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May 26 2026
SC Court of Appeals

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Judge Steven DeBerry, IV, Circuit Court Judge
Circuit Court Case No. 2022-CP-07-01195

Appellate Case No. 2025-001618

Beaufort County, South Carolina,

Respondent,

v.

Adams Outdoor Advertising Limited Partnership,

Appellant.

APPELLANT'S FINAL REPLY BRIEF

Jeffrey S. Tibbals (S.C. Bar No. 72628)
jst@bybeetibbals.com
Evan P. Williams (S.C. Bar No. 101981)
ewilliams@bybeetibbals.com
Gaillard T. Dotterer, III (S.C. Bar No. 103620)
gdotterer@bybeetibbals.com
BYBEE & TIBBALS, LLC
1100 Queensborough Blvd., Suite 202
Mt. Pleasant, SC 29464
843.881.1623

Counsel for Appellant

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INTRODUCTION

The County raises three unfounded arguments in its brief.[1] First, the Lease supposedly provides Adams, the Lessee, with an indefinite right of renewal, even though the Lease expressly provides ***both*** parties with independent rights of termination. Second, Adams was not allowed during the litigation to develop arguments based upon the Lease language to defend against the County's claim, nor is Adams allowed to support its arguments with certain case opinions — one of which was cited for the first time in the case by the County in its motion to reconsider. Third, Adams is not allowed to appeal or even discuss the defect of the lower court failing to consider Adams' motion to reconsider before ruling on the motion.

Simply put, the County's assertions lack any factual or legal support. Relying on misdirection and baseless attacks, the County responded to Adams' arguments on the merits by fabricating procedural defects and misstating the holdings and import of relevant case law. The County's tack is made apparent out of the gate in its non-compliant Statement of Issues on Appeal. Rather than concisely state issues that are presented for review, as required, the County sets forth separate paragraphs of its own legal analysis and conclusory opinion statements.

This esteemed Court is fully capable of sifting through such self-serving rhetoric to reach the correct conclusion after considering the plain language of the Lease, including the termination right of the Lessor (the County), copied below.

> In the event the property is improved by the erection of buildings thereon **by Lessor or at Lessor's direction, as evidenced by a building permit, Lessor shall have the right to cancel this agreement by giving Lessee sixty (60) days advance written notice**, together with a rebate of all unearned rent.

(R. p. 320 (Lease), fifth clause (emphasis added); R. p. 321 (enlarged version of the fifth clause of the Lease)).

[1] Unless otherwise stated, capitalized terms are afforded the meaning set forth in Appellant's Brief.

If the text of the Lease is analyzed under a proper reading of South Carolina law, it is clear that the lower court erred in terminating the contract and in applying *Carolina Cable Network v. Alert Cable TV, Inc.*, 316 S.C. 98, 447 S.E.2d 199 (1994).

ARGUMENT

Adams has consistently opposed the County's misinformed theory that the Lease created an indefinite right of renewal. After December 2020, when the County voided its contractual right of termination, the County no longer had the ability to terminate the Lease. But the text and provisions of the Lease itself do not give rise to a perpetual right of renewal or create a contract of indefinite duration. The Lease expressly provides both parties with an ability to terminate that is not contingent on the other party's acts or omissions — a fact the County does not contest.

Both common sense and common law dictate that the existence of mutual, independent rights of termination is fundamentally inconsistent with a perpetual right of renewal. As a result, under the plain language of the Lease, neither party could indefinitely renew. The County's position requires this Court to ignore the fact that the County willingly placed restrictive covenants on the Leased Property that nullified and extinguished its ability to terminate the Lease.

I. ADAMS OPPOSES THE COUNTY'S "PERPETUAL RENEWAL" NOTION BASED ON THE LEASE'S PLAIN LANGUAGE AND THE COUNTY CANNOT CLAIM SURPRISE OR PREJUDICE BY ADAMS' ARGUMENT.

The substance of the County's perpetual right of renewal contention, or lack thereof, is addressed in detail in Adams' brief. Appellant Br. at pp. 6-13 (Argument I), p. 16. However, Adams is compelled to reply to the County's implications that it was somehow improper for Adams to reference Lease provisions and raise corresponding legal arguments during summary judgment. This is one of the County's many appeal arguments focused on Adams' purported case conduct, rather than the merits of the claim filed against Adams.

Although meandering, the County's first argument, which bleeds into its second and begins in its Statement of Facts, seems to contend that Adams is forever bound by statements made in a September 2021 letter (R. pp. 138-139), which was sent 10 months before the County served its original Complaint (R. pp. 37-38) (Cert. of Service). Under the County's logic, after Adams sent that letter, it was prohibited from reading the Lease, citing its plain language, and developing legal arguments, even after it was sued by the County. Resp't Br. at 3-11. Despite having nearly three years to conduct discovery before the cross-motions for summary judgment, and having more than four years' notice of the Lease, the County essentially claims it was caught off guard by Adams' argument — which is based solely on the contract language and the County's own acts.

Contrary to the County's assertion, Adams' September 2021 letter, which responded to the County's wrongful attempted termination (R. p. 230 at § 2), does not present a contradictory position to the one Adams raised on summary judgment. In that letter, Adams wrote, in part, that "[t]he County, as Assignee of the Lease, and the current 'lessor' under the Lease, has no right to terminate the Lease *at this time*." (R. p. 138 (emphasis added)). That statement does not mean that Adams was claiming the Lease did not contain a termination right for the Lessor such that the Lease language created a perpetual contract. As written, Adams advised that the County did not possess a right to terminate in April 2021 and thereafter. This is accurate and consistent with Adams' summary judgment argument: the County waived and nullified the contractual termination right by executing restrictive and conservation easements on December 30, 2020,[2] which prohibit it from constructing any buildings or improvements on the Leased Property. (R. p. 129 at ¶¶ 3-3.a.; R. pp. 152, 154-157).

[2] (R. pp. 261-272 (Restrictive Easement, executed and recorded December 30, 2020); R. pp. 274-289 (Conservation Easement, executed December 30, 2020 and recorded January 13, 2021)).

> This easement was recorded in December of 2020 as part of its purchase of the Port Royal Island Battlefield parcels. … When you go back to the lease, the county, under the lease is given an express right to terminate the lease if it builds anything on the property. … These conservation easements, restrictive easements unequivocally state the county is not allowed to build anything on this property that's been covered by this lease. As a result, they've waived the express right to terminate this lease. They don't have an implied right of []termination. They had an express right, which they waived, willingly, by entering into these easements that completely bars their claim and their attempt to terminate the lease.

(R. p. 113, line 18–p. 114, line 16 (Summary Judgment Hearing Tr.) (argument by Adams' counsel) (cleaned up)).

Moreover, parties are fully entitled to develop legal theories during the course of litigation based upon the facts and evidence of the case. *See, e.g.*, *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 252, 489 S.E.2d 472, 477 (1997) ("It is certainly conceivable that parties may want to present novel legal theories, which may require changing one's previous legal theory."). If they were not, there would be no need for discovery. Indeed, when the County took Adams' Rule 30(b)(6) deposition, ten months before the cross-summary judgment motions were filed, Adams informed the County that its legal position had evolved since the September 2021 letter.

> [A.] That was -- what was in that letter as of that time was my position at the time. After conferring with our counsel, our legal position has certainly evolved. And so what I wrote then was what I meant.
>
> Q. Okay. And do you -- does Adams hold a different position now?
>
> A. My counsel is going to make legal arguments, yes.

(R. p. 150, lines 12-21).

The majority of the County's deposition questioning on this topic impinged on Adams' attorney-client privilege and attorney work product, forcing Adams to file a motion for protective order. (R. pp. 123-124 (May 29, 2024 motion); R. pp. 125-127 (August 9, 2024 supporting memorandum)). However, the County did not oppose the motion (R. pp. 10-11), attempt to reconvene the deposition, or otherwise seek subsequent discovery regarding Adams' legal position

as to the invalidity of the County's attempted Lease termination, which has remained consistent since this litigation commenced. Additionally, during its Rule 30(b)(6) deposition of the County, Adams questioned the County's designated witness in depth about the County's land purchases, and the Conservation and Restrictive Easements, including inquiries about the provisions relating to improvements and construction on the Leased Property. (R. p. 168, line 6–p. 169, line 22; R. p. 181, line 22–p. 182, line 18; R. p. 182, line 24–p. 184, line 1; R. p. 186, lines 7-19; R. p. 188, line 15–p. 200, line 25).

Finally, it is not as if Adams' argument relies on an obscure fact or fringe document, a proverbial needle in a haystack. Adams' position is based on a plain-language provision in the one-page Lease that the County is seeking to terminate. (R. p. 320); (R. pp. 51-52 at ¶ 74; R. pp. 53-54 at ¶ 79). The County was aware of and free to read the Lease before its December 2020 purchase and agreements to prohibit alteration of the Leased Property. (R. p. 175, line 15–p. 176, line 12; R. p. 246, line 10–p. 247, line 24; R. p. 250, lines 15-18; Appellant Br. at 15, sources cited therein; R. pp. 142-146 (County Deed); R. pp. 261-272; R. pp. 274-289). The County was aware of and free to read the Lease (including the Lessor termination right therein) before it attempted to invoke the *Lessee's* termination right in April 2021 and then an implied termination right in December 2021.[3] (Appellant Br. at 1, 5, 6-7, 13); (R. p. 205, line 3-p. 206, line 1; R. p. 230 at § 2; R. p. 141). Lastly, the County was aware of and free to read the Lease before it initiated this action in August 2022 and moved for summary judgment in March 2025. (R. pp. 37-38; R. pp. 133-134).

[3] Under the County's reasoning, after it sent its April 2021 letter attempting termination, the County could not change its position that it was terminating pursuant to the Lessee's contractual right of termination, which is quoted in its letter. (R. p. 230 at § 2).

A. The County, Not Adams, Initiated this Lawsuit — After Extinguishing Its Contractual Right to Terminate the Lease.

Following along the County's diversionary trail, it next alleges that Adams, the Defendant below, is somehow responsible for the County filing its lawsuit. According to the County, Adams should have just accepted the County's wrongful attempted termination, taken it on the chin, packed up and went home. But because Adams seeks to exercise its leasehold rights and opposes the County's unlawful effort to tear down the Billboard, Adams is the supposed wrongdoer. Resp't Br. at 10 ("Adams … started this case, … [a]s described above, Adams triggered Count 2 by refusing to abide by the County's April 1, 2021 notice to terminate[.]").

In essence, the County's rationale is that that it cannot be held to account for its prior acts and omissions. In the County's scenario, it is not responsible for its failure to examine the Lease before restricting the Leased Property and it cannot suffer consequences from willfully negating its ability to terminate the Lease. If the County's premise is further extended, Adams should have figured out that the County was going to purchase the property before the transaction occurred, read the Lease to the County before the County's purchase, and given the County pre-acquisition notice of the Lessor's express termination right explicitly set forth in plain language in the Lease.

This argument of the County's is not an argument. It is a red herring geared at shifting blame and creating prejudice, while attempting to concoct an ability to cancel the Lease when one no longer exists, all to cover up for its failure to adequately perform due diligence on the Leased Property.

B. Because the Lease Provides Each Party With an Express Right of Termination, It Does Not Give Either Party a Perpetual Right of Renewal.

The County also repeats its nonsensical theory that the presence of express termination rights does not render a contract definite in term or negate a potential indefinite right of renewal. Resp't Br. at 7, 10-12, 16. It is true that only the Lessee currently possesses an ability to terminate

— but that is the County's fault and the result of its own affirmative actions which waived its express termination right. As written and agreed to, it is illogical to argue that the Lease is for an indefinite term or that the Lessee is vested with a perpetual right of renewal. ***If the Lessor obtains a building permit and exercises its right to terminate, the Lessee cannot renew the Lease.***

Moreover, the express provisions of a contract governing termination rights control over potential implied rights.

> "As the parties in this case have entered into a contract as to the time and mode of terminating the tenancy, **their *rights are to be determined by the fair construction of that contract,* and <u>not</u> by the technical rules which apply to the termination of a tenancy at will where there is no contract on the subject**."

Rice v. Nat'l Advertising Co., 292 S.C. 454, 455, 357 S.E.2d 189, 190 (Ct. App. 1987) (quoting *Biber v. Dillingham*, 111 S.C. 502, 504, 98 S.E. 798, 799 (1919)) (emphasis added).

Whether intentional or not, the County fails to grasp this concept and writes as if the Court will be unable to perceive the legal and logical fallacy that is the County's argument. Resp't Br. at 10, 11 ("It is Adams who has injected an allegedly off-setting 'right to terminate' concept, which is foreign to both the County's arguments and to the law. … Adams's reliance on a separate conditional lease provision to supply a specific durational term that the lease lacks is illogical and legally unsupported."); (*see also* R. p. 324 ("the implied right of termination exists independent of the express right [of termination]");[4] R. p. 326 ("having an express right of termination on specific grounds does not negate the implied right of termination that exists when a contract is renewable at will by one party")).

> [W]hat gives the county the ability to terminate **this lease is the fact that it purports, <u>on its face</u>**, under California -- or Carolina Cable Network, to give the lessee, an indefinite right of renewal. And – and because that is what gives both parties the right to terminate the contract at will upon reasonable notice,

[4] This excerpt is one example of the County's prior filings that disproves its contention on appeal that it "has never claimed 'an implied right to terminate the Lease[.]'" Resp't Br. at 11.

> that's ***totally independent from*** another provision that says if the county happens to build a building, they can tell the lessee they're going to terminate.

(R. p. 107, line 20–p. 108, line 3 (Summary Judgment Hearing Tr.) (argument by the County, emphasis added)).

To summarize the County's position, it contends that: (i) clear, unambiguous contractual language conferring an independent right of termination on one party can be overridden or simply read out of the contract to find that the other party can renew the contract indefinitely, and, (ii) because the County's prior arguments did not incorporate or reference its contractual right to terminate, Adams is wrong for citing that Lease provision. It is true that the County's 43-page summary judgment brief, and each of its prior lower court filings, failed to reference or even mention the termination right provided to the Lessor in the Lease. A few conclusions can be reasonably drawn from that, none of which are favorable to the County.

Regardless, a right to terminate at will that arises under *Carolina Cable* cannot exist on the face of the Lease. First, although quite elementary, for a provision or right to exist on "the face" of a contract means the contract must contain actual text explicitly setting forth that specific right. Second, a *Carolina Cable* at-will termination ability, which arises when the contract language creates a right of perpetual renewal in favor of *one party* (i.e., a unilateral right), is an implied right that is created separate and apart from the contract text to balance the parties' rights under the agreement. *Carolina Cable*, 316 S.C. at 101-02, 447 S.E.2d at 201-02 ("where the parties to a contract express no period for its duration, … the only reasonable intention that can be ***imputed*** to the parties is that the contract may be terminated by either, on giving reasonable notice of his intention to the other.") (emphasis added).

In *Carolina Cable* scenarios, the contract is construed in such a manner to read in additional language that does not exist, akin to the parol evidence rule, such that each party is provided the

same cancellation right to alleviate an uneven, one-sided contract (R. p. 106, line 25–p. 107, line 3) (Summary Judgment Hearing Tr. ("The case is *Carolina Cable Network*, when a contract attempts to give **one party** an indefinite right of renewal, the contract can only be **construed** as terminable at will.") (argument by County's counsel) (emphasis added); (R. p. 100, lines 11-15) Dec. 14, 2022 Hearing Tr. ("[T]he South Carolina Court of Appeals [sic] published an opinion when it's a year-to-year lease, **there cannot be a one-sided ability to terminate**. So any side can terminate within 30 and give reasonable notice.") (argument by County's counsel, referencing *Carolina Cable*) (emphasis added)).[5] However, when the contract contains express terms providing each party with objective rights of termination, the contractual language controls. *Biber*, quoted *supra* p. 7; *Prestwick Golf Club, Inc. v. Prestwick Ltd. P'ship*, 331 S.C. 385, 391-92, 503 S.E.2d 184, 187-88 (Ct. App. 1998); Appellant Br. at 8-9, authority cited therein.

What cannot be lost in the County's tenuous discourse is that the County does not dispute that: (a) the Lease provides both parties with a right of termination, (b) the Lessor could have terminated the Lease upon obtaining a building permit for any part of the 3.73-acre Leased Property, (c) the County has never obtained a building permit, and (d) the Leased Property has at all times been and remains vacant.[6] Based on those undisputed material facts, *Carolina Cable* has no place in this matter and the County's attempt to terminate the Lease was invalid and constituted a breach of the Lease. (R. p. 129 at ¶¶ 3.a.-b.; R. p. 71 at ¶ 77 (asserting the defense that the

[5] This argument to the lower court by the County disproves its proclamation on appeal that it never previously stated "that the lease only provides" one party the right to terminate. Resp't Br. at 11.

[6] (R. p. 320 (Lease) at fifth and ninth clauses; R. p. 322; R. p. 211; R. p. 220, informational materials provided to County Council prior to approving the County's Leased Property purchase ("The Kling tract is an unimproved vacant parcel…"); R. pp. 324, 326-327); Resp't Br. at 10-12; Appellant Br. at 3-4, 13, 16, sources cited therein.

County's claims "are barred due to [the County's] material breach(es) of the lease agreement at issue[]"); *see also infra* Arguments I.C., II).

C. Adams Negated the County's "Indefinite Renewal" Theory and *Carolina Cable* Reliance During Summary Judgment.

Yet another disingenuous contention by the County is that Adams purportedly failed to previously assert arguments which oppose or distinguish *Carolina Cable*'s holding. Resp't Br. at 5, 7, 10-13. Despite outlining them in its own brief, the County fails to realize that the arguments that Adams raised during summary judgment directly opposed (and refuted) the County's assertions based on *Carolina Cable*. Resp't Br. at 5 ("Adams argued that no implied right of termination could arise because the agreement did give the County, in another term, an express right of termination in the event 'the property is improved by the erection of buildings thereon . . . .'") (quoting R. p. 156 (Adams' Summ. J. Mem. at 5 (quoting the Lease (R. p. 320)))).

As both parties have expressed, *Carolina Cable* stands for the principle that if one party can continuously renew the lease at its sole discretion, such that the other party does not possess an independent contractual termination right, then the lease is indefinite and an implied right arises allowing termination at will upon reasonable notice. (Resp't Br. at 1 (Statement I); R. p. 314 at ¶ 2); *see also supra* Argument I.B. Adams made the lower court aware of the fact that the Lease explicitly states, in clear language, that the Lessor has a separate, independent right to cancel the Lease, which means the Lessee cannot perpetually renew the contract on its own volition. *See supra* pp. 3-4; *infra* pp. 13-14, Argument II. As a result, Adams proved the insignificance of *Carolina Cable* and negated the County's reliance on the opinion.

The County's attempt to compare *Carolina Cable* to the Lease at hand veers into the realm of far-fetched; it even asserts that "the parallels between that case and this one are remarkable." Resp't Br. at 9. But what the County fails to mention is that the lessor's ability to terminate in

Carolina Cable was entirely under the control of the other contract party, the lessee, meaning the lessor had no independent, objective termination right. Appellant Br. at 9-10. Here, the County's right of termination is not controlled or triggered by an act or omission of Adams. Even if the Lessor's cancellation right under the subject Lease is indefinite (which it is not), the fact that the Lessor can exercise that right independent of the Lessee is what matters. And, as demonstrated by the County extinguishing its termination right, the right is not perpetually indefinite.

The County also asserts that, to defeat contract perpetuality, a cancellation right cannot be contingent or conditioned on an event, which is entirely off base. Every right of termination is contingent on some event transpiring, even if it is just the passage of time to reach a specific calendar date. There is no requirement that termination or a party's right to terminate be an inevitable outcome, or that termination be conditioned on a guaranteed occurrence. Indeed, there is no indication in this Court's *Prestwick* opinion that the termination-triggering event was guaranteed to happen, yet it found that the contract was ***not*** indefinite and no perpetual right of renewal was present, such that *Carolina Cable* did not apply. The terminating event need not be an absolute certainty to alleviate a potential indefinite renewal issue. The test is whether each party has a separate termination right which can be exercised at the terminating party's option and is beyond the other party's control.

> [A] contract which nonetheless provides that it will terminate upon the occurrence of a specific event is not deemed perpetual in duration and **is *not* terminable at will, but is terminable upon the occurrence of any of the conditions enunciated**. The event upon which the contract will terminate must be an 'objective event' so as to make the contract sufficiently definite in duration.

Jespersen v. Minnesota Mining & Mfg. Co., 288 Ill. App. 3d 889, 893, 681 N.E.2d 67, 70 (Ill. App. Ct. 1997); *see also Prestwick*, 331 S.C. at 392, 503 S.E.2d at 188 (quoting *Jespersen*).

The condition enunciated in the Lease which triggers the Lessor's right to terminate is an objective event: the receipt of a building permit to construct improvements on the Leased Property. Here, the zoning designation of the Leased Property is "S1 Light Industrial" (R. p. 219) and there are presumably a number of developed uses of the property allowed by-right under the County's zoning regulations for that designation. As a result, it is the Lessor's choice that controls whether its express termination right under the Lease is triggered and exercised. The County admits this. Resp't Br. at 11-12 ("The Lessor would have to choose to build, and obtain building permits, before a right to cancel would arise.").

Debunking another County misrepresentation, the Lessor obtaining a building permit was not conditioned on approval by the U.S. Department of the Navy or the Battleground Trust. Resp't Br. at 12. Under the Lease, the Lessor only needs approval from the County, as the local government with jurisdiction over the property,[7] in the form of a County-issued building permit, which creates a contract definite in duration, fixed by a specific, objective event. The Navy and the Battleground Trust have no control over or input in the issuance of building permits in Beaufort County.

And, even if they did, the Restrictive and Conservation Easements (the "Easements") that the County entered into with those third parties explicitly ***prohibit*** **construction on or alteration of the Leased Property**, meaning those entities would not entertain, let alone approve, a request to develop the property. Appellant Br. at 13-15, 14 n.7, 15 n.8, sources cited therein (*e.g.*, R. pp. 263-264 at § 3.c. (stating the only improvements on the battleground properties which may be

[7] (*See, e.g.*, R. p. 211 (EXEMPT from local government approval stamp, signed by Beaufort County); (R. p. 261); (R. pp. 274, 288) (property description for TMP 100-020-000-0047-000)).

repaired, maintained, demolished, or removed are the parking lot and abandoned commercial building located on different parcels than the Kling Parcel (Leased Property)); (R. pp. 300-302)).

Now, the County could seek permission from the Navy and the Battleground Trust to cancel the Easements to allow for new construction on the Leased Property. However, the Easements explicitly state they are perpetual in nature (R. p. 262; R. p. 275) and they were conveyed as consideration in exchange for funds that the County used to purchase the battleground properties (R. p. 172, line 3–p. 175, line 5; R. p. 190, lines 6-10; R. p. 196, line 15–p. 197, line 4); (R. p. 233-234 at 7th, 9th, and 16th Recitals; R. p. 235 at ¶¶ 3, 4). Additionally, the County could have but failed to preserve its ability to obtain a building permit for the Leased Property to exercise its cancellation right. (R. p. 114, lines 2-7 (Summary Judgment Hearing Tr.) ("The county could have taken the actions to preserve their right to terminate the lease, you know. … They could have included a clause saying this has no impact on the lease with Adams Outdoor, and the provisions therein, ability to terminate the lease, but it didn't.")).

In any event, while the County waived its contractual right to cancel the Lease by executing the Easements, those post-Lease, third-party agreements cannot alter or amend the actual text of the Lease or the intentions of the contract parties at the time of contract, nor can they give rise to an additional condition precedent to termination. The Lessor County's right to terminate the Lease is clearly set forth in plain language in the Lease — it must obtain a building permit, which cannot be obtained from the Department of the Navy or the Battleground Trust.

The only reason that an express-right-termination by the Lessor would not occur is if the Lessor ***chose*** not to trigger or exercise the right, or, as in the instant matter, if it ***chose*** to place restrictions on the property which prohibit construction and thereby void the right to terminate. (R. p. 115, lines 12-21 (Summary Judgment Hearing Tr.) ("[T]he provision I've highlighted right

here, this is the fifth paragraph of the lease. This gives the county an express right to terminate the lease. So, if the county had not executed that conservation easement, the county could have said, Adams, we're going to be constructing buildings on this parcel, and we're going to terminate your lease as a result. Because it says, in the event the property is improved by the erection of buildings, lessor can cancel this agreement, this lease, by giving 60 days' notice.") (argument by Adams' counsel) (cleaned up)).

In sum, the termination-triggering event for the Lessor is an objective event outside the Lessee's control, meaning the Lease is not perpetual in duration and it is not terminable at will.

II. CASE LAW CITATIONS ARE NOT "ARGUMENTS" AND ADAMS' CASE REFERENCES TO SUPPORT ITS PREVIOUSLY ASSERTED ARGUMENTS WERE NOT WAIVED.

It is an axiom of the law that a party is entitled to reference legal authorities in support of previously asserted arguments. Yet the County asks this Court to adopt a rule stating the opposite. Because the *Prestwick* and *Jespersen* opinions cut against its arguments, the County is left to contend that case law opinions, in and of themselves, are matters which can be waived. Resp't Br. at 13 ("Adams waited until its Rule 59(e), SCRCP motion to … raise the cases of *Prestwick Golf* … and *Jespersen*[.] Thus, the argument is waived."). Once again, the County strives to contort the law, citing South Carolina decisions providing that Rule 59(e) motions cannot be used to bring "theories or arguments" or "advance an issue" that were not asserted earlier. *Hickman v. Hickman*, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990); *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 563, 567, 762 S.E.2d 693, 695 (2014); Resp't Br. at 13 (citing same).

The County's theory fails because a citation to a case opinion is not a theory, argument, or issue. Even more, one of the two opinions that the County takes issue with, the *Jespersen* decision, was first raised in the lower court by *the County* in its own Motion to Reconsider. (R. p. 326).

Adams did not cite *Jespersen* in its motion to reconsider or other filings, despite the County stating the opposite. Resp't Br. at 13.

Setting the County's faulty premises aside, Adams did not waive its ability to reference *Prestwick* or *Jespersen* because they are additional supporting authorities for arguments that Adams previously raised to the lower court. Adams raised the same arguments during summary judgment that it did in requesting reconsideration — that the County does not have an implied right to terminate at will because Adams does not have a unilateral, perpetual right of renewal due to the Lease providing each party with an objective, express rights of termination.

> [T]he county's argument is that the lease only gives the lessee, a unilateral right of termination, and therefore it creates a perpetual right of renewal. And the county must have an implied right, because a lease with the perpetual right of renewal is unauthorized and inequitable. **The key issue, the key provision, Your Honor, is this fifth clause.** … **This [Lessor termination clause] completely negates the county's argument that Adams has a perpetual right of renewal and there's a unilateral right of termination. The lease has an express right of termination for the lessor.** The issue is, the county wants to ignore the fact that [it has] willingly contract[ed] away its ability to exercise that right. When it purchased these parcels [it] utilize[d] funds from third parties, in exchange, it conveyed those parties perpetual easements, … In key part, the county has agreed that it cannot conduct any construction or improvement on this parcel on the lease premises. Doing so would violate this perpetual easement that the county willingly entered into. It's contracted away its right to build anything on the lease premises, and as a result, it contracted away and doesn't have its ability to terminate the lease.

(R. p. 111, line 21-p. 113, line 8 (Summary Judgment Hearing Tr.) (argument by Adams' counsel) (cleaned up, emphasis added); *see also* R. pp. 152, R. pp. 155-157).

> **First**, respectfully, ***Carolina Cable Network v. Alert Cable TV, Inc.*, 316 S.C. 98, 447 S.E.2d 199 (1994) does not have any bearing on or application to the case at hand**. … That is because the Lease at issue gives both parties, the lessor (the County) and the lessee (Adams), an express right of termination. … ***Carolina Cable Network* is only relevant to leases which only give one party a right of termination or otherwise create a unliteral "indefinite right of renewal[,]"** [which] must be construed as terminable at will by either party upon reasonable notice[]"); … The County's Termination Right is only four paragraphs above the provision in the Lease providing Adams with such

> a right (Ex. 1), but it appears that the County overlooked it in filing its claim and advancing its "unilateral perpetual right of renewal" arguments.

(R. pp. 313-315 at ¶¶ I, 1-2, 6 (emphases added to third sentence); *see also* R. pp. 314-316 at ¶¶ 3-5, 7-9).

There is no distinction between an implied right of termination that arises due to a contract containing a unilateral right of renewal (or unilateral right of termination) and a construed right to terminate at will arising from a perpetual right of renewal. Each phrasing describes the same argument, such that it is preserved. *See*, *e.g.*, *Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011) ("Of course, a party is not required to use the exact name of a legal doctrine in order to preserve the issue."). Similarly, by arguing both parties have separate, objective rights of termination, Adams identified contract provisions that give the Lease a definite duration.

The foregoing arguments by Adams refute the applicability of *Carolina Cable*. These arguments were raised by Adams during summary judgment, which the County acknowledges. Resp't Br. at 5. As a result, Adams never waived these arguments and never waived its ability to reference additional supporting legal authority for the same.

Also damaging for the County is that **it had the opportunity to raise its waiver contention to the lower court but chose not to do so**. After the lower court ruled on the cross-motions for summary judgment (R. pp. 18-20), the County filed its motion to reconsider twelve (12) days later (R. pp. 323-328). Therein (R. pp. 324-327), the County responded to the renewed arguments and supporting reference to *Prestwick* in Adams' motion to reconsider, which had been timely filed four days before the County's (R. pp. 313-318). Attempting to rebut the merits of Adams' position, the County cited *Jespersen* for the first time in the proceedings, claiming it conflicts with *Prestwick* because it involved an indefinite contract and therefore supports the County's position. (R. p. 326). Importantly, the County's motion to reconsider is absent of any

allegation that Adams was prohibited from or had waived its right to reference *Prestwick*. (R. pp. 323-328). It was not until this appeal that the County alleged Adams waived its ability to cite *Prestwick*. As the County notes in its brief, "[a]n argument raised for the first time on appeal is waived." Resp't Br. at 16 (internal citations omitted).

Regardless, the County's post-hoc procedural objection fails and is another red herring to distract from the substance of this appeal. Relying again on conclusory statements rather than analysis, the County posits that one opinion (*Carolina Cable*) is applicable while the other (*Prestwick*) is "inapposite" simply because of the ultimate holdings of each fact-based decision. Resp't Br. at 13 ("*Prestwick Golf* [] is inapposite because it did not involve a perpetual contract[.]"). That type of argument cannot prevail when this matter requires review of the opinions' detailed analysis and examination of the lease provisions at issue in each respective case. The error of the County's position and the lower court's ruling, and the applicability of *Prestwick* to the valid Lease at issue, are more fully addressed in Adams' brief. Appellant Br. at Arguments I – I.B. (pp. 6-13).

III. IT IS A BASIC, UNQUESTIONED PRINCIPLE THAT THE MERITS OF A MOTION CANNOT BE RULED ON IF THE MOTION IS NOT CONSIDERED.

The County asserts that Adams abandoned its argument "that the lower court erred in not considering its motion for reconsideration arguments[,]" and the argument was waived because Adams' motion to reconsider supposedly "raised primarily new arguments." Resp't Br. at 17. The County's latter contention can be readily disposed of, as <u>all</u> of Adams' arguments in its motion to reconsider were previously asserted and therefore preserved. *See supra* Arguments I.C., II.

Our Courts have identified certain circumstances when abandonment may occur, such as when "[a] matter [is] raised for the first time in oral argument or in the reply brief[.]" or when parties include an argument "in their statement of the issues on appeal, [but] they fail to argue it in

their brief." *Bochette v. Bochette*, 300 S.C. 109, 112, 386 S.E.2d 475, 477 (Ct. App. 1989); *Fields v. Melrose P'ship*, 312 S.C. 102, 106, 439 S.E.2d 283, 285 (Ct. App. 1993). Adams' argument that the lower court did not review its motion to reconsider prior to ruling on the motion was included in Adams' Statement of Issues on Appeal and addressed in the brief in a separate argument section. Appellant Br. at 1 (Statement 3), 16-17 (Argument III). As a result, the "failure to raise" forms of abandonment are not present here.

The second "failure to analyze" form of abandonment appears to have developed in response to the first, with Courts holding that short, conclusory statements lacking analysis or support are treated as arguments that are not properly raised for appellate review. *See, e.g., Glasscock, Inc. v. United States Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691-92 (Ct. App. 2001); *Herron v. Century BMW*, 395 S.C. at 465-66, 719 S.E.2d at 642-43.

While Adams sufficiently analyzed and supported its argument, the Court may exercise discretion to hear arguments that may otherwise be waived or abandoned. "These [abandonment and waiver] 'rules,' however, are not jurisdictional in the sense that they encroach in any fashion upon our inherent authority to consider and decide pertinent matters that otherwise may be ignored as abandoned or waived." *United States v. Holness*, 706 F.3d 579, 592 (4th Cir. 2013); *United States v. Heyward*, 42 F.4th 460, 486 (4th Cir. 2022) (summarizing typical factors considered in deciding whether to exercise such discretion, including "the degree to which the court could be certain of its resultant legal analysis" and enhancing judicial economy and efficiency).

The principle that a court must consider a motion and the arguments therein to properly rule on that motion is an obvious and undeniable tenet of our legal system. Indeed, a party may file a Rule 59(e) motion if the court "failed to fully consider or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it." *Elam v. S.C.*

Dep't of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004); *id.* ("A party *must* file such a motion when an issue or argument has been raised but not ruled on[.]") (emphasis in original). It is rudimentary logic that an issue or argument cannot be ruled on if it is not considered.

Additionally, the lower court's non-compliance with this obligation is plainly evidenced by the text of the truncated, three-sentence order. (R. pp. 21-22 (holding that, after it "duly considered the motion of the Plaintiff [County], this Court has determined that its original [summary judgment] ruling" "is fully supported" such that Adams' motion was denied)). Adams' argument was raised in its Statement of Issues and argued with support in its brief.

CONCLUSION

As it did below, the County relies entirely on *Carolina Cable* and strident efforts to gloss over the opinion's irrelevance to the case at hand. Because the Lease confers on the Lessor an express right to terminate upon the occurrence of an objective event, the Lease does not provide the Lessee with a perpetual right of renewal. And because the County chose to burden the Leased Property with easements prohibiting construction or alteration, the County waived and extinguished its contractual right to cancel the Lease.

As a result, the lower court erred in relying on *Carolina Cable* and erred in terminating the Lease. For the same reasons, the lower court erred in denying Adams' motion for summary judgment on the County's second cause of action. Therefore, the lower court's rulings must be reversed, such that summary judgment is granted in favor of Adams on the County's second claim and Adams is awarded its reasonable attorneys' fees and costs, pursuant to the authority referenced in its lower court filings. (R. p. 71 at ¶ 78; R. pp. 96-97 (Prayer)); (R. p. 131); (R. p. 160).

[*Signature Follows*]

Respectfully submitted,

s/Evan P. Williams

Jeffrey S. Tibbals (S.C. Bar No. 72628)
jst@bybeetibbals.com
Evan P. Williams (S.C. Bar No. 101981)
ewilliams@bybeetibbals.com
Gaillard T. Dotterer, III (S.C. Bar No. 103620)
gdotterer@bybeetibbals.com
BYBEE & TIBBALS, LLC
1100 Queensborough Blvd., Suite 202
Mt. Pleasant, SC 29464
843.881.1623

Counsel for Appellant

May 26, 2026
Mt. Pleasant, South Carolina