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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

The Honorable William A. McKinnon

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 Mather, GRH Development Resources, LLC, The Greens of Rock Hill, LLC, and Assured Administration, LLC,.....Appellants.

APPELLANTS' FINAL BRIEF

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I. **Did the trial court err in denying Riverwalk's motion to strike Grapevine's jury trial demand as to all claims against Appellant Riverwalk when the Lease contained an enforceable jury trial waiver by Grapevine?**

II. **Was Riverwalk entitled to judgment as a matter of law because Grapevine unequivocally failed to exercise the option to purchase in conformance with the Lease's clear requirements?**

III. **Did the trial court err when it granted specific performance in the absence of a binding real estate purchase contract?**

IV. **Was it error of law to find that the commercial Lease Agreement allows one tenant *exclusive* use of "common areas"?**

V. **Because there was no duty owed, no false statement made, and no detrimental reliance by Grapevine, did the trial court err in denying a JNOV on the negligent misrepresentation claim?**

VI. **Should the award of attorney's fees be reversed due to error of law?**

In this commercial lease dispute between two sophisticated parties, the trial court made multiple errors of law that command reversal. The rulings culminated in an improper grant of "specific performance" on a real estate purchase contract ***that did not exist***. In the absence of an enforceable purchase contract, the trial court wrongly imposed new, unbargained-for terms, not only on the parties to this litigation but also on non-parties. This Court should reverse the trial court's errors and remand for a new trial.

STATEMENT OF THE FACTS

This is a dispute over a negotiated commercial lease. Appellant Riverwalk District Building 6 LLC ("Riverwalk") is the owner—as its name indicates—of Building Number 6 within a mixed-use development project in Rock Hill, South Carolina. Riverwalk's Building 6 includes retail, mercantile, and residential uses. (R. p. 1247 ¶ A). Respondent The Grapevine of Riverwalk, Inc. ("Grapevine") is—as its name suggests—a wine and craft beer shop. (R. p. 1384).

There is a ***very*** long backstory to this appeal, as the voluminous Record on Appeal forbodes. However, despite a lengthy trial which was book-ended by copious motions, the facts of real significance are few—and they are not disputed. Of paramount importance in this appeal is that Grapevine entered into a Commercial Lease Agreement (the "Lease") with Riverwalk, to rent a 1,490 square foot commercial space on the first floor of Building 6. (R. p. 1247 ¶ B. 1).

Grapevine agreed to lease the space while the mixed-use project was in its nascent stages; construction had not yet even begun on Building 6 when the Lease was executed.

(R. p. 745:4-8). Before signing the Lease, Grapevine negotiated its terms at length with Riverwalk. (R. pp. 759-762). The principals of Grapevine are sophisticated businesspeople; they have several other successful Grapevine store locations, as well as quite a few other commercial holdings. (R. pp. 755:11 – 758:16). Among other negotiated terms, the Lease contains an option to purchase in favor of Grapevine, as well as a restrictive provision barring Riverwalk from leasing to other wine shops or craft beer stores. (R. p. 1262 ¶ 33; p. 1268 ¶ 57; 1279). When they signed the Lease in 2014, both principals of Grapevine initialed every page, including its exhibits. (R. p. 763:15–18) ("Q: And at the time you and your husband initialed each page and executed that document you were satisfied with the form of the document, correct? A: Yes"). Two years later, on completion of the construction of Building 6 in 2016, Grapevine executed a "Tenant Acceptance Letter" in which it confirmed that the Lease was in full force and effect, and that it had not been modified in any way. (R. p. 1302).

This appeal revolves around provisions in the Lease governing an option to purchase and the use of the common areas, as well as a jury trial waiver.

A. Option to Purchase

Paragraph 33 of the Lease contains the negotiated option to purchase in favor of Grapevine, to be exercised during the third lease year. (R. p. 1262 ¶ 33). Paragraph 33 incorporates by reference a "Purchase and Sale Agreement," attached as Exhibit G to the Lease; this purchase agreement was to be executed when (if) the option was exercised, and it was to govern the terms of purchase. (*Id.*). The "Purchase and Sale Agreement"

attached to the Lease contains blank spaces to be filled out by the parties when the contract to purchase was made. (R. pp. 1281-1297, Ex. G).

> **Option to Purchase.** Tenant shall have the Option to purchase the Premises during the third lease year with not less that 120 days advanced written notice to Landlord for $270,000.00 (the "Purchase Price") in accordance with the Purchase and Sale Agreement as provided in Exhibit G. Landlord shall apply $25,000 of Rent collected and the Security Deposit against the Purchase Price at the time of closing. Upon the purchase of the Leased Premises by Tenant, this Lease shall be terminated.

(R. p. 1262). The Commencement Date of the Lease, which marked the beginning of the first lease year, was February 2, 2016. (R. pp. 228 ¶ 8; 1248 ¶ 4). About mid-way through the second lease year, on July 26, 2017, Grapevine sent a letter to Riverwalk which stated that the Lease contained an option to purchase and that

> THIS LETTER CONSTITUTES NOTICE, pursuant to paragraph 33 of the Lease, of [Grapevine's] intent to exercise its purchase option . . . .

(R. p. 1298). The letter asked Riverwalk to take the steps necessary to create a horizontal property regime, of which the Grapevine unit would be a part. Riverwalk subsequently sent to the Grapevine a draft Master Deed on January 30, 2018. (R. p. 1358). Because the Master Deed would affect the entire mixed-use project, consisting of multiple condominium regimes, Riverwalk's attorney would not have recorded it until just before a real estate closing was set to occur. (R. pp. 1024 – 1025:8).

For the next several months, Grapevine continued to send emails to Riverwalk, requesting that a closing date be identified. (R. pp. 1362-1377). Aside from its repeated emails insisting on closing, it is undisputed that the Grapevine did nothing further to exercise its option beyond sending its letter of July 26, 2017.

On October 5, 2018, well before the third lease year was to expire in February of 2019, Grapevine's attorney sent a letter to Riverwalk "as formal written notice that Landlord is in breach of the Lease, including but not limited to Section 33 . . . ." (R. p. 1299). Grapevine filed this lawsuit shortly thereafter, in December of 2018, before the expiration of the third lease year. (R. p. 39).

B. Common Area Use

The 1,490 square foot space leased by Grapevine is one of many commercial units on the bottom floor of the mixed-use Building 6. Above the commercial units are residential condominiums.

(R. p. 1320). A wide sidewalk runs around the building's perimeter, providing access to the storefronts and to the residences. This design is contemplated by the Lease, and the sidewalks are described as "Common Areas." (R. p. 1256 ¶ 15, 1253 ¶ 12).

Grapevine put chairs and tables on the sidewalk[1] outside its storefront, and it serves customers in this space:

(*See* R. pp. 1320, 1384-1386). The Lease is explicit that the Demised Premises leased by Grapevine includes only the space "within the Building." (R. p. 1247 ¶ 1). Grapevine has acknowledged that the Lease does not allow it to use the sidewalk in this way, but it insists that Riverwalk must nonetheless convey to it an entitlement to do so. (R. p. 144 ¶ 76; R. pp. 1039:15–1040:3).

C. Extensive Negotiations

As noted above, the evidence reflects extensive negotiations among these sophisticated parties. One sticking point was whether the transaction would be structured as either a sale or a lease. Riverwalk anticipated that the bank would require a lease:

> Melanie/Dave: We discussed the purchase option with our lender and they *will* require a 2-year lease as we discussed last week. Attached is redline

[1] At trial, Grapevine referred to the sidewalks as its "patios." The Lease calls them "common areas."

> and clean version of the LOI which reflects a 2 years lease and purchase option. Please review and let us know if you have any questions.

(R. p. 1341) (emphasis added). The evidence showed that Riverwalk's statement was based, *inter alia*, on language in the loan documents stating that the borrower (Riverwalk River District Building 6, LLC) "shall" deliver to the bank the fully-executed commercial lease with The Grapevine of Riverwalk, Inc., dated June 23, 2014, which satisfied the § 4.1.5 retail lease requirements of the agreement. (R. p. 1414—1415 § 4.1.5, "Retail Leases"; R. pp. 871:17—872:21).

When offered a lease, Grapevine "said we were only interested in purchasing" and walked away. (R. pp. 651:15—652:10: "So we thanked them and said we were not interested and we left, we left the meeting."). Later, Grapevine was offered a lease with a purchase option, which it accepted. (R. p. 654:12–13: "A. It was the only reason we signed the lease was because they added the purchase option."). Grapevine also negotiated a restriction across the entire development (a series of mixed-use buildings) where Grapevine was to be the sole business able to operate as a stand-alone wine or craft beer bar. (R. p. 1268 ¶ 57; 1279). In sum, Grapevine negotiated hard, and in the end got to a written lease agreement that it deemed acceptable. Grapevine initialed each page and signed the contract. (R. pp. 1247 - 1297).

D. Governing Terms of the Lease

The Lease contains the following provisions that are key to this appeal:

> **1. Demised Premises.** Landlord hereby leases and demises to Tenant and Tenant hereby takes and leases from Landlord that certain space comprised of approximately 1,490 square feet, more or less (being heretofore defined as the "Demised Premises"), having an anticipated street address of __

Herron's Ferry Road, depicted as "Wine Shop" on Exhibit A attached hereto and ***being located within the Building***.

12. Real Estate Taxes and Common Areas.

(c) Tenant agrees to pay Landlord, monthly as Additional Rent, Tenant's Proportionate Share of Landlord's costs and expenses incurred in maintaining and otherwise caring for the common areas ("Common Areas") of the Building (hereinafter collectively called the "Common Area Charge"). The Common Area Charge is equal to the total cost and expense incurred by Landlord in operating and maintaining the Common Areas, including, without limitation, (i) all costs to maintain, repair, replace, supervise, and *administer the Building and the Common Areas thereof such as* stairwells, common reception areas, common restrooms, common hallways and entranceway, parking areas, landscaping, ***sidewalks and other building common areas****; . . .*

(d) Landlord shall obtain and keep in force during the term of this Lease a policy or policies of insurance, covering loss or damage to . . . the Common Areas.

15. Common Areas. Tenant, its customers, employees, and invitees shall have the ***non-exclusive right to use and enjoy, in common with Landlord, other tenants and their customers, employees and invitees, the Common Areas***, which Landlord agrees to provide for the reasonable operation of the Building. . .

18. Tenant's Care of Common Areas. Tenant covenants and agrees that it will, at all times during the term hereof, keep the Demised Premises and all Common Areas immediately adjoining the Demised Premises clean and ***free from obstruction***, rubbish, and dirt. Tenant shall place all trash . . . in a proper closed receptacle and shall pay all costs incident to the removal thereof.

33. Option to Purchase [*see supra*].

43. Entire Agreement. This Lease contains the entire agreement between the parties hereto and cannot be altered or modified in any way except in writing signed by the parties hereto. All prior representations, discussions, covenants, or warranties of the parties with respect to the Demised Premises or the subject matter hereof are merged herein and superseded hereby.

> **59. Miscellaneous Provisions.** This Lease is entered into and shall be construed in accordance with and governed by the laws of the State of South Carolina . . . THE PARTIES KNOWINGLY AND VOLUNTARILY WAIVE ANY RIGHT THEY MAY HAVE TO A TRIAL BY JURY IN ANY CLAIM OR CAUSE OF ACTION ARISING HEREUNDER OR RELATING TO THIS LEASE. . . .

(R. pp. 1247 *et seq.*, Lease) (emphasis in italics added; all other emphasis in original).

STATEMENT OF THE CASE

Before the expiration of the third lease year, Grapevine filed this lawsuit against Riverwalk, on December 10, 2018; it filed a *lis pendens* shortly thereafter. (R. pp. 39; 52). Grapevine amended its Complaint several times to add numerous causes of action and additional defendants, proceeding to trial on its Second Amended Complaint, filed January 15, 2021. (R. p. 133). Grapevine's Second Amended Complaint included causes of action against Riverwalk for specific performance, breach of contract, and breach of contract accompanied by fraudulent acts, as well as claims of amalgamation, and causes of action against Riverwalk, Mark Mather,[2] GRH Development Resources, LLC, The Greens of Rock Hill, LLC, and Assured Administration, LLC for fraudulent inducement, fraud/fraudulent misrepresentation, unfair trade practices, tortious interference with contractual relations, civil conspiracy, and negligent misrepresentation. (*Id.*).

Appellants answered the Second Amended Complaint on January 29, 2021, by moving to strike Grapevine's jury trial demand, denying its allegations, and raising affirmative defenses. (R. p. 158).

[2] Mark Mather is not a part of this appeal; the trial court granted a JNOV as to the jury's finding against him.

All parties moved for summary judgment in February of 2021. (R. p. 178, 202). The parties filed memoranda in support of and in opposition to summary judgment and the motion to strike the jury trial demand. (R. pp. 178-220). The circuit court ruled on the motions in an Order filed March 10, 2021. The court denied the motion to strike Grapevine's jury trial demand; it granted in part the Defendants' motion for summary judgment, as to Grapevine's claims for fraudulent inducement, fraud/fraudulent misrepresentation, and breach of the duty of good faith and fair dealing. (R. p. 1).

This matter came for trial before the Honorable William McKinnon, beginning on August 23 and concluding on August 27, 2021. At the outset of trial, Appellants moved to limit introduction of evidence of lost profits, and consequential and punitive damages, which are not recoverable under the Lease; the court granted the motion as to Riverwalk, only. (R. pp. 544:8 – 550:18). Appellants argued to exclude evidence going to damages from alleged loss use of the "patios," because as a matter of law the Lease does not permit Grapevine's use of them; the court denied this motion, holding that it found the common area provision of the Lease to be ambiguous. (R. pp. 551 – 553:13; 605:13–14). Appellant Riverwalk moved for a non-jury trial; the court denied this motion. (R. p. 569; 573).

The trial proceeded before the jury. At the close of Grapevine's evidence, Appellants moved for directed verdict as to all causes of action. (R. pp. 942 –1009). The trial decided the contract questions were for the jury, but it granted directed verdict in favor of defendants on Grapevine's causes of action for breach of contract accompanied by fraudulent act, unfair trade practices, tortious interference with contract, amalgamation, and portions of the negligent misrepresentation claims. As to the

impropriety of the tort claims, the trial court stated, "They negotiated a commercial lease . . . [Grapevine] didn't get what [it] wanted. That doesn't mean it is a misrepresentation." (R. p. 961:6-8). After Appellants rested their case, Grapevine moved for directed verdict on specific performance; the trial court deferred hearing or ruling on the motion until after the jury verdict. (R. p. 1101:19-20).

Ultimately, the only causes of action that went to the jury were: (1) Grapevine's claim of breach of contract by Riverwalk as to the Lease's option to purchase; (2) Grapevine's claim of breach of contract by Riverwalk as to the Lease's common space/patio provision; (3) negligent misrepresentation as to all defendants—but only as to a single representation: that defendants misrepresented the bank's two-year lease requirement; and (4) civil conspiracy as to defendants Riverwalk and GRH Development. (R. p. 1114:15—19; 1116:22—25; R. p. 19).

The jury returned a verdict in favor of Grapevine on all counts except civil conspiracy. It awarded damages against Riverwalk for breach of contract in the amounts of $221,700 (Question 1, option to purchase) and $141,124 (Question 2, common area use). It awarded damages against all defendants for negligent misrepresentation in the amount of $96,800. (R. p. 19).

After trial, the parties made numerous post-trial motions. Grapevine moved for attorney's fees and costs, and for specific performance. (R. pp. 232, 250). Appellants moved for JNOV as to Grapevines' claims for breach of contract and negligent misrepresentation; to require Grapevine to elect its remedies; and for a new trial. (R. p. 271). The grounds for a new trial included that Grapevine had waived its right to a jury

trial in the Lease. The parties filed supporting and opposing memoranda of law. (R. pp. 232-312).

In an Order filed December 13, 2021, the trial court (*inter alia*) granted Grapevine's Motion for Specific Performance, ordering Riverwalk to convey the premises to Grapevine and requiring that Appellants "shall not restrict or limit Plaintiff's right to use the Common Areas in conjunction with the remaining tenants." The court further granted Grapevine's motion for attorney's fees and costs, with a 30% reduction of the total. (R. p. 8). Appellants filed a Motion pursuant to Rule 59 on the post-trial order, as to the award of specific performance and attorney's fees. (R. p. 313).

On April 19, 2021, the trial Court issued its Order on Rule 59 Motion and Final Judgment. (R. p. 21). In this Order, the trial court (*inter alia*) ordered Riverwalk to create a horizontal property regime, and it required that the master deed be substantially the same as that circulated to the Grapevine in January of 2018. (*Id*.).

Appellants timely filed and served their Notice of Appeal on April 29, 2022. (R. p. 1521). Riverwalk recorded a master deed on May 31, 2022 with York County. Appellants then moved the trial court to stay the enforcement of judgment; Grapevine opposed the motion and filed a motion to compel specific performance. (R. pp. 321-477). On August 15, 2022, the trial court filed an Order granting the Motion to Stay, subject to (*inter alia*) the requirement that the Defendants post a bond in the amount of $950,000 and also subject to the requirement that Riverwalk amend and record an amended master deed for its horizontal property regime that (*inter alia*) incorporated input from an attorney appointed by Grapevine; the court dictated that the amended master deed could "not

[be] unduly restrictive of [Grapevine's] rights, including the right to use the Common Area adjacent to its space, as established by the judgment in this case." The court further ordered that effective August 1, 2022, Grapevine would have no further obligation to pay rent or any other charge. (R. p. 31).

STANDARD OF REVIEW

Most of the questions in this appeal concern errors of law by the trial court, which this Court exists to correct—regardless of the standard of review. For example, the questions as to the construction of the Commercial Lease between Grapevine and Riverwalk are questions of law. *Pearson v. Church of God*, 325 S.C. 45, 478 S.E.2d 849 (1996). The question of whether the trial court erred in finding the common area provisions of the Lease to be ambiguous is also one of law. *See Middleton v. Eubank*, 388 S.C. 8, 14, 694 S.E.2d 31, 34 (Ct. App. 2010) ("It is a question of law for the court whether the language of a contract is ambiguous."); *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008) (providing appellate courts "review[] questions of law de novo").

Beyond that, it gets a bit more complicated, and the standard depends on the particular Appellant who is seeking review, as well as the decision to be reviewed.

A. Appellant Riverwalk.

Riverwalk was the Landlord in the Lease. Grapevine initially filed this lawsuit against Riverwalk alone, seeking specific performance. Over the course of several years, Grapevine amended its complaint to include causes of action against numerous other defendants, as well as a claim at law against Riverwalk based on the Lease. As discussed

in the Statement of the Case, most of the other causes of action were dismissed, and the gravamen of Grapevine's lawsuit remained that it was an action for specific performance on Grapevine's alleged right to purchase its leased space. In the midst of trial—and again after trial—Grapevine made directed verdict motions for specific performance. *See*, *e.g.*, R. p. 1213 ("Plaintiffs brought this action initially seeking specific performance. They want to purchase this space. We believe they're entitled to do that.").

An action for specific performance is in equity. *Ingram v. Kasey's Associates*, 340 S.C. 98, 531 S.E.2d 287 (2000); *Collier v. Green*, 244 S.C. 367, 137 S.E.2d 277 (1964). In equity actions, an appellate court can review the record and make findings based on its view of the preponderance of the evidence. *Townes Assoc. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976). **This Court should use this standard to review the issues pertaining to the Lease's option to purchase.**

As to the issues on appeal pertaining to the common areas and the option to purchase, Riverwalk made directed verdict motions and a motion for judgment notwithstanding the verdict on those questions, which the trial court wrongly denied. "When reviewing the denial of a motion for directed verdict or JNOV, this Court applies the same standard as the trial court." *Fettler v. Gentner*, 396 S.C. 461, 722 S.E.2d 26 (Ct. App. 2012). A directed verdict should be granted when the evidence raises no issue for the jury. *Evans v. State Farm Mut. Auto. Ins. Co.,* 269 S.C. 584, 239 S.E.2d 76 (1977).

The Lease is clear that Grapevine and Riverwalk were waiving trial by jury, as to claims against one another arising under the Lease, and Riverwalk thus moved to strike Grapevine's demand for a jury trial. "Whether a party is entitled to a jury trial is a

question of law." *Verenes v. Alvanos*, 387 S.C. 11, 15, 690 S.E.2d 771, 772 (2010). Appellate courts may decide questions of law with no particular deference to the circuit court's findings. *Id.* at 15. Further, the refusal of a motion to strike will be reversed if it is controlled by error of law. *Brown v. Coastal States Life Ins. Co.*, 213 S.E.2d 726, 264 S.C. 190 (1975).

B. Appellants GRH Development Resources, LLC, The Greens of Rock Hill, LLC, and Assured Administration, LLC

Only one issue on appeal pertains to Appellants GRH Development Resources, LLC, The Greens of Rock Hill, LLC, and Assured Administration, LLC, and that is the issue on their alleged negligent misrepresentation. An action in negligence is an action at law. On appeal from a case tried before a jury in a law action, this Court has authority to correct errors of law, and it may reverse the jury's findings of fact if there is no evidence which reasonably supports them or if appellants are entitled to judgment as a matter of law. *Townes Assoc.*, 266 S.C. at 81, 221 S.E.2d at 773. One of the questions here is whether a duty existed, which is a matter of law. *See Doe v. Citadel*, 805 S.E.2d 578, 421 S.C. 140, 146 (Ct. App. 2017) ("In a negligence action, the court must determine, as a matter of law, whether the defendant owed a duty of care to the plaintiff.") (internal quotations and citations omitted); *cf. Koontz v. Thomas*, 511 S.E.2d 407, 333 S.C. 702, 713 (Ct. App. 1999) (affirming summary judgment on negligent misrepresentation claim because "All of T&D's alleged representations related to future events, not existing facts.").

ARGUMENT

The trial court's rulings, including its post-trial orders as well as its decisions at trial on directed verdict, were controlled by error of law that tainted the judgment and the trial itself. Those errors compel reversal and remand for a new trial.

The issues on appeal, as between Appellant Riverwalk and Respondent Grapevine, are governed by their Lease Agreement, which is unambiguous and clearly sets forth the rights and obligations of the parties. The construction of a contract is a matter of law for the court, and the trial court misconstrued the Lease's controlling terms. Among other things, the trial court erred as a matter of law when it: (1) ignored the Lease's provisions on jury trial waiver, (2) disregarded the required mechanism for Grapevine's exercise of the option to purchase, and (3) found the common area provisions of the Lease to be ambiguous.

Moreover, with regard to Appellants GRH Development Resources, LLC, The Greens of Rock Hill, LLC, Assured Administration, LLC, and Riverwalk, there is no evidence whatsoever that would support the jury's finding that any of those entities made a negligent misrepresentation to Grapevine, and this Court should reverse on the jury's findings on this claim as a matter of law. Finally, the trial court's award of attorney's fees should be reversed as improper under the law and Lease.

I. The trial court erred in denying Riverwalk's motion to strike the jury trial demand as to all claims against Appellant Riverwalk.

The Lease contains a clear and conspicuous all-caps jury trial waiver:

> 59. **Miscellaneous Provisions.** This Lease is entered into, and shall be construed in accordance with and governed by, the laws of the State of South Carolina, without reference to principles of conflicts of laws. Any claim or cause of action arising hereunder or relating hereto shall be brought in a state court of competent subject matter jurisdiction located within York County, South Carolina, and the parties irrevocably consent to the personal jurisdiction of any such court for the purposes of such an action and waive any defense they may have as to the venue or convenience of any such a court for the purposes of such an action. THE PARTIES KNOWINGLY AND VOLUNTARILY WAIVE ANY RIGHT THEY MAY HAVE TO A TRIAL BY JURY IN ANY CLAIM OR CAUSE OF ACTION ARISING HEREUNDER OR RELATING TO THIS LEASE. This Lease may be executed in counterparts, the aggregate of which shall constitute a complete and fully executed version hereof, and may be executed by facsimile or like method of electronically reproduced signature, which signature hereon shall have the same force and effect as an original signature.

(R. p. 1269 ¶ 59). South Carolina law is clear—a contractual waiver of the right to a jury trial such as the one contained in the Lease is enforceable. *Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 60, 566 S.E.2d 863, 864 (Ct. App. 2002). Indeed, the *Beach Co.* decision, often cited by the appellate courts for the proposition that jury trial waivers are enforceable, itself involves a commercial lease and a lease provision that is nearly identical to the provision governing the subject lease, except that the waiver in *Beach Co.* was not in all caps:

> Section 27.16 of the "Miscellaneous Provisions" section of the lease, entitled "Waiver of Counterclaim" provides:
>
> Tenant waives any and all right to trial by jury or to interpose any counterclaim in any summary proceeding for eviction or nonpayment of Rent. Any and all claims or 'counterclaims' that may be asserted by Tenant shall only be made the subject of a separate action. In such separate action, it is agreed that trial by jury shall be waived by both parties.

Id. at 60. The Grapevine therefore clearly waived its right to a jury trial, and Riverwalk's Motion to Strike should have been granted as to Grapevine's claims.

Faced with the clear waiver provision in the Lease and the controlling *Beach Co.* decision, the Grapevine was forced to resort to all manner of technical arguments to keep the lawsuit on the jury trial roster. The trial court, in a short order without analysis, erroneously agreed with Grapevine for reasons that are unexplained. (R. p. 1). It reiterated its decision at trial. (R. pp. 569–573). The trial court's decision was wrong as a matter of law, and this Court should reverse and remand for a non-jury trial on Grapevine's claims against Riverwalk.

A. The Motion to Strike was proper, and the trial court did not have discretion to deny it so long as the jury trial waiver was enforceable.

Riverwalk filed the Motion to Strike the jury demand along with its Answer to Grapevine's Second Amended Complaint on January 29, 2021. (R. p. 158). Riverwalk had the absolute right to assert new defenses and file the Motion to Strike in response to the Second Amended Complaint. South Carolina Rules of Civil Procedure 8(c), 12(a), 12(f) and 15(a) all contemplate a response to an amended pleading, and none restrict that response to prior defenses; such a restriction would be nonsensical. The effect of an amended complaint is that prior complaints are wiped out, and the defendants are free to assert new defenses. *Rullan v. Goden*, 134 F. Supp. 3d 926, 941 (D. Md. 2015) ("Because a plaintiff's new complaint wipes away prior pleadings, the amended complaint opens the door for defendants to raise new and previously unmentioned affirmative defenses.") (citations omitted). Riverwalk did so, as was its legal right.

Grapevine contended, without meaningful citation or explanation, that Riverwalk's alleged change of position unfairly prejudiced the Grapevine. (R. p. 210 - 220). In so arguing, Grapevine cited *King v. Shorter*, 291 S.C. 501, 354 S.E.2d 402 (Ct. App.

1987). The *King* decision involved a party's failure to demand a jury trial until what appears to be a Fourth Amended Complaint. This case is absolutely distinguishable. The right to a jury trial is controlled by South Carolina Rule of Civil Procedure 38, which requires a party to demand a jury trial "not later than ten days after the service of the last pleading directed to such issue." Rule 39(b) specifically provides that "notwithstanding the failure of a party to demand a jury in an action in which such demand might have been made of right, the court in its discretion upon motion may order a trial by jury of any or all issues." (emphasis added). The rule therefore renders the decision to transfer the case to a jury roster discretionary. The *King* decision turned on the trial judge's discretion:

> We have carefully analyzed the allegations by Shorter in each of his pleadings and find that they involve essentially the same facts. We therefore hold, under the above authorities, that the trial judge did not abuse his discretion in either allowing Shorter's amended pleading or in denying his motion to transfer the case to the jury calendar. And we so hold.

Id. at 403.

The present case involves a clear issue of law, not a question of discretion. There is no question that, under South Carolina law, a contractual jury trial waiver is enforceable. *Beach Co.*, 351 S.C. at 60, 566 S.E.2d at 864. Therefore, if the contractual provision is enforceable, the judge has no discretion under the South Carolina Rules of Civil Procedure to deny a request that the matters be tried non-jury. The party asserting the right to a jury trial either waived it, or it did not. **In this case, Grapevine waived its right to a jury trial against Riverwalk when it signed the Lease.**

Before the trial court, Grapevine made what can best be described as a reverse waiver argument—that the contractual waiver of a jury trial by Grapevine was waived by Riverwalk because the timing of the Motion to Strike somehow prejudiced Grapevine. In so arguing, Grapevine cited *Wachovia Bank Nat'l Ass'n v. Blackburn*, 407 S.C. 321, 332, 755 S.E.2d 437, 443 (2014), for the proposition that "the right to a trial by jury is a substantial right." This is a circular argument, belied by the *Blackburn* decision itself. The *Blackburn* case did not involve an alleged waiver by the defendants of a right to contest the jury trial. Rather, it concerned, and upheld, the impact of a contractual jury trial waiver:

> By signing the note and guaranty, Respondents are charged with having read their contents; therefore, although they assert via affidavit that they were "not aware of any jury trial waiver clause until the motion to strike [their] request for jury trial was made by" Wachovia, they cannot avoid the effects of the waivers merely by arguing that they were unaware that such provisions were included in the note and guaranty. We therefore find the waivers enforceable and applicable to any of Respondents' counterclaims that are legal and compulsory.

Blackburn, 407 S.C. 321 at 333, 755 S.E.2d at 443. Therefore, the fact that a right to trial by jury is a substantial right is immaterial where there is an enforceable jury trial waiver by contract. That is not impacted by any alleged prejudice.[3]

C. The jury trial waiver in the Lease is enforceable as to the claims against Riverwalk.

Grapevine also argued that the jury trial waiver in the Lease was unenforceable because it cannot benefit any Appellant other than Appellant Riverwalk and because it

[3] Even assuming prejudice is a viable consideration in this context, Grapevine provided no examples of actual prejudice. Grapevine would have been able to present its claims to a judge just like it would have been able to present those claims to a jury. The only thing that would have changed would be the decision-maker.

was not conspicuous, unambiguous, knowing and intentional as to the Grapevine and was therefore not enforceable by Appellant Riverwalk, either. (R. pp. 216-217). Riverwalk concedes that the jury trial waiver in the Lease was not enforceable as to the remaining Appellants. However, the jury trial waiver ***was*** enforceable as to Riverwalk, which would have altered the manner in which the case was tried and requires reversal of the judgment.[4]

Grapevine further argued that the jury trial waiver found in the Lease is unenforceable because it was ambiguous, inconspicuous, and because the signatory for

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[4] In a similar matter, the Supreme Court of South Carolina held that the claims against a tenant could be transferred to the non-jury roster and tried separately from the guarantors or tried in the same action:

> Notwithstanding Guarantors' right to jury trial and Tenant's waiver of that right, the issue here may be decided in a single trial at a jury term of court.
>
> After all evidence is presented to an empaneled jury, the court, sitting as judge and jury, shall determine Landlord's claim against Tenant for past-due rent. If it holds Landlord has failed to establish its claim, the case against both Tenant and Guarantors shall be dismissed. If it holds Landlord has established its claim, the jury, upon proper instruction, shall decide Landlord's action against Guarantors.
>
> Alternatively, the trial judge, in a bench trial, shall determine the issue of past-due rent raised by the pleadings between Landlord and Tenant. If the court holds that Landlord has failed to prove its claim, the case against all defendants shall be dismissed. If it determines that Landlord is entitled to judgment from Tenant, a jury shall then be empaneled to hear and decide Landlord's case against Guarantors.

N. Charleston Joint Venture v. Kitchens of Island Fudge Shoppe, Inc., 307 S.C. 533, 535, 416 S.E.2d 637, 638 (1992). Either way, the matters between the landlord and tenant would be decided by the Court, not the jury. In the present case, those matters were decided by the jury, including the separate awards against Respondent Riverwalk for breach of contract and negligent misrepresentation. (R. p 19). The court then used that jury verdict to find that Appellant Grapevine was entitled to specific performance. *Johnson v. S.C. Nat. Bank*, 292 S.C. 51, 55, 354 S.E.2d 895, 897 (1987) ("when issues common to both legal and equitable claims are to be tried in a single proceeding, legal issues are to be determined first, and the findings of the jury are binding on the sitting judge, as trier of the equitable claims."). The entire judgment is therefore infected by the erroneous failure to strike the jury trial demand as to Appellant Riverwalk.

the Grapevine was ignorant and unwary when she signed the Lease. In so arguing, Grapevine did not state **how** the Lease was ambiguous, and cited only the *Blackburn* case and cases from other jurisdictions as support for the claim that the waiver provision is inconspicuous. That argument is absurd, and it also ignores the fact that both principals of the Grapevine initialed the provision when they signed the Lease—acknowledging notice of it. (R. p. 1269, Lease ¶ 59).

The subject provision provides, in **ALL CAPS**: THE PARTIES KNOWINGLY AND VOLUNTARILY WAIVE ANY RIGHT THEY MAY HAVE TO A TRIAL BY JURY IN ANY CLAIM OR CAUSE OF ACTION ARISING HEREUNDER OR RELATING TO THIS LEASE. (*Id.* ¶ 59). There is nothing mysterious about this provision. It is clear and readily understandable by any reader. It is therefore not ambiguous, and the argument that it should be construed against Appellant Riverwalk is irrelevant.

Further, the jury trial waiver is conspicuous as a matter of established South Carolina precedent. As discussed above, the *Beach Co. v. Twillman* decision is directly on point. In that case, the tenant argued that the following provision which, like here, was found in the "Miscellaneous Provisions" section of the lease but was not bolded, in capital letters, or underlined, was inconspicuous and therefore not enforceable:

> Section 27.16 of the "Miscellaneous Provisions" section of the lease, entitled "Waiver of Counterclaim" provides:
>
> Tenant waives any and all right to trial by jury or to interpose any counterclaim in any summary proceeding for eviction or nonpayment of Rent. Any and all claims or 'counterclaims' that may be asserted by Tenant shall only be made the subject of a separate action. In such separate action, it is agreed that trial by jury shall be waived by both parties.

Beach Co., 351 S.C. at 60, 566 S.E.2d at 864. The Court of Appeals rejected tenant's argument about conspicuousness, holding:

> The waiver provision in the lease plainly provides that in any claim asserted by Twillman, "trial by jury shall be waived by both parties." **We find the clause is a valid waiver of Twillman's right to a jury trial.**

Id. at 64, 566 S.E.2d at 866 (emphasis added). Therefore, Grapevine's attempts to distinguish the *Blackburn* decision and cite cases from other jurisdictions were of no consequence.

Grapevine also argued that it should not be bound to the jury trial waiver because the signatory, Melanie Sills, thought that much of the Lease was "legalese" and "mumbo jumbo," and she did not understand what she was signing. (R. p. 217). This argument is hardly persuasive. Grapevine is a business entity and is charged with understanding what it is signing. Feigning ignorance is no excuse, as noted in the same *Blackburn* decision cited by the Grapevine in its opposition to the Motion to Strike:

> However, although the right to a trial by jury is a substantial right, and we "strictly construe" such waivers, a person who signs a contract or other written document cannot avoid the effect of the document by claiming that he did not read it. Instead, when a person signs a document, he is responsible for exercising reasonable care to protect himself by reading the document and making sure of its contents. The law does not impose a duty on the bank to explain to an individual what he could learn from simply reading the document.

Blackburn, 407 S.C. at 332–333, 755 S.E.2d at 443 (citations omitted).

The jury trial waiver is plainly enforceable as between Appellant Riverwalk and Grapevine. Therefore, the claims against Riverwalk should have been tried non-jury, either in the same action as the jury trial or a separate action. This error by the trial court infected all of the verdicts rendered, including the trial court's post-trial grant of specific

performance which was based on the jury's decision, and the award of attorney's fees. The entire verdict must therefore be reversed, and the case remanded for a bifurcated trial.

II. Grapevine failed to exercise the option to purchase in conformance with the Lease's clear requirements, and Riverwalk was therefore entitled to judgment as a matter of law.

It was error for the trial judge to submit to the jury the question regarding the option to purchase. The evidence and testimony, coupled with the unambiguous language of the Lease, led to only one reasonable inference: Grapevine did not properly exercise the option to purchase, and Riverwalk's requirement to perform was therefore never triggered. South Carolina law requires "exact compliance with the terms of an option." *Alexander's Land Co. v. M & M & K Corp.*, 390 S.C. 582, 703 S.E.2d 207 (2011) (emphasis added). Because of Grapevine's admitted failure to comply with the terms of its option, Riverwalk was entitled to judgment as a matter of law on this question. A directed verdict and/or a JNOV should be granted where the evidence raises no issue for the jury as to the defendant's liability. *Guffey v. Columbia/Colleton Reg'l Hosp., Inc.*, 364 S.C. 158, 163, 612 S.E.2d 695, 697 (2005). Questions of law should be decided and corrected by this Court with no particular deference to the circuit court. *I'on LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000).

Mid-way through the second Lease Year, Grapevine sent a letter to Riverwalk which communicated its desire to exercise the Lease's option:

> Pursuant to the lease between [Grapevine and Riverwalk], the parties agreed, in paragraph 33, for [Grapevine] to have the "Option to purchase the Premises during the third lease year with not less than 120 days

> advanced written notice to the Landlord . . .”[5] THIS LETTER CONSTITUTES NOTICE, pursuant to paragraph 33 of the Lease, of **[Grapevine's] intent to exercise its purchase option** . . .

(R. p. 1298) (emphasis added). As discussed below, this letter—standing alone—was insufficient under the Lease and South Carolina law to induce an obligation to perform by Riverwalk. In the light most favorable to Grapevine, the evidence is clear that Grapevine did nothing more in the letter than provide notice of its future intent to exercise its option to purchase. Riverwalk did not breach the option provision, as matter of law.

A. The Lease required Grapevine to execute a Purchase and Sale Agreement and to tender a deposit.

The trial court misapprehended the nature of an option to purchase when it held, "Grapevine exercised the option when it wrote its letter." (R. p. 12). An option is not a purchase contract—it is a right to make a purchase contract in the future. "Options . . . are unilateral contracts where the optionor, for a valuable consideration, **grants the optionee a right to make a contract of purchase** but does not bind the optionee to do so." *Alexander's Land Co.*, 703 S.E.2d at 213–214 (emphasis added). Grapevine never tendered to Riverwalk a contract to purchase, nor its consideration, both of which were expressly required to properly exercise the option.

The law disfavors options. *See Cotter v. James L. Tapp Co.*, 267 S.C. 647, 230 S.E.2d 715 (1976) (Observing that "harsh results in option cases are necessary to further more compelling considerations of public policy"). Therefore, "the transition of an option into

[5] By using these ellipses in its letter, Grapevine omitted critical language requiring that the option be exercised pursuant to Exhibit G of the Lease.

a contract of purchase and sale can only be effected by an unqualified and unconditional acceptance of the offer in accordance with the terms and within the time specified in the option contract." *Ingram*, 340 S.C. at 98, 531 S.E.2d at 287.

The Lease's Option to Purchase is set forth in Paragraph 33. It has specific requirements, including advance written notice and a Purchase and Sale Agreement, as provided as Exhibit G to the Lease:

> **Option to Purchase.** Tenant shall have the Option to purchase the Premises during the third lease year with not less that 120 days advanced written notice to Landlord for $270,000.00 (the "Purchase Price") ***in accordance with the Purchase and Sale Agreement as provided in Exhibit G.***

(R. p. 1262) (emphasis added). In other words, the execution of the Purchase and Sale Agreement in Exhibit G—which would create a binding purchase contract between the parties—was necessary to exercise the option. Exhibit G contains a signature block for the Buyer. (R. p. 1285 - 1297). To accept the terms of the offer, Grapevine was obligated to accept and execute a purchase contract under the terms specified in Exhibit G. Moreover, the Purchase and Sale Agreement in Exhibit G required a $25,000 "deposit due upon execution of this Agreement," which was to be held in escrow.[6] (R. p. 1283). To exercise the option "in accordance with the Purchase and Sale Agreement," Grapevine would have had to tender the $25,000 deposit.

The Lease's Paragraph 33 and its Exhibit G are in harmony with South Carolina law, which holds that an "Option to Purchase" is equivalent to an optional **future right**

[6] Notably, according to the Purchase and Sale Agreement (which was never executed by Grapevine), Grapevine had no remedy, other than recovery of the escrowed deposit, in the event that Riverwalk was unable after reasonable efforts to convey marketable title by the contract's closing date. (*See* R. pp. 1286 - 1288, ¶ 4.3).

to make a contract of purchase. *Alexander's Land Co.*, 703 S.E.2d at 213–214. "[I]f the option requires performance in a certain manner, time is of the essence and exact compliance with the terms of the option are required." *Id*. Importantly, this provision does not impose an obligation on Riverwalk until the option is exercised, except the obligation not to sell its property to another purchaser for so long as the option remains valid.[7] *See id.* (an option is irrevocable during its term) (*citing Ingram,* 340 S.C. at 98, 531 S.E.2d at 287).

B. Grapevine failed to perform.

Grapevine agreed that the Lease's Option to Purchase paragraph is unambiguous:

> Q Is there anything in your mind that is ambiguous about the option to purchase. I mean, it says you have the right to purchase the space during the third lease year on advanced written notice of 120 days. Right?
>
> A To me there is nothing ambiguous about it.

(R. p. 716: 10–14).

As this Court knows well, the construction of a clear and unambiguous contract is a matter of law for the court. *Lee v. Univ. of S.C.*, 407 S.C. 512, 757 S.E.2d 394 (2014). "If its language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required, and the contract's language determines the instrument's force and effect." *Progressive Max Ins. Co. v. Floating Caps, Inc.*, 405 S.C. 35, 46, 747 S.E.2d 178, 183 (2013) (internal citations omitted).

What this Court might not know as well—and a source of error on the part of the

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[7] Riverwalk did not sell the premises nor revoke the option.

trial court—is that **option contracts are unique in the realm of contract construction.** When construing an option contract, a court's interpretation of the contract is supposed to be skewed in favor of the owner of property who gives an option (here, Riverwalk). "It is well settled in South Carolina that option contracts are strictly construed in favor of the optionor and against the optionee." *Cotter,* 230 S.E.2d at 717 (1976). The trial court erred in construing the contract in favor of Grapevine. (R. pp. 1112:11—1113:11). It further erred in finding that the evidence yielded any inference whatsoever that Grapevine had complied with the Option to Purchase provision of the Lease. As a matter of law, the evidence leaves no question that it did not comply.

By its own admission, the Grapevine failed to tender to Riverwalk either the mandatory Purchase Agreement or the mandatory $25,000 deposit, both of which were required conditions to exercise the right. Grapevine was aware of the Purchase and Sale Agreement in Exhibit G. Not only did Grapevine's principals initial each and every page of Exhibit G, but its attorney referred to it when he notified Riverwalk of Grapevine's desire to exercise the purchase option. (R. pp. 1285 - 1297; R. p. 1298) ("Exhibit G sets forth the parameters of the purchase with more specificity."). Despite this knowledge, Grapevine testified at trial that it never executed or submitted a purchase contract:

> Q At any time during the third lease year did Grapevine ever tender a contract in the form of Exhibit G to its landlord in order to exercise a purchase?
>
> A No, we were trying to get a contract date or a closing date scheduled so we could put it in the agreement along with the other information.

(R. p. 777:16–21).

Grapevine further testified that it never tendered the $25,000 deposit money:

> Q Earnest money and a purchase offer would have been buyer's obligations, correct?
>
> A Correct.
>
> Q And you never tendered a purchase money, right?
>
> A Right.
>
> Q And you never tendered a contract signed by you and your husband on behalf of Grapevine?
>
> A Depending on my attorney and I was assuming he was doing things properly.

(R. pp. 779:7–15; *see also id.* pp. 779–783).

"[T]he transition of an option into a contract of purchase and sale can only be effected by an unqualified and unconditional acceptance of the offer in accordance with the terms and within the time specified in the option contract." *Ingram*, 340 S.C. at 108, 531 S.E.2d at 292. Here, as a matter of law, Grapevine failed to act in accordance with the terms of the Lease to exercise its option.

C. Hearing it through the Grapevine[8] was not enough.

Grapevine argued—and the trial court erroneously agreed—that the letter it sent, coupled with its repeated requests to Riverwalk for a closing date, was sufficient to obligate a sale. This argument is wrong under the Lease and the law. In a case with facts similar to this one, our Supreme Court held, "**Defendant could have given written notice every day in the month of February 1975, and such notice still would not have satisfied**

[8] [Deferential nod to Marvin Gaye].

a requirement to [comply exactly with the terms of the option]." *Cotter*, 267 S.C. at 647, 230 S.E.2d at 715.

Importantly, South Carolina law regards options differently than other contracts, because options run counter to public policy favoring the free alienation of property. When an owner restricts his ability to sell by giving an option (an exclusive future right to contract to buy property), the law demands strict conformance with the terms of the option in order to effectuate it. *Alexander's Land Co.*, 703 S.E.2d at 214–215, *quoting Cotter,* 230 S.E.2d at 719 ("[T]he courts have recognized that harsh results in option cases are necessary to further more compelling considerations of public policy. When an individual grants an option he ties up his rights and property for a specified period of time without binding the other side. For this reason he is entitled to strict compliance with time limits and other terms of the option.") (emphasis added).

Grapevine argued that it could not have "filled in the blanks" in the Purchase and Sale Agreement in Exhibit G, and that no escrow agent was identified, so it could not tender the deposit. **These are not legitimate excuses**. It was Grapevine's duty under the Lease's "Option to Purchase" provision to put forward a purchase contract "in accordance with the Purchase and Sale Agreement in Exhibit G." Grapevine was fully capable of executing such an agreement. As the purchaser, Grapevine was also fully capable of nominating an escrow agent and depositing the funds. It failed to make any effort to do so. South Carolina law is clear that "if the optionee fails to comply with the terms of the option, **even though he may have an excuse, he must bear the responsibility and not the optionor**." *Cotter*, 230 S.E.2d at 719 (emphasis added).

"It is also well settled in this state that if the option requires performance in a certain manner . . . exact compliance with the terms of the option are required." *Id*. at 717–718; *see also Alexander's Land*, 703 S.E.2d at 214–214 (quoting the same rules of construction). The terms of Paragraph 33 of the Lease, read in context with the Lease's Exhibit G, and construed as they must be in favor of Riverwalk, leave no doubt that Grapevine did not exercise its option "in accordance with the Purchase and Sale Agreement as provided in Exhibit G." This Court should therefore reverse.

III. The trial court erred when it granted specific performance in the absence of a binding real estate purchase contract.

After trial, Grapevine moved for a directed verdict on its claim for specific performance. The trial court was wrong to grant this remedy, particularly in the absence of an enforceable real estate purchase contract between the parties. The trial court compounded its error by ordering "relief" to Grapevine that far exceeded the terms of any conceivable agreement by Riverwalk—including that the court wrongly allowed the Grapevine to dictate to Riverwalk the terms of a master deed governing an entire horizontal property regime, including non-parties; it disregarded the plain meaning of "Common Elements" within a condominium regime (*see infra*, Section IV); and it ignored rights and obligations on the part of the bank (also not a party).[9]

[9] The trial judge granted this relief in a series of orders, all of which hinge upon its flawed decision to grant specific performance. *See* R. pp. 8, 26, 31: Order on Post-Trial Motions (granting Grapevine's Motion for Specific Performance); Amended Order on Rule 59 Motion and Final Judgment (delineating requirements for terms of the master deed); Order on . . . Plaintiff's Rule 70 Motion to Compel Compliance with Final Judgment (making findings about the master deed and requiring amended master deed); Order Denying Motion to Alter or Amend (refusing to

Specific performance is an equitable remedy in which the court acts to enforce a contract for the purchase of real property. Essentially, specific performance presumes that a purchaser holds title in equity to real property, having completely fulfilled all requirements necessary to obtain it. In order to compel specific performance, a court of equity must first find that "there is clear evidence of a valid agreement." *Ingram*, 340 S.C. at 98, 531 S.E.2d at 287.

An option is <u>not</u> a purchase contract. An option is a mere right held in anticipation of a potential future purchase contract:

> In *Faulkner v. Millar*, this Court noted that an option merely gives a person the right to make a purchase at a fixed price within a fixed time, but it imposes no obligation to do so: "An option is to be distinguished from a sale, or a contract, or agreement or offer to sell. **The chief difference between a contract to sell and purchase real property, and an option to purchase said property lies in the fact that, while the former creates a mutual obligation on the part of one party to sell and the other to purchase, the option merely gives the right to purchase**, at a fixed price, within a fixed time, without imposing any obligation to do so." An option limits the power of the optionor to revoke the offer, and it typically occurs where the optionee pays the optionor to keep an offer to sell open.

Alexander's Land Co., 703 S.E.2d at 216 (emphasis added) (internal citations omitted). Indeed, a distinguishing difference between a purchase contract and a mere option is the instrument's ability to be specifically enforced. *Hutto v. Wiggins*, 175 S.C. 202, 178 S.E. 869 (1935) ("A test in determining in which of the categories [either option or purchase contract] a particular instrument is to be placed is said to be, 'Could the agreement be specifically enforced?'"); *see also Barr v. Lyle*, 211 S.E.2d 232, 263 S.C. 426 (1975) (denying

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amend order on stay). Each of these successive orders should be set aside for error by the court, in allowing a matter of law to go to the jury (*see infra* Issue II) and in granting specific performance.

specific performance when no enforceable contract existed).

As discussed above in Issue II, as a matter of law and contract construction, the Lease is not a contract for the purchase of real property . . . it is a lease that contains an option provision. The Lease is clear that a "Purchase and Sale Agreement as provided in Exhibit G," executed by Grapevine, would be a necessary condition to its exercise of its option to purchase. The Lease's Option to Purchase provision cannot be fulfilled without the execution of a Purchase Agreement, including a contemporaneous escrow deposit. Obviously, if Grapevine had tendered to Riverwalk such a purchase agreement—along with consideration in the form of a deposit into escrow—this Brief might have a different trajectory. Had Grapevine done so, there might have been terms for the trial court to specifically enforce, including express provisions going to the parties' remedies for breach and direction to the court as to Riverwalk's obligation to create a horizontal property regime and to clear title of the Bank's lien. (*See, e.g.,* Lease, Ex. G, R. p. 1287, "Extension to Perfect Title;" p. 1289, "Title; Deed;" p. 1291, "Use of Purchase Money to Clear Title;" p. 1294, "Seller Default"). But Grapevine never tendered a purchase agreement, and **it therefore had no purchase contract for the court to specifically enforce**.

This Court should reverse the trial court's erroneous grant of specific performance on a real estate purchase contract that did not exist.

IV. The trial court erred as a matter of law to find that "Common Areas" could ever be used exclusively by one party, either under the Lease or the law.

The trial court was wrong to send to the jury the question of whether the Lease permitted Grapevine to put its tables and chairs in the community sidewalk when, as a matter of law, the Lease did not. The court's error sprang from its legally defective determination that the Lease's terms governing the "Common Areas" were ambiguous. (R. p. 605:13–14) ("I find Paragraph 15 to be ambiguous."). In the context of the Lease and real property law, there is nothing even remotely ambiguous about the Lease's non-exclusive use provision governing common areas. Because the Lease is clear that Grapevine could not put its restaurant seating on the community sidewalks, this Court should reverse the trial court on this issue as a matter of law.

The question of whether a contract is ambiguous is a question of law for the court. *N. Am. Rescue Prods., Inc. v. Richardson*, 411 S.C. 371, 769 S.E.2d 237 (2015). "If a contract's language is unambiguous, the plain language will determine the contract's force and effect. A contract must be read as a whole document so that one party may not create ambiguity by pointing out a single sentence or clause." *Id*. (cleaned up). Here, the trial court wrongly plucked a few sentences out of the context of a very detailed commercial Lease and found ambiguity where there is none.

Riverwalk's Building 6 is a large, multi-use building. It has multiple commercial and mercantile tenants on the first floor, and then three floors of residential apartment units above. (R. p. 95:8–10) ("We have three floors of apartments upstairs. I think that it is 24 apartments in total and on the bottom floor is all commercial tenants."). Grapevine

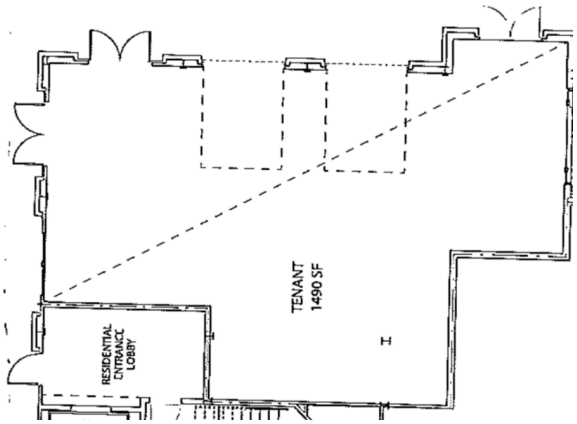
set up an outdoor seating area for its customers on the sidewalk outside of its storefront:

(*See* R. pp. 1384-1386). The sidewalks are owned by the Landlord, Riverwalk. The Lease defines sidewalks as "Common Areas" of the Building, which the Landlord has the duty to maintain, care for, and insure. (R. pp. 1253-1256, Lease § 12) (identifying "stairwells, common reception areas, common restrooms, common hallways and entranceways, parking areas, landscaping, sidewalks" as common areas). This makes sense, because "common areas" or "common elements" are, by definition, "realty that all tenants may use though the landlord retains control over and responsibility for it." *Black's Law Dictionary* (11th ed. 2019) (emphasis added).[10] Pursuant to the Lease, Grapevine, as well as "its customers, employees, and invitees," has the "**non-exclusive right** to use and enjoy **in common with** Landlord, other tenants and their customers, employees and invitees, the Common Areas which **Landlord agrees to provide** for the reasonable operation of the Building." (R. p. 1256, Lease § 15).

[10] Anecdotally, although this is a strictly legal question, the testimony show that tension arose between Riverwalk and Grapevine when a dog bite occurred in the common area, involving one of Grapevine's patrons; a lawsuit ensued. (R. pp. 793:17–794:8; p. 1379).

There is nothing ambiguous about this non-exclusive right to use the common areas: "non-exclusive" in the realm of property law means that one cannot use the property in a manner that excludes others from the same or a similar use.[11] It goes almost without saying that putting up restaurant chairs and tables in a sidewalk for the customers of one business is an exclusive use, which operates to exclude other tenants from using that part of the sidewalk. The Lease confirms this meaning: It states that tenants must keep "all Common Areas immediately adjoining the Demised Premises clean and **free from obstruction**, rubbish and dirt." (R. p. 1258, § 18) (emphasis added).

Moreover, the Lease defines the premises leased by the Grapevine as "that certain space comprised of approximately 1,490 square feet . . . and *being located within the Building*." (R. p. 1247 § 1) (emphasis added). This definition of the space rented by Grapevine leaves no question that Grapevine's premises does not include the sidewalks outside of its storefront. Further, Exhibit A to the Lease depicts the 1,490 square foot space leased by the Grapevine, and it does not show **<u>any</u>** outdoor seating area or patio:



(R. p. 1272, Lease Ex. A).

[11] Black's Law Dictionary defines "exclusive" as: "1. Limited to a particular person, group, entity, or thing <exclusive right>." *Black's Law Dictionary* (11th ed. 2019).

When the Lease is construed "as a whole document," as it must be under South Carolina law, there can be no question that Grapevine had no right under the Lease to clog up the Building's sidewalks with restaurant tables and chairs for its customers. *Richardson*, 769 S.E.2d at 240. It was error for the trial court to send this question to the jury when there was no evidence or factual inference to be drawn from the Lease other than that Riverwalk had no obligation under the Lease to allow Grapevine's tables and chairs. Indeed, Riverwalk had a duty to the numerous other tenants in the Building to keep the sidewalks free from obstruction. "When the language of a contract is plain and capable of legal construction, that language alone determines the instrument's force and effect." *Ellis v. Taylor*, 449 S.E.2d 487, 316 S.C. 245 (1994).

For this same reason, the trial court erred as a matter of law in its grant of specific performance to Grapevine on this question. The unit leased by Grapevine is a part of a horizontal property regime, and it therefore must be subject to a Master Deed. Horizontal property regimes ("HPRs") are creatures of statute, governed by South Carolina Code § 27-31-10, *et seq*. As in the Lease, "common elements" in a HPR's master deed are for the shared use of all the units in a condominium regime. S.C. Code § 27-31-80, *Use of common elements* ("Each co-owner may use the elements held in common in accordance with the purpose for which they are intended, without hindering or encroaching upon the lawful rights of the other co-owners.").

No single unit owner has exclusive rights to a general common element, like the sidewalk, in a South Carolina HPR. *Id.*; *see also* S.C. Code § 27-31-60(a). But the trial court wrongly dictated that Riverwalk must draft its master condominium deed in such a way

as to allow Grapevine to maintain its tables and chairs in the common area outside its storefront. (R. p. 33, Order p. 3) (requiring Riverwalk to amend its master deed, and holding "[t]he amended Master Deed shall contain terms that are . . . not unduly restrictive of Plaintiff's rights, including the right of Plaintiff to use Common Areas adjacent to its space, as established by the judgment in this case."). This was error for at least two reasons: (1) because exclusive use of a common area is improper, as a matter of law, and (2) also because the Lease itself delimited the premises to be conveyed, assuming the option was correctly exercised, to the "Leased Premises." (R. p. 1262, § 33). In other words, **the option did not give Grapevine the right to own something greater than that which it rented**. The Lease is clear that Grapevine was leasing "that certain space comprised of approximately 1,490 square feet . . . and *being located within the Building*." (R. p. 1247 § 1; 1272). The Lease is equally clear that Grapevine was obligated to keep the common areas "free from obstruction." (R. p. 1258, § 18).

The trial court erred in denying directed verdict and JNOV on this question, when the Lease is unambiguous in its prohibition of exclusive use by Grapevine of the common areas. Moreover, the trial court compounded this error by compelling Riverwalk to convey to Grapevine unrestricted use of a common area. This Court should reverse the trial court's errors on these matters of law.

V. The circuit court erred in not granting JNOV as to the negligent misrepresentation count because there was no duty owed, no false statement made, and no detrimental reliance by Grapevine.

The circuit court erred in denying Appellants' motion for a JNOV on the negligent misrepresentation claim. Even construed in a light that is most favorable to Grapevine,

the evidence presented at trial could not support the jury's verdict for negligent misrepresentation. *See Allegro, Inc. v. Scully*, 418 S.C. 24, 791 S.E.2d 140 (2016) (an appellate court will reverse the trial court's ruling if there is no evidence to support the ruling below).

When the case went to the jury, the only remaining negligent misrepresentation claim was based on a statement by Riverwalk that the bank would require a two-year lease for Grapevine. (R. p. 1140:14–20).[12] The circuit court described that issue as a "close call." (R. p. 1123:23). Grapevine contended that the bank did not ultimately require a two-year lease, and therefore the representation was untrue and breached a duty to Grapevine. The jury found negligent misrepresentation as to all defendants and awarded $96,800 to Grapevine on that count. (R. p. 19).

As an initial matter, the Lease contained unequivocal language excluding other representations and limiting the parties' agreement to the terms in the document:

> 43. **Entire Agreement.** This Lease contains the entire agreement between the parties hereto, and cannot be altered or modified in any way except in writing signed by the parties hereto. All prior representations, discussions, covenants, or warranties of the parties with respect to the Demised Premises or the subject matter hereof are merged herein and superseded hereby.

(R. p. 1265, ¶ 43). The parties explicitly agreed that the *only* terms were set forth in the written agreement, and that all prior discussions were superseded by those terms.[13]

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12 *See also* R. pp. 1001:21–25; 1114:15–19; 1116:22–25.

13 "The parol evidence rule prevents the introduction of extrinsic evidence of agreements or understandings contemporaneous with or prior to execution of a written instrument when the extrinsic evidence is to be used to contradict, vary or explain the written instrument." *Rodarte v. University of South Carolina*, 799 S.E.2d 912, 917 (2017). In particular, where parties have entered into a written contract, the alleged verbal "promises and assurances" of the parties' agents that

South Carolina courts have long recognized that experienced businesspeople dealing at arms' length should be free to contract as they see fit. *See Bowaters Carolina Corp. v. Carolina Pipeline Co.*, 193 S.E.2d 129 (1972). In the absence of intentional fraud, South Carolina courts have consistently enforced the contract made by the parties and refused to re-write parties' contracts, or to give a party a better deal than the one it negotiated. *See Gilstrap v. Culpepper*, 320 S.E.2d 445 (1984).

As another initial matter, there is no evidence that Appellants The Greens of Rock Hill, LLC, Assured Administration, LLC or Mark S. Mather had *any* communication with Grapevine prior to the execution of the lease. With no communication, there can be no false representation. Each of those Appellants, therefore, was entitled to JNOV.

In addition, the trial court erred on this count for at least four reasons.

A. No duty in tort existed here, as a matter of law.

First, there is no duty in tort among these parties for matters related to the Lease (contract) at issue. This was a negotiated commercial lease between sophisticated commercial entities. (R. pp. 961:20–21; 962:14). During discussions before the lease was executed, there was no duty between these experienced, arms-length parties,[14] and after the lease was executed any related cause of action was in contract. "Where the cause of

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vary from the terms of that contract are "the very type of evidence that the parol evidence rule excludes." *Id.* (*citing Sanders v. Allis Chalmers Mfg. Co.*, 115 S.E.2d 793, 795 (1960)).

[14] *See, e.g.*, *AMA Management Corp. v. Strasburger*, 420 S.E.2d 868, 875 (Ct. App. 1992) ("AMA is a sophisticated commercial lender with expert knowledge in managing and financing large business corporations. It was engaged in arm's length bargaining in which it was the initiating party, it was acting with professional legal advice, it understood that each party was seeking its own commercial advantage, it knew that each party was expected to exercise due diligence to protect its own interests, and it knew that each party must make its own calculations of risk.").

action is predicated on the alleged breach, or even negligent breach, of a contract between the parties, an action in tort will not lie." *Foxfire Village, Inc. v. Black & Veatch, Inc.*, 404 S.E.2d 912, 918 (Ct. App. 1991) ("As a matter of law, if the duty owed arises merely from agreement of the parties, breach of the duty does not create a cause of action for negligent conduct."); *see also Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 463 S.E.2d 85, 88 (1994) ("A breach of a duty which arises under the provisions of a contract between the parties must be redressed under contract, and a tort action will not lie."). Because the alleged breaches were based on the contract and alleged actions related to the contract, the circuit court was in error to allow the tort claim to go to the jury.

B. The statement was not false.

The alleged misrepresentation is found in one of many emails exchanged between the Grapevine and Riverwalk while they were negotiating the terms of a potential lease agreement. Riverwalk stated:

> Melanie/Dave: We discussed the purchase option with our lender and they will require a 2-year lease as we discussed last week. Attached is redline and clean version of the LOI which reflects a 2 years lease and purchase option. Please review and let us know if you have any questions.

(R. p. 1341). **There is no evidence that the statement was (i) false, (ii) at the time it was made.** To the contrary, the evidence showed that the lease statement was <u>true</u> at the time it was made in 2014. (R. p. 1341; R. p. 651:15–653:14).

"An integral component of the false representation element is that the representation be 'false at the time it was made.'" *GSM Dealer Services, Inc. v. Chrysler Corp.*, 32 F.3d 139, 142 (4th Cir. 1994) (*citing Winburn v. Insurance Co. of N. Am.*, 339 S.E.2d 142, 147 (Ct. App. 1985); *see also Fields v. Melrose Ltd. Partnership*, 439 S.E.2d 283, 285 (Ct.

App. 1993) ("To be actionable, the representation must relate to a present or pre-existing fact and be false when made."). Here, the evidence at trial led to the clear inference that the statement was true at the time it was made. The testimony at trial showed that the bank's credit memorandum "specifically mentioned a lease with Grapevine of Riverwalk as a material term that the bank would want to see as a condition of making the loan." (R. p. 869:17–870:8).[15] Similarly, the Bank of the Ozarks' loan agreement (dated in 2014) stated that the borrower (Riverwalk River District Building 6, LLC) "shall" deliver to the bank the fully-executed commercial lease with The Grapevine of Riverwalk, Inc., dated June 23, 2014, which satisfied the § 4.1.5 retail lease requirements of the agreement. (R. pp. 1404, 1415, § 4.1.5 ("Retail Leases"); R. p. 871:17–872:21). The bank also required the borrower to warrant that the commercial leases identified in the agreement were valid, enforceable, and in effect. (R. p. 874:1–15; *see also* R. pp. 875:15–876:7). "The truth or falsity of a representation must be determined as of the time it was made or acted on and not at some later date. . . . Inferences of fact, like fullbacks on football teams, do not ordinarily run backward." *Winburn v. Ins. Co. of N. Am.*, 339 S.E.2d at 146 (internal citations omitted). In sum, the evidence showed that a statement that the bank would require a lease was true when it was made, and the trial court erred in failing to grant JNOV on that claim.

[15] Although at trial Grapevine presented testimony of another bank person, Anthony Swain, regarding the lease requirement, Mr. Swain indisputably was not working on this matter during the 2014 timeframe in question and did not claim he knew what communications were made by the bank to Riverwalk during that time-period. (R. p. 868:1–869:10).

C. A future prediction cannot support a misrepresentation claim.

Third, the alleged misrepresentation was about a predicted event in the future, that the lender "*will* require a 2-year lease" as a condition of a loan. (R. p. 1341) (emphasis added). "The general rule is that [a claim for negligent misrepresentation] must relate to present or pre-existing fact, and cannot ordinarily be predicated on unfulfilled promises or statements as to future events." *Woodward v. Todd*, 240 S.E.2d 641, 643 (1978) (*citing Davis v. Upton*, 157 S.E.2d 567 (1967)); *see also Koontz*, 333 S.C. at 713 (affirming summary judgment on negligent misrepresentation claim because "All of T&D's alleged representations related to future events, not existing facts."). Only "where one promises to do a certain thing, having at the time no intention of keeping his agreement" is a statement of future intent actionable. *Woodard,* 240 S.E.2d at 643. Here, the statement of what the lender "will" require was a prediction of a future event, conditioned on the decision of the lender. There was no evidence that Riverwalk was promising to do a certain thing, or had no intention of keeping the agreement.

D. There was no evidence of detrimental reliance by Grapevine.

Fourth, the evidence at trial showed no detrimental reliance on the statement about the bank, by Grapevine. "To maintain a claim for negligent misrepresentation, a plaintiff must show by a preponderance of the evidence: . . . (5) the plaintiff justifiably relied on the representation; and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance upon the representation." *McLaughlin v. Williams*, 665 S.E.2d 667, 670 (Ct. App. 2008). "[T]here is no right to rely . . . where there is no confidential or fiduciary relationship, and there is an arm's length transaction between

mature, educated people. This is especially true in circumstances where one should have utilized precaution and protection to safeguard his interests." *DeHart v. Dodge City of Spartanburg, Inc.*, 427 S.E.2d 720, 722 (Ct. App. 1993).

At trial, Grapevine testified that "there was a little bit of a misunderstanding about [the terms] at first" and at the next meeting Grapevine asked for clarification—Was it a purchase or a lease? When told it was to be a lease, Grapevine "said we were only interested in purchasing" and walked away. (R. p. 651:15–652:10: "So we thanked them and said we were not interested and we left, we left the meeting."). Later, Grapevine *was* offered a purchase option, which it accepted. (R. p. 654:12–13: "A. It was the only reason we signed the lease was because they added the purchase option.").

The undisputed testimony showed that (a) Grapevine was free to walk away from the lease offer, and in fact did so, and (b) Grapevine resumed negotiations when it was offered what it wanted: a purchase option. Grapevine bargained for what it wanted, and Grapevine got it. **That is not justifiable reliance on an allegedly false and damaging statement, it is bargaining between sophisticated business parties**.[16] And, regardless, once the parties reached mutually-acceptable terms, they included a merger clause agreeing that "All prior representations, discussions, covenants, or warranties of the parties with respect to the Demised Premises or the subject matter hereof are merged herein and superseded hereby." (R. p. 1265, ¶ 43).

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[16] "[A]n unspecific and false statement of opinion such as occurs in puffing generally cannot constitute fraud . . . Similarly, a false prediction or promise of future events generally cannot be a basis for fraud because it is not a representation, *there is no right to rely on it*, and it is not false when made. . . ." *Miller v. Premier Corp.*, 608 F.2d 973, 981 (4th Cir. 1979) (applying South Carolina law) (internal citations omitted, emphasis added).

In sum, it was error for the circuit court to deny JNOV to Riverwalk on the negligent misrepresentation count. This Court should reverse, for failure of evidence and error of law.

VI. The award of attorneys' fees and costs should be reversed.

The trial court granted judgment in favor of Grapevine and against Appellant Riverwalk, in the amount of $404,934.75 in costs and attorneys' fees. (R. p. 27). The order was based on Rule 54, SCRCP, and paragraph 38 of the Lease:

> In the event of any default by Landlord hereunder, Tenant shall provide Landlord with notice thereof and thirty (30) days to thereafter cure the same, failing which, subject to the other provisions hereof, Tenant may commence an action against Landlord for its actual damages, together with its attorneys' fees and costs, as its sole and exclusive remedy on account thereof.

(R. pp. 1263-64, ¶ 38). The court's order was in error for several reasons.

A. Grapevine could not selectively enjoy the Lease.

First, equitable estoppel barred Grapevine from enforcing Lease paragraph 38 given that Grapevine avoided and disregarded numerous other provisions in the contract. As an example, discussed herein, Grapevine ignored the Lease's clear jury trial waiver, insisting instead on a lengthy, multi-party jury trial involving numerous claims against other defendants in addition to Riverwalk. "Equitable estoppel precludes a party from asserting rights 'he otherwise would have had against another' when his own conduct renders assertion of those rights contrary to equity." *See, e.g., International Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 417–418 (4th Cir. 2000) (plaintiff cannot avoid contract's arbitration provision while also claiming some benefit under that same contract) (internal citations omitted). "To allow [a plaintiff] to claim the benefit of the contract and simultaneously avoid its burdens would . . . disregard equity.

. . ." *Id*. at 418 (internal citations omitted); *see also Beverly v. Grand Strand Medical Center, LLC*, 839 S.E.2d 468, 472 (Ct. App. 2020) ("[A litigant] cannot selectively enjoy certain benefits of [a contract] while disregarding terms beneficial to [the other party]."). Here, Grapevine disregarded and avoided other provisions in the Lease such as, *inter alia*, Grapevine's contractual waiver of jury trial and its clear limitation on recoverable damages. (R. p. 1267 ¶ 56, p. 1269 ¶ 59). Grapevine "cannot selectively enjoy certain benefits of [its Lease] while disregarding terms beneficial to [its landlord]." *Beverly*, 839 S.E.2d at 472.

Because Grapevine chose to ignore its contractually-agreed limitations on recovery and waiver of jury trial, the circuit court should have ruled that Grapevine was estopped from enforcing the attorney's fee provision within that same contract.

B. The Lease did not permit attorney's fees incurred in pursuing extra-contractual damages.

Second, Lease paragraph 38 limits damages to "**actual** damages, together with attorney's fees and costs, as its **sole and exclusive remedy** on account thereof." (R. p. 1263-64, ¶ 38) (emphasis added). The provision did not entitle Grapevine to recover its fees incurred in pursuing consequential, punitive, or statutorily enhanced damages from its landlord. It did not entitle Grapevine to recover its fees incurred to pursue its theories of "amalgamation" or claims against persons and entities that were never parties to the Lease. When 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 Riverwalk River District Building 6, LLC.

C. The attorney's fees claimed from Riverwalk are absolutely unreasonable.

Third, Grapevine's claimed attorneys' fees 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). In South Carolina, when the amount of attorney's fees is not set by the parties' contract, the court must evaluate the claim and award only fees that are reasonable under the circumstances. *See NationsBank v. Scott Farm*, 465 S.E.2d 98 (Ct. App. 1995).

Grapevine pursued ten causes of action against five defendants. To do so, Grapevine billed six partner attorneys, five associate attorneys, five paralegals, and a legal assistant—**in total, seventeen billing legal professionals**, not including expert witnesses and vendors.[17] In the end, Grapevine obtained a verdict in its favor on just *two* of its ten causes of action (breach of contract and negligent misrepresentation). As to those two claims, the jury awarded approximately one-half of the amount Grapevine claimed as its damages. Lease paragraph 38 only allows arguable attorneys' fees and costs as to *one* of the five defendants, Riverwalk River District Building 6, LLC. Grapevine apparently paid its lawyers $58,500 more to pursue its claims than the amount the jury awarded as damages.[18] Although 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

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17 R. pp. 261-270, Affidavit of Steven A. Meckler at p. 6 ¶10.

18 R. p. 302.

Appellants against whom Grapevine had no right to attorney's fees and costs.[19]

This Court should reverse the award of attorney's fees and costs for the reasons above—and also because it must reverse the trial court's errors of law on the Lease's option and common area provisions.

CONCLUSION

For each of the reasons set forth above, this Court should reverse the trial court's errors of law, reverse the award of attorney's fees, and remand for a new trial.

Respectfully submitted,

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December 28, 2023

[19] Significantly, Grapevine redacted the task descriptions in the legal invoices filed in support of its petition for attorneys' fees. As a result, there was no reasonable basis for the circuit court to determine what was done in support of which claims against which parties. Nor could Riverwalk check or confirm how much work was done on relevant claims against the landlord, as opposed to other Appellants. (Affidavit of Steven A. Meckler in Support of Plaintiff's Motion for Award of Costs and Attorney's Fees, Ex. A, filed Sept. 3, 2021).