THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable G.D. Morgan, Jr. Circuit Court Judge

Case No. 2023-CP-23-02302
Appellate Case No. 2023-001957

BA Holdings, Inc., ……..……Appellant,

v.

Zay N Limo, LLC, Sharif Farhan, and Mohammad Farhan……..……..Respondents,

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FINAL BRIEF OF RESPONDENTS

Dated: August 14, 2024

Respectfully submitted,

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STATEMENT OF ISSUES ON APPEAL

1. As a matter of issue preservation, the appellant's brief does not take exception to many of the layered rulings supporting the circuit court's decision and focuses instead on new issues and arguments.

2. On the merits, the circuit court did not err in granting partial summary judgment because there is no genuine issue of material fact based upon the admissions made and undisputed contractual documents produced by the appellant through pleadings and discovery; and interrelatedly, the circuit court did not abuse its discretion by fully and efficiently considering the complaint together with the proposed amended complaint and denying leave to amend as clearly futile and moot.

STATEMENT OF THE CASE

This is an appeal taken from the Honorable G.D. Morgan, Jr.'s decision granting a motion for partial summary judgment as to all claims asserted in the complaint, and interrelatedly, denying a motion for leave to amend to file a proposed amended complaint, as futile and moot. The orders at issue include a Form 4 order with a brief description of the basis for the decision, entered on October 16, 2023, a more detailed formal order, entered on November 7, 2023, and a Form 4 order denying reconsideration, entered on November 21, 2023. (Orders, R. pp. 4, 7, 30).

On May 9, 2023, this action was commenced by the e-filing of the complaint (publishing the respondents' social security numbers on the internet). (Cmplt., R. p. 34); (Letter, R. p. 58). The named plaintiff and appellant here is BA Holdings, Inc. (Cmplt., R. p. 34). The named defendants and respondents here are Zay N Limo, LLC, Sharif Farhan, and Mohammad Farhan. (Cmplt., R. p. 34). The complaint is contractual in nature and arises from the express written contract attached as the first exhibit thereto. (Cmplt.,

R. p. 35). The claims asserted in the complaint include breach of contract, breach of guaranties, and unjust enrichment. (Cmplt., R. pp. 36-38).

As recounted in further detail without dispute in the order,[1] generally contemporaneous with initiating the action, BA Holdings, Inc. served discovery requests on the respondents, to which they timely responded. (Order, R. pp. 22-23). BA Holdings, Inc. also made a production of documents referenced in the contract. (Order, R. pp. 22-23); (Memo., Ex. 3-4, Agreements, R. pp. 184, 194).

On June 8, 2023, the answer and counterclaims were filed. (Ans. & Cc., R. p. 60). The defenses were based on falsities in the contract. (Ans. & Cc., R. pp. 63-65). The counterclaims involve violations of federal and state franchise, business opportunity, and unfair trade practice laws, in addition to breach of the contract. (Ans. & Cc., R. pp. 65-81).

[1] (Order, R. pp. 22-23) ("Together with the summons and complaint, Plaintiff served discovery requests on Defendants, namely, requests for admissions under Rule 36, SCRCP, to which Defendants timely responded pursuant to the rules on June 23, 2023. Plaintiff made an initial production of documents, responding to Defendants' informal requests for documents relating to the Contract, on May 15, 2023 . . . Defendant Zay N Limo, LLC served its first set of discovery requests on Plaintiff on June 8, 2023, including requests for admissions, interrogatories, and requests for production. Plaintiff made a request for a 30-day extension to respond to that discovery, to which Defendant Zay N Limo, LLC consented. Plaintiff then timely provided its responses to the requests for admissions on August 7, 2023; however, Plaintiff untimely provided its responses to the interrogatories and requests for production on August 11, 2023. Meanwhile, Defendant Mohammad Farhan served his first set of discovery requests on Plaintiff on August 3, 2023, including requests for admissions, interrogatories, and requests for production. It appears Plaintiff acknowledged receipt, but then did not timely respond to those discovery requests within 30 days or request an extension and no extension was ever agreed to by Defendants. 61 days after those discovery requests were served, on October 3, 2023, Plaintiff made an attempt to answer the requests for admissions, but did not attempt to respond to the corresponding interrogatories and requests for production.").

Generally contemporaneous with responding to the complaint, the respondents served discovery requests on BA Holdings, Inc., some of which was timely responded to, some of which was belatedly responded to (including certain requests for admissions), and some of which was entirely disregarded, as recounted in further detail without dispute in the order.[2] (Order, R. pp. 22-23); (Memo., Ex. 5, Discovery, R. pp. 240-242).

On August 7, 2023, the reply to the counterclaims was filed, admitting certain facts, including that BA Holdings, Inc. should not have entered into the contract that it attached as the first exhibit to its complaint. (Reply, R. p. 88); (Memo., Ex. 7, Reply, R. p. 268).

On August 14, 2023, a mid-litigation assignment document was drawn up between BA Holdings, Inc. and BA Greenville, LLC, an entity that BA Holdings, Inc. is the sole member of and which is commonly owned by Dustin Pelletier and commonly represented by counsel of record, Brian Autry and David Paavola. (Pr. Am. Cmplt., R. p. 105); (Memo., Ex. 2, Assignment, R. p. 182); (Aff., Ex. B, R. p. 143). The sole signatory of the document was Dustin Pelletier, signing for both of his entities. (Pr. Am. Cmplt., R. p. 105); (Memo., Ex. 2, Assignment, R. p. 182); (Aff., Ex. B, R. p. 143).

On August 14, 2023, also, the respondents filed their motion for partial summary judgment as to all claims asserted in the complaint. (Motion, R. p. 92).

On August 15, 2023, the hearing was scheduled for that motion to be held two months later, on October 10, 2023. (Notice, R. pp. 511, 514).

On September 25, 2023, the motion for leave to file the proposed amended complaint was filed, which likewise attached the contract as the first exhibit, adding the

[2] *Supra* note 1.

mid-litigation assignment as another exhibit, and BA Greenville, LLC as a proposed second plaintiff, in addition to BA Holdings, Inc. (Motion, R. pp. 94, 96).

On September 26, 2023, that motion was also scheduled to be heard on October 10, 2023. (Notice, R. pp. 511, 515).

On October 6, 2023, the appellant filed an affidavit by Dustin Pelletier. (Aff., R. p. 125).

On October 9, 2023, the respondents filed a memorandum of law on both motions, attaching several exhibits, consisting of admissions made and undisputed contractual documents produced by the appellant. (Memo., R. pp. 145-280).

The appellant did not file a memorandum of law on either motion.

On October 10, 2023, Judge Morgan held the hearing. (Tr., R. p. 485). Considering the two pending motions to be interrelated, the circuit court first heard the plaintiff's subsequently filed motion, and then heard defendants' earlier filed motion. (Tr., R. p. 487, ll. 19-25). The circuit court took both motions under advisement together and carefully reviewed the entirety record before making its decision. (Tr., R. p. 508, l. 25 – p. 509, l. 4).

On October 16, 2023, the circuit court entered the Form 4 order with a brief description of the basis for its decision granting the motion for partial summary judgment as to all claims asserted in the complaint, and interrelatedly, denying the motion for leave to amend to file a proposed amended complaint, as futile and moot. (Order, R. p. 4). The circuit court also indicated that it would issue a more detailed formal order and requested a proposal from the respondents. (Order, R. p. 4).

On October 26, 2023, the appellant filed a reconsideration motion as to the Form 4 order (without providing a copy to Judge Morgan within 10 days of filing). (Motion, R. p. 281); (Letter, R. p. 289).

On October 30, 2023, the respondents submitted their proposal.

On November 7, 2023, the circuit court entered its more detailed formal order. (Order, R. pp. 7-29).

On November 17, 2023, the appellant filed a (second) reconsideration motion, as to the more detailed formal order. (Motion, R. p. 292). That motion resembled a memorandum of law, and attached numerous exhibits, including e-mails (and attachments) that were not previously presented. (Motion, R. pp. 292-484).

On November 21, 2023, the circuit court entered a Form 4 order denying reconsideration. (Order, R. p. 30).

On December 20, 2023, the notice of appeal was filed and served. (Notice, R. p. 516).

STATEMENT OF FACTS

1. Introduction

The plaintiff in this action, BA Holdings, Inc., as was revealed and admitted after this lawsuit was filed, is a commissioned sales agent for a national franchisor, Big Air Franchising, LLC. (Order, R. pp. 16-18); (Memo., Ex. 3, Agreement, R. p. 184). That national franchisor undisputedly sold the defendants the rights and duties to operate one new franchise business in Anderson, South Carolina. (Order, R. pp. 21-22, 27); (Memo., Ex. 7, Reply, R. pp. 263-264); (Aff., Ex. A, R. p. 129). As was also revealed and admitted, the plaintiff, as its commission for soliciting and orchestrating that sale, has received 50%

of the initial franchise fees and monthly royalties that the defendants have paid the national franchisor. (Order, R. pp. 21-22, 27); (Memo, Ex. 3, Agreement, R. pp. 184-193, Ex. 7, R. pp. 263-264). Separately, the contract that is at the center of this lawsuit was entered into by the plaintiff, attempting to double sell and charge the defendants extra fees and monthly royalties to operate their new franchise business in Anderson, without the right to do so. (Order, R. pp. 7-22, 24-28); (Cmplt., Ex. 1, R. p. 41); (Pr. Am. Cmplt, Ex. 1, R. p. 129); (Memo., Ex. 1, R. p. 172). The plaintiff's commonly owned and represented mid-litigation assignee of the contract, BA Greenville, LLC, another franchisee, which operates one franchise business in Greenville, likewise had no such rights from the franchisor to sell to the defendants. (Order, R. pp. 7, 18-21, 26-27); (Memo., Ex. 2, R. p. 182; Ex. 4, R. pp. 197, 201; Ex. 7, R. p. 276; Ex. 6, R. p. 266). No matter what hat Dustin Pelletier wears, or entity he purports to be, or unilateral amendments he attempts to make, he has no case against the defendants under the contract or otherwise. (Order, R. pp. 7-22, 24-28).

2. Contract At Issue

The contract at issue in this case is entitled "Assignment and Assumption Agreement," and it is attached as the first exhibit to both the complaint and the proposed amended pleading. (Order, R. p. 10); (Cmplt., Ex. 1, R. p. 41); (Pr. Am. Cmplt., Ex. 1, R. p. 105). The contract was entered into by and between, and executed by, the plaintiff, BA Holdings, Inc., and the defendant, Zay N Limo, LLC (with accompanying guaranties signed by the other the other defendants, Sharif Farhan and Mohammad Farhan), on February 18, 2021. (Order, R. pp. 10-11); (Contract, R. pp. 41, 49).

The contract begins with the plaintiff's claim to own and to have the right to sell franchise rights in Anderson, South Carolina, incorporating by reference the plaintiff's

agreement with the franchisor, Big Air Franchising, LLC. (Order, R. p. 11); (Contract, R. p. 41). The contract purported to sell, assign, grant, convey, and transfer such franchise rights, title, duties, and obligations. (Order, R. p. 11); (Contract, R. p. 41).

The contract also included representations and warranties, made by the plaintiff, about its authority, as of the effective date of the contract, to sell, assign, grant, convey, and transfer such franchise rights, title, duties, and obligations, and its full performance of and compliance with its agreement with the franchisor. (Order, R. p. 12) (Contract, R. p. 43).

The contract further provided that its consideration involved the exchange of the purported assignment in return for (expectedly, ten years or more) of monthly royalties and fees: 1% of monthly gross sales + 5% of monthly net profits + $5,000 per month. (Order, R. p. 13); (Contract, R. pp. 41-42).

The contract also included certain well-understood provisions under black letter law. It included an entire agreement clause (aka merger or integration), superseding all else. (Order, R. p. 13); (Contract, R. p. 47). It also included an amendment clause, requiring a writing signed by each party to the contract. (Order, R. p. 13); (Contract, R. p. 47). And it included a no third-party beneficiaries clause, limiting the benefits of the contract to its parties. (Order, R. p. 13); (Contract, R. p. 47).

3. Mid-Litigation Assignment

After suing the defendants based on the contract and producing documents referenced in the contract, the plaintiff, BA Holdings, Inc., in replying to counterclaims, admitted it was not a proper party to the contract. (Order, R. pp. 13-14); (Memo., Ex. 7, Reply, R. p. 268). The plaintiff adopted a new position: that BA Greenville, LLC, an entity

that the plaintiff is the sole and controlling member of (and is commonly owned by Dustin Pelletier and represented by Brian Autry), should have entered into the contract with the defendants instead of the plaintiff. (Order, R. pp. 13-14); (Memo., Ex. 7, Reply, R. p. 268).

Mid-litigation, on August 14, 2023, the plaintiff then purported to "clean up" the contract by unilaterally creating and executing a new document, without the defendants. (Order, R. p. 14); (Memo., E-mail, p. 152). The plaintiff's newly created document is titled as an assignment. (Order, R. p. 14); (Memo., Ex. 2, Assignment, R. p. 182). Dustin Pelletier signed the newly created document for both the plaintiff and the new assignee, which he commonly owns and controls. (Order, R. p. 14); (Memo., Ex. 2, Assignment, R. p. 183). The newly created document renames the contract, changing it from "Assignment and Assumption Agreement" to "Territory Release Agreement." (Order, R. pp. 14-15); (Memo., Ex. 2, Assignment, R. p. 182). It likewise recharacterizes the intent of the contract, stating that Plaintiff "intended to release certain rights of Assignee" by entering into the contract. (Order, R. p. 14); (Memo., Ex. 2, Assignment, R. p. 183). By contrast, the word "release" appears nowhere in the contract, which, as already discussed, instead purports to sell franchise rights and title owned by the plaintiff and to transfer and convey the plaintiff's franchise duties and obligations to the defendants. (Order, R. p. 15); (Contract, R. p. 41). The newly created document then purports to make the new assignee the "substitute counterparty" to the contract and the party that in "effect" made the representations and warranties therein "as of" the time they were made. (Order, R. p. 15); (Memo., Ex. 2, Assignment, R. p. 183).

In its proposed amended complaint, the plaintiff alleges that the contract was "in error in at least two ways," and that one of these errors is corrected by the newly created

document. (Order, R. pp. 15-16); (Pr. Am. Cmplt., R. p. 99). The plaintiff did not allege that the other error is corrected or that any of the other errors it alludes to are corrected. (Order, R. pp. 15-16); (Pr. Am. Cmplt., R. p. 99). Further, Dustin Pelletier's affidavit that the plaintiff filed characterizes the same as being "mistakes" that "I made" and an "attempt to rectify my error." (Aff., ¶¶ 21-22, R. p. 128).

4. Agreements With The Franchisor

During discovery, the plaintiff also produced the agreements between itself and the franchisor (incorporated by reference in the contract) and between its new assignee of the contract and the franchisor (which the plaintiff now contends should have been the agreement incorporated by reference in the contract). (Order, R. p. 16); (Memo., Ex. 3 and 4, Agreements, R. pp. 184, 194).

The first agreement referenced above, between the plaintiff and the franchisor, authorized the plaintiff to act as a sales agent for the franchisor and entitled it to receive 50% of the franchise fees and royalties paid to the franchisor from the franchisor in the form of sales commissions. (Order, R. p. 17); (Memo., Ex. 3, Agreement, R. pp. 184, 186, 192-193). The plaintiff concedes in its proposed amended complaint that this agreement with the franchisor gave it no right to sell franchise rights. (Order, R. pp. 17-18); (Memo., Ex. 8, R. p. 273); (Pr. Am. Cmplt., R. p. 97).

The second agreement referenced above was between the franchisor and another franchisee, the plaintiff's commonly owned and represented mid-litigation assignee of the contract, BA Greenville, LLC. (Order, R. p. 18); (Memo., Ex. 4, Agreement, R. p. 194). That agreement made it expressly clear that Plaintiff had no rights thereunder by reason of its membership interests in BA Greenville, LLC. (Order, p. 18); (Memo., Ex. 4,

Agreement, p. 236). That agreement gave that franchisee the right, license, and duty to operate only "one" franchise business in a defined territory. (Order, R. pp. 18-19); (Memo., Ex. 4, Agreement, R. pp. 197, 201). And that franchisee has always operated its "one" franchise business in Greenville, specifically, at its trampoline recreation center located at 36 Park Woodruff Drive (meaning that it had no right to operate a second one in Anderson, 37 miles away, and could not sell such a right that it did not own), which the plaintiff admitted in replying to allegations in the defendants' counterclaims. (Order, R. p. 19); (Counterclaims, R. p. 71); (Memo., Ex. 7, Reply, p. 266).

Without expanding that franchisee's right, license, and duty to operate only "one" franchise business in the defined territory, the agreement also included a provision stating that the franchisor or its affiliate would not establish or license another franchise business in a defined buffer territory of zip codes surrounding the one operating franchise business. (Order, R. pp. 19-20); (Memo., Ex. 4, Agreement, R. p. 203).

The agreement strictly prohibited and deemed "void" any attempted assignment of the franchisee's rights and duties, without compliance with numerous terms and conditions and restrictions therein, and "prior written approval" from the franchisor. (Order, R. p. 20); (Memo., Ex. 4, Agreement, R. p. 234). The agreement includes several pages of conditions and restrictions. (Order, R. p. 20); (Memo., Ex. 4, Agreement, R. pp. 233-238). For example, the proposed assignment could not grant a subfranchise. (Order, R. p. 21); (Memo., Ex. 4, Agreement, R. p. 238). As another example, the franchisee was required to provide the franchisor with an exact copy of a purchase offer and give it a right of first refusal. (Order, R. pp. 20-21); (Memo., Ex. 4, Agreement, R. pp. 234, 238). The plaintiff admitted that the franchisor did not even participate in the negotiation and execution of the

contract, let alone give its "prior written approval" to the contract. (Order, R. p. 21); (Memo., Ex. 7, Reply, R. p. 267).

5. Extra Fees Demanded

The plaintiff has admitted that it has provided no services of any kind or anything of value that it owns to earn the monthly fees it has demanded under the contract or otherwise, by not timely responding to certain requests for admissions, under Rule 36, SCRCP. (Order, R. p. 21); (Memo., Ex. 5, Discovery, R. pp. 240-255). It is also undisputed that the defendants have paid the franchisor, which has shared 50% of the franchise fees and royalties with the plaintiff in the form of sales commissions. (Order, pp. 21-22); (Memo., Ex. 7, Reply, R. pp. 263-264). The defendants refuse to pay anything extra to Dustin Pelletier's entities, BA Holdings, Inc. or BA Greenville, LLC, under the contract or otherwise. (Order, R. p. 22).

ARGUMENT

1. Issue Preservation

"South Carolina is an 'exception state.' This means the South Carolina Supreme Court and this court are 'confined to a disposition of appeals upon the exceptions taken....'" *Langley v. Boyter*, 284 S.C. 162, 325 S.E.2d 550, 561 (Ct. App. 1984) (internal citations omitted). "Additionally, there is a presumption in favor of the correctness of an appealed order and the burden of showing error by the trial judge is on the appellant." *Ehlke v. Nemec Const. Co., Inc.*, 381 S.E.2d 508, 298 S.C. 477, 481 (Ct. App. 1989).

Here, the appellant's brief does not take exception to, raise, and argue, and therefore abandons and concedes, many of the layered rulings supporting the circuit court's decision, which cannot be later challenged in a reply brief or at oral argument. *See Matthews v. City*

of Greenwood, 305 S.C. 267, 407 S.E.2d 668, 669 (Ct. App. 1991) ("The issue . . . is neither raised by an exception nor argued in the brief. Therefore, this issue is not presented for review."); *State v. Austin*, 306 S.C. 9, 409 S.E.2d 811 (Ct. App. 1991) ("An exception not argued in the brief is deemed abandoned on appeal."); *Glasscock, Inc. v. US Fidelity & Guar.*, 348 S.C. 76, 557 S.E.2d 689 (Ct. App. 2001) ("[A]n argument made in a reply brief cannot present an issue to the appellate court if it was not addressed in the initial brief."); *In the Interest of Bruce O.*, 311 S.C. 514, 515 n. 1, 429 S.E.2d 858, 858 n. 1 (Ct. App. 1993) ("Further, an appellant may not use oral argument as a vehicle to argue issues not argued in the appellant's brief."); *Fields v. Melrose Ltd. Partnership*, 312 S.C. 102, 439 S.E.2d 283, 285 n.3 (Ct. App. 1993) ("[A]n issue is deemed abandoned on appeal and, therefore, not presented for review, if it is argued in a short, conclusory statement without supporting authority.").

To wit, the appellant's brief does not address the circuit court's rulings on the following points:

- **(i)** the entire agreement (aka merger or integration) clause in the contract (Order, R. pp. 13, 24-26);
- **(ii)** the parol evidence rule (Order, pp. 24-26);
- **(iii)** the amendment clause in the contract (Order R. pp. 13, 24-26);
- **(iv)** the no third-party beneficiaries clause in the contract (Order, R. pp. 13, 24-26);
- **(v)** the law that an assignee stands in the assignor's shoes, as of the time of the assignment (Order, R. p. 26);

(vi) the undisputed false grant of rights and false representations and warranties in the contract (that the appellant only argues should be ignored) (Order, R. pp. 7-8, 11-21, 24-27); and

(vii) the failure to timely respond to discovery requests for admissions under Rule 36, SCRCP, whereby the appellant admitted that it has provided no services of any kind or anything of value that it owns to earn the monthly fees it has demanded under the contract or otherwise; and disregard for accompanying requests for production and interrogatories (Order, pp. 21, 23, 28).

Instead of addressing the above layered rulings supporting Judge Morgan's decision, the appellant's brief focuses on new issues that were not preserved for review before the circuit court. *See Carolina Attractions, Inc. v. Courtney*, 287 S.C. 140, 337 S.E.2d 244, 248 (Ct. App. 1985) ("An issue not presented to the trial court is not before this Court for review.").

Among the new issues, the appellant dedicates much of its brief to e-mails (and attachments). (App. Br. pp. 4, 5, 6, 11, 12, 14, 15, 16, 17, 18, 19). All such e-mails, however, pre-date and were in the appellant's possession prior to the hearing, and the appellant did not present any of the e-mails to the circuit court until after it lost, via its (second) motion for reconsideration. (Rec. Mot., R. pp. 292-484). "A party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not." *Hickman v. Hickman*, 392 S.E.2d 481, 482, 301 S.C. 455 (Ct. App. 1990)); *see also I'ON, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716 (2000) ("It [issue preservation] prevents a party from keeping an ace card up his sleeve— intentionally

or by chance—in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case.").

For example, of the e-mails unpreserved for review, the appellant focuses much of its attention on a particular e-mail chain between the appellant and a third party (Dustin Pelletier for the appellant, and Kevin Odekirk for the national franchisor), attaching an unsigned affidavit that the appellant drafted for that third party, and an unsigned release and indemnity agreement that the third party drafted and requested in exchange.[3] (App. Br. pp. 4, 5, 6, 11, 12, 14, 15, 16, 17, 19); (Rec. Mot., Ex. 7, R. pp. 472-482). Based on the dates appearing in the e-mail chain with the attachments, August 28-29, 2023, it is clear that the documents were created in the middle of this litigation and existed and were secretly in the appellant's possession two months prior to the hearing held by Judge Morgan, on October 10, 2023, yet the appellant did not produce them to the respondents (*i.e.*, withheld them in discovery) and did not present them to the circuit court until after it lost, via its (second) motion for reconsideration, on November 17, 2023. (Rec. Mot., Ex. 7, R. pp. 472-482).

In the same vein, the appellant did not file anything resembling a memorandum of law until after it lost, via its (second) motion for reconsideration. (Rec. Mot., R. pp. 292-484). It should be remembered too that the appellant is the plaintiff that brought the respondents into court and forced them to incur great expense in disposing of the complaint and the proposed amended complaint.

[3] These e-mails and unsigned attachments, withheld and unpreserved, only expose a failed conspiratorial objective of "dismantling Mohammad's narrative like we discussed in our meeting." (Rec. Mot., Ex. 7, R. p. 473).

Additionally, on appeal, the appellant argues that the false grant of rights and false representations and warranties in the contract arose by "mutual" mistake. (App. Br., pp. 5-6). Whereas inconsistently, in the affidavit submitted by the appellant to the circuit court, Dustin Pelletier states that they were "mistakes" that "I made" and "my error," as Judge Morgan quoted in the order. (Order, R. p. 16); (Aff., ¶¶ 21-22, R. p. 128). To be sure, the false grant of rights and false representations and warranties in the contract that Dustin Pelletier admitted to making in the contract were not akin to a typo by a scrivener, but were substantive, multifarious, and fundamental to the contract, as Judge Morgan recognized, and will be discussed further below. (Order, R. pp. 11-21, 27).

Likewise, on appeal, the appellant argues that the contract was "mutually drafted." (App. Br., p. 6). Whereas, inconsistently, Dustin Pelletier's affidavit describes his mistakes and his error "[w]hen drafting" the contract. (Order, R. p. 16); (Aff., ¶¶ 21-22, R. p. 128).

In sum, as a matter of issue preservation – because the appellant's brief does not challenge the above layered rulings supporting the circuit court's decision, and otherwise focuses on the above new issues that were not preserved before the circuit court – the appellant's brief does not pass the threshold requirement, of presenting reviewable exceptions to the reasoning in the order on appeal, sufficient to create a genuine question as to whether the result of this appeal should be anything other than an affirmance. *See Langley*, 284 S.C. 162, 325 S.E.2d at 561. This appeal should therefore be expeditiously decided without oral argument, pursuant to Rule 215, SCACR.

2. The Merits

a. Legal Standards

The appellate standard of review to be applied to the circuit court's grant of partial summary judgment as all claims in the complaint is the *de novo* standard. *See Wright v. PRG Real Est. Mgmt., Inc.*, 426 S.C. 202, 211, 826 S.E.2d 285, 290 (2019). The underlying standard for summary judgment is provided by Rule 56, SCRCP. As recently held by our Supreme Court, "[w]e now clarify that the 'mere scintilla' standard does not apply under Rule 56(c). Rather, the proper standard is the 'genuine issue of material fact' standard set forth in the text of the Rule… '[I]t is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine.'" *Kitchen Planners, LLC v. Friedman*, 440 S.C. 456, 892 S.E.2d 297 (2023) (quoting *Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013)). Partial summary judgment under this standard is enabled by Rule 56(e), SCRCP. "The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder." *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). "Courts and commentators have stated that a partial summary judgment under Rule 56[] is an appropriate procedure whereby a court can narrow the scope of trial." *Limehouse v. Resolution Trust Corp.*, 862 F.Supp. 97 (D.S.C. 1994). "Chief among the functions of summary judgment are those of avoiding long and expensive litigation productive of nothing and curbing the danger that threat of such litigation will be used to harass or to coerce settlement." *Id*.

The appellate standard of review to be applied to the circuit court's interrelated denial of leave to amend the complaint based on the futility and mootness of the proposed amended complaint is the abuse of discretion standard. *See Duncan v. CRS Sirrine Engineers, Inc.*, 337 S.C. 537, 542, 524 S.E.2d 115, 118 (Ct. App. 1999); *Jennings v. Jennings*, 389 S.C. 190, 209, 697 S.E.2d 671, 681 (Ct. App. 2010) ("[A]lthough leave to

amend should generally be 'freely given' [under Rule 15(a), SCRCP] . . . it may be denied where the proposed amendment would be futile."); *Stokes v. Oconee Cty*., 895 S.E.2d 689, 700 (2023) ("[A] trial court may deny a motion to amend if the amendment would be clearly futile.") (quoting *Skydive Myrtle Beach, Inc. v. Horry Cnty.*, 426 S.C. 175, 182, 826 S.E.2d 585, 589 (2019)).

The complaint and proposed amended complaint both make claims for breach of contract and breach of guaranty relating to the same contract. The legal elements for these claims are as follows: (1) a binding contract entered into by the parties; (2) breach or unjustifiable failure to perform the contract; and (3) damage suffered by the claimant as a direct and proximate result of the breach. *See Fuller v. Eastern Fire & Cas. Ins. Co.*, 124 S.E.2d 602, 240 S.C. 75 (1962).

The complaint and proposed amended pleading also both make claims for unjust enrichment. "To recover restitution in the context of unjust enrichment, the plaintiff must show: (1) he conferred a non-gratuitous benefit on the defendant; (2) the defendant realized some value from the benefit; and (3) it would be inequitable for the defendant to retain the benefit without paying the plaintiff for its value." *Inglese v. Beal*, 742 S.E.2d 687, 691, 403 S.C. 290 (Ct. App. 2013).

b. The Order Should Be Affirmed For The Reasons Set Forth Therein

The circuit court's decision should be affirmed, on its own merits, for all of the reasons given in the order, which will now be reiterated. (Order, R. pp. 24-28). Again, the appellant's brief ignores these layered rulings supporting the decision and focuses instead on new issues.

After filing this lawsuit, BA Holdings, Inc. conceded it has no valid legal claim against the defendants, as set forth above. (*Supra*, p. 7). Accordingly, the crux of the issue before the circuit court was whether the plaintiff's newly created document could clean up the contract to give plaintiff's commonly owned and represented mid-litigation assignee a valid legal claim to litigate further under the proposed amended complaint. As a matter of law, Judge Morgan correctly found that the answer was no. (Order, R. p. 24).

The contract's express provisions – that it is the sole and entire agreement between the parties superseding all else; that it cannot be unilaterally amended; and that there are no third-party beneficiaries – controlled the decision under black letter contract law. (Order, R. pp. 24-25); (*Supra*, pp. 6-7). *See* Black's Law Dictionary 880 (9th ed.2009) (defining an integration clause, also termed a merger clause, as "[a] contractual provision stating that the contract represents the parties' complete and final agreement and supersedes all informal understandings and oral agreements relating to the subject matter of the contract"); *Wilson v. Landstrom*, 315 S.E.2d 130, 281 S.C. 260 (Ct. App. 1983) ("A merger clause expresses the intention of the parties to treat the writing as a complete integration of their agreement.") (citing Williston On Contracts § 633 (3d ed. 1961) and other authority); *Wilson*, 315 S.E.2d 130, 281 S.C. 260 ("The terms of a completely integrated agreement cannot be varied or contradicted by parol evidence of prior or contemporaneous agreements not included in the writing.") (citing *Armour Fertilizer Works v. Hyman*, 120 S.C. 375, 113 S.E. 330 (1922); *M'Dowall v. Beckly*, 9 S.C.L. (2 Mill) 265 (1818)); *Davis v. Kb Home of South Carolina Inc.*, 394 S.C. 116, 713 S.E.2d 799 (Ct. App. 2011), *aff'd in part, vacated in part*, 429 S.C. 634, 842 S.E.2d 653 (2014) ("[W]hen the writing on its face appears to express the whole agreement, parol evidence cannot be

admitted to add another term to the agreement, even when the writing is silent as to the particular term sought to be established.") (citing *U.S. Leasing Corp.*, 294 S.C. at 318, 364 S.E.2d at 205; *Blackwell v. Faucett*, 117 S.C. 60, 65, 108 S.E. 295, 296 (1921) (noting if the writing on its face appears to express the whole agreement, parol evidence cannot be admitted to add another term thereto)); *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 241, 672 S.E.2d 799, 802 (Ct. App. 2009) ("The court is without authority to consider parties' secret intentions, and therefore words cannot be read into a contract to impart an intent unexpressed when the contract was executed."); *Ellis v. Taylor*, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994) ("The court's duty is to enforce the contract made by the parties regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully.").

Without the defendants' agreement, the plaintiff could not unilaterally amend the sole and entire agreement between it and the defendants in the middle of the litigation. More particularly, the plaintiff could not rename the contract, changing it from "Assignment and Assumption Agreement" to "Territory Release Agreement." Nor could the plaintiff recharacterize the intent of the contract, stating that the plaintiff "intended to release certain rights of Assignee" by entering into the contract. (*Supra*, p. 8). By contrast, the word "release" appears nowhere in the contract, which, as shown, instead purports to sell franchise rights and title owned by the plaintiff and to convey and transfer the plaintiff's franchise duties and obligations to the defendants. (Order, R. pp. 25-26).

Likewise, the plaintiff could not time-travel to make its new assignee the "substitute counterparty" to the contract and the party that in "effect" made the representations and warranties therein "as of" the date they were made by the plaintiff. (*Supra*, p. 8). It is

fundamental that the assignee steps into the assignor's shoes as of the time of the assignment and cannot change who entered into the agreement in the first place, and who made representations and warranties therein and what was their meaning and effect when made. *See Singletary v. Aetna Cas. & Sur. Co.*, 447 S.E.2d 869, 316 S.C. 199 (Ct. App. 1994) ("An assignee of a chose in action can claim no higher rights than his assignor had *at the time* of the assignment.") (emphasis added). (Order, R. p. 26).

Also, as a matter of the black letter contract law cited above, the plaintiff was expressly barred by the contract from advancing any arguments based on parol evidence to try to controvert, rewrite, or add to the contract. The plaintiff's newly created document and proposed amended complaint both tried to do exactly that, and so did the affidavit that the plaintiff filed in opposition to partial summary judgment, by Dustin Pelletier. The four corners of the contract drafted by the plaintiff and attached by the plaintiff to its complaint and its proposed amended pleading controlled, as a matter of law. (Order, R. p. 26).

Notwithstanding, even assuming *arguendo* that none of the above black letter contract law applied here, the plaintiff's new assignee, BA Greenville, LLC, would not have had the right to enter into the contract with the defendants to begin with, either. Nor does it have any equitable right to restitution. In sum, the two agreements with the franchisor produced by the plaintiff indisputably establish that neither the plaintiff, nor its new assignee, BA Greenville, LLC, were in the position to double sell and charge extra fees to the defendants for the rights and duties to open a new Big Air franchise business in Anderson. (*Supra*, pp. 9-10). Attempting to do so was wrong and inequitable. The plaintiff only had the right to receive sales commissions equal to 50% of all franchise fees and royalties paid by the defendants to the franchisor (which it admittedly received).

(*Supra*, pp. 9-10). The plaintiff's new assignee of the contract, BA Greenville, LLC, only had the right, license, and duty to operate the "one," already existing franchise business in Greenville; and numerous conditions and restrictions prohibited and rendered "void" any attempted assignment of the same without the franchisor's "prior written approval" (which it admittedly did not receive). (*Supra*, pp. 9-10). Because neither the plaintiff, nor BA Greenville, LLC, had the rights they purported to sell the defendants and made representations and warranties about that were indisputably false, neither has a valid claim under the contract or the alternative theory of unjust enrichment asserted in the complaint and the proposed amended pleading. (Order, R. pp. 26-28).

Any issue that the plaintiff raised about Big Air Franchising, LLC breaching or amending its franchise agreement with BA Greenville, LLC (regarding the provision therein stating that the franchisor or its affiliate would not establish or license another franchise business in a defined buffer territory of zip codes surrounding the one operating franchise business) is between those parties – not the defendants. Moreover, the plaintiff, under common ownership with BA Greenville, LLC, and acting as a sales agent and affiliate of Big Air Franchising, LLC, was admittedly responsible for causing Big Air Franchising, LLC to sell the defendants their franchise business in Anderson, for which the plaintiff is admittedly already being handsomely rewarded with the right to receive 50% of the franchise fees and royalties paid by the defendants to the franchisor in the form of sales commissions. (Order, R. p. 26).

Finally, by not timely responding to certain requests for admissions, as set forth above, under Rule 36, SCRCP, the plaintiff additionally admitted that it provided no services of any kind or anything of value that it owns to earn the monthly fees it demanded

under the contract or otherwise. (*Supra*, p. 10). *See* Rule 36, SCRCP ("The *matter is admitted* unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow or as stipulated in writing by the parties pursuant to Rules 29 and 6(b), the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney...") (emphasis added); *Nexstar Media Grp., Inc. v. Davis Roofing Grp.*, LLC, 431 S.C. 593, 848 S.E.2d 597 (Ct. App. 2020) ("This court has affirmed the seriousness of the ramifications for a failure to respond to requests in a timely matter."); *Moore, Matter of*, 494 S.E.2d 804, 329 S.C. 294 (1997) ("Because of this failure to reply, the Request for Admissions were deemed admitted."). (Order, R. p. 28).

c. The Appellant's Arguments Are Otherwise Without Merit

Having shown that the appellant focuses on issues that are unpreserved and reiterated the supporting rulings unchallenged by the appellant, the respondents will now address the underlying lack of merit to the arguments presented in the appellant's brief.

(i) The Circuit Court Accepted The Mid-Litigation Assignment

The appellant seems to argue or imply that the circuit court did not accept the mid-litigation assignment document or recognize the new assignee. (App. Br., 20-21). This is simply not true. Throughout the order, that document is accepted as an assignment and the new assignee, BA Greenville, LLC, is recognized as such. (Or., R. pp. 7-8, 14-16, 18-19, 23-28). Without negating these undisputed and accepted facts, Judge Morgan correctly found that the same document (which the appellant described as being created to "clean up" errors in the contract), contains provisions that ineffectively appear to attempt to amend

the contract, which could not be done without the written agreement of the respondents, as a matter of law. (Or., R. pp. 14-15, 24-26).

(ii) The Circuit Court Properly Ruled On The Futility Of The Proposed Amended Complaint

The circuit court's ruling on the futility of the proposed amended complaint was not an impermissible advisory opinion, as argued by the appellant. (App. Br., pp. 12-13, 19). In the motion for leave, the proposed amended complaint was, in fact, put before Judge Morgan by the appellant and its commonly owned and represented mid-litigation assignee. (Pr. Am. Cmplt., R. p. 96); (Tr., R. p. 495, ll. 9-12) ("[Mr. Autry] So we've attached to our motion the proposed amended Complaint. And the one we filed is highlighted so the Court can see every change that we made. THE COURT: I read it. I saw it."). This was not an unsolicited hypothetical exercise, in the likes of an advisory opinion.

Rather, it was entirely appropriate and judicially efficient for Judge Morgan to consider the legal merits of the complaint, together with the interrelated futility of the proposed amended complaint, at the same time, at the same hearing, involving the same issues, the same arguments, the same principals, and the same attorneys. *See Jennings v. Jennings*, 389 S.C. 190, 209, 697 S.E.2d 671, 681 (Ct. App. 2010), *rev'd on other grounds*, 401 S.C. 1, 736 S.E.2d 242 (2012) (considering a summary judgment motion together with a motion for leave, and reciting the law: "Although leave to amend should generally be 'freely given,'. . . it may be denied where the proposed amendment would be futile."); *Stokes v. Oconee Cty*., 895 S.E.2d at 700 (considering summary judgment together with motion to amend).

Indeed, it would have been futile to go through the piecemeal machinations of first pausing and adding BA Greenville, LLC as a second plaintiff, only to then require more motion practice and another hearing to summarily dispose of the proposed amended pleading that was already before the Court. *See Jennings*, 389 S.C. at 209, 697 S.E.2d at 681("[A]dding Neal as a party defendant would have been futile. Like Wife, Cooke, and BJR, Neal would have been entitled to summary judgment if he had been added as a defendant. Accordingly, we conclude that the circuit court did not err in refusing to grant Husband leave to amend his complaint to add Neal as a party defendant."); *Stokes v. Oconee Cty*., 895 S.E.2d at 700 ("However, given Stokes's failure to produce sufficient evidence on at least two elements of his slander per se claim, any amendment to his complaint would be clearly futile.").

Particularly so, because the motion for leave to amend, filed on September 25, 2023, was in essence a last-minute attempt to delay the Court's consideration of the motion for partial summary judgment that had been filed more than a month earlier, on August 14, 2023 (the same day as the mid-litigation assignment), when notice had already been given to the parties, on August 15, 2023, that the hearing would be held on October 10, 2023. (Mot., R. p. 92); (Notice, R. pp. 511, 514).

At the hearing held by Judge Morgan, counsel for the appellant and its commonly owned mid-litigation assignee made the following statement:

> And, again, if we can't amend the Complaint, we're going to waste a bunch of court time and resources by going and filing another lawsuit on behalf of BA Greenville. And they'll either be running parallel or consolidated and we just feel like that's a waste of everybody's time.

(Tr., R. p. 507, ll. 5-9).

To which counsel for the respondents replied:

> I think that we have fully addressed the proposed pleading that BA Greenville made to the Court [and] is before Your Honor. I hear him talking about filing another lawsuit and spending more time and money. I don't think that's necessary. Our position is the proposed pleading is futile or let's just -- or if Your Honor wants to grant it, then I think it should immediately be summarily dismissed instead of everybody coming back here to make the same arguments.

(Tr., R. p. 507, ll. 18-25).

Judge Morgan made it clear that the motions "are interrelated and I've read everything." (Tr., R. p. 487, ll. 22). Adding, "he hit the buzz word of futile that the amended complaint even if I granted the motion to allow you to amend that that shouldn't be done because it would be futile based on his argument." (Tr. R. p. 501, l.25 – p. 502, l. 4).

Soon after taking this interlocutory appeal and receiving the strategic benefit of automatically staying all matters affected by Judge Morgan's decision (including the respondents' counterclaims that would otherwise proceed to a speedy trial), a second, duplicative lawsuit was filed by the appellant's commonly owned and represented mid-litigation assignee, BA Greenville, LLC, this time, in a different county, Anderson County (presumably aiming for a different presiding judge), disregarding the forum selection clause in the contract (attached again as the first exhibit to the complaint in that action), upon which this first lawsuit was filed against the respondents in Greenville County and ended up before Judge Morgan in the first place. *BA Greenville, LLC v. Zay N Limo, LLC*, Case No. 2024-CP-0400052 (Anderson County) (Cmplt., Filed January 10, 2024).[4] After

[4] In compliance with Rule 210(c), SCACR, the respondents have not included the above-described filings from this second lawsuit in their designations for the record on appeal

being sued for the second time, and while being burdened with fending off this appeal, the respondents were forced to prepare a motion to dismiss or alternatively stay that action, as well as objections to discovery pressed on them in that action. *Id*. (Mot., Filed March 8, 2024). Ultimately, less than a week before a scheduled hearing on that motion, and five months after bringing the action and pressing for discovery, the appellant's commonly owned and represented mid-litigation assignee, BA Greenville, LLC, finally stood down, requested, drafted, and filed a consent motion for a stay, acknowledging therein: "A stay of this matter until completion of the Appeal [referencing this appeal] will promote judicial economy and eliminate the risk of inconsistent rulings." *Id*. (Con. Mot., Filed May 29, 2024).

Accordingly, the appellant's commonly owned and represented mid-litigation assignee effectively admitted that Judge Morgan's decision was not an advisory opinion, just a few days after the appellant filed its brief arguing so with this Court. (App. Br, Filed May 23, 2024). And in the end, the appellant and its commonly owned and represented mid-litigation assignee did exactly what they said they would do at the hearing held by Judge Morgan: "[W]e're going to waste a bunch of court time and resources by going and filing another lawsuit on behalf of BA Greenville." (Tr. R. p. 507, ll. 5-7).

(iii) The Circuit Court's Decision Was Not Premature And There Was No Genuine Dispute Of Material Fact

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because such filings were not technically part of the proceedings below before Judge Morgan; however, this Court may nonetheless take judicial notice of these filings readily available online through the South Carolina Judicial Department Public Index, the existence of which is indisputable and sheds light on the positions taken by the appellant in the appeal before this Court. *See Palmetto Homes, Inc. v. Bradley*, 357 S.C. 485, 593 S.E.2d 480, 491 n.3 (Ct. App. 2003) ("Although the rules are not within our record on appeal, we take judicial notice of them.").

The circuit court's decision was not premature, as argued by the appellant throughout its brief. (App. Br.). The order applied the law to the contractual documents and admissions provided through pleadings and discovery by the appellant and its commonly owned and represented mid-litigation assignee. (Order, R. pp. 7-8, 11-21, 24-28). Based thereupon, there were no material facts genuinely in dispute, and the appellant could not avoid summary judgment by offering a mere scintilla of evidence, or presenting inferences that are not reasonable or an issue of fact that is not genuine, by affidavit or otherwise. (Order, R. pp. 7-8, 11-21, 24-28). *See Kitchen Planners*, 440 S.C. 456, 892 S.E.2d 297; Rule 56(e), SCRCP ("[A]n adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial"); *see also* Rule 56 (g), SCRCP (prohibiting the use of affidavits to attempt to avoid summary judgment that are "presented in bad faith or solely for the purpose of delay").

More particularly, the e-mails (and attachments) that are the focus of the appellant's brief do not create a genuine dispute of material fact, as argued by the appellant. (App. Br.). Again, the appellant failed to present the e-mails to the circuit court prior to its motion for reconsideration. And again, the appellant's brief does not even attempt to argue that the e-mails overcome the primacy of the contract and other of the circuit court's layered rulings, reiterated again here:

(i) the entire agreement (aka merger or integration) clause in the contract (Order, R. pp. 13, 24-26);

(ii) the parol evidence rule (Order, pp. 24-26);

(iii) the amendment clause in the contract (Order R. pp. 13, 24-26);

(iv) the no third-party beneficiaries clause in the contract (Order, R. pp. 13, 24-26);

(v) the law that an assignee stands in the assignor's shoes, as of the time of the assignment (Order, R. p. 26);

(vi) the undisputed false grant of rights and false representations and warranties in the contract (that the appellant only argues should be ignored) (Order, R. pp. 7-8, 11-21, 24-27); and

(vii) the failure to timely respond to discovery requests for admissions under Rule 36, SCRCP, whereby the appellant admitted that it has provided no services of any kind or anything of value that it owns to earn the monthly fees it has demanded under the contract or otherwise; and disregard for accompanying requests for production and interrogatories (Order, pp. 21, 23, 28).

Arguendo, even if the e-mails are reviewed and incorrectly given primacy, however, the e-mails only further reflect the false representations, infecting the controlling contract, made by Dustin Pelletier, that he (through no matter which of his entities) owned a separately saleable right to open another, new franchise in Anderson, approximately 37 miles from his one already operating franchise in Greenville, and that he would lose money if not paid for that right. (Rec. Mot., E-mail, Sept. 30, 2020, R. p. 450) ("As you know, the Anderson territory is already owned by the Greenville Big Air location. You and I discussed this . . . Having a Big Air in Anderson would be fantastic for the Anderson area but it would reduce at least 10% of Greenville's sales. Because of this, I have always

intended to build an Anderson location for myself because the loss of revenue would still be mine, just at a different location.").

Whereas the franchise documents produced in discovery and admissions made by the appellant undisputedly exposed that he did not have that right, nor was he authorized to sell it, and that he, through BA Holdings, Inc., the entity that entered into the contract and filed this lawsuit, was already being paid by the national franchisor to sell the Anderson franchise for the national franchisor, as Judge Morgan explained in his order. (Order, R. pp. 7-8, 11-21, 24-28). And all of this was conceded once more at the hearing. (Tr., R. p. 491, ll. 9-14) ("[MR. AUTRY] Now, you're going to hear a lot today about the regional director agreement and how BA Holdings is already making money off this deal, which is absolutely true. BA Holdings, the Plaintiff, gets a cut of the franchise fee that Zay N Limo pays to Big Air by virtue of that regional director agreement."); (Tr., R. p. 504, ll. 1-7) ("THE COURT: What about his argument that it's futile, that BA Greenville is not -- and they don't have the rights to sell the franchise, wouldn't that certainly be an argument of futility under Patton vs. Miller and Rule 15? MR. AUTRY: That is absolutely true, Your Honor. BA Greenville does not have the right to sell a franchise and that's not what they were doing.").

The appellant likewise argues that the affidavit of Dustin Pelletier creates a genuine dispute of material fact. (App. Br.). But, again, the contractual documents and admissions provided through pleadings and discovery by the appellant and its commonly owned and represented mid-litigation assignee speak for themselves, as a matter of law, as detailed in the order and above. (Order, R. pp. 7-8, 11-21, 24-28). Partial summary judgment thereupon could not be delayed or avoided by way of an affidavit. Rule 56 (g), SCRCP

(prohibiting the use of affidavits to attempt to avoid summary judgment that are "presented in bad faith or solely for the purpose of delay"); *Kitchen Planners*, 440 S.C. 456, 892 S.E.2d 297 ("'[I]t is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine.'") (quoting *Town of Hollywood*, 403 S.C. at 477, 744 S.E.2d at 166).

Moreover, Dustin Pelletier's affidavit only further admitted that he was responsible for drafting and making the false representations in the contract; and that neither BA Holdings, Inc. nor BA Greenville, LLC had the right, in their respective existing agreements with the national franchisor, that the contract purported to sell to the respondents. (Aff., ¶¶ 21-22, R. p. 128) ("When drafting . . . I made two mistakes . . . my error."); (Aff., ¶ 9, R. p. 126) ("BAH [BA Holdings, Inc.] and BA Greenville do not have the authority to sell a Big Air franchise."; (Aff. ¶ 11, R. p. 126) ("BA Greenville had the ability to open a Big Air location in Anderson, *as long as a new franchise agreement was signed for that new location*.") (emphasis added).

Emphasis is added to the latter half of the above statement – "*as long as a new franchise agreement was signed for that new location*" – because what Dustin Pelletier is admitting here is that BA Greenville, LLC had no new franchise agreement for a new location in Anderson, for which it would have had to pay franchise fees and royalties to the national franchisor. The notion in the first half of the above statement, that BA Greenville, LLC had a so-called "ability" to enter into, and pay for, such a new agreement, that did not exist, and that it did not pay for – means nothing – and did not give it the right to sell, that which it did not have and did not pay for, to the respondents. Again, as Judge Morgan recognized, BA Greenville, LLC's single, actual, existing agreement with the

national franchisor, as produced by the appellant, was clearly limited to operating "one" location, which it already operated in Greenville. (Order, R. pp. 18-19, 27).

No additional amount of discovery could change the law, or the undisputed contractual documents and admissions provided by the appellant and its mid-litigation assignee, to which the law was applied. *See Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433 (2003) ("The nonmoving party must demonstrate the likelihood that further discovery will uncover additional relevant evidence and that the party is not merely engaged in a fishing expedition."). Moreover, the parties had been afforded the opportunity to engage in discovery, which began promptly after this lawsuit was filed, with both sides exchanging discovery requests and responses, resulting in the production of the dispositive documents and admissions by the appellant. (Order, R. pp. 22-23). As the appellant's case quickly fell apart after instigating this lawsuit, the appellant ultimately demonstrated a disregard for the rules of discovery, failing to timely respond to additional discovery requests for admissions under Rule 36, SCRCP, and not responding at all to additional corresponding requests for production and interrogatories. (Or., R. p. 23). Again, the appellant has conceded these points. And again, it is apparent also that the appellant withheld the e-mails discussed above attaching the unsigned affidavit and the unsigned release and indemnity agreement that the appellant first presented with its motion for reconsideration and are now the focus of the appellant's brief. (Mot. Rec., Ex. 7, R. p. 472-483).[5]

(iv) The unjust enrichment claim should not survive

[5] *Supra* note 3.

The appellant argues that the unjust enrichment claim should survive. (App. Br., p. 19). Again, this argument fails in view of the rulings that the appellant has ignored, reiterated once more here:

(i) the entire agreement (aka merger or integration) clause in the contract (Order, R. pp. 13, 24-26);

(ii) the parol evidence rule (Order, pp. 24-26);

(iii) the amendment clause in the contract (Order R. pp. 13, 24-26);

(iv) the no third-party beneficiaries clause in the contract (Order, R. pp. 13, 24-26);

(v) the law that an assignee stands in the assignor's shoes, as of the time of the assignment (Order, R. p. 26);

(vi) the undisputed false grant of rights and false representations and warranties in the contract (that the appellant only argues should be ignored) (Order, R. pp. 7-8, 11-21, 24-27); and

(vii) the failure to timely respond to discovery requests for admissions under Rule 36, SCRCP, whereby the appellant admitted that it has provided no services of any kind or anything of value that it owns to earn the monthly fees it has demanded under the contract or otherwise; and disregard for accompanying requests for production and interrogatories (Order, pp. 21, 23, 28).

In sum and substance, defeating any argument for unjust enrichment, Judge Morgan recognized the undisputed facts that neither of Dustin Pelletier's entities had the right that

the contract falsely purported to sell and that he was already being paid for selling that right for the national franchisor. (Order, R. pp. 7-8, 11-21, 24-28).

The appellant's brief only offers new confounding hypothetical arguments about what could have happened, but did not, as between Dustin Pelletier's own entities, his sales agent entity BA Holdings, Inc. and his franchisee entity BA Greenville, LLC, and the national franchisor, Big Air Franchising, LLC. (App. Br.). Again, as Judge Morgan's order explained, any issue that the appellant raised about Big Air Franchising, LLC breaching or amending its franchise agreement with BA Greenville, LLC (regarding the provision therein stating that the franchisor or its affiliate would not establish or license another franchise business in a defined buffer territory of zip codes surrounding the one operating franchise business) is between those parties – not the respondents. Moreover, the appellant, under common ownership with BA Greenville, LLC, and acting as a sales agent and affiliate of Big Air Franchising, LLC, was admittedly responsible for causing Big Air Franchising, LLC to sell Defendants their franchise business in Anderson, for which the plaintiff is admittedly already being rewarded with the right to receive 50% of the franchise fees and royalties paid by the defendants to the franchisor in the form of sales commissions. (Order, R. p. 27). In other words, as between Dustin Pelletier's entities, if his left hand has a problem with what is right hand did, he can take that up with himself. And if either BA Holdings, Inc. or BA Greenville, LLC has a problem with Big Air Franchising, LLC, or vice versa, they can litigate any such issue among themselves. Neither of Dustin Pelletier's entities has a valid claim against the respondents under the contract or otherwise. (Order, R. p. 27).

Additionally, where the existence of a contract is the premise of a case, no quasi-contract theory is available. *See Limehouse*, 862 F.Supp. at 104 (applying South Carolina law and holding: "Relief under a theory of quantum meruit is not available if a party bases its action on the existence of a contract . . . In Paragraph 19 of the Amended Complaint, Plaintiff alleges that 'at the time Plaintiff rendered his services for the Defendants, a contract existed between them for the payment of 2% of the sales price of the Inn.' Thus, Plaintiff's quantum meruit cause of action fails as a matter of law."); *Gantt v. Morgan*, 199 S.C. 138, 140, 18 S.E.2d 672 (1942) ("Generally, a plaintiff cannot in an action brought on an express or special contract recover or introduce evidence on an implied contract or quantum meruit.").

Here, both the complaint and the proposed amended complaint are premised on the existence of the contract. (Cmplt., R. p. 33); (Pr. Am. Cmplt., R. p. 96). Both attach the contract as the first exhibit thereto. (Cmplt., Ex. 1, R. p. 41); (Pr. Am. Cmplt. Ex. 1, R. p. 106). And doubling-down on the existence of the contract, the proposed amended complaint is further premised on the mid-litigation assignment of the contract and the existence thereof. (Pr. Am. Cmplt. Ex. 3, R. p. 123).

Lastly, the respondents' motion for partial summary judgment, filed and noticed on the roster two months in advance of the hearing, covered "all claims asserted in the complaint," so the appellant cannot feign surprise, as it appears to do in its brief, that the circuit court ruled on the unjust enrichment claim together with the contractual claims asserted in the complaint and the proposed amended pleading. (App. Br. p. 19) (Mot., R. p. 92).

CONCLUSION

This appeal fails as a matter of issue preservation and should be expeditiously decided without oral argument under Rule 215, SCACR. Judge Morgan correctly granted partial summary judgment as to all claims in the complaint, and interrelatedly, did not abuse his discretion in denying the motion for leave to amend, as clearly futile and moot, after carefully and efficiently considering the proposed amended complaint before him. The respondents also request affirmance based on any other ground appearing on the record under Rules 220(c), SCACR.

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Respectfully submitted,

/s/ Jason S. Smith

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