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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from York County
Court of Common Pleas

William A. McKinnon, Circuit Court Judge

Appellate Case No. 2022-000580
Circuit Court Case No. 2018-CP-46-03726

The Grapevine of Riverwalk, Inc.,

Respondent,

v.

Riverwalk River District Building 6, LLC, Mark S. Mather, GRH Development Resources, LLC, The Greens of Rock Hill, LLC, and Assured Administration, LLC,

Appellants.

FINAL BRIEF OF RESPONDENT

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PROLOGUE

I don't understand what fair is.

–Mark Mather[1]

STATEMENT OF ISSUES ON APPEAL

I. Did the trial court err in denying Building 6's motion to strike Grapevine's demand for a jury trial?

A. As an initial matter, must Building 6's challenge to the trial court's denial of its motion to strike Grapevine's demand for a jury trial fail because it is not properly before this Court for review?

(1) Because the trial court's order denying Building 6's motion to strike Grapevine's demand for a jury trial is an order affecting the mode of trial, did Building 6 waive any challenge on this issue by not immediately appealing the order?

(2) Even assuming, *arguendo*, the trial court's order denying Building 6's motion to strike Grapevine's demand for a jury trial is an order that it did not have to immediately appeal, did Building 6 nonetheless waive any challenge to the order by not properly appealing it?

B. In any event, does Building 6's challenge to the trial court's denial of its motion to strike Grapevine's demand for a jury trial fail on the merits?

II. Was Building 6 entitled to "judgment as a matter of law" with regard to the Option to Purchase?

A. Did Grapevine properly execute its notice to exercise the Option to Purchase?

B. Did Grapevine take all actions necessary to perform under the Lease?

III. Did the trial court properly grant Grapevine specific performance?

IV. Is Building 6 correct that the trial court determined as a matter of law that common areas could be used "exclusively" by Grapevine?

V. Did the trial court correctly deny JNOV as to the negligent misrepresentation claims against all but one Appellant because all elements were met and the jury properly determined that each of the Appellants made a negligent misrepresentation to Grapevine?

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[1] (R. p. 1098:22.) All references to a transcript ("Tr.") are to the trial transcript unless otherwise noted.

VI. Should the trial court's award of attorney fees and costs to Grapevine be affirmed?

A. Building 6 argues that Grapevine could not selectively enjoy the Lease. Is this argument availing?

(1) Is this argument properly before the Court for review?

(2) Is this argument meritorious?

B. Building 6 argues that the Lease did not permit attorney fees incurred in pursuing extra-contractual damages. Is this argument availing?

(1) Is this argument properly before the Court for review?

(2) Is this argument meritorious?

C. Building 6 argues that the amount of the attorney fees award is unreasonable. Is this argument availing?

STATEMENT OF THE CASE

This action arises primarily from a dispute between Respondent, The Grapevine of Riverwalk, Inc. ("Grapevine"), and its landlord, Riverwalk River District Building 6, LLC ("Building 6"), over Grapevine's lease and option to purchase ("Lease") commercial space in the "River District" section of the Riverwalk Development in York County, South Carolina. Grapevine alleges that Building 6 failed to honor the Option to Purchase provision of the Lease. Grapevine also alleges that Building 6 never intended to honor the Option to Purchase and Appellants made negligent misrepresentations regarding whether their bank required a two-year lease from Grapevine before it could purchase the Premises and further as to the right of customers of Grapevine and others to use patio common area adjacent to its Premises.

Grapevine filed this lawsuit in December 2018, naming Building 6 as the only defendant and asserting claims for specific performance of the Option to Purchase, breach of contract, breach of contract accompanied by fraudulent act, and several tort claims. (R. pp. 39-51). Building 6 answered. (R. pp. 82-94.) Grapevine and Building 6 both demanded a jury trial. (R. pp. 39-51, 82-

94.) In March 2020, Grapevine amended its complaint to name four additional parties[2] and to assert additional claims. (R. pp. 96-118.) Grapevine and Appellants once again demanded a jury trial. (R. pp. 96-132.)

In January 2021, Grapevine filed a second amended complaint, adding a claim for negligent misrepresentation against all Appellants. (R. pp. 134-157.) For the first time, Building 6 sought to strike Grapevine's demand for a jury trial. (R. pp. 158-177.) After fully briefing the issue and conducting a hearing via electronic means, the trial court issued an order denying Building 6's motion to strike Grapevine's jury demand. (R. pp. 1-7.)

Once our courts were able to go back into operation following the worst of the COVID-19 crisis, this case was tried before the Honorable William McKinnon and a jury on August 23-27, 2021. After the presentation of evidence and motions by the parties, the jury responded as follows (highlighted in bold print) to the four questions presented to it on the verdict form:

> 1. Did Building 6 breach its lease agreement with Grapevine in regards to the lease's option to purchase?
>
>   **Yes, resulting in damages in the amount of $221,700.00**
>
> 2. Did Building 6 breach its lease agreement with Grapevine in regards to the lease's use of the patio/common space?
>
>   **Yes, resulting in damages in the amount of $146,124.00**
>
> 3. Did any Appellant(s) make any negligent misrepresentations to the plaintiff?
>
>   **Yes as to all Defendants, resulting in damages in the amount of $96,800.00**

[2] The additional corporate Appellants are affiliated entities of Building 6: GRH Development Services, LLC ("GRH"); The Greens of Rock Hill, LLC ("Greens"); and Assured Administration, LLC ("Assured"). In addition, Grapevine added Mark Mather, alleging that Mr. Mather "has the ultimate decision-making authority for all the corporate Defendants." (R. p. 141 ¶ 52.) He was dismissed as a party by the grant of a JNOV.

4. Did the defendants Riverwalk River District Building 6, LLC and GRH Development Resources, LLC conspire to harm the Plaintiff?

   No.

(R. pp. 19-20.)[3]

Post-trial motions were filed by Appellants and a request for election of remedies made by Grapevine on issue one (requesting specific performance over the damages relating to the Option to Purchase) as well as pre-judgment interest and attorneys' fees. (R. pp. 244-260; R. pp. 232-243; R. pp. 328-333.) The trial court granted specific performance on issue one, affirmed the remainder of the verdict and awarded attorney fees in an amount reduced to reflect an appropriate amount under the verdict rendered, as well as pre-judgment interest. (R. pp. 8-14, 21-35.) The trial court also entered orders designed to protect the Premises and the use of the patio common area and the parties pending appeal. (R. pp. 8-14, 21-35.) This appeal then followed.

STATEMENT OF FACTS

Grapevine is a wine and craft beer shop and bar. (R. pp. 624, 628-630.) The principals of Grapevine, David and Melanie Sills, are also the owners of two other "Grapevine" locations in Fort Mill and York Market Place. (R. pp. 624-625.) In approximately 2010, the Sills began exploring the possibility of opening a location in Rock Hill's Riverwalk Development. (R. p. 626.)

David Williams, who was then an employee of Building 6's lead developer, Appellant GRH, served as the Sills' primary point of contact. (R. p. 634.) As the Sills met and spoke with David Williams, they provided him with a list of their desired criteria, including approximate square footage, kitchen requirements, and access to "patio space." The Sills explained to Mr. Williams that they "would be most interested" in owning, as opposed to renting, space. Between

2010 and 2014, the Sills explored two potential opportunities with David Williams, but neither of those culminated in a deal, primarily due to the desire of the Sills to own their own space.

In early 2014, Mr. Williams again contacted the Sills to inform them of a new opportunity. Riverwalk's developer was planning to build a mixed-use building in the Riverwalk's "River District." (R. pp. 1324-1340; R. pp. 644-649.) After learning that the developer intended to develop the building referred to in this appeal as Building 6 as "leasable space," and still not for sale, the Sills declined. (R. pp. 651-652.) A few weeks later, Mr. Williams called the Sills with a proposal. Mr. Williams proposed that Grapevine consider entering a lease, with an option for Grapevine to purchase its space after leasing for two years. (R. pp. 1341-1348; R. pp. 653-654.) Although the Sills wanted to purchase their own space, they were informed the Appellants' banker required the two-year lease. As will be discussed later in this brief, the Sills also made inquiries and were provided documents from Appellants showing the wine shop having use of the patio common area space adjacent to the proposed Premises. This was consistent with the Sills' understanding of the use of Common Space in Section 15 of the Lease. Based upon this scenario and representations, the Sills ultimately agreed and entered the Lease with the Option to Purchase the Premises. (R. pp. 655-656, 658, 723-724; R. pp. 1247-1297.)

On February 24, 2014, Mr. Williams sent the Sills a Letter of Intent. From March–June 2014, the parties negotiated the specific terms of the Lease, including the terms of the Option to Purchase. David Williams was Building 6's lead negotiator, and Melanie Sills handled the matter for Grapevine. Melanie Sills reviewed schematic diagrams depicting the location of a proposed "Wine Shop" and adjoining outdoor space. (R. pp. 649-652; R. pp. 1328-1340.) The Sills suggested and/or requested modifications to the drawings including having doors, which opened

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[3] The verdict form was shortened slightly in the interest of space. An exact copy is

upwards similar to garage doors, to allow unimpeded access between the store and the patio common areas. (R. pp. 630-632, 653, 660; R. pp. 1320-1322.)

On June 20, 2014, Melanie Sills, as Grapevine's president, signed the Lease, which contained the Option to Purchase. Mark Mather signed the Agreement on June 23, 2014, on behalf of Building 6's managing member, The Greens of Rock Hill, LLC, and Assured Administrators. (R. pp. 1247-1297.) Throughout the negotiations, the Sills were never informed that the diagrams they were provided, which showed their premises having access to outdoor patio space, was incorrect. (R. p. 661.) Likewise, the Lease did not contain all referenced exhibits, but rather had "place holders." (R. pp. 662-663; R. pp. 670-671.)

Construction of the mixed-use building (i.e. Building 6) was essentially completed by early 2016. Grapevine took possession of its Premises on February 2, 2016. Throughout the first two years of Grapevine's Lease, the parties' relationship was relatively harmonious. For example, Grapevine utilized Building 6's outdoor patio common areas to provide seating and tables for customers as well as non-customers. When a tropical storm was approaching, a representative of Appellants called and reminded the Sills to be careful about leaving any patio furniture loose to avoid any damages or injuries. (R. pp. 726-727; R. p. 1381.) It is important to remember Grapevine never asserted any exclusive rights to use of any portion of the Common Areas as asserted by Building 6 in this appeal and the trial court never made such a judgment. Grapevine simply wanted what it was allowed to use for over two years by Building 6 and what it understood to be its allowable uses under the Lease as to Common Areas.

In that Grapevine intended to purchase its Premises at the first opportunity allowed under the Lease and the Option to Purchase, it did all it could to promote Building 6 and the Riverwalk

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included in the Record on Appeal. (R. pp. 19-20.)

Development generally. This not only reflected well on its store, but helped increase the value of its investment.[4]

Consistent with the terms of the Lease, Grapevine gave the required notice of its intent to purchase. (R. pp. 648, 674-675; R. p. 1262 ¶ 33.) On July 26, 2017, Brian Wilson, an attorney representing Grapevine with regard to the Option to Purchase, sent a letter to Building 6, "Attn: David Williams," titled "Exercise of Option to Purchase." That letter constituted notice of Grapevine's intent to exercise the Option to Purchase and specified a proposed closing date of February 2, 2018. (R. pp. 688-690; R. p. 1298.) The letter also pointed out that the attorney's "review of records filed with the South Carolina Secretary of State and with the York County Clerk of Court does not reveal the existence of [a] condominium project, yet." *Id*. The lawyer requested that Building 6 "take the necessary steps to create [a] horizontal property regime and provide me with a copy of such documentation." (R. p. 1298; R. pp. 690-691.)[5]

Building 6 did not immediately respond to attorney Wilson. He sent two or three follow-up emails before Travis Hege, an employee of GRH, responded on October 13, 2017:

> Good morning, sorry for the delay. I have been in and out of the office lately. Slight correction, I am the Development Director; non-the-less I look forward to working with you to get this completed. I will let you know once I determine what we need to do on our end and will touch base to get this completed.

(R. pp. 1391-1402.)

On October 26, 2017, Grapevine's attorney responded to Mr. Hege, "Please confirm we will be able to close on this condo unit on February 2nd. Please advise if I can assist you in any

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[4] The record reflects somewhere between $200,000 and $300,000 dollars were spent up fitting the space for their store in Building 6. (R. pp. 688-717.) While the Sills are portrayed ad naseum in Appellants' brief as sophisticated parties, the record reflects they are hard-working individuals who have put all of their efforts into making any business venture they undertake succeed. Simply put, they are good people who work hard and keep their word.

fashion, I have experience in setting up horizontal property regimes." (R. pp. 1391-1402.) Mr. Hege replied: "We are working on the condo documents. I will give you an update once I hear back from the lender and our attorney. Sorry for the delay." (R. pp. 1391-1402.) In November 2017, Attorney Todd Brockman contacted Grapevine's attorney, presenting himself as Building 6's attorney and requesting that Grapevine's attorney "please direct any future emails to my attention." (R. pp. 693-694.) Nothing changed regarding any progress in the efforts to close.

Over the next several months, the parties and their attorneys communicated with one another concerning various aspects of the proposed establishment of the Premises as a condominium under the Horizontal Property Regime Act and the sale of that condominium to Grapevine as agreed in the Lease and the Option to Purchase. (R. pp. 693-701; R. pp. 1358-1361.) On April 12, 2018, Mark Mather sent a text message proposing a closing date of April 17, 2018. That proposed date was never utilized by Building 6 and no other closing date was set by it. (R. pp. 701-707, 709-712; R. pp. 1305, 1363-1387.)

As time went on and Building 6 made no progress towards the closing, the parties' relationship became increasingly acrimonious. In late August 2018, Mr. Mather (essentially the developer of Riverwalk) came into the Grapevine store to complain about the way certain cars had double parked. (R. p. 712.) Mr. Mather threatened the Sills that if they got "on the wrong side of this contract … you will never use the patio again." (R. p. 713.) The Sills attempted to calm Mr. Mather even though no one was sure if the cars were Grapevine customers. (R. pp. 714-715; R. p. 1378.) Mr. Mather never responded to their attempt to address the issue. (R. p. 715.) At the time Grapevine exercised its option, a large pile of dirt appeared and blocked Grapevine's view of the river. (R. p. 721.) Letters of default came from Building 6 on numerous petty or improper issues.

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[5] The Horizontal Property Regime Act is found at S.C. Code Ann. § 27-31-10 *et seq.*

(R. p. 721.)[6] On November 1, 2018, the property manager for Building 6 sent Grapevine a letter, informing Grapevine that its Lease gave it no right to use the outdoor patio common areas adjacent to its Premises, and declaring that Grapevine's continued use of those areas was a default of its Lease. (R. pp. 722-723; R. pp. 1379-1380.) Even after receiving that letter, Grapevine was allowed (or not stopped) from continuing to use the patio common areas until March 2019, when Appellants' prior counsel demanded that Grapevine cease using the patio "until and unless a formal agreement can be reached" for Grapevine's use of that area. (R. pp. 721-722; R. pp. 1379-1380.) Interestingly this was the day Building 6 had to file an answer in this lawsuit. Since Building 6 never closed on the Option to Purchase, this litigation ensued.[7] Mr. Mather could never explain why he nor his attorney could not agree to proposed closing dates. (R. pp. 1090-1094.)

STANDARD OF REVIEW

An action for specific performance is one in equity. *Campbell v. Carr*, 361 S.C. 258, 262–63, 603 S.E.2d 625, 627 (Ct. App. 2004). In reviewing a proceeding in equity, this court may find facts based on its own view of the preponderance of the evidence. *Greer v. Spartanburg Technical College*, 338 S.C. 76, 79, 524 S.E.2d 856, 858 (Ct. App. 1999). This broad scope of review does not require this court to ignore the findings below when the trial court was in a better position to evaluate the credibility of the witnesses. *Id*.

An action to construe a contract is an action at law. *McGill v. Moore*, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009). A legal question in an equity case receives review as in law. *Sloan v. Greenville County*, 356 S.C. 531, 546, 590 S.E.2d 338, 346 (Ct. App. 2003). Questions of law may be decided with no particular deference to the trial court. *S.C. Dept. of Transp. v. M & T*

[6] Due to the failure of Building 6 to close, Grapevine also declared a notice of default. (R. pp. 1299-1301.)

Enters. of Mt. Pleasant, LLC, 379 S.C. 645, 654, 667 S.E.2d 7, 12 (Ct. App. 2008). This court may correct errors of law in both legal and equity actions. *Id.*

The granting or refusal of a motion to strike is committed to the sound discretion of the trial court and will not be reversed unless the action of the trial court was an abuse of discretion or controlled by an error of law. *Brown v. Coastal States Life Ins. Co.*, 264 S.C. 190, 213 S.E.2d 726 (1975).

In reviewing the denial of motions for a directed verdict and a JNOV, the evidence and the reasonable inferences that can be drawn therefrom must be viewed in the light most favorable to the non-moving party. *Brady Dev. Co. v. Town of Hilton Head Island*, 312 S.C. 73, 78, 439 S.E.2d 266, 269 (1993); *Evans v. Taylor Made Sandwich Co.*, 337 S.C. 95, 99, 522 S.E.2d 350, 352 (Ct. App. 1999). The motion should be denied where the "evidence yields more than one inference or its inference is in doubt." *Evans*, 337 S.C. at 99, 522 S.E.2d at 352. When considering the motion, neither the appellate court nor the circuit court has authority to decide credibility issues or to resolve conflicts in the testimony and evidence. *Reiland v. Southland Equip. Serv., Inc.*, 330 S.C. 617, 634, 500 S.E.2d 145, 154 (Ct. App. 1998).

When a contract exists, the award of attorney fees is left to the sound discretion of the trial judge and will not be disturbed unless an abuse of discretion is shown. *Smith v. Smith*, 264 S.C. 624, 216 S.E.2d 541 (1975).

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[7] An outdoor seating area was always important to the Grapevine business model. (R. p. 632.)

ARGUMENT

I. The trial court did not err in denying Building 6's motion to strike Grapevine's demand for a jury trial.

A. As an initial matter, Building 6's challenge to the trial court's denial of its motion to strike Grapevine's demand for a jury trial must fail because it is not properly before this Court for review.

(1) The trial court's order denying Building 6's motion to strike Grapevine's demand for a jury trial is an order affecting the mode of trial, and Building 6 waived any challenge on this issue by not immediately appealing the order.

Obviously, the trial court's order denying Building 6's motion to strike Grapevine's demand for a jury trial is an order affecting the mode of trial. Building 6's counsel expressly acknowledged this when he re-raised it (after the trial court had already denied Building 6's motion to trike Grapevine's jury demand by order filed March 10, 2021[8]) the issue of its alleged right to a non-jury trial just as the trial was about to start on August 23, 2021:

> THE COURT: Okay. Tell me, Mr. Martens, you raised the issue of the trial, your argument is it should be a bench trial?
>
> MR. MARTENS: Correct, Your Honor.
>
> THE COURT: Tell me why.
>
> MR. MARTENS: Because the lease calls for it and I, Christopher, can I have a copy.
>
> THE COURT: What paragraph.
>
> MR. MARTENS: Paragraph 59, Your Honor.
>
> THE COURT: It does say that.
>
> MR. MARTENS: It does indeed, Your Honor. As you may recall, when we argued this issue before, as I recall, you stated, not included in your order, but you stated that it was, in fact, a conspicuous provision of the lease. And I think there was an issue

[8] (R. pp. 1-7.)

> about whether parties could waive a waiver, our argument is that the *mode of trial*, jury versus non-jury, is not an issue of concern until the trial is upon us. And therefore while you may waive your right to a jury trial, demanding a jury trial when you have a right to insist upon non-jury, you have not waived the right to insist upon non-jury.

(R. p. 569:4-24 (emphasis added); *see also* R. p. 570:10-14 ("My argument, my position, Your Honor, that the *mode of trial*, whether it is jury or non-jury is of no consequence until it is time for trial. And so we are entitled, we believe entitled to enforce the non-jury trial provision of this lease.") (emphasis added.).)

Orders affecting the mode of trial affect a substantial right as defined in S.C. Code Ann. § 14-3-330(2) "and must, therefore, be appealed immediately." *Lester v. Dawson*, 327 S.C. 263, 266, 491 S.E.2d 240, 241 (1997); *e.g., Foggie v. CSX Transp., Inc.*, 313 S.C. 98, 103, 431 S.E.2d 587, 590 (1993) ("Issues regarding mode of trial must be raised in the trial court at the first opportunity, and the order of the trial judge is immediately appealable."). "Moreover, the failure to timely appeal an order affecting the mode of trial effects a waiver of the right to appeal that issue." *Lester*, 327 S.C. at 266, 491 S.E.2d at 241 (citing *Foggie*, 313 S.C. at 103, 431 S.E.2d at 590).

The trial court denied Building 6's motion to strike Grapevine's demand for a jury trial by order filed March 10, 2021. (R. p. 1-7.) The order was electronically filed, and Building 6's counsel received notice of its entry that day. (R. pp. 1-7.) As an order affecting the mode of trial, the order was immediately appealable, and Building 6 had thirty days to appeal it. Rule 203(b)(1), *SCACR* ("A notice of appeal shall be served on all respondents within thirty (30) days after receipt of written notice of entry of the order or judgment.").[9]

[9] To be clear, Riverwalk did not move for reconsideration of the order, so the provision of Rule 203 that provides, "When a timely motion for judgment n.o.v. (Rule 50, *SCRCP*), motion to alter or amend the judgment (Rules 52 and 59, *SCRCP*), or a motion for a new trial (Rule 59, *SCRCP*) has been made, the time for appeal for all parties shall be stayed and shall run from receipt of written notice of entry of the order granting or denying such motion," did not apply.

Because Building 6 did not immediately appeal the trial court's March 10, 2021, order affecting the mode of trial within the thirty-day window,[10] it waived the right to appeal the issue. *Frampton v. S.C. Dep't of Transp.*, 406 S.C. 377, 385–86, 752 S.E.2d 269, 274 (Ct. App. 2013) (holding that an order denying a motion asserting a right to a non-jury trial is an order affecting the mode of trial and that the failure to immediately appeal the order results in a waiver of the issue); *see also Cobb v. S.C. Dep't of Transp.*, 365 S.C. 360, 363, 618 S.E.2d 299, 300 (2005) ("If an order deprives a party of a mode of trial to which that party is entitled as a matter of right, the order is immediately appealable and failure to do so forever bars appellate review."). Indeed, this Court does not have appellate jurisdiction to review the trial court's order denying Building 6's motion to strike Grapevine's demand for a jury trial,[11] and this unappealed—and now unappealable—order is the law of the case. *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) ("[A]n unappealed ruling, right or wrong, is the law of the case.").

Accordingly, Building 6's challenge to the trial court's denial of its motion to strike Grapevine's demand for a jury trial must fail because it is not properly before this Court for review.

(2) Even assuming, *arguendo*, the trial court's order denying Building 6's motion to strike Grapevine's demand for a jury trial is an order that it did not have to immediately appeal, Building 6 nonetheless waived any challenge to the order by not properly appealing it.

Even assuming, *arguendo*, Building 6 did not have to take an immediate interlocutory appeal of the trial court's order denying its motion to strike Grapevine's demand for a jury trial but could instead wait until final judgment to appeal it, Building 6 did not do so even then. Making no

[10] For that matter, as explained in Argument IA(2) below, even to this day, Building 6 has still not appealed the order.

[11] *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 14–15, 602 S.E.2d 772, 775 (2004) ("The requirement of service of the notice of appeal is jurisdictional, i.e., if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to 'rescue' the delinquent party by extending or ignoring the deadline for service of the notice.").

mention of the trial court's March 10, 2021, order denying its motion to strike Grapevine's jury demand, the body of Building 6's second notice of appeal reads, in its entirety, as follows:

> [Appellants] hereby appeal the following orders by the Honorable William A. McKinnon: Order Regarding Post-Trial Motions, filed December 13, 2021, and Amended Order on Rule 59 Motion and Final Judgment, filed April 19, 2022. Appellants received written notice of the entry of the latter order on April 19, 2022, and this Notice of Appeal is timely served.

(R. pp. 1521-1522.) Building 6's original Notice of Appeal likewise contained no reference to the March 10, 2021 order being appealed. (R. pp. 1512-1513.)

The South Carolina Appellate Court Rules require that the notice of appeal identify the particular orders from which an appeal is taken. Rule 203(e)(1), SCACR ("In appeals from lower courts, the notice of appeal shall contain the following information: . . . (C) The date of the order, judgment, or sentence from which the appeal is taken . . . ."); *see also* Rule 203(d)(1)(B), SCACR ("The notice filed with the appellate court shall be accompanied by the following: . . . (ii) A copy of the order(s) and judgment(s) to be challenged on appeal if they have been reduced to writing . . . .").

While "a mere clerical error in a Notice of Appeal does not warrant dismissal of the appeal,"[12] as illustrated by contrasting the circumstances of the instant case with those that controlled *Weatherford*, the complete absence from Building 6's notices of appeal of any reference whatsoever to the trial court's order filed March 10, 2021, is not a mere clerical error.

Weatherford was an action by an attorney to collect a fee from a client. Following a non-jury trial, the circuit court entered a money judgment for the attorney and thereafter denied the client's motion for reconsideration. The language of the client's ensuing notice of appeal referred only to an appeal of the order denying the motion for reconsideration, without mentioning the original order of judgment. Notably, however, the client's notice of appeal did attach a copy of

the original order. Under the circumstances, the *Weatherford* Court found that the client's failure to reference the original order in the notice of appeal was of a clerical nature and, thus, did not deprive it of appellate jurisdiction:

> Though Client did not "technically" appeal from the trial court's original order by referring to it in the Notice of Appeal, the Client did attach a copy of the order to the Notice. Under these circumstances, we believe Client's omission is of a clerical nature only and this Court has jurisdiction to hear the appeal.

Id. at 577–78, 532 S.E.2d at 313.

The circumstances of the instant case are materially different from *Weatherford*. In *Weatherford*, even though the client did not state in the body of the notice of appeal that the original order was being appealed, the fact that a copy of the original order was attached to the notice of appeal certainly evidenced the client's intent to appeal it. Moreover, the order that the client did reference in the notice of appeal, the order denying reconsideration of the original order, clearly reflected that the client took exception to the original order. In the instant case, however, not only does the notice of appeal not state that an appeal is being taken from the March 10, 2021, order, it also does not attach a copy of that order; nor does it in any other conceivable way reflect any intention on Building 6's part to challenge the order. (R. pp. 1512-1513, 1521-1522.)

Moreover, and, again, assuming, *arguendo*, Building 6 had not already waived any challenge on this issue (the denial of its alleged right to a non-jury trial) when it did not immediately appeal the trial court's March 10, 2021, order denying its motion to strike Grapevine's jury demand, Building 6's post-trial motion for a new trial was untimely and, therefore, failed to preserve Building 6's alleged right to a non-jury trial as a basis for granting Building 6 a new trial.

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[12] *Weatherford v. Price*, 340 S.C. 572, 577, 532 S.E.2d 310, 313 (Ct. App. 2000).

Trial concluded on Friday, August 27, 2021. (*See* R. pp. 532, 1178-1189; R. pp. 19-20.). The trial court allowed the parties "two full weeks," i.e., until Friday, September 10, 2021, to make post-trial motions. (R. p. 1186:4-24.) And Building 6 filed its post-trial motions on Friday, September 10, 2021, seeking, among other things, a new trial absolute on the basis that it was denied it contractual right to a non-jury trial. (R. pp. 288-289.)

Although Building 6's post-trial motions were filed within the two weeks allowed by the trial court, they were not filed within the ten days mandated by Rule 59(b), SCRCP ("The motion for a new trial shall be made promptly after the jury is discharged, or in the discretion of the court not later than 10 days thereafter."), and the trial court did not actually have authority to allow JNOV and new trial motions beyond the ten-day limit in the rules. *See Ex. parte Beard*, 359 S.C. 351, 597 S.E.2d 835 (Ct. App. 2004) ("The established case law is that a trial judge loses jurisdiction over a case when the time to file post-trial motions has elapsed.") (citing *Pitman v. Republic Leasing Co.*, 351 S.C. 429, 432, 570 S.E.2d 187, 189 (Ct. App. 2002)); *Boone v. Goodwin*, 314 S.C. 374, 444 S.E.2d 524 (1994) (reversing the trial court's grant of a new trial and holding that, if a party does not move for a new trial promptly after the jury is discharged, the party must request ten days within which to make the motion and that, if the party makes such a motion within ten days without having first obtained the trial court's permission to do so, the trial court is not authorized to excuse the party's failure to have obtained permission); *see also Ness v. Eckerd Corp.*, 350 S.C. 399, 402, 566 S.E.2d 193, 195 (Ct. App. 2002) ("Although trial judges retain jurisdiction to alter judgments on their own initiative for ten days if a Rule 59(e), SCRCP, motion is filed, after ten days that jurisdiction is lost.").)

Accordingly, for these additional reasons, Riverwalk's challenge to the trial court's denial of its motion to strike Grapevine's demand for a jury trial must fail because it is not properly before this Court for review.

B. In any event, Riverwalk's challenge to the trial court's denial of its motion to strike Grapevine's demand for a jury trial fails on the merits.

When it commenced this action on December 10, 2018, Grapevine demanded a jury trial. (R. p. 50.) Did Building 6 respond by asserting its right to a non-jury trial? No. To the contrary, it expressly demanded a jury trial in its answer filed March 25, 2019. (R. pp. 82-94.) A year later, on March 25, 2000, when Grapevine filed its first amended complaint and again demanded a jury trial,[13] did Building 6 respond by asserting its right to a non-jury trial? No. It again expressly demanded a jury trial in its answer filed April 9, 2020. (R. p. 131.)

It was not until the filing of its motion to strike Grapevine's jury demand on January 29, 2021, when this action was already more than two years old, that Building 6 first asserted any right to a non-jury trial. (R. pp. 158-177.) By this time, the case had already been scheduled—with Building 6's consent—for a date-certain jury trial set to begin on February 16, 2021. (R. p. 570:20 – p. 572:3; R. p. 220.) It so happened that, due to the disruption of our court system caused by the COVID-19 pandemic, the trial of this case did not actually proceed until about six months later, but this does nothing to take away from the fact of Building 6's waiver of any right to a non-jury trial.

"Waiver is the voluntary and intentional relinquishment of a known right." *Provident Life & Acc. Ins. Co. v. Driver*, 317 S.C. 471, 478, 451 S.E.2d 924, 928 (Ct. App. 1994). "Acts that are inconsistent with the continued assertion of a right may also give rise to a waiver." *Id.* The trial court properly found a waiver had occurred. (R. p. 573.)

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[13] (R. pp. 96-118.)

Building 6 expressly waived any right to a non-jury trial when, on multiple occasions, it demanded a jury trial itself. It also effected such a waiver implicitly by acting in a way that is completely irreconcilable with any assertion of a right to a non-jury trial for a period of some two years. Under these circumstances, the trial court cannot possibly be said to have erred in rejecting Building 6's 11th hour attempt to resurrect an alleged right to a non-jury trial that Building 6 itself had already forever laid to rest.

II. Building 6 was not entitled to "judgment as a matter of law" with regard to the Option to Purchase.

As an initial matter, this issue is not preserved for review, because it is an issue that is based on a challenge to the sufficiency of the evidence regarding the claim for breach of the Lease in regard to the Option to Purchase (i.e., question 1 on the verdict form), and Building 6 did not properly preserve it by making a renewed motion for directed verdict on it at the close of all evidence. (*See* R. p. 1099:22 (Grapevine rests its case), R. p. 1122:21 – p. 1124:13 (renewing Appellants' motion for directed verdict as to civil conspiracy and negligent misrepresentation claims, but not renewing a motion for directed verdict in regard to this issue).) *Wright v. Craft*, 372 S.C. 1, 19–20, 640 S.E.2d 486, 496 (Ct. App. 2006) ("When a defendant moves for a directed verdict under Rule 50, SCRCP at the close of the plaintiff's case, he must renew that motion at the close of all evidence. Craft moved for a directed verdict at the close of Wright's case, but failed to renew the motion after concluding his presentation of evidence. Consequently, the denial of Craft's motion is not preserved for our review.") (internal citations omitted); *id.* at 20, 640 S.E.2d at 496 (Moreover, "a motion for JNOV under Rule 50(b), SCRCP is a renewal of a directed verdict motion. When a party fails to renew a motion for a directed verdict at the close of all evidence, he waives his right to move for JNOV.") (internal citations omitted). Additionally, as explained in Argument IA(2) above, Appellants' post-

trial motions,[14] which included not only the aforementioned motion for a new trial but also a motion for JNOV, which is likewise governed by at 10-day time limit, *see* Rule 50(e), SCRCP ("The motion for judgment n.o.v. shall be made promptly after the jury is discharged, or in the discretion of the court not later than 10 days thereafter."), were untimely, because they were not made until more than ten days after trial, and the trial court did not have authority to allow them. *See Ex. parte Beard*, 359 S.C. 351, 597 S.E.2d 835; *Boone*, 314 S.C. 374, 444 S.E.2d 524; *see also Ness*, 350 S.C. at 402, 566 S.E.2d at 195. But even assuming, arguendo, this issue is properly before the Court for review, it is without merit in any event.

Building 6 argues it was an error for the trial court to submit to the jury the question regarding the Option to Purchase and whether or not it breached this contractual provision. In doing so Building 6 is arguing that the evidence on this issue did not yield more than one inference or that the inferences related to the issue were never in doubt. It strains all credibility for Building 6 to make such an argument in light of the evidence before the trial court and the jury.

The specific question presented on the jury form relating to this issue was "Did Building 6 District Building 6, LLC breach its lease agreement with the Grapevine of Building 6, Inc. in regards to the lease's option to purchase?" (R. pp. 19-20.) The jury's answer to this question was yes. On appeal, Building 6's argument must be judged by asking did the evidence and inferences support the jury's verdict. The answer is an undeniable yes.

Grapevine was interested in purchasing a store in Building 6 or possibly earlier in other areas. At all times, including prior sets of negotiations, Grapevine made it clear that it would only enter a deal if it could purchase its Premises. (R. p. 802.) Alan Aschenbrenner, architect for Building 6 who also had a long history of working with the developers of Building 6, introduced

[14] (R. pp. 271-289.)

Melanie and David Sills to David Williams, who was employed by GRH as the person who worked on the front end to coordinate leases and agreements in an attempt to place tenants at properties in the Riverwalk Development including Building 6. (R. pp. 837-838.) David Williams testified the Sills were "always very clear that they wanted to purchase their space." (R. p. 838.) A deal was ultimately reached where the Sills through Grapevine would have to lease the Premises for two years before they could exercise an option to purchase it. Although unhappy with the two-year lease requirement, Grapevine only entered the Lease because it was told the lending bank required such an agreement. Little did they know this was a deliberate misrepresentation designed solely to allow Building 6 obtain its construction loan.

Building 6 had pecuniary reasons for not meeting its requirements to close under the Option to Purchase discussed below. Under these circumstances, there were facts and issue in dispute which mandated that this cause of action go to the jury.

Building 6 acknowledges that Grapevine sent a letter in which it exercised its rights to purchase the Premises. (R. pp. 795-798.) The provision found in paragraph 33 of the Lease states that Grapevine would have the "option to purchase the premises during the third lease year with no less than 120 days advance written notice to the landlord…." Grapevine's letter went on to say "THIS LETTER CONSTITUTES NOTICE, pursuant to paragraph 33 of the Lease, of [Grapevine's] intent to exercise its purchase option." (R. p. 1298.) Building 6 asserts that this letter and the actions taken by Grapevine and its counsel were insufficient to induce an obligation for any performance by it. It is mistaken in this belief as was found by the trial court and the jury.

Further, Building 6 selectively ignores other evidence presented in the case which clearly established that Grapevine did all it could and was required to do under the Lease to exercise its option to purchase. It had an intent to properly exercise its purchase option and was willing,

ready, and able at all times to comply with and close on the purchase of this particular horizontal property regime unit even though Mark Mather acknowledged the ease of the closing. (R. p. 1305.) ("Not anything more than a home closing.")

The problem was Building 6 had no desire, much less any intent, to abide by the contractual terms in entered. Rather, it sought to ignore or frustrate the requirements of the Lease, all the while claiming Grapevine was prohibited from enforcing the Lease and the Option based on Building 6's own actions undertaken in an effort to frustrate the Lease.

Building 6 did all it could to avoid having to close for many self-serving reasons. In order for the lender for Building 6, Bank OZK f/k/a Bank of the Ozarks, to release the unit or Premises to be purchased by Grapevine, the Appellant's collateral would require an increase as they would own less of Building 6 if there was a sale. (R. pp. 852-867.) Releasing the collateral would increase the risk and costs to the borrower. It is no surprise the bank executive testified Building 6, as landlord, **never** followed through with its required request for a partial release of the collateral, even through the date he testified at trial. (R. p. 857.) Building 6 simply never had an intent to honor the Option to Purchase.

In addition, the agreed to purchase price for the Grapevine Premises was $270,000 per the Lease. (R. p. 656.) At the time Grapevine sought to exercise its right to purchase, the unit or Premises was valued at $430,000. A closing as agreed to would not only increase the personal exposure of the landlord, but Building 6 and Appellants would also lose approximately $160,000 in value. (R. p. 934.) Abiding by the Lease and the Option to Purchase entered by Building 6 was not in the financial interest of Building 6 or its partners.

Building 6 continues to provide manufactured reasons it should be allowed to escape the Option to Purchase. This Court of Appeals should not condone such actions based upon self-

serving and financially motivated reasons, especially when the Appellant's excuses are we did not quite get around to fulfilling our promises or responsibilities so you should have done so. Such arguments are specious at best and evidence of an intent to deceive to get what they wanted and then leave Grapevine hanging out to dry.

Further, Building 6 also used Grapevine during the periods in issue to help advertise and build up its general development of this area. (R. p. 731.) The Riverwalk Development stated on its website that Grapevine was "an area where you can enjoy wine, beer, artisan cheese and desserts in the company of friends and neighbors." (R. p. 628; R. pp. 1311-1323.) It took away this right once this litigation commenced. (R. pp. 600-601; R. pp. 627-628.) Exhibits 9 and 10 (Building 6's website) contained representations of the patio area's use by Grapevine until this litigation commenced. (R. pp. 1311-1322.) This makes it difficult, if not impossible, to argue Grapevine never had the right to use the patio common area.

A. Grapevine properly executed its notice to exercise the Option to Purchase.

Building 6 goes on to search for some escape clause by arguing Grapevine did not tender a deposit or execute Exhibit G and that it was mandated to do so. Grapevine, through Mrs. Sills' testimony, established why this is a non-issue. (R. pp. 777-778.) She noted that they "were trying to get a contract date or a closing date scheduled so we could put it in [Exhibit G to Lease] along with the other information…we did not have the information to fill in the blanks. There were no [finalized] condominium documents, none of these things were in there. (R. pp. 777-778.) Evidence established Exhibit G was a "place holder" that could not be used for obvious reasons i.e. the failure of Building 6 to do what was required of it including complying with and establishing a horizontal property regime under the act. (R. p. 662; R. pp. 819-820.) As Brian

Wilson testified "[w]e were not in a position to create the contract in Exhibit G until the landlord had created the actual thing for them to buy." (R. p. 820.)

Without the seller establishing a Horizontal Property Regime under South Carolina law, Grapevine could not "fill in" much less execute Exhibit G. No escrow agent was named to provide escrow funds to at any time, even after repeated requests by Grapevine and its counsel. The unrefuted evidence is had Building 6 performed as it contractually committed to do, Grapevine was ready, willing and able to do all things required under the Agreement. There is not one shred of evidence to contradict this key piece of evidence. Building 6 made the deliberate choice not to adopt and file with the Register of Deeds a masterplan, rules and satisfy other requirements Horizontal Regime Act even though drafts had been prepared and agreed to by Grapevine. This case becomes very simple when one realizes – absent the Horizontal Property Regime, the sale to Grapevine cannot take place. (R. pp. 777-778.) No deposit could be made. No property could be conveyed.

Upon receipt of the notice of intent to purchase, Building 6 could have had its counsel execute the draft Master Plan and related document so Exhibit G to the Lease could have been completed. The record shows Building 6 did not do so. It would string along Grapevine with drafts or promises of finishing and then filing the required paperwork and then take no action for extended periods. Every closing date proposed by Grapevine was ignored. Building 6 even ignored its own proposed closing date on occasion. Grapevine did what it was required to do under the Lease and the Option to Purchase. (R. pp. 733-734.) In light of the failure of Building 6 to finalize the terms of the Horizontal Regime Act, to adhere to the terms of the Agreement and to act in good faith, to allow Building 6 to hide behind its inaction, malfeasance and improper actions to avoid closing on this transactions is contrary to all notions of justice, fair play, good faith and fair dealing.

The trial court gave what may be the best summation of what the evidence established in this trial in his hearing on post-trial motions:

> The Court: [I]t was the landlord's duty, as the jury found, to create the. horizontal property regime and create the property that would then be transferred. Correct?
>
> Mr. Martens: Well, correct.
>
> The Court : So it seems to me, I mean basically the jury found that your client breached the contract, in part, by not creating the horizontal property regime….How can the you say the plaintiff [Grapevine] has to tender the purchase money when the property they're trying to buy does not exist yet…the plaintiff's testimony was that they were ready, willing and able to close and had the funds. **That was uncontroverted as I recall**….
>
> Mr. Martens: I believe that is correct…Your Honor, and our position is that they just never triggered a duty to act to—to move forward with the purchase option….
>
> The Court: But in this case and the condition precedent to executing the option is your client had to create the horizontal property regime…this is an issue I have given considerable thought to , both at the actual trial, I've read Mr. Marten's briefing and I am going to deny this motion, given I have had enough time to think about it.

(R. pp. 1192-1197.) (emphasis added.)

Giving this issue the same "considerable thought" provided by the trial court, the denial of Building 6's motion on this issue should be affirmed by this Court of Appeals.

B. Grapevine took all actions necessary to perform under the Lease.

The jury was presented with extensive evidence with regard to both the actions taken by Grapevine so that it complied with the Lease and the Option to Purchase as well as the deliberate lack of actions taken by Building 6 to avoid having to honor the Option to Purchase. As detailed above in this brief, extensive testimony was presented on these issues by witnesses from both sides. The jury found that Building 6 breached the Lease with regard to the Option to Purchase. (R. p. 19-20.) Grapevine argued and the trial court found, as obviously did the jury, that the letter

sent by Grapevine coupled with its "repeated requests" to Building 6 for a closing date was sufficient to obligate a sale.

Somewhat shockingly, Building 6 goes on to say that Grapevine's assertion that the fact that it could not unilaterally fill in the blanks Exhibit G to the Lease which included the fact that no escrow agent was identified so that it could tender a deposit, no address had been established and no Horizontal Property Regime had been set up were not "legitimate excuses". They state, "It was Grapevine's **duty**...to put forth a purchase contract in accordance with the … Agreement in Exhibit G."

It takes a bold litigant or someone with no concern for the truth, much less good faith and fair dealing, to argue the other side was responsible for your obligations which you purposefully failed to fulfil. The truth is Grapevine gave proper notice and was entitled to exercise the option to purchase. Exhibit G is a red herring. The unrefuted evidence is Grapevine gave timely notice of exercising the option, at all times had the funds to close and attempted repeatedly in good faith to set a closing date with Building 6. (R. pp. 1444-1478.) The same cannot be said for Building 6. As such, the trial court properly denied a jnov on this issue.

III. The trial court properly granted Grapevine specific performance.

The Lease provided an Option to purchase to Grapevine. In accordance with those terms, on July 26, 2017 Grapevine's counsel, Brian Wilson, issued a letter to satisfy Grapevine's duty to give advanced written notice of 120 days of its intent to exercise the option to purchase. (R. p. 689; R. p. 1298.) Mr. Wilson requested a closing date of February 2, 2018, the first day of the third year of the Lease. (R. pp. 689-690.) This was only logical, as Grapevine would much prefer to pay towards its ownership of the premises as opposed to rent to Building 6.

Building 6 would not commit to this or for that matter any closing date. (R. p. 692.) Even those it proposed itself would never take place. (R. pp. 701-702.) The date of closing was important in that the Sills were going to engage in a Section 1031 property exchange, which has certain time limits attached to it. (R. p. 692; R. pp. 1389-1390.) Failure to meet this date would, and did, cost it a significant amount of money. (R. p. 711.) In addition, Building 6 could continue to collect rent from Grapevine even though it had the right to purchase the Premises.

During this period Building 6 engaged its own attorney, Todd Brockman, who wrote the land surveyor on January 19, 2018 stating:

> "Where do we stand on getting the condo plat for the building completed[?] You have a contract that requires selling the space in a couple of weeks so we need to get this done as soon as possible."

(R. p. 694; R. p. 1304.) On January 30th Mark Mather sent an email to GV's attorney Brian Wilson. Mr. Mather sent draft forms of the master deed, bylaws, and architectural plans all of which needed to be filed with the Register of Deeds for York County before any closing could take place. Mather never mentioned a closing date in response. (R. pp. 695-696.) Meanwhile, Grapevine was ready, willing and able to purchase the premises on February 2, 2018, the closing date proposed by their attorney and which satisfied the Option to Purchase. (R. p. 696.)[15] Building 6, through Mather, proposed a closing date April 17, 2018 but was still not prepared to close on that date. (R. p. 701.) As of the trial of this case on April 23-27, 2021, Building 6 had still not filed its master plan and other documents required under the Horizontal Property Regime Act.

It is important to remember the drafts of these documents had been approved by the Sills and their counsel for some time. (R. pp. 701-702, 704-708, 711-712; R. pp. 1369-1376.) The Sills were never the hold up in this matter at any time. Although Building 6 used every excuse and even

[15] (R. p. 697.)

untruths to avoid closing, the record establishes Grapevine was always ready, willing and able to close on the transaction from its first proposed closing date through the trial of this case. In fact, Melanie Sills testified had Building 6 closed on the transaction even up to the time of the lawsuit, they would have dropped the litigation and purchased the property in accordance with the terms of the Lease. (R. p. 719.) This shows Grapevine's commitment to its right to purchase. Grapevine paid $102,336.54 in rent from February 2018 (the first closing state proposed by its counsel) until the commencement of trial in rent it should have never had to pay. (R. p. 720.) If that amount were limited to amounts paid after the third year of the Lease, Grapevine paid rent in the amount of $74,239.04 it did not owe and should have never had to pay. At the time of her testimony, Mrs. Sills testified Grapevine had complied with all of the requirements under the Agreement it could comply with and remained ready, willing and able to purchase its space at Building 6. (R. p. 733.) Specific performance was properly granted.[16]

Building 6 needs to be required to take a position and stick with it on the issue of specific performance. It argues on the one hand that specific performance is inappropriate because one or more essential term of the parties' Lease cannot be determined with certainty based upon its own lack of action. On the other hand, Building 6 had no problem accepting the rent and other charges that Grapevine paid for the Premises on a monthly basis for over five years under the Lease. It had no trouble having counsel prepare drafts of the documents needed to comply with the Horizontal Property Regime Act, but could never get to the point of executing them. To do so would be contrary to its argument that one or more essential terms were missing, thus preventing specific performance as well as having a significant financial impact on it in lost rent, increased collateral

[16] Appellants' attorney Todd Brockman testified the horizontal property regime could have been set up before Grapevine exercised its option. "It could have been done anytime." (R. p. 1054.)

requirements, and loss of value in its investment. Building 6 wants the best of all worlds. Grapevine simply seeks justice, fairness and for Building 6 to abide by its contractual obligations.

At the time Grapevine entered the Agreement, the lender (then Bank of the Ozarks) required at least two tenants in order to honor its loan commitment. Grapevine was the first tenant. Building 6 could and did say anything to get Grapevine to sign the Lease and then sat on its hands so it could claim a sale was not possible due to a lack of essential terms based on its own malfeasance.

An action for specific performance of an option contract is in equity. *Ingram v. Kasey's Assocs.*, 340 S.C. 98, 105, 531 S.E.2d 287, 290 (2000). In order to compel specific performance, a court of equity must find: (1) there is clear evidence of a valid agreement; (2) the agreement had been partly carried into execution on one side with approbation of the other; and (3) the party who comes to compel performance has performed his or her part, or has been and remains able and willing to perform his or her part of the contract. *Id*. at 106, 531 S.E.2d at 290. The *Ingram* court concluded that specific performance was inappropriate under the facts of that case because the tenant, as the party seeking to compel it, **acted inequitably and with unclean hands by misleading the landlord** and had an improper ulterior motive. This is the exact opposite of the behavior of the parties in this appeal. The *Ingram* court took no issue with the language of the option to purchase itself, which is substantially similar to the one at issue here.[17]

Further, the Sills or their attorneys approved the master deed "multiple times." (R. p. 1055; R. p. 1403.)

[17] The option at issue in *Ingram* provided that "Lessee shall have the right to purchase the premises at any time during the term hereof, as is described in this paragraph; provided however, that this right shall terminate forthwith upon default of the lessee, as provided in Paragraph 6 hereof." *Id*. According to the *Ingram* court, the remainder of the paragraph describes how to calculate the purchase price, lists the credits Ingram would receive if he purchased the property, and refers to the amortization schedule. *Id*. There is no indication from the Court's written opinion that the parties had agreed to an actual purchase and sale contract or otherwise attached such an agreement to the lease.

Building 6 concedes, as it must, that the Lease's reference to the Purchase and Sale Agreement ("PSA") attached to it as Exhibit G was only intended as a "placeholder" at the time the Agreement signed. This fact does not render the Option to Purchase unenforceable. The reality is that it would have been impossible for the parties to complete the PSA at the time the Agreement was executed, given that neither the Building nor the Devised Premises had been built, the exact street address was unknown to the parties at that time and a Horizontal Property Regime had not been established. These requirements fell on Building 6, not Grapevine. (R. pp. 610-611.) While Building 6 never agreed to a closing date and the closing never took place, Grapevine complied with the requirements of the Lease and Option, operated under the terms of such while Building 6 profited off of the benefit of the bargain. Specific performance was properly ordered by the trial court. *Clardy v. Bodolsky*, 383 S.C. 418, 679 S.E.2d 527 (Ct. App. 2009).

Building 6's suggestion that the existence of a fully completed PSA is essential to Grapevine's specific performance claim is not supported by the evidence. The clear intent of the parties was to cooperate in completing the PSA once the Option to Purchase was exercised and the parties were preparing for the closing. Building 6 never allowed matters to get this far.

In South Carolina, every contract has implied in its terms a covenant of good faith and fair dealing, especially if such is necessary to effectuate the manifest intent of the parties. *Commercial Credit Corp. v. Nelson Motors Inc.*, 247 S.C. 360, 147 S.E.2d 481 (1966). Good faith "emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party" and simultaneously excludes "conduct characterized as involving 'bad faith' because it violates community standards of decency, fairness and reasonableness." Restatement (Second) of Contracts § 205, Comment a. ("Meanings of 'good faith'".) The duty of good faith and fair dealing required Building 6 to honor Grapevine's reasonable and justified expectations that it could

purchase the Premises upon proper exercise of the Option to Purchase. Compliance with that duty required Building 6 to cooperate with Grapevine in completing the PSA after Grapevine exercised its option right, prior to the closing and actual conveyance of the Premises. The parties' failure to complete the PSA, especially when one considers the actions and inactions of Building 6, does not preclude Grapevine's right to specific performance.

IV. The trial court never determined as a matter of law that any common areas could be used "exclusively" by Grapevine.

As an initial matter, this issue is not preserved for review, because it is an issue that is based on a challenge to the sufficiency of the evidence regarding the claim for breach of the Lease in regard to the use of patio/common space (i.e., question 2 on the verdict form), and Building 6 did not properly preserve it by making a renewed motion for directed verdict on it at the close of all evidence. (*See* R. p. 1099:22 (Grapevine rests its case), R. p. 1122:21 – p. 1124:13 (renewing Appellants' motion for directed verdict as to civil conspiracy and negligent misrepresentation claims, but not renewing a motion for directed verdict in regard to this issue).) *Wright v. Craft*, 372 S.C. 1, 19–20, 640 S.E.2d 486, 496 (Ct. App. 2006) ("When a defendant moves for a directed verdict under Rule 50, SCRCP at the close of the plaintiff's case, he must renew that motion at the close of all evidence. Craft moved for a directed verdict at the close of Wright's case, but failed to renew the motion after concluding his presentation of evidence. Consequently, the denial of Craft's motion is not preserved for our review.") (internal citations omitted); *id.* at 20, 640 S.E.2d at 496 (Moreover, "a motion for JNOV under Rule 50(b), SCRCP is a renewal of a directed verdict motion. When a party fails to renew a motion for a directed verdict at the close of all evidence, he waives his right to move for JNOV.") (internal citations omitted). Additionally, as explained in Argument IA(2) above,

Appellants' post-trial motions,[18] which included not only the aforementioned motion for a new trial but also a motion for JNOV, which is likewise governed by at 10-day time limit, *see* Rule 50(e), SCRCP ("The motion for judgment n.o.v. shall be made promptly after the jury is discharged, or in the discretion of the court not later than 10 days thereafter."), were untimely, because they were not made until more than ten days after trial, and the trial court did not have authority to allow them. *See Ex. parte Beard*, 359 S.C. 351, 597 S.E.2d 835; *Boone*, 314 S.C. 374, 444 S.E.2d 524; *see also Ness*, 350 S.C. at 402, 566 S.E.2d at 195. But even assuming, arguendo, this issue is properly before the Court for review, it is without merit in any event.

Argument four presented by Building 6 is an absolute misstatement of the trial court's findings and ruling. The jury found that Building 6 breached its lease agreement with Grapevine with regard to Grapevine's use of the patio and common space. As a result the jury awarded damages of $146,124 on this specific cause of action.[19] Nowhere in the various orders at issue did the court rule that the patio common areas could be used "exclusively" by Grapevine. Building 6's brief is devoid of any citation to the record on this issue of exclusivity.

The trial court originally found the terms governing "Common Areas" to be ambiguous. (R. p. 605.) Accordingly, it submitted the issue to the jury which found in Grapevine's favor. There is no finding of a right of exclusive use by Grapevine. This is a made up argument not found in the record and not supported by the evidence. As detailed below, the verdict was supported by the evidence and must be affirmed.

First, Grapevine asks this Court of Appeals to review Argument IV and find a reference to any order by the trial court granting it "exclusive rights" to use of the patio or Common Areas

[18] (R. pp. 271-289.)

in issue. Rather, the trial court required Building 6 to amend its Master Deed to contain terms that are not unduly restrictive of Grapevine's rights to use the Common Areas adjacent to its Premises as established by the judgment in this case. (R. p. 33.) The record established non-customers of Grapevine were more than welcome to use their chairs and tables. (R. pp. 725-726.) "It happened all the time." (R. p. 715.) The trial court's ruling was necessitated as it heard significant testimony about the behavior of the developer in essentially holding the patio common area hostage. It was not beyond Building 6 and the Appellants to try and put in place additional rules or restrictions in an effort to harass Grapevine to give up this litigation or to give up its Option to Purchase. The trial court's findings and order on this issue were necessary to support the equities between the parties and supported by the evidence.

The evidence from all engaged in negotiating the Agreement established having an outdoor seating area was extremely important to the Grapevine business model. (R. p. 632 – Ms. Sills.) Melanie Sills wrote David Williams, representative for GRH indicating they were "looking for approximately 1400-1500 square feet on an end where **we could have patio space**." (Emphasis added.) (R. p. 636; R. p. 1323.) Mrs, Sills also raised their desire to purchase as opposed to leasing. (R. p. 636; R. p. 1323.) By August 14, 2012, Dave Williams had sent the Sills a letter of intent. (R. pp. 1324-1327.) This letter of intent was for a straight sale with no lease to Grapevine. As such, the deal fell apart.

A few years passed when Melanie Sills again heard from David Williams about another opportunity to locate a wine shop in Building 6. (R. pp. 644-645; R. pp. 1328-1340.) The proposed design showed the space ultimately occupied by Grapevine as a wine shop **with an outdoor dining**

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[19] Building 6 has not appealed the amount of damages *per se*, only attorneys' fees. All damages were clearly supported at trial by a proper evidentiary basis and testimony. (R. pp. 898-911, 919-930; R. pp. 1479-1504.)

area that was denoted for use of the wine shop. (R. pp. 1328-1340; R. p. 647.) At first, David Williams did not offer the Sills an opportunity to purchase the space he was showing them in Building 6. (R. p. 651.) The Sills turned down the proposed lease indicating they were only interested in purchasing the unit being offered. David Williams indicated a purchase could not be offered due to "something with their lender." (R. p. 652.) He later followed up with a letter of intent and an email. (R. pp. 1341-1348.) In the email, he misrepresented that "we discussed the purchase option with our lender and they will require a two-year lease as we discussed last week." (R. pp. 1341-1348; R. p. 653.) Melanie Sills testified she and her husband had no reason to doubt what David Williams was telling them, they relied on what he said about the two-year lease requirement before they could purchase, and the fact that a purchase option was included was the **only** reason they were willing to enter the Agreement. (R. p. 659.)

In her exchange of diagrams and schematics of the space with David Williams and in their negotiations, he never indicated outdoor space could not be used by Grapevine. (R. pp. 660-661.) To the contrary, "they constantly talked about how they (sic) [there] would be an outdoor area, the garage doors, the view of the river." (R. p. 661.) When the lease was sent, there were various blank exhibits or placeholders which Mr. Williams indicated would be "forthcoming". (R. p. 663.) The architect for Building 6 of Building 6, Alan Aschenbrenner, testified the outdoor dining space shown on Exhibit 13 was intended for the wine shop and Grapevine was the only wine shop Building 6 negotiated with in this development. (R. pp. 802-811.) Mrs. Sills understood the common area description in the Lease to allow the use of the patio area. (R. p. 762.)

The Sills received an acceptance letter indicating a commitment date of February 2, 2016. (R. p. 673; R. pp. 1302-1303.) Grapevine was allowed to use outdoor common areas for nearly three years. (R. pp. 687-688.) It believed it has such a right under paragraph 15 of the Lease (R. pp.

1247-1297) which granted a non-exclusive right to use and enjoy such area in common with landlord, other tenants and their customers. Building 6 allowed the use, as noted, for several years provided Grapevine had all proper licenses, cleaned its trash and debris and maintained insurance on the areas being used. Grapevine complied with each of these conditions. (R. pp. 726-729; R. pp. 1382-1388.) Grapevine never asserted or attempted to have or exercise any exclusive right over any patio or common area. (R. p. 725.) It was not until March 18, 2019 - the day an answer was due by Building 6 in this litigation that Building 6 issued a letter to Grapevine indicating it could no longer use the outdoor patio areas as it had done for years. (R. p. 662; R. pp. 1379-1380.) Grapevine removed all tables and chairs at that time.

Based upon these facts, the trial court correctly determined it would not grant a JNOV on this cause of action. The trial court found the relevant portion of the Lease (Section 15) ambiguous and allowed it, along with evidence of the parties conduct under the Lease to go to the jury. Grapevine had been allowed to use the patio for nearly three years under the description of "common area" in the Lease. (R. pp. 791-792.) There is no legal error in the trial court's actions.

V. The trial court correctly denied JNOV as to the negligent misrepresentation claims against all but one Appellant because all elements were met and the jury properly determined that each of the Appellants made a negligent misrepresentation to Grapevine.[20]

In reviewing the negligent misrepresentation verdict found by the jury, it is necessary to explain the role of each Appellant. As noted throughout this brief, Riverwalk River District Building 6, LLC is the landlord for Building 6, the building which contains the Premises in issue. The parties entered into several stipulations, which were made part of the record (R. pp. 795-798.) Mark S. Mather, is an employee of GRH Development Resources, LLC (R. pp. 797-798,

R. p. 228 ¶ 13.) He is likewise the managing member of GRH Development Resources, LLC (R. p. 778, R. p. 229 ¶ 14.) Appellant the Greens of Rock Hill is the majority owner, 99.8 percent, and the manager of Riverwalk River District Building 6, LLC. Greens of Rock Hill is owned and managed by Assured Administration, LLC (R. p. 798, R. p. 229 ¶ 15, 16.) Mark S. Mather is a managing member of Assured Administration, LLC (R. p. 798, R. p. 229 ¶ 17.)

As noted earlier, the Sills were informed that the lender for this project would not allow an outright purchase of the premises, but would rather require a lease of at least two years per the testimony of GRH employee and the lead person for negotiating leases, David Williams. We know from the testimony of Anthony Swainey, the bank executive, that this is not true. (R. p. 854.) The key tying together the various appellants is Mr. David Williams. It was stipulated by the parties that "Mr. David Williams was employed by GRH Development Resources, LLC as the managing director of the development. In that capacity he was generally responsible for overseeing the construction of Building 6 within what the demised premises are located in and also responsible for the negotiation of the lease with the Grapevine of Riverwalk." (R. p. 797; R. p. 228 ¶ 10.)

Anthony Swainey from Bank OZK appeared before the jury and testified:

> Q: Did Bank OZX or Bank of the Ozarks require that Grapevine lease its space for two years before it could exercise its purchase option to buy the space?
> A: No, sir.
> Q: Did Bank of the Ozark require that Grapevine lease its space for any period of time before it could exercise its purchase option to buy the space?
> A: No.
> …

[20] The trial court granted a directed verdict as to Mark S. Mather, which is not on appeal. As such, even though he is generally recognized as the developer, he escaped any liability for the actions in issue.

He further testified that with regard to the loan on Building 6 (which was in excess of two million dollars), there were guarantors in place, not surprisingly the Appellants in this appeal, and that financials rolled through each entity up to Assured Administration. (R. pp. 861-862, 864-865.) The loan with Bank OZK was made July 30, 2014, "shortly after Grapevine signed the lease" with Building 6. (R. p. 865.) Appellants made money with this negligent misrepresentation while Grapevine paid years of rent it could have avoided by locating elsewhere or calling Appellants' bluff. This is quintessential negligent misrepresentation.

In addition, while trying to get the Sills to enter the Lease. David Williams discussed their need and desire for outdoor seating, indicated it was common "in any lease the common areas are used by all the tenants." (R. p. 840.) He also had marketing brochures prepared and showed them to the Sills portraying outdoor use of adjacent patio space with tables and chairs. (R. pp. 840-841.) Marketing materials used by the Building and the Riverwalk Development showed pictures of Grapevine with the patio tables and chairs in use and people having a good time. (R. p. 843.) At the time David Williams was deposed he did not feel that the use of tables and chairs on the patio areas was a violation of the Lease which he negotiated. (R. p. 843.) When asked whether in light of his testimony as to what was shown in marketing documents, advertised and the uses allowed without objection were misleading, he frankly and honestly stated:

> **A: I could see in this case how that could be construed as misleading.**

(R. pp. 845-846.) (emphasis added.) This from the agent of all Appellants except Mark Mather in his individual capacity clearly shows negligent misrepresentation was a jury issue.[21]

[21] Mark Mather asked Melanie Sills to keep the purchase of the Premises confidential as "we did not extend that option to other tenants." (R. p. 1357.)

Based upon this testimony, it is undeniable that the misrepresentations and statements made by Mr. David Williams, who was acting for all Appellants (except Mark S. Mather per the trial court's ruling) were not true, but rather constituted negligent misrepresentations undertaken in an effort to get them to sign a lease which was a requirement of Ozark, i.e. that there be at least two tenants signed up. He admitted he could see how his statements and the actions of the Appellants could be construed as misleading. Accordingly, in light of David Williams' joint authority amongst all of the appellants with the exception of Mark S. Mather in his individual capacity, the Court found as did the jury that each of the Appellants was responsible for negligent misrepresentations to Grapevine.

Appellants seek to ignore the law. They claim they had no duty to Grapevine. A party negotiating a lease involving a pecuniary or financial interest has a duty to exercise reasonable care in providing information. *Winburn v. Insurance Co.* 287 S.C. 435, 441, 339 S.E.2d 142, 146 (Ct. App. 1985). False statements were made by David Williams, which he candidly admitted to. Finally, it is clear Grapevine relied to its detriment on these statements and entered the Lease with the Option to Purchase. It turned down prior offers because there was no ability to purchase. (R. pp. 651-652.) Appellants lied about the terms of the ability to purchase in this case for their own financial benefit, attributed such false and misleading misrepresentations to their banker and now seek to avoid liability for misleading innocent parties. Further, each of these misleading statements or acts were false at the time made. Nothing more is required to support a claim for negligent misrepresentation. As such, the trial court properly denied Appellants'' motions for JNOV on this cause of action. *Turner v. Milliman,* 392 S.C. 116, 665 S.E.2d 667 (2016); *Gilliand v. Elmwood Properties*, 301 S. C. 295, 391 S.E.2d 577 (1990).

VI. The trial court's award of attorney fees and costs to Grapevine should be affirmed.

An appealed order comes to the appellate court with a presumption of correctness, with the burden on the appellant to demonstrate reversible error. *McCall v. IKON*, 380 S.C. 649, 659–60, 670 S.E.2d 695, 701 (Ct. App. 2008). The only issues/arguments that the appellant can raise in an attempt to meet their burden to demonstrate reversible error are those that the appellant first properly preserves and then duly presents (i.e., briefed) to the appellate court for review. *See Kennedy v. S.C. Retirement Sys.*, 349 S.C. 531, 532–33, 564 S.E. 322, 323 (2001) ("Preserving issues for appellate review is a fundamental component of appellate practice. South Carolina appellate courts do not recognize the plain error rule. The appellants have the responsibility to identify errors on appeal, not the Court.") (internal citation and quotation marks omitted)); *Elam*, 361 S.C. at 25, 602 S.E.2d at 780 (noting that South Carolina's preservation requirements are "mandatory"); *id.* at 23, 602 S.E.2d at 779–80 ("Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court."); *id.* at 24, 602 S.E.2d at 780 ("[O]ur rules contemplate two basic situations in which a party should consider filing a Rule 59(e)[, SCRCP,] motion. A party *may* wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.") (emphasis in original); *First Savings Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (issues not argued in the brief are deemed abandoned and will not be considered on appeal); *R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 437, 540 S.E.2d 113, 120 (Ct. App. 2000) (where no authority is cited and argument in brief is conclusory, issue is deemed abandoned); *Eaddy v. Smurfit-Stone Container Corp.*, 355 S.C. 154, 164, 584 S.E.2d 390, 396 (Ct.

App. 2003) ("This court has noted that short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not preserved for our review.".)

Building 6's brief raises three arguments in challenge to the trial court's presumptively valid award of attorney fees and costs to Grapevine: (A) that Grapevine could not selectively enjoy the Agreement, (B) that the Agreement did not permit attorney's fees incurred in pursuing extra-contractual damages, and (C) that the amount of the attorney fees award is unreasonable. They are all undermined by procedural problems, i.e., problems of error preservation and/or argument presentation. And in any event, they are all without merit.

A. Building 6's argument that Grapevine could not selectively enjoy the Agreement is unavailing.

Building 6 argues that the trial court should have found that Grapevine was equitably estopped from enforcing the attorney fee provision of the Agreement, because, according to Building 6, Grapevine avoided and disregarded numerous other provisions in the Agreement. (Building 6 Br. pp. 46–47.) This argument is not properly before the Court for review; therefore, it must fail. Further, it is without merit.

(1) This argument is not properly before the Court for review.

While Building 6 did raise this argument in opposition to Grapevine's motion for attorney fees and costs,[22] the trial court did not rule on the argument in its order awarding Grapevine attorney fees and costs. (R. pp. 10-11.) While, pursuant to Rule 59(e), Building 6 did move the trial court to reconsider its order awarding Grapevine attorney fees and costs, its motion did not ask the trial court for a ruling on this argument.[23] Naturally, the trial court's order on Building 6's motion to reconsider does not include a ruling on it. (R. pp. 21-25.)

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[22] (R. pp. 296-297.)

[23] (R. pp. 313-315.)

Accordingly, this argument is not preserved for review;[24] therefore, it cannot possibly upset the presumptive validity the trial court's award of attorney fees and costs to Grapevine. *See McCall***,** 380 S.C. at 659–60, 670 S.E.2d at 701; *Kennedy*, 349 S.C. at 532–33, 564 S.E. at 323; *Elam*, 361 S.C. at 23–25, 602 S.E.2d at 779–80.

(2) This argument is without merit.

Building 6's equitable estoppel argument is plainly off base. "In order for justice to be done between parties, a party is required to do equity when asking the court to invoke the aid of equity." *Regions Bank v. Wingard Props., Inc.*, 394 S.C. 241, 259, 715 S.E.2d 348, 358 (Ct. App. 2011). Clearly, Building 6 cannot invoke the aid of equity, because it has not done equity. The very reason for which it now attempts to invoke the aid of equity is to try to avoid the consequences of its own inequitable conduct in breaching the Lease and Option to Purchase. Moreover, Building 6 misapprehends the case law it cites in support of this argument. *International Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411 (4th Cir. 2000), stands for the proposition that equitable estoppel my apply to estop a party from denying the enforceability of contract provisions they do not like when the party has already directly benefitted under other provisions of the contract. That proposition is not relevant here, as Grapevine is not denying the enforceability of the provision of the Agreement allowing for recovery of attorney fees. *Beverly v. Grand Strand Medical Center, LLC*, 429 S.C. 502, 839 S.E.2d 468 (Ct. App. 2020), the other case Building 6 cites, is not even a case about equitable estoppel at all. Accordingly, this argument fails in any event, because it is without merit.

[24] *Elam*, 361 S.C. at 24, 602 S.E.2d at 780 ("A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.") (emphasis in original.)

B. Building 6's argument that the Agreement did not permit attorney fees incurred in pursuing extra-contractual damages is unavailing.

Pointing to language in paragraph 38 of the Agreement that "that limits damages to '**actual** damages, together with attorney's fees and costs, as its **sole and exclusive remedy** on account thereof,'" Building 6 argues that, "[w]hen Grapevine chose to forgo the 'exclusive remedy' available under its lease—and to pursue claims, parties, and forms of relief that Grapevine and Riverwalk never contemplated—it also gave up its right to insist that its attorney's fees and costs for that litigation be reimbursed by [Building 6]." (Building 6 Br. p. 47 (emphasis in original).) This argument is not properly before the Court for review; therefore, it must fail. Further, it is without merit.

(1) This argument is not properly before the Court for review.

While Building 6 did raise an this argument in opposition to Grapevine's motion for attorney fees and costs,[25] the trial court did not rule on the argument in its order awarding Grapevine attorney fees and costs. (R. pp. 10-11.) Pursuant to Rule 59(e), Building 6 did move the trial court to reconsider its order awarding Grapevine attorney fees and costs, its motion did not ask the trial court for a ruling on this argument,[26] and naturally, the trial court's order on Building 6's motion to reconsider does not include a ruling on it. (R. pp. 21-25.)

Accordingly, this argument is not preserved for review;[27] therefore, it cannot possibly upset the presumptive validity the trial court's award of attorney fees and costs to Grapevine. *See McCall***,** 380 S.C. at 659–60, 670 S.E.2d at 701; *Kennedy*, 349 S.C. at 532–33, 564 S.E. at 323; *Elam*, 361 S.C. at 23–25, 602 S.E.2d at 779–80. Moreover, because the argument consists only of short,

[25] (R. pp. 299-300.)
[26] (R. pp. 313-315.)

conclusory statement without supporting legal authority, it is rightly deemed abandoned on appeal. *R & G Constr.*, 343 S.C. at 437, 540 S.E.2d at 120; *Eaddy*, 355 S.C. at 164, 584 S.E.2d at 396.

(2) This argument is without merit.

The purpose of the rules of contract construction is to ascertain the intention of the parties as gathered from the contents of the entire document and not from any particular provision within the contract. *Litchfield Co. of S. C., Inc. v. Kiriakides*, 290 S.C. 220, 223, 349 S.E.2d 344, 346 (Ct. App. 1986); *see also Goldston v. State Farm Mut. Auto. Ins. Co.*, 358 S.C. 157, 170, 594 S.E.2d 511, 518 (Ct. App. 2004) ("The primary purpose of all rules of contract construction is to determine the intent of the parties."). Where one interpretation of a contract makes it unusual or extraordinary and another interpretation, equally consistent with the language employed, would make it reasonable, fair, and just, the latter construction prevails. *Farr v. Duke Power Co.*, 265 S.C. 356, 362, 218 S.E.2d 431, 434 (1975). "An interpretation which establishes the more reasonable and probable agreement of the parties should be adopted while an interpretation leading to an absurd result should be avoided." *Koon v. Fares*, 379 S.C. 150, 155, 666 S.E.2d 230, 233 (2008).

Here, Building 6 argues that the language in paragraph 38 of the Agreement referring to "actual damages, together with attorney's fees and costs" as the "sole and exclusive remedy" includes some sort of phantom forfeiture clause, such that any pursuit of any other "claims, parties, and forms of relief" effects a waiver of the right to recover attorney fees and costs. (Building 6 Br. p. 47.) Obviously, the Agreement itself says nothing of the sort, and the notion that it does relies on an absurd and untenable construction of the Agreement. Accordingly, this argument fails in any event, because it is without merit.

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[27] *Elam*, 361 S.C. at 24, 602 S.E.2d at 780 ("A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.") (emphasis in original.)

C. Building 6's argument that the amount of the attorney fees award is unreasonable is unavailing.

Building 6 argues that the attorney fees awarded to Grapevine "are not reasonable when considered in light of the enumerated factors set forth in *Blumberg v. Nealco, Inc.*, 427 S.E.2d 659 (1993), including time and labor devoted to the case (factor 2), fee customarily charged in the locality for similar services (factor 5), and beneficial results obtained (factor 6)." (Building 6 Br. pp. 47–48.) According to Building 6, "[a]lthough the trial judge reduced the demanded fees by 30%, that still is disproportionate and unreasonable given than the vast majority of the fees and costs were incurred pursuing (a) unsuccessful causes of action, (b) against four Appellants against whom Grapevine had no right to attorney's fees and costs." (Building 6 Br. p. 48.) Building 6's argument is incapable of upsetting the presumptive validity of the trial court's attorney fee award.

Awarding attorney fees is a matter entrusted to the sound discretion of the trial court. *See Maybank Corp. v BB&T Corp.*, 416 S.C. 541, 579–80, 787 S.E.2d 498, 518 (2016) ("The decision to award or deny attorneys' fees and costs will not be disturbed on appeal absent an abuse of discretion. An abuse of discretion occurs when the conclusions of the trial court are either controlled by an error of law or are based on unsupported factual conclusions.") (internal citation and quotation marks omitted).)

Blumberg states that there are six factors for the trial court to consider in determining an award of attorney fees:

> 1) nature, extent, and difficulty of the legal services rendered; 2) time and labor devoted to the case; 3) professional standing of counsel; 4) contingency of compensation; 5) fee customarily charged in the locality for similar services; and 6) beneficial results obtained.

310 S.C. 492, 427 S.E.2d 659 (1993). In determining the award of attorney fees to *Grapevine*, the trial court expressly attested to its "careful consideration [of] each of the[se] six (6) factors"[28] and, as to them, specifically found as follows:

> (i) that the legal services rendered by [Grapevine's] counsel were substantial and complex; (ii) that the time and labor devoted by [Grapevine's] counsel was substantial; (iii) that the professional standing of [Grapevine's] counsel is high; (iv) that no contingency-based compensation structure applied to the representation provided by [Grapevine's] counsel; (v) that the fees charged by [Grapevine's] counsel are in-line with the fees customarily charged by firms of similar size with lawyers of similar experience and qualification practicing in this jurisdiction; and (vi) the result obtained by [Grapevine's] counsel were beneficial to [Grapevine].

(R. pp. 10-11.) While recognizing that the attorney fee provision in the Agreement only allowed Grapevine to recover attorney fees against one of the defendants, Building 6, and only as to the breach of lease claims, the trial court found that, similar to *Maybank*, 416 S.C. 541, 787 S.E.2d 498, "the claims in this case shared the same common facts and required combined efforts throughout the litigation process," and therefore, a 30% reduction of the amount of Grapevine's requested attorney fees and costs was reasonably "account[ed] for a distinction in the claims and the time allotted to assert claims unrelated to the breach of lease claims." (R. p. 11.)

As an initial matter, Grapevine would note that Building 6 does not raise any complaint about *Blumberg* factors (1), (3), and (4). Accordingly, any challenge to the trial court's treatment of these factors is abandoned, and indeed, the correctness of the trial court's treatment of them is the law of the case. *See McLean*, 314 S.C. at 363, 444 S.E.2d at 514 (issues not argued in the brief are deemed abandoned and will not be considered on appeal); *Atl. Coast Builders*, 398 S.C. at 329, 730 S.E.2d at 285 ("[A]n unappealed ruling, right or wrong, is the law of the case.").

[28] (R. p. 10.)

Most notably, this means that it is the law of the case "that the legal services rendered by [Grapevine's] counsel were substantial and complex."

Similarly, Building 6 does not dispute the trial court's finding that "the claims in this case shared the same common facts and required combined efforts throughout the litigation process." So, here again, any challenge in this regard is abandoned, and the correctness of this finding by the trial court is the law of the case. *See McLean*, 314 S.C. at 363, 444 S.E.2d at 514; *Atl. Coast Builders*, 398 S.C. at 329, 730 S.E.2d at 285.

Moreover, Building 6's contention that, because "Grapevine redacted the task descriptions in the legal invoices filed in support of its petition for attorneys' fees[,] . . . there was no reasonable basis for the circuit court to determine what was done in support of which claims against which parties,"[29] is not preserved for review. The trial court's order granting attorney fees and costs to Grapevine does not contain any ruling on any argument by Building 6 to the effect that Grapevine's redacted bills were not sufficient to provide the trial court with a reasonable basis to award Grapevine attorney fees. (R. pp. 10-11.) And while, pursuant to Rule 59(e), Building 6 did move the trial court to reconsider its order awarding Grapevine attorney fees and costs, its motion did not ask the trial court for a ruling on any such argument,[30] and naturally, the trial court's order on Building 6's motion to reconsider does not include a ruling on it. (R. pp. 21-25.) Accordingly, any such argument is not preserved for review. *Elam*, 361 S.C. at 24, 602 S.E.2d at 780 ("A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.") (emphasis in original.)

Further still, besides the fact that it did not preserve any issue/argument that the trial court erred in awarding Grapevine attorney fees based on redacted bills, Building 6 itself says that it is

[29] (Building 6 Br. p. 48 n.19.)

not possible to determine from the redacted bills, which are the only bills in the record,[31] "what was done in support of which claims against which parties." (Building 6 Br. p. 48 n.19.) Here again, the trial court's award of attorney fees comes to this Court bearing the presumption of validity, and it is Building 6 who has the affirmative burden of showing otherwise. And because Building 6 cannot possibly show "[w]hat was done in support of which claims against which parties," it cannot possibly show that the trial court's award of attorney fees is unreasonable in light of "[w]hat was done in support of which claims against which parties."

It is the law of the case "that the legal services rendered by [Grapevine's] counsel were substantial and complex." It is the law of the case that "the claims in this case shared the same common facts and required combined efforts throughout the litigation process." And Building 6 can neither complain about the trial court basing its award of attorney fees on Grapevine's redacted bills nor show that the trial court's award is unreasonable in light of "[w]hat was done in support of which claims against which parties," because Grapevine does not know "[w]hat was done in support of which claims against which parties." Against this backdrop, Building 6's argument is wholly unavailing to upset the trial court's presumptively valid award.

CONCLUSION

For the reasons set forth above, the jury verdict and the rulings of the trial court should be affirmed. Specific performance should be mandated, with the terms of trial court's post-trial motions affirmed and enforced. Grapevine should be allowed to collect $146,124.00 for breach of contract as to the patio common areas, $96,800 for negligent misrepresentation from

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30 (R. pp. 313-315.)

31 In this regard, Grapevine would note that the burden is on the appellant to make a sufficient record to demonstrate any error that it argues on appeal. See *Helms Realty, Inc. v. Gibson-Wall Co.*, 363 S.C. 334, 339, 611 S.E.2d 485, 488–89 (2005) ("Appellant had the burden of providing a sufficient record.").

Appellants other than Mark Mather, legal fees as awarded by the trial court and all pre and post-judgment interest allowed by law and the orders of the trial court.

Respectfully submitted,

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December 21, 2023

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from York County
Court of Common Pleas

William A. McKinnon, Circuit Court Judge

Appellate Case No. 2022-000580
Circuit Court Case No. 2018-CP-46-03726

The Grapevine of Riverwalk, Inc.,

Respondent,

v.

Riverwalk River District Building 6, LLC, Mark S. Mather, GRH Development Resources, LLC, The Greens of Rock Hill, LLC, and Assured Administration, LLC,

Appellants.

RESPONDENT'S CERTIFICATION FOR FINAL BRIEF

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I, Stephen L. Brown, do hereby certify that the Final Brief of Respondent complies with Rule 211(b), SCACR. Additionally, the undersigned hereby certifies that this filing complies with the Supreme Court order of April 15, 2014.

Respectfully submitted,
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December 21, 2023