THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. Supreme Court

Appeal from Berkeley County
Court of Common Pleas

Thomas L. Hughston, Jr., Circuit Court Judge

Opinion No. 2010-UP-382 (S.C. Ct. App. filed August 4, 2010)

Sheep Island Plantation, LLC,

Respondent,

v.

Bar-Pen Investments, LLC,

Petitioner.

BRIEF OF PETITIONER

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INTRODUCTION

This litigation arises out of the failure of the respondent, Sheep Island Plantation, LLC (the "Buyer" or "Sheep Island") to timely close on the purchase of real property in accordance with the terms of the contract in issue (the "Contract"), which Contract required closing to take place no later than July 31, 2006, with "Time being of the essence." At the very last minute, on the afternoon of July 31, 2006, the Buyer notified the petitioner, Bar-Pen Investments, LLC (the "Seller" or "Bar-Pen"), without giving any reason, that the closing previously scheduled for that day would not take place. The Seller was ready, willing, and able to close in accordance with the Contract. Nonetheless, the Buyer sued the Seller for breach of contract.

When the Buyer filed suit against the Seller on August 23, 2006, the Buyer alleged it had purchased from the Seller a 30-day extension of the closing deadline for $50,000, and the Seller failed to honor the extension. Later, however, approximately seven months after the initial complaint was filed, and when discovery unquestionably revealed the Buyer's theory of liability was without merit, the Buyer amended its complaint. In its amended complaint, the Buyer abandoned its initial theory of liability and for the first time asserted a wholly different and, indeed, contradictory theory of an alleged breach of contract. The Buyer asserted the Contract

contained a clause entitling it to a 15-day extension, which the Seller did not honor. This amendment occurred more than eight months after the passage of the time for performance under the Contract, and was the first time the Buyer ever asserted it had been entitled to an extension of the closing deadline under the terms of the Contract.

When the case came on for trial, the court correctly granted a directed verdict in favor of the Seller, finding the Buyer failed to present any evidence to submit its new-found breach of contract claim to the jury.[1] More specifically, the trial court explained its ruling as follows:

> All right, I've heard, I've heard enough now as far as that's concerned and everything. My ruling is it's amply summed up by the last witness actually when he said, "I cannot help it if [the Buyer's] attorney and [the Buyer's] agent did not tell them about the 15-day clause." I rule as a matter of law under [the Contract] the [Buyer] had an obligation to bring it to the Seller's attention . . . if they wanted to exercise their rights under the 15-day clause and there's absolutely no testimony in the record which would support the idea they notified them that they were proceeding under that 15-day clause.

(R. p. 646, lines 11-21.)

[1] The directed verdict granted by the trial court came after the court had previously denied a motion for summary judgment immediately prior to trial and also denied a motion for directed verdict at the conclusion of the Buyer's case. The basis of these motions was essentially the same as the directed verdict motion that was granted. There is no question that the Buyer received from the trial court a full and complete opportunity to present and develop its position before directed verdict was granted.

The Court of Appeals, however, reversed the trial court, finding the record contained some evidence to support the Buyer's breach of contract claim. More specifically, the Court of Appeals found the evidence supports more than one inference regarding whether the Contract's extension clause is invoked automatically, or whether notice is required, and that evidence exists to support an inference that a letter the Seller sent to the Buyer on July 31, 2006 constituted a repudiation of the Contract. (App. pp. 1225-26.)

Respectfully, this Court should reverse the Court of Appeals' decision and uphold the trial court's directed verdict, because taking the evidence in a light most favorable to the Buyer, the only reasonable conclusion which can be drawn from the evidence presented is that the Buyer's breach of contract claim is without merit. Such a decision is supported by the applicable law and the undisputed facts of this case, and is consistent with the interests of justice as well as judicial economy.

The Buyer never invoked the extension clause contained in the Contract, and the evidence clearly shows the Buyer was not entitled to invoke the clause in any event. If the Buyer believed it was entitled to invoke the extension clause, it was, as the trial court correctly found, the Buyer's responsibility to do so when the closing was supposed to occur, not eight months later. A ruling to the contrary is both inequitable and contrary

to established principles of contract interpretation. Indeed, the extension clause could not have had automatic operation as contended by the Buyer because it expressly required, as conditions precedent to its operation, that there be (1) a contingency that remained unsatisfied (2) through no fault of the Buyer. The only reasonable interpretation of the Contract is that it was incumbent upon the Buyer to communicate to the Seller its entitlement to the benefit of the extension clause and the reasons for its entitlement (premised upon facts establishing these two essential conditions precedent) when the closing was to have occurred. Moreover, here, the only reasonable conclusion capable of being drawn from the evidence is that neither of the conditions precedent was satisfied; thus, the extension clause was, in fact, unavailable to the Buyer. Further still, the evidence cannot reasonably support the conclusion that the Seller repudiated the Contract; the Seller merely recognized the Buyer's default while making clear the Seller was ready, willing, and able to perform in accordance with the Contract.[2]

[2] Additionally, and as explained herein, the trial court's ruling should be upheld because the Buyer did not timely notice its appeal, precluding the exercise of appellate jurisdiction.

QUESTIONS PRESENTED

I. Did the Court of Appeals err in holding that the record contained evidence requiring the jury's consideration of the Respondent's breach of contract claim and that the trial court should have denied the Petitioner's motion for a directed verdict on that claim because (A) the evidence supported more than one inference regarding whether the extension clause in the subject contract was invoked automatically or whether notice was required and (B) the evidence supported an inference that the Petitioner's July 31, 2006 letter constituted a repudiation of the contract?

II. Did the Court of Appeals err in failing to rule that the trial court's directed verdict in favor of the Petitioner on the Respondent's breach of contract claim should be affirmed because the necessary conditions precedent for the operation of the extension clause in the subject contract were not met where, under the only reasonable view of the evidence, (A) no contractual contingency remained unsatisfied and (B) some degree of fault must be attributed to the Respondent for not being able to close the transaction during the closing period agreed upon in the parties' "time is of the essence" contract?

III. Did the Court of Appeals err in failing to rule that it did not have appellate jurisdiction over this matter because the Respondent did not timely serve its notice of appeal?

IV. Is the Court of Appeals' decision in Person v. Carolina Pines Regional Medical Center, Op. No. 2010-UP-484 (S.C. Ct. App. filed November 4, 2010) inconsistent with its ruling regarding the jurisdictional issue in the present case?

STATEMENT OF THE CASE

The Buyer commenced this action on August 23, 2006 by filing a summons and complaint alleging the Seller breached the Contract, under which the Seller was to have conveyed to the Buyer an approximately 101-acre tract of unimproved land in Berkeley County (the "Property") for a purchase price of $2,530,000. (R. pp. 7-11.) More specifically, the complaint alleged the Contract provided for closing to take place no later than July 31, 2006, and the parties had, on or about July 13, 2006, amended the Contract to extend the time for closing by 30 days in exchange for a $50,000 payment from the Buyer to the Seller. The Buyer alleged that, despite its payment to the Seller of $50,000 for the extension, the Seller improperly terminated the Contract on August 1, 2006. (R. p. 8.)[3]

The uncontroverted evidence showed, however, that the Buyer requested a 30-day extension of the closing date on or about July 13, 2006, for an undisclosed reason. On the same date, the Seller offered a 30-day extension of the closing date for a payment of $50,000. Receiving no response from the Buyer by July 20, 2006, the Seller withdrew the offer. All communications regarding the extension request, offer, and withdrawal took

[3] The Seller answered the Buyer's complaint, denying its material allegations, raising a number of affirmative defenses, and asserting a counterclaim against the Buyer for its failure to timely close. (R. pp. 12-18.) The Buyer replied, denying the material allegations of the Seller's counterclaim, and raising its own affirmative defenses. (R. pp. 19-21.)

place through oral and email communications.

When discovery proved there had been no extension agreement, the Seller filed a motion for summary judgment. Approximately one week before the motion was to be heard, in April of 2007, the Buyer asked the Seller to consent to an amendment of its complaint. Over the Seller's objection, the circuit court allowed the Buyer's requested amendment and, as a result, denied the Seller's summary judgment motion. (R. p. 157, line 6 – p. 158, line 14.)

On July 3, 2007, the Buyer filed an amended complaint, again alleging breach of contract by the Seller, but this time based upon an entirely different theory of an alleged breach; indeed, a theory contradictory to that set forth in its original complaint. The Buyer's amended complaint omitted and abandoned its prior allegation that the Contract was amended by agreement, and instead alleged the Seller failed to honor an "extension clause" in the original Contract. This extension clause (hereinafter, the "Extension Clause") provided:

> If the transaction has not closed within the stipulated time because a contingency has not been satisfied through no fault of either party, then both parties agree to extend this agreement for a period not to exceed 15 consecutive days from the original closing date.

(R. pp. 22-27.)

Under the Buyer's new theory of the case, the Contract was contingent upon it obtaining financing; the closing had been properly scheduled for July 31, 2006 but on July 28th its lender allegedly "changed the closing conditions" and required the Buyer to deposit additional funds for issuance of the necessary loan;[4] the Buyer was not able to make the additional deposit; and, when the closing did not occur on July 31st, the Buyer claimed the Seller wrongfully terminated the Contract, not allowing any extension to "complete its financing and close." (R. pp. 23-24.) To be clear, at no time prior to the Buyer's request in April of 2007 for consent to amend its complaint—eight months after the transaction was supposed to have been closed—did the Seller have any notice that the Buyer had even thought about the Extension Clause. (R. p. 157, line 6 – p. 158, line 14.)[5] Until then, the Seller had no notice that the Buyer was in any way claiming that it was entitled to invoke or rely upon the Extension Clause.

On the basis of the Buyer's new theory of liability, the case was tried in the Berkeley County Court of Commons Pleas before the Honorable Thomas L. Hughston, Jr. and a jury from March 10 to March 13, 2008. (R.

[4] As discussed below, the only commitment issued by the lender was on July 28, 2006, and the idea for the additional funds came from the Buyer.

[5] The Seller answered the Buyer's first amended complaint, again denying its material allegations, raising a number of affirmative defenses, and asserting a counterclaim against the Buyer for its failure to timely close. (R. pp. 28-35.) The Buyer again replied, denying the material allegations of the Seller's counterclaim, and raising its own affirmative defenses. (R. pp. 36-38.)

pp. 130-33.) At the close of all evidence, the trial court granted the Seller's renewed motion for a directed verdict, ruling the Buyer failed to present evidence from which a reasonable jury could conclude the Seller breached the Contract. The Buyer did not move for a new trial or request ten days in which to do so thereafter. (R. p. 511, line 3 – p. 527, line 13; p. 632, line 19 – p. 646, line 25.) The trial court entered judgment in favor of the Seller at the conclusion of the trial on March 13, 2008 by Form 4 order. (R. p. 1.)

On March 24, 2008, the Buyer filed a motion to alter or amend the judgment and for a new trial. (R. pp. 39-46.) It did not serve the motion upon the Seller until March 31st. (App. p. 1215.) The trial court heard the motion on May 8, 2008, denying it on the merits from the bench, and thereafter entering a written order of denial on May 9th. (R. p. 2.) The Buyer appealed by notice served May 15, 2008. (R. pp. 113-14.).

By decision filed August 4, 2010, without oral argument, the Court of Appeals reversed the trial court's directed verdict in favor of the Seller and remanded the matter for a new trial in what is essentially a Rule 220, SCACR, opinion. It found the Buyer's service of a notice of appeal on May 15, 2008 was timely even though it had not moved for a new trial or requested ten days in which to do so after the jury was discharged following the March 13th directed verdict. It further found the directed verdict should

not have been granted because (A) the evidence supported an inference that the Extension Clause was invoked automatically and did not require notice and (B) the evidence supported an inference that the Seller repudiated the Contract via correspondence on July 31, 2006, i.e., the closing deadline, citing the Buyer's default for failing to timely close. (App. pp. 1225-26.)

On August 19, 2010, the Seller filed a petition for rehearing with request for oral argument. (App. pp. 1227-40.) The Court of Appeals denied the Seller's petition by order entered November 2, 2010. (App. pp. 1268-69.) This Court granted the Seller's petition for a writ of certiorari to the Court of Appeals on February 24, 2012.

STATEMENT OF FACTS

On or about December 14, 2005, Bruce Marshall "and/or" his son Jeremy Marshall entered the Contract with the Seller. The Contract provided that "**[t]ime [was] of the essence**" of the parties' agreement throughout. (R. p. 215, line 21 – p. 219, line 1; p. 530, line 21 – p. 531, line 10; pp. 661-67) (emphasis in original.)

Under the Contract, "[c]losing [was to] take place no sooner than July 15, 2006, and **no later than July 31, 2006**,[6] with '**Time being of the essence.**'" (R. p. 665) (emphasis added.) The Extension Clause—the only

[6] Under the terms of the Contract, the Buyer had over eight months to prepare for closing.

provision of the Contract that addressed extension of the closing deadline—provided as follows:

> **EXTENSION AGREEMENT:** If the transaction has not closed within the stipulated time limit because a contingency has not been satisfied through no fault of either party, then both parties agree to extend this agreement for a period not to exceed 15 consecutive days from the original closing date. **Time is of the essence.**

(R. p. 665) (emphasis in original.)

The Contract provided that payment of the purchase price was subject to financing, with such financing to be obtained via conventional loan. It contained a provision addressing loan processing and application that, in pertinent part, provided as follows:

> **LOAN PROCESSING AND APPLICATION:** Buyer's obligation under this agreement is contingent on Buyer obtaining said loan. Buyer shall apply for a maximum 80.000 % loan (loan to value ratio) within 30 consecutive days from the execution of this agreement and shall provide Seller with written satisfactory loan approval within 45 consecutive days that contains no credit, income, or asset conditions, unless otherwise set forth in this contract. **Time is of the essence.** . . .

(R. p. 661) (emphasis in original.)

The Contract also provided for a 90-day "Due Diligence Period" during which the purchaser was granted a "Termination Right." (R. p. 662). During the Due Diligence Period, the purchaser could, at its discretion,

"perform whatever due diligence, inspections, examinations, surveys and testing, if any, Buyer deems appropriate to evaluate the suitability of [the] Property for Buyers intended use including but not limited to, zoning, governmental regulations, environmental concerns, **availability of utilities** and whether the soil on [the] Property will support a septic system of a size and type of desired Buyer . . . ." (R. p. 662) (emphasis added.) If the Termination Right was not exercised within the 90-day Due Diligence Period the Termination Right automatically expired and the purchaser was "deemed to have accepted [the] Property 'as-is.'" (R. p. 662.)[7] Importantly, **the Contract expressly disclosed that there was no public water or sewer available at the Property**. (R. p. 662.)

In a light most favorable to the Buyer, the evidence at trial established that the Marshalls initially sought financing from BB&T, but were turned down because they did not have sufficient financial strength to satisfy lender

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[7] With respect to the Due Diligence Period, the Contract also provided as follows:

> Buyer agrees to make an additional $40,000 deposit directly to the Seller at the end of said "Due Diligence Period". This $40,000 plus the original $10,000 [earnest money] deposit become[s] Non-Refundable should the Buyer not close for any reason whatsoever as stipulated in Paragraph 34.(a) above and Paragraph 33. Buyer authorizes the Escrow Agent to disburse the original $10,000 [earnest money] deposit to the Seller at the end of said "Due Diligence Period".

(R. p. 665.)

requirements. (R. p. 222, line 16 – p. 223, line 18; p. 224, line 23 – p. 225, line 8.)[8] They thereafter began pursuing financing through Southcoast Community Bank, intending to bring in additional investors to increase their financial strength. (R. p. 223, line 19 – p. 225, line 20; p. 668.)

At their initial meeting with Southcoast, the bank's loan officer advised the Marshalls that Southcoast could loan 75% of the value of the Property if public water and sewer were available, but only 65% of the value of the Property if public water and sewer were not available. (R. p. 407, line 24 – p. 410, line 18.) The Marshalls believed, however, that Berkeley County would be directing water and sewer lines to the Property. (R. p. 251, line 25 – p. 253, line 19.)

From the outset, the Marshalls intended to form the Buyer as a real estate holding company to take title to the Property. In March of 2006, they formed the Buyer and assigned to it their rights under the Contract. (R. p. 224, line 23 – p. 229, line 10; p. 234, line 2 – p. 235, line 14; p. 239, lines 1-9; pp. 667, 672-73.)

As of the expiration of the Due Diligence Period, uncertainty remained as to whether public water and sewer lines would be directed to the

[8] The subject transaction was by far the largest real estate investment project the Marshalls had ever been involved with. Previously, "the biggest thing [Bruce Marshall] had [done] was like two acres . . . ." (R. p. 217, line 22 – p. 218, line 11.)

Property. Nonetheless, the Buyer did not exercise its Termination Right, choosing instead to pay the Seller the non-refundable $40,000 due upon the expiration of the Due Diligence Period and releasing to the Seller its $10,000 earnest money deposit. (R. p. 229, line 22 – p. 234, line 1; p. 241, line 22 – p. 243, line 9; p. 251, line 25 – p. 256, line 3; p. 409, line 19 – p. 410, line 3.) In addition, the record shows that the Buyer did not have a written loan commitment at the time the Due Diligence Period expired. Nonetheless, the Buyer did not terminate the Contract and did not inform the Seller of its failure to procure a firm loan commitment. In fact, the Buyer informed its real estate agent, Georgia Richard (the "Buyer's Agent"), that it had financing, which information was immediately relayed by the Buyer's Agent to the Seller's real estate agent, Mickey Rakes (the "Seller's Agent"). (R. p. 348, line 16 – p. 349, line 20; p. 354, line 16 – p. 358, line 14; p. 614, line 3 – p. 615, line 6.)

By "March [or] April of 2006," the Buyer added two individuals as investors in an effort to increase its financial strength. (R. p. 411, line 25 – p. 412, line 12.) In late June/early July, however, the Buyer learned public water and sewer would not be directed to the Property. (R. p. 259, lines 13-25; p. 413, line 16 – p. 414, line 5; p. 433, lines 15-20). Because the Buyer's existing investors did not have sufficient resources to take out a 65% loan,

they found three other individuals they believed could make up the shortfall: Cecil Curtis, John Bordine, and Steve Hill. Ultimately, and apparently unbeknownst to the investors, Bruce Marshall later disallowed Curtis and Bordine to be members of the Buyer. (R. p. 261, line 9 – p. 262, line 19.)

None of the new investors submitted the necessary loan application information to Southcoast before Monday, July 24th, 2006, with one investor not submitting his financial information until July 26th. (R. p. 413, line 1 – p. 415, line 2.) This left only five days for the bank to process the loan application. Nonetheless, once Southcoast's loan officer received the needed financial information from all investors, he submitted the loan package to the bank's loan committee. (R. p. 416, line 1 – p. 418, line 20.)

Citing problems with the "water and sewer," on or about July 13, 2006, the Buyer's Agent approached the Seller's Agent requesting an extension of the closing deadline. There is no evidence in the record that the Buyer's Agent communicated to the Seller's Agent that the "water and sewer" issue related to financing. Indeed, as noted above, the Buyer's Agent testified at trial that Bruce Marshall had told her the loan was approved on or about April 26, 2006, and that she immediately relayed this information to the Seller's Agent. (R. p. 348, line 16 – p. 349, line 20; p. 354, line 16 – p. 358, line 14; p. 614, line 3 – p. 615, line 6.)

The Seller's Agent advised the Buyer's Agent that any problems with the "water and sewer" should have been addressed during the Due Diligence Period, but nonetheless communicated the extension request to the Seller, and was thereafter authorized to offer the Buyer a 30-day extension in exchange for a non-refundable payment of $50,000 that was not to be deducted from the purchase price. (R. p. 615, lines 7-13; p. 616, lines 1-7.) By email correspondence of the same date, July 13, 2006, the Seller's Agent confirmed to the Buyer's Agent the Seller's offer to grant the Buyer a 30-day extension of time to close (the "$50,000 Extension Offer"). (R. p. 259, line 13 – p. 264, line 19; p. 533, line 17 – p. 534, line 13; p. 681.)

On July 16, 2006, one day into the contracted-for closing window from July 15th – July 31st, the Seller's real estate attorney, Skipper Wooddy (the "Seller's Attorney"), provided the Seller's closing documents, including the deed, to the Buyer's attorney, Benjamin Lafond (the "Buyer's Attorney").[9] There were no problems with the closing documents the Seller's Attorney provided. (R. p. 387, lines 1-7; p. 535, line 17 – p. 536, line 6.)

Having received no response from the Buyer about the $50,000 Extension Offer by July 20, 2006, the Seller instructed the Seller's Agent to

[9] The Seller's Attorney was also a member of the Seller. (R. p. 269, lines 6-24.)

withdraw it. (R. p. 613, line 24 – p. 614, line 2.) The Seller's Agent communicated the withdrawal of the $50,000 Extension Offer by oral and email communications to the Buyer's Agent on July 20, 2006. (R. pp. 682-83; p. 264, line 23 – p. 265, line 8; p. 534, line 14 – p. 535, line 16.) The Seller's Agent's email expressly stated that the Seller was "ready, willing and able to close per the contract and will grant no extension of time." (R. p. 682.) It also advised that the Seller had been requesting, without success, a closing date from the Buyer for approximately three weeks, and again requested that a closing date be provided. (R. p. 682.) Thereafter, closing was scheduled to take place at the Buyer's Attorney's office at the latest possible date/time under the Contract (4:00 p.m. on July 31, 2006). (R. p. 536, lines 7-14.)

On July 28, 2006, Southcoast issued its loan commitment letter to the Buyer as "Borrower." (R. p. 402, lines 19 – p. 404, line 18; pp. 684-90.) Because of the size of the loan request, the bank's president's approval was required. Southcoast's president would not approve the loan unless the Borrower agreed to deposit the amount needed for interest for one year in a money market account at the bank that would be drafted for payments—the loan the Buyer sought (and obtained) was an interest-only loan with a one-

year term. (R. p. 401, line 2 – p. 404, line 10.)[10]

The commitment letter was addressed to all of the individuals that had provided financial information in the loan application process. (R. p. 420, lines 6-20.) It was purposefully not addressed to Bruce Marshall because he was not going to sign for the loan. He was, according to his testimony, "just helping [his son] Jeremy establish his own credit." (R. p. 272, line 22 – p. 273, line 18.)[11] Every addressee but Cecil Curtis—who, as noted above, was ultimately disallowed as a member of the Buyer—signed the commitment letter accepting its terms. (R. p. 421, line 2 – p. 422, line 19; pp. 684-90.)

Bruce Marshall was out of town for the weekend at the time Southcoast's commitment letter was issued on Friday, July 28, 2006. As a result, he did not read the letter until Monday, July 31st, which was the day of the scheduled closing, and the final day of the closing period as set forth in the Contract. (R. p. 272, lines 3-15.) Upon reviewing the letter, Bruce Marshall realized the structure of the loan being provided by Southcoast required that the Buyer deposit with the bank $211,625 more than the Buyer had planned to provide in order to collateralize the year's interest payments. (R. pp. 684-90.) Believing the Buyer could not get that money together in

[10] Notably, although the Buyer claims the interest deposit requirement caught it by surprise, as discussed below, the idea for the deposit was initiated by the Buyer.

[11] At the time, Bruce Marshall was in his late forties and Jeremy was in his early twenties. (R. p. 213, line 13 – p. 214, line 5.)

one day,[12] Bruce Marshall contacted the Buyer's Agent and instructed her to seek an extension of the closing deadline from the Seller. (R. p. 279, line 20 – p. 280, line 25.)

The Buyer's Agent, without giving a reason for the request, called the Seller's Agent "about the possibilit[y] of a day or two extension." The Seller's Agent advised the Buyer's Agent it was his understanding that his client did not intend to grant any extension and told her to have the Buyer's Attorney contact the Seller's Attorney to discuss the matter. (R. p. 622, lines 12-23.)

Following the Buyer's Agent's telephone call, the Seller's Agent himself contacted the Buyer's Attorney. According to the Seller's Agent, the Buyer's Attorney was busy with another large closing scheduled to take place at the Buyer's Attorney's office that day and quickly discontinued their conversation, but not before confirming the Buyer's Agent's communication that the closing was uncertain and advising him it might be a good idea to advise the Seller's Attorney of this development.[13]

The scheduled closing did not take place. (R. p. 627, lines 20-22.)

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[12] Notably, Bruce Marshall did not speak with investor Hill, whose trial testimony indicated that he could have obtained sufficient cash to close on July 31st. (R. p. 510, line 3 – p. 511, line 2.)

[13] The Buyer's Attorney testified that several documents, including the closing package and company governance documents (to include the Buyer's operating agreement), were not ready on the day of closing, and he had another large commercial closing that day. (R. p. 378, line 22 – p. 381, line 10; R. p. 385, line 19 – p. 389, line 10.)

The uncontested evidence presented at trial established the Seller was ready, willing, and able to close on July 31, 2006, but the Buyer was not. (R. p. 368, line 21 – p. 369, line 1; p. 629, lines 20-22; pp. 691-92; pp. 788-89.)

After the Seller's Attorney learned the closing would not take place, he transmitted a letter via facsimile and email to the Buyer's Attorney, stating his understanding that the scheduled closing had been cancelled; making clear that the Seller was ready, willing, and able to close; and advising that the Contract was terminated as a result of the Buyer's default. (R. p. 536, line 15 – p. 537, line 118; p. 691.) Thereafter, at approximately 5:10 p.m. that same day, without explanation or in any way contradicting the Seller's Attorney's stated understanding of the Buyer's default, the Buyer's Attorney sent the Seller's Attorney an email advising that he would have a check for $50,000 (representing consideration for a 30-day extension) delivered to the Seller's Attorney's office the next morning. The Seller's Attorney replied, stating that the $50,000 Extension Offer had been withdrawn ten days earlier and the check would be returned. (R. p. 537, line 19 – p. 540, line 9.) When the check arrived the following morning, it was immediately rejected and returned by the Seller's Attorney. (R. p. 538, line 24 – p. 539, line 25; p. 692.)

According to the Buyer's Agent, after July 31st, she spoke with Bruce

Marshall who advised her to "make another attempt to try to set up a closing with the seller." (R. p. 350, lines 4-12.) On August 2nd, the Buyer's Agent called the Seller's Agent, telling him, "the buyers are ready to close, they got their money and I just need two days, a couple more days." (R. p. 350. line 4 – p. 360, line 2.) The Seller refused to **grant** an extension. At no time after July 31, 2006 did the Buyer tender performance.

ARGUMENT[14]

I. The Court of Appeals erred in holding that the record contained evidence requiring the jury's consideration of the Buyer's breach of contract claim and that the trial court should have denied the Seller's motion for a directed verdict.

A. The Court of Appeals erred in finding the evidence supported more than one reasonable inference regarding whether the Extension Clause was invoked automatically or whether notice was required.

In ruling on a motion for a directed verdict, the trial court must view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motion. Erickson v. Jones St. Publishers, LLC, 368 S.C. 444, 463, 629 S.E.2d 653, 663 (2006). A directed verdict is warranted, however, when the case presents only questions of law, and should be allowed if the evidence would not be legally

[14] The Seller incorporates herein by reference the facts stated above where relevant to its argument.

sufficient to sustain a verdict for the opposite party. *See* McEntire v. Mooregard Exterminating Servs., Inc., 353 S.C. 629, 632, 578 S.E.2d 746, 748 (Ct. App. 2003).

The construction of an agreement is a matter of contract law,[15] with its primary objective being to ascertain and give effect to the intention of the contracting parties. Williams v. Teran, Inc., 266 S.C. 55, 59, 221 S.E.2d 526, 528 (1976). To accomplish this objective, the court must look at the language of the contract, reading it as a whole. S. Atl. Fin. Servs., Inc. v. Middleton, 356 S.C. 444, 447, 590 S.E.2d 27, 29 (2003). Where the language of the contract is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and the contract's language determines the instrument's force and effect. Blakeley v. Rabon, 266 S.C. 68, 72, 221 S.E.2d 767, 769 (1976). Of course, "[a]ll contracts should receive a sensible and reasonable construction, and not such a one as will lead to absurd consequences or unjust results." Proffitt v. Sitton, 244 S.C. 206, 212, 136 S.E.2d 257, 260 (1965).

Here, the indisputable procedural history shows the sole contractual provision upon which the Buyer's case is founded was not in any way raised as an issue between the parties until April of 2007, some eight months after

[15] McDuffie v. McDuffie, 313 S.C. 397, 399, 438 S.E.2d 239, 241 (1993).

the closing deadline and seven months after the Buyer brought suit pursuing a completely different theory of an alleged breach of contract by the Seller. Indeed, the Buyer's Attorney, who tendered the Buyer's $50,000 check to the Seller's Attorney the day after the closing deadline in an attempt to buy an extension, candidly admitted that, as of August 15, 2006, **he did not even know that the Extension Clause was in the Contract**. (R. p. 382, line 23 – p. 383, line 8.) The Buyer's attempt to purchase an extension outside the Contract for $50,000 is simply irreconcilable with its after-the-fact claim that it was automatically entitled to an extension under the Contract.

In unambiguous terms, the Extension Clause states that it applies to extend the time for closing by up to 15 days, but only when a contingency has not been met through no fault of either party. The trial court correctly granted a directed verdict because there is no evidence the Buyer sought an extension on the basis that a contingency was unfulfilled through no fault of the Buyer. Construction of the Extension Clause so as to allow it to be raised from the dead by the Buyer and used as a sword against the Seller many months after the Buyer's contracted-for time for performance had passed is patently absurd and inequitable. From the Seller's perspective, it is akin to being placed on "double-secret probation." The Buyer's position is that it is entitled to hold back critical information until it is too late for the

Seller to act, and then hold the Seller responsible. Such cannot be countenanced by this Court. 17A Am. Jur. 2d Contracts § 594 ("A party who has contracted with another to do a particular act upon the happening of a certain event is bound to perform when that party knows that the event has occurred, without a demand or notice from the obligee. The obligor's knowledge of the occurrence of the contingency is sometimes presumed, as where the contingency consists of the entry of a judgment in an action to which the obligor is a party. **On the other hand, notice should be given when information material to performance is within only one of the parties' knowledge**.") (emphasis added); *cf.* American College of Surgeons v. Lumbermens Mutual Casualty Co., 142 Ill.App.3d 680, 693-94, 491 N.E.2d 1179, 96 Ill. Dec. 719 (1986) (secret, undisclosed mental reservations on the part of one party to a contract cannot be considered); Ner Tamid Congregation of North Town v. Igor Krivoruchko, 2009 U.S. Dist. Lexis 58318 (N.D. Ill. 2009) ("'[P]rivate intent counts only if it is conveyed to the other party and shared.'").

The only construction of the Contract that comports with our established rules of construction is that notice must be given to invoke the Extension Clause. The time of closing was expressly made "of the essence" both in the Extension Clause itself and elsewhere in the Contract. The

Extension Clause merely expressed the parties' contemplation that a justifiable need to extend the firm July 31, 2006 deadline might arise. Whether the need for an extension was justifiable was to be determined in reference to two mandatory conditions precedent set forth in plain and unambiguous language: "**if** the transaction has not closed within the stipulated time limit because [(1)] a contingency has not been satisfied [(2)] through no fault of either party, **then** both parties agree to extend this agreement . . . ." (R. p. 665) (emphasis added); Springs & Davenport, Inc. v. AAG, Inc., 385 S.C. 320, 326, 683 S.E.2d 814, 816-17 (Ct. App. 2009) ("A condition precedent 'is any fact, other than the mere lapse of time, which, unless excused, must exist or occur before a duty of immediate performance by the promisor can arise.' 'Words and phrases such as 'if,' 'provided that,' 'when,' 'after,' 'as soon as,' and 'subject to' frequently are used to indicate that performance expressly has been made conditional.'") Otherwise, the need was not justifiable and simply reflected the party's default with respect to its contractual obligations. A contrary interpretation would improperly render the conditions precedent meaningless.

Reading the Contract as a whole, it is clear that the Extension Clause was intended as a limited exception to the otherwise firm and material July 31, 2006 deadline, to be resorted to only in the event that the party invoking

it was doing so because, in the absence of its fault, a contingency in the Contract had not come to pass. It was not automatically operative on account of the "mere lapse of time."

The construction accepted by the Court of Appeals allows a party to expand the contracted-for deadline simply by asking for an extension of some duration with no explanation of the need therefore, whether or not such need was brought about because a contingency had not been satisfied, and whether or not the unsatisfied contingency was that party's fault. It converts the Extension Clause into an automatic extension of up to 15 days, allowing an at-fault party to mask its failure to make timely preparations for closing (i.e., default) so long as it could be ready to close within 15 days after the firm closing date. Such an interpretation allows the Buyer, without consequence, to withhold the consideration (in this case, more than $2,500,000) from the Seller for more than two weeks beyond the agreed-upon closing deadline. Such an interpretation is unreasonable and absurd when reading the Contract as a whole and giving effect to its clear intention to make "time of the essence." This is particularly so in this context, where the Buyer never mentioned the Extension Clause until eight months after the passage of the time for performance, and only then after haling the Seller into court on a completely different—not to mention undeniably meritless—

theory of an alleged breach of contract.

In every contract there is "an implied covenant of good faith and fair dealing that neither party will do anything to impair the other's rights to receive benefits under the contract." Nichols v. State Farm Mut. Auto. Ins. Co., 279 S.C. 336, 339, 306 S.E.2d 616, 618 (1983). But the Seller never took any action to impair the Buyer's rights under the Contract. While the implied covenant of good faith and fair dealing prohibited the Seller from doing anything to impair the Buyer's rights to receive benefits under the Contract, it did not require the Seller to invoke the Extension Clause for the benefit of the Buyer; particularly so in this context, where, even if there was a basis to invoke it, the Seller had no reason to know that it was applicable.

Respectfully, the Court of Appeals erred in reversing the trial court on this issue.

B. The Court of Appeals erred in finding the evidence supported a reasonable inference that the Seller's July 31, 2006 letter constituted a repudiation of the Contract.

According to the Restatement (Second) of Contracts, repudiation is

> (a) a statement by the obligor to the obligee indicating that the obligor will commit a breach that would of itself give the obligee a claim for damages for total breach . . . or (b) a voluntary affirmative act which renders the obligor unable or apparently unable to perform without such a breach.

Restatement (Second) of Contracts § 250 (1981).

Under the doctrine known as "breach by anticipatory repudiation . . . if one party to a contract declares in advance that he will not perform at the time set for his performance, the other party may bring an immediate action for total breach of the contract." Fairfax v. Washington Metro. Area Transit Auth., 582 F.2d 1321, 1325 (4th Cir. 1978). To constitute an anticipatory repudiation, "it must appear that the party bound under a contract has **unequivocally refused to perform**." Id. at 1326 (emphasis added). In other words, in order to demonstrate that an anticipatory repudiation has occurred, "there must be a **positive, unconditional, and unequivocal declaration of fixed purpose not to perform the contract in any event or any time**." Id. at 1326 (emphasis added).

Under no reasonable view of the evidence could the July 31, 2006 correspondence from the Seller's Attorney to the Buyer's Attorney[16] convey the necessary intention of nonperformance to constitute a repudiation of the Contract. The letter expressly stated it was written because of the Buyer's cancellation of the closing scheduled to take place on the final day of the closing period. It made clear the Seller's understanding—which is supported by the plain language of the Contract—that closing was to take

[16] (R. p. 691.)

place on or before July 31, 2006 with "Time Being of the Essence" and that, while, the Seller was "ready, willing and able to close" the transaction on time, the Buyer was not.[17] And, of course, it is beyond dispute that the Buyer was not able to close the transaction on time. Indeed, the Buyer's Attorney never contradicted or challenged the letter; rather, he sent the Seller's Attorney a $50,000 check attempting to buy an extension that was not available.

This is consistent with the July 20th correspondence from the Seller's Agent to the Buyer's Agent withdrawing the $50,000 Extension Offer and expressly advising that the Seller "is ready, willing and able to close **per the contract** and will grant no extension of time." (R. p. 682) (emphasis added.) Performance "per the Contract" would, of course, include performance in accordance with Extension Clause—if the Buyer had a basis to invoke it. Similarly, the Seller's refusal to "grant" any extension outside the Contract did not repudiate or impact an extension, if applicable, under the Extension Clause, which was, of course, already agreed upon and included in the Contract as of the time of contracting.

In no way can the July 31st letter reasonably be viewed as any, much

[17] There is no question that, "[w]here 'time is made the essence of the contract,' the parties are bound by the time limited in the contract, and the vendee forfeits his rights by a failure to comply within the specified time." Williams v. McManus, 90 S.C. 490, 495, 73 S.E. 1038, 1048 (1912); (App. p. 1220.)

less an unequivocal, declaration of the Seller's intention not to perform or not to recognize any rights of the Buyer, including its rights under the Extension Clause. The letter simply stated the Seller was prepared to perform, the closing scheduled for that day had been cancelled, and that was a default by the Buyer. No communication from the Buyer on that day indicated a reason for the closing being cancelled or that the Buyer was entitled to rights under the Extension Clause. In light of the evidence presented, the Seller's July 31, 2006 letter cannot reasonably be viewed as a repudiation of the Contract by the Seller.

Respectfully, the Court of Appeals erred in reversing the trial court on this issue.

II. The Court of Appeals erred in failing to rule that, under any view of the evidence presented, the necessary conditions precedent to the operation of the Extension Clause were not met.

Rule 220(c), SCACR, provides that "[t]he appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal." Rule 208(b)(2), SCACR, provides that the respondent's brief "may also contain argument asking the court to affirm for any ground appearing on the record as provided by Rule 220(c)."

The Seller was the respondent before the Court of Appeals. It raised the issues set forth herein to the Court of Appeals, which are evident from

the record. (App. pp. 1175-1210, 1227-40.) Respectfully, the Court of Appeals erred in failing to address these issues in its opinion and in response to the Seller's petition for rehearing and in failing to rule that the trial court's directed verdict should be affirmed because, under any view of the evidence presented, the necessary conditions precedent to the operation of the Extension Clause were not met.

A. The conditions precedent to the operation of the Extension Clause were not met because no contractual contingencies remained unsatisfied.

An essential premise of the Buyer's argument is that the financing contingency remained unsatisfied. The undisputed record reveals, however, that the Buyer's inability to timely close was not occasioned by its lack of financing, but by its inability to meet the terms of the financing it, in fact, was offered and accepted.

It is important for the Court to bear in mind that the Contract was not contingent upon the Buyer obtaining a loan with an 80% loan-to-value ratio, only that the loan it decided to apply for within the loan application period would be for no more than this ratio. The record is clear that the Buyer was aware it would only be able to receive a loan with a 65% loan-to-value ratio if water and sewer were not available to the property. (R. p. 259, lines 13-25; p. 407, line 24 – p. 410, line 8; p. 413, line 16 – p. 414, line 5; p. 433,

lines 15-20.) The record is further clear that the Buyer applied for, received, and accepted a loan within parameters of the Contract, and the loan commitment letter clearly delineated the financial obligations the Buyer was to meet. (R. p. 272, lines 2-15; p. 272, line 22 – p. 273, line 18; p. 279, line 21 – p. 280, line 25; p. 403, line 1 – p. 404, line 18; p. 420, lines 6-20; p. 421, line 2 – p. 422, line 19; pp. 684-90.)

Moreover, the Contract required the Buyer to provide the Seller with written loan approval within 45 consecutive days of the Contract's execution. (R. p. 661.) When the Buyer allowed this 45-day period to expire without securing financing and without exercising its right to get out of the deal, the Buyer's obligations under the Contract were no longer contingent upon financing.

Under any reasonable view of the evidence, financing was not an unsatisfied contingency, and the Extension Clause was unavailing to the Buyer. Respectfully, the Court of Appeals should have affirmed the trial court for this reason.

B. The conditions precedents to the operation of the Extension Clause were not met because the Buyer was at fault in not being able to timely close.

As revealed by the undisputed record, the Buyer's inability to timely close was not brought about because it did not have financing, but because it

was not prepared to meet the financial obligations imposed by its lender as a condition of the loan that it sought and accepted. Moreover, the evidence revealed the Buyer failed to timely read the lender's commitment letter; failed to provide timely information to its lender regarding its members and their financial condition; failed to timely obtain/produce the funds necessary for issuance of the loan proceeds; failed to communicate pertinent information to the Seller, for instance, the reason for its need for an extension; failed to ensure its members met their financial obligations with respect to having their money ready in time for closing; and failed to timely communicate within its own membership to discover that Steve Hill could have obtained sufficient cash to meet the terms of the commitment letter by the agreed-upon closing deadline. (R. p. 272, line 3 – p. 273, line 18; p. 279, line 21 – p. 280, line 25; p. 403, line 1 – p. 404, line 18; p. 420, lines 6-20; p. 421, line 2 – p. 422, line 19; p. 510, line 3 – p. 511, line 2; pp. 668, 684-90.) Its attorney even admitted that a number of documents required for closing—none of which were to be provided by the Seller—were not ready for a timely closing on July 31, 2006. (R. p. 378, line 22 – p. 381, line 8; p. 385, line 19 – p. 389, line 11.)

Further still, there was, in fact, no "change" in the terms of financing offered by the Buyer's lender. Southcoast issued only one commitment

letter, which the Buyer accepted. It did not change. (R. pp. 684-90.) The Buyer simply allowed itself to be in a position where it ran short on time and did not take the steps necessary to timely meet the terms of the commitment letter. This is the Buyer's fault. *See* Moon v. Jordan, 301 S.C. 161, 164, 390 S.E.2d 488, 490 (Ct. App. 1990) ("the fact that one is unable to perform a contract because of his inability to obtain money, whether due to his poverty, a financial panic, or failure of a third party on whom he relies for furnishing the money, will not ordinarily excuse nonperformance in the absence of a contract provision in that regard.").[18]

The loan officer's undisputed testimony was that the reason for delay in the Buyer obtaining the financing commitment from Southcoast was the Buyer's delay in providing Southcoast with the necessary names and financial information for the persons who were to be members of the Buyer. (R. p. 432, lines 17-20.) Additionally, while the Buyer now claims the problem with the financing was because of the need to come up with additional money to deposit to pay the interest for one year, the testimony of the loan officer was that the idea for the deposit came from the person negotiating the loan for the Buyer. (R. p. 433, lines 3-14.)

[18] And, again, as noted above, when the Buyer allowed the 45-day financing-contingency period to expire without securing financing and without exercising its right to get out of the deal, the Buyer's obligations under the Contract were no longer contingent upon financing, i.e., the Contract did not provide an excuse for the Buyer's nonperformance.

When the loan commitment was received at the last minute and the Buyer could not meet the bank's (i.e., its chosen lender's) requirements, it was a problem of the Buyer's own making. The Seller had no role in this. In fact, the Buyer had previously told the Buyer's Agent, who immediately thereafter informed the Seller's Agent, months earlier that the Buyer had financing. The Seller had no reason to believe otherwise.

Additionally, the Buyer had allowed the Due Diligence Period to pass without raising any questions or asking for more time with regard to the financing issue. In fact, the Contract expressly provided that, upon the expiration of the Due Diligence Period without the Buyer's exercise of its termination right, the Buyer "shall be deemed to have accepted the Property 'as-is.'" (R. p. 662.) Further, in this regard, any contention by the Buyer that its fault with regard to financing is absolved by a reasonable belief that water and sewer would be directed to the Property is without merit. Even assuming, *arguendo*, the Buyer reasonably believed that water and sewer would be directed to the Property (and it would therefore be able to borrow 75% of the value of the Property, instead of 65%), the Buyer nonetheless bore the risk that it would not.

Under any reasonable view of the evidence, the Buyer was not without fault in failing to close within the time period agreed upon in the

Contract, and the Extension Clause was unavailing to the Buyer. Respectfully, the Court of Appeals should have affirmed the trial court for this reason.

III. The Court of Appeals erred in failing to rule that it did not have appellate jurisdiction over this matter because the Buyer did not timely serve its notice of appeal.

Accepting the Buyer's claim that it did not receive written notice of the trial court's entry of the directed verdict in favor of the Seller, the Court of Appeals found the Buyer's May 15, 2008 notice of appeal was timely because "the time for appeal did not begin to run until the trial court denied Buyer's Rule 59(**e**) motion on May 8, 2008." (App. p. 1225) (emphasis added.)

Assuming, *arguendo*, the Buyer did not receive written notice of the trial court's entry of the directed verdict in favor of the Seller, it is beyond dispute that the verdict was directed in open court on March 13, 2008, with all parties and their counsel present, and the Buyer did not—as it was required by this Court's precedent—move for a new trial or request ten days to do so promptly upon discharge of the jury. Boone v. Goodwin, 314 S.C. 374, 376, 444 S.E.2d 524, 525 (1994) (holding that "a party **must** make a motion for a new trial promptly after the jury is discharged or request ten days within which to make the motion.") (emphasis added).

On March 24, 2008, the Buyer filed its post-trial motion—styled as a "motion to alter or amend the judgment and for a new trial"—thereby establishing its notice of the judgment. This motion can only be properly viewed as a motion for a new trial under Rule 59(b), SCRCP, because that is the only relief the trial court was capable of awarding—no other alteration or amendment of the judgment was possible. As such, it was untimely and improper under Boone. Even assuming, *arguendo*, the Buyer's motion may properly be considered as a motion to alter or amend under Rule 59(e)—as the Court of Appeals did—it was nonetheless untimely and improper because it was not served on the Seller until March 31, 2008. (App. p. 1215) ("On March 24, 2008, [Sheep Island] filed a Rule 59(e) motion and served it upon counsel on March 31, 2008 . . . ."); Rule 59(e) ("A motion to alter or amend the judgment shall be **served** not later than 10 days after receipt of written notice of the entry of the order.") (emphasis added).

Accordingly, the Buyer's post-trial motion was not properly made and did not stay the time for it to notice its appeal. Rule 203(b)(1), SCACR. Its May 15, 2008 notice of appeal was therefore untimely and not sufficient to confer appellate jurisdiction upon the Court of Appeals to review the March 13th directed verdict. Mears v. Mears, 287 S.C. 168, 169, 337 S.E.2d 206, 207 (1985) (holding that timely service of the notice of appeal is a

jurisdictional requirement and that the Court has no authority to extend or expand the time in which the notice must be served). Being without appellate jurisdiction, the Court of Appeals had no choice but to dismiss the Buyer's appeal, and, respectfully, erred by not doing so.

IV. The Court of Appeals' decision in Person v. Carolina Pines Regional Medical Center, Op. No. 2010-UP-484 (S.C. Ct. App. filed November 4, 2010) is inconsistent with its ruling regarding the jurisdictional issue in the present case.

After deciding the Seller's petition for rehearing on November 2, 2010, on November 4, 2010, the Court of Appeals issued a decision in Person v. Carolina Pines Regional Medical Center, Op. No. 2010-UP-484 (S.C. Ct. App. filed November 4, 2010)—one of the members of the Court of Appeals' panel in Person, Judge Pieper, was also a member of the panel that decided the instant case. There, following a jury verdict against her, appellant Person appealed the trial court's denial of her motion for a new trial pursuant to Rule 59(b). After the jury verdict, however, the appellant's counsel had indicated, upon inquiry by the trial court, that appellant had no post-trial motions. The Court of appeals found her request for leave to make a new trial motion the following day to be untimely and dismissed the appeal, citing, among other authority, Boone, 314 S.C. 374, 444 S.E.2d 524.

Person is inconsistent with the Court of Appeals' decision here.

Under the reasoning apparently accepted by the Court of Appeals in the present case, as long as appellant Person's post-trial motion was made within ten days after trial, and denominated as a Rule 59(e) motion to alter or amend, as opposed to a Rule 59(b) motion for a new trial, it would have been timely—even though the only possible relief that the trial court could have granted was, indeed, a new trial.

With jurisdiction being a concept fundamental to the administration of justice, respectfully, the Seller submits that the inconsistency between Person and the present case lends support to its request for this Court to exercise discretionary review here, and to hold that the Buyer's notice of appeal was untimely.

CONCLUSION

For the reasons stated herein, Bar-Pen asks this Honorable Court to reverse the decision of the Court of Appeals and to restore and uphold the trial court's properly directed verdict in its favor.

<SIGNED ON THE FOLLOWING PAGE>

Respectfully submitted,

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Dated: April 25, 2012

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Berkeley County
Court of Common Pleas

Thomas L. Hughston, Jr., Circuit Court Judge

Opinion No. 2010-UP-382 (S.C. Ct. App. filed August 4, 2010)

Sheep Island Plantation, LLC,

Respondent,

v.

Bar-Pen Investments, LLC,

Petitioner.

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I, Russell G. Hines, of Young Clement Rivers, LLP, counsel for the petitioner above named, do hereby certify that I have served the **Brief of Petitioner** on the respondent, Sheep Island Plantation, LLC, by depositing a copy of the same in the United States Mail, postage prepaid, on April 25, 2012, addressed as follows to its counsel of record:

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Dated: 4/25/12

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April 25, 2012

VIA U.S. MAIL
The Honorable Daniel E. Shearouse, Clerk
Supreme Court of South Carolina
Supreme Court Building
1231 Gervais Street
Columbia, SC 29201

Re: *Sheep Island Plantation, LLC vs. Bar-Pen Investments, LLC*
Case No.: 2006-CP-08-1650
YCR File: 13737-20080508

Dear Mr. Shearouse:

Enclosed for filing in the above-referenced matter, please find the original and sixteen (16) copies of the **Brief of Petitioner** along with the original and two (2) copies of a **Proof of Service** for the same. Also enclosed are thirteen (13) additional copies of the **Appendix** previously filed. Kindly return a file-stamped copy of the brief and proof of service to us in the envelope provided. By copy of this correspondence, we are serving a copy of the Brief of Petitioner upon counsel for the Respondent.

Thank you, in advance, for your assistance.

Respectfully yours,

YOUNG CLEMENT RIVERS, LLP

Russell G. Hines
Associate

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