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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' REPLY BRIEF

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Reply to Grapevine's "Prologue"

"*Mark Mather is a villain!*" That is the essence of Grapevine's Prologue. Never mind that this statement by Mr. Mather is taken entirely out of context.[1] Never mind that Mark Mather is not a party to this appeal because the trial court set aside the jury's verdict against him. And **never mind that this is not a Charles Dickens novel** in which a villainous Scrooge is oppressing a Tiny Tim—this is an appeal pertaining to a commercial lease with unambiguous provisions, entered into by sophisticated businesspeople, in which the key facts were conceded by Grapevine but the jury and trial judge were led astray by exactly the sort of stunt Grapevine tries to pull against this Court, in its Prologue.

Reply to Grapevine's Statement of Facts

Grapevine's statement of the facts—as well as the "facts" that it harps on throughout its Brief—are a dramatic rendition of arms-length negotiations which resulted in a Commercial Lease Agreement with provisions by which Grapevine agreed to be bound. Most of Grapevine's "facts" are geared toward Grapevine's narrative of fraud and misrepresentation, which was expressly rejected by the trial court. (R. pp. 1; 943—989). Also, the "facts" argued by Grapevine are extracted from Grapevine's own testimony at trial, and they are not the subject of any finding of fact by the court or jury.

Happily, Appellants and Respondents agree that the standard of review in this case permits this Court to review the facts without deference to the trial court, and

[1] The context was a question in the midst of Mr. Mather's deposition, asking him if he thought the deposition questions were "fair." Mr. Mather, who is not a lawyer and does not know the rules of procedure, replied that he did not understand what "fair" is in a deposition. (R. pp. 1097:11 - 1098:16).

particularly as to Appellants' Issue II (error of law as to the option to purchase), Issue III (error as to specific performance), and Issue IV (error of law as to common areas). *See* App. Br. pp. 13-15; Resp. Br. p. 10. Even so, most of Grapevine's colorful "facts," and its repeated, negative characterization of Appellants as untruthful, are immaterial to the issues on appeal.

The facts that matter—and which compel reversal and remand—are not in dispute. Those key, undisputed facts include: (1) the clear language of the Commercial Lease, which governs the parties; (2) the admission by Grapevine that it neither tendered a purchase contract nor made an earnest money deposit; (3) the admission by Grapevine that it put tables and chairs for its business on the sidewalks; and (4) the fact that Grapevine's principals each initialed every page of their Commercial Lease Agreement with Riverwalk, and then reaffirmed the Lease two years later. (R. pp. 1247-1297, 1302, 775:9-12). For the details of these actual facts, Appellants refer to their initial Brief, pages 1-8, and the record citations therein.

Reply to Grapevine's Statement of the Case

Grapevine is right that Appellants first moved to strike Grapevine's jury demand when Grapevine amended its complaint for a second time—several years after filing the lawsuit—to add claims for negligent misrepresentation against all Appellants. Appellants' Motion to Strike pursuant to Rule 12, SCRCP, was part of its answer[2] to the Second Amended Complaint. (R. pp. 158-177). As discussed in Appellants' Brief and in

[2] Grapevine chose to amend to make new substantive claims late in the litigation, and Appellants were absolutely entitled by the rules of procedure to answer and respond with a motion to strike. Rule 12, SCRCP.

this Reply, this timing does matter.

Next, Grapevine inappropriately changes Question 3 on its recap of the jury form, transforming "a negligent misrepresentation" into "any negligent misrepresentation." (*Compare* R. p. 19 *with* Resp. Br. p. 3). This is a material mis-alteration, which wrongly suggests to this Court that the jury had a much broader question before it than it actually did. In fact, the trial court dismissed Grapevine's causes of action for fraud, unfair trade practices, tortious interference with contract, and amalgamation, and it also granted directed verdict to Appellants on each of Grapevine's negligent misrepresentation claims (except the statement that Riverwalk's bank required a lease).[3]

As to Grapevine's Preservation Arguments

In response to almost all of Riverwalk's issues on appeal, Grapevine makes preservation arguments first and foremost. Grapevine claims that because Riverwalk filed "post-trial" motions fourteen days after the jury was dismissed, it therefore failed to preserve numerous issues for appeal. *See, e.g.*, Resp. Br. pp. 16-17, 19-20, 31-32.

Initially, Grapevine's argument wrongly ignores that the jury's determination did not end the trial. Judgment in this action was not entered until several months after the jury was dismissed, in a series of successive orders filed in response to Grapevine's own trial motions for specific performance. (R. pp. 8, 21, 26).

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[3] R. pp. 943-989; 1114:15-19; 1116:22-25 (rejecting Grapevine's misrepresentation arguments pertaining to the outdoor space, the existence of a condominium regime, and the option to purchase, *inter alia*, and stating "This is[] a commercial contract [among] sophisticated parties. I just don't see a misrepresentation. I mean, I certainly don't see something that can be reasonably relied upon by a commercial entity that is an assertion . . . This is a negotiated commercial lease, it is very clear what is in it . . .").

From the outset of trial, the trial judge stated that he would hear Grapevine's specific performance arguments only ***after*** the jury was dismissed. (R. pp. 736; 990:3-5; 1007:4-11). After the jury returned its verdict, the trial judge reiterated that the cause of action for specific performance was still pending. (R. p. 1186). In other words, the trial was not over, the case was not finally decided, and Riverwalk was thus not yet obligated by the rules to file post-trial motions.[4]

After dismissing the jury, the judge granted the parties "two full weeks" for certain motions, including Grapevine's motion for specific performance. Although Grapevine now argues in its Brief that the trial judge was incorrect to allocate two weeks for "post-trial" motions, it is significant that Grapevine's counsel consented to this timeline on the record:

> THE COURT: Let's get back on the record. Counsel, my inclination is to give y'all ten days for post-trial motions and that would include, if the Plaintiffs want to make the motion for specific performance. . . . Let's just give y'all two full weeks. We will say, post-trial motions by, that would be Friday, the 10th.
>
> **That is acceptable to the Plaintiff?**
>
> ATTY. MECKLER: **Yes, Your Honor.**
>
> THE COURT: To the Defense?
>
> ATTY. MARTENS: Yes, Your Honor.
>
> THE COURT: So post-trial motions will be due by September 10th.

(R. p. 1186) (emphasis added).

[4] Rule 59, SCRCP, permits motions under this rule to be filed "not later than 10 days after receipt of written notice of the entry of the order," and where a trial court indicates that further rulings are to follow, the clock does not begin to run. *See*, Rule 203(b), SCACR.

Importantly, Grapevine filed its motion for directed verdict six days after the jury was discharged. (R. p. 232). The trial court did not rule on Grapevine's directed verdict motion until three months later.[5] (R. p. 8). It filed its "Final Judgment" Order four months after that. (R. p. 21, 26).

Despite this unique timeline, Grapevine asks this Court to find that Riverwalk somehow missed its window to challenge the same findings of fact and law that were the basis for Grapevine's own motions, and for the series of orders granting them.

Riverwalk respectfully asks that this Court would not take such a hard line on preservation, and particularly not when the trial court rendered the rulings that are the subject of this appeal in multiple, successive orders after the jury was excused. (R. pp. 8, 21, 26, 36). "Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006); *Singh v. Singh*, 434 S.C. 223, 232, 863 S.E.2d 330, 334 n.7 (2021) ("preservation rules are not a 'gotcha' game aimed at embarrassing attorneys or harming litigants and . . . it is 'good practice' to reach the merits when preservation is unclear.").

The trial court made erroneous rulings of law, including in intermediate orders necessarily affecting the final judgment. *See* S.C. Code § 14-3-330(1). For the reasons set forth in Appellants' Initial Brief and this Reply, this Court should review and reverse.

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[5] Notably, Riverwalk did file a notice of appeal as to the trial court's first order, and this Court *sua sponte* dismissed the appeal, without prejudice, pursuant to *Hudson v. Hudson*, 290 S.C. 215, 349 S.E.2d 341 (1986) (Ct. App. Case No. 2022-000059).

ARGUMENTS IN REPLY

Grapevine's arguments, as they did at trial, hinge on sympathy, emotion, and the characterization of Appellants as bad actors. Importantly, Appellants are not asking this Court to make any credibility determinations—the facts which command reversal are not in dispute. What subjectively might be perceived as "fair" does not matter in this appeal, but the clear terms of the Lease and the established law of South Carolina do matter. The trial court erroneously disregarded South Carolina law governing contract construction, real property, options to purchase, and its own limitations on the negligent misrepresentation claim.[6]

I. The denial of Riverwalk's Rule 12 Motion was not immediately appealable but should be reversed on appeal of final judgment. The Lease contains a clear and conspicuous jury trial waiver of trial by jury, and it was error of law for the trial court to ignore this agreed-upon provision.

Grapevine is wrong—not all mode of trial decisions can or should be immediately appealed. This argument, and this issue on appeal, does not involve the deprivation of a party's fundamental, constitutional right to a trial by jury. Instead, this question—like every other question at issue in this appeal—is a question involving the merits; the answer to the question lies in the construction of the Commercial Lease Agreement that is the focal point of this case. Grapevine fails to provide any legitimate argument that would justify the lower court's erroneous decision to disregard the Lease's clear terms.

The error was first made in an interlocutory order denying Riverwalk's Rule 12 Motion to Strike (which was filed in response to Grapevine's Second Amended Summons

[6] The court limited the claim to the question of whether Riverwalk negligently misrepresented that the bank required a 2-year lease.

and Complaint). (R. pp. 1, 158). The error was compounded from the bench at trial in response to a renewed Motion to Strike; in that second ruling, the judge misconstrued the Lease and the law. (R. pp. 226; 569, 572-73). Riverwalk properly waited until final judgment was rendered to appeal these interlocutory orders, pursuant to S.C. Code § 14-3-330(1).

A. This Court has power to review the circuit court's intermediate orders denying Riverwalk's Rule 12 motion.

This Court ***exists*** to "correct errors of law in law cases." S.C. Code § 14-3-330. And, when an appeal has been taken from a final judgment, this Court has explicit jurisdiction to "review any intermediate order or decree necessarily affecting the judgment not before appealed from." S.C. Code § 14-3-330(1). Grapevine contradicts this statutory law when it argues that this issue is not properly before the Court because Riverwalk failed to immediately appeal.[7]

Notably, Riverwalk's motion to strike did not assert a substantial right to a jury trial. Rather, **Riverwalk contended that Grapevine had waived its own substantial right**. The court *denied* the motion—meaning that its order did not deny Grapevine access to a jury trial, thereby arguably affecting or abridging a substantial right. Generally, no

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[7] Grapevine makes the additional preservation argument that Riverwalk abandoned this appeal by not attaching the March 10, 2021 Order to its Notices of Appeal, or otherwise identifying that order in the notices. First, this was an inadvertent mistake by the undersigned counsel, and Riverwalk hereby respectfully moves this Court for permission to amend the Notice of Appeal to include the Order, including the rulings from the bench at trial. Notably, Grapevine's technical "gotcha!" argument has been rejected by this Court in other instances. *See Charleston Lumber Co., Inc. v. Miller Housing Corp.*, 318 S.C. 471, 458 S.E.2d 431 (Ct. App. 1994); *Puniyani v. Grocers*, No. 2015-UP-050 (Ct. App. 2015).

Moreover, S.C. Code § 14-3-330(1) only requires that the "final judgment" be appealed, at which point this Court is empowered to review "any intermediate order or decree" affecting the judgment. A clear reading of this statute is that an appellant need only attach the final judgment to the Notice of Appeal.

immediate appeal lies from an order denying a Rule 12 Motion which does not involve the deprivation of a party's absolute rights. *Jacobs v. Harman*, 282 S.C. 17, 18, 316 S.E.2d 146, 147 (1984). In this instance, the circuit court's denial of the motion to strike did not discontinue the action, did not strike a defense, and did not finally determine the contract construction of the Lease. Therefore, there could be no direct appeal from the order.

Immediate, direct appeal is a limited statutory privilege, confined to orders violating a party's constitutional right to trial by jury or finally determining the merits. Court rules stoutly protect "[t]he right of a trial by jury as declared by the Constitution or as given by a statute of South Carolina," and they require issues of fact to be tried by jury "unless a jury trial be waived." Rule 38(a), SCRCP. In keeping with the importance of this substantial right, the appellate courts have permitted immediate, interlocutory appeal from orders that actually abridge a party's constitutional right to trial by jury. Our Supreme Court has held that such permissive, immediate appeal is reserved for cases which "involve review of denials of trial by jury and are based on the public policy consideration of advancing the constitutional mandate to preserve the right to trial by jury inviolate." *Senter v. Piggly Wiggly Carolina Co.*, 341 S.C. 74, 78, 533 S.E.2d 575, 575 (2000) (acknowledging bifurcated trial as a "mode of trial" but declining to find that the issue was immediately appealable), *citing Lester v. Dawson*, 327 S.C. 263, 491 S.E.2d 240 (1997), *C & S Real Estate Services, Inc. v. Massengale*, 290 S.C. 299, 350 S.E.2d 191 (1986). Moreover, courts should balance whether an immediate appeal is critical to protect an essential right against the strong policy of "avoiding piecemeal litigation." *Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. 89, 93-95, 529 S.E.2d 11 (2000) (holding that although the right

to a particular venue is a "substantial right," nonetheless "requiring a defendant to wait until after trial to appeal the issue of proper venue is the most appropriate course to take where any error in that decision will not prejudice the defendant anymore than other interlocutory orders which, if in error, would require a new trial.").

Most "mode of trial" decisions, including the court's denial of the motion to strike in this case, do not meet this stringent test. A swift, lucid discussion of the distinction between an immediately appealable mode of trial decision, and one that must wait for appeal until final judgment, may be found in *Rowe Furniture Corp. v. Carolina Wholesale Furniture Co.*, Inc., 292 S.C. 575, 357 S.E.2d 725 (Ct. App. 1987), *cited with approval by Lester v. Dawson*, 327 S.C. 263, 491 S.E.2d 240 (1997). In *Rowe*, the parties failed to demand trial by jury within 10 days after service of the last pleading, as required by Rule 38(b), SCRCP. *Id.* at 576, 357 S.E.2d at 725. The trial court therefore ruled that the parties had waived the substantive right to trial by jury. *Id.* The parties subsequently moved the trial court to transfer the case to the jury calendar, pursuant to Rule 39(b), SCRCP. *Id.* When the trial court denied this motion, the parties attempted an immediate appeal of the order denying transfer—arguing that their substantial right to a jury trial had been abridged. *Id.* But the Court of Appeals dismissed the appeal "as premature," finding that because they were not entitled to a jury trial as a matter of right (having waived the right), an immediate appeal did not lie. *Id.*

The circumstances in this appeal are analogous to those in *Rowe*. Riverwalk does not have a substantial, constitutional right to a non-jury trial, which must be preserved "inviolate." Instead, Riverwalk asked the trial court to find that Grapevine had, as a

matter of law, waived its own constitutional right by signing and initialing a Lease that says "THE PARTIES KNOWINGLY AND VOLUNTARILY WAIVE ANY RIGHT THEY MAY HAVE TO A TRIAL BY JURY." (R. p. 1269 ¶59). The trial court's order, essentially denying Riverwalk a non-jury trial, did not deprive Riverwalk of a constitutional right to a trial by jury. Thus, it was proper for Riverwalk to wait for final judgment to appeal.[8] *See Mid-State Distributors, Inc. v. Century Importers, Inc.*, 310 S.C. 330, 426 S.E.2d 777 (1993) (order denying motion to dismiss for lack of personal jurisdiction was not directly appealable); *Shields v. Martin Marietta Corp.*, 303 S.C. 469, 402 S.E.2d 482 (1991) (avoidance of trial is not a substantial right entitling immediate appeal); *Tatnall v. Gardner*, 350 S.C. 135, 138, 564 S.E.2d 377 (Ct. App. 2002) ("Pursuant to section 14-3-330(2), this Court may not review an order that 'does not prevent a judgment from being rendered in the action, and [from which the] appellant can seek review . . . in an appeal from [the] final judgment.'").

To summarize: The interlocutory orders at issue—which hinge on construction of the Lease and not on an entitlement to a fundamental right—fall under S.C. Code § 14-3-330(1), which allows review of intermediate orders on appeal of final judgment, and not § 14-3-330(2). Therefore, this Court may review the rulings within this appeal of final judgment.

[8] To be clear, if the circuit court had ***granted*** the motion to strike, Grapevine could have taken an immediate appeal—because such a ruling could have affected Grapevine's alleged substantial right to a trial by jury. But the ***denial*** of the motion did not finally determine Riverwalk's rights under the Lease.

B. This Court should reverse the trial court's failure to enforce the Lease's clear jury trial waiver.

Contrary to Grapevine's argument, denial of the motion to strike was not "committed to the sound discretion of the trial court." (Resp. Br. p. 10). Rather, the question of whether Grapevine waived its right to trial by jury was a question of law that the trial court answered wrongly, and which this Court may decide without deference to the circuit court. *S.C. Dep't of Commerce v. Clemson Univ.*, 432 S.C. 352, 851 S.E.2d 735 (Ct. App. 2020). It is telling that Grapevine provides only four short paragraphs addressing the merits of Riverwalk's arguments and instead dedicates pages of its Response Brief to procedural challenges to appealability. Grapevine does not respond to Riverwalk's argument that the trial judge erred as a matter of law and did not have discretion to disregard the clear, conspicuous, ALL-CAPS JURY TRIAL WAIVER, which both principals of Grapevine initialed, within the Lease signed by Grapevine. Grapevine does not attempt to revive or defend its assertions to the trial court that the clause was ambiguous or that Grapevine's savvy signatories were somehow ignorant of its import.

In short, Grapevine has no response to Riverwalk's legal arguments that Grapevine entered into a Lease with clear, enforceable provisions by which it was bound. (*See* App. Br. pp. 17-24). Instead, Grapevine makes a weak waiver argument, which disregards that Grapevine itself elected to amend its complaint—for the second time—more than two years into the lawsuit, and Riverwalk's motion to strike the jury demand was a procedurally proper part of its Answer to the Second Amended Complaint. (R. pp. 133, 155).

Grapevine makes much of who demanded a jury trial, and when, and why, and

how. But this Court has expressly held that Rules 38(a) and 39(a)(2), SCRCP each operate to permit the circuit court to remove a case from the jury docket, notwithstanding a jury trial demand, when it finds that "a jury trial be waived" or "a right of trial by jury . . . does not exist." *Dep't. of Commerce v. Clemson* at 362-63, 851 S.E.2d at 741 (*quoting* Rule 38 and Rule 39, SCRCP).[9]

The Lease is clear as a matter of law, and the circuit court did not have discretion to ignore it. "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." *Wachovia Bank, N.A. v. Blackburn*, 407 S.C. 321, 755 S.E.2d 437, 441 (2014). Because Grapevine knowingly and voluntarily waived its right to a jury trial when it signed the Lease Agreement, this Court should reverse and remand for a new, non-jury trial.

II. The trial court committed reversable error as to the Lease's option provision.

Grapevine's argument on this issue starts out with issue preservation (discussed *supra*), and it asks this Court to find that Riverwalk missed its chance to challenge rulings the court made long after trial, in response to arguments that Grapevine itself made even

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[9] Grapevine argues that Riverwalk was precluded from moving to strike the jury demand because it had initially asked for trial by jury. This Court has rejected a similar argument:

> Next, having concluded the School District had no statutory right to a jury trial, we find the Department's initial demand for a jury trial in the condemnation action was not dispositive. . . .Rules 38 and 39, SCRCP, in and of themselves, do not create the right to a jury trial. Rather, pursuant to Rule 39(a)(2), SCRCP, **if the circuit court finds a right of trial by jury of some or all of the issues does not exist, a jury trial is not required even if the parties have demanded one**. ***Thus, notwithstanding the Department's initial demand for a jury trial, Rule 39(a), SCRCP, did not confer upon the School District the right to a jury trial.***

S.C. Dep't. of Commerce, 432 S.C. at 362-363 (cleaned up) (emphasis added).

after the jury was excused. This Court has jurisdiction to correct the errors of law made by the trial court, not only in its final order(s), but also in "every intermediate order necessarily affecting the judgment not before appealed from." S.C. Code § 14-3-330(1). The law, applied to Grapevine's own admissions, leaves no question or inference that Grapevine did not properly exercise the Option.

A. Grapevine did not exercise the option as required by the Lease.

Riverwalks' grounds for reversal as a matter of law are simple: (1) the Lease clearly calls for the purchase option to be exercised in a particular way, and (2) there is no dispute, even if the facts are taken in the light most favorable to Grapevine (which they should not be, really),[10] that Grapevine did not fulfill the requirements to exercise its option. On this, the law is clear: "[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 v. Kasey's Associates*, 340 S.C. 98, 108, 531 S.E.2d 287. "[I]f the option requires performance in a certain manner . . . **exact compliance with the terms of the option are required**." *Alexander's Land Co. v. M & M & K Corp.*, 390 S.C. 582, 595, 703 S.E.2d 207, 214 (2011) (emphasis added).

Grapevine spends a lot of space reciting alleged facts[11] in its favor and generally

[10] "It is well settled in South Carolina that option contracts are strictly construed in favor of the optionor [*i.e.*, Riverwalk] and against the optionee [*i.e.*, Grapevine]." *Cotter v. James L. Tapp Co.*, 267 S.C. 647, 230 S.E.2d 715 (1976).

[11] Importantly, neither the jury nor the trial court "found" the facts relied on by Grapevine; Grapevine cites its own testimony, not decisions by the court. Moreover, the facts that Grapevine argues, including its allegations that Riverwalk was financially motivated to falsely represent its intent to convey the property: (a) are immaterial to the question of whether or not Grapevine properly exercised the Option,

villainizing Appellants. (Resp. Br. pp. 20-26). Essentially, Grapevine asks this Court to override the clear terms of the Option—and Grapevine's own testimony that it never submitted purchase money or a purchase contract—based on its assertions that Riverwalk was a "bad actor," "self-serving," "financially-motivated," and engaged in "deliberate misrepresentation." (Resp. Br. pp. 20-26). But, Grapevine misses the point: **Riverwalk's argument on this issue has nothing to do with disputed facts or disputed evidence**—because Grapevine conceded[12] that it never tendered the $25,000 purchase money deposit "due upon execution of this Agreement," nor executed a purchase and sale agreement at all, let alone "the Purchase and Sale Agreement as provided in Exhibit G," which was required by the Lease. (R. pp. 1262, 1281 - 1297).

There was not conflicting testimony on the question of whether Grapevine did or did not comply with the terms of the Option—Grapevine itself admitted that it did not comply. The lack of conflicting testimony should have meant that there was no question for the jury, and that Riverwalk was therefore entitled to a directed verdict. But the trial court mis-perceived the question as one of credibility. The jury then made a finding that was outright contrary to the facts and the law governing option contracts.

As our South Carolina Supreme Court noted recently, "**It does not work that way.**" *Odom v. McBee Mun. Election Comm'n,* Case No. 2021-000165, Opinion No. 28133 (2023) (emphasis added). In *Odom*, the testimony left no question of fact, and there was

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and (b) were expressly rejected by the trial court when it granted directed verdict and dismissed Grapevine's causes of action for fraud and misrepresentation. (R. pp. 1; 943—989).

[12] "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" (R. p. 777:16–21); "Q: And you never tendered purchase money, right? A: Right." (R. p. 779:7–15; *see also* pp. 779–83).

no conflicting evidence, but "[t]he commission decided, however, it did not believe Baker's testimony." The Supreme Court rejected this method of fact-finding, holding, "No factfinder may take the denial of a fact, find the denial not credible, and treat its credibility finding as evidence of the fact." *Id.* at 7-8 (ruling that "Baker's testimony that no violation occurred does not become evidence that a violation did occur simply because the factfinder finds the testimony not credible."). Similarly, here, neither the jury nor the trial judge could take Grapevine's admissions of fact and choose to ignore them because they found Riverwalk to be (in Grapevine's words) "self-serving" or "financially motivated" or "someone with no concern for the truth." (Resp. Br. pp. 22, 26).

This Court should ignore Grapevine's characterizations and reverse on the law and Grapevine's unequivocal admission that it failed to perform in compliance with the terms of the offer.

B. The pot and the kettle.

On pages 25-26 of its Brief, Grapevine blames Riverwalk for its own failure to perform, alluding that Grapevine certainly would have been willing to tender a purchase contract and escrow the $25,000 purchase deposit if only Riverwalk had hurried up and formed a complicated, multi-building, multi-million-dollar condominium regime for the sake of one unit. This is backwards—the optionee's proper exercise of its option is what triggers the optionor's obligation to perform. *Alexander's Land Co.* at 596, 703 S.E.2d at 214 ("Since the Buyer never satisfied the condition precedent . . . no duty arose on the part of the Seller to convey the real property."); *see also Cotter* at 647, 654-56, 230 S.E.2d at 715-19 ("Defendant could have given written notice every day in the month of February

1975, and such notice still would not have satisfied a requirement to [comply exactly with the terms of the option] . . . When an individual grants an option . . . he is entitled to strict compliance with time limits and other terms of the option.") (emphasis added).

Grapevine, as the optionee, never submitted the requisite purchase offer (including earnest money) that would have triggered Riverwalk's obligation to close on the property, including by recording a master deed.

The essence of Grapevine's argument on this issue is that the law in this area is unfair.[13] It contends that to allow Riverwalk to "avoid closing" on an option that Grapevine had failed to exercise according to its terms would be "contrary to all notions of justice, fair play, good faith and fair dealing." (Resp. Br. p. 24). But, whether Grapevine says the law is "fair" or not is immaterial—it is the law. Moreover, the courts have expressly recognized that there may be harsh results where the law is properly applied. *See Alexander's Land Co.*, at 596, 703 S.E.2d at 214 (*quoting Cotter*, at 656, 230 S.E.2d at 719) ("harsh results in option cases are necessary to further more compelling considerations of public policy.").

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[13] If this Court wants to delve into what is fair and what is not, it is manifestly *unfair* for Grapevine to avoid the obligations of the Option by failing to execute the Purchase Agreement —and then argue that Riverwalk's failure to *just hand over the property in response to a letter and some emails* was "contrary to good faith and fair dealing."

An example is in the purchase contract that Grapevine never executed. (R. pp. 1285 - 1297). The Purchase and Sale Agreement that Grapevine agreed in the Option to execute (but never did) has important, itemized remedies for breach, and it contractually deals with the precise possibility that has become this lawsuit (*i.e.* that it might take time to perfect title by recording a Master Deed). For example, Section 4.3 "Closing Date: Extensions to Perfect Title" allows for extra time in the event "Seller shall be unable to give title or to make conveyance or to deliver possession of the Unit" and supplies **the remedy: a refund of the Deposit**, in the event the Seller cannot close. Section 7 states that Grapevine would take title subject to the restrictions contained in a Master Deed (including, presumably, restrictions on its use of common areas). **Grapevine wants the benefits of the Option, without the burdens of doing it right.**

Grapevine agreed to the Lease's terms, and it agreed that the option provision, which incorporates the purchase and sale agreement, is unambiguous. (R. p. 716:10-14). Even *if* this Court thinks the option provision was somehow "unfair," it should nonetheless enforce the Lease as written. "We are without authority to alter an unambiguous contract by construction or to make new contracts for the parties. A court must enforce an unambiguous contract according to its terms regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully." *Dept. of Transp. v. M & T Ent.*, 379 S.C. 645, 667 S.E.2d 7, 13 (Ct. App. 2008).

Without proper compliance by Grapevine, its option did not transform into a purchase contract. This Court should so hold, and it should reverse the trial court's error in failing to direct a verdict according to the law, the Lease, and the undisputed facts.

III. Specific performance was not appropriate in the absence of a purchase contract on which to perform.

Grapevine says that "[Riverwalk] needs to be required to take a position and stick with it on the issue of specific performance." Resp. Br. at 28 (going on to mis-state Riverwalk's arguments). But Riverwalk's position has not changed: Grapevine never executed the Purchase and Sale Agreement attached to the Lease as Exhibit G and expressly incorporated into the Lease's Option to Purchase Provision, nor tendered the mandatory earnest money. (R. p. 1262 ¶ 33, p. 1283) ("Tenant shall have the Option to purchase the Premises . . . in accordance with the Purchase and Sale Agreement as provided in Exhibit G."). Therefore, there was no purchase contract for the trial court to specifically enforce. *Campbell v. Carr*, 361 S.C. 258, 264, 603 S.E.2d 625 (Ct. App. 2004) ("in order to compel specific performance, a court of equity must find . . . there is clear

evidence of a valid agreement.").

The execution of the Purchase and Sale Agreement (in conjunction with the $25,000 purchase money deposit) was a condition of the Lease necessary to transform a mere option into a valid contract for sale. (R. pp. 1262 ¶ 33, 1281—97). "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." *Alexander's Land Co.*, at 599, 703 S.E.2d at 216 (*quoting Faulkner v. Millar*, 319 S.C. 216, 220, 460 S.E.2d 378, 380). Because Grapevine never fulfilled this condition, the option never became an enforceable purchase contract.

The remedy of specific performance is designed to compel performance of an existing contract. Lacking contractual terms to enforce, the trial court's series of orders on Grapevine's Motion for Directed Verdict/Motion for Specific Performance created and "enforced" an imaginary, speculative "agreement." For example, the first order dictates an inflexible closing date, changes the purchase price set forth in the Option provision, decides what happens to the Lease, pronounces Grapevine's "right to jointly use the Common Areas," makes no mention of common expenses, and dictates terms of the "condominium documents" that were to control the entire horizontal property regime, including regime members who were not party to the Lease or the litigation. (R.

pp. 8-14). The second order requires a general warranty deed,[14] reduces the purchase price, and—shockingly—limits encumbrances to "matters of record not objected to by Buyer."[15] (R. pp. 21-25).

It should be noted that, in conformance with the first two orders, Riverwalk recorded a Master Deed, creating a Horizontal Property Regime. (R. p. 349—400). But Grapevine did not like the Master Deed, and so it filed a motion to "compel compliance with final judgment." (R. p. 328). The court's third order then altered the entire condominium regime by requiring Riverwalk to collaborate with Grapevine as to what Grapevine believed to be "essential terms" of Riverwalk's horizontal property regime and to amend the Master Deed in accordance with Grapevine's wishes (thereby affecting units not parties to this action).[16] The trial court's series of orders granting specific performance—and conjuring up contractual terms, in the process—defy hornbook law:

> The fundamental basis of a suit for specific performance is that there is a contract between the parties . . . Before specific performance can be decreed, it is first necessary to determine whether there is a contract between the parties or not. **If there is no contract, then there is nothing to enforce**. It would be speculative for a Court to say what would have been the rights of the parties if they had made a contract.

Finklea v. Carolina Farms Co., 196 S.C. 466, 471-72, 13 S.E.2d 596, 599 (1941) (emphasis

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[14] Notably, the Purchase Agreement in Exhibit G requires only a quitclaim deed. (R. p. 1286 § 4.1).

[15] (?!?!?!) It is hard to fathom a contract for the purchase of real estate that would **ever** have this as a term, and particularly not in conjunction with a general warranty deed. In contrast, there are at least eight (8) encumbrances specifically identified as part of the Purchase Agreement in Exhibit G, including express use restrictions. (R. pp. 1289 - 90).

[16] As it happened, Grapevine did not like the length of the declarant control period, nor the references to Building 6 as part of the larger multi-unit "River District" development, nor the possibility of additional property being submitted to the regime (a common practice), nor the right of first refusal by declarant, nor the plat, nor the uniform restrictions on use of common elements, nor the unit numbers, nor the encroachment easements (*inter alia*). (*See* R. pp. 338 - 39). It demanded that Riverwalk change its development scheme, without any right to do so.

added). Here, the trial court simply wrote a new contract, with new terms, created from nothing. In doing so, it committed reversible error.

IV. Grapevine's outright occupation of the sidewalk with restaurant furniture excluded use of that area by other tenants as a matter of law.

This issue is not a challenge to the sufficiency of the evidence, as Grapevine tries to argue in the midst of its tsunami of preservation arguments. This issue is a challenge to the trial court's error of law in finding the Lease to be ambiguous about the use of common areas. (R. p. 605:13–14) ("I find Paragraph 15 ['Common Areas'] to be ambiguous."). 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, 378, 769 S.E.2d 237, 240 (2015); *see also Sifonios v. Town of Surfside Beach*, 414 S.C. 269, 777 S.E.2d 425 (Ct. App. 2015). Errors of law are well within the reach of appellate review. S.C. Code § 14-3-330.

The trial court's early finding of ambiguity (an error of law) necessarily affected the ultimate judgment in the case—it was the improper basis for submitting the question to the jury, for one thing. Because the Lease is not ambiguous, the intent of the parties must be determined from the four corners of the Lease and not from the extrinsic testimony of the parties about what they later thought it might have meant. *C.A.N. Enterprises, Inc. v. South Carolina Health and Human Services Finance Com'n*, 296 S.C. 373, 373 S.E.2d 584 (1988). As discussed in detail in Appellant's Brief, the Lease did not permit Grapevine to obstruct the sidewalks or to put its business furniture on it, thereby occupying the common space to the exclusion of others. (*See* App. Br., Issue IV).

Instead of addressing the legal arguments in Riverwalk's Brief, Grapevine provides a mish-mashed response alleging negligence, fraud, purportedly differing pre-

lease negotiations, and equity. *See* Resp. Br. pp. 31-35. **None of those things apply in this argument about a clear contract and what it requires.** Grapevine's assertions that it negotiated for a patio, and that it subjectively believed it could put its chairs on the sidewalk, and that it relied on representations by the developer, and that the "trial court's findings and order were necessary to support the equities" are all immaterial in an action of law on a clear contract. Moreover, the trial court unequivocally rejected Grapevine's claims of fraud, misrepresentation, and fraudulent inducement, which Grapevine wrongly regurgitates, despite not having appealed the orders dismissing those claims. (R. p. 1; pp. 943—89).

Because Grapevine does not address Riverwalk's arguments on the question of law as to the construction of the Lease, Riverwalk reincorporates those arguments herein and respectfully asks this Court to reverse the trial court's error of law in finding the Lease to be ambiguous. App. Br. pp. 34-39. Even if the question is evidentiary, the evidence leaves no question but that Grapevine's tables and chairs—used as seating for its business—are located in the sidewalks, which is in violation of the Lease's clear provisions governing "Common Areas":

(*See* R. pp. 1253-1256 § 12, § 15; 1320, 1384-1386). In other words: there was no question of fact for the jury to decide. The evidence and Lease are unequivocally contrary to the jury's finding.

This Court should reverse the trial court's error of law and the jury's findings for which there is no support in the record.

V. This Court should reverse on alleged negligent misrepresentation because Grapevine concedes that the representation—about a future event—was true at the time it was made, and because there was no duty as a matter of law, *inter alia*.

Grapevine voluntarily entered into a Commercial Lease Agreement with Riverwalk. For several years leading up to its execution of the lease, Grapevine and Riverwalk negotiated its terms. Grapevine's point of contact for pre-lease negotiations was David Williams, who was employed by GRH Development Resources LLC, acting on behalf of the landlord, Riverwalk.[17] (R. p. 228 ¶ 10).

In its complaint, at trial, and in its Response Brief to this Court, Grapevine has alleged a veritable plethora of purported misrepresentations allegedly made by David Williams prior to Grapevine's signing of the Lease. These purported misrepresentations ostensibly concerned outdoor seating, the option to purchase, the existence of a condominium, and the bank's loan requirements. Appellants moved for directed verdict as to each of these claimed misrepresentations, and the trial court granted their motion—***except*** for the alleged misrepresentation about the bank's requirements. (R. p. 1140:16-20). This Court should find that the trial court erred when it found that any duty existed,

[17] There is no evidence that Grapevine had any communications with Appellants on behalf of The Greens of Rock Hill, LLC, Assured Administration, LLC, or Mark Mather. The judge erred in denying directed verdict/JNOV to those Appellants who never communicated with Grapevine, and this Court should reverse.

and that the statement about the bank—which was true, and which pertained to a future event—could support a misrepresentation claim.

First, the existence of a duty is a question of law. *Houck v. State Farm Fire and Cas. Ins. Co.*, 366 S.C. 7, 620 S.E.2d 326, 329 (2005). Here, Grapevine agreed that the Commercial Lease governed its relationship with Riverwalk; it further agreed that "[a]ll prior representations, discussions, covenants, or warranties of the parties" were superseded by the Lease. (R. p. 1265, ¶ 43). Grapevine thereby voluntarily relegated Riverwalk's duties to those found within the Lease. The Lease states that Landlord's duties "are expressly conditioned upon Landlord receiving financing . . .," but it is otherwise silent as to the terms of any financing. (R. p. 1267 - 68, ¶ 54). In other words, Riverwalk had duties in contract—but any tort duties in negotiating the lease (if they existed) were forgone by Grapevine when it initialed this provision and signed the Lease. *Foxfire Village, Inc. v. Black & Veatch, Inc.*, 304 S.C. 366, 375, 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."); *Dept. of Transp. v. M & T Ent.*, 379 S.C. at 657-58, 667 S.E.2d at 13-14 ("The terms of a lease, like the terms of any contract, are construed to achieve the intent of the parties at the time the lease was entered into. The courts must construe and enforce contracts as written, in order to preserve the fundamental right of freedom of contract.").

Moreover, even Grapevine acknowledges that the statement about the bank requiring a lease was **true** at the time it was made. Resp. Br. at p. 28 ("At the time Grapevine entered the Agreement, the lender . . . required at least two tenants in order to

honor its loan commitment."); *see also* R. p. 1341; R. pp. 651:15–653:14. A statement that is true at the time it is made does not constitute a misrepresentation. *Sauner v. Public Serv. Auth.*, 354 S.C. 397, 407, 581 S.E.2d 161 (2003) (holding the plaintiff has the burden to prove the representation to be false); *Fields v. Melrose Ltd. Partnership*, 312 S.C. 102, 105, 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.").

Importantly, the statement about the bank was made in an email, and the statement indubitably pertained to future events: "the lender ***will*** *require* a 2-year lease" as a condition of a loan. (R. p. 1341) (emphasis added). Indeed, the statement was made more than four months before Grapevine ultimately signed the Lease and more than five months before the bank made its loan with Riverwalk. A statement about the future cannot support a misrepresentation claim. *Sauner*, 354 S.C. at 408 ("Representations based on statements as to future events or unfulfilled promises are not usually actionable.").

Finally, Grapevine shamelessly puts a misleading quotation (ironically about misleading statements) in the center of p. 37 of its Brief and then wrongly uses the quote to support its argument that David Williams "candidly admitted" his statements were false. Resp. Br. pp. 37-38. The only alleged negligent misrepresentation at issue in this appeal was the statement about the bank—which was actually true. The quote in the center of page 37 has nothing to do with the bank.[18]

[18] Here is the complete quote, in context: "The site was marketed with the outdoor space, two sites in that building were marketed for outdoor space. Q: And the question was, in your opinion is that misleading at all? A: I could see in this case how that could be construed as misleading." (R. p. 846).

For these reasons, and those in Appellant's Initial Brief, this Court should reverse on this issue and find that the statement that "the bank will require a two-year lease" cannot support Grapevine's claim for misrepresentation.

VI. This Court should reverse the award of attorney's fees and costs.

The attorney's fees provision is in the Lease between Riverwalk and Grapevine, and it pertains only to disputes between those two parties. (R. pp. 1263-64, § 38). Thus, the only claims that could support an award of attorney's fees are the breach of Lease claims against Riverwalk. As discussed above, and in Appellants' Brief, this Court should reverse the trial court's errors of law as to the construction of the Lease, and it should remand for a new, non-jury trial. For this simple reason, as well as for those in Appellants' Brief, this Court should also vacate the award of attorney's fees and costs—generated by six partners, five associates, two experts, five paralegals, and a legal assistant[19] in pursuit of ten causes of action against five defendants.

CONCLUSION

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

[signature appears on next page]

[19] R. pp. 261 – 70.

Respectfully submitted,

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