THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Bentley D. Price

Case No. 2015-CP-07-02047

Appellant Case No. 2023-000222

James R. Brady……..……..……..…..……...Respondent.

v.

Hilton Head Homes at Allenwood, LLC,
Village Square Development Company, LLC,
Lancaster Redevelopment Corp. and
Gary Grossman …….....Appellants,

SECOND AMENDED FINAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

I. THE CIRCUIT COURT ERRED IN REFUSING TO GRANT A DIRECTED VERDICT OR MOTION NOTWITHSTANDING THE VERDICT IN THIS MATTER WHERE THE EVIDENCE SHOWED THE ONLY AGREEMENT THE PLAINTIFF HAD WAS WITH TWO LIMITED LIABILITY COMPANIES DISMISSED BY THE PLAINTIFF AT THE START OF TRIAL WHERE MERGER CLAUSES SHOW THAT THOSE AGREEMENTS SUPERSEDED ANY AND ALL PRIOR REPRESENTATIONS AND WARRANTIES SO THAT THE REMANING DEFENDANT GARY GROSSMAN HAD NO AGREEMENT WITH THE PLAINTIFF

II. THE CIRCUIT COURT ERRED IN NOT RELYING UPON THE STATUTE OF FRAUDS TO GRANT A DIRECTED VERDICT OR JUDGMENT NOTWITHSTANDING THE VERDICT WHERE THE CHIEF DOCUMENT RELIED UPON BY THE PLAINTIFF WAS AN UNSIGNED LETTER FOR WORK TO BE PERFORMED LONGER THAN IN THE SPACE OF ONE YEAR FROM THE MAKING OF THE LETTER

STATEMENT OF THE CASE

This matter is before this Court appealing the Order of the Honorable Bentley D. Price dated January 13, 2023. (ROA 1-6) In that Order, Judge Price denied the Defendant Gary Grossman's motion for a judgment notwithstanding the verdict and/or vacation of judgment pursuant to Rule 50(b) SCRCivP filed September 7, 2022 (ROA 44-46)

This case commenced with the filing of a Summons and Complaint on August 25, 2015.[1] (ROA 182-190) In his Complaint, the Plaintiff asserted causes of action for breach of contract, quantum meruit, and conversion arising out of his former employment to market and sell homes at developments on Hilton Head Island. *Id.* There are no causes of action for fraud or negligent misrepresentation. *Id.*

[1] There was an earlier case between these parties which was dismissed pursuant to Rule 40(j). *See Brady v. Hilton Head Homes at Allenwood*, 2009-CP-07-2690 (ROA 26-27). The current case started a new with the filing of the Summons and Complaint on August 25, 2015

The Defendants Hilton Head Homes at Allenwood, LLC, and Village Square Development, LLC, are South Carolina limited liability companies. *Id.* The Defendant Lancaster Redevelopment Corporation is a Pennsylvania corporation. *Id.* Gary Grossman is an individual residing in Pennsylvania. *Id.* Lancaster Redevelopment Corporation is sole Member of Hilton Head Homes at Allenwood, LLC, and Village Square Development, LLC. (ROA 593-640). Mr. Grossman serves as the President of Lancaster Redevelopment Corporation. *Id.* The Plaintiff never had any employment agreement with Mr. Grossman, but, rather, with these entities. (ROA 653-655).

The Defendants filed their Answer and Counterclaim on September 14, 2015, setting forth affirmative defenses and causes of action against Mr. Brady. (ROA 172-181). In the Answer and Counterclaim, the Defendants asserted that pursuant to an agreement with Lancaster Redevelopment Corporation, the Plaintiff was to have provided services to Hilton Head Homes at Allenwood, LLC, Village Square Development, LLC, and Lancaster Redevelopment Corporation in connection the construction, sales, and marketing of certain development in Beaufort County. *Id.* The Defendants alleged that loans and advances were given to the Plaintiff for work which was not performed and for which the Defendants would be repaid prior to any distributions to be made to the Plaintiff. *Id.* The Defendants further alleged that the Plaintiff failed to perform so that the Defendants had to hire third parties to complete the Plaintiff's job. *Id.* Hilton Head Homes at Allenwood, LLC, Village Square Development, LLC, and Lancaster Redevelopment Corporation made numerous payments to the Plaintiff in excess of Six Hundred Thousand and No/100 ($600,000.00) Dollars (ROA 247) The Defendants asserted causes of action against the Plaintiff for breach of contract and unjust enrichment for actual damages in excess of Six Hundred Thousand and No/100 ($600,000.00) Dollars in amounts to be determined at trial. *Id.*

On July 27, 2016, the Plaintiff submitted his Reply to Counterclaim [sic] setting forth some affirmative defenses. (ROA 164-171)

Discovery commenced, including the taking of an out of state deposition of Ms. Ginger Griffith, who has worked for Lancaster Redevelopment Corporation as treasurer until the company succumbed to the Great Recession in 2010. (ROA 511-565)

The Plaintiff filed a Motion for Summary Judgment as to the Defendants' Counterclaims on January 5, 2017 (ROA 143-145) and January 8, 2019. (ROA 140-142)

While the motion was pending, the parties participated in mediation which resulted in a provisional settlement which ultimately fell apart. (ROA 492-510)

The hearing of the Plaintiff's motion for summary judgment was continued by consent due to scheduling conflicts, including mandatory evacuations order during one of the times the motion was scheduled to be heard. (ROA 23-25)

The parties filed a Consent Motion for an Order of Protection and for a Status Conference to Set a Trial Date Certain. (ROA 138-139)

The parties also filed their Memoranda in Support and in Opposition to the Plaintiff's Motion for Summary Judgment on February 4, 2019. (ROA 49-137)

The Motion was heard by the Honorable J. Mark Hayes, II, on February 6, 2019, in Beaufort who, two days after the motion hearing, entered his Form 4 Order granting the Plaintiff Summary Judgment. (ROA 18-20).

The case was then appealed to this Court by Notice of Appeal filed February 10, 2019 (ROA 151-163) and Amended Notice of Appeal filed February 11, 2019 (ROA 146-150). Judge Hayes' Final Order was filed March 1, 2019, while this appeal was pending. (ROA 15-17) This Court heard the appeal of the Order of the Honorable J. Mark Hayes, II, dated February 8, 2019. (ROA 18-20) This Court denied that appeal. (ROA 11-14)

The case came to trial before the Honorable Bentley D. Price on August 29 and 30, 2022. (ROA 206-484)

At the beginning of the trial of this case on August 29, 2022, the Defendants Hilton Head Homes at Allenwood, LLC, Village Square Development Company, LLC, and Lancaster Redevelopment Corporation were dismissed by the Plaintiff. (ROA 365-385). Only the Defendants Hilton Head Homes at Allenwood, LLC and Village Square Development, LLC, have any written agreement with the Plaintiff. (ROA 368) Lancaster Redevelopment Corporation was the only member of those two limited liability companies. (*Id.*) There were Assignments from 2004 in which the Plaintiff and another individual agreed to be members of those limited liability companies. (ROA 368-369) Judge Price allowed the corporate defendants to be dismissed. (ROA 384-385)

At the close of evidence, the Defendant moved to amend his answer to assert a Statue of Frauds defense under Rule 15(b) SCRCivP as well as for a directed verdict on all causes of action: breach of contract, quantum meruit, conversion, and for the demand for punitive damages. (ROA 305-312) As quantum meruit was an equitable claim, it did not go to the jury, by stipulation. (ROA 310-311). Judge Price denied the motion for a directed verdict as to the breach of contract claim and ruled that the quantum meruit claim was for his determination. (ROA at 310-311). He also declined to charge punitive damages at that time. *Id.* He also denied the motion as to the conversion cause of action. *Id.*

The jury received the case after Judge Price's charges and closing arguments. (ROA 350-351) After deliberations, the jury returned a verdict against the Defendant for $711,027.00 finding a breach of contract by Gary Grossman and for damages for conversion in the same amount. (ROA 7-10) (ROA 355-356)

After the verdict, Judge Price directed a verdict in favor of Mr. Grossman as to punitive damages and as to quantum meruit. (ROA 9-10).

On September 7, 2022, Mr. Grossman moved for a judgment notwithstanding the verdict and/or vacation of judgment pursuant to Rule 50(b) SCRCivP. (ROA 44-46) Judge Price heard that motion on November 2, 2022. (ROA 485-491) By Order of January 13, 2023, Judge Price denied the motion. (ROA 1-7) This appeal followed. (ROA 146-163)

STATEMENT OF FACTS

This matter comes before the Court after the trial of the case to a jury verdict in August, 2022.

The Defendants Hilton Head Homes at Allenwood, LLC, and Village Square Development Company, LLC, are limited liability companies organized and existing pursuant to the laws of the State of South Carolina, which formerly developed two neighborhoods on Hilton Head. (ROA 593-640)

The Defendant Lancaster Redevelopment Corporation is a corporation organized and existing pursuant to the laws of the State of Pennsylvania and authorized to conduct business in South Carolina, and the Defendant Gary L. Grossman is a citizen and resident of the State of Pennsylvania. (ROA 180)

Lancaster Redevelopment Corporation is the Member of both Hilton Head Homes at Allenwood, LLC, and Village Square Development Company, LLC. (ROA 653-655)

Mr. Brady and Mr. Grossman met each other at a national builder's convention in 1998. (ROA 406-408, ROA 443; ROA 259) Mr. Brady was interested in Mr. Grossman's panelized building products. (ROA 407) They eventually became friends, great friends. (ROA at 407) Mr. Grossman helped Mr. Brady with a development known as Cypress Harbor in Jasper County. (ROA 444; ROA 447). Cypress Harbor was actually failing at the time with threats of

foreclosure and pursuit of deficiency judgments against Mr. Brady. (ROA 447-448) Mr. Grossman advised Mr. Brady that Lancaster Redevelopment Corporation would be the one hundred percent owner of separate limited liability companies that would conduct transactions on Hilton Head regarding townhomes and single family homes. ROA 450-451) Mr. Grossman also arranged for financing and to help get the Cypress Harbor development back on track. (ROA 255-256)

Eventually, Mr. Grossman and Mr. Brady entered into negotiations for Mr. Brady to help with a development known as Allenwood. (ROA at 253) Lancaster Redevelopment Corporation was to be the purchaser of the lots at Allenwood. (ROA at 445)

In February of 2004, the Plaintiff claimed to have received an unsigned letter setting for the terms of employment . *Id.* (ROA 249) The letter had Mr. Grossman's name at the top in the letterhead. (ROA 254) The letter states that Lancaster Redevelopment Corporation was to purchase certain lots and Hilton Head Homes, LLC, would be developing sixty-four family lots and that the Allenwood project would be separate and hopefully not subject to any creditor of Hilton Head Homes, Inc. versus Hilton Head Homes, LLC. *Id.*

The letter went on to say that Lancaster Redevelopment Corporation would own 100% of the companies but would engage the Plaintiff to work as an independent contractor along with a person named Joy Walker. Again, the letter states that Lancaster Redevelopment Corporation would be engaging the Plaintiff to perform services as an independent contractor subject to those terms. *Id.* It does not say that Gary Grossman would be engaging Mr. Brady. *Id.* At the beginning of the trial of this case, the Plaintiff dismissed Lancaster Redevelopment Corporation, Hilton Head Homes at Allenwood, LLC, and Village Square Development Company, LLC. (ROA 384-385). The letter was not signed by Mr. Grossman. (ROA 653-655)

At trial, no one could produce a signed copy of the February 2004 letter. (ROA 223) No one has seen a signed copy. (ROA 226; ROA 249)

Pursuant to the terms and conditions of an agreement with Lancaster Redevelopment Corporation, the Plaintiff was to have provided services to Hilton Head Homes at Allenwood, LLC, Village Square Development Company, LLC, and Lancaster Redevelopment Corporation in connection with the construction, sales, and marketing of those certain development Hilton Head. *Id.* The letter from February clearly stated that Lancaster Redevelopment Corporation would be the party in agreement with Mr. Brady. (ROA 663-655). Mr. Grossman confirmed that there were to be two limited liability companies to be set up to conduct this business. (ROA 224). He also confirmed he did not sign the letter. *Id.*

The Plaintiff often informed the Defendants Hilton Head Homes at Allenwood, LLC, Village Square Development Company, LLC, and Lancaster Redevelopment Corporation that he could not cover the workload required of him in order to receive commissions and other compensation. *Id.*

The Defendants Hilton Head Homes at Allenwood, LLC, Village Square Development Company, LLC, and Lancaster Redevelopment Corporation made numerous payments to the Plaintiff in spite of his inability to perform as promised and as relied upon by Hilton Head Homes at Allenwood, LLC, Village Square Development Company, LLC, and Lancaster Redevelopment Corporation. (ROA 172-181)

Also in that letter, Mr. Grossman's companies, and Mr. Grossman individually, had to be paid back prior to any profits or distributions to anyone else. (ROA 222)

In July of 2004, five months after the February, 2004, letter, Mr. Brady, along with a gentleman named Arthur F. Long, Jr., entered into two Assignment of Interest agreements with Hilton Head Homes at Allenwood, LLC, and Village Square Development Company, LLC.

(ROA 641-652) Those two Assignment agreements are the only signed contracts by and between the Plaintiff and any party to this dispute. *Id.* (ROA 288)

Both Assignments contain the following language:

> 9.5 Entire Agreement. This assignment constitutes the entire agreement between the parties pertaining to its subject matter, and it supersedes all prior and contemporaneous agreements, representations, and understandings. No supplement, modification, or amendment of this assignment will be binding unless executed in writing by all parties.

(ROA 641-652)

The Operating Agreements are for those same entities for which Lancaster Redevelopment Corporation is the only member of both limited liability companies. (ROA 291) Mr. Brady concurred. *Id.* Mr. Grossman confirmed that Lancaster Redevelopment Corporation is the member and manager of both limited liability companies. (ROA 263-264)

Mr. Brady acknowledged his signatures on both Assignments. (ROA 451-452) Mr. Grossman testified that he thought there was an inked and signed deal when Mr. Brady signed the Assignments. (ROA 228)

Mr. Brady also acknowledged the language in Paragraph 9.5 of the Assignments. (ROA 452-453) Mr. Grossman recognized the same language. (ROA 267-268).

By virtue of these signatures, Mr. Brady became a six percent owner of both of the limited liability companies with no other signed agreement being presented at trial. (ROA 455)

There are no causes of action in the Complaint for fraud or negligent misrepresentation. (ROA 182-188)

In September, 2007, Ginger Griffith, who worked as the treasurer for Lancaster Redevelopment Corporation, wrote to Mr. Brady regarding an analysis of compensation to be paid to him as a result of his employment. (ROA 584-592)

In her correspondence, Ms. Griffith advised that under the terms of the agreement with Lancaster Redevelopment Corporation, past due receivables were to be repaid first. *Id.* She also advised that given carrying costs, there could be no additional monthly expenses funded. *Id.*

Mr. Brady even acknowledged that all cash invested by Mr. Grossman, an entity known as Forest Homes, and Lancaster Redevelopment Corporation would have to be repaid prior to any profit distributions to Mr. Brady. (ROA 458-459) Mr. Brady acknowledged that one hundred per cent of the loans from Lancaster Redevelopment Corporation had to be repaid as a priority distribution. (ROA 467-468)

Mr. Brady did not guaranty any debt for Village Square or for Hilton Head Homes at Allenwood. (ROA 463) He brought nothing to court showing the hours worked. *Id.* Mr. Grossman personally guaranteed over three million dollars in debt for the Allenwood development. (ROA 257, ROA 259)

Ms. Griffith gave her deposition in this matter on December 20, 2018. (ROA 511-5565)

Ms. Griffith testified that as of September of 2007, the housing marking was falling apart and there was standing inventory that could not be sold *Id.* There were rumblings of foreclosures and other hostile actions by lenders against the formerly dismissed entities around this time. *Id.* (ROA 256) There could be no payments to Mr. Brady accordingly. *Id;* (ROA 584-592)

Mr. Grossman testified that in 2007, his companies were in technical default with their lender, Sea Island Bank. (ROA 256). Sea Island Bank sent its first notice of default on July 10, 2007. (ROA 272) The bank ended its reserves for the companies in September of 2007. ROA 273-274) This was after Ms. Griffith sent her letter to Mr. Brady. (*Id.*) Between 2007 and 2009, the banks were "tightening the screws" according to Mr. Grossman. (ROA 274; ROA 278))

Ms. Griffith testified that Mr. Brady was advanced sums during his employment by Hilton Head Homes and by Village Square against fees earned. *Id.* These advances were never

repaid to the Defendants. Any incentive management fees were to be paid after the initial debts from Lancaster Redevelopment or Mr. Grossman were repaid.

In correspondence to Mr. Brady of September 13, 2007, Ms. Griffith wrote

> Given the carrying costs of the inventory, and past due receivables to Forest Homes from Allenwood, the monthly carrying costs at Cypress Harbor and our massive increase in overhead associated with the new plant, LRC [Lancaster Redevelopment Corporation] simply cannot fund any additional monthly expenses.

(ROA 584-592)

Mr. Grossman acknowledged that there were sums due to Mr. Brady from the limited liability companies. (ROA 241, ROA 298) Mr. Grossman stipulated that money was owed, just not by himself individually. (ROA 298-299) Mr. Grossman even agreed to lend ten thousand dollars ($10,000.00) to Lancaster Redevelopment Corporation to give money to Mr. Brady for business development. (ROA 243-244). This dispute ended the friendship between Mr. Brady and Mr. Grossman: the biggest tragedy in the whole dispute. (ROA 245)

As indicated, it was always Lancaster Redevelopment Corporation which had an agreement or intended to have an agreement with Mr. Brady, and not the only individual Defendant, Gary Grossman. (*Id; see also*, ROA 653-655) Lancaster Redevelopment Corporation and not Mr. Grossman, was going to purchase and develop everything. (ROA 253) Eventually, Mr. Brady had to deal with numerous foreclosures, more than he could count, involving entities or the developments he had. (ROA 474-475).

STANDARD OF REVIEW

Under the state standard, a trial court should not grant JNOV where evidence yields more than one inference. *Gilliland v. Doe*, 357 S.C. 197, 592 S.E.2d 626 (2004) An appellate court may not overturn the decision of a trial court under the state standard if there is any evidence to support the trial court's ruling. *Rogers v. Norfolk Southern Corp.*, 356 S.C. 85, 588 S.E.2d 87 (2003). The Supreme Court has further held that in ruling on motions for directed verdict or judgment notwithstanding the verdict, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions. *Steinke v. S.C. Dep't of Labor Licensing and Regulation*, 356 S.C. 373, 520 S.E.2d 142 (1999).

ARGUMENT

I. THE CIRCUIT COURT ERRED IN REFUSING TO GRANT A DIRECTED VERDICT OR MOTION NOTWITHSTANDING THE VERDICT IN THIS MATTER WHERE THE EVIDENCE SHOWED THE ONLY AGREEMENT THE PLAINTIFF HAD WAS WITH TWO LIMITED LIABILITY COMPANIES DISMISSED BY THE PLAINTIFF AT THE START OF TRIAL WHERE MERGER CLAUSES SHOW THAT THOSE AGREEMENTS SUPERSEDED ANY AND ALL PRIOR REPRESENTATIONS AND WARRANTIES SO THAT THE REMANING DEFENDANT GARY GROSSMAN HAD NO AGREEMENT WITH THE PLAINTIFF

The trial court erred in not granting a directed verdict and, subsequent, a judgment notwithstanding a verdict where the Entire Agreement language contained in the Paragraph 9.5 of the Assignments set forth entire agreement and language and merged all representations into those Assignments.

As set forth above, language is as follows:

> 9.5 Entire Agreement. This assignment constitutes the entire agreement between the parties pertaining to its subject matter, and it supersedes all prior and contemporaneous agreements, representations, and understandings. No supplement, modification, or amendment of this assignment will be binding unless executed in writing by all parties.

(ROA 621-632)

With such language in place and relied upon and agreed to by Mr. Brady, his reliance on any earlier representations from an unsigned letter February 2004 is misplaced and should have led to a directed verdict and JNOV.

Any reliance on any other document is misplaced as the Assignment contained the entire agreement of all which were merged into Assignment language. This case is analogous to *Wilson v. Landstrom*, 281 S.C .260, 315 S.E.2d 130 (Ct. App. 1984) in which this Court went through the doctrine of merger arising out of a deed, another form of contract. Citing the

Supreme Court case of *Charleston Western Carolina Railway Co. v. Joyce* (1957), this Court expounded as follows:

> The doctrine of merger is founded upon the privilege, which parties always possess, of changing their contract obligations by further agreements prior to performance. The execution, delivery, and acceptance of a deed varying form the terms of antecedent contract indicated an amendment of the original contract, and generally the rights of the parties are fixed by their expressions as contained in the deed. [Citations omitted.} **** **Where there is no mistake or fraud** a deed executed subsequently to the making of an executory contract for the sale of land is generally regarded as conclusive evidence of a previous modification of the executory contact. A deed executed subsequent to the make of an executory contract for the sale of land surpasses that contract.

231 S.C. at 504-505, 99 S.E. 2d 1983(quoting with approval from *Snyder v. Roberts*, 45 Wn.2d 865, 278 P.2d 348 (1955), and from 55 Am.Jur., Vendor and Purchaser, Para. 327)(emphasis added)

The same should be said to this case as to contracts entered into after any alleged agreement to enter into an agreement and which contains Entire Agreement language without any fraud or mistake. Here, there is no fraud or mistake alleged. There was no evidence of either presented or pled. This has been good law in South Carolina for over two hundred years. The terms of a completely integrated agreement cannot be varied or contradicted by parol evidence of prior contemporaneous agreements not included in the writing. *Wilson, id.* at 260, 315 S.E2d 130; *Armour Fertilizer Works v. Hyman*, 120 S.C. 375, 113 S.E. 330 (1922); *M'Dowall v. Beckly*, 9 S.C.L. (2 Mill)(1818). The Assignments were completely integrated agreements by and between Mr. Brady and two of the Defendants which he dismissed. All representations and agreements were contained therein and the trial court should have granted its directed verdict, and, subsequently, its JNOV.

Similarly, in *Redwend Ltd. Partnership v. Edwards*, 354 S.C. 459, 581 S.E.2d 496 (Ct. App. 2003), this Court examined an entire agreement clause contained in a partnership

withdrawal agreement. *Id.* That withdrawal agreement contained language similar to that of Paragraph 9.5 in the Assignments at issue in this case stating it contained the "entire agreement and understanding" between the parties. *Id.* In *Redwend*, the trial court granted summary judgment to the withdrawing partner in a case alleging fraud and negligent misrepresentation stating the entire agreement language barred reliance by the other partner. *Id.* This Court disagreed due to the causes of action for fraud and negligent misrepresentation. *Id.* Neither of those causes of action were pled in this case. The Court cited the case relied upon by the trial court, which is on point here: *One-O-One Enters., Inc. v. Varuson* , 848 F.2d 1283 (D.C.Cir. 1988). One may not reasonably rely on prior representations where the agreement "supersede[s] any and all previous understandings and agreements." *Id.* at 1286, as cited in *Redwend, id.* That is exactly what happened between the parties here. Mr. Brady cannot rely on unsigned letter from February of 2004 when the July of 2004 Assignments contained a valid and enforceable entire agreement clause. Mr. Brady admitted signing that document and admitted its language at trial (ROA 470) His reliance on any earlier agreement is barred and misplaced. Accordingly, the trial court should have granted a directed verdict as well as a judgment notwithstanding the verdict.

A contract with an Entire Agreement provision should be enforced as written unless there are allegations of fraud or negligent misrepresentation, none of which there are in this case. In *Slack v. James*, 364 S.C. 609, 614 S.E.2d 636 (2005), the Supreme Court examined a real property sales contract that contained an Entire Agreement provision. After entering into a sales contract, the buyer of the property discovered there was an sewer easement running across the property. *Id.* The buyers refused to close claiming they had asked the sellers' real estate agent about easements and that agent informed them there were none. *Id.* The sellers sued for breach of contract and the sellers counterclaimed for fraud, negligent misrepresentation and violations

of the South Carolina Unfair Trade Practices Act (the UTPA). *Id.* The trial court dismissed the counterclaims for fraud, negligent misrepresentation, the UTPA, and parts of the buyers' breach of contract claim. *Id.* The trial court focused on the lack of reliance and the doctrine of merger. *Id.* This Court reversed. *Id.* The Supreme Court upheld this Court's ruling. *Id.* The entire agreement language "did not afford any protection to Sellers against allegations of fraud and negligent misrepresentation". *Id.* However, breach of contract or other claims are precluded by the parol evidence rule and the entire agreement language. *Id.* The same is true in this case. Accordingly, not granting a directed verdict or JNOV constitutes an error of law.

II. THE CIRCUIT COURT ERRED IN NOT RELYING UPON THE STATUTE OF FRAUDS TO GRANT A DIRECTED VERDICT OR JUDGMENT NOTWITHSTANDING THE VERDICT WHERE THE CHIEF DOCUMENT RELIED UPON BY THE PLAINTIFF WAS AN UNSIGNED LETTER FOR WORK TO BE PERFORMED LONGER THAN IN THE SPACE OF ONE YEAR FROM THE MAKING OF THE LETTER

The alleged agreement was not signed and violates the Statute of Frauds. S.C. Code Ann. §32-3-10(5) and Mr. Grossman cannot be charged with the terms thereof where it was never signed by him.

Mr. Brady agreed that the 2004 letter could not have been fulfilled within a year:

Q. So this agreement from 2004 was in place for well over a year; correct?

A. This was – this is what we agreed on to go forward with that development

(ROA 470) In fact, he said it would be "lead-up time" before the development would be up and running. *Id.* Failure to render that in a writing signed by Mr. Grossman makes it unenforceable.

As in *Player v. Chandler*, 299 S.C. 101, 382 S.E.2d (1989), in this case there was not any contract that cannot be performed within one year must be in writing and signed by the parting against whom it is seeking to be enforced. S.C. Code Ann. §32-3-10. Also, a contract required

to be in writing by the South Carolina cannot be orally modified. *Windham v. Honeycutt*, 279 S.C. 109, 302 S.E2d 856 (1983)(court held evidence of oral modification of the real estate contract as violative of the Statute of Frauds). The Plaintiff argued part performance at trial. (Transcript Vol. II, pp 100-103). However, in order to remove an agreement from the Statute of Frauds, there must be acts related clearly and unequivocally to the agreement, exclusive of any other relation to between the parties touching such agreement. *Player, supra,* (citing *Aust v. Beard*, 230 S.C. 515, 96 S.E.2d 558 (1957); *Gibson v. Hrysikos*, 293 S.C. 8, 358 S.E.2d. 173 (Ct. App. 1987)) Here, the evidence was that Mr. Grossman intended for there to be agreements with Hilton Head Homes at Allenwood, LLC; Village Square Development Company, LLC; Lancaster Redevelopment Corporation which he acknowledged. (ROA 221) There was not testimony of actions by Mr. Grossman other than acknowledgment that these three companies owed Mr. Brady compensation (ROA 239; 296) Mr. Grossman stipulated that money was owed, just not by himself individually. (ROA 296-297) Mr. Grossman even agreed to lend ten thousand dollars ($10,000.00) to Lancaster Redevelopment Corporation to give money to Mr. Brady for business development. (ROA 241-242) There was no evidence presented that Mr. Grossman ever did anything to lend credence to a partial performance individually. (ROA 204-482)

The Court should have allowed the amendment of the pleadings to conform to the evidence under Rule 15(b) SRCivP. Such amendments are to be liberally allowed when no prejudice to the opposing party will result. *Harvey v. Strickland*, 350 S.C. 303, 566 S.E.2d 529 (2002). Here, there is no prejudice when no party could produce a signed copy of the letter from 2004 and the entire case hinges upon that document, which violates the Statute of Frauds where the Plaintiff introduced the letter, discussed the letter at length, and where the evidence showed that Mr. Grossman intended for the corporate entities to be bound to the obligations to the

Plaintiff. It was the Plaintiff who made this an issue throughout the trial, and the amendment should have been allowed.

CONCLUSION

The Circuit Court improperly denied the motions for directed verdict, for JNOV, and to allow the amendment of pleadings to conform to the evidence.

For these reasons, the decision of the Circuit Court should be REVERSED.

Respectfully submitted:

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