The South Carolina Court of Appeals

Bank of Newington, Appellant-Respondent,

v.

LHSC, Inc., Williamsburg County Development Corporation, Viking Fire Protection, Inc. of the Southeast, and HBC, Inc., Defendants,

of which Williamsburg County Development Corporation and HBC, Inc. are the Respondents-Appellants,

AND

HBC, Inc., Cross-Claimant, Respondent-Appellant,

v.

LHSC, Inc., Cross-Claim Defendant,

AND

HBC, Inc., 3rd Party Plaintiff, Respondent-Appellant,

v.

Louis Hornick, II, and Blake Fickling, 3rd Party Defendants,

AND

Williamsburg County Development Corporation, CrossClaimant, Respondent-Appellant,

v.

LHSC, Inc., Cross-Claim Defendant,

AND

Williamsburg County Development Corporation, 3rd Party Plaintiff, Respondent-Appellant,

v.

Louis Hornick, II, and Blake Fickling, 3rd Party Defendants.

Appellate Case No. 2023-001087

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SC Court of Appeals

The Honorable R. Ferrell Cothran, Jr.
Williamsburg County
Trial Court Case No. 2018CP4500258

INITIAL BRIEF OF RESPONDENT-APPELLANT WILLIAMSBURG COUNTY DEVELOPMENT CORPORATION

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2. Did the trial court err on June 2, 2023 by amending the March 13, 2023 Order because the amendment is without evidentiary support and contradicts the 50 unchanged Findings of Fact and 12 unchanged Conclusions of Law?

3. Did the trial court err by not sustaining Williamsburg County Development Corporation's objections to Bank of Newington's March 22, 2023 Rule 59(e) motion on grounds of lack of particularity and resulting prejudice to Williamsburg County Development Corporation?

4. Did the trial court err at the May 12, 2023 hearing on Bank of Newington's March 22, 2023 Rule 59(e) motion by not sustaining WCDC's objections to Bank of Newington's submission of 200 pages of trial transcript less than 24 hours before the hearing and by allowing new arguments more than 10 days after entry of the March 13, 2023 Order?

STATEMENT OF THE CASE

Two cases were consolidated for trial by agreement of all parties on May 18, 2022 (3/13/2023 and 6/2/2023 Orders, p. 2), these being Viking Fire Protection Inc. of the Southeast's ("**Viking**") mechanics lien/contract action (2018-CP-45-00258), filed in Williamsburg County Court of Common Pleas on June 8, 2018, and Bank of Newington's ("**BON**") commercial foreclosure action (2019-CP-45-00193), filed April 4, 2019. (2018-CP-45-00258 Compl., *passim*; 2019-CP-45-00193 Compl., *passim*).

LHSC, Inc. ("**LHSC**") has been in default and without representation in the consolidated

cases since April 16, 2021, but all other original parties timely responded, and counterclaims and cross-claims were raised in both cases, and third-party claims added Defendants Louis Hornick II ("**Hornick**") (who never participated in any litigation), and Blake Fickling ("**Fickling**"), alleging that these men were officers of LHSC and BON, respectively.

In the first case, Hon. Judge R. Kirk Griffin granted summary judgment to Viking on August 17, 2022 against HBC, Inc. ("**HBC**") on the mechanics lien action; and all other claims remained for trial. (8/17/2022 Order in 2018-CP-45-00258, pp. 1-3).

In the second case (2019-CP-45-000193) BON sued LHSC, Williamsburg County Development Corporation ("**WCDC**"), Viking, and HBC, seeking commercial foreclosure and a deficiency judgment against LHSC on BON's $3,535,535.00 commercial development loan, which had been guaranteed by Hornick and the United States Department of Agriculture Office of Rural Development ("**USDA**"), and on which LHSC had defaulted in June 2018. (2019-CP-45-000193 Compl. *passim*). (Tr. Vol. 1, 1/23/2023, p. 95, lines 8-23). BON also asserted priority of its mortgage lien over the mortgage lien held by WCDC and mechanics liens held by Viking and HBC. (2019-CP-45-000193 Compl. *passim*). And, in a closely-related third case (019-CP-45-00325, BON vs. Hornick), BON received a default judgment in the amount of $3,932,124.68, plus *per diem* interest of $807.91, on September 25, 2019. (2019-CP-45-00325, default judgment, pp. 1-2).

In the second case (2019-CP-45-000193), LHSC, WCDC, HBC, Viking and Fickling timely answered the complaint and asserted and answered other claims, but LHSC was without representation and did not participate in this or any related litigation after April 16, 2021; and third-party defendant, Hornick, never participated. (4/24/2019 Viking Answer; 4/29/2019 WCDC

Answer; 6/3/2019 HBC Answer, Counterclaim, Crossclaim and 3rd-party Compl.; 12/12/2022 WCDC Am. Answer, Counterclaim, Crossclaim and 3rd-party Compl.; and 2018-CP-45-00258, 4/16/2021 Order).

On March 10, 2022 BON obtained a foreclosure decree awarding it $4,495,651.88, plus attorney fees and appointing G. Wells Dickson, Jr. to act as Special Referee in the public sale of the property. (3/10/2022 Foreclosure Decree, p. 5). Per this Decree, the property was sold at public auction and the proceeds of $1,992,025.83 were held by the trial court, for distribution as determined at trial of the remaining claims. (3/13/2023 and 6/2/2023 Orders, p. 4).

Following several years of discovery disputes and COVID-related continuances, BON settled with Viking, paying Viking $181,500.00 directly; and all remaining issues were tried by the Hon. R. Ferrell Cothran, Jr., Chief Administrative Judge for the Third Judicial Circuit, on January 23-25, 2023. (3/13/2023 and 6/2/2023 Orders, p. 4).

The court entered its Order in favor of WCDC and HBC on March 13, 2023. (3/13/2023 Order). BON then filed three post-trial motions. The first, filed on March 13, 2023 to stay *enforcement* of the order, was granted without objection by Order entered on March 22, 2023. (3/13/2023 BON execution motion; 3/22/2023 Order). Also, on March 13, 2023 BON filed its motion stay *interest* on the order pending motions and appeal. (3/13/2023 BON interest motion).

Then, on March 22, 2023 BON filed its Rule 59(e) motion to amend, for new trial, and to reconsider. (3/22/2023 BON motion). This motion was argued on May 12, 2023. (Tr. 5/12/2023).

On June 2, 2023 the court entered its amended order. (6/2/2023 Order). On June 12, 2023 WCDC filed its motion to alter or amend the June 2, 2023 order. (6/12/2023 WCDC motion). This motion was argued on June 29, 2023, along with BON's motion to stay enforcement. (Tr.

6/29/2023). And the court entered its order denying both motions and vacating the stay on July 25, 2023. (7/25/2023 Order). HBC filed its motion to alter the July 25, 2023 Order on August 2, 2023. (8/2/2023 HBC motion). This motion was not heard or decided.

BON filed its notice of appeal on June 29, 2023. (6/29/2023 BON NOA). WCDC filed its notice of cross appeal on July 26, 2023. (7/26/2023 WCDC NOA). HBC filed its notice of cross appeal on July 26, 2023. (7/26/2023 HBC NOA). And BON filed its amended notice of appeal on August 23, 2023. (8/23/2023 BON amended NOA). On October 4, 2023 this Court entered its order extending the time for filing all appellants' initial briefs through November 6, 2023.

STATEMENT OF THE FACTS

On February 1, 2017, the USDA entered into a Conditional Commitment to guarantee 90% of a contemplated start-up loan of $3,535,535.00, to be made by BON to LHSC; it stated the purpose of the guarantee as "to provide long-term financing for the start-up of a curtain/drapery manufacturing business at a commercial property" in Williamsburg County, which was "to be used as a manufacturing facility;" and it listed detailed conditions and loan servicing requirements to be imposed on BON. (BON Exhibit 6, VIKING v BON 000467; and 000469) (3/13/2023 and 6/2/2023 Orders, FOF 3, p. 5). (The financing and construction of the facility are referenced generally as the "**Project;**" all documents related to the BON loan are referenced as the "**Loan;**" and the USDA Conditional Commitment and Guarantee are referenced generally as the "**Guarantee**" in the court's orders and sometimes herein for the sake of brevity).

The Conditional Commitment required that the Loan funds be used in specific amounts for specific purposes and that local government provide grants totaling $350,000:

> Funds will be used for real estate acquisition ($250,000), real estate improvements ($1,250,000), machinery & equipment ($805,050), inventory ($223,535), working capital

> & contingency ($637,530) and fees & costs associated with this loan ($369,420). These funds are to be matched with grant contributions from Williamsburg County of approximately $100,000, South Carolina Department of Department Commerce of approximately $150,000 and Palmetto Development Group of approximately $100,000. Upon final disbursement of loan funds, a copy of the lender's detailed loan settlement must be provided to Rural Development as evidence that all funds were **disbursed in amounts and for purposes outlined above.**

(BON Exhibit 6, USDA Guarantee, VIKING v. BON 000469) (emphasis added); (3/13/2023 and 6/2/2023 Orders, FOF 3, p. 5). At trial, BON President, Tripp Sheppard admitted (albeit reluctantly) that the Guarantee would not even have existed without the USDA's purpose of bringing a manufacturing plant to the County to benefit Williamsburg County citizens, with WCDC's deep investment in the Project. (Tr. 1/23/2023, p. 14, line 21 – p. 15, line 6; p. 28, line 17 – p. 31, line 1; p. 33, line 5 – p. 35, line 6; p. 147, line 1 - p. 151, line 22; p. 159, line 21 – p. 160, line 2). Sheppard also admitted that BON disbursed hundreds of thousands of dollars other than as required by the Conditional Commitment. (Tr. 1/23/2023, p. 159, lines 9-20).

The Guarantee required BON to oversee Project disbursements and service the Loan through completion and startup of the manufacturing plant, in accord with numerous other conditions, which follow:

> The lender must ensure that all project facilities are designed, and costs estimated, by an independent professional utilizing accepted architectural, engineering and design practices and conform to applicable Federal, State, and local codes and to approved plans, specifications, and contract documents.

(BON Exhibit 6, USDA Guarantee, VIKING v. BON 000472) (3/13/2023 and 6/2/2023 Orders, FOF 8, p. 6). Sheppard testified at trial that $637,000 of the BON Loan was required to go to start-up capital, after the business was up and running. (Tr. 1/23/2023, p. 166, line 4 – p. 167, line 2).

> CONSTRUCTION
>
> ...
>
> Prior to disbursement of construction funds, [BON] must have: ... Contingencies in place

> to handle unforeseen cost overruns without seeking additional guaranteed assistance. These are to be agreed to by the borrower.

(BON Exhibit 6, USDA Guarantee, VIKING v. BON 000472-473) (3/13/2023 and 6/2/2023 Orders, FOF 11, p. 7).

> The lender will also ensure that the project will be completed with available funds and, once completed, will be used for its intended purpose and produce products in the quality and quantity proposed in the completed application approved by the Agency.

(BON Exhibit 6, USDA Guarantee, VIKING v. BON 000472) (3/13/2023 and 6/2/2023 Orders, FOF 14, p. 8). Sheppard admitted at trial that BON had this responsibility to complete the project with available funds, that it had complete control over the nearly $4,000,000 in Project funds, and that it had authority to override the borrower as to disbursements. (Tr. 1/23/2023, p. 169, line 16 – p. 170, line 2)

> The lender must have a construction-monitoring plan acceptable to the Agency and undertake the added responsibilities set forth in this paragraph. The lender will monitor the progress of construction and undertake the reviews and inspections necessary to ensure that construction conforms to applicable Federal, State, and local code requirements; proceeds are used in accordance with the approved plans, specifications, and contract documents; and that funds are used for eligible project costs. The lender must expeditiously report any problems in project development to the Agency.

(BON Exhibit 6, USDA Guarantee, VIKING v. BON 000473) (3/13/2023 and 6/2/2023 Orders, FOF 22, p. 10).

> Prior to disbursement of construction funds, the lender must have: ... (ii) A detailed timetable for the project with a corresponding budget of costs, setting forth the parties responsible for payment.

(BON Exhibit 6, USDA Guarantee, VIKING v. BON 000473) (3/13/2023 and 6/2/2023 Orders, FOF 25, p. 11).

> By signing this Conditional Commitment, the lender and borrower certify that they understand and accept the conditions outlined herein. No provision stated herein shall be amended or waived without the prior written consent of the lender and Rural Development.

(BON Exhibit 6, USDA Guarantee, VIKING v. BON 000475) (3/13/2023 and 6/2/2023 Orders, FOF 27, pp. 11-12).

> The Loan Note Guarantee constitutes an obligation supported by the full faith and credit of the United States and is incontestable except for fraud or misrepresentation of which Lender or any Holder has actual knowledge ... or which Lender or any Holder participates in or condones. The Loan Note Guarantee will be unenforceable to the extent that any loss is occasioned by ... use of loan proceeds for unauthorized purposes, ... [or] negligent Loan servicing. ... Any losses occasioned will be unenforceable to the extent that loan funds are used for purposes other than those specifically approved by USDA in its Conditional Commitment or amendment thereof. Negligent loan origination/negligent loan servicing is the failure to perform those services which a reasonably prudent lender would perform in processing or servicing ... its own portfolio of loans that are not guaranteed. The term includes not only the concept of a failure to act but also not acting in a timely manner or acting in a manner contrary to the manner in which a reasonably prudent lender would act[.]

(BON Exhibit 6, USDA Guarantee, VIKING v. BON 000477) (3/13/2023 and 6/2/2023 Orders, FOF 29, p. 12).

Dividend payments and compensation of officers and owners will be **limited**[1] to an amount

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[1] In response to WCDC's motion to amend the June 2, 2023 order as a scrivener's error, apropos of this duty included in FOF 32, BON argued "[T]he Amended Order states in Findings 32-33 that dividends to owners **cannot be paid**. Consequently, any argument that WCDC would have received dividends from LHSC for the stock is **precluded by the Order** ..." (6/28/2023 BON Memo. p. 3) (emphasis added). Clearly BON mischaracterized the Guarantee and Finding 32, quoted verbatim, above, which actually shows that such dividends can be paid. And BON's argument muddies the waters even further, because WCDC made no such dividend claim or dividend argument. WCDC claimed a debt owed via its contract with LHSC, and that BON tortiously interfered with that contract by causing LHSC to breach it. (12/21/2022 WCDC amended counterclaim, cross-claim and 3rd-party claims, pp. 14-15). Nor is WCDC's argument "precluded by" either of the orders. To the contrary, this FOF 32 is unchanged from the original March 13, 2023 order granting full damages to WCDC and it supports the other findings and conclusions to the effect that BON's outrageous disbursements of $16,666.67 in monthly salary to Hornick (LHSC's owner), totaling $116,666.69, helped to cause the Project to fail and to make LHSC incapable of ever being able to pay WCDC the balance due on the real estate purchase. (3/13/2023 and 6/2/2023 Orders, FOF 26; 28; 32; 30; 33; 37 and COL 5 pp. 11-13; 15; 21).

Baseless arguments such as this one, using false statements of fact and law, populate BON's March 22, 2023 Rule 59 motion, making it nearly impossible to discern any legitimate error claimed to have been included in the March 13, 2023 order.

that, **when taken,** will not adversely affect the repayment ability of the borrower. (BON Exhibit 6; VIKING V BON 000471) (3/13/2023 and 6/2/2023 Orders, FOF 32, p. 13) (emphasis added).

The USDA issued its Guarantee and the Loan closed on February 25, 2017. (VIKING V BON 000483). WCDC sold the property to LHSC for $500,000, of which $250,000 came from BON's Loan, and the other $250,000 was represented by LHSC's pledge of 250 shares of its stock, which it valued at $1,000 per share. (Tr. 1/25/2023, p. 39, line 22 - p. 41, line 25).

WCDC also contributed County grant funds of $200,000.00 for "infrastructure and construction" and "upfit" of the existing building (WCDC Exhibits 10; 23; & Exhibit HBC-1), and it facilitated additional grant funds from the State of South Carolina in the amount of $150,000.00. (3/13/2023 Order, FOF 16, p. 8).

On February 7, 2018, construction and "upfit" were complete but for the fire suppression system, for which Project funds were no longer available, due to BON's gross mismanagement of disbursements and its failure to preserve funds required to be set aside for construction and contingencies; LHSC sought additional funds from WCDC (which was not privy to disbursement information), and WCDC then lent LHSC an additional $80,000.00 to pay for the fire suppression system. (HBC Exhibit 10; WCDC Exhibits 26, 27, and 28). The grants and additional loan totaled $430,000.00; and all of these public funds were included in Project funds administered by BON, pursuant to the USDA Guarantee. (3/13/2023 and 6/2/2023 Orders, FOF 16, p. 8). Sheppard admitted at trial that "every single dime" of Project funds, from every source, went into the LHSC Project account disbursed by BON. (Tr. 1/23/2023 p. 131, line 25 -p. 132, line 3).

BON hired an independent professional engineering firm, Partner Engineering and

Science, Inc. ("**Partner**") to oversee the construction of the Project. (3/13/2023 and 6/2/2023 Orders, FOF 9, p. 6). But later in the Project, Hornick sought and received disbursement of $30,000 to Alexia Cortez, as manager of a company identified in the invoice as Maritime Communications, LLC, but BON admitted on cross-examination that the nature of the engineering services was never documented, nor when they were received, nor what was determined by these services. (WCDC Exhibit 35, VIKING v. BON 000588 to 590) (3/13/2023 and 6/2/2023 Orders, FOF 34, p. 14). At trial, Sheppard admitted that at his deposition he had been shown Instagram photos of Ms. Cortez showing that she was a pole dancer. (Tr. 1/23/2023 p. 237, line 25 – p. 238, line 19). No evidence showed that Maritime Communications, LLC was an engineering firm. And at trial the court noted that the name itself was suspicious: "The Court: That's not normal---that's not normally a name of an engineering firm." (Tr. 1/25/2023 p. 342, lines 19-21). But, despite these obvious red flags, as with every other disbursement request from Hornick, Sheppard admitted that BON paid it without seeking verification of the expense. (Tr. 1/23/2023 p. 160, line 24 – p. 161, line 7; p. 181 lines 8-25; p. 218, line 20 – p. 219, line 12; p. 235, lines 14-20).

During the life of the Project, BON disbursed to itself 13 monthly interest payments on the Loan totaling $406,332.48. (WCDC Exhibits 33, 34 and 35) (HBC Exhibits 7 and 10) (and 6/2/2023 Orders, FOF 40, pp. 15-16).

HBC was the general contractor for the Project. Its contract amount initially totaled $1,600,000. (HBC Exhibits 2, 3, 10, 26 and 43). With change orders, HBC's total contract charges were $1,621,275.00. (HBC Exhibits 14, 34 and 35) (3/13/2023 and 6/2/2023 Orders, FOF 17, p. 9; FOF 23, p. 10). On December 22, 2017, HBC submitted its final invoice for $262,496.50 for work completed on November 28, 2017, and the engineering firm, Partner, recommended that

BON disburse funds to pay it, but BON refused to pay it because Defendant Louis Hornick would not approve payment from amounts set aside for either Working Capital or Construction Contingencies (WCDC Exhibit 25, HBC Exhibit 14; VIKING v. BON 000053; 56; and 59) (HBC Exhibit 3, pages 2-6; 8-11; VIKING v BON 000507; 526; 533; 536; 543; 556; 566; 570; and 573) (3/13/2023 and 6/2/2023 Orders, FOF 10-11, pp. 6-7).

Thereafter, Viking refused to complete the fire suppression system and the Project came to a halt; BON placed LHSC in default on the Loan; all disbursements ceased; and BON retained the amount remaining in Project funds, which was $85,632.20. (3/13/2023 and 6/2/2023 Orders, FOF 40, pp. 15-16).

On June 8, 2018, Viking sued LHSC, BON, and WCDC for nonpayment and foreclosure on its mechanic's lien; BON and LHSC asserted joint counterclaims on August 14, 2018; HBC asserted counter and cross-claims for its mechanics lien on August 22, 2018; and Viking obtained summary judgment in the amount of $181,479 plus interest, against HBC on August 17, 2022, while the counter and cross-claims remained for trial. (6/8/2018 Complaint, *passim*; 8/17/2019 Order, p. 1 in 2018-CP-45-000252; 3/13/2023 and 6/2/2023 Orders, p. 2).

On April 4, 2019, BON sued LHSC; WCDC; Viking; and HBC (2019-CP-45-000193) for a deficiency judgment in foreclosure on its commercial mortgage, asserting primary lien status over the mortgage lien of WCDC and mechanic's liens of HBC and Viking. (4/4/2019 Complaint, *passim*).

After discovery disputes, dispositive motions, continuances, and BON's settlement with Viking, the matters were tried to the court over three full days. (Tr. 1/23-1/25/2023). The Court issued its 24-page order on March 13, 2023, consisting of 50 detailed Findings of Fact, each of

which refers to the evidence on which it was based, and 13 detailed Conclusions of Law, which also refer to the evidence on which they were based and cite to the legal authority underlying them. (3/13/2023 Order).

The order granted relief to WCDC and HBC and denied relief to BON, concluding that WCDC is entitled to damages as follows:

> 12. WCDC is a prevailing party entitled to recover from the foreclosure sale proceeds a total of $621,404.66 in damages. This figure represents $99,842.82 for payment of the outstanding mortgage balance owed by LHSC to WCDC with interest as of January 9, 2023; $200,000.00 for WCDC grant funds provided to LHSC and included in Project funds disbursed by BON; **and $250,000.00 for payment of the balance owed for the real property purchase, currently represented by worthless LHSC stock**; and $71,561.84 for payment of WCDC attorney fees and costs incurred in the prosecution of their claim as of January 25, 2023.

(3/13/2023 Order, COL 12, p. 21) (emphasis added).

On March 22, 2023, BON moved to amend this order, and on June 2, 2023, the court amended the above Conclusion of Law by editing out the language emphasized above[2]. (6/2/2023 Order, COL 12, p. 23).

The original order included many Findings of Fact which supported the excised damages award to WCDC. (3/13/2023 Order, FOF 1-48, pp. 4-17). It directed that judgment be entered in favor of WCDC on its causes of action and it equitably subordinated BON's lien on the foreclosure proceeds from the sale of the Project property, held in escrow with the court, such that WCDC was to receive damages in the total amount of $621,404.66, plus statutory interest beginning March 13, 2023. (3/13/2023 Order, Decree ¶¶ 1-4, p. 22).

The June 2, 2023 order included all of these same Findings and decretal terms, but for the

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[2]The only other amendment was made with the agreement of WCDC and HBC. It made additions to the Findings regarding attorneys' fees only.

damages awarded to WCDC, which were reduced by $250,000 to $371,404.66 plus statutory interest from the date of the order. (6/2/2023 Order, Decree ¶¶ 1-4, pp. 23-23).

WCDC had objected to BON's Rule 59(e) motion because it lacked specificity and did not challenge dispositive Findings nor any of the Conclusions. (5/10/2023 WCDC/HBC joint return, pp. 1-54). WCDC argued that it was prejudiced by this lack of specificity because it had to guess what the alleged errors were. (Tr. 5/12/2023, p. 45, lines 11-20).

The June 2, 2023 order stated no basis for the change in the damages award, and, because all other Findings and Conclusions in that order support the original award, and BON's motion had misstated facts and raised bogus legal arguments, WCDC took the damages change to be a scrivener's error. On June 12, 2023, WCDC moved to amend the June 2, 2023 order as a scrivener's error. (6/12/2023 WCDC motion). This motion was heard on June 29, 2023, at which time the court announced that it had amended the damages award after rethinking BON's argument and objections, and that the court had changed its mind and concluded that the $250,000 award for the balance of the real estate purchase was "speculation." (Tr. 6/29/2023, p. 6, line 10 – p. 7, line 25).

The Court then entered its order denying WCDC's motion on July 25, 2023 and this and other appeals followed.

STANDARD OF REVIEW

"Ordinarily, an appellate court reviews cases in equity by finding facts in accordance with its own view of the preponderance of the evidence. However, an appellate court still affords a degree of deference to the trial court because it was in the best position to judge the witnesses' credibility." *Matter of Estate of Kay*, 423 S.C. 476, 480, 816 S.E.2d 542, 544–45 (2018).

"When an action at law is tried without a jury, the standard of review extends only to the correction of errors of law." *J&H Grading & Paving, Inc. v. Clayton Constr. Co., Inc.*, __ S.C. 2d __, No. 2019-001950, 2023 WL 5598697, at *3 (S.C. Ct. App. Aug. 30, 2023), *reh'g denied* (Oct. 11, 2023). In an action at law "the trial judge's findings of fact will be upheld unless without evidentiary support." *Kuznik v. Bees Ferry Associates*, 342 S.C. 579, 589, 538 S.E.2d 15, 20 (Ct. App. 2000). "A case with legal and equitable issues presents a divided scope of review. When legal and equitable actions are maintained in one suit, each retains its own identity as legal or equitable for purposes of the applicable standard of review on appeal." *Id.* (citations omitted).

ARGUMENT

I. THE TRIAL COURT ERRED ON JUNE 2, 2023 BY AMENDING ITS MARCH 13, 2023 ORDER, THEREBY REDUCING THE DAMAGES AWARDED TO WILLIAMSBURG COUNTY DEVELOPMENT CORPORATION BY $250,000.00.

(A) THE TRIAL COURT ERRED BY AMENDING THE MARCH 13, 2023 ORDER ON GROUNDS OF SPECULATIVENESS, WHICH WERE NOT RAISED AT TRIAL NOR IN BANK OF NEWINGTON'S MARCH 22, 2023 RULE 59(e) MOTION.

As shown in the Statement of Facts, above, the court initially awarded damages to WCDC in specific amounts for specific elements of loss, including $250,000 for the balance due on LHSC's purchase of the real property, which amount is reflected by LHSC's now worthless stock pledge. (3/13/2023 order, COL 12, p. 21). At trial, the evidence showed that LHSC was a single-

purpose corporation formed for the sole purpose of obtaining financing of construction and startup of the drapery manufacturing plant, which was the subject of BON's Loan; the USDA Guarantee; WCDC's grants; WCDC's loan; and WCDC's sale of the real property at which the plant was to be situated. (*See, e.g.*, Sheppard testimony that BON considered LHSC's incorporation documents when BON made the Loan (Tr. 1/23/2023, p. 194, lines 11-24); and Conditional Commitment identifying the location of the plant and purpose of the Loan and the Project (BON Exhibit 6, VIKING v BON 000467; and 000469). (3/13/2023 and 6/2/2023 Orders, FOF 3, p. 5). Without changing any related findings or conclusions, the court amended this damages award by excising the $250,000 for the balance owed on the real estate. (6/2/2023 order, COL 12, p. 23)

WCDC moved to amend the June 2, 2023 change in the damages award, believing it to be a scrivener's error, but at the hearing on its motion, the court announced that it intentionally reduced the damages award after *rethinking BON's argument and objections*, and that the court had changed its mind and concluded that the $250,000 award for the balance of the real estate purchase was "*speculation*". (Tr. 6/29/2023, p. 6, line 10 – p. 7, line 25).

The problems with this rationale are twofold: (1) **BON raised no such speculation argument or objections at trial;** and (2) **BON raised no such speculation argument or objections in its Rule 59 motion.** So, it is unknown what argument or objection the court revisited and based its June 2, 2023 amend on; and WCDC never had an opportunity to refute those arguments or objections. Neither at trial, nor in BON's Rule 59(e) motion, nor even at the hearing on that motion did BON ever make any such speculation argument - let alone properly support it with evidence and authorities.

(i) SPECULATIVENESS WAS NOT RAISED AT TRIAL.

BON did not raise the speculativeness issue at trial, and, it has long been the law in South Carolina that an issue which could have been raised earlier cannot be raised for the first time in a Rule 59(e) motion. *See, e.g., Hickman v. Hickman,* 301 S.C. 455, 392 S.E.2d 481 (Ct. App. 1990) ("A party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not. Rule 59(e) motions are not vehicles for bringing before the court theories or arguments that were not advanced earlier. Issues which could have been presented to the court for consideration previously, but which were not, are not the proper subject of Rule 59(e) relief; the issues are waived.") *Id.* at 456, 392 S.E.2d at 482 (citations and internal quotation marks omitted).

And see, Stevens & Wilkinson of S.C., Inc. v. City of Columbia, 409 S.C. 563, 567, 762 S.E.2d 693, 695 (2014) ("[A] party cannot use a Rule 59(e) motion to advance an issue the party could have raised to the circuit court prior to judgment, but did not.") (citing and quoting *Hickman*, *supra*).

See also, *First Citizens Bank & Tr. Co., Inc. v. Taylor*, 431 S.C. 149, 847 S.E.2d 249 (Ct. App. 2020). There, Appellants argued that the master erred in finding that funds were transferred in violation of the SOE without determining if they were statutorily exempt. But Appellants did not raise this issue to the master at the hearing, the master did not rule on it, and Appellants raised it for the first time in their Rule 59(e) motion. The court held that the issue was not preserved for review because Appellants could not use a Rule 59(e) motion to advance an issue they could have raised to the master at the hearing. *Id.,* 431 S.C. at 161–62, 847 S.E.2d at 695 (quoting *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. at 567, 762 S.E.2d at 695).

BON could have, but did not make any objection or written or oral motion at trial raising the issue of the speculativeness of the balance owed on the real estate. (Tr. 1/23-1/25/2023, *passim*). Such an objection or motion would have been particularly timely and pertinent during WCDC's Executive Director's 200 pages of testimony about WCDC Exhibits 1; 2; 3A-3B (amended purchase and sale agreement for the real property); WCDC Exhibit 4 (LHSC stock agreement; WCDC Exhibits 5-7 (deed, note, mortgage and loan closing documents; 8 (letter and check from WCDC for grant); WCDC Exhibit 9 (LHSC proposal for the project); WCDC Exhibit 19 (Rural Infrastructure Fund Grant Request Summary Sheet); WCDC Exhibit 33 (BON spreadsheet of dates and amounts it received and disbursed from various USDA mandated categories throughout the Project); HBC Exhibit 3 (showing $350,000 in grants received by BON on July 28, 2027); the process of vetting LHSC for the real estate purchase and the grants; the balance owed on the real property; the process of accepting the stock pledge; that the $200,000 grant fund was WCDC money that it had received in a grant from Santee; BON deviations from USDA disbursement and oversight requirements; and the reasonableness of WCDC's expectation that LHSC could have repaid the balance within 5 years, had LHSC's contract with WCDC not been interfered with by BON's gross mismanagement of Project funds. (Tr. pp. 588-787, *passim*) (WCDC Exhibits 1-2; 3A; 3B; 19; 33 *passim;* HBC Exhibit 3, p. 10).

BON could have, but did not raise the speculativeness issue in its three separate "pre-trial" briefs, which were actually submitted after trial on March 1, 2023. (3/1/2023 BON pre-trial brief; pre-trial brief supplement; and pre-trial brief 2d supplement, *passim*). And the court did not rule on the speculativeness issue at trial nor any time prior to entering its June 2, 2023 order. (Tr. 1/23-1/25/2023, *passim*). Thus, the issue should not have been raised for the first time in the Rule 59(e)

motion. WCDC contends that it was not raised in that motion, but the fact that the issue was not raised at trial is very important, because BON contends that this issue was raised in the Rule 59 motion. BON contends, there is no "formal" particularity requirement for Rule 59 motions, and it is a "very liberal notice requirement" that was met because the court got the "gist" of BON's asserted errors. (Tr. 5/12/2023, p. 5, lines 9-19).

"A party cannot sit back at trial without offering proof, then come to this court complaining of the insufficiency of the evidence to support the ... findings." *Brown v. Odom*, 425 S.C. 420, 432, 823 S.E.2d 183, 189 (Ct. App. 2019) (citation omitted) (brackets omitted).

The issue of whether the $250,000 balance was "speculative" was never raised to the trial court at trial, and should not have been raised for the first time in BON's Rule 59(e) motion. *See, State v. Stahlnecker,* 386 S.C. 609, 690 S.E.2d 565 (2010) ("For an issue to be properly preserved it has to be raised and ruled on by the trial court."). "A party must file a Rule 59(e), SCRCP, motion to preserve an issue the trial court fails to rule on." *Id.* (quoting *Elam v. S.C. Dep't of Transp.,* 361 S.C. 9, 602 S.E.2d 772 (2004).

(ii) SPECULATIVENESS WAS NOT RAISED IN BON'S RULE 59 MOTION.

BON did not raise the speculativeness issue in its Rule 59(e) motion. It did argue matters outside its Rule 59 motion at the hearing on that motion, to which WCDC objected multiple times, but none of these issues concerned speculativeness in awarding damages for the balance due on the real estate purchase. (5/12/2023 Tr. p. 45, line 11 – p. 46, line 8).

The nearest BON ever came to a speculativeness argument was to question whether the LHSC shares WCDC received in 2017 were actually worth $250,000 when they were received in 2017, when LHSC's asset was the BON Loan of $3,535,535.00. (Tr. 5/12/2023, p. 9, line 17 – p.

10, line 1).

But the damages award is based[3] on the purchase price ($500,000) and the balance owed on it ($250,000), not the value of the stock at any time. (3/13/2023 and 6/2/2023 orders, FOF 21; 46; and COL 5; 7, pp. 10; 17; 21-22). And BON did not articulate this valuation challenge by pointing to any legal error in the order. The motion stated only: "WCDC did not pay $200,000 in grant money[4] and it received $250,000 worth of shares, as WCDC valued them, from LHSC for the purchase of the real property. It still owns these shares." (BON 3/22/2023 motion, p. 9). BON never argued that the shares were *improperly* valued at any time, only that counsel's "hunch" was that they had little value. (Tr. 5/12/2023, p. 12, lines 1-4). Typically, such conclusory arguments, without context and citations to authority, are deemed abandoned. *Hoyler v. State*, 428 S.C. 279, 833 S.E.2d 845 (2019) (finding issue to be unpreserved as to post-trial motions because supporting materials were conclusory and cited no authority) (citing *S.C. Dep't of Soc. Servs. v. Mother ex rel. Minor Child*, 375 S.C. 276, 283, 651 S.E.2d 622, 626 (Ct. App. 2007) (noting an issue was abandoned because the appellant made a conclusory argument without citation of any authority to

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[3] *Authority* for the award is based on WCDC's status as an intended third-party beneficiary of the USDA Guarantee documents requiring BON to properly oversee Project contracts (which would necessarily include WCDC's $200,000 grant, its $80,000 note and mortgage, and its $500,000 purchase and sale agreement regarding the real property), and disburse all Project funds. And all of this is for the express purpose of providing long-term financing for the construction and startup of the manufacturing plant located at that real property, for the benefit of the County, which is WCDC's alter ego. (12/12/2022 WCDC amended answer, counterclaim, crossclaim and 3rd party claim, p. 4-5; 7). The award was also based on BON's tortious interference with the LHSC/WCDC contracts, and equitable lien subordination to provide relief from the funds held by the court in escrow from the foreclosure sale of the property. (*Id.* pp. 3-9; 14-15).

[4] This, like other factual statements made in BON's motion, is false. Gilleon Frieson testified that the grant was paid by WCDC per WCDC Exhibit 8, its cover letter and check for the $200,000 grant, made payable to BON's Project account. (Tr. 1/25/2023, p. 629, lines 7-16; p. 653, lines 5-15; 686, lines 2-12; p. 690, line 6 – p. 691, line 15). No evidence contracted this testimony.

support her claim). *See also, R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 437, 540 S.E.2d 113, 120 (Ct. App. 2000) ("An issue is deemed abandoned if the argument in the brief is only conclusory."); *State v. Colf*, 332 S.C. 313, 322, 504 S.E.2d 360, 364 (Ct. App. 1998) (finding a conclusory, two-paragraph argument that cited no authority other than an evidentiary rule was abandoned), *aff'd as modified on other grounds*, 337 S.C. 622, 525 S.E.2d 246 (2000)). *See also, Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001) ("South Carolina law clearly states that short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review.").

Nowhere, as to the issue of the balance owed on the real estate, does BON's motion cite any of the voluminous documentary evidence adduced at trial, nor does it include any portion of the trial transcript to support its valuation argument. (3/22/2023 BON motion, *passim*). (Long after the 10-day window for Rule 59 motions, BON emailed 200 pages of the transcript to the court and counsel on May 11, 2023, a few hours before the hearing; and WCDC objected to this late submission at the hearing. (Tr. 5/12/2023 p. 3, line 5 – p. 4, line 10).

If somehow BON's valuation argument were inferred to be an argument that the damage award itself was speculative, BON offered no authority to support it, and therefore, the argument was conclusory, and the court should have disregarded it for that reason.

Moreover, as described more thoroughly in Argument point I(A)(i), above, WCDC Executive Director, Frieson, testified at length at trial about issues related to the real estate purchase and WCDC's involvement in the Project (Tr. 1/23-1/25/2023, *passim*), and specifically that the stock pledge came about as a result of Hornick's counteroffer to the $500,000 purchase price – he offered $250,000 in cash and $250,000 in preferred stock, with the balance payable in

five years. (Tr. 1/25/2023, p. 623, lines 8-25).

BON's motion did not offer any evidence, legal authority or any argument contending that LHSC was not allowed to set the price for its shares, that the share price was invalid, or that WCDC was unreasonable for having accepted LHSC's counteroffer of the stock pledge as consideration for deferring payment of $250,000 for five years.

BON's argument on this issue at the hearing on its Rule 59(e) motion is summed up by its counsel's statement: "My *hunch* is those shares are worth exactly now what they were before that closing. The 250 shares in LHSC, Inc., *probably* didn't have a bunch of value back then." (Tr. 5/12/2023, p. 12, lines 1-4). But, of course, counsel's hunch is no substitute for evidence and legal authority. "[A]rgument is not evidence[.]" *Sosebee v. Leeke*, 293 S.C. 531, 535, 362 S.E.2d 22, 24 (1987). *And see, e.g., Hicks Unlimited, Inc. v. UniFirst Corp.*, 439 S.C. 623, 634, 889 S.E.2d 564, 570 (2023) (quoting *McClurg v. Deaton,* 395 S.C. 85, 86 n. 1, 716 S.E.2d 887, 887 n. 1 (2011) ("A memorandum in support of a motion is not evidence.") *Id.* (cleaned up).

At trial, Sheppard, admitted that BON received the WCDC/LHSC real estate purchase closing documents and BON was aware that the purchase price was $500,000, of which $250,000 was paid from the BON Loan, and the other $250,000 was represented by an LHSC stock pledge. (Tr. 1/23/2023, p. 127 line 18 – p. 128, line 16). Sheppard admitted that he knew these things, but that he did not know the specific repayment "*structure*" for the remaining $250,000 owed on the purchase, represented by the LHSC stock. (Tr. 1/23/2023, p. 128, lines 18-19). This attempt to walk back his admission does nothing to evade BON's knowledge that LHSC still owed $250,000 for the real estate purchase, per its contract with WCDC. And BON provided no argument or authority to the contrary.

BON never argued speculativeness. At the hearing on its motion, despite the late submission of 200 pages of WCDC's testimony, BON never argued that it was speculative to assert that the money was still owed. BON never argued that it was speculative to conclude that, if BON had fulfilled its duties by ensuring the completion of the Project and getting the plant up and running, that LHSC would have been able to repay this balance. Nor could any such arguments hold sway because at trial BON admitted that WCDC's expectation of repayment for the $250,000 from LHSC had been reasonable. (Tr. 1/23/2023, p. 155, line 22 -p. 156, line 16).

BON also admitted that it had been aware of the State of South Carolina Department of Commerce analysis of the Project, showing LHSC's assets as the $3 million BON Loan, and estimating the likelihood of success of the business. That analysis showed that LHSC would generate revenues to sustain an annual payroll of $3,810,000 in its first year in business, and made equivalent projections for the first 15 years. (WCDC Exhibit 19, pp. 2-4). (This Exhibit 19 is referenced in the March 13, 2023 and June 2, 2023 Orders, at FOF 6, p. 5).

Surely, it would be unreasonable to infer that BON, USDA, or WCDC would have made nearly $4 million in loans, grants, and guarantees here, if any of them had any evidence in 2017 leading them to suspect this startup company, LHSC, was likely to fail, or that its chances of success were tenuous. Indeed, BON reviewed all of the USDA and Loan packager's underwriting analysis first; and when those projection numbers "checked out" as reasonable projections, BON did its own due diligence via appraisals and the like, before it made its Loan. (Tr. 1/23/2023, p. 11, line 8 – p. 13, line 12; p. 128, lines 20-25; p. 129, lines 20-21; p. 130, lines 17-23).

And WCDC was not required to prove that LHSC was *guaranteed* to succeed, but for BON's interference, only that it *could have* paid what it owed on the real property, which is exactly

what the court found. (3/13/2023 and 6/2/2023 orders, FOF 46 p. 17). Thus, there is no evidentiary basis for the Court's amended order on the basis of speculativeness of the award of $250,000 for the balance owed on the real property. (Tr. 6/29/2023, p. 6, line 10 – p. 7, line 25).

Both the original order and the amended order specifically find and conclude that it was BON's gross mismanagement of Project funds which prevented Project completion within available funds, and caused LHSC to be incapable of paying the balance owed on WCDC's contract. (3/13/2023 and 6/2/2023 Orders, FOF 20; 36; 37; and COL 5; 6; 7; 9, pp. 9; 14; 15; 19; 20 -21). Thus, the court's amended order, based on rethinking BON's arguments that were not made and ruled on at trial, and that were not stated in its Rule 59(e) motion, contradicts the Findings and Conclusions which are based on the evidence. And this is reversible error. "An action to construe a contract is an action at law." *Byrd v. Livingston*, 398 S.C. 237, 241, 727 S.E.2d 620, 622 (Ct. App. 2012). The contract being construed is the USDA guarantee, which made WCDC an intended third-party beneficiary through its purpose statement and all the duties it imposed, to protect WCDC's interests. (3/13/2023 and 6/2/2023 orders, FOF 4-7; COL 1 and 3, pp. 5; 20-21). ""In an action at law, on appeal of a case tried without a jury, the judge's findings will not be disturbed unless they are without evidentiary support." *Id.*

"No evidence suggested that the Project could not have been completed within the available funds of $3,965,535.00." (3/13/2023 and 6/2/2023 Orders, FOF 17, p. 9). BON admitted this at trial. (Tr. 1/23/2023, p. 196, lines 3-9).

And Project completion meant more than just completion of *construction* – it meant getting the business outfitted with inventory and equipment that BON never followed up on, and it meant getting the business up and running: "The lender will also ensure that the project will be completed

with available funds **and, once completed, will be used for its intended purpose and produce products in the quality and quantity proposed in the completed application approved by the Agency.**" (BON Exhibit 6, USDA Guarantee, VIKING v. BON 000472). (3/13/2023 and 6/2/2023 Orders, FOF 14, p. 8) (emphasis added)).

Thus, the court erred in amending the March 13, 2023 order on grounds never raised and ruled on at trial and not raised in BON's rule 59 motion. And, as addressed in argument below, the court improperly acted *sua sponte* when it amended the March 13, 2023 order on the grounds that LHSC's ability to repay the $250,000 balance was speculative. (Tr. 6/29/2023, p. 6, line 10 – p. 7, line 25).

(B) THE COURT ERRED BY AMENDING THE MARCH 13, 2023 ORDER SUA SPONTE MORE THAN 10 DAYS AFTER IT WAS ENTERED.

As shown in Argument I(A)(i) and (ii) above, BON did not raise the speculativeness issue at trial or in its Rule 59 motion. As a result, the court's amended order based on speculativeness grounds was entirely on its own initiative.

The problem with this is that, pursuant to Rule 59(d) SCRCP, a judge "does not have the authority to alter or amend a judgment, *sua sponte,* once the judgment is more than 10 days old." *Heins v. Heins,* 344 S.C. 146, 157, 543 S.E.2d 224, 229 (Ct.App.2001). *Heins* also explained the policy reasons against allowing judges to amend judgments on grounds other than those stated in the Rule 59(e) motion before them:

> Strong policy considerations militate against what occurred here. ... a successful plaintiff given a less-than-complete remedy could not ask for correction without putting at risk the judgment in her favor, though the party cast in judgment has raised no question of the validity of the judgment.

Heins v. Heins, 344 S.C. 146, 155, 543 S.E.2d 224, 228 (Ct. App. 2001) (citation omitted).

And, see, *Ness v. Eckerd Corp.*, 350 S.C. 399, 566 S.E.2d 193 (Ct. App. 2002) ("In this case, as in *Heins,* the trial judge modified an order not as requested in a Rule 59(e) motion, but rather on his own initiative and after more than ten days had passed. He therefore lacked jurisdiction to [do so].") *Id.*, at 402–03, 566 S.E.2d at 195–96.

What happened here is precisely what happened in *Heins* and *Ness, supra* – BON timely moved to alter or amend, but it did not raise the issue of speculativeness on which the court based its amended order, and which it entered after the 10 days had passed.

As a result, the June 2, 2023 amended order should be reversed as to the damages award to WCDC, and the original damages award stated in the March 13, 2023 order should be reinstated.

(C) BON'S RULE 59 MOTION SHOULD HAVE BEEN DENIED FOR LACK OF PARTICULARITY AND RESULTING PREJUDICE TO WCDC.

WCDC objected to BON's Rule 59(e) motion, on the grounds that WCDC was prejudiced by the motion's lack of specificity. (WCDC 5/10/2023 WCDC/HBC joint return, passim).WCDC could not discern what errors BON was asserting in it, in part because it asserted legal arguments that do not apply, and false statements of fact, and it did not point to any legal error in any Conclusion of Law, nor in any of 20 fundamental and determinative Findings of Fact. (5/10/2023 WCDC/HBC joint return, passim). (Tr. 5/12/2023, p. 45, lines 11-20).

None of the COL's are even mentioned in BON's Rule 59 motion. "The unchallenged ruling, right or wrong, is the law of the case and requires affirmance." *First Union Nat. Bank of S.C. v. Soden*, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998). See, also, *Buckner v. Preferred Mut. Ins. Co.*, 255 S.C. 159, 160–61, 177 S.E.2d 544 (1970) ("[A]ppellant excepted to the court's first conclusion, but has not excepted to its second ... Therefore, the finding...is the law of this case and requires affirmance.")." (5/10/2023 WCDC/HBC joint return, p. 44).

BON contended there is no "formal" particularity requirement, and it is a "very liberal notice requirement" that was met because the court got the "gist" of BON's asserted errors. (Tr. 5/12/2023, p. 5, lines 9-19). It cited *Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 27, 609 S.E.2d 506, 510 (2005), *overruled by State v. Wallace*, 440 S.C. 537, 892 S.E.2d 310 (2023) and *Camp v. Camp*, 386 S.C. 571, 575, 689 S.E.2d 634, 636 (2010). (Tr. p. 5, line 20 – p. 6, line 1). But these cases do not support BON's position here. *Fields* addressed successive motions for new trial under Rule 59(b) under circumstances not present here. *Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. at 27, 609 S.E.2d at 510. And *Camp* supports WCDC's position:

> The particularity requirement is to be read flexibly in recognition of the **peculiar circumstances** of the case. **By requiring notice to** the court and **the opposing party of the basis for the motion**, rule 7(b)(1) **advances the policies of reducing prejudice to either party** and assuring that the court can comprehend the basis of the motion and deal with it fairly. **Therefore, when a motion is challenged for a lack of particularity, the court should ask whether any party is prejudiced by a lack of particularity** or whether the court can comprehend the basis for the motion and deal with it fairly. The particularity requirement should not be applied in an **overly** technical fashion when the purpose behind the rule is not jeopardized.

Camp v. Camp, at 575, 689 S.E.2d at 636 (citations omitted) (emphasis added).

Under the "peculiar circumstances" of this incredibly fact and document intensive case, and the case law below, it is not "overly technical" to conclude that WCDC was prejudiced by the lack of particularity in BON's motion, which did not raise the speculativeness issue, but only the issue of the stock's valuation in 2017. At the hearing BON offered its own speculation that the value was not much then or now. ("My *hunch* is those shares are worth exactly now what they were before that closing. The 250 shares in LHSC, Inc., *probably* didn't have a bunch of value back then." (Tr. 5/12/2023, p. 12, lines 1-4)).

BON simply presented no evidentiary basis for amending the damages award to WCDC,

and no cogent argument or legal authorities to justify it. *See e.g., Johnson v. Lloyd*, 407 S.C. 610, 757 S.E.2d 705, (2014) (reversing Court of Appeals because the State's Rule 59(e) motion did not raise the issue that petitioner failed to argue equitable relief and therefore was not entitled to equitable relief. Instead, the State acknowledged petitioner sought equitable relief at the time of the hearing, and the State argued the doctrines of laches and estoppel precluded petitioner from being eligible for such relief). The distinction between the issue it raised and the issue it did not raise seems much less distinct in *Johnson, supra*, than in the present case. Yet our Supreme Court held: "We find the Court of Appeals erred in addressing the merits of this case, as the issue of whether petitioner was entitled to equitable relief was clearly not preserved for review." *Id.* at 612, 757 S.E.2d at 706 (citing *State v. Stahlnecker,* 386 S.C. 609, 690 S.E.2d 565 (2010) ("For an issue to be properly preserved it has to be raised and ruled on by the trial court."). "A party must file a Rule 59(e), SCRCP, motion to preserve an issue the trial court fails to rule on." *Id.* (quoting *Elam v. S.C. Dep't of Transp.,* 361 S.C. 9, 602 S.E.2d 772 (2004). "An issue not properly preserved cannot be raised for the first time on appeal." *Id.* (quoting *State v. Hoffman,* 312 S.C. 386, 440 S.E.2d 869 (1994)).

BON's Rule 59 motion did not state any error in Findings 6, 21 and 46, which form the basis for the award, nor any error in any of the 13 Conclusions, including Conclusion 12, which specifically awarded damages for the balance owed on the real estate. (3/22/2023 BON motion, passim) (3/13/2023 Order, pp. 5; 10; 17-21). This itself hid whatever error BON intended to assert, and caused prejudice to WCDC in responding to the motion.

Failure to challenge a ruling "is an abandonment of the issue." *Lindsay v. Lindsay,* 328 S.C. 329, 338, 491 S.E.2d 583, 588 (Ct.App.1997). "The unchallenged ruling, right or wrong, is

the law of the case and requires affirmance." *Biales v. Young,* 315 S.C. 166, 168, 432 S.E.2d 482, 484 (1993). *See Noisette v. Ismail*, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991) (finding where a trial court does not explicitly rule on an argument raised and appellant does not make a Rule 59, SCRCP, motion to obtain a ruling on that issue, the appellate court may not address the issue).

BON's motion does *address* Finding 21, but only on unrelated issues, as follows:

> 9. As to Findings of Facts 19-21, 28 and 30, the Conditional Commitment and Guarantee did not require direct disbursement to vendors. Also, Diversified Systems and LHSC represented to the Bank of Newington that Diversified received the funds from the initial draw. Plaintiff's Exhibit 37, Emails from Diversified Systems. Neither LHSC nor Diversified disclosed to the Bank of Newington that they entered into a payment plan to payoff the amount that LHSC withheld. Plaintiff's Exhibit 38, DSI Agreement with LHSC. The Bank of Newington was not required under any loan document to immediately terminate the loan upon realizing that LHSC kept a portion of the equipment payment.

(3/22/2023 BON motion, p. 15).

These statements are factually incorrect, and/or are irrelevant to the damages awarded to WCDC for the balance owed on the real estate purchase: Firstly, the evidence at trial relating to BON disbursements – all of which was finally obtained from BON itself after its four-years-long campaign to withhold this evidence - showed that BON paid vendors directly when it chose to do so. HBC counsel reminded the court:

> [Mr. Few] Four years of discovery, the bulk of the useful information we didn't get until March the 17th, 2022, when Mr. Sheppard admitted for the first time that they didn't own 90-percent of the loan. We had no idea prior to then that the USDA had paid the Guarantee. We didn't even have the documents at that time regarding the existence of the investors. Despite the fact that Judge Curtis had already ruled in our favor on one motion to compel regarding the USDA, we didn't get it. We got thousands and thousands of pages of documents months before the trial.

(Tr. 5/12/2023, p. 61, lines 14-25). And many months later, only a month before trial, BON inadvertently revealed the existence of crucial disbursement documents during its 30(b)(6) deposition:

> [Mr. Few] Not only that, recall that exhibit 33 that Mr. Jenkinson referred to, that we didn't get our eyes on until December 1 of 2022 in the middle of a 30(b)(6) deposition after unbelievable discovery battles about what is relevant; obviously it was relevant.

(Tr. 5/12/2023, p. 71, lines 11-16). (And see the balance of Mr. Few's argument on this point at Tr. 5/12/2023, p. 71, line 16 – p. 73, line 18).

BON counsel conceded that it paid vendors directly at the May 12, 2023 hearing on its motion, stating: "One thing I do want to point out is **all the disbursements were made** either to LHSC or **to a vendor.**" (Tr. 5/12/2023, p. 7, lines 23-25) (emphasis added). Thus, whether the Conditional Commitment required BON to pay vendors is irrelevant to its actual practice of paying them when it wanted to.

Secondly, the references to Diversified Systems; BON exhibit 37; Exhibit 38, all relate to the vendor, Diversified, and are irrelevant to the real estate purchase and the $250,000 balance owed on it. They are irrelevant except that it was fully established at trial that BON paid Hornick an enormous amount ($603,787.50, which is more than 15% of the total Project funds of $3,965,535.00) on Hornick's say so. But this money was owed to Diversified for equipment:

> On March 1, 2017, BON paid Mr. Hornick $603,787.00 at his request, **on [Hornick's] assurance that he would then pay Diversified** that amount. (VIKING v. BON 000486, 487, 507). On cross-examination, **BON ... admitted** that, soon after this disbursement, **BON became aware that Mr. Hornick paid Diversified only $500,000.00 and Mr. Hornick retained $103,787.00, without justification** for doing so. There was **no evidence** that Diversified was ever paid the balance owed to it ... ($103,787.00), nor **that BON ever sought the return from Mr. Hornick of the $103,787.00** he had wrongfully retained. **And there was no evidence that any equipment was ever delivered to the property by Diversified.**

(3/13/2023 and 6/2/2023 Orders, FOF 19, p. 9) (emphasis added). This disbursement to Hornick instead of to the vendor – only two weeks into the Project - set the pace for BON's hands-off approach to oversight of the Project. It signaled to Hornick that he could treat the Project funds as

his personal piggy bank. And it was the start of BON's complete abdication of its duties as a prudent lender in general, and of its specific contractual duties under the Guarantee, by paying Hornick whenever and in whatever amounts he requested, no matter how ridiculous, and without any sort of independent verification of these expenses. This gross mismanagement of Project funds is precisely what caused the project to fail and caused[5] LHSC to become incapable of paying WCDC the balance on the real estate purchase. (3/13/2023 and 6/2/2023 Orders, FOF 18-30; 36-37; and COL 4-12; pp. 9-12; 14-15; 19-21).

Thirdly, as both orders clearly find and conclude, the Guarantee does require BON to oversee the Project and Project funds, all the way through to completion and startup of the manufacturing plant; it requires BON to use prudent lending practices all along the way; and it requires BON to comply with and honor Project contracts, as follows:

> The **lender must ensure** that all project facilities are designed, and costs estimated, by an independent professional utilizing accepted architectural, engineering and design practices **and conform to** applicable Federal, State, and local codes and to **approved plans, specifications, and contract documents**. (BON Exhibit 6, USDA Guarantee, VIKING v. BON 000472).

(3/13/2023 and 6/2/2023 Orders, FOF 8, p. 6) (emphasis added).

> Prior to disbursement of construction funds, **[BON] must have: ... Contingencies in place to handle unforeseen cost overruns** without seeking additional guaranteed assistance.

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[5] There can be no doubt as to the correctness of the causation findings because they are supported throughout the order, in accord with *Newton v. S.C. Pub. Railways Comm'n*, 319 S.C. 430, 432, 462 S.E.2d 266, 267 (1995) ("Although **foreseeability of some injury** from an act or omission is a prerequisite to establishing proximate cause, the plaintiff need not prove that the actor should have contemplated the **particular event** which occurred. The defendant may be held liable for **anything** which appears to have been a **natural and probable consequence of his negligence**. A plaintiff therefore proves legal cause by establishing the injury in question occurred as a natural and probable consequence of the defendant's negligence." *Id.* at 432, 462 S.E.2d at 267 (quoting *Bramlette v. Charter-Medical-Columbia,* 302 S.C. 68, 393 S.E.2d 914 (1990) (emphasis added)).

> These are to be agreed to by the borrower. (BON Exhibit 6, USDA Guarantee, VIKING v. BON 000472-473)

(3/13/2023 and 6/2/2023 Orders, FOF 11, p. 7) (emphasis added).

> The **lender will also ensure** that the **project will be completed** with available funds **and, once completed, will be used for its intended purpose and produce products** in the quality and quantity proposed in the completed application approved by the Agency." (BON Exhibit 6, USDA Guarantee, VIKING v. BON 000472).

(3/13/2023 and 6/2/2023 Orders, FOF 14, p. 8) (emphasis added). It is undeniable that ensuring completion and startup, by any definition, requires more than taking the borrower's word for every single outrageous expense and disbursement. But even though BON knew that Hornick had wrongfully held on to over $103,000 of Diversified's money, two weeks into the project, BON did absolutely nothing to verify or curb Hornick's demands for compensation for himself, travel, fabric swatch books and even a pole dancer, to the tune of "$810,050.40 in unverified and otherwise unjustified disbursements" constituting "more than one-fifth of the total available Project funds of $3,965,535.00." (3/13/2023 and 6/2/2023 Orders, FOF 37, p. 15).

And BON's duties and breaches did not end there. The Conditional Guarantee also imposed the following duties on BON:

> **The lender must have a construction-monitoring plan** acceptable to the Agency **and undertake the added responsibilities** set forth in this paragraph. **The lender will monitor the progress of construction and undertake the reviews and inspections necessary to ensure that** construction conforms to applicable Federal, State, and local code requirements; **proceeds are used in accordance with the approved plans, specifications, and contract documents; and that funds are used for eligible project costs**. The lender must expeditiously report any problems in project development to the Agency. (BON Exhibit 6, USDA Guarantee, VIKING v. BON 000473)

(3/13/2023 and 6/2/2023 Orders, FOF 22, p. 10) (emphasis added).

> Prior to disbursement of construction funds, **the lender must have: ... (ii) A detailed timetable for the project** with a **corresponding budget** of costs, **setting forth the parties responsible for payment.** (BON Exhibit 6, USDA Guarantee, VIKING v. BON 000473)

(3/13/2023 and 6/2/2023 Orders, FOF 25, p. 11) (emphasis added).

> By signing this Conditional Commitment, the **lender** and borrower **certify** that they **understand and accept the conditions outlined herein. No provision stated herein shall be amended or waived without the prior written consent of** the lender and **Rural Development [USDA].** (BON Exhibit 6, USDA Guarantee, VIKING v. BON 000475)

(3/13/2023 and 6/2/2023 Orders, FOF 27, pp. 11-12) (emphasis added).

> The Loan Note **Guarantee** constitutes an obligation supported by the full faith and credit of the United States and **is incontestable except for fraud or misrepresentation of which Lender** or any Holder **has actual knowledge ... or which Lender** or any Holder **participates in or condones.** The Loan Note **Guarantee will be unenforceable to the extent that any loss is occasioned by ... use of loan proceeds for unauthorized purposes, ... [or] negligent Loan servicing. ... Any losses occasioned will be unenforceable to the extent that loan funds are used for purposes other than those specifically approved** by USDA **in its Conditional Commitment** or amendment thereof. **Negligent loan origination/negligent loan servicing is the failure to perform those services which a reasonably prudent lender would perform in processing or servicing ... its own portfolio of loans that are not guaranteed. The term includes not only the concept of a failure to act but also not acting in a timely manner or acting in a manner contrary to the manner in which a reasonably prudent lender would act**[.] (BON Exhibit 6, USDA Guarantee, VIKING v. BON 000477)

(3/13/2023 and 6/2/2023 Orders, FOF 29, p. 12) (emphasis added).

> Dividend payments and **compensation of officers** and owners **will be limited to an amount that, when taken, will not adversely affect the repayment ability of the borrower.** (BON Exhibit 6; VIKING V BON 000471)

(3/13/2023 and 6/2/2023 Orders, FOF 32, p. 13) (emphasis added).

The original damages award is supported throughout the Order, but the unchallenged, unamended and dispositive Findings and Conclusions which address WCDC's damages specifically are as follows:

> 6. Evidence showed that the State of South Carolina projected that the drapery manufacturing plant would bring economic benefits to the County and its citizens in the amount of $88,000,000.00 over the course of ten years. (WCDC Exhibit 19).

(3/13/2023 and 6/2/2023 Orders, FOF 6, p. 5). (WCDC Exhibit 19 explicitly showed the basis for

this projection and included the financial history of LHSC's parent company; its $3,000,000 asset in the form of Project funds from sources other than WCDC; additional participation by local government in the amount of $581,857; State Incentives in the forms of Job Development Credits of $1,018,769; Job Tax Credits of, $3,937,739, and Readysc of $210,000. (*Id.* p. 2). And it showed that LHSC would provide 105 jobs with an average salary of $36,286.00 and would have an annual payroll of $3,810,000 in its first year. (*Id.* pp. 2; 4) This Exhibit and this Finding, in turn, support Findings 21 and 46, and Conclusions 5, 7, and 12:

> 21. On and after March 1, 2017, Mr. Hornick's unjustified retention of $103,787.00 put BON on notice that BON needed to obtain verification of any and all payment or disbursement requests coming from Mr. Hornick, including proof of claimed expenses and purchases for which he sought reimbursement. I find that BON did not obtain verification or other proof from Mr. Hornick at any time after March 1, 2017, and this failure caused the Project to become incapable of completion within available funds; **it caused the Project to be abandoned; it caused the drapery manufacturing plant to never become operational; it caused LHSC to be incapable of paying the balance owed to WCDC for the real estate purchase ($250,000.00),** WCDC Grants ($200,000.00), and WCDC post-construction loan ($80,000.00); and it caused LHSC to be incapable of paying HBC the balance owed to it under its contract ($271,679.00).

(3/13/2023 and 6/2/2023 Orders, FOF 21, p. 10) (emphasis added).

> 46. The combined improper disbursements made after December 22, 2017, total $358,798.96 ($193,231.94 interest plus amount retained by BON; $139,568.50 unverified inventory/equipment reimbursements to Mr. Hornick; and $25,998.52 unverified travel reimbursements to Mr. Hornick). This amount of $358,798.96, alone, would have more than covered the amount of HBC's lien, $271,679.00. **Had BON paid HBC instead of making these improper disbursements after December 22, 2017, the Project could still have been completed within available funds, despite all the improper disbursements made prior to December 22, 2017.** This litigation could have been avoided, **and the drapery manufacturing plant could have been up and running today,** to the substantial benefit of Williamsburg County and its citizens. **Notably, Gilleon Frieson, WCDC Executive Director, testified that it was reasonable to expect that LHSC would have been able to pay the $250,000.00 balance owed on the real property purchase price, if LHSC had opened its facility.**

(3/13/2023 and 6/2/2023 Orders, FOF 46, p. 17) (emphasis added).

> 5. **BON's actions constituted gross negligence and gross mismanagement** of Project funds, including WCDC's grant of $200,000.00, and loan of $80,000.00; and **those actions caused LHSC to become incapable of paying the remaining $250,000.00 owed to WCDC, for the real estate purchase,** represented by LHSC's now worthless stock pledge.

(3/13/2023 Order, COL 5, p. 19; 6/2/2023 Order, COL 5, p. 21) (emphasis added).

> 7. **BON's gross mismanagement of Project funds proximately caused the Project to fail; it caused LHSC to default on the Loan; it caused LHSC to become defunct and incapable of repaying** WCDC's $200,000.00 grant, **WCDC's $250,000.00 balance on the real property,** and WCDC's $80,000.00 post-construction loan and interest accrued thereon, plus attorney fees and costs.

(3/13/2023 Order, COL 7, p. 20; 6/2/2023 Order, COL 7, p. 22) (emphasis added).

> 12. WCDC is a prevailing party entitled to recover from the foreclosure sale proceeds a total of $621,404.66 in damages. This figure represents $99,842.82 for payment of the outstanding mortgage balance owed by LHSC to WCDC with interest as of January 9, 2023; $200,000.00 for WCDC grant funds provided to LHSC and included in Project funds disbursed by BON; **and $250,000.00 for payment of the balance owed for the real property purchase, currently represented by worthless LHSC stock**; and $71,561.84 for payment of WCDC attorney fees and costs incurred in the prosecution of their claim as of January 25, 2023.

(3/13/2023 Order, COL 12, p. 21) (emphasis added).

The emphasized language in Conclusion 12, above, was excised from the court's June 2, 2023 Amended Order, but all Findings 1 through 47 (including FOF 6, 21 and 46 quoted above), and Conclusions 1-11 and 13 (including COL 5 and 7 quoted above), remained unchanged. (6/2/2023 Amended Order, pp. 1-17; 20-24). These Findings and Conclusions are based on and specifically refer to the preponderance of the evidence. (*Id*). And they fully support the damages award which was excised from Conclusion 12. Thus, WCDC could not discern what errors BON intended to assert in its motion, which did not challenge any of them, in any coherent way, and WCDC was prejudiced by being unable to properly respond to any error BON intended to assert..

While this court reviews cases in equity by finding facts in accordance with its own view

of the preponderance of the evidence, it "still affords a degree of deference to the trial court because it was in the best position to judge the witnesses' credibility." *Matter of Est. of Kay*, 423 S.C. 476, 480, 816 S.E.2d 542, 544-45 (2018). But the trial court's interpretation of the contracts in evidence is not an equitable issue, it is an issue of law. "An action to construe a contract is an action at law." *Byrd v. Livingston*, 398 S.C. 237, 241, 727 S.E.2d 620, 622 (Ct. App. 2012). ""In an action at law, on appeal of a case tried without a jury, the judge's findings will not be disturbed unless they are without evidentiary support." *Id.*

The unchanged Findings are solidly supported by the evidence and the unchallenged and unchanged Conclusions are contradicted by the June 2, 2023 amended order. The court indicated that this order was based on the court's rethinking of BON's (irrelevant) argument (its "hunch" that the stock was valueless). Reduction of WCDC's damages award on that basis is clearly reversible because it is "without evidentiary support." *See Byrd v. Livingston*, 398 S.C. at 241, 727 S.E.2d at 622.

Considering that one purpose of Rule 59(e) motions is to preserve an issue for appeal while allowing the trial court an opportunity to correct its own errors[6], standard practice among South Carolina attorneys is to cite to chapter and verse, as it were, so as to clearly show reversible error by demonstrating that specific findings are unsupported by evidence, and specific conclusions are likewise unsupported by findings and evidence. But here, as to the $250,000.00 damage award, BON's motion did none of that. It left WCDC in the dark.

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[6] *See Arnold v. State*, 309 S.C. 157, 172-73, 420 S.E.2d 834, 842 (1992) ("The purpose of Rule 59(e) ... is to request the trial judge [ ] 'reconsider matters properly encompassed in a decision on the merits.' " (citation omitted).

In opposing BON's motion, WCDC was compelled to address every Finding and Conclusion in turn, showing how each is supported by the evidence and by other Findings and Conclusions, because it could not discern what errors BON intended to assert. (5/10/2023 WCDC/HBC joint return, pp. 1-54). WCDC argued that the motion should be denied because it was too vague to meet the particularity requirements of Rules 7, 52 and 59 SCRCP because these Rules required BON's motion to be specific enough to draw attention to the precise nature of the error. (5/10/2023 WCDC/HBC joint return, p. 4). At the hearing, WCDC argued the motion caused prejudice to WCDC because it had to guess what errors BON was talking about, making the motion "a moving target" preventing WCDC from making a proper argument in response. (Tr. 5/12/2023, p. 45, lines 11-20). And WCDC argued that the motion did not point to any reversible error. "[F]or a Rule 59 motion to successfully challenge this Order, it has to show that the order includes [] reversible error and the conclusions are unsupported by the findings and the findings are [un]supported by the evidence." (Tr. 5/12/2023, p. 54, lines 6-11)

But WCDC conceded the only error it could actually discern in the motion - that the attorneys' fees awards did not include the analysis required by *Blumberg v. Nealco, Inc.*, 310 S.C. 492, 427 S.E.2d 659 (1993). WCDC submitted two exhibits consisting of the eighty-six pages of trial testimony by Gilleon Frieson to support its proposed amendment to the attorneys' fees award; and the twenty-three pages of trial cross-examination of BON V.P., Stormy Garland to support its other arguments opposing BON's motion. (5/10/2023 WCDC/HBC joint return, pp. 42-43; 53; and Exhibits A and B attached thereto).

WCDC also submitted an additional response in the form of a proposed finding on attorneys' fees, to be added to an amended order, citing WCDC's attorney fee affidavit (WCDC

Ex. 30); the Note and Mortgage for the real estate purchase (WCDC Ex.s 26 and 27); the more than 5000 pages of documentary evidence obtained from BON in discovery; and Gilleon Frieson's testimony at trial. (5/11/2023 WCDC/HBC joint response, pp. 2-3). And these facts were added as Findings of Fact in the amended order. (6/2/2023 Order, FOF 48-53, pp. 17-18).

In Rule 59 motions, the movant must be sufficiently clear in framing his objection so as to draw the court's attention to the precise nature of the alleged error. *Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011). *See also, Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (holding that where a party objected only to the time allowed for payment of an attorney fee award, but not the fee award itself, his Rule 59 motion was not adequately specific to challenge the fee award) (citation omitted). And see, *Hatfield v. Hatfield*, 327 S.C. 360, 369, 489 S.E.2d 212, 217 (Ct. App. 1997) (Rule 59 motion for reconsideration of order awarding wife's inherited stock to husband did not specifically raise the issue of transmutation of stock, and, thus, the issue was not preserved for review).

The unchallenged findings and conclusions are sufficient to support the original order and, thus, it should not have been disturbed, even if "another finding is, *arguably*, found to be not supported by the evidence. *Dawson Industries, Inc. v. Godley Construction Co., Inc.*, 29 N.C.App. 270, 224 S.E.2d 266 (1976), *cert. denied,* 290 N.C. 551, 226 S.E.2d 509 (1976); *see also Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 328, 730 S.E.2d 282, 284 (2012) (holding that unappealed grounds become law of the case.)). *And see, Cowburn v. Leventis*, 619 S.E.2d 437, 449 (Ct. App. 2005). "If the party is not **reasonably clear** in his objection to the perceived error, he waives his right to challenge the erroneous ruling on appeal. *Buist v. Buist*, 410 S.C. 569, 575, 766 S.E.2d 381, 384 (2014) (citation omitted) (emphasis added). See also, *Hatfield v. Hatfield*,

327 S.C. 360, 489 S.E.2d 212 (Ct. App. 1997) ("Wife contends the stock holdings should be deemed transmuted and equitably divided. This issue is not properly before the court for review. Although Wife did file a Rule 59(e), SCRCP motion for reconsideration of the judge's order, she did not specifically raise the issue of transmutation of the stock[.]"). *Id.* at 369, 489 S.E.2d at 217 (citations omitted). Again, the distinction between what was argued and what was not argued in the Rule 59 motion in *Hatfield,* seems much less distinct than the difference between arguing that the LHSC stock value in 2017 was speculative, but not arguing that award of damages in the amount of $250,000 owed on the real property purchase is speculative.

"Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011). "Of course, a party is not required to use the exact name of a legal doctrine in order to preserve the issue. Nonetheless, the issue must be **sufficiently clear to bring into focus the precise nature of the alleged error** so that it can be reasonably understood by the judge." *Id.*, 395 S.C. at 466, 719 S.E.2d at 642 (citations omitted) (emphasis added). "Every ground of appeal ought to be so distinctly stated that the reviewing court may at once see the point which it is called upon to decide without having to **grope in the dark** to ascertain the precise point at issue." *Herron v. Century BMW*, 395 S.C. at 466, 719 S.E.2d at 643 (citation omitted) (emphasis added).

But the judge is not the only one who must not be left to grope in the dark to ascertain the precise point at issue – the parties are also entitled to *meaningful* notice of the alleged error, and a *meaningful* opportunity to be heard on it. See, e.g., Rule 7, requiring that all motions other than those made in open court "shall state with particularity the grounds therefor, and shall set forth the

relief or order sought." SCRCP 7(b)(1). "By requiring notice to the court and the opposing party of the basis for the motion, rule 7(b)(1) advances the policies of reducing prejudice to either party[.]" *Camp v. Camp*, 386 S.C. 571, 575, 689 S.E.2d 634, 636 (2010) (citation omitted). "Therefore, when a motion is challenged for a lack of particularity, the court should ask whether any party is prejudiced by a lack of particularity[.]" *Id.* (citation omitted).

WCDC argued that the motion was so imprecise that WCDC had to guess what errors were being raised. (5/10/2023 WCDC/HBC joint return, p. 4). This constitutes prejudice because WCDC was deprived of meaningful notice of the precise error at issue. WCDC argued this prejudice to the court at the hearing on BON's motion and again objected to BON's argument at that hearing on matters it did not include in its motion. (5/12/2023 Tr. p. 45, line 11 – p. 46, line 8).

Due to the lack of particularity in the motion, the court should have denied BON's motion to amend as to all issues other than the attorneys' fees awards (to which WCDC and HBC conceded), due to prejudice suffered by WCDC. And this Court should reverse the June 2, 2023 Order as to its Conclusion of Law 12, and the original damages award should be reinstated.

CONCLUSION

Based on all of the above, WCDC respectfully requests that the Court reverse the trial court's June 2, 2023 order as to its Conclusion of Law 12 and order the court to reinstate the award of $250,000 to WCDC for the balance owed on the real estate purchase.

Respectfully submitted,

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November 6, 2023

The South Carolina Court of Appeals

Bank of Newington, Appellant-Respondent,
v.
LHSC, Inc., Williamsburg County Development Corporation,
Viking Fire Protection, Inc. of the Southeast, and HBC, Inc., Defendants,
of which Williamsburg County Development Corporation
and HBC, Inc. are the Respondents-Appellants,
AND
HBC, Inc., Cross-Claimant, Respondent-Appellant,
v.
LHSC, Inc., Cross-Claim Defendant,
AND
HBC, Inc., 3rd Party Plaintiff, Respondent-Appellant,
v.
Louis Hornick, II, and Blake Fickling, 3rd Party Defendants,
AND
Williamsburg County Development Corporation, CrossClaimant,
Respondent-Appellant,
v.
LHSC, Inc., Cross-Claim Defendant,
AND
Williamsburg County Development Corporation, 3rd Party Plaintiff,
Respondent-Appellant,
v.
Louis Hornick, II, and Blake Fickling, 3rd Party Defendants.

Appellate Case No. 2023-001087

PROOF OF SERVICE

Undersigned certifies that the above Initial Brief was filed electronically and served electronically and by regular U.S. mail on November 6, 2023 to all parties as follows:

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November 6, 2023

VIA EMAIL AND US MAIL:
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The Honorable Jenny Abbott Kitchings
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RE: Bank of Newington v. LHSC, Inc., et al.
Case Nos.: 2019-CP-45-00193 and 2018-CP-45-00258
Appellate Case No. 2023-001087

Dear Ms. Kitchings,

Please find attached hereto the Initial Brief of Respondent/Appellant, Williamsburg County Development Corporation and Designation of Matter to be Included in the Appeal by Williamsburg County Development Corporation along with proof of service. Please note that a copy is being mailed as well.

By copy of this letter to Walker Willcox, attorney for Appellant Bank of Newington, and Wesley D. Few, attorney for the Respondent HBC, Inc. I am serving them with copies of the same.

If you have any questions or need additional information, please do not hesitate to contact me.

Thanking you for your consideration, I am

Very truly yours,

Jenkinson, Kellahan, Thompson & Reynolds, PA

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WEJ/lls
Enclosure(s): as stated
Cc: Wesley D. Few, Esquire – via email and US Mail
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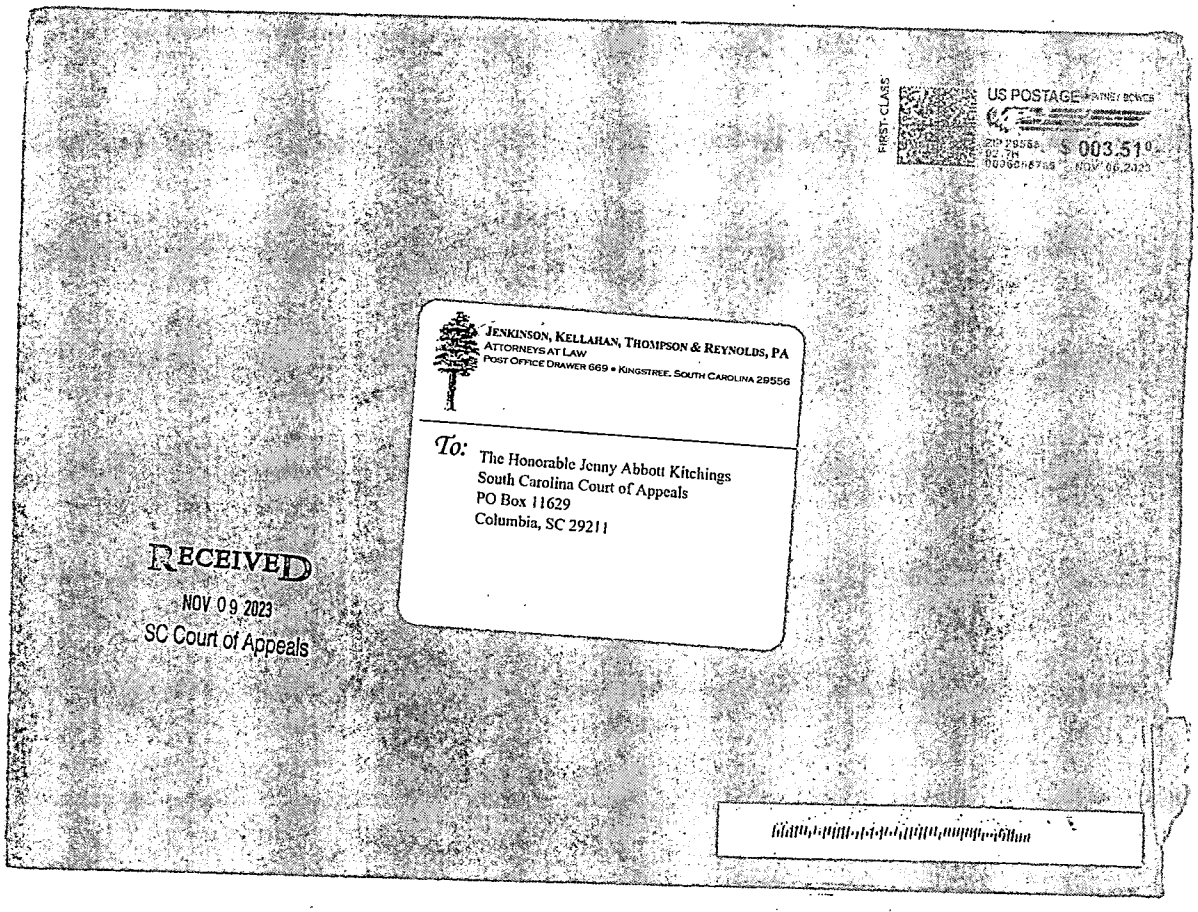

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