity in support of Affidavit of Attorney's Fees of Edward D. Buckley, Jr. The Master-in-Equity held a hearing on the Motion to Reconsider the Order of Judgment Against Plaintiff Maybank Holding's, LLC and the Grant of Defendant James Island Center's Motions for Partial Summary Judgment and Plaintiff's Objections to Defendant's Request for an Award of Attorney's Fees and Affidavit of Attorneys' Fees and Motion to Compel on September 7, 2022. On September 22, 2022, the Master-in-Equity filed a Form 4 Order granting an award of attorneys' fees to James Island Center in the amount of $1,000,000.00 and amending the entry of judgment to $2,361,164.90.

On September 29, 2022, Maybank Holdings served and filed a Notice of Appeal of the Order Granting Partial Summary Judgment to James Island Center, LLC filed on December 30, 2021; the Order Granting Partial Summary Judgment to James Island Center, LLC On Fraud Causes of Action filed on February 2, 2022; the Order of Judgment Against Maybank Holding's, LLC, Richard D. Tuorto, Jr., Chandler Frierson, Natalie Myers n/k/a Natalie Frierson, John

[5] On August 5, 2022, Maybank Holdings filed a Motion to Reconsider the Order of Judgment Against Plaintiff Maybank Holding's, LLC and the Grant of Defendant James Island Center's Motions for Partial Summary Judgment. On September 9, 2022, the Master-in-Equity filed a Form 4 Order denying the Motion to Reconsider the Order of Judgment Against Plaintiff Maybank Holding's, LLC and the Grant of Defendant James Island Center's Motions for Partial Summary Judgment filed on August 5, 2022.

Hibbits, Jr. and Elizabeth A. Hibbits filed on July 27, 2022; the Order of Judgment filed on August 1, 2022; the Order Denying Plaintiff's Motion to Reconsider the Judgment Against Plaintiff and the Grant of Defendant James Island Center's Motion for Partial Summary Judgment filed on September 9, 2022; and the Amended Order of Judgment filed on September 22, 2022.

On September 27, 2022, Maybank Holdings also filed a Motion for Rule to Show Cause and to Reconsider Amended Order of Judgment. On October 20, 2022, the Mater-in-Equity filed a Form 4 Order Denying Plaintiff Maybank Holding's, LLC's Motion to Reconsider the Amended Order of Judgment, the Grant of Defendant James Island Center's Motions for Partial Summary Judgment, and Plaintiff's Objections to Defendant's Request for an Award of Attorney's Fees and Affidavit of Attorneys' Fees and Motion to Compel.

On October 26, 2022, Maybank Holdings served and filed a Notice of Appeal of the Order Denying Plaintiff Maybank Holding's, LLC's Motion for Rule to Show Cause and to Reconsider the Amended Order of Judgment filed on October 20, 2022. On November 22, 2022, the South Carolina Court of Appeals filed an Order consolidating the two appeals.

STATEMENT OF THE FACTS

James Island Center constructed the shopping center outparcel building pursuant to a lease executed by its original tenant on June 16, 2004 ("Original Lease"). Construction of the outparcel building included the installation of a wastewater system common to the two outparcel tenants served by a set of grinder pumps[6] located in a lift station in a common area adjacent to the outparcel building. After construction, James Island Center delivered the premises to the original tenant and the lease commenced pursuant to an estoppel agreement on April 15, 2006.

The Original Lease had an initial ten-year term that ran from the delivery of the premises scheduled to expire on April 15, 2016. After the first three years of the initial term, the Original Lease provided that the rental rate increased by three percent annually. In addition to the initial ten-year term, the Original Lease provided the original tenant with a unilateral right to renew the lease for three consecutive five-year terms. The Original Lease specifically provides that:

> Provided TENANT is not in default beyond the expiration of any applicable grace or cure period and upon one hundred eighty (180) days prior written notice, LANDLORD hereby grants TENANT the right to renew the lease upon the same terms and conditions for three consecutive five (5) year terms, at the rental rates for the specific option periods as outlined on Page 2A.

(Original Lease at ¶ 3b.) The Original Lease further provides that "[a]ll notices required under this Lease shall be in writing and deemed to be properly served if sent by registered mail to the LANDLORD at the last address where rent was paid[.]" (Id. at ¶ 49.) The Original Lease expressly restricted use of the premises to "the operation of a full service sit down Tapas style restaurant." (Id. at ¶ 13.)

[6] Grinder pumps are mechanical pumps that grind up solid and other waste material into a fine slurry so that it can be pumped into a sewer system where there is insufficient gravity to allow the sewage to run through the plumbing system without assistance.

The original tenant operated a restaurant within the premises until assigning the Original Lease to Robert Walker ("Walker") on December 16, 2009. Upon taking possession, Walker immediately continued the operation of the existing restaurant. (Dep. Walker p. 49, ll. 4-11.) Only ten days later, Walker began having problems with the grinder pump system. (JIC 00468-00473.) As a result, James Island Center replaced the grinder pumps on or about March 20, 2010. (Id.) Although grinder pumps typically have a life span of between 5 and 15 years, (Dep. Frye, p. 98, l. 25-p. 99, l. 3), the grinder pumps failed again on August 14, 2012, causing raw sewage to spill into the restaurant's parking lot, (CBRE_000258). After a temporary fix, the grinder pumps failed again on September 1, 2012, again resulting in raw sewage spilling into the restaurant's parking lot and backing up into the restaurant's sinks, toilets, and floor drains. (JIC 0356-0361) The grinder pumps failed again on November 16, 2012. (JIC 0356-0361; JIC 3237) As a result, James Island Center again had both grinder pumps replaced. (JIC 1372-1374)

At the time, James Island Center acknowledged that the failure of the grinder pumps had not been an isolated incident and resulted from a problem with the design of the sewer system that could not be permanently corrected unless it was completely reconstructed. (CBRE_00284-286; CBRE_000295) In compensation, therefore, James Island Center provided Walker with an abatement of three month's rent and agreed to enter into a preventative maintenance agreement with a third-party vendor to ensure that the grinder pumps were regularly inspected and serviced to avoid any additional sewer backup incidents. (CBRE_00284-286; CBRE_000346; CBRE 303.) The quarterly preventative maintenance service began on September 18, 2013, and continued throughout Walker's tenancy. (JIC 01343-01354) The vendor provided the service invoices to James Island Center's property manager who forwarded them to Beatty Management for payment.

(Dep. Fabie p.75, l. 14 - p.76, l. 16). Walker did not receive or review the invoices. (Dep. Walker p. 86, l. 22 – p. 87, l .6.)

In October 2013, the anchor tenant grocery store closed, and a new grocery store chain agreed to take over the vacant space and perform significant renovations prior to opening. As a part of the project, James Island Center reviewed and approved the renovation plans, which included a rendering of a large construction laydown area in the shopping center parking lot. (Dep. Miller p. 120, l. 14-p. 122, l. 20). In compensation for the lessened foot traffic due to the closing of the anchor tenant, James Island Center agreed to reduce Walker's rent by twenty percent until the new grocery store opened. (CBRE_000445) Neither Walker nor the other tenants were informed that the construction laydown area would be in the shopping center parking lot. (Dep. Smallwood, p. 188, ll. 3-11; Dep. Walker, p. 138, l. 7 – p. 139, l. 24.)

Prior to the renovation, Walker's restaurant had not been performing well and gradually fell significantly behind on rent. (Dep. Smallwood, p. 131 l. 21 – p. 132, l. 12; see also WRS 92; CBRE_000521.) James Island Center, however, did not hold Walker in default. (Dep. Walker, p. 143, ll. 2-25; p. 168, ll. 13-16; p. 173, l. 21 - p. 175, l. 10; JIC 1017 – 1018; Dep. Smallwood, p. 167, l. 15 – p. 169, l. 15; WRS 285; Dep. Beach, p. 79, l. 14-p. 81, l. 19; Dep. John Beatty, p. 124, l. 18 – p. 128, l. 10; CBRE 640.) Instead, James Island Center expressed an interest in keeping Walker's restaurant in the shopping center. (Dep. Smallwood, p. 105, l. 17 – p. 106, l. 20; CBRE 284-286.) In early 2014, Walker eventually closed the restaurant with the intention of renovating, rebranding, and reopening. (Dep. Walker, p. 144, l. 12 – p. 145, l. 14; Dep. Smallwood, p. 144, ll. 5 - 23.) While closed, Tuorto and Verner approach Walker about potentially selling the restaurant's lease and business assets. (Dep. Walker, p. 145, l. 15 – p. 146, l. 22.)

On April 9, 2014, Tuorto, Verner, Frierson, and Hibbits submitted an offer to purchase the the dormant restaurant, including the unexpired term of the Original Lease, through an existing company called Ion Holdings, LLC. (Offer to Purchase) Because the Original Lease prohibited assignment without the prior written consent of the landlord, the offer was expressly contingent on the landlord's approval of an assignment to I'On Holdings, LLC, or another legal entity controlled by Tuorto, Verner, Frierson, and Hibbits. (Id.) If not accepted and approved, the offer would expire on May 5, 2014. (Id.)

While considering the offer, Walker continued his conversations with James Island Center about remaining in the space beyond the initial term of the Original Lease. On April 28, 2014, Walker and James Island Center memorialized the exercise of the first of the three available additional five-year terms available pursuant to the terms of the lease. (See CBRE_ 295). This renewal included a continuation of the reduced rental rate that Walker had been paying since January 1, 2014, to mitigate the effect of the closing of the anchor tenant. (Id.) The parties agreed that the reduced rental rate would continue until the anchor tenant grocery store reopened. (Id.) Otherwise, the terms of the Original Lease were to continue pursuant to the option language contained in the lease. Walker informed the potential buyer of the renewal (Dep. Walker, p. 207, l. 19 – p. 209, l. 2.)

In evaluating the offer and potential assignment, James Island Center insisted upon approving the potential new owner's proposed restaurant concept and reviewing the financial condition of the entity created to own and operate the restaurant—Maybank Holdings—and its members. (Dep. Smallwood p. 153, ll. 10-21) Accordingly, on or about July 1, 2014, Verner and Tuorto met with Walker and the landlord's leasing agent and property managers at the restaurant to discuss the potential assignment. (Dep. Smallwood, p. 157, l. 9-p. 163, l. 18.) During the

meeting, Walker disclosed that the grinder pumps servicing the restaurant and adjacent coffee shop had failed in 2012.[7] (Dep. Smallwood p. 158, ll 13-23; p. 159, ll. 18-23.) At the meeting, the landlord's property managers expressly informed those present that the problem had been fixed and there was no chance that it would occur again. (Dep. Smallwood, p. 159, l. 24 - p. 161, l. 20; see also Dep. Tuorto p. 39, l. 9-p. 40, l. 15.) Neither the landlord nor Walker disclosed that the grinder pumps had also failed in 2009. (Dep. Smallwood, p. 159, l. 24 – p. 162, l. 9.)

At the time of the meeting, those present observed a construction fence that had been erected around a small area of the shopping center parking lot. (Dep. Smallwood p. 193, ll. 8-22.) The fenced area created the impression that the shopping center parking lot would remain largely available throughout the construction of the new grocery store. (Dep. Smallwood p. 192, l. 24-p. 193, l. 22.) Moreover, the shopping center's leasing agent informed Verner that "all construction and the laydown yard for the construction would not be in the parking lot of the shopping center and that it would be behind [the grocery store]" and that "the impact on the parking lot would be minimal." (Dep. Verner, p. 41, l. 22-p. 42, l. 9; p. 45, ll. 1-22.)

After receiving approval of the assignment, Maybank Holdings and Walker entered into an Assignment and Assumption Agreement and Modification to Lease Agreement on August 1, 2014 ("Assignment"). The Assignment provides as follows:

> As used in this Agreement the term "Lease" shall mean the "Lease" as modified hereby; unless context expressly requires it to mean the Original Lease and/or the First Assignment[.]
>
> * * * *

[7] On July 24, 2014, Walker forwarded to Tuorto an email train with the shopping center property manager in which the parties had discussed the incident in 2012. (Walker Email to Tuorto, July 24, 2014.) In the email, Walker informed Tuorto that the emails may be helpful in the event that the landlord has stopped servicing the grinder pumps. (Id.)

2. Assignment and Security Deposit. Assignor hereby assigns and sets over to Assignee all of Assignor's right, title, interest, and claims in the Lease including, without limitation, the Security Deposition as referenced herein (the "Assignment").

* * * *

8. Term. The term of the Lease as set forth in Paragraph 3 remains in full force and effect with the initial term of the Lease set to expire on April 14, 2016. The provisions in the Original Lease at Paragraph 3b entitled "Lease Renewal" containing the right of Tenant to renew the Lease for three consecutive five year terms remains in full force and effect on the same terms and conditions contained in the Original Lease. In addition thereto and provided that Tenant: (i) actually exercises each right to renew for three consecutive five year terms set forth in Paragraph 3b, and (ii) is not in default beyond the expiration of any applicable grace or cure period and gives Landlord no less than one hundred eighty (180) days written notice of Tenant's intent to further extend the Lease prior to the expiration of the current term, Landlord hereby grants Tenant the additional right to extend the Lease for a fourth five year term ("Fourth Extension Period") with the Minimum Guaranteed Rental for the Fourth Extension Period to be set at a mutually agreed upon market rate for the Demised Premises but in no case shall the Minimum Guaranteed Rental be set at a rate that is less than the Minimum Guaranteed Rental rate for the immediately preceding Lease Year.

* * * *

Immediately following the One Month Rent Abatement, the Minimum Guaranteed Rental to be paid by the Tenant to Landlord for the use of the Premises shall be reduced from the current contract rate of Twenty Five Dollars and Sixty Cents ($25.60) per square foot to a temporary reduced rate of Nineteen Dollars and Eighty Eight Cents ($19.88) per square (as set forth herein below) until such time as the Harris Teeter Supermarket opens to the public for business at the Shopping Center (the "Reduced Rent Period").

* * * *

12. Use. Paragraph 13 of the Original Lease is hereby removed and replaced hereby to read as follows:

13. USE OF THE DEMISED PREMISES

Tenant may use the Demised Premises for the operation of a traditional restaurant and bar and no other purpose.

* * * *

> 15. Miscellaneous. Assignor, Assignee, Original Guarantors and Additional Guarantors hereby acknowledge that the Original Lease as modified hereby is and remains in full force and effect. In the event of an express conflict between the terms and conditions of this Amendment and the remainder of the Lease, this Amendment shall control.

Prior to opening the new restaurant, Maybank Holdings completely renovated the leased premises. (Fabie Dep. p. 107, ll. 1 – 12; Verner p. 144, l. 19 – p. 145, l. 11.) On August 7, 2014, Maybank Holdings informed its landlord that the new restaurant would open within 90 days. (WRS 314.) Those plans changed, however, when the grocery store renovation contractors placed a large, fenced construction laydown area in the shopping center parking lot. (Dep. Smallwood p. 194, l. 19- p. 195, l. 21.) The lay down area took up three-quarters of the available parking lot. (Dep. Fabie p. 29, l. 16 - p.30, l. 6; see also Dep. Verner, p. 57, ll. 7-23.) As a result, Maybank Holdings delayed opening the new restaurant until completion of the renovation of the anchor tenant grocery store. (Fabie Dep. p. 102, l. 24 – p. 103, l. 9.)

During the renovation, James Island Center hired a roofing company to assess the condition of the roof of the outparcel building. (Fabie Dep. p. 155, l. 25-p.156, l. 21.) On September 9, 2015, the roofing company issued a report documenting numerous deficiencies in the roof that allowed for water intrusion. (Tecta 13-17.) James Island Center, however, did not perform the recommended repairs nor inform Maybank Holdings of the findings. (See Fabie Dep. p. 155, l. 16 – p. 159, l. 11.)

Maybank Holdings opened its new restaurant on November 11, 2015. (Miller Dep. p. 134, ll. 17-24.) On the same day, James Island Center informed Maybank Holdings that the option to renew the lease for an additional five-year term had not been timely exercised. (Dep. Fabie, p. 114, ll. 11-25; Maybank 1368.) The landlord then presented Maybank Holdings with a new form lease

for execution to remain in the lease premises beyond the initial term expiring on April 14, 2016. (Dep. Fabie, p. 127, l. 25-p. 128, l. 12; see also p. 92, l. 14-p. 93, l. 6) Maybank Holdings, James Island Center, and Beatty Management executed a new lease on June 1, 2016 ("Second Lease").

On April 1, 2016, Verner informed the property manager of a roof leak in the restaurant. (Fabie Dep. p. 159, l. 17 – p. 160, l. 7; Avison Young 186-189.) As a result, the property manager placed the leak on the agenda prepared for his weekly leasing and property management conference call with the landlord and the shopping center's leasing agent on April 4, 2016. (Id.) Two days later, Verner executed a Tenant Estoppel Certificate affirming that the landlord was in full compliance with the lease and that the tenant did not have any outstanding claims against James Island Center. (Estoppel Certificate) In March 2017, Maybank Holdings observed mold on the walls and ceiling in the dining room area of the restaurant. (Verner Dep. p. 147, ll. 6-22.) On or about March 8, 2017, a company scraped and removed the mold and performed other remedial work on the restaurant. (JIC 2870-2872; JIC 2876-2877.) At the end of August 2017, Maybank Holdings reported water intruding into the restaurant. James Island Center eventually identified numerous building envelope issues that allowed water intrusion through the roof and exterior walls. (Fabie Dep. p. 190, l. 1 – p. 193, l. 6; Statesville 26-57.) The required repairs necessitated demolition of the interior of the restaurant and various roof repairs. (Fabie Dep. p. 190, l. 11 – p. 193, l. 6.)

After February 24, 2017, the preventative maintenance vendor ceased inspecting and servicing the grinder pumps. (Dep. Miller, p. 176, l. 5-p. 177, l. 7; Cullum 1444-1448.) James Island Center never informed Maybank Holdings of the termination of the service. (Dep. Miller, p. 176, l. 5-p. 177, l. 7.) On or about July 31, 2017, the grinder pumps failed, and sewage backed up into the restaurant, ran across the restaurant's landscaping and sidewalk, and pooled in the

shopping center parking lot. (Fabie Dep. p. 169, ll. 12-23.) In response, James Island Center's property manager wrote "[I]f this is LL responsibility and you're unable to open before its fixed, I will go to bat and get you prorated rent." (JIC 5550) James Island Center replaced the grinder pumps, but the system failed again on September 2, 2017. (Fabie Dep. p. 183, ll. 20-22; Avison Young 57-58.)

On October 3, 2017, Maybank Holdings informed the landlord that the restaurant would close while the remedial work was completed. (Fabie Dep. p. 196, l. 2 – p. 197-15; Avison Young 73.) James Island Center agreed that the restaurant would be untenantable while work was being completed. (See id.; Miller Dep. p. 197, ll. 7-21.) In accordance with the property manager's representations of the rent abatement, Maybank Holdings did not pay rent for the month of October 2017. On October 11, 2017, however, James Island Center issued a notice of default for failure to pay the October rent. On October 20, 2017, James Island Center issued a second notice of default for the delinquent payment of rent, as well as for the restaurant's failure to continuously operate despite the remedial work not having been completed.

On the morning of October 26, 2017, the property manager informed Maybank Holdings that the repairs should be completed later that day. (Avison Young 110.) After the email, James Island Center ceased direct communication with its tenant. (Miller Dep. p. 214, l. 23 – p. 215, l. 7.) On November 28, 2017, James Island Center sent Maybank Holdings an email which stated in pertinent part:

> The landlord has not received payment and wants to know if the tenant intends to pay the arrearage. . . . If the arrearage is not paid by tomorrow (Wednesday, November 2[9]), the landlord is going to terminate the lease.

(Willis 431-432.) Maybank Holdings did not satisfy the arrearage by November 29, 2017. Instead, Maybank Holdings filed this lawsuit the following day. On September 28, 2018, Maybank

Holdings notified James Island Center of its rescission of the current lease and returned the keys to the building on October 9, 2018. (Pl. Trial Ex. 109, Cooke Letter to Molony, Sept. 28, 2018.)

Upon retaking possession of the premises, James Island Center had the space prepared to re-lease to another tenant beginning of the summer of 2019. (Ault Dep. p. 205, ll. 10-22.) In the fall of 2019, James Island Center had already received numerous letters of intent from potential tenants interested in leasing the premises, including an offer from Walker. James Island Center, however, did not respond to the offers. (See Walker Dep. p. 222, l. 8 – p. 223, l. 4.) In August 2021, James Island Center reached out to Walker regarding re-leasing the premises. On November 30, 2021, the parties entered into a new lease with rent commencing on June 1, 2022. (Walker Dep. p. 224, l. 6 - p. 225, l. 4.)

STANDARDS OF REVIEW

The trial court granted summary judgment in favor of Respondent as to Appellant's causes of action for fraud, breach of lease accompanied by a fraudulent act, fraud in the inducement, breach of implied covenant of good faith and fair dealing, nuisance, constructive eviction, and violation of the South Carolina Unfair Trade Practices Act pursuant to Rule 56(c), SCRCP. "An appellate court reviews the granting of summary judgment under the same standard applied by the trial court." Jackson v. Swordfish Invs., L.L.C., 365 S.C. 608, 612, 620 S.E.2d 54, 56 (2005) (citing George v. Fabri, 345 S.C. 440, 548 S.E.2d 868 (2001)). "Summary judgment is appropriate when it is clear that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Id. at 611, 620 S.E.2d at 55-56 (citing Cafe Assocs., Ltd. v. Gerngross, 305 S.C. 6, 406 S.E.2d 162 (1991)). "Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." Id. (citing Middleborough Horizontal Property Regime Council of Co-Owners v. Montedison, 320 S.C. 470, 465 S.E.2d 765 (Ct. App. 1995)). "In order to withstand a motion for summary judgment in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence." Turner v. Milliman, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011) (citing Hancock v. Mid-South Mgmt Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009)). "In cases requiring a heightened burden of proof, the non-moving party must submit more than a mere scintilla of evidence to withstand a motion for summary judgment." Id. (citing Hancock, 381 S.C. at 330-31, 673 S.E.2d at 803). "[S]ummary judgment should not be granted even when there is no dispute as to the evidentiary facts, if there is a dispute as to the conclusion to be drawn therefrom." Jackson, 365 S.C. at 608, 611-12, 620 S.E.2d at 56 (citing MacFarlane v. Manly, 274 S.C. 392, 264 S.E.2d 838 (1980)). "On appeal from an order granting summary

judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below." Hurst v. E. Coast Hockey League, Inc., 371 S.C. 33, 36, 637 S.E.2d 560, 561-62 (2006) (citing Osborne v. Adams, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001)). "When a circuit court grants summary judgment on a question of law, [an appellate court] will review the ruling de novo." Wright v. PRG Real Estate Mgmt., Inc., 426 S.C. 202, 212, 826 S.E.2d 285, 290 (2019).

The trial court granted a motion for nonsuit in favor of Respondent as to Appellant's claims for negligent misrepresentation, trespass, unjust enrichment, restitution, and extra-contractual damages pursuant to Rule 41(b), SCRCP. "Rule 41(b) allows the judge as fact finder to weigh the evidence and determine the facts." Waterpointe I Prop. Owner's Ass'n v. Paragon, Inc., 342 S.C. 454, 458, 536 S.E.2d 878, 880 (Ct. App. 2000) (citing Johnson v. J.P. Stevens & Co., 308 S.C. 116, 118, 417 S.E.2d 527, 529 (1992)). "Because a dismissal under these circumstances has the same effect as summary judgment, the standard for summary judgment applies." Livingston v. Livingston, 404 S.C. 137, 142, 744 S.E.2d 203, 206 (Ct. App. 2013) (citations omitted)

The trial court entered a judgment in favor of Respondent as to Appellant's claims for breach of lease and Respondent's claims for breach of lease pursuant to Rules 52 and 54, SCRCP. "Actions seeking damages for breach of contract . . . are actions at law." Mathis v. Brown & Brown of S.C., Inc., 389 S.C. 299, 307, 698 S.E.2d 773, 777 (2010). "In an action at law tried without a jury, the trial judge's findings have the force and effect of a jury verdict upon the issues and are conclusive on appeal when supported by competent evidence." (Id.) "Accordingly, this Court's scope of review is limited to determining whether the findings are supported by competent evidence and correcting errors of law." (Id.)

"The admission or exclusion of evidence is within the circuit court's discretion, and the circuit court's ruling on the admissibility of evidence is not subject to reversal on appeal absent a showing of a clear abuse of that discretion." Turner v. Med. Univ. of S.C., 430 S.C. 569, 589, 846 S.E.2d 1, 11 (Ct. App. 2020) (citing Haselden v. Davis, 341 S.C. 486, 497, 534 S.E.2d 295, 301 (Ct. App. 2000), aff'd, 353 S.C. 481, 579 S.E.2d 293 (2003)). "'An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion is without evidentiary support.'" Id. (quoting Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005)). "'To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or lack thereof.'" Id. (quoting Fowler v. Nationwide Mut. Fire Ins. Co., 410 S.C. 403, 408, 764 S.E.2d 249, 251 (Ct. App. 2014)).

ARGUMENT

I. The Master-in-Equity Erred in Granting Summary Judgment in Favor of Respondent as to Appellant's Causes of Action for Fraud, Fraud in the Inducement, and Breach of Lease Accompanied by Fraudulent Act.

In the Order Granting Partial Summary Judgment to James Island Center, LLC on Fraud Causes of Action, the Master-in-Equity determined that Maybank Holdings failed to present any evidence that it had a right to rely upon any representations made by James Island Center and of any material misrepresentation, fraudulent act, or deceptive practice. This included express determinations that the landlord could not have falsely represented that (1) Maybank Holdings had missed the opportunity to renew the terms of the Original Lease, (2) the problems with the grinder pumps had been fixed and had no chance of reoccurring, (3) all construction and the laydown yard for the renovation of the anchor tenant grocery store would not be in the shopping center parking lot, and (4) Maybank Holdings was in default for failing to pay rent and for continuously operating the restaurant.

A. The Master-in-Equity Erred in Determining that Respondent Could Not Have Falsely Represented that Appellant Had Missed the Opportunity to Renew the Terms of the Original Lease.

"Option contracts generally have three main characteristics: (1) they are unilateral contracts where the optionor, for a valuable consideration, grants the optionee a ***right*** to make a contract of purchase but does not bind the optionee to do so; (2) they are continuing offers to sell, ***irrevocable*** during the option period; and (3) the transition of an option into a contract of purchase and sale can only be effected by an ***unqualified and unconditional acceptance*** of the offer in accordance with the terms and within the time specified in the option contract." Ingram v. Kasey's Assocs., 340 S.C. 98, 108, 531 S.E.2d 287, 292 (2000) (emphasis added). "When an option is subject to a condition precedent, in addition to manifesting acceptance within the stated time, the optionee

must satisfy the conditions, and the contract will not be specifically enforced until any such conditions are met." Alexander's Land Co., L.L.C. v. M&M&K Corp., 390 S.C. 582, 595, 703 S.E.2d 207, 214 (2010). "[A]n optionor can waive his right to require exercise of an option within the time period stipulated in an option contract." Edwards v. Rouse, 290 S.C. 449, 451, 351 S.E.2d 174, 176 (Ct. App. 1986). "Waiver can consist of an expression of intention not to demand a certain thing." Id. (citing South Carolina Tax Commission v. Metropolitan Life Insurance Co., 266 S.C. 34, 221 S.E.2d 522 (1975)).

The Original Lease provided the current tenant with a unilateral right to renew the lease for three consecutive five-year terms "[p]rovided TENANT is not in default beyond the expiration of any applicable grace or cure period and upon one hundred eighty (180) days prior written notice." (Original Lease at ¶ 3b.) Pursuant to the Original Lease, "[a]ll notices required under this Lease shall be in writing ***and*** deemed to be properly served if sent by registered mail to the LANDLORD at the last address where rent was paid[.]" (Original Lease at ¶ 49.) Accordingly, the tenant had the unilateral right to exercise the option by notifying the landlord in writing 180 days prior to the expiration of the current lease term as long as the tenant was not in default.

The initial lease term expired pursuant to an estoppel agreement on April 14, 2016. Accordingly, the Original Lease required the current tenant to notify the landlord in writing of any exercise of the first lease option prior to October 4, 2015. On April 28, 2014, the current tenant—Robert Walker—and the landlord memorialized in writing the tenant's unqualified and unconditional acceptance of the offer to exercise of the first option. (CBRE_000634-000640; CBRE_000295); see also Wells Fargo Bank, N.A. v. Fallon Props. S.C., LLC, 422 S.C. 211, 213, 810 S.E.2d 856, 857 (2018); Lemmons v. Maced. Water Works, Inc., 431 S.C. 186, 847 S.E.2d 471 (Ct. App. 2020). Although Walker may have been behind in rent at the time of the notification,

James Island Center expressly waived the requirement that the tenant not be in default by (1) expressly informing Walker that the landlord was not holding him in default and (2) consciously failing to issue a notice of default. See Edwards, 290 S.C. at 451, 351 S.E.2d at 176. As a result, the current tenant notified the landlord in writing of the exercise of the first lease option prior to October 4, 2015, in accordance with the terms of the Original Lease, and Walker obtained the right to possess the leased premises pursuant to the terms of the Original Lease until April 14, 2021.

In his deposition, Walker also testified to memorializing in electronic correspondence his agreement with James Island Center to renew the terms of the Original Lease for an additional five-year term prior to his sale of the restaurant to Maybank Holdings. (Walker Dep. p. 157, l. 8-p. 158, l. 2.) James Island Center also confirmed that Walker had renewed the terms of his lease for an additional five-year term and that the next time for a lease renewal would have been after an additional five-years. (Beatty Dep. p. 127, l. 8-p. 128, l. 10.) Walker also confirmed performing under the terms of that agreement beginning on January 1, 2014. (Walker Dep. p. 209, l. 4-p. 210, l. 2.) James Island Center also confirmed the performance of this agreement beginning on January 1, 2014. (Beach Dep. p. 129, ll. 5-21; p. 133, ll. 3-10; p. 153, l. 20-p. 154, l. 1; p. 155, ll. 14-25.)

On August 1, 2014, Walker, Maybank Holdings, and James Island Center agreed to modify the Original Lease, including by assigning to Maybank Holdings "all of Assignor's right, title, interest, and claims in the Lease." (Maybank 0543-0555 ¶ 2.) This included the tenant's right to possess the leased premises pursuant to the exercise of the option until April 14, 2021. The Assignment also provided that:

> The term of the Lease as set forth in Paragraph 3 remains in full force and effect with the initial term of the Lease set to expire on April 14, 2016. The provisions in the Original Lease at Paragraph 3b entitled "Lease Renewal" containing the right of Tenant to renew the Lease for three consecutive five year terms remains in full force and effect on the same terms and conditions contained in the Original Lease.

(Maybank 0543-0555 ¶ 8.) This provision expressly memorialized that the ***initial term*** of the lease would expire on April 14, 2016, and that the option terms were not extinguished by the Assignment. In addition, the Assignment provided for an additional option term—the Fourth Extension Period. The correspondence amongst the prior tenant, James Island Center's leasing agent, and its chief executive officer supports this reading by reference to a "new" five-year term and not a negotiated expansion of the initial term of the Original Lease.

Only through a strained reading of this provision could one infer that the parties intended to imply that the tenant's right to renew the terms of the Original Lease for a second five-year term had not yet been exercised. There is no language contained in the provision that memorializes an agreement that the parties agreed to waive the tenant's right to possess the leased premises pursuant to the terms of the Original Lease until April 14, 2021. There is also no evidence that either Walker or Maybank Holdings intended to waive the tenant's right to possess the premises through April 14, 2021, let alone where Maybank Holdings completed a significant renovation of the restaurant in the months taking possession of the restaurant. Nevertheless, the Master-in-Equity determined that the Assignment impliedly nullified any prior exercise of the tenant's unilateral right to renew the terms of the Original Lease for an additional second five-year term.

While the Assignment does modify the terms of the Original Lease, any modifications are made expressly and not by implication or inference. For example, the Assignment expressly removes and replaces Paragraph 13 of the Original Lease. (Maybank 0543-0555 ¶ 12.) In addition, the Assignment expressly grants the tenant the Fourth Extension Period. (Id. at ¶ 8). Accordingly, any provision purporting to memorialize an agreement of the parties that the prior tenant, in fact, had not exercised its unilateral right to continue the terms of the Original Lease for an additional

five-year term would have been expressed in plain language similar to the above examples and not left to implication or inference. No such language exists because the parties did not, in fact, memorialize any such agreement in the Assignment. As a result, the Master-in-Equity erred as a matter of law in determining that the Assignment's provision that the initial term would expire on April 14, 2016, extinguished the tenant's right to possess the premises pursuant to the terms of the Original Lease through April 14, 2021. (Or. pp.15-19.)

The Master-in-Equity also erred in determining that there was no evidence that James Island Center falsely represented that the tenant did not have the right to possess the leased premises pursuant to the terms of the Original Lease through April 14, 2021. (Or. pp.15-19.) On November 12, 2015, James Island Center's leasing agent sent an e-mail to Heath Verner informing Maybank Holdings that it had missed the opportunity to exercise its option to extend the terms of the Original Lease for an additional five years. (Maybank 1368; see also Dep. Miller, p. 143, l. 20-p. 150, l. 16; see also Equitable Trust Co. of Columbia v. Columbia National Bank, 145 S.C. 91, 115, 142 S.E. 811, 817 (1928) ("[I]f an officer or agent of a corporation acquires or possesses knowledge of facts, in the course of his employment . . . as to matters which are within the scope of his authority, his knowledge is imputable to the corporation.")) James Island Center waited to make the representation until the restaurant opened to create leverage in the negotiation of a new lease. (Dep. Miller, p. 143, l. 20-p. 147, l. 3; p. 149, l. 6-p. 150, l. 23; Dep. Fabie, p. 114, ll. 11-25; p. 116, l. 25-p. 117, l. 23.). As discussed above, the representation was false because James Island Center previously memorialized Walker's renewal of the terms of the Original Lease on April 28, 2014. (CBRE_000634-000640; CBRE_000295). At the time of the representation, Maybank Holdings believed that the option had been exercised but did not possess any documentation to

counter the assertion. Accordingly, Maybank Holdings relied upon the representation in abandoning the existing lease and entering a new lease with less favorable terms.

In the event that Walker did not have the right to exercise the option because of a technical default, the Master-in-Equity erred in determining that James Island Center did not waive its right to require a lack of default for exercise of the option. In its correspondence with Walker, James Island Center expressed the intention not to demand that Walker not be in default in order to exercise the option by (1) expressly informing Walker that the landlord was not holding him in default and (2) consciously failing to issue a notice of default. See Edwards, 290 S.C. at 451, 351 S.E.2d at 176. As a result, the Master-in-Equity erred in determining that James Island Center could not have falsely represented that Maybank Holdings had missed the opportunity to renew the terms of the Original Lease.

B. The Master-in-Equity Erred in Determining that Respondent Did Not Falsely Represent that the Problems with the Grinder Pumps Had Been Fixed and Had No Chance of Reoccurring.

In the Order Granting Partial Summary Judgment to James Island Center, LLC on Fraud Causes of Action, the Master-in-Equity determined that: "The record before me establishes that there was a sewer backup issue in 2012, which the Center repaired, and that there was a separate sewer incident five (5) years later in 2017. The testimony of Plaintiff's Partners establishes that these were two separate and distinct events, and not the continuing, latent defect as alleged." (Or. P.28) In making this determination, the Master-in-Equity ignored evidence that the grinder pumps had experienced continuing problems that had occurred in 2009 and after Maybank Holdings had vacated the space, and that a preventative maintenance agreement was required to service the grinder pumps at a greater frequency than normal.

Although the Master-in-Equity determined that the restaurant did not experience any sewer related issues between August 2012 and 2017, there is evidence that the grinder pumps experienced prior problems and had failed on November 16, 2012. (*Compare* Order p. 3, 26-28 *with* Walker Dep. p. 88, l. 6-p. 90, l. 19.) In fact, Walker testified that, in 2013, the restaurant "continued to suffer uninterrupted septic and sewer service malfunctions and sewage overflows . . . since 2010." (Walker Dep. p. 107, l. 4-p. 108, p. 16.) In addition, Walker testified that he went through two years of dealing with the grinder pump issues prior to reporting them to James Island Center. (Walker Dep. p. 23, l. 24 – p. 24, l. 2; p. 35, ll. 12-18; p. 76, l. 16-p. 78, l. 7.) These problems included sewage overflowing into the restaurant parking lot on three or four occasions during that two-year period. (Walker Dep. p. 76, l. 16-p. 78, l. 7.) Walker also testified to paying to pump sewage out of the lift station housing the grinder pumps every nine months prior to reporting it to James Island Center. (Walker Dep. p. 43, ll. 2-14.) In fact, Walker testified that, in 2014, "the problem hadn't been fixed, but the problem had a – not even a solution, but it had become more manageable[.]" (Walker Dep. p. 179, l. 2-21.)

The problems with the grinder pump system also continued after Maybank Holdings had ceased operating its restaurant and the premises were vacant. (Fabie Dep. p. 236, l. 16 – p. 238, l. 17; Avison Young 118-123.) As a result, upon releasing the space in 2021, Mr. Walker insisted that the landlord provide a service agreement for the grinder pumps and sewer system. (Walker Dep. p. 228, l. 12-p. 229, l. 4.) Even James Island Center confirmed that a service agreement was required to prevent the grinder pumps from failing. (Beatty Dep. p. 104, ll. 15-21.)

Nevertheless, on or about July 1, 2014, James Island Center's property manager represented to Maybank Holdings that the problem with the grinder pumps had been fixed and had no chance of reoccurring. (Dep. Smallwood p. 159, l. 24 - p. 161, l. 7; Dep. Tuorto p. 39, l. 9-p.

40, l. 15.) At the time of this representation, James Island Center knew that the repeated failure of the grinder pumps resulted from a larger problem with the sewer system that could not be permanently corrected unless it was completely reconstructed. (CBRE_00284-286; CBRE_000295) ("The design of this system is not something that can be changed and does make for challenging times when both pumps go out.") James Island Center also knew that the problems with the grinder pumps had not been limited to a one-time incident in 2012. Nevertheless, James Island Center made the representation to induce Maybank Holdings into signing the assignment agreement and lease. (Dep. Miller p. 138, ll. 17-18; p. 79, l. 17- p. 80, l. 3.)

Maybank Holdings had the right to rely on this representation because of James Island Center's superior knowledge of the premises and the fact that any manifestation of the grinder pump issues had been masked by the preventative maintenance being performed. (CBRE 284-286; CRBE 000295); see also Allwin v. Russ Cooper Assocs., 426 S.C. 1, 21, 825 S.E.2d 707, 717 (Ct. App. 2019) ("Latent defects are those which a reasonably careful inspection will not reveal or those which could not have been discovered by such an inspection. A latent defect is unknown and, in the exercise of reasonable care, could not have been discovered."). The representation was material as the chronic problems with the grinder pumps had prevented previous restaurants from operating—Maybank Holdings even attempted to address the grinder pumps within the Assignment. As a result, the Master-in-Equity erred in determining that James Island Center did not falsely represent that the problems with the grinder pumps had been fixed and had no chance of reoccurring.

C. The Master-in-Equity Erred in Determining that Respondent Did Not Falsely Represent that All Construction and the Laydown Yard for the Renovation of the Anchor Tenant Grocery Store Would Not be in the Shopping Center Parking Lot.

In the Order of Judgment Granting Partial Summary Judgment to James Island Center, LLC on Fraud Causes of Action, the Master-in-Equity determined that James Island Center could not have falsely represented that construction of the Harris Teeter would have a minimal impact on the operation of Maybank Holdings' restaurant and that Maybank Holdings could not identify any other false representation regarding the renovation of the anchor tenant grocery store. (Or. p. 31-35.) This determination, however, ignores the evidence presented by Maybank Holdings that James Island Center falsely represented that the construction laydown area would not be in the parking lot when the landlord had approved construction plans showing a construction laydown area within the shopping center parking lot.

Prior to execution of the Assignment, James Island Center's leasing agent informed Maybank Holdings that "all construction and the laydown yard for the construction would not be in the parking lot of the shopping center and that it would be behind [the grocery store]" and that "the impact on the parking lot would be minimal." (Dep. Verner, p. 41, l. 22-p. 42, l. 9; p. 45, ll. 1-22.) At that time, James Island Center knew that the construction project would take up a significant portion of the available parking for the shopping center. (Dep. Miller p. 120, l. 11-p. 121, l. 3). In fact, James Island Center had approved the plans for renovation, which included an area to be fenced off within the shopping center parking lot for the construction lay down area. (Dep. Miller p. 120, l. 11-p. 122 l. 20.) James Island Center admitted that the laydown area on the construction plans were concerning. (Dep. Miller p. 120, l. 11-p. 122 l. 20.) Maybank Holdings relied on the representation because James Island Center had superior knowledge of the

construction plans to which Maybank Holdings did not have access. (Dep. Smallwood, p. 189, ll. 8-11.)

Moreover, Maybank Holdings had been misled by a small staging area present in the parking lot when it conducted an inspection of the restaurant and shopping center on or about July 1, 2014. (Dep. Smallwood p. 193, ll. 8-22.) James Island Center did not correct this impression or otherwise disclose the planned placement of the construction laydown area in the parking lot. (Dep. Smallwood p. 192, l. 25-p. 193, l. 7; Dep. Miller p. 120, l. 11-p. 122, l. 10.) This false impression deterred Maybank Holdings from making a more in-depth investigation into the extent of the construction project's impact on the premises.

On August 7, 2014, James Island Center also failed to correct Maybank Holdings' false impression that it could open the restaurant within 90 days. (See e.g., Dep. Smallwood p. 197, ll. 12-24; Dep. Miller p. 128, ll. 6-19). Maybank Holdings only learned of the actual scope of the laydown area and proximity of construction to the restaurant when the lay down area increased significantly from what was observed by Maybank Holdings on July 1, 2014. (Dep. Smallwood p. 194, l. 19- p. 195, l. 21.) James Island Center similarly failed to inform other tenants of the nature and scope of the anticipated impact of the construction project. (Dep. Smallwood, p. 188, ll. 3-11; p. 188, l. 21-p. 189, l. 23.) As a result, the Master-in-Equity erred in determining that James Island Center did not falsely represent that the construction laydown area would not be in the shopping center parking lot.

D. The Master-in-Equity Erred in Determining that Respondent Did Not Falsely Represent that Appellant was in Default for Failing to Pay Rent and for Continuously Operating the Restaurant.

In the Order of Judgment Granting Partial Summary Judgment to James Island Center, LLC on Fraud Causes of Action, the Master-in-Equity determined that James Island Center did

not falsely represent that Appellant was in default for failing to pay rent for October 2017 and for continuously operating the restaurant. This determination, however, ignores the evidence presented by Maybank Holdings that it had been entitled to an abatement of rent for October 2017, the landlord's property manager had represented that Maybank Holdings would receive an abatement of rent for October 2017, and that James Island Center had waived the right to hold Maybank Holdings in default for failing to continuously operate by performing remedial work that prohibited the restaurant's operation during October 2017.

On October 11, 2017, James Island Center issued a notice of default for delinquent payment of rent. The Second Lease, however, expressly provides as follows:

> **12.1 DESTRUCTION**
>
> Subject to the provisions of Sections 12.2, 12.3, 12.4 below, if the Premises shall be damaged or destroyed by any casualty, Landlord shall promptly restore same to its condition immediately prior to the occurrence of the damage to the extent of Landlord's insurance obligation set forth in Article 11 and to the extent of insurance proceeds received (or would have received had Landlord maintained the insurance required of it under this Lease), and the Minimum Rent and Tenant's Proportionate Share of Common Area Costs, Taxes and Insurance shall be abated proportionately as to that part of the Premises rendered untenable.

A casualty is a loss or damage of property that results from a fire, storm, natural occurrence, negligence, or other accident. Black's Law Dictionary (11th ed. 2019). In this case, the outparcel building was damaged by three casualty events resulting from the landlord's negligence: water intrusion through the roof; sewage backups from the grinder pumps; and water intrusion through the building's exterior walls and building envelope. At the time, James Island Center conceded that the restaurant could not remain open until the remedial work had been completed on or about October 26, 2017. (Dep. Fabie, p. 197, 11. 10-15; Dep. Miller, p. 197, 11. 7-21). As a result, Maybank Holdings was entitled to an abatement of rent for October 2017. James Island Center's

property manager also informed Maybank Holdings that its rental obligation for October 2017 would be abated. (Dep. Fabie, p. 202, 11. 11-17; p. 210, 1. 17-p. 211, 1. 18; p. 212, 1. 18- p. 213, 1. 14). In a text message to Richard Tuorto and Heath Verner, Joe Fabie wrote "Also, if this is LL responsibility and you're unable to open before its fixed, I will go to bat and get you prorated rent." (emphasis added). Maybank Holdings, therefore, did not pay rent for October 2017.

Nevertheless, James Island Center issued a notice of default for delinquent payment of rent for October 2017. This representation was false because the lease entitled Maybank Holdings to an abatement of rent for October 2017 and James Island Center informed Maybank Holdings that rent would be abated for October 2017. As a result, the Master-in-Equity erred in determining that James Island Center did not falsely represent that Maybank Holdings was in default for failing to pay rent.

James Island Center also issued a second notice of default on October 20, 2017, for the failure to pay rent and for the tenant failing to continuously operate the restaurant. Dep. Miller, p. 204, 1. 17-p. 205, 1. 13). This representation was also false because the remediation work preventing the restaurant from opening would not be completed until October 26, 2017. In fact, the parties had agreed that the restaurant would not be able to stay open during the repairs and that it was reasonable for Plaintiff to cease operations until the work was completed. Moreover, James Island Center ceased all communications with Maybank Holdings on October 26, 2017, despite the property manager being Plaintiff's point of contact for the continuing remediation work and for routine property management issues. (Dep. Miller, p. 214, 1. 9-p. 216, 1. 4). As a result, Maybank Holdings could not have continuously operated its restaurant within the premises during the alleged period of default.

In the event, however, that James Island Center had the right to hold Maybank Holdings in default for failing to continuously operate, James Island Center waived that right by performing remedial work that prohibited the restaurant's operation during October 2017 and by informing Maybank Holdings that it would receive an abatement of rent for October 2017. As a result, the Master-in-Equity erred in determining that James Island Center did not falsely represent that Maybank Holdings was in default for failing to continuously operate the restaurant during October 2017.

II. The Master-in-Equity Erred in Determining that James Island Center Did Not Have the Obligation to Maintain the Grinder Pump System Service Agreement, Did Not Allow the Cancellation of the Preventative Maintenance Agreement, and that the Grease Trap Maintenance Caused the Grinder Pumps Failure.

A. The Master-in-Equity erred in determining that James Island Center did not have the obligation to maintain the grinder pump system service agreement.

The Second Lease expressly obligated James Island Center to maintain the grinder pumps and sewer system servicing the outparcel building. Under the lease, the grinder pumps and sewer system are Common Area elements because they are facilities and improvements "not reserved for the exclusive use of any Shopping Center occupants", as they served both tenants of the outparcel building. (Second Lease at 8.2.) Accordingly, as part of the Common Area Costs, James Island Center had a contractual obligation to maintain them in good condition pursuant to Sections 8.1 and 8.2. (Second Lease at 8.1, 8.2.) In fact, James Island Center's property manager admitted that the maintenance of the grinder pumps system was a contractual obligation of the landlord. (Fabie Dep. p. 130, ll. 6-20.)

At the time of execution of the Second Lease, James Island Center satisfied this obligation through a contractual agreement with a third-party vendor. The cost of that agreement was a Common Area Cost. In pertinent part, Lease Section 8.5 defines Common Area Costs as follows:

> costs related to Landlord's maintenance, replacement and repair obligations set forth in this Lease . . . and all other costs incurred in a manner deemed by Landlord to be reasonable and appropriate and for the best interests of the Shopping Center in connection with the management, operation, maintenance, replacement and repair of the Common Areas including, but not limited to . . . [the] sanitary sewer . . . and other utility charges (including surcharges) of every type and nature for services provided to the common and public areas of the Property; [and] the costs of service and maintenance contracts[.]

(Second Lease at 8.5.) The cost of the preventative maintenance agreement was incurred in a manner deemed by James Island Center to be reasonable and appropriate and for the best interests of the Shopping Center in connection with the operation and maintenance of a Common Area. James Island Center expressly entered into the agreement to avoid further sewage backups and catastrophic failures and to satisfy its duty to its tenant to maintain the grinder pump system.

Although the Second Lease does not otherwise expressly include a requirement for this type of maintenance agreement, Section 8.5 expressly created an obligation for the landlord to continue to provide such preventative maintenance because (1) the grinder pump system's extensive repair history demonstrated that it required regular maintenance to function without failing; (2) James Island Center had deemed it to be a reasonable and appropriate cost in the best interest of the shopping center; (3) it was required for the maintenance of the sanitary sewer servicing the outparcel building, and (4) it was a service and maintenance contract in effect at the time the parties executed the lease. As regular maintenance of the grinder pump system was integral to the continued functioning the sewer system, the preventative maintenance agreement for the grinder pumps became part of the condition of the premises at the time of delivery, i.e.,

when the grinder pumps systems were not maintained, the premises would face foreseeable and consistent sewage interruptions.

James Island Center also had an ongoing obligation to provide regular maintenance that conveyed to Maybank Holdings pursuant to Section 2.3. In pertinent part, the lease provides as follows:

> **2.3 DELIVERY OF PREMISES**
>
> . . . . Landlord will deliver possession of the Premises to Tenant in its current "AS-IS" condition with the addition of only those items of Landlord's Work (if any) specifically described on Exhibit C-2. . . .[8]

(Second Lease at 2.3.) Although such clauses are generally employed by sellers to avoid liability for existing faults with conveyed premises, this clause plainly states that the landlord delivered possession of the premises "in its current 'AS-IS' condition" with no additions. Moreover, Maybank Holdings was not a purchaser of property which undertook an obligation to maintain the grinder pump system and sewer system upon conveyance. Instead, Maybank Holdings was merely a lessee and the continuing obligation for maintenance of the grinder pump system remained with the landlord. See Nine v. Henderson, 313 S.C 309, 319, 437 S.E.2d 182, 187 (Ct. App. 1993) (J. Cureton, dissenting) ("A tenant has no obligation to discover hidden defects in the leased premises.") As a result, the landlord agreed to deliver the premises in the condition in which it existed at the time of conveyance. See MacFarlane, 274 S.C. at 395, 264 S.E.2d at 840 ("The inclusion of 'as is' clauses is usually an effort on the part of the seller to assure application of the caveat emptor rule. . . . The more recent trend at the law is to hold the seller to a more strict accountability.") This included the maintenance regime in place to ensure the consistent proper functioning of the grinder pump system in place at the time of conveyance. As the drafter of the

[8] Exhibit C-2 does not provide for any items in the section designated as Landlord's Work.

lease, James Island Center could have drafted an "as is" clause that would have expressly disclaimed any such obligation instead of one that incorporated such maintenance agreements into the Common Area Costs for which Defendant was obligated. See Herbert v. Saffell, 877 F.2d 267, 270-71 (4th Cir. 1989); see also Duncan v. Little, 384 S.C. 420, 426, 682 S.E.2d 788, 791 (2009) (holding that a court must construe any doubts and ambiguities in a lease agreement against the drafter) (citations omitted). Accordingly, James Island Center's chief operating officer, who introduced the lease form, testified that the delivery of the premises "AS-IS" included delivery of the preventative maintenance agreement. (Dep. Miller p. 164, l. 11 – p. 166, l. 7.)

As the agreement was in place at the time of the execution of the lease and known to be necessary for the grinder pump system's proper functioning, Section 2.3 obligated the landlord to continue the regular preventative maintenance of the grinder pump system. James Island Center had an obligation to continue to provide a sufficient preventative maintenance regime either with its current vendor, with another vendor, or provide the maintenance itself. The failure to do so after notice that regular maintenance had ceased constituted a breach of Operative Lease Sections 2.3, 8.1, 8.2, 8.3, 8.5, 13.1, 19.1 and 22.1. As a result, the Master-in-Equity erred in determining that James Island Center did not have an obligation to maintain the grinder pump service agreement.

B. The Master-in-Equity Erred in Determining that James Island Center Did Not Allow the Cancellation of the Preventative Maintenance Agreement.

James Island Center ceased receiving invoices for the grinder pump preventative maintenance inspection and service after February 24, 2017. Nevertheless, the landlord failed to take any action to replace the vendor's services, perform further inspections and maintenance on the pump system, or inform Maybank Holdings that the maintenance regime had been

discontinued. As a result, the Master-in-Equity erred in determining that James Island Center did not allow the cancellation of the preventative maintenance contract.

C. The Master-in-Equity Erred in Determining that the Grease Trap Maintenance Caused the Grinder Pump Failure.

Maybank Holdings diligently and adequately maintained the grease trap servicing the restaurant by employing Valley Proteins to perform regular maintenance on the grease trap. Valley Proteins performed the service every 12 weeks, including on: November 23, 2014; February 19, 2015; June 1, 2015; November 18, 2015; February 12, 2016; May 6, 2016; July 29, 2016; January 12, 2017; April 16, 2017; June 30, 2017; September 20, 2017; and December 13, 2017. (Trial Transcript pp. 1538-1578.) Notably, the last date of service was almost two months after the restaurant ceased its operations. Moreover, James Island Center's property manager testified to finding no grease in the lift station housing the grinder pumps on April 30, 2018—approximately seven months after the restaurant ceased producing grease. (BMC 5005; Pl. Trial Exhibit 143.) Nevertheless, the Master-in-Equity determined that grease had been the proximate cause of the grinder pumps failures. Although the landlord's plumber testified that his inspection of the grease trap and lift station revealed a large amount of grease within the grease trap, lift station housing the grinder pumps, and in the influent pipe running from the grease trap to the lift station, the plumber also testified that he did not conduct the inspection until August 6, 2018—approximately 10 months after the restaurant had ceased operations. (Dep. Frye p. 105, ll. 4-19.) The plumber also admitted that he could only speculate as to the manner by which the grease he observed during his inspection got into the plumbing system. (Dep. Frye, p. 233, l. 16 – 236, l. 4.) As a result, the Master-in-Equity erred in determining that the grease trap maintenance caused the grinder pumps failure.

III. The Master-in-Equity Erred in Failing to Admit the Manifests Documenting Appellant's Maintenance of the Grease Traps.

At trial, the Master-in-Equity committed reversible error by failing to admit certain business records documenting Maybank Holdings' maintenance of the restaurant's grease traps on the grounds that certain statements within the business records constituted inadmissible hearsay. (Tr. 1537-1582; Pl. Trial Exhibit 155.) These records from Valley Proteins unambiguously prove that Maybank Holdings regularly, repeatedly had the grease traps cleaned and serviced by a vendor. (Valley Proteins Invoices.) What's more, these records show that Maybank Holdings had the traps cleaned even after it ceased operating the restaurant, making it impossible for Maybank Holdings to have clogged the lines and created the other damage the Master-in-Equity assigned to it. (Valley Proteins Invoices at 12.13.17 Service Date.)

As a matter of law, in a bench trial, all evidence must be admitted. See, e.g., Brown v. Allstate Ins. Co., 344 S.C. 21, 27, 542 S.E.2d 723, 726 (2001) ("A trial judge's role in a bench trial is to ***admit all evidence*** and then evaluate it in a non-jury setting.") (emphasis added). By improperly refusing to admit and consider records demonstrating that Maybank Holdings regularly maintained the restaurant's grease traps, the Master-in-Equity overlooked key evidence that entirely contradicted his conclusion that Maybank Holdings failed to maintain the grease traps. (See, e.g., Order at 27 (stating "[t]he grinder pump failures were caused by Maybank's failure to maintain or service the grease traps in a manner sufficient to prevent grease contamination of JIC's plumbing pipes and the grinder pumps," but without admitting essential evidence proving otherwise).) Nor is this an inconsequential error. The Master-in-Equity leveraged Maybank Holdings' supposed failure to maintain the grease traps to excuse James Island Center's own breaches of the contract. (See, e.g., id. at 27 n.1 ("While the grinder pumps are a common element

which are the Landlord's duty to maintain (Article 13.1), because their failure was directly attributable to the failure to maintain the grease trap which was the Tenant's duty (Article 13.2), I find this breach of the Agreement is the fault of Maybank Holdings.").

In South Carolina, a party suing for breach must not be in breach itself. See, e.g., Swinton Creek Nursery v. Edisto Farm Credit, 334 S.C. 469, 487, 514 S.E.2d 126, 135 (1999) (noting parenthetically that "one who seeks to recover damages for breach of a contract, to which he was a party, must show that the contract has been performed on his part, or at least that he was, at the appropriate time, able, ready, and willing to perform it" (quoting Parks v. Lyons, 219 S.C. 40, 48, 64 S.E.2d 123, 126 (1951))). If the Master-in-Equity had admitted and considered documents demonstrating Maybank Holdings properly performed its responsibility of maintaining the grease trap under the Lease, then James Island Center would have been foreclosed from succeeding on its claims as a matter of law because it did not properly maintain the grinder pumps. The failure to admit this key evidence, therefore, constitutes reversible error.

Moreover, even if the Master-in-Equity had discretion to exclude evidence in a bench trial—again, as a matter of law, he does not—it was still error to exclude these business records as hearsay. "The rule against hearsay prohibits the admission of evidence of an out-of-court statement to prove the truth of the matter asserted unless an exception to the rule applies." Fowler, 410 S.C. at 411, 764 S.E.2d at 253; see also Rule 802, SCRE. "A report kept in the course of regularly conducted business activity is admissible unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." Duncan v. Ford Motor Co., 385 S.C. 119, 682 S.E.2d 877 (Ct. App. 2009) (citing Rule 803(6), SCRE). "However, subjective opinions and judgments found in business records are not admissible." Id.

In this case, the Master-in-Equity erred in finding inadmissible certain business records proffered by a records custodian of Maybank Holdings documenting the maintenance of the restaurant's grease traps on the grounds that certain statements within the records constituted the subjective opinions of employees of the vendor performing the service. (Tr. 1537-1582; Pl. Trial Exhibit 155.) The select statements contained within portions of the records did not, however, constitute subjective opinions. Instead, the statements contained only statements of observed, measurable facts recorded within the records—the dates of service, the size of the tank, the services performed, and the amount of grease removed. These are not subjective opinions but, rather, statements of measurable fact that should have been held admissible. In the event that the statements constitute inadmissible hearsay, the appropriate remedy would have been to admit the records with appropriate redactions rather than excluding the entire documents, which the Master-in-Equity found relevant to whether Maybank Holdings diligently and adequately maintained the grease trap servicing the restaurant. (Tr. 1537-1582.) As a result, the Master-in-Equity erred in finding the records inadmissible, and the judgment below should be vacated and a new trial ordered accordingly.

IV. The Master-in-Equity Erred in Determining that Respondent's Efforts to Mitigate It's Damages Were Reasonable.

In the Order of Judgment, the Master-in-Equity determined that James Island Center's efforts to mitigate its damages were reasonable despite its failure to accept an offer to re-lease the premises at a reasonable rate and terms in 2019. The evidence, however, showed that the landlord had the premises prepared to re-lease to another tenant in the summer of 2019 and, by the fall of 2019, had received numerous offers to rent the premises ranging from $27 per square foot to $38 per square foot. This included a letter of intent from Robert Walker, which the leasing agent

described as a "home run". In fact, Walker sent an executed letter of intent to the leasing agent on October 11, 2019, offering to re-lease the space for $27 per square foot with a $25 per square foot tenant improvement allowance with rent beginning on April 1, 2020. James Island Center, however, did not respond for over three months by which time Robert Walker was no longer interested. Moreover, James Island Center completely failed to respond to the other myriad offers received from other perspective tenants. James Island Center also had internal discussions on whether there was a way to gain value in the litigation in determining whether to re-lease the premises. As a result of the failure to respond to those offers, the premises remained vacant until James Island Center solicited an offer from Robert Walker in August 2021. The landlord accepted Walker's offer to re-lease the premises at $28 per square foot with a $32 per square foot tenant improvement allowance beginning on June 1, 2022. Accordingly, James Island Center failed to avoid damages that were reasonably avoidable. Nevertheless, the Master-in-Equity determined that James Island Center's efforts to mitigate its damages were reasonable.

V. The Master-in-Equity Erred in Determining that Richard Tuorto, Heath Verner, John Hibbits, and Chandler Frierson Owned and Operated Maybank Holdings as a General Partnership.

In the Order of Judgment, the Master-in-Equity determined that Richard Tuorto, Heath Verner, John Hibbits, and Chandler Frierson operated Maybank Holdings as a general partnership. (Trial Order at 4-5, 30.) A general partnership is an association of two or more co-owners who come together to operate a business for profit. S.C. Code § 33-41-210. The existence of a general partnership is a question of fact, and certain statutory rules apply to determine whether a partnership exists. See S.C. Code § 33-41-220. A limited liability company is a legal entity separate and distinct from its owners. See S.C. Code §§ 33-44-101 et seq.

As a threshold matter, whether the members of Maybank Holdings owned and operated the entity as a general partnership is a question of fact that was not before the Master-in-Equity. There is no cause of action to which the form and structure of the entity is relevant or germane, such as an action seeking to pierce the corporate veil or regarding the scope of liability for any of the members. In fact, individual liability was addressed only through the of the guarantees of the limited liability company's obligations. Accordingly, the Master-in-Equity did not conduct the factual analysis required by S.C. Code § 33-41-220 to determine whether the individuals or entities operated as a general partnership.

Moreover, the evidence presented at trial shows that the members did not operate the company as a general partnership. An occasional, casual use of the term partner is insufficient to determine that the members operating the company as a general partnership as anyone with whom the company did business knew that the company was a limited liability company and the members testified that they assigned no legal significance to the term. For example, the company did not use a trade name or name that did not include "LLC", which notifies all doing business with it that its members have limited liability. See S.C. Code § 33-44-105. This is also demonstrated by the landlord's requirement that the company's owners and their spouses execute guarantees of the limited liability company's obligations.

While the Master-in-Equity noted that no operating agreement establishes the identity of the members, South Carolina law does not require an operating agreement for a limited liability company. S.C. Code § 33-44-103 ("[A]ll members of a limited liability company may enter into an operating agreement, which need not be in writing, to regulate the affairs of the company and the conduct of its business, and to govern relations among the members, managers, and company. To the extent the operating agreement does not otherwise provide, this chapter governs relations

among the members, managers, and company."). Ownership of a limited liability company is established not by the execution of an operating agreement but by the agreement of the members. Id. A company may memorialize the ownership in an operating agreement, but also choose not to do so. Id. As a result, the Master-in-Equity erred in determining that Richard Tuorto, Heath Verner, John Hibbits, and Chandler Frierson operated Maybank Holdings as a general partnership.

VI. The Master-in-Equity Erred in Granting Respondent's Request for an Award of Attorneys' Fees Without the Production to Appellant of a Copy of Its Billing Records and Transaction Entries that Redacted Only Privileged Information.

Although South Carolina courts appear silent on the issue, other courts have held that it is impermissible for a court to award fees based on an in-camera review of timesheets and billing records because the information is not available to the opposing party for an opportunity to respond. See generally Concepcion v. Amscan Holdings, Inc., 168 Cal. Rptr. 3d 40, 53 (Ct. App. 2014). Based on the principle that privileges cannot be used as both sword and shield, courts have also held that a party puts its attorney's billing records "at issue" by moving for an award of fees and necessarily waives any privileges relating to the billing records. See Avaya, Inc. v. Telecom Labs, No. 06-2490, 2016 U.S. Dist. LEXIS 6111 at *6 (D.N.J. Jan. 19, 2016); Dulcich, Inc. v. USI Ins. Servs. Nat'l, Inc., No. 3:18-cv-01089-YY, 2019 U.S. Dist. LEXIS 58888 at *3, *5 n.3 (D. Or. Apr. 5, 2019). In fact, the Fourth Circuit has expressly observed that the attorney-client privilege typically does not extend to billing records and expense reports; however, advice sought or given is protected. Chaudhry v. Gallerizzo, 174 F.3d 394, 402 (4th Cir. 1999) (citing In re Grand Jury Proceedings, 33 F.3d 342, 353-54 (4th Cir. 1994); see also Accor Franchising N. Am., LLC v. HR&F Hotel Group, LLC, 2014 U.S. Dist. LEXIS 58963*; 204 WL 1705402 (D.S.C. April 28, 2014) ("Although the fee statements likely contain some privileged or protected information,

redacting all of the services performed and hours spent performing those services is overbroad and unhelpful to the court's determination of reasonableness of hours."); Uhlig LLC v. Shirley, Civil Action No. 6:08-1208-HFF-WMC, 2010 U.S. Dist. LEXIS 147571 (D.S.C. May 26, 2010) (ordering the production of invoices and timesheets with redactions for any privileged material).

In this case, the Master-in-Equity allowed the production to the opposing party of a copy of transaction entries offered in support of its request for attorneys' fees to the Court for in camera inspection that identified only (1) the date of the time entry, (2) the person associated with the time entry, (3) the file name, (4) the amount of time billed, (5) the price of the fee billed, and (6) the total amount of the fee. (Affidavit of Ed Buckley; Clement Rivers Billing Entries.) The transaction entries did not include (1) the identity of the client for whom the work was performed or (2) any information regarding the purpose or type of work performed. (See id.) Although Maybank Holdings moved to compel the production of a copy of the transaction entries that included all non-privileged information, the Master-in-Equity determined that Appellant was not entitled to the production on the ground that the trial court is charged with determining the reasonableness of any request for an award of attorneys' fees.

This determination undermines South Carolina's adversarial judicial system. See Day v. Kilgore, 314 S.C. 365, 368, 444 S.E.2d 515, 517 (1994) (quoting Morrison v. State, 845 S.W.2d 882, 885 (Tex. 1992) ("The adversary theory as it has prevailed for the past 200 years maintains that the devotion of the participants, judge, juror and advocate, each to a single function, leads to the fairest and most efficient resolution of the dispute."); see also In re Amendments to Rules of Prof'l Conduct, Comment to Rule 3.4, Rule 407, SCACR, 2005 S.C. LEXIS 199 (June 20, 2005) ("The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties."). Moreover, the determination improperly

prevents the discovery of relevant information by asserting attorney-client and work product privileges without establishing any factual basis proving the asserted privileges.

Moreover, the transaction entries submitted did not include the identity of the client for whom the work was performed. As a result, the transaction entries were insufficient to support any award of attorneys' fees. In the course of litigation, counsel of record for James Island Center represented various persons and entities and performed work for clients other than the landlord, including various witnesses such as Beatty Management Company, Susi Beatty, Burr Ault, CBRE, and Joyce Beach. (See e.g., Beach Dep. p. 14, l. 2 – p. 17, l. 4.) This representation included coordinating the production of documents in response to subpoenas to non-party witnesses and representing non-party witnesses at depositions. As a result, the transaction entries are patently insufficient to support any award of attorneys' fees. See Jackson v. Speed, 326 S.C. 289, 308, 486 S.E.2d 750, 759 (1997) ("The award of attorney's fees is made to the party, not his lawyer."). As a result, the Master-in-Equity erred in granting Respondent's request for the award of attorneys' fees without the production to Appellant of a copy of its billing records and transaction entries that redacted only privileged information.

VII. The Master-in-Equity Erred in Awarding Interest on the Claimed Damages Because the Contractual Provisions Regarding Interest Constitutes an Unenforceable Penalty.

In South Carolina, "[p]arties to a contract may stipulate as to the amount of liquidated damages owed in the event of nonperformance." Foreign Academic & Cultural Exchange Services v. Tripon, 394 S.C. 197, 204, 715 S.E.2d 331, 335 (2011) (citing Lewis v. Premium Investment Corporation, 351 S.C. 167, 568 S.E.2d 361 (2002)). "Where, however, the sum stipulated is plainly disproportionate to any probable damage resulting from breach of contract, the stipulation is an unenforceable penalty." Id. In addition, "'whe[n] the stipulation is not based upon actual damages

in the contemplation of the parties, but is intended to provide punishment for breach of the contract, the sum stipulated is a penalty.'" DD Dannar, LLC v. SC LAUNCH!, Inc., 431 S.C. 9, 13, 846 S.E.2d 883, 889 (Ct. App. 2020) (citations omitted).

As to the interest claimed by Defendant, the lease provides, in pertinent part, as follows:

> **18.3 DEFAULT RATE**
>
> Upon an event of default by Tenant, all outstanding Rent and other amounts outstanding shall accrue interest at a rate equal to the greater of eighteen percent (18%) per annum or the rate per annum which is five (5) whole percentage points higher than the prime rate published in the Wall Street Journal, from the due date (or date incurred by Landlord where funds are paid out by Landlord) to the date of payment thereof by Tenant. Interest charged pursuant to this Section shall constitute Additional Rent due hereunder; provided, however, that nothing contained herein shall be construed as permitting Landlord to charge or receive interest in excess of the maximum rate then allowed by law.

James Island Center's chief financial officer testified that the above rate of interest on each of the identified items served as a contractual remedy agreed upon by the parties upon execution of the lease. (Trial Transcript pp. 1514-1533.) He, however, could not articulate any relationship that the rate of interest held to any actual damages the landlord might sustain as a result of a breach of the lease. (Id.) Moreover, the rate of interest in the lease is plainly disproportionate to any damage resulting from the failure to pay any rent owed under the terms of the lease. As a result, the Master-in-Equity erred in awarding the interest claimed pursuant to Section 18.3.

CONCLUSION

For the foregoing reasons, this Court should reverse the trial court's various orders and remand this matter for retrial.

[Separate Signature Page Follows]

Respectfully submitted,

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July 5, 2023

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Mikell R. Scarborough, Master-in-Equity

Case No. 2017-CP-10-06111

Maybank Holding's, LLC,

Appellant,

v.

James Island Center, LLC,

Respondent.

v.

Richard D. Tuorto, Chandler Frierson, Natalie Myers, John R. Hibbits, Jr. and Elizabeth A. Hibbits,

Appellants.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellant on the above-referenced Respondent and all other parties by email and by depositing a copy of it in the United States Mail, on July 5, 2023, addressed to its attorney of record as follows:

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