YCRLAW
Young Clement Rivers, LLP

Russell G. Hines
Associate

Direct Dial: (843) 720-5488
Direct Fax: (843) 579-1327
E-mail: rhines@ycrlaw.com

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

RGH/
ce: (all below via U.S. Mail)
Stephan V. Futeral, Esquire
Thomas C. Nelson, Esquire
Aubrey J. Wooddy, Jr., Esquire
Meredith Long Coker, Esquire
Charles S. Altman, Esquire

The Supreme Court of South Carolina

Sheep Island Plantation, LLC, Respondent,

v.

Bar-Pen Investments, LLC, Petitioner.

The Honorable Thomas L. Hughston, Jr.
Berkeley County
Trial Court Case No. 2006-CP-08-01650

ORDER

For good cause having been shown, the time for serving and filing the Brief of Petitioner and additional copies of the Appendix in the above entitled matter is hereby extended until April 25, 2012.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY Brenda F. Shealy
Chief Deputy Clerk

Columbia, South Carolina

March 16, 2012

cc: Charles S. Altman, Esquire
Meredith L. Coker, Esquire
William L. Howard, Esquire
Russell G. Hines, Esquire
Stephen V. Futeral, Esquire
Thomas C. Nelson, Esquire

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.

MOTION FOR EXTENSION OF TIME TO FILE/SERVE BRIEF OF PETITIONER

ALTMAN & COKER, LLC
Charles S. Altman
Meredith L. Coker
P.O. Box 265
Charleston, South Carolina 29402
Telephone: (843) 853-9907

and

YOUNG CLEMENT RIVERS, LLP
William L. Howard
Russell G. Hines
P.O. Box 993
Charleston, South Carolina 29402
Telephone: (843) 724-6669
Attorneys for the Petitioner

TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF SOUTH CAROLINA

COMES NOW the petitioner, Bar-Pen Investments, LLC ("Bar-Pen"), by and through its undersigned counsel, pursuant to Rule 263(b), SCACR, and moves this Honorable Court for a 30-day extension of time to file/serve its brief in the above-captioned matter.

The Court granted Bar-Pen's petition for a writ of certiorari to the Court of Appeals on February 24, 2012. Pursuant to Rule 242(i), SCACR, Bar-Pen's brief to this Court is currently due to be filed/served no later than March 26, 2012.

In light of other work-related time commitments, the undersigned respectfully requests that Bar-Pen's deadline for filing/serving its brief be extended by 30 days from March 26, 2012. Prior to making this request, the undersigned corresponded with Thomas C. Nelson, Esquire, counsel for the respondent, Sheep Island Plantation, LLC, and can advise the Court that Mr. Nelson has no objection.

WHEREFORE, Bar-Pen respectfully requests that this Honorable Court grant it an extension of 30 days' time to file/serve its brief in this matter. With the requested extension, the new deadline for such brief would be April 25, 2012, according to the undersigned's calculations. Further, the undersigned respectfully requests that the Court hold Bar-Pen's briefing

deadline in abeyance until it acts upon this motion.

Respectfully submitted,

ALTMAN & COKER, LLC
Charles S. Altman
Meredith L. Coker
P.O. Box 265
Charleston, South Carolina 29402
Telephone: (843) 853-9907
and
YOUNG CLEMENT RIVERS, LLP

By: _____
William L. Howard
Russell G. Hines
P.O. Box 993
Charleston, South Carolina 29402
Telephone: (843) 724-6669
Attorneys for the Petitioner

Charleston, South Carolina

Dated: 3/12/12

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.

PROOF OF SERVICE

ALTMAN & COKER, LLC
Charles S. Altman
Meredith L. Coker
P.O. Box 265
Charleston, South Carolina 29402
Telephone: (843) 853-9907
and
YOUNG CLEMENT RIVERS, LLP
William L. Howard
Russell G. Hines
P.O. Box 993
Charleston, South Carolina 29402
Telephone: (843) 724-6669
Attorneys for the Petitioner

I, Russell G. Hines, of Young Clement Rivers, LLP, counsel for the petitioner above named, do hereby certify that I have served the petitioner's **Motion for Extension of Time to File/Serve 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 March 12, 2012, addressed as follows to its counsel of record:

FUTERAL & NELSON, LLC
Stephan V. Futeral, Esquire
Thomas C. Nelson, Esquire
1004 Anna Knapp Blvd., 2nd Floor
Mt. Pleasant, SC 29464

YOUNG CLEMENT RIVERS, LLP

By: _____
Russell G. Hines

Charleston, South Carolina

Dated: 3/12/12

YCRLAW
Young Clement Rivers, LLP

Elizabeth R. O'Neil
Paralegal

Direct Dial: (843) 724-6658
Direct Fax: (843) 579-2936
E-mail: eoneil@ycrlaw.com

March 12, 2012

VIA US MAIL and FACSIMILE
The Honorable Daniel E. Shearouse, Clerk of Court
South Carolina Supreme Court
P. O. Box 11330
Columbia, SC 29211-1330

Re: *Appeal: 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 matter are the original and six copies of a Motion for Extension of Time to File/Serve Brief of Petitioner. Also enclosed is our firm check in the amount of $25.00 to cover the cost of filing same. Kindly return one clocked copy to us in the self addressed stamped envelope provided.

Thank you, in advance, for your assistance with this.

Respectfully yours,

RECEIVED
MAR 16 2012
S.C. SUPREME COURT
pm 3-12-12

YOUNG CLEMENT RIVERS, LLP

Lynn O'Neil

Elizabeth R. O'Neil
Paralegal

Check # 135405
$25.00

ERO/ero
Enclosures
cc: Stephan V. Futeral, Esquire (via US Mail)
Thomas C. Nelson, Esquire (via US Mail)
Aubrey J. Wooddy, Jr., Esquire (via email)
Meredith Long Coker, Esquire (via email)
Charles S. Altman, Esquire (via email)

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

February 24, 2012

William L. Howard, Esquire
Russell G. Hines, Esquire
Young Clement Rivers, LLP
P O Box 993
Charleston, SC 29402

Re: Sheep Island Plant. v. Bar-Pen Invest.

Dear Counsel:

Enclosed is the Order granting your Petition for Writ of Certiorari in the above entitled matter.

It will be necessary for you to furnish this office with an additional thirteen (13) copies of the appendix within thirty (30) days from the date of this letter.

Brief of Petitioner should be served and filed on or before March 26, 2012. The brief is not properly filed until we have proof of service.

Brief of Respondent should be served and filed within thirty (30) days after petitioner's brief is filed. We must have proof of service. Any reply brief should be served and filed within ten (10) days after filing of respondent's brief.

Very truly yours,

Daniel E. Shearouse
CLERK

DES/lda

cc: Charles S. Altman, Esquire
Meredith L. Coker, Esquire
Stephen V. Futeral, Esquire
Thomas C. Nelson, Esquire
The Honorable Tanya Gee

The Supreme Court of South Carolina

Sheep Island Plantation, L.L.C., Respondent,

v.

Bar-Pen Investments, L.L.C., Petitioner.

ORDER

We grant the petition for a writ of certiorari to review the Court of Appeals' decision in *Sheep Island Planation, L.L.C. v. Bar-Pen Investments, L.L.C.*, Op. No. 2010-UP-382 (S.C. Ct. App. filed Aug. 4, 2010). The parties shall proceed to serve and file the appendix and briefs as provided by Rule 242(i), SCACR.

C. J.

J.

J.

J.

J.

Columbia, South Carolina

February 24, 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.

PETITION FOR A WRIT OF CERTIORARI

ALTMAN & COKER, LLC
Charles S. Altman
Meredith L. Coker
P.O. Box 265
Charleston, South Carolina 29402
Telephone: (843) 853-9907
Facsimile: (843) 853-9838
and
YOUNG CLEMENT RIVERS, LLP
William L. Howard
Russell G. Hines
P.O. Box 993
Charleston, South Carolina 29402
Telephone: (843) 724-6669
Facsimile: (843) 579-1392
Counsel for the Petitioner

CERTIFICATE OF COUNSEL

Counsel for the petitioner, Bar-Pen Investments, LLC, certify that Bar-Pen's petition for rehearing was timely made and finally ruled upon by the Court of Appeals on November 2, 2010.

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 any 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 respondent, Sheep Island Plantation, LLC, commenced this action on August 23, 2006 by filing a summons and complaint alleging that Bar-Pen breached a real estate sales contract (the "Contract") under which it was to have conveyed to Sheep Island an approximately 101-acre tract of unimproved land in Berkeley County (the "Subject

Property") in exchange for a purchase price of $2,530,000. (R. pp. 7-11.) More specifically, the complaint alleged that the Contract provided for closing to take place no later than July 31, 2006 and that the parties had, on or about July 13, 2006, amended the Contract to extend the closing by 30 days in exchange for a $50,000 payment from Sheep Island to Bar-Pen. Sheep Island alleged that it tendered $50,000 to Bar-Pen on August 1st but Bar-Pen improperly terminated the Contract. (R. p. 8.)[1]

After sufficient discovery, Bar-Pen moved for summary judgment based on indisputable evidence showing that its offer to sell a 30-day extension for $50,000 had been withdrawn prior to Sheep Island's attempted acceptance. About a week before the hearing on the motion, in April of 2007, Sheep Island asked Bar-Pen to consent to an amendment of its complaint. Over Bar-Pen's objection, the circuit court allowed Sheep Island's requested amendment and, in light thereof, denied Bar-Pen's summary judgment motion. (R. p. 157, line 6 – p. 158, line 14.)

On July 3, 2007, Sheep Island filed an amended complaint, again alleging breach of contract by Bar-Pen, but based upon an entirely different theory of an alleged breach. Its amended complaint omitted and wholly abandoned its prior allegation that the Contract was amended by agreement, and instead alleged that Bar-Pen failed to honor an "extension clause" in the Contract – i.e., the original Contract, not any alleged amendment thereto – providing "that '[i]f 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

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

consecutive days from the original closing date'" (hereinafter, this clause will be referred to as the "No Fault Extension Agreement"). (R. pp. 22-27.)

Under Sheep Island'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 "changed the closing conditions" and required it to deposit additional funds for issuance of the necessary loan; it was not able to make the additional deposit; and, when the closing did not occur on July 31st, Bar-Pen wrongfully terminated the Contract, not allowing any extension for it to "complete its financing and close." (R. pp. 23-24.) To be clear, at no time prior to Sheep Island's request in April of 2007 for consent to amend its complaint – some seven months after filing this action, eight months after the subject transaction was supposed to have been closed, and essentially on the eve of the hearing of Bar-Pen's patently meritorious dispositive motion – did Bar-Pen have any notice that Sheep Island was in any way invoking or relying on the No Fault Extension Agreement. (R. p. 157, line 6 – p. 158, line 14.)[2]

On the basis of Sheep Island'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. p. 130-33.) At the close of all evidence, the trial court granted Bar-Pen's renewed motion for a directed verdict, ruling that Sheep Island failed to present evidence from which a reasonable jury could conclude that Bar-Pen breached the Contract. Sheep Island 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 –

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

p. 646, line 25.) The trial court entered judgment in favor of Bar-Pen that day via Form 4 order. (R. p. 1.)

On March 24, 2008, Sheep Island 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 Bar-Pen until March 31st. (App. p. 1215.) The trial court heard the motion on May 8, 2008, denying it from the bench, and thereafter entering a written order of denial on May 9th. (R. p. 2.) Sheep Island 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 Bar-Pen and remanded the matter for a new trial. It found that Sheep Island'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 that the directed verdict should not have been granted because (A) the evidence supported an inference that the No Fault Extension Agreement was invoked automatically and did not require notice and (B) that the evidence supported an inference that Bar-Pen repudiated the Contract via correspondence on July 31, 2006 – i.e., the closing deadline – citing Sheep Island's default for failing to timely close. (App. pp. 1225-26.)

On August 19, 2010, Bar-Pen filed a petition for rehearing with request for oral argument. (App. pp. 1227-40.) The Court of Appeals denied Bar-Pen's petition by order entered November 2, 2010. (App. pp. 1268-69.) This petition for a writ of certiorari follows.

STATEMENT OF FACTS

On or about December 14, 2005, Bruce Marshall "and/or" his son Jeremy Marshall entered the Contract with Bar-Pen. 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**, with '**Time being of the essence.**'" (R. p. 665) (emphasis added.) The No Fault Extension Agreement – the only 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 provided for a 90-day "Due Diligence Period" during which the buyer was granted a "Termination Right." (R. p. 662). During the Due Diligence Period, the buyer 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 . . . .[3]

(R. p. 662) (emphasis added.) If the Termination Right was not exercised within the 90-day Due Diligence Period it automatically expired and the buyer was "deemed to have accepted [the] Property 'as-is.'" (R. p. 662.)[4]

In a light most favorable to Sheep Island, the evidence at trial established that the Marshalls initially sought financing through BB&T, but were turned down because they did not have sufficient financial strength to satisfy lender requirements. (R. p. 222, line 16 – p. 223, line 18; p. 224, line 23 – p. 225, line 8.)[5] 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.)

---

[3] The Contract expressly disclosed that there was no public water or sewer available at the Subject Property. (R. p. 662.)

[4] 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.)

[5] The subject transaction was by far the largest real estate investment project that 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.)

Again, the Contract expressly disclosed, "[t]here is no public water or sewer at [the] subject property." (R. p. 662.) At their initial meeting with Southcoast, the bank's loan officer advised the Marshalls that Southcoast could loan 75% of the value of the Subject Property if public water and sewer were available but only 65% of the value of the Subject 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 Subject Property. (R. p. 251, line 25 – p. 253, line 19.)

From the outset, the Marshalls intended to form Sheep Island as a real estate holding company to take title to the Subject Property. In March of 2006, they formed Sheep Island 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 Contract's Due Diligence Period, uncertainty remained as to whether public water and sewer lines would be directed to the Subject Property. Nonetheless, Sheep Island did not exercise its Termination Right, paying Bar-Pen the non-refundable $40,000 due upon the expiration of the Due Diligence Period and also releasing to Bar-Pen 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.)

By "March [or] April of 2006," Sheep Island 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, Sheep Island learned that public water and sewer would not be directed to the Subject Property. (R. p. 259, lines 13-25; p. 413, line 16 – p. 414, line 5; p. 433, lines 15-20). Because Sheep Island's existing investors did not have sufficient

resources to take out a 65% loan, they found three other individuals that they believed could make up the shortfall: Cecil Curtis, John Bordine, and Steve Hill. Ultimately, and apparently unbeknownst to them, Bruce Marshall later disallowed Curtis and Bordine to be members of Sheep Island. (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. One of them did not submit his financial information until Wednesday, July 26th. (R. p. 413, line 1 – p. 415, line 2.) This left an unusually short amount of time for the bank to approve a commercial loan. 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, Sheep Island's real estate agent, Georgia Richard, had approached Bar-Pen's real estate agent, Mickey Rakes, about an extension of the closing deadline. There is no evidence in the record that Richard communicated to Rakes that the "water and sewer" issue related to financing. In fact, Richard testified that Bruce Marshall told her the loan had been approved on or about April 26, 2006 and that she immediately relayed this information to Rakes. (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.)

Rakes advised Richard that any problems with the "water and sewer" should have been addressed during the Contract's Due Diligence Period, but nonetheless communicated the extension request to Bar-Pen, and was thereafter authorized to offer Sheep Island 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, Rakes confirmed Bar-Pen's offer to grant Sheep Island 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 closing window from July 15th – July 31st, Bar-Pen's real estate attorney, Skipper Wooddy, provided Bar-Pen's closing documents, including the deed, to Sheep Island's attorney, Benjamin Lafond.[6] There were no problems with the closing documents that Wooddy provided. (R. p. 387, lines 1-7; p. 535, line 17 – p. 536, line 6.)

Having received no response from Sheep Island about the $50,000 Extension Offer, Bar-Pen instructed its agent, Rakes, to withdraw it. (R. p. 613, line 24 – p. 614, line 2.) Rakes communicated the withdrawal of the $50,000 Extension Offer by oral and email communications to Sheep Island's agent, Richard, on July 20, 2006. (R. pp. 682-83; p. 264, line 23 – p. 265, line 8; p. 534, line 14 – p. 535, line 16.) His email expressly stated that Bar-Pen was "ready, willing and able to close per the contract and will grant no extension of time." (R. p. 682.) It also advised that Bar-Pen had been requesting, without success, a closing date from Sheep Island for approximately three weeks, and again requested that a closing date be provided. (R. p. 682.) Thereafter, the closing was scheduled to take place at Sheep Island'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 Sheep Island 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 prepay the interest on the loan in advance – the loan that Sheep Island sought (and obtained) was an interest-only loan with a one-year term. (R. p. 401, line 2 – p. 404, line 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.)[7] Every addressee but Cecil Curtis – who, as noted above, was ultimately disallowed as a member of Sheep Island – 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 that Southcoast's commitment letter was issued on Friday, July 28, 2006. As a result, he did not read the letter until Monday, July 31st, 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, Marshall realized that Southcoast was providing a net 65% loan, which required Sheep Island's investors to come up with an additional $211,625 to collateralize the year's interest payments. (R. pp. 684-90.) Believing that Sheep Island could not get that money together in one day,[8] Marshall contacted Sheep Island's agent, Richard, and instructed her to seek an extension of the closing deadline from Bar-Pen. (R. p. 279, line 20 – p. 280, line 25.)

---

[6] Wooddy was also a member of Bar-Pen. (R. p. 269, lines 6-24.)

[7] 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.)

[8] Notably, Marshall did not speak with investor Hill, whose trial testimony indicated that he could have

Richard called Bar-Pen's, agent, Rakes "about the possibilit[y] of a day or two extension." Rakes advised Richard that it was his understanding that his client did not intend to grant any extension and told her to have Sheep Island's attorney, Lafond, contact Bar-Pen's attorney, Wooddy, to discuss the matter. (R. p. 622, lines 12-23.)

Following Richard's telephone call, Rakes himself contacted Lafond. According to Rakes, Lafond was busy with another large closing scheduled to take place that day and quickly discontinued their conversation, but not before confirming Richard's communication that the closing was uncertain and advising him that it might be a good idea to advise Wooddy of this development.[9] Rakes testified that he told Lafond to call Wooddy to discuss the matter, because the Contract made time "of the essence" and his client had made it clear to him it would not grant another extension. Rakes further clarified, "[a]gain, we're still talking about - - no one has said there's a problem with financing to us. We're still talking about the 30-day, what we're assuming something over water and sewer." (R. p. 623, lines 17 – p. 624, line 22.)

Rakes then called Wooddy and apprised him of the situation. The two planned to meet at Rakes's office at 3:30 p.m. to ride to Lafond's office for the 4:00 p.m. scheduled closing. (R. p. 626, line 16 – p. 627, line 8.) But the scheduled closing did not take place. (R. p. 627, lines 20-22.) The uncontested evidence presented at trial established that Bar-Pen was ready, willing, and able to close on July 31, 2006, but Sheep Island was not. (R. p. 368, line 21 – p. 369, line 1; p. 629, lines 20-22; pp. 691-92; pp. 788-89.)

After Wooddy learned that the closing would not take place, on July 31, 2006, he

---

obtained sufficient cash to close on July 31st. (R. p. 510, line 3 – p. 511, line 2.)

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

transmitted a letter via facsimile and email to Lafond, stating his understanding that the scheduled closing had been cancelled; making clear that Bar-Pen was ready, willing, and able to close; and advising that the Contract was terminated as a result of Sheep Island'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 Wooddy's stated understanding of Sheep Island's default, Lafond sent Wooddy an email advising that he would have a check for $50,000 – representing consideration for a 30-day extension – delivered to Wooddy's office the next morning. Wooddy replied, stating that the $50,000 Extension Offer had been withdrawn ten days earlier and that 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 Wooddy. (R. p. 538, line 24 – p. 539, line 25; p. 692.)

According to Richard, 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, Richard called Rakes, 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) (emphasis added.) Bar-Pen refused to grant an extension. At no time after July 31, 2006 did Sheep Island attempt to schedule a closing or otherwise tender performance.

---

p. 389, line 10.)

ARGUMENT[10]

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

A. The Court of Appeals erred in finding that the evidence supported more than one reasonable inference regarding whether the No Fault Extension Agreement was invoked automatically or whether notice was required.

Of course, 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 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,[11] 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

[10] Bar-Pen incorporates herein by reference the facts stated above where relevant to its argument.
[11] McDuffie v. McDuffie, 313 S.C. 397, 399, 438 S.E.2d 239, 241 (1993).

(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 that that sole contractual provision upon which Sheep Island's case is founded was not in any way raised as an issue between the parties until April of 2007, some eight months after the closing deadline and seven months after Sheep Island brought suit pursuing a completely different theory of an alleged breach of the Contract. Indeed, Lafond, Sheep Island's attorney, who tendered a $50,000 check to Bar-Pen the day after the scheduled closing in an attempt to buy an extension – an extension to which Sheep Island would only later, in April of 2007, claim that it was automatically entitled – admitted that, as of August 15, 2006, he did not even know that the No Fault Extension Agreement was a part of the Contract. (R. p. 382, line 23 – p. 383, line 8.)

Construction of the No Fault Extension Agreement so as to allow it to be risen from the dead by Sheep Island and used as a sword against Bar-Pen many months after Sheep Island's contracted-for time for performance had passed is patently absurd and inequitable – indeed, from Bar-Pen's perspective, it is akin to being placed on "double-secret probation," whereby it is cited after-the-fact for alleged noncompliance with a provision that only applied if certain facts occurred, those facts were within the peculiar knowledge of Sheep Island, were never communicated to Bar-Pen, and Sheep Island never requested that Bar-Pen comply with the provision during the course of performance. Such cannot be countenanced by this Court. *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 No Fault Extension Agreement. The time of closing was expressly made "of the essence" both in the No Fault Extension Agreement itself and elsewhere in the Contract. The No Fault Extension Agreement 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: that "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." Otherwise, the need was not justifiable and simply reflected the party's default with respect to its contractual obligations. A contrary interpretation would render the conditions precedent meaningless.

Reading the Contract as a whole, it is clear that the No Fault Extension Agreement 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 condition of the Contract had not come to pass. 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 No Fault Extension Agreement 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 July 31, 2006, placing Bar-Pen at the mercy of Sheep Island's unvoiced intentions and, thereby, allowing Sheep Island, without consequence, to withhold more than $2,500,000 from Bar-Pen 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."

To be sure, 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 Bar-Pen never took any action to impair Sheep Island's right to avail itself to the No Fault Extension Agreement or any other benefit to which it was entitled under the Contract; rather, Sheep Island failed to protect its own interests. While the implied covenant of good faith and fair dealing prohibited Bar-Pen from doing anything to impair Sheep Island's rights to receive benefits under the Contract, it did not require Bar-Pen to invoke the No Fault Extension Agreement for the benefit of Sheep Island.

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

B. The Court of Appeals erred in finding that the evidence supported a reasonable inference that Bar-Pen'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 Bar-Pen's attorney, Wooddy, to Sheep Island's attorney, Lafond,[12] convey the necessary intention of nonperformance to constitute a repudiation of the Contract. The letter expressly stated that it was written because of Sheep Island's cancellation of the closing that was scheduled to take place on the final day of the closing period. It made clear Bar-Pen's understanding – which is supported by the plain language of the Contract – that closing was to take place on or before July 31, 2006 with "Time Being of the Essence" and that, while, Bar-Pen was "ready, willing and able to close" the transaction

[12] (R. p. 691.)

on time, Sheep Island was not.[13] And, of course, Lafond never contradicted or challenged the letter; rather, he tendered Wooddy a $50,000 check attempting to buy an extension.

This is consistent with the July 20th correspondence from Bar-Pen's agent, Rakes, to Sheep Island's agent, Richard, withdrawing the $50,000 Extension Offer and expressly advising that Bar-Pen "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 No Fault Extension Agreement – if Sheep Island invoked it. Similarly, Bar-Pen's refusal to "grant" any extension outside of the Contract did not refer to or impact the No Fault Extension Agreement, 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 less an unequivocal, declaration of Bar-Pen's intention not perform or not to recognize any rights Sheep Island had under the No Fault Extension Agreement – again, it must be remembered that Sheep Island never even raised the No Fault Extension Agreement to Bar-Pen as an issue until it sought to amend its complaint in April of 2007 and that the only extension-related communications between Sheep Island and Bar-Pen through July 31st pertained to the $50,000 Extension Offer. As stated in the letter, termination of the Contract was only – and expressly – in response to Sheep Island's breach (i.e., default) by cancelling the closing that was supposed to take place on July 31, 2006. It was not a repudiation of the Contract by Bar-Pen.

[13] 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

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 No Fault Extension Provision 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)."

Bar-Pen 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.) The Court of Appeals erred in failing to address these issues in its opinion and in response to Bar-Pen'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 No Fault Extension Provision were not met.

A. The conditions precedent to the operation of the No Fault Extension Agreement were not met because all contractual contingencies had been satisfied.

An essential premise of Sheep Island's argument is that the financing contingency had not been satisfied. The undisputed record reveals, however, that Sheep Island's inability to timely close was not occasioned by its lack of financing, but by its inability to meet the terms of the financing that it, in fact, had.

The Contract was not contingent upon Sheep Island obtaining a loan with an 80% loan-to-value ratio, only that the loan it decided to apply for within the loan application

---

time." Williams v. McManus, 90 S.C. 490, 495, 73 S.E. 1038, 1048 (1912); (App. p. 1220.)

period would be for no more than this ratio. The record is clear that Sheep Island was aware that 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 Sheep Island applied for, received, and accepted a loan within parameters of the Contract, and that the loan commitment letter clearly delineated the financial obligations Sheep Island 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.)

Under any reasonable view of the evidence, financing was not an unsatisfied contingency, and the No Fault Extension Agreement was unavailing to Sheep Island. The Court of Appeals should have affirmed the trial court for this reason.

B. The conditions precedents to the operation of the No Fault Extension Agreement were not met because Sheep Island was at fault in not being able to timely close.

As revealed by the undisputed record, Sheep Island'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 it sought and accepted. Moreover, the evidence revealed that Sheep Island: 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 Bar-Pen, for instance, the reason for its need for an extension; failed to ensure that 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 agree-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 Bar-Pen – 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 Sheep Island's lender. Southcoast issued only one commitment letter – which Sheep Island accepted – and it did not change. (R. pp. 684-90.) Sheep Island simply allowed itself to be in a position where it ran short on time and did not take the steps to necessary to timely meet the terms of the commitment letter.

The alleged change with respect to the financing available to Sheep Island is tied to the availability of water and sewer at the Subject Property. The absence of public water and sewer at the property and its impact upon the financing available to Sheep Island from Southcoast was known early on. When Sheep Island allowed the Due Diligence Period to pass without terminating the Contract, even though no water and sewer had been made available to the Subject Property, it necessarily accepted the risk that no public water and sewer would be made available and any related consequences. In fact, the Contract expressly provided that, upon the expiration of the due diligence period without Sheep Island's exercise of its termination right, Sheep Island "shall be deemed to have accepted the Property 'as-is.'" (R. p. 662.)

Any contention by Sheep Island that its fault absolved by a reasonable belief that water and sewer would be directed to the Subject Property is without merit. 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.") Even assuming, *arguendo*, that Sheep Island reasonably believed that water and sewer would be directed to the Subject Property, it nonetheless bore the risk that it would not.

Under any reasonable view of the evidence, Sheep Island was not without fault in failing to close within the time period agreed upon in the Contract. 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 Sheep Island did not timely serve its notice of appeal.

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

Assuming, *arguendo*, that Sheep Island did not receive written notice of the trial court's entry of the directed verdict in favor of Bar-Pen, it is beyond dispute that the verdict was directed in open court on March 13, 2008 with all parties and their counsel present and that Sheep Island 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, Sheep Island 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 that 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*, that Sheep Island'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 Bar-Pen 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.").

Accordingly, Sheep Island 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 Sheep Island's appeal, and 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 Bar-Pen'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). 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, Bar-Pen submits that the inconsistency between Person and the present case lends support to its request for this Court to exercise discretionary review here.

CONCLUSION

For the reasons stated, Bar-Pen asks the Court to grant this petition for a writ of certiorari, to reverse the decision of the Court of Appeals, and to restore the trial court's properly directed verdict in its favor.

Respectfully submitted,

ALTMAN & COKER, LLC
Charles S. Altman
Meredith L. Coker
P.O. Box 265
Charleston, South Carolina 29402
Telephone: (843) 853-9907
Facsimile: (843) 853-9838
and
YOUNG CLEMENT RIVERS, LLP

By: _____
William L. Howard
Russell G. Hines
P.O. Box 993
Charleston, South Carolina 29402
Telephone: (843) 724-6669
Facsimile: (843) 579-1392
Counsel for the Petitioner

Charleston, South Carolina

Dated: 12/17/10

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Berkeley County
Court of Common Pleas

Thomas L. Hughston, Jr., Circuit Court Judge

RECEIVED
DEC 20 2010
S.C. Supreme Court

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

Sheep Island Plantation, LLC,

Respondent,

v.

Bar-Pen Investments, LLC,

Petitioner.

PROOF OF SERVICE

ALTMAN & COKER, LLC
Charles S. Altman
Meredith L. Coker
P.O. Box 265
Charleston, South Carolina 29402
Telephone: (843) 853-9907
Facsimile: (843) 853-9838
and
YOUNG CLEMENT RIVERS, LLP
William L. Howard
Russell G. Hines
P.O. Box 993
Charleston, South Carolina 29402
Telephone: (843) 724-6669
Facsimile: (843) 579-1392
Counsel for the Petitioner

I, Russell G. Hines, of Young Clement Rivers, LLP, counsel for the petitioner above named, do hereby certify that I have served the **Petition for a Writ of Certiorari** in the above-captioned case on the respondent, Sheep Island Plantation, LLC, by depositing a copy of the same in the United States Mail, postage prepaid, on December 17, 2010, addressed as follows to its counsel of record:

FUTERAL & NELSON, LLC
Stephan V. Futeral, Esquire
Thomas C. Nelson, Esquire
1004 Anna Knapp Blvd., 2nd Floor
Mt. Pleasant, SC 29464

I further certify that I have filed said **Petition for a Writ of Certiorari** with the Court of Appeals, along with this **Proof of Service**, by depositing a copy of the same in the United States Mail, postage prepaid, on December 17, 2010, addressed as follows:

The Honorable Tanya Gee
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

YOUNG CLEMENT RIVERS, LLP

By: _____
Russell G. Hines

Charleston, South Carolina

Dated: 12/17/10

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Thomas L. Hughston, 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.

RESPONDENT'S RETURN TO PETITION FOR WRIT OF CERTIORARI

Stephan V. Futeral
S.C. Bar ID 66427
Thomas C. Nelson
S.C. Bar ID 71178
Post Office Box 1543
Mt. Pleasant, South Carolina 29465-1543
Telephone (843) 284-5500
Facsimile (843) 284-5501
email to: sfuteral@charlestonlaw.net
email to: tnelson@charlestonlaw.net
Attorneys for Respondent

TABLE OF CONTENTS

QUESTIONS PRESENTED

I. Did the Court of Appeals correctly reverse the lower court's grant of directed verdict where the evidence contained more than one inference (A) whether the extension clause in the contract was invoked and (B) whether Petitioner repudiated the contract?

II. Did the Court of Appeals correctly reverse the lower court's grant of directed verdict because it is for a jury to decide (A) whether a contractual contingency remained unsatisfied, thus entitling Respondent to its 15-day extension and (B) whether Respondent was at fault in delaying the closing so that it is not entitled to an extension as provided for in the contract?

III. Did the Court of Appeals correctly decide that it had appellate jurisdiction over this matter because Respondent timely served its notice of appeal?

STATEMENT OF THE CASE

On or about August 22, 2006, Sheep Island Plantation, LLC (hereinafter referred to as "Respondent")[1] brought this action against Bar-Pen Investments, LLC (hereinafter referred to as "Petitioner") for specific performance and breach of contract arising out of Petitioner's sale of a 101-acre tract of land to Respondent. [R. p. 17; p. 32] Petitioner answered, asserted defenses of waiver, estoppel, and laches, and counterclaimed for breach of contract. [R. p. 22; p. 38]

This case was tried before the Honorable Thomas L. Hughston, Jr. on March 10 – 13, 2008. At trial, Respondent presented actual damages of $606,000.00, plus $46,856 in attorney's fees and costs. [R. p. 470, lines 2 – 3; p. 496, lines 16 – 20; p. 681 – 687] At trial, Petitioner moved for a directed verdict. [R. p. 652, line 25 – p. 653, line 4] The trial court granted Petitioner's directed verdict motion and issued a written Form 4 Order. [R. p. 666, lines 11 – 22; p. 1] Thereafter, on March 24, 2008, Respondent filed a motion pursuant to Rule 59 of the South Carolina Rules of Civil Procedure. [R. p. 49 – 56] The trial court denied Respondent's motion. [R. p. 677, line 18 – p. 678, line 23; p. 2] On May 15, 2008, Respondent served its notice of appeal on Petitioner.

On August 4, 2010, the Court of Appeals reversed the trial court's decision to direct a verdict and remanded the case for trial. [R. p. 1225 – 1226] Petitioner moved for a rehearing, and the Court of Appeals denied rehearing on November 2, 2010. [R. p. 1227 – 1269] The petition for a Writ of Certiorari to this Court followed.

---

[1] E. Bruce Marshall and Jeremy S. Marshall originally entered into the contract with Petitioner. [p. 681 – 687] Then, in March 2006, the Marshalls organized Respondent Sheep Island Plantation, LLC. [R. p. 244, lines 2 – 7; p. 249, lines 1 – 9; p. 692 – 693] The Marshalls assigned their rights in the contract to Respondent in March 2006. [R. p. 244, line 8 – p. 245, line 14; p. 247, line 3 – p. 248, line 5]

FACTS

On December 14, 2005, Respondent entered into a contract with Petitioner to purchase real estate from Petitioner. [R. p. 681 – 687] One of Petitioner's members, Aubrey Wooddy, Esquire, is a seasoned real estate attorney and the person through whom Petitioner conducted its business. [R. p. 549, line 16 – p. 550, line 4] Petitioner drafted the sales contract. [R. p. 230, lines 4 – 14; p. 251, lines 5 – 21; p. 369, lines 12 – 13; p. 631, lines 2 – 4] Petitioner set the original closing date for July 31, 2006. [R. p. 685, ¶ 34] Among other things, the contract contained the following provision:

> 33. 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. Closing shall occur within this time extension, but in no event shall closing occur later than the above extension date. Time is of the essence.

[R. p. 685] (emphasis in original).

The contract was contingent upon Respondent obtaining financing. [R. p. 681, ¶ 6] Respondent applied for a 75% loan. [R. p. 233, line 19 – p. 235, line 8; p. 263, line 17 – p. 264, line 2; p. 415, line 25 – p. 416, line 11; p. 688; p. 820 – 821] The loan officer from Southcoast Community Bank (the "lender") testified that Respondent diligently pursued financing and promptly provided information to the lender. [R. p. 417, line 25 – p. 419, line 3; p. 249, line 25 – p. 250, line 21; p. 269, lines 3 – 12; p. 410, lines 8 – 17] The lender continually assured Respondent that the loan would be issued before the closing date. [R. p. 264, line 25 – p. 265, line 5; p. 321, lines 18 – 22] The lender also assured Respondent that the loan would be for 75% of the purchase price. [R. p. 267, lines 11 – 23] Respondent was prepared to bring the remaining 25% ($632,000.00) prior

to closing, and the lender informed Respondent that Respondent would not have to deposit 25% until the day of closing. [R. p. 268, lines 6 – 20]

The 75% loan was based on an understanding by the lender that the land would be developed as a residential community. [R. p. 411, line 20 – p. 412, line 10; p. 266, lines 12 – 14] Berkeley County planned to direct water and sewer lines to the property, which was essential to the property's residential development. [R. p. 262, lines 4 – 24] However, through no fault of Respondent, Berkeley County officials re-directed the installation of the water and the sewer lines away from the property in early July 2006. [R. p. 262, line 4 – p. 263, line 8; p. 412, lines 11 – 14; p. 459, lines 1 – 25] Therefore, in early July 2006, the lender reassessed the transaction as one for "raw" land, instead of residential development, and determined it would only issue a loan for 65% of the purchase price. [R. p. 265, line 23 – p. 266, line 20; p. 459, lines 1 – 25] Thus, the lender required Respondent to raise an additional 10% ($253,000.00) of the purchase price. Nevertheless, Respondent was prepared to pay 35% ($885,000.00) of the purchase price to closing. [R. p. 266, lines 10 – 20; p. 268, line 6 – p. 269, line 22; p. 338, line 17 – p. 351, lines 7 – 19; p. 806]

In early July 2006, Respondent's realtor informed Petitioner's realtor about the water and sewer line problem and requested an extension to the original closing date of July 31, 2008. [R. p. 634, line 3 – p. 636, line 7] On or about July 13, 2006, without mention of the 15-day extension in the parties' agreement, Petitioner replied by offering to sell Respondent a 30-day extension for $50,000, which was non-applicable to the purchase price. [R. p. 700 – 701; p. 273, lines 12 – 23] On July 20, 2006, Petitioner revoked its offer to sell an extension. Importantly, Petitioner also informed Respondent

that Petitioner "will grant no extension of time." [R. p. 702 – 703; p. 275, line 1 – p. 276, line 1]

On Friday, July 28, 2006, one business day before closing, the lender issued its commitment letter.[2] [R. p. 704 – 710] In the commitment letter, the lender changed the loan's terms in two significant ways. First, instead of 65%, the loan was for 100%, and Respondent would deposit 35% with the lender. [R. p. 285, lines 8 – 23; p. 704 – 710] Second, and more importantly, the lender required Respondent to deposit one year's interest ($211,625.00) in advance into a money market account with the lender. [R. p. 286, line 19 – p. 287, line 12; p. 321, lines 8 – 10; p. 704 – 710] Thus, one business day before closing, Respondent learned it needed $1,096,625.00 to close instead of $885,000.00, which was a difference of $211,625.00. With such short notice, Respondent could not close on July 31, 2006, but it could close within a day or two after it made liquid an additional $211,625.00. [R. p. 336, lines 4 – 6; p. 521, lines 3 – 5; p. 450, line 7 – p. 451, line 2]

On July 21, 2006, Respondent called Petitioner's realtor and left the realtor a voice mail message regarding the closing. [R. p. 792, 07/21/2006, 09:30 note, 12:15 note] After listening to Respondent's message, Petitioner's realtor contacted Petitioner's member, Aubrey Wooddy, Esquire, and specifically asked Mr. Wooddy "about the extension in the contract." [R. p. 792, 07/21/2006, 12:15 note] Mr. Wooddy told his realtor that if Respondent tried to use the extension clause, Petitioner would "litigate it."

[2] The contract gave Petitioner the option to terminate the contract if Respondent did not provide it with satisfactory written loan approval within 45 days. [R. p. 681, ¶ 6] However, Petitioner admitted that it waived this provision of the contract. [R. p. 575, line 7 – p. 576, line 11; p. 242, line 12 – p. 244, line 1; p. 648, line 7 – p. 649, line 9; p. 681 – 687; p. 691]

[R. p. 792, 07/21/2006 12:15 note; p. 638, line 2 – p. 641, line 6] Thereafter, on July 21, 2006, Petitioner's realtor returned Respondent's call. [R. p. 792, 07/21/2006, 13:30 note] According to Petitioner's realtor, Respondent "asked about a day or two extension," and Petitioner's realtor replied that Petitioner "made it clear there would be no extension . . . ." [R. p. 792, 07/21/2006 13:30 note]

On July 31, 2006, Respondent's realtor contacted Petitioner's realtor and advised him that the lender had required additional sums, and that Respondent needed "a couple of days" to close. [R. p. 364, lines 16 – 25; p. 370, lines 21 – 22] Petitioner's realtor told Respondent's realtor to have Respondent's closing attorney contact Petitioner. [R. p. 640, line 15 – p. 641, line 6]

On either Friday, July 28, 2006 or Monday, July 31, 2006, Respondent's closing attorney contacted Petitioner and informed Petitioner that Respondent was not able to close on July 31, 2006 because of the lender's last minute changes to Respondent's loan. [R. p. 380, line 21 – p. 382, line 6; p. 394, lines 7 – 25] The closing attorney informed Petitioner that Respondent could secure the additional $211,625.00 it needed to close. [R. p. 380, line 21 – p. 382, line 6] The closing attorney then asked Petitioner for "a couple of days" to close, but Petitioner denied Respondent an extension. [R. p. 380, line 21 – p. 382, line 6]

On July 31, 2006, Petitioner informed Respondent's closing attorney by facsimile and by email that Petitioner was terminating the contract. [R. p. 711] On August 1, 2006, Respondent attempted to deliver a $50,000 check to Petitioner to express its desire to close. [R. p. 294, line 16 – p. 295, line 12; p. 340, lines 7 – 9; p. 386, lines 15 – 21; p. 818] Petitioner returned the $50,000 check on August 1, 2006 and stated in writing that it

"has terminated the agreement between the parties because of [Respondent's] failure to close in a timely manner." [R. p. 712; p. 294, line 12 – p. 295, line 24]

On August 2, 2006, Respondent's realtor again contacted Petitioner's realtor and stated that Respondent was ready to close and pleaded with Petitioner's realtor for the closing to take place. [R. p. 360, line 20 – p. 362, line 3] Petitioner's realtor informed Respondent's realtor that the transaction would not close and that "[one of Petitioner's members] is a lawyer. He will go to trial and he have [sic] a lot of money. He don't [sic] care." [R. p. 364, lines 2 – 4]

ARGUMENTS

Standard of Review

> In ruling on motions for directed verdict or judgment notwithstanding the verdict, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom **in the light most favorable** to the party opposing the motions. The trial court must deny the motions when the evidence yields more than one inference or its inference is in doubt.

Parrish v. Allison, 656 S.E.2d 382, 388 (Ct. App. 2007) (emphasis added).

> When considering directed verdict motions, the trial court does not have the authority to decide credibility issues or to resolve conflicts in the testimony or evidence. The issue must be submitted to the jury whenever there is material evidence tending to establish the issue in the mind of a reasonable juror.

Id.

I. The Court of Appeals correctly reversed the lower court's grant of directed verdict where the evidence contained more than one inference whether the extension clause in the contract was invoked and whether Petitioner repudiated the contract.

The Court of Appeals held that:

> After a careful review of the trial transcript and exhibits in the light most favorable to [Respondent], we find some evidence to support [Respondent's] breach of contract claim. In particular, the evidence supports more than one inference regarding whether the Paragraph 33 extension clause is invoked automatically, or whether notice is required. Further, evidence exists to support an inference that the letter of termination [Petitioner] sent to [Respondent] on July 31, 2006 constitutes a repudiation. In light of this evidence, the trial court should have denied [Respondent's] motion for directed verdict.

[R. p. 1225 – 6]

(A) Respondent was entitled to a 15-day extension to close pursuant to Paragraph 33 of the contract where both before and after the closing date, Respondent repeatedly notified Petitioner that the lender had changed the terms of the loan at the last minute and that Respondent required an additional day or two to close and where Petitioner repudiated the contract prior to the 15-day extension becoming ripe.

In granting Petitioner's directed verdict motion, the lower court held that Respondent failed to give "clear, unequivocal" notice to Petitioner to invoke the 15-day extension under paragraph 33 of the parties' contract. [R. p. 662, line 10 – p. 664, line 5; p. 677, line 18 – p. 678, line 5] In essence, the lower court rewrote the parties' agreement to require formal notice from Respondent. However, under South Carolina law, the lower court had no right to impose additional terms or conditions on Respondent.

Parties have the right to make their own contracts. Torrington Co. v. Aetna Cas. & Sur. Co., 264 S.C. 636, 643, 216 S.E.2d 547, 550 (1975); MailSource, LLC v. M.A. Bailey & Assocs., 356 S.C. 363, 369, 588 S.E.2d 635, 638-39 (Ct.App.2003). When the language of a contract is clear, explicit, and unambiguous, the language of the contract

alone determines the contract's force and effect, and the court must construe it according to its plain, ordinary, and popular meaning. Moser v. Gosnell, 334 S.C. 425, 430, 513 S.E.2d 123, 125 (Ct.App.1999). "Succinctly stated, a court has no authority to rewrite a contract and impose unwanted obligations and terms under the guise of specific performance or judicial construction." Lowcountry Open Land Trust v. Charleston Southern University, ---- S.E.2d ----, 6, 2007 WL 4754032 (Ct. App. 2007) (emphasis added).

Here, paragraph 33 of the parties' contract provided that "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."[3] [R. p. 685, ¶ 33] Aside from this language, nothing in the contract requires Respondent give any notice or the manner or procedure in which any notice should be given. Nevertheless, both before and after the closing date, Respondent repeatedly notified Petitioner that the lender had changed the terms of the loan at the last minute and that Respondent required an additional day or two to close. In July 2006, Respondent's realtor informed Petitioner's realtor about the water and sewer problem and requested an extension to the original closing date of July 31, 2006. [R. p. 634, line 3 – p. 636, line 7] On July 21, 2006, Respondent asked Petitioner's realtor "about a day or two extension." [R. p. 640, line 15 – p. 641, line 6] On July 31, 2006, Respondent's realtor again contacted Petitioner's realtor and advised that the lender had required additional sums to close, and therefore, Respondent needed "a couple of days" to close. [R. p. 364, lines 16 – 25; p.

[3] Whether Respondent was "at fault" is discussed in Section II.B, *infra*.

370, lines 21 – 22] On either Friday, July 28, 2006 or Monday, July 31, 2006, Respondent's closing attorney contacted Petitioner and informed Petitioner that Respondent was not able to close on July 31, 2006 because of the lender's last minute change in the loan's terms and that Respondent needed "a couple of days" to close. [R. p. 380, line 21 – p. 382, line 6; p. 394, lines 7 – 15] On August 2, 2006, Respondent's realtor again contacted Petitioner's realtor and stated that Respondent was ready to close and pleaded for the closing to take place. [R. p. 360, line 20 – p. 362, line 3]

Petitioner argues that Respondent did not invoke the contract's extension clause until April 2007 when Respondent raised this issue via an amended pleading during the course of litigation. However, Petitioner's reasoning is in error because it ignores Petitioner's duty to act in good faith and fair dealing regarding Respondent's obvious and repeated requests for an extension where evidence exists to show that Petitioner was aware of the extension clause.

Every contract contains an implied covenant of good faith and fair dealing that neither party will do anything which will injure the rights of the other to receive the benefits of the parties' agreement. Shiftlet v. Allstate Ins. Co., 451 F. Supp. 2d 763 (D.S.C. 2006). Here, Respondent presented evidence at trial showing that Petitioner acted in bad faith and unfairly regarding Respondent's attempts to obtain an extension. Here, as discussed *supra*, Petitioner was aware both prior to and after closing that Respondent needed an extension to close and of the reason why Respondent needed an extension. Respondent also presented evidence that prior to any time for performance Petitioner was aware of and intended to "litigate" the 15-day extension clause if Respondent attempted to use it. [R. p. 792, 07/21/2006 12:15 entry] Therefore, the lower

court erred in directing a verdict for Petitioner when there was a question of fact for the jury whether Petitioner breached the implied covenant of good faith and fair dealing, and thus breached the contract, by purposefully disregarding paragraph 33 and by refusing to allow Respondent to extend the closing date.

To the extent the trial court's ruling suggests that Respondent needed to specifically refer to paragraph 33 as a condition precedent to invoke the 15-day extension clause, such ruling is in error. In South Carolina, "a condition precedent may not be implied when it might have been provided for by the express agreement." Worley v. Yarborough Ford, Inc., 317 S.C. 206, 452 S.E.2d 622 (Ct. App. 1994) (citing 17A C.J.S. Contracts § 338 (1963); 17A Am.Jur.2d Contracts § 471 (1991)). Here, paragraph 33 clearly, explicitly, and unambiguously provides that "[i]f the transaction has not closed within the stipulated time limit . . . then both parties agree to extend this agreement . . . ." [R. p. 685, ¶ 33] (emphasis added). Given the plain meaning of the phrase "has not closed," the extension could not be triggered until after the original closing date of July 31, 2006.

Even assuming *in arguendo* that Respondent was required to give Petitioner some specific form of notice, such notice was not due until after July 31, 2006. However, as discussed *infra*, there is a question of fact whether Petitioner repudiated the contract before the closing date on July 31, 2006, thereby rendering notice of an extension, formal or otherwise, superfluous.

Because the contract is clear and unambiguous and because there is no notice requirement to invoke an extension of the closing date, the lower court erred in rewriting the parties' agreement to require some form of notice, formal or otherwise. To the extent

Respondent needed to provide some form of notice, there is a question of fact for the jury whether Respondent's actions and communications, directly and through its agents, constituted sufficient notice. Finally, there is a question of fact whether Petitioner breached its covenant of good faith and fair dealing by intending to litigate any attempt by Respondent to extend the closing date. Accordingly, this Court should affirm the Court of Appeals' decision and remand this case for trial.

(B) Whether Petitioner repudiated the contract is for a jury to decide where repeatedly denied, both orally and in writing, any extension under the parties' agreement.

At trial, Respondent argued that Petitioner repudiated the parties' contract. The lower court stated, "I never have understood this idea of repudiation." [R. p. 660, lines 19 – 20] Without explanation or application of law to the facts of this case, the lower court held that "as a matter of law," Petitioner did not repudiate the contract. The Court of Appeal correctly reversed finding that more than one inference is supported by evidence that Petitioner repudiated the agreement.

Under South Carolina law, "[r]epudiation of a contract means refusal to perform a duty or obligation owed to the other party." Ralph King Anderson, Jr., *South Carolina Requests to Charge – Civil*, 2002 §-19-21. "Repudiation includes a refusal or declination to perform in accordance with the contract." Id. at § 19-18.

> Repudiation of a contract before the time for performance, which amounts to a refusal to perform it at any time, gives the adverse party the option to treat the entire contract as broken and to sue immediately for damages as for a total breach. . . . There is no necessity in such case for a tender of performance, or compliance with conditions precedent, or waiting for the time of performance to arrive . . . . No notice need be given that the repudiation is treated as a breach. . . .

Id. at § 19-19. *See also* Harmon v. Aughtry, 226 S.C. 371, 85 S.E.2d 284 (1955) (wherein the court stated, in *dicta*, that when a promisor repudiates an agreement, such conduct may be treated as an anticipatory breach and an action for appropriate relief may be immediately maintained by the promisee against the promisor).

At trial, Respondent presented evidence that from July 20, 2006 until after July 31, 2006, Petitioner repeatedly repudiated the contract by denying, both orally and in writing, any extension under the parties' agreement. On July 20, 2006, Petitioner's realtor informed Respondent by email that Petitioner "will grant no extension of time." [R. p. 702; p. 275, line 1 – p. 276, line 1] On July 21, 2006, after Respondent requested an extra "day or two," Petitioner's realtor told Respondent that Petitioner would not grant any extensions. [R. p. 638, line 2 – p. 641, line 6; R. p. 792, 07/21/06 13:30 entry] On either Friday, July 28, 2006 or Monday, July 31, 2006, Petitioner denied the request made by Respondent's closing attorney for "couple of days" to close. [R. p. 380, line 21 – p. 382, line 6; p. 394, lines 7 – 15; p. 396, lines 1 – 9] On July 31; 2006, Petitioner formally terminated the contract via facsimile and email. [R. p. 711] On August 2, 2006, Petitioner's realtor informed Respondent's realtor that "[one of Petitioner's member's] is a lawyer. He will go to trial and he have [sic] a lot of money. He don't [sic] care." [R. p. 344, lines 2 – 4]

The evidence shows that Petitioner was prepared to litigate *any* extension whatsoever, including one under the terms of the parties' agreement. [R. p. 792, 07/21/2006 12:15 note] Regardless, these were matters for a jury to decide.

Considering all of this evidence in the light most favorable to Respondent, there were questions of fact for the jury regarding whether Petitioner repudiated the contract, this Court should affirm the Court of Appeals remand Respondent's claims for trial.

II. The Court of Appeals correctly reversed the lower court's grant of directed verdict because it is for a jury to decide (A) whether a contractual contingency remained unsatisfied, thus entitling Respondent to its 15-day extension, and (B) whether Respondent was at fault in delaying the closing so that it is not entitled to an extension as provided for in the contract.

(A) Whether a contractual contingency remained unsatisfied if for a jury to decide where two (2) days before the scheduled closing, the lender imposed closing conditions that Petitioner could not meet without a brief extension of time.

Petitioner argues that Respondent did not have a lack of financing, but instead had an "inability to meet the terms of financing that it, in fact, had." The parties' agreement provides: "[Respondent]'s obligation under this agreement is contingent upon [Respondent] obtaining said loan." [R. p. 1124, ¶ 6] "Obtain" is defined as "to gain or attain possession or disposal of usu. by some planned action or method." Webster's Third New International Dictionary 1559 (2002). Here, Respondent never obtained any loan because the lender never issued a loan. Under the plain language of the contract, the contingency was unsatisfied. Whether the closing conditions imposed by the lender in the offer it made for financing were attainable by Respondent is for a jury to decide.

(B) Whether Respondent was at fault in delaying the closing so that it is not entitled to an extension as provided for in the contract is for a jury to decide where Respondent diligently pursued financing at all times and where the lender imposed additional, unattainable closing conditions just one business day prior to closing.

Fault is a question of fact for the jury. Jones v. Sun Pub. Co., 278 S.C. 12, 292 S.E.2d 23 (1982). At trial, Respondent presented evidence that it was not at fault in

obtaining financing, thus precluding it from utilizing the extension provision in the contract. Pursuant to the terms of the contract, immediately after its execution, Respondent applied for a loan with BB&T. [R. p. 232, line 16 – p. 233, line 13] BB&T declined to issue Respondent a loan. [R. p. 233, lines 14 – 18] Then, within the 30-day period as defined in the contract, Respondent applied for a loan with Southcoast Community Bank (the "lender"). [R. p. 233, line 19 – p. 236, lines 6; pp. 820 – 821] The loan application was for 75% of the value of the property. [R. p. 263, line 17 – p. 264, line 2]

Although Respondent did not provide written loan approval to Petitioner within 45 days, as provided for in paragraph 6 of the contact, Petitioner waived its right to terminate the contract under this provision. Waiver is a voluntary and intentional abandonment or relinquishment of a known right by a party who possessed actual or constructive knowledge of its rights. Janasik v. Fairway Oaks Villas Horizontal Prop. Regime, 307 S.C. 339, 344, 415 S.E.2d 384, 387-88 (1992). After not receiving this loan approval, instead of electing to terminate the contract under paragraph 6, Petitioner accepted and retained a $40,000 nonrefundable deposit from Respondent. [R. p. 242, lines 15 – p. 243, line 6; p. 649, lines 5 – 6; p. 691] Petitioner also admitted that it waived its rights under paragraph 6. [R. p. 576, lines 2 – 25]

The evidence shows that Respondent diligently pursued financing at all relevant times. Initially, Respondent added two additional partners for financial strength. [R. p. 238, lines 6 – 24] Respondent formed itself into a limited liability company. [R. p. 244, lines 2 – 7; p. 249, lines 1 – 9; p. 692 – 693] Respondent had constant communication with the lender and responded promptly to all requests for information. [R. p. 249, line

14 – p. 250, line 21; p. 417, line 25 – p. 419, line 24] Respondent incurred substantial costs in performing due diligence on the land, including a series of expensive engineering tests. [R. p. 252, line 24 – p. 261, line 16; pp. 694 – 697] Throughout the contract term, Respondent received assurances from the lender that the loan would be issued. [R. p. 264, line 25 – p. 265, line 5]

Water and sewer were an issue regarding the loan because their availability to the property would determine whether the bank would lend either 65% or 75% of the value of the property. [R. p. 429, lines 8 – 18] At all relevant times, Respondent reasonably believed that water and sewer would be directed to the property. [R. p. 262, lines 4 – 24] Respondent was in constant contact with the Berkeley County officials to oversee this process. [R. p. 262, lines 4 – 16] However, the water and sewer issues remained unresolved for several months. [R. p. 412, lines 11 – 14] As the closing date approached, around June or July 2006, Respondent learned that water and sewer would not be directed to the property and that the lender would require additional money up front to issue the loan. [R. p. 262, line 20 – p. 263, line 16; R. p. 524, line 21 – p. 525, line 15] Ultimately, Respondent learned that it would have to put down $885,000 (65% loan) instead of $632,000 (75% loan) to obtain the financing for this transaction. [R. p. 280, line 19 – p. 282, line 14] Therefore, in June or July 2006, Respondent added a fifth member, Steve Hill, who had the financial strength to obtain this loan by himself. [R. p. 317, lines 7 – 20; p. 421, line 10 – p. 422, line 5] After performing due diligence as an investor, Mr. Hill brought his financial statements to the lender. [R. p. 516, line 12 – p. 517, line 23] Thereafter, Respondent was prepared to have $885,000 available at closing. [R. p. 281, line 13 – p. 282, line 9] Petitioner's reliance on Moon v. Jordan, 301

S.C. 161, 164 390 S.E.2d 488, 490 is misplaced because in Moon, the lender was prepared to lend the money to the buyer on the closing date and there was no "fault based" extension clause to the contract as there is in this case.

On or about Friday, July 28, 2006, Respondent first learned it would have to put down an additional $211,000 as prepayment for the first year of interest. [R. p. 286, line 19 – p. 287, line 21; p. 704] Despite receiving notice of this additional requirement only one business day before closing, Respondent attempted to raise the additional $211,000 but could not. [R. p. 288, line 11 – p. 290, line 25] The evidence showed that Respondent could have had this money available and could have closed if Petitioner had granted it a 15-day extension. [R. p. 465, lines 7 – 24; p. 520, line 24 – p. 521, line 15]

Respondent presented evidence that the lender's lack of diligence caused the problems with the loan. Unbeknownst to Respondent, the loan officer was inexperienced with regard to loans of this size. [R. p. 412, line 23 – p. 393, line 3] This loan was large for this bank. [R. p. 413, lines 7 – 8] Finally, unbeknownst to Respondent, the loan officer did not begin working on the loan until the beginning of July 2006. [R. p. 416, lines 3 – 15]

The evidence presented at trial would allow a reasonable juror to find that Respondent was not at fault in obtaining the loan.

III. Respondent's Rule 59(e) motion stayed the time for appeal because the clerk of court never sent to Respondent written notice of the entry of judgment granting Petitioner's motion for directed verdict.

After the lower court granted a directed verdict on March 13, 2008, the clerk of court never sent to Respondent written notice of the entry of judgment. On March 24, 2008, Respondent filed a Rule 59(e) motion and served it upon counsel on March 31, 2008 via

first class mail. On May 8, 2008, the lower court heard and denied Respondent's motion. Thereafter, on May 15, 2008, Respondent served its notice of appeal on opposing counsel via first class mail.

Rule 59(e), SCRCP, provides that "[a] motion to alter or amend the judgment shall be served not later than 10 days after receipt of the written notice of entry of the order." Pursuant to Rule 77, SCRCP, "[i]mmediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by first class mail upon every party affected thereby . . . ." (emphasis added). "[U]nder the Rules of Civil Procedure a party has ten days from receipt of the clerk of court's notice of judgment to serve these post-trial motions." Diamond Jewelers of Spartanburg, Inc. v. Naegle Outdoor Advertising Co., 290 S.C. 260, 260, 349 S.E.2d 888, 888 (1985). Such rule applies even when the 10-day period expires before counsel receives the written notice of judgment. Id.

Here, the clerk of court never sent Respondent written notice of entry of judgment via mail. [R. p. 1148 – 1155] The clerk of court attempted to send notice to an email address that is no longer in use by Respondent's counsel and not listed on Respondent's counsel's pleadings, but no hard copy followed. [R. p. 1148 – 1155; pp. 91 – 139]

Under Rule 203(b)(1), SCACR, the time for filing this appeal was stayed until Respondent received written notice of the entry of the order denying Respondent's Rule 59(e) motion. *See also* Rule 59(f), SCRCP ("The time for appeal of all parties shall be stayed by a timely motion under [Rule 59] and shall run from the receipt of written notice of entry of the order granting or denying such motions."). Because Respondent never received written notice of the entry of judgment until after it filed its 59(e) motion, the time for Respondent to serve its notice of appeal began no earlier than May 8, 2008 when the lower

court denied Respondent's motion to alter or amend the judgment. [R. pp. 1148 – 1151] Therefore, Respondent timely served its notice of appeal on May 15, 2008, and the Court of Appeals had jurisdiction to hear this appeal.

Respondent made its Rule 59 motion for two reasons: (1) to preserve the issue of repudiation and (2) to ask the lower court to reconsider whether Respondent invoked its right to a 15-day extension under the parties' agreement. [R. pp. 49 – 56] It is of no consequence that Respondent styled its motion as a "Motion to Alter or Amend the Judgment and For a New Trial under Rule 59 (a) – (e), SCRCP." Motions should be treated based on their substance and effect as opposed to how they are styled. *See* Mickle v. Blackmon, 255 S.C. 136, 140, 177 S.E.2d 548, 549 (1970) (treating motion based on its "substance and effect" as opposed to how it was styled by plaintiff); Standard Fed. Sav. & Loan Ass'n v. Mungo, 306 S.C. 22, 26, 410 S.E.2d 18, 20 (Ct. App. 1991) (stating that it is the substance of the relief sought that matters "regardless of the form in which the request for relief was framed").

Although Respondent's motion included reference to a new trial, a plain reading of the motion and review of the hearing transcript reveals that it was a Rule 59(e) motion in substance and effect because the relief sought involved the preservation of one issue and the reconsideration of another.

"A party must file [a Rule 59(e)] motion when an issue or argument has been raised, but not ruled upon, in order to preserve it for appellate review." Elam v. S.C. Dept. of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (emphasis added). "Imposing this preservation requirement on the Respondent is meant to enable the lower

court to rule properly after it has considered all relevant facts, law, and arguments." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000).

> If a party is unsure whether he properly raised all issues and obtained a ruling, he must file a Rule 59(e) motion or an appellate court may later determine the issue or argument is not preserved for review. But in filing the motion, he may unwittingly forfeit the right to an appeal if an appellate court later determines the Rule 59(e) motion was unnecessary because he already had raised the issue and obtained a ruling. [Our Supreme Court] strive[s] to avoid an interpretation of procedural rules which routinely would place a party between the proverbial rock and a hard place.

Elam, 361 S.C. at 25, 602 S.E.2d at 780. Moreover, parties are generally "free" to file an initial Rule 59(e) motion as "part and parcel of a party's 'single bite at the apple' in presenting his case to the trial court." Id., 361 S.C. at 21, 602 S.E.2d at 778.

At trial, Respondent argued to the lower court that Petitioner repudiated the parties' contract. [R. p. 659, line 21 – p. 662, line 8] However, the lower court did not specifically rule upon the issue of repudiation when it granted Petitioner's motion for a directed verdict. [R. p. 666, lines 11 – 22] Therefore, to preserve this issue for this Court's review, it was imperative that Respondent make a Rule 59(e) motion. Respondent further expressed its intent in making its motion to alter or amend when the motion was heard on May 8, 2008:

> Mr. Nelson: I'm asking that Your Honor rule on the issue of repudiation.
>
> The Court: Okay.
>
> Mr. Nelson: Whether or not it was a jury issue that should have been submitted to the jury.

[R. p. 672, lines 9 – 13; p. 670, lines 17 – 19; p. 671, lines 10 – 22; p. 676, lines 8 – 13]

Petitioner now argues that Person v. Carolina Pines Regional Medical Center, Op. No. 2010-UP-484 (S.C. Ct. App. Filed November 4, 2010) is inconsistent with the Court of Appeals' decision in the present case. Petitioner's argument is misplaced in that Person references a Rule 59(b) motion and is irrelevant to the case at hand because the time limitations for making Rule 59(b) motions and Rule 59(e) motions are not the same. Specifically, a motion to alter or amend pursuant to Rule 59(e) must be served with ten (10) days of receipt of notice of judgment. Petitioner's argument also overlooks that not only was the Rule 59(e) motion was necessary to preserve the issue of repudiation for appellate review, but also that a Rule 59(b) motion was superfluous because the jury did not render a verdict. A motion for a new trial under Rule 59(b) is made after and as a consequence of a jury verdict. *See* Adams v. Duffie, 244 S.C. 365, 137 S.E.2d 276 (1964) (applying the "thirteenth juror doctrine" after a jury render a verdict in favor of a plaintiff); Taylor v. Devore, 253 S.C. 393, 171 S.E.2d 158 (1969) (applying the "thirteenth juror doctrine" after a jury rendered a verdict in favor of a plaintiff); *See also* Constant v. Spartanburg Steel Products, 316 S.C. 86, 447 S.E.2d 194 (1994) (denying a defendant's motion for a new trial absolute where the defendant claimed a large verdict was grossly excessive); Knoke v. S.C. Dep't of Parks, Recreation, and Tourism, 324 S.C. 136, 478 S.E.2d 256 (1996) (denying a new trial absolute motion where the defendant claimed the verdict was excessive); *See also* Rush v. Blanchard, 310 S.C. 375, 426 S.E.2d 802 (1993) (granting a defendant's motion for a new trial *nisi remittitur*); O'Neal v. Bowles, 314 S.C. 525, 431 S.E.2d 555 (1993) (denying a plaintiff's motion for a new trial *nisi additur*); Ralph King Anderson, Nuts and Bolts of South Carolina Substantive and Procedural Law, 2d ed., 232 – 256 (1998) (discussing new trial motions in cases of "thirteenth juror doctrine," new

trial absolute, and new trial *nisi*). Here, there was no jury verdict, and thus, no reason for a new trial motion.

To adopt Petitioner's novel interpretation of Rule 59 would impose a hyper-technical requirement outside of the plain language of the rule. "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." Rule 59(e), SCRCP. Until an order is written and entered, the trial judge has discretion to change his mind or amend his oral ruling. Rhoad v. State, 372 S.C. 100, 641 S.E.2d 35 (Ct. App. 2007). Here, Appellant made its Rule 59 motion prior to receiving the written order because Appellant's counsel did not receive a written order promptly after the grant of the directed verdict. Petitioner's interpretation of Rule 59 would require a party to file a Rule 59(b) motion in conjunction with a Rule 59(e) motion to stay the time for serving a notice of appeal after the grant of a directed verdict motion, thus forcing a party to prematurely file its 59(e) motion and removing a trial court's discretion to alter or amend its ruling *sua sponte* within ten days. *See* Ness v. Eckerd Corp., 350 S.C. 399, 566 S.E.2d 193 (Ct. App. 2002) (holding a trial judge loses jurisdiction to vacate an earlier order *sua sponte* after ten days).

Petitioner argues that the trial judge court could not alter, amend, or otherwise reconsider its judgment without granting a new trial. This argument has no merit because a trial court may alter, amend, or otherwise reconsider its judgment by addressing the all of the issues before it, yet still come to the same conclusion, such as the court in this case did. Regardless, a "new trial" can be proper relief from a Rule 59(e) motion, and a Rule 59(b) motion is not the proper motion in this instance. *See* Getsinger v. Midlands Orthopaedic Profit Sharing Plan, 327 S.C. 424, 489 S.E.2d 223 (Ct. App. 1997) (reversing the lower

court's granting of a directed verdict against plaintiff and remanding the case for a new trial when plaintiff only made a Rule 59(e) motion to reconsider).

For these reasons, Appellant's motion to alter or amend the judgment stayed the time for perfecting the appeal, and the Court of Appeals had jurisdiction to hear this matter.

CONCLUSION

The Court of Appeals correctly reversed the lower court and remanded this case for trial where (1) the lower court erred by re-writing the parties' contract to impose specific notice provisions into the contract when Petitioner could have negotiated such a provision into the contract itself, (2) the lower court erred by holding that, to the extent notice was required, Respondent's notice was insufficient to invoke the paragraph 33 extension, (3) the lower court erred by holding that Petitioner did not repudiate the contract when the paragraph 33 extension could not be triggered until after July 31, 2006, (4) the lower court erred by failing to recognize Petitioner's implied covenant of good faith and fair dealing where there was evidence that Petitioner was aware of the paragraph 33 extension but ignored it by terminating the contract, and (5) the lower court erred in holding that Petitioner did not repudiate the contract when, on multiple occasions, Petitioner, directly or through its agents, informed Petitioner that there would be no extensions prior to and after terminating the contract on July 31, 2006 before the 15-day extension expired. The evidence supports reasonable inferences that the financing contingency was not met and that Respondent was not at fault for this unsatisfied contingency. Finally, because Respondent never received written notice of the entry of

the lower court's order directing a verdict, Respondent timely served its notice of appeal approximately seven (7) days after the lower court denied its 59(e) motion.

Viewing the evidence in the light most favorable to Respondent, and for all the reasons stated in the record and in this brief, this Court should AFFIRM the Court of Appeal's decision and remand this case for a new trial.

Respectfully submitted,

FUTERAL & NELSON, LLC

Stephan V. Futeral
S.C. Bar ID 66427
Thomas C. Nelson
S.C. Bar ID 71178
Post Office Box 1543
Mt. Pleasant, South Carolina 29465-1543
Telephone (843) 284-5500
Facsimile (843) 284-5501
email to: sfuteral@charlestonlaw.net

Dated: 2/25/11

Attorneys for Petitioner

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Thomas L. Hughston, Circuit Court Judge

RECEIVED
FEB 28 2011
S.C. Supreme Court

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

Sheep Island Plantation, LLC, ...Respondent,

v.

Bar-Pen Investments, LLC, ...Petitioner.

PROOF OF SERVICE
OF RESPONDENT'S RETURN TO PETITION FOR WRIT OF CERTIORARI

I certify that I have served Respondent's Return to the Petition for Writ of Certiorari on Bar-Pen Investments, LLC by depositing a copy of it in the United States Mail, postage prepaid, on February 25, 2011, addressed to its attorneys of record as follows:

Charles S. Altman
Meredith L. Coker
Altman & Coker, LLC
Post Office Box 265
Charleston, South Carolina 29402

William L. Howard
Russell G. Hines
Young Clement Rivers, LLP
Post Office Box 993
Charleston, South Carolina 29402

February 25, 2011

Thomas C. Nelson
S.C. Bar ID 71178
Post Office Box 1543
Mt. Pleasant, South Carolina 29465-1543
Telephone (843) 284-5500
Attorney for Respondent

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.

PETITIONER'S REPLY TO RESPONDENT'S RETURN TO PETITION FOR A WRIT OF CERTIORARI

ALTMAN & COKER, LLC
Charles S. Altman
Meredith L. Coker
P.O. Box 265
Charleston, South Carolina 29402
Telephone: (843) 853-9907
Facsimile: (843) 853-9838
and
YOUNG CLEMENT RIVERS, LLP
William L. Howard
Russell G. Hines
P.O. Box 993
Charleston, South Carolina 29402
Telephone: (843) 724-6669
Facsimile: (843) 579-1392
Counsel for the Petitioner

The petitioner, Bar-Pen Investments, LLC, submits this reply to the return to its petition for a writ of certiorari to the Court of Appeals submitted by the respondent, Sheep Island Plantation, LLC.

INTRODUCTION

The trial court correctly construed the Contract and its No Fault Extension Agreement to require Sheep Island to bring to Bar-Pen's attention any request and contractual entitlement to an extension under the No Fault Extension Agreement. The trial court correctly determined that the record contained no evidence from which a reasonable jury could find that Sheep Island met this requirement or that Bar-Pen repudiated the Contract by denying a contractually-provided extension. The trial court's directed verdict in favor of Bar-Pen should also be affirmed because the record is clear that Sheep Island was not entitled to an extension under the No Fault Extension Agreement because the conditions precedent to invocation of that Contract provision were not met.[1]

ARGUMENT[2]

1. The trial court did not rewrite the Contract; rather, it ascribed to it the only meaning that comports with our established rules of construction.

In granting Bar-Pen's motion for a directed verdict, the trial court ruled 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 their attorney and their agent did not tell them about the [No Fault Extension Agreement]." **I rule as a matter of**

[1] Though not addressed herein, Bar-Pen notes that its petition also contains argument for affirmance of the trial court's directed verdict in favor of Bar-Pen because Sheep Island's appeal was not timely noticed.

[2] In addition to the facts cited in this reply, Bar-Pen incorporates herein by reference the facts cited in its petition where relevant to its argument.

> **law under this contract that [Sheep Island] had an obligation to bring it to [Bar-Pen's] attention . . . if they wanted to exercise their rights under the [No Fault Extension Agreement] and there's absolutely no testimony in the record which would support the idea that they notified them that they were proceeding under [the No Fault Extension Agreement].** I grant the motion for a directed verdict.

(R. p. 646, lines 11-22.) The trial court's ruling that Sheep Island had an obligation to "bring it to [Bar-Pen's] attention if they wanted to exercise their rights under the [No Fault Extension Agreement] . . ." is consistent with the Contract language, and ascribed to that language the only meaning that comports with our State's established rules of construction.

Contrary to Sheep Island's argument, the trial court did not rewrite the Contract. The Contract made time "of the essence" of the parties' deal. The No Fault Extension Agreement was not an automatic extension provision but, in plain and unambiguous language, required two conditions precedent to be met before any party acquired a right to exercise it. As previously argued, Sheep Island did not meet either of these conditions. Time was "of the essence," requiring both sides to perform within the required closing window unless circumstances beyond a party's control prevented performance and that party was not at fault in bringing about the delaying circumstances. Unless the party desiring to extend the time for performance as a matter of contractual right is required to notify the other party of the circumstances that give rise to a right to an extension as articulated in the No Fault Extension Agreement and in some way communicate to the other party their belief that they are entitled to the contractually-provided extension, then the conditions precedent to operation of the No Fault Extension Agreement as well as the material term of time in the Contract would be rendered meaningless.

2. **There is no evidence in the record from which a reasonable jury could find that Sheep Island met its obligation to bring to Bar-Pen's attention that it wanted to exercise rights under the No Fault Extension Agreement.**

As Sheep Island's return makes clear, there is no evidence in the record that Sheep Island ever communicated to Bar-Pen that it wanted to obtain a contractually-provided extension under the No Fault Extension Agreement. All of the evidence in the record regarding Sheep Island's communications to Bar-Pen about an extension of the closing deadline was in the nature of **requests** to Bar-Pen for the allowance of additional time, both for consideration or gratuitously. Indeed, the record shows that Sheep Island tendered $50,000 to Bar-Pen on August 1, 2006 (after the closing deadline) in an attempt to accept the offer to sell it an extension that Bar-Pen previously made on July 13, 2006 and duly revoked on or about on July 20, 2006. Sheep Island never suggested that it should have been granted an extension due to circumstances beyond its control under the No Fault Extension Agreement until it amended its complaint eight months after the time for performance. In doing so (on the eve of the hearing of a patently meritorious motion for summary judgment), Sheep Island's newly-raised argument was totally inconsistent with its original claim that Bar-Pen had agreed to sell it an extension for $50,000. Bar-Pen is unaware of any South Carolina precedent supporting such a reverse-engineered breach of contract claim.

3. **There is no evidence in the record from which a reasonable jury could find that Bar-Pen breached the covenant of good faith and fair dealing.**

Despite the fact that Sheep Island never made a request for a contractually-provided extension under the No Fault Extension Agreement, Sheep Island contends that Bar-Pen's "reasoning is in error because it ignores [Bar-Pen's] duty to act in good faith and fair dealing regarding [Sheep Island's] obvious and repeated **requests** for an

extension where evidence exists to show that [Bar-Pen] was aware of the [No Fault Extension Agreement]." (Return p. 9) (emphasis added.)

Sheep Island's return, therefore, confirms (1) that the only evidence in the record of its communications to Bar-Pen about an extension of the time for closing was in the nature of "requests," not demands for the exercise of rights that it possessed under the contract No Fault Extension Agreement; (2) that Sheep Island did not raise the No Fault Extension Agreement as an issue between the parties until April of 2007, when it amended its complaint to pursue a completely different theory of an alleged breach contract; and (3) that Sheep Island's argument is grounded upon the illogical hypothesis that Bar-Pen could be charged with a legal obligation to bring the No Fault Extension Agreement to the attention of Sheep Island and grant an extension pursuant to that contractual provision under the facts of this case, even though the uncontroverted facts establish that Sheep Island never indicated it was requesting a contractually-imposed extension, never stated it was without fault in bringing about the need for the extension, and, to the contrary, notified Bar-Pen that it claimed it just needed one or two additional days to get its money together for the closing.

The only proven communications from Sheep Island to Bar-Pen at the time of the default prove Sheep Island's lack of knowledge of the No Fault Extension Agreement's existence in the Contract and apparent belief that the only way to extend the closing deadline was via Bar-Pen's agreement to sell Sheep Island an extension or Bar-Pen gratuitously allowing Sheep Island more time to be prepared to close – either of which being irreconcilably inconsistent with the notion that Sheep Island believed or had communicated to Bar-Pen that it possessed any right to an extension under the No Fault

Extension Agreement. On both July 31, 2006 (following Sheep Island's cancellation of the closing that it scheduled for that day) and August 1, 2006, Sheep Island's attorney, Benjamin Lafond, sent correspondence to Bar-Pen's attorney, Skipper Wooddy, attempting to purchase from Bar-Pen the extension that Bar-Pen had previously offered to sell Sheep Island and duly withdrawn – to be clear, Bar-Pen was under no obligation to sell Sheep Island and extension. In neither of these communications did Lafond mention the No Fault Extension Agreement. (R. p. 537, line 19 – p. 540, line 9; pp. 692, 788-89.) Additionally, on August 2, 2006, Sheep Island's real estate agent, Georgia Richard, contacted Bar-Pen's real estate agent, Mickey Rakes, 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.) Richard never mentioned the No Fault Extension Agreement.

As explained in Bar-Pen's petition, there is no question that South Carolina law implies a covenant of good faith and fair dealing in every contract and, pursuant to this covenant, "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); (Return p. 9) ("Every contract contains an implied covenant of good faith and fair dealing that neither party will do anything to injure the rights of the other to receive the benefits of the parties' agreement.") (citation omitted). But Bar-Pen did not impair or injure any right of Sheep Island's to exercise the No Fault Extension Agreement.

Sheep Island does not cite, and Bar-Pen is not aware of, any precedent applying the covenant of good faith and fair dealing to require one party to a written contract to actively advise the other party of a contractual provision that is equally accessible to both

parties, or to impose an obligation to *sua sponte* inquire as to a contract provision's applicability in favor of the other party. Indeed, "it is a duty owed by every contracting party to the other party and to the public to learn and know the contents of a written contract before he signs and delivers it." J.B. Colt Co. v. Britt, 129 S.C. 226, 232, 123 S.E. 845, 847 (1924); Regions Bank v. Schmauch, 354 S.C. 648, 663, 582 S.E.2d 432, 440 (Ct. App. 2003) ("A person signing a document is responsible for reading the document and making sure of its contents. Every contracting party owes a duty to the other party to the contract and to the public to learn the contents of a document before he signs it.").

In its simplest terms, the question presented here is whether there is any evidence that Bar-Pen improperly refused a request from Sheep Island to grant an extension to which Sheep Island was entitled under the Contract. Under any view of the facts, the answer is no, because the only evidence in the record establishes that Sheep Island never requested that Bar-Pen acknowledge an entitlement to an extension under the No Fault Extension Agreement and, ancillary to that fact, never provided any information to suggest that the conditions upon which that contractual provision could be invoked were present. This latter point is critical in this case, because it is illogical to suggest that a party has an obligation to invoke the No Fault Extension Agreement on behalf of the other party to the Contract when the No Fault Extension Agreement is conditional, and no information is provided that would suggest the conditions have been met. In this regard, the Court must remain mindful that Sheep Island acknowledges, as it must under the facts in this record, that it had no idea there was an extension clause in the Contract, so it never requested an extension under the clause.

Sheep Island misplaces its focus upon evidence in the record that Bar-Pen "was aware of and intended to 'litigate' the [No Fault Extension Agreement] if [Sheep Island] attempted to use it." (Return p. 9.) As an initial matter, the record makes clear that Sheep Island never attempted to use it – of course, Sheep Island did not raise it for the first time until some eight months after the time for performance. Moreover, as Sheep Island's return makes clear, the idea that Bar-Pen intended to litigate an attempt by Sheep Island to exercise rights under the No Fault Extension Agreement was not communicated to Sheep Island but was communicated from Bar-Pen's member and attorney, Wooddy, to Bar-Pen's real estate agent, Rakes, not to Sheep Island:

> On July 21, 2006, [Sheep Island] called [Bar-Pen's] realtor and left the realtor a voice mail message regarding the closing. After listening to [Sheep Island's] message, [**Bar-Pen's**] realtor contacted [**Bar-Pen's**] member, [Skipper] Wooddy, Esquire, and specifically asked Mr. Wooddy "about the extension in the contract." **Mr. Wooddy told his realtor** that if [Sheep Island] tried to use the extension clause, [Bar-Pen] would "litigate it."

(Return p. 5) (internal citations to the record omitted) (emphasis added.)

Indeed, Sheep Island did not learn of Bar-Pen's alleged intent to litigate an attempt by Sheep Island to exercise rights under the No Fault Extension Agreement – again, such attempt never being made – until it received Rakes' notes via discovery in this litigation. The particular entry in Rakes' notes provides: "07/21/2006 12:15 Called Skipper – he was at the airport in Atlanta – told him about my message from Bruce Marshall – I asked Skipper about the extension clause in the contract – he said if they try to use it he would litigate it – he also said he had no problem with me returning Bruce Marshall's call." (R. p. 762.) At trial, Rakes provided the following explanation of the context of this entry during examination by Sheep Island's counsel:

[**Counsel**]: Okay, then according to your notes, and I'm only asking about this one conversation, okay, is this correct that on July 21st at 12:15 you had a conversation with the attorney, "I asked Skipper about the extension clause in the contract," that's the 15-day one, and Skipper said to you if they try to use it he would litigate it, a lawsuit. That's what your notes say; right?
[**Rakes**]: And yes.
[**Counsel**]: Are your notes different from this?
[**Rakes**]: That's what I'm trying to read so I can see. The conversation again - -
[**Counsel**]: I asked you are your notes different from this?
[**Rakes**]: The context was different to this. It was paraphrased.
[**Court**]: You want to explain what you just said?
[**Rakes**]: May I please?
[**Court**]: Go ahead.
[**Rakes**]: Thank you. The context was different. These notes were meant to jog my memory. My conversation with Skipper, and he did not have his notes in front of him; and we were, at that point I was doing what any good realtor would do. I said, "Hey, Skipper, they're asking about this 30-day extension about the water and sewer [i.e., the extension that Bar-Pen had previously offered to sell Sheep Island for $50,000]. We've withdrawn it. Mr. Marshall has called and left me a message. I have not returned his telephone call. Do you have a problem with me returning the telephone call?" I mentioned to Skipper at that point would this have any bearing on [the No Fault Extension Agreement], and again, at this point we're talking about the water and sewer issue. At that point Skipper said something to the effect to me that if they did they would have to litigate it or they may have to litigate it, something to that effect. My notes are paraphrased to job my memory, but that was the context of the contract. That was the context of the conversation and that was about, it was about the water and sewer issue.

(R. p. 618, line 2 – p. 619, line 9.)

Rakes' explanation, of course, belies the sinister intent ascribed by Sheep Island. More importantly, though, this internal communication between Rakes and Wooddy in

no way impaired or injured any rights of Sheep Island under the Contract. Lastly, Bar-Pen's decision to litigate the issue, had Sheep Island tried to invoke the extension clause, would have been completely legitimate under these facts. At the time of the conversation between Wooddy and Rakes, the record is clear that there were no facts known to Bar-Pen that would allow Sheep Island to invoke the No Fault Extension Agreement.

4. There is no evidence in the record from which a reasonable jury could find that Bar-Pen repudiated the Contract.

In its decision, the Court of Appeals found only that the July 31, 2006 correspondence from Bar-Pen's attorney, Wooddy, to Sheep Island's attorney, Lafond, could have been found by a reasonable jury to constitute a repudiation of the Contract. Bar-Pen's petition refutes this finding. In its return, Sheep Island points to alleged evidence beyond the July 31, 2006 letter that was not cited by the Court of Appeals. To the extent that it is appropriate for Sheep Island, the appellant below, to cite evidence apparently found to be unpersuasive by the Court of Appeals, Bar-Pen replies that this evidence is nonetheless insufficient to create a jury question on the issue of repudiation.

The record contains no evidence of any unequivocal declaration by Bar-Pen of its refusal to perform its obligations under the Contract in general or to abide by the No Fault Extension Agreement in particular. All of the evidence on the subject – including the July 31, 2006 letter – shows that Bar-Pen repeatedly communicated to Sheep Island that it was ready, willing, and able to close **per the Contract**,[3] which the No Fault Extension Agreement was part of – a fact that Sheep Island was under a legal duty to know by virtue of its entering the Contract. Britt, 129 S.C. at 232, 123 S.E. at 847; Regions Bank, 354 S.C. at 663, 582 S.E.2d at 440. Sheep Island only presented evidence

[3] (R. pp. 682, 691.)

that Bar-Pen communicated its lack of willingness to agree to (i.e., "**grant**") any extensions of time outside (i.e., separate and apart from) the Contract. And, of course, as noted above, the communication between Rakes and Wooddy about potential litigation over the No Fault Extension Agreement was entirely internal to Bar-Pen and not communicated to Sheep Island.

The clear and irrefutable evidence in the record is that Sheep Island approached Bar-Pen with a request – not an exercise of any existing right under the No Fault Extension Agreement – for the allowance of an extension of the material closing deadline and that Bar-Pen responded with an offer to sell Sheep Island a 30-day extension for $50,000. Sheep Island did not accept this offer and Bar-Pen rejected it. Notably, of course, for the first seven months of this lawsuit, Sheep Island's breach of contract claim was solely founded upon the (patently false) allegation that the parties had amended the Contract to extend closing by 30 days in exchange for Sheep Island's $50,000 payment, but Bar-Pen wrongfully failed to accept Sheep Island's tender of $50,000 and improperly terminated the Contract – it is now beyond dispute that such allegation was untrue. Having properly withdrawn the $50,000 extension offer, Bar-Pen communicated to Sheep Island that it was ready, willing, and able to close **per the Contract** (which, again, included from its inception the No Fault Extension Agreement), but would **grant** no extension outside of the Contract. Sheep Island was not able to timely close – in fact, cancelling the closing that it had scheduled for the last business hour on the final day of the contracted-for closing period – and never brought to Bar-Pen's attention any exercise of rights under the No Fault Extension Agreement. After the closing deadline expired, Sheep Island continued to **request** an extension from Bar-Pen, never exercising any

rights under the No Fault Extension Agreement and never scheduling, or even attempting to schedule, a closing within the 15-day window of time to which it would only much later claimed it was entitled as a matter of contractual right. Bar-Pen rightfully recognized Sheep Island's default of its contractual obligations. There is no evidence in the record to support a reasonable jury finding that Bar-Pen repudiated the Contract.

5. Sheep Island does not dispute that it received and accepted a loan commitment from its chosen lender.

Sheep Island does not dispute that it received and accepted a loan commitment from its chosen lender, Southcoast Community Bank. Rather, Sheep Island argues that, because the loan was not issued, the Contract's financing contingency remained unsatisfied because Sheep Island did not "obtain" the loan. (Return p. 13.) Respectfully, this argument is without merit and relies upon an absurd construction of the Contract.

With regard to the financing contingency, the plain and unambiguous terms of the Contract contemplate that the financing contingency will be satisfied by the buyer, Sheep Island, obtaining "loan approval." (R. p. 661.) Indeed, the Contract obligates the buyer to provide the seller "written satisfactory loan approval within 45 consecutive days" from the time of contracting – a deadline only half of the way through the Contract's Due Diligence Period. Clearly, the financing contingency was not intended to be satisfied by the actual issuance of the loan. The loan would, of course, be secured by a mortgage on the Subject Property, and could never be issued to Sheep Island before the time of the consummation of the transaction.

6. The undisputed evidence in the record shows that at least some degree of fault must be attributed to Sheep Island in failing to timely close.

As an initial matter, Sheep Island incorrectly asserts that it "diligently pursued financing at all relevant times." (Return p. 14.) The undisputed evidence was that the last of Sheep Island's investors did not submit his financial information for Southcoast's consideration until July 26, 2006, just five days before the July 31st closing deadline, with two of those days being an intermediate weekend. (R. p. 413, line 1 – p. 415, line 2.) The Southcoast loan officer's undisputed testimony was that Sheep Island delayed getting the bank needed financial information for loan approval. (R. p. 418, line 14 – p. 419, line 2.) That Sheep Island received any loan commitment under the circumstances is miraculous. But the fact that Sheep Island received a 65% loan commitment with additional funding requirements is legally insufficient to provide a contractual right to a closing date extension under the No Fault Extension Agreement because the transaction was no longer contingent upon financing.

The only evidence in the record is that Sheep Island did not obtain loan approval during the 45-day period set forth in the Contract provision regarding financing, allowing that contingency to expire. Once this occurred, whether Sheep Island had financing or not, it was still obligated to close the transaction on or before July 31, 2006. By voluntarily remaining obligated under the contract without a loan commitment after the financing contingency expired, Sheep Island represented itself as ready, willing and able to meet its contractual obligations, including the payment of the purchase price by the closing deadline. Under any view of the evidence, Sheep Island's last minute funding issues resulted from its own fault, and do not provide a basis for an extension as a matter of right under the Contract.

Further, Sheep Island's alleged reasonableness in believing that water and sewer would become available at the Subject Property in time for them to receive their desired loan is irrelevant. The record leaves no doubt that Sheep Island knew from the explicitly stated declaration in the Contract that water and sewer were not currently available to the property. The record is equally clear that Sheep Island knew, from its initial meeting with Southcoast, that it would not be able to borrow more than 65% of the purchase price in the absence of public water and sewer availability. That meeting occurred more than five months before the closing deadline. Even assuming, *arguendo*, the reasonableness of Sheep Island's belief that public water and sewer **would** become available at the Subject Property at some time prior to closing (presumably, at a time sufficient to allow Sheep Island to complete its loan application and obtain a financing commitment from its chosen lender in time to timely close), when it allowed the Due Diligence Period to lapse without terminating the Contract, knowing water and sewer were not yet available at the Subject Property, it necessarily accepted and assumed the risk that they would not be made available in time for closing, along with all related consequences.

CONCLUSION

For the reasons stated herein, as well as those set forth in its petition for a writ of certiorari to the Court of Appeals, Bar-Pen asks the Court to grant its petition for a writ of certiorari, to reverse the decision of the Court of Appeals, and to restore the trial court's properly directed verdict in its favor.

<SIGNATURE BLOCK ON THE FOLLOWING PAGE>

Respectfully submitted,

ALTMAN & COKER, LLC
Charles S. Altman
Meredith L. Coker
P.O. Box 265
Charleston, South Carolina 29402
Telephone: (843) 853-9907
Facsimile: (843) 853-9838
and
YOUNG CLEMENT RIVERS, LLP

By: _____
William L. Howard
Russell G. Hines
P.O. Box 993
Charleston, South Carolina 29402
Telephone: (843) 724-6669
Facsimile: (843) 579-1392
Counsel for the Petitioner

Charleston, South Carolina

Dated: 3/28/11

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.

PROOF OF SERVICE

ALTMAN & COKER, LLC
Charles S. Altman
Meredith L. Coker
P.O. Box 265
Charleston, South Carolina 29402
Telephone: (843) 853-9907
Facsimile: (843) 853-9838
and
YOUNG CLEMENT RIVERS, LLP
William L. Howard
Russell G. Hines
P.O. Box 993
Charleston, South Carolina 29402
Telephone: (843) 724-6669
Facsimile: (843) 579-1392
Counsel for the Petitioner

I, Russell G. Hines, of Young Clement Rivers, LLP, counsel for the petitioner above named, do hereby certify that I have served the **Petitioner's Reply to Respondent's Return to Petition for a Writ of Certiorari** in the above-captioned case on the respondent, Sheep Island Plantation, LLC, by depositing a copy of the same in the United States Mail, postage prepaid, on March 28, 2011, addressed as follows to its counsel of record:

FUTERAL & NELSON, LLC
Stephan V. Futeral, Esquire
Thomas C. Nelson, Esquire
1004 Anna Knapp Blvd., 2nd Floor
Mt. Pleasant, SC 29464

YOUNG CLEMENT RIVERS, LLP

By: _____
Russell G. Hines

Charleston, South Carolina

Dated: 3/28/11

CHARLESTON
28 BROAD STREET
P.O. BOX 993
CHARLESTON, SC 29402-0993
TELEPHONE: (843) 577-4000

www.ycrlaw.com

Other Office:
Columbia, SC

YOUNG CLEMENT RIVERS LLP
ATTORNEYS AT LAW

Russell G. Hines
Associate

Direct Dial: (843) 720-5488
Direct Fax: (843) 579-1327
E-mail: RHines@ycrlaw.com

March 28, 2011

VIA U.S. MAIL
The Honorable Daniel E. Shearouse, Clerk of Court
South Carolina Supreme Court
P. O. Box 11330
Columbia, SC 29211-1330

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

Dear Mr. Shearouse:

Enclosed please find the original and seven (7) copies of the ***Petitioner's Reply to Respondent's Return to Petition for a Writ of Certiorari*** in the above-referenced matter. I also enclose the original and two (2) copies of the ***Proof of Service*** regarding the same.

I would appreciate your filing these documents and returning one (1) stamped copy of each to me in the enclosed self-addressed, stamped envelope.

Thank you, in advance, for your assistance.

Respectfully yours,

YOUNG CLEMENT RIVERS, LLP

Russell G. Hines
Associate

RGH/rgh
Enclosures (all below via email & U.S. Mail)
cc: Stephan V. Futeral, Esquire
Thomas C. Nelson, Esquire
Aubrey J. Wooddy, Jr., Esquire
Meredith Long Coker, Esquire
Charles S. Altman, Esquire

The Supreme Court of South Carolina

Sheep Island Plantation, LLC, Respondent,

v.

Bar-Pen Investments, LLC, Petitioner.

The Honorable Thomas L. Hughston, Jr.
Berkeley County
Trial Court Case No. 2006-CP-08-01650

ORDER

For good cause having been shown, Petitioner's request for a second extension of time for serving and filing the Reply to Return to Petition for Writ of Certiorari in the above entitled matter is hereby extended until March 28, 2011.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY Brenda F. Healy
Chief Deputy Clerk

Columbia, South Carolina

March 18, 2011

cc: Charles S. Altman, Esquire
Meredith L. Coker, Esquire
William L. Howard, Esquire
Russell G. Hines, Esquire
Stephen V. Futeral, Esquire
Thomas C. Nelson, Esquire

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.

MOTION FOR SECOND EXTENSION OF TIME TO FILE/SERVE REPLY TO RETURN TO PETITION FOR A WRIT OF CERTIORARI

ALTMAN & COKER, LLC
Charles S. Altman
Meredith L. Coker
P.O. Box 265
Charleston, South Carolina 29402
Telephone: (843) 853-9907
Facsimile: (843) 853-9838
and
YOUNG CLEMENT RIVERS, LLP
William L. Howard
Russell G. Hines
28 Broad Street
Charleston, South Carolina 29401
Telephone: (843) 724-6669
Facsimile: (843) 579-1392
Attorneys for the Petitioner

TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF SOUTH CAROLINA

COMES NOW the petitioner, Bar-Pen Investments, LLC ("Bar-Pen"), by and through its undersigned counsel, pursuant to Rule 263(b), SCACR, and moves this Honorable Court for an additional 10-day extension of time to file/serve a reply to the return to its petition for a writ of certiorari to the Court of Appeals submitted by the respondent, Sheep Island Plantation, LLC ("Sheep Island"), in the above-captioned matter.

Sheep Island served its return upon Bar-Pen on February 25, 2011. Pursuant to Rule 242(g), SCACR, the original deadline for any reply thereto that Bar-Pen wished to submit was March 7, 2011. By Order dated March 8, 2011, the Court granted Bar-Pen an extension of time to file/serve a reply through today, March 17, 2011. In light of other work-related time commitments, the undersigned respectfully requests that Bar-Pen's deadline for filing/serving a reply to Sheep Island's return to its petition for writ of certiorari to the Court of Appeals again be extended by 10 days from today's date.

Prior to making this request, the undersigned corresponded with Thomas C. Nelson, Esquire, counsel for Sheep Island and can advise the Court that Mr. Nelson has no objection. Further, the undersigned respectfully submits that the instant motion is consistent with the interests of

justice.

WHEREFORE, Bar-Pen respectfully requests that this Honorable Court grant it an additional extension of 10 days' time to file/serve a reply to Sheep Island's return to its petition for writ of certiorari to the Court of Appeals in this matter. With the requested extension, the new deadline for such reply would be March 28, 2011, according to the undersigned's calculations.

Respectfully submitted,

ALTMAN & COKER, LLC
Charles S. Altman
Meredith L. Coker
P.O. Box 265
Charleston, South Carolina 29402
Telephone: (843) 853-9907
Facsimile: (843) 853-9838
and
YOUNG CLEMENT RIVERS, LLP

By: _____
William L. Howard
Russell G. Hines
28 Broad Street
Charleston, South Carolina 29401
Telephone: (843) 724-6669
Facsimile: (843) 579-1392
Attorneys for the Petitioner

Charleston, South Carolina

Dated: 3/17/11

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.

PROOF OF SERVICE

ALTMAN & COKER, LLC
Charles S. Altman
Meredith L. Coker
P.O. Box 265
Charleston, South Carolina 29402
Telephone: (843) 853-9907
Facsimile: (843) 853-9838
and
YOUNG CLEMENT RIVERS, LLP
William L. Howard
Russell G. Hines
28 Broad Street
Charleston, South Carolina 29401
Telephone: (843) 724-6669
Facsimile: (843) 579-1392
Attorneys for the Petitioner

I, Russell G. Hines, of Young Clement Rivers, LLP, counsel for the petitioner above named, do hereby certify that I have served the petitioner's **Motion for Second Extension of Time to File/Serve Reply to Return to Petition for a Writ of Certiorari** on the respondent, Sheep Island Plantation, LLC, by depositing a copy of the same in the United States Mail, postage prepaid, on March 17, 2011 addressed as follows to its counsel of record:

FUTERAL & NELSON, LLC
Stephan V. Futeral, Esquire
Thomas C. Nelson, Esquire
1004 Anna Knapp Blvd., 2nd Floor
Mt. Pleasant, SC 29464

YOUNG CLEMENT RIVERS, LLP

By: _____
Russell G. Hines

Charleston, South Carolina

Dated: 3/17/11

CHARLESTON
28 BROAD STREET
P.O. BOX 993
CHARLESTON, SC 29402-0993
TELEPHONE: (843) 577-4000

www.ycrlaw.com

Other Office:
Columbia, SC

YOUNG CLEMENT RIVERS LLP
ATTORNEYS AT LAW

Russell G. Hines
Associate

Direct Dial: (843) 720-5488
Direct Fax: (843) 579-1327
E-mail: RHines@ycrlaw.com

March 17, 2011

VIA FACSIMILE & U.S. MAIL
The Honorable Daniel E. Shearouse, Clerk of Court
South Carolina Supreme Court
P. O. Box 11330
Columbia, SC 29211-1330

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

Dear Mr. Shearouse:

Enclosed please find the original and seven (7) copies of the Petitioner's ***Motion for Second Extension of Time to File/Serve Reply to Return to Petition for a Writ of Certiorari*** in the above-referenced matter. I also enclose the original and two (2) copies of the ***Proof of Service*** regarding the same, as well as our firm's check in the amount of $25.00 to cover the motion filing fee.

I would appreciate your filing these documents and returning one (1) stamped copy of each to me in the enclosed self-addressed, stamped envelope.

Thank you, in advance, for your assistance.

Respectfully yours,

YOUNG CLEMENT RIVERS, LLP

Russell G. Hines
Associate

RGH/rgh
Enclosures (all below via email & U.S. Mail)
cc: Stephan V. Futeral, Esquire
Thomas C. Nelson, Esquire
Aubrey J. Wooddy, Jr., Esquire
Meredith Long Coker, Esquire
Charles S. Altman, Esquire

RECEIVED

MAR 17 2011

S.C. Supreme Court

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.

MOTION FOR SECOND EXTENSION OF TIME TO FILE/SERVE REPLY TO RETURN TO PETITION FOR A WRIT OF CERTIORARI

ALTMAN & COKER, LLC
Charles S. Altman
Meredith L. Coker
P.O. Box 265
Charleston, South Carolina 29402
Telephone: (843) 853-9907
Facsimile: (843) 853-9838

and

YOUNG CLEMENT RIVERS, LLP
William L. Howard
Russell G. Hines
28 Broad Street
Charleston, South Carolina 29401
Telephone: (843) 724-6669
Facsimile: (843) 579-1392
Attorneys for the Petitioner

TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF SOUTH CAROLINA

COMES NOW the petitioner, Bar-Pen Investments, LLC ("Bar-Pen"), by and through its undersigned counsel, pursuant to Rule 263(b), SCACR, and moves this Honorable Court for an additional 10-day extension of time to file/serve a reply to the return to its petition for a writ of certiorari to the Court of Appeals submitted by the respondent, Sheep Island Plantation, LLC ("Sheep Island"), in the above-captioned matter.

Sheep Island served its return upon Bar-Pen on February 25, 2011. Pursuant to Rule 242(g), SCACR, the original deadline for any reply thereto that Bar-Pen wished to submit was March 7, 2011. By Order dated March 8, 2011, the Court granted Bar-Pen an extension of time to file/serve a reply through today, March 17, 2011. In light of other work-related time commitments, the undersigned respectfully requests that Bar-Pen's deadline for filing/serving a reply to Sheep Island's return to its petition for writ of certiorari to the Court of Appeals again be extended by 10 days from today's date.

Prior to making this request, the undersigned corresponded with Thomas C. Nelson, Esquire, counsel for Sheep Island and can advise the Court that Mr. Nelson has no objection. Further, the undersigned respectfully submits that the instant motion is consistent with the interests of

justice.

WHEREFORE, Bar-Pen respectfully requests that this Honorable Court grant it an additional extension of 10 days' time to file/serve a reply to Sheep Island's return to its petition for writ of certiorari to the Court of Appeals in this matter. With the requested extension, the new deadline for such reply would be March 28, 2011, according to the undersigned's calculations.

Respectfully submitted,

ALTMAN & COKER, LLC
Charles S. Altman
Meredith L. Coker
P.O. Box 265
Charleston, South Carolina 29402
Telephone: (843) 853-9907
Facsimile: (843) 853-9838
and
YOUNG CLEMENT RIVERS, LLP

By: _____
William L. Howard
Russell G. Hines
28 Broad Street
Charleston, South Carolina 29401
Telephone: (843) 724-6669
Facsimile: (843) 579-1392
Attorneys for the Petitioner

Charleston, South Carolina

Dated: 3/17/11

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED
MAR 17 2011
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.

PROOF OF SERVICE

ALTMAN & COKER, LLC
Charles S. Altman
Meredith L. Coker
P.O. Box 265
Charleston, South Carolina 29402
Telephone: (843) 853-9907
Facsimile: (843) 853-9838

and

YOUNG CLEMENT RIVERS, LLP
William L. Howard
Russell G. Hines
28 Broad Street
Charleston, South Carolina 29401
Telephone: (843) 724-6669
Facsimile: (843) 579-1392
Attorneys for the Petitioner

I, Russell G. Hines, of Young Clement Rivers, LLP, counsel for the petitioner above named, do hereby certify that I have served the petitioner's **Motion for Second Extension of Time to File/Serve Reply to Return to Petition for a Writ of Certiorari** on the respondent, Sheep Island Plantation, LLC, by depositing a copy of the same in the United States Mail, postage prepaid, on March 17, 2011 addressed as follows to its counsel of record:

FUTERAL & NELSON, LLC
Stephan V. Futeral, Esquire
Thomas C. Nelson, Esquire
1004 Anna Knapp Blvd., 2nd Floor
Mt. Pleasant, SC 29464

YOUNG CLEMENT RIVERS, LLP

By: _____
Russell G. Hines

Charleston, South Carolina

Dated: 3/17/11

CHARLESTON
28 BROAD STREET
P.O. BOX 993
CHARLESTON, SC 29402-0993
TELEPHONE: (843) 577-4000

www.ycrlaw.com

Other Office:
Columbia, SC

YOUNG CLEMENT RIVERS LLP
ATTORNEYS AT LAW

Russell G. Hines
Associate

Direct Dial: (843) 720-5488
Direct Fax: (843) 579-1327
E-mail: RHines@ycrlaw.com

March 17, 2011

RECEIVED
MAR 17 2011
S.C. Supreme Court

VIA FACSIMILE & U.S. MAIL
The Honorable Daniel E. Shearouse, Clerk of Court
South Carolina Supreme Court
P. O. Box 11330
Columbia, SC 29211-1330

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

Dear Mr. Shearouse:

Enclosed please find the original and seven (7) copies of the Petitioner's ***Motion for Second Extension of Time to File/Serve Reply to Return to Petition for a Writ of Certiorari*** in the above-referenced matter. I also enclose the original and two (2) copies of the ***Proof of Service*** regarding the same, as well as our firm's check in the amount of $25.00 to cover the motion filing fee.

I would appreciate your filing these documents and returning one (1) stamped copy of each to me in the enclosed self-addressed, stamped envelope.

Thank you, in advance, for your assistance.

Respectfully yours,

YOUNG CLEMENT RIVERS, LLP

Russell G. Hines
Associate

RGH/rgh
Enclosures (all below via email & U.S. Mail)
cc: Stephan V. Futeral, Esquire
Thomas C. Nelson, Esquire
Aubrey J. Wooddy, Jr., Esquire
Meredith Long Coker, Esquire
Charles S. Altman, Esquire

YOUNG CLEMENT RIVERS LLP
ATTORNEYS AT LAW

THE FOLLOWING PAGES ARE FOR IMMEDIATE DELIVERY

To: 18037341499
From: Huffman Wendy
Date: March 17, 2011 11:30:49 AM EST
Subj: Sheep Island Plantation, LLC vs. Bar-Pen Investments, LLC
Pages: 7

To: The Honorable Daniel E. Shearouse, Clerk of Court
Re: Sheep Island Plantation, LLC vs. Bar-Pen Investments, LLC
Case No.: 2006-CP-08-1650
YCR File: 13737-20080508

Wendy M. Huffman, Project Assistant
Young Clement Rivers, LLC
Phone: (843) 724-6610
Fax: (843) 579-2929
whuffman@ycrlaw.com

Young Clement Rivers, LLP
http://www.ycrlaw.com
Charleston: (843) 577-4000

Charleston Office
28 Broad Street ● Charleston SC 29401
P.O. Box 993 ● Charleston, SC 29402-0993

TELEPHONE: (843) 577-4000
WEBSITE: www.ycrlaw.com

The Supreme Court of South Carolina

Sheep Island Plantation, LLC, Respondent,

v.

Bar-Pen Investments, LLC, Petitioner.

The Honorable Thomas L. Hughston, Jr.
Berkeley County
Trial Court Case No. 2006-CP-08-01650

ORDER

For good cause having been shown, the time for serving and filing the Reply to Return to Petition for Writ of Certiorari in the above entitled matter is hereby extended until March 17, 2011.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY _____
Clerk

Columbia, South Carolina

March 8, 2011

cc: Charles S. Altman, Esquire
Meredith L. Coker, Esquire
William L. Howard, Esquire
Russell G. Hines, Esquire
Stephen V. Futeral, Esquire
Thomas C. Nelson, Esquire

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.

MOTION FOR EXTENSION OF TIME TO FILE/SERVE REPLY TO RETURN TO PETITION FOR A WRIT OF CERTIORARI

ALTMAN & COKER, LLC
Charles S. Altman
Meredith L. Coker
P.O. Box 265
Charleston, South Carolina 29402
Telephone: (843) 853-9907
Facsimile: (843) 853-9838
and
YOUNG CLEMENT RIVERS, LLP
William L. Howard
Russell G. Hines
28 Broad Street
Charleston, South Carolina 29401
Telephone: (843) 724-6669
Facsimile: (843) 579-1392
Attorneys for the Petitioner

TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF SOUTH CAROLINA

COMES NOW the petitioner, Bar-Pen Investments, LLC ("Bar-Pen"), by and through its undersigned counsel, pursuant to Rule 263(b), SCACR, and moves this Honorable Court for a 10-day extension of time to file/serve a reply to the return to its petition for a writ of certiorari to the Court of Appeals submitted by the respondent, Sheep Island Plantation, LLC ("Sheep Island"), in the above-captioned matter.

Sheep Island served its return upon Bar-Pen on February 25, 2011. Pursuant to Rule 242(g), SCACR, the current deadline for any reply thereto that Bar-Pen wishes to submit is today, March 7, 2011. In light of other work-related time commitments, the undersigned respectfully requests that Bar-Pen's deadline for filing/serving a reply to Sheep Island's return to its petition for writ of certiorari to the Court of Appeals be extended by 10 days from today's date.

Prior to making this request, the undersigned corresponded with Thomas C. Nelson, Esquire, counsel for Sheep Island and can advise the Court that Mr. Nelson has no objection. Further, the undersigned respectfully submits that the instant motion is consistent with the interests of justice.

WHEREFORE, Bar-Pen respectfully requests that this Honorable

Court grant it an extension of 10 days' time to file/serve a reply to Sheep Island's return to its petition for writ of certiorari to the Court of Appeals in this matter. With the requested extension, the new deadline for such reply would be March 17, 2011, according to the undersigned's calculations.

Respectfully submitted,

ALTMAN & COKER, LLC
Charles S. Altman
Meredith L. Coker
P.O. Box 265
Charleston, South Carolina 29402
Telephone: (843) 853-9907
Facsimile: (843) 853-9838
and
YOUNG CLEMENT RIVERS, LLP

By: _____
William L. Howard
Russell G. Hines
28 Broad Street
Charleston, South Carolina 29401
Telephone: (843) 724-6669
Facsimile: (843) 579-1392
Attorneys for the Petitioner

Charleston, South Carolina

Dated: 3/7/11

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED
MAR 08 2011
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.

PROOF OF SERVICE

ALTMAN & COKER, LLC
Charles S. Altman
Meredith L. Coker
P.O. Box 265
Charleston, South Carolina 29402
Telephone: (843) 853-9907
Facsimile: (843) 853-9838

and

YOUNG CLEMENT RIVERS, LLP
William L. Howard
Russell G. Hines
28 Broad Street
Charleston, South Carolina 29401
Telephone: (843) 724-6669
Facsimile: (843) 579-1392
Attorneys for the Petitioner

I, Russell G. Hines, of Young Clement Rivers, LLP, counsel for the petitioner above named, do hereby certify that I have served the petitioner's **Motion for Extension of Time to File/Serve Reply to Return to Petition for a Writ of Certiorari** on the respondent, Sheep Island Plantation, LLC, by depositing a copy of the same in the United States Mail, postage prepaid, on March 7, 2011 addressed as follows to its counsel of record:

FUTERAL & NELSON, LLC
Stephan V. Futeral, Esquire
Thomas C. Nelson, Esquire
1004 Anna Knapp Blvd., 2nd Floor
Mt. Pleasant, SC 29464

YOUNG CLEMENT RIVERS, LLP

By: _____
Russell G. Hines

Charleston, South Carolina

Dated: 3/7/11

CHARLESTON
28 BROAD STREET
P.O. BOX 993
CHARLESTON, SC 29402-0993
TELEPHONE: (843) 577-4000

www.ycrlaw.com

Other Office:
Columbia, SC

YOUNG CLEMENT RIVERS LLP
ATTORNEYS AT LAW

Elizabeth R. O'Neil
Paralegal

Direct Dial: (843) 724-6658
Direct Fax: (843) 579-2936
E-mail: eoneil@ycrlaw.com

March 7, 2011

VIA US MAIL
The Honorable Daniel E. Shearouse, Clerk of Court
South Carolina Supreme Court
P. O. Box 11330
Columbia, SC 29211-1330

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

Dear Mr. Shearouse:

Enclosed please find the original and seven (7) copies of the Petitioner's ***Reply to Return to Petition for Writ of Certiorari*** in the above-referenced matter. I also enclose the original and two (2) copies of the ***Proof of Service***.

I would appreciate your filing these documents and returning one stamped copy of each to us in the enclosed self-addressed, stamped envelope.

Thank you, in advance, for your assistance with this.

Respectfully yours,

YOUNG CLEMENT RIVERS, LLP

Elizabeth R. O'Neil
Paralegal

ERO/ero
Enclosures
cc: Stephan V. Futeral, Esquire
Thomas C. Nelson, Esquire
Aubrey J. Wooddy, Jr., Esquire
Meredith Long Coker, Esquire
Charles S. Altman, Esquire

Futeral & Nelson LLC
Attorneys Serving the Lowcountry

February 25, 2011

The Honorable Daniel E. Shearouse
South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211-1330

RE: Sheep Island Plantation, LLC v. Bar-Pen Investments, LLC
Case No: 2006-CP-08-1650

Dear Mr. Shearouse:

Enclosed please find the original and seven (7) copies of Respondent's Return to Petition for Writ of Certiorari and an original and one (1) copy of a Proof of Service. Please return one (1) stamped copy of each to my office in the envelope provided.

Thank you for your kind assistance.

Sincerely,

Thomas Nelson

cc: Charles S. Altman
Meredith L. Coker
William L. Howard
Russell G. Hines

Local 843-284-5500 Toll Free 877-913-5500 Fax 843-284-5501
1004 Anna Knapp Blvd., 2nd Floor • Mount Pleasant, South Carolina 29464
Reply to: P. O. Box 1543 • Mount Pleasant, South Carolina 29465-1543
www.charlestonlaw.net

The Supreme Court of South Carolina

Sheep Island Plantation, LLC, Respondent,

v.

Bar-Pen Investments, LLC, Petitioner.

The Honorable Thomas L. Hughston, Jr.
Berkeley County
Trial Court Case No. 2006-CP-08-01650

ORDER

Respondent seeks a second extension of time for an additional ten (10) days to serve and file the Return to Petition for a Writ of Certiorari in the above entitled matter. The request for an extension is granted and extended until February 28, 2011.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY _____
CLERK

Columbia, South Carolina

February 10, 2011

cc: Charles S. Altman, Esquire
Meredith L. Coker, Esquire
William L. Howard, Esquire
Russell G. Hines, Esquire
Stephen V. Futeral, Esquire
Thomas C. Nelson, Esquire

Futeral & Nelson LLC
Attorneys Serving the Lowcountry

RECEIVED
FEB 10 2011
S.C. Supreme Court

February 9, 2011

The Honorable Daniel Shearouse
South Carolina Supreme Court
Post Office Box 11330
Columbia South Carolina 29211

RE: Sheep Island Plantation, LLC v. Bar-Pen Investments, LLC
Case No: 200891160
Client ID: 31207
Matter ID: 9123174

Dear Mr. Shearouse:

Please find enclose an original and seven (7) copies of a motion for enlargement of time to file return to petition for writ of certiorari for the above referenced matter as well as an original and one (1) copy of a proof of service of the same. Please file the original documents and return the extra filed copies to us in the envelope included. I have also enclosed our firm's check in the amount of $25.00 to satisfy the filing fee for this motion. Should you have any questions or concerns please contact our office.

Thank you for your attention to this matter.

Sincerely,

Kelsey J. Gilmore-Futeral

/KGF
/Enclosure

cc: William L. Howard, Esq.
Charles S. Altman, Esq.
Earl Bruce Marshall

Local 843-284-5500 Toll Free 877-913-5500 Fax 843-284-5501
1004 Anna Knapp Blvd., 2nd Floor • Mount Pleasant, South Carolina 29464
Reply to: P. O. Box 1543 • Mount Pleasant, South Carolina 29465-1543
www.charlestonlaw.net

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Thomas L. Hughston, 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.

MOTION FOR ENLARGEMENT OF TIME TO FILE RETURN TO PETITION FOR WRIT OF CERTIORARI

Respondent, by and through undersigned counsel, hereby moves this Court to allow a ten (10)-day extension of time to file the Return To Petition For Writ Of Certiorari. This request is made because the Respondent's attorney's schedule along with a recent vacation creates the need for additional time to complete the Return.

The undersigned certifies that he contacted counsel for Petitioner prior to filing this motion, and counsel has no objection to this extension.

Attorney Signature on Following Page.

FUTERAL & NELSON, LLC

Stephan V. Futeral
S.C. Bar ID 66427
Thomas C. Nelson, Esquire
S.C. Bar ID 71178
Post Office Box 1543
Mt. Pleasant, South Carolina 29465-1543
Telephone (843) 284-5500
Facsimile (843) 284-5501
email to: sfuteral@charlestonlaw.net
Attorneys for Respondent

Dated: 2/9/11

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Thomas L. Hughston, 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.

PROOF OF SERVICE

I certify that I have served a copy of the Motion for Enlargement of Time to File Return to Petition for Writ of Certiorari by delivering a copy via U.S. Mail, postage prepaid, to the following address, this 9th day of February, 2011:

William L. Howard, Esquire
Russell G. Hines, Esquire
Young Clement Rivers LLP
Post Office Box 993
Charleston, South Carolina 29402

Charles S. Altman, Esquire
Meredith L. Coker, Esquire
Post Office Box 265
Charleston, South Carolina 29402

Attorney Signature on Following Page.

FUTERAL & NELSON, LLC

Stephan V. Futeral
S.C. Bar ID 66427
Thomas C. Nelson, Esquire
S.C. Bar ID 71178
Post Office Box 1543
Mt. Pleasant, South Carolina 29465-1543
Telephone (843) 284-5500
Facsimile (843) 284-5501
email to: sfuteral@charlestonlaw.net
Attorneys for Respondent

Dated: 2/9/11

The Supreme Court of South Carolina

Sheep Island Plantation, LLC, Respondent,

v.

Bar-Pen Investments, LLC, Petitioner.

The Honorable Thomas L. Hughston, Jr.
Berkeley County
Trial Court Case No. 2006-CP-08-01650

ORDER

For good cause having been shown, the time for serving and filing the Return to the Petition for Writ of Certiorari in the above entitled matter is hereby extended until February 16, 2011.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY _____
Clerk

Columbia, South Carolina

January 14, 2011

cc: Charles S. Altman, Esquire
Meredith L. Coker, Esquire
William L. Howard, Esquire
Russell G. Hines, Esquire
Stephen V. Futeral, Esquire
Thomas C. Nelson, Esquire

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Thomas L. Hughston, 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.

MOTION FOR ENLARGEMENT OF TIME TO FILE RETURN TO PETITION FOR WRIT OF CERTIORARI

Respondent, by and through undersigned counsel, hereby moves this Court to allow a thirty (30)-day extension of time to file the Return To Petition For Writ Of Certiorari. This request is made because the Respondent's attorney's schedule along with a recent holiday and vacation creates the need for additional time to complete the Return.

The undersigned certifies that he contacted counsel for Petitioner prior to filing this motion, and counsel has no objection to this extension.

Attorney Signature on Following Page.

FUTERAL & NELSON, LLC

Stephan V. Futeral
S.C. Bar ID 66427
Thomas C. Nelson, Esquire
S.C. Bar ID 71178
Post Office Box 1543
Mt. Pleasant, South Carolina 29465-1543
Telephone (843) 284-5500
Facsimile (843) 284-5501
email to: sfuteral@charlestonlaw.net
Attorneys for Respondent

Dated: 1/11/11

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Thomas L. Hughston, 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.

PROOF OF SERVICE

I certify that I have served a copy of the Motion for Enlargement of Time to File Return to Petition for Writ of Certiorari by delivering a copy via U.S. Mail, postage prepaid, to the following address, this 11th day of January, 2011:

William L. Howard, Esquire
Russell G. Hines, Esquire
Young Clement Rivers LLP
Post Office Box 993
Charleston, South Carolina 29402

Charles S. Altman, Esquire
Meredith L. Coker, Esquire
Post Office Box 265
Charleston, South Carolina 29402

Attorney Signature on Following Page.

FUTERAL & NELSON, LLC

Stephan V. Futeral
S.C. Bar ID 66427
Thomas C. Nelson, Esquire
S.C. Bar ID 71178
Post Office Box 1543
Mt. Pleasant, South Carolina 29465-1543
Telephone (843) 284-5500
Facsimile (843) 284-5501
email to: sfuteral@charlestonlaw.net
Attorneys for Respondent

Dated: 1/11/11

Futeral & Nelson LLC

Attorneys Serving the Lowcountry

January 11, 2011

The Honorable Daniel Shearouse
South Carolina Supreme Court
Post Office Box 11330
Columbia South Carolina 29211

RE: Sheep Island Plantation, LLC v. Bar-Pen Investments, LLC
Case No: 200891160
Client ID: 31207
Matter ID: 9123174

Dear Mr. Shearouse:

Please find enclose a motion for enlargement of time to file return to petition for writ of certiorari for the above referenced matter as well as an original and one copy of a proof of service of the same. Please file the original documents and return the extra filed copies to us in the envelope included. I have also enclosed our firm's check in the amount of $25.00 to satisfy the filing fee for this motion. Should you have any questions or concerns please contact our office.

Thank you for your attention to this matter.

Sincerely,

Kelsey J. Gilmore-Futeral

/KGF
/Enclosure

cc: William L. Howard, Esq.
Charles S. Altman, Esq.
Earl Bruce Marshall

Local 843-284-5500 Toll Free 877-913-5500 Fax 843-284-5501

1004 Anna Knapp Blvd., 2nd Floor • Mount Pleasant, South Carolina 29464
Reply to: P. O. Box 1543 • Mount Pleasant, South Carolina 29465-1543

www.charlestonlaw.net

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

December 21, 2010

William L. Howard, Esquire
Russell G. Hines, Esquire
Young Clement Rivers, LLP
P O Box 993
Charleston, SC 29402

Re: Sheep Island Plant. v. Bar-Pen Invest.
Case Tracking No. 2010-178066

Dear Counsel:

This office has received your Petition for Writ of Certiorari and Appendix in the above matter. It has been assigned the Case Tracking Number that appears above. Please use this number on all future correspondence relating to this matter.

I do wish to call the attention of the parties to the attached order relating to the inclusion of personal data identifiers and other sensitive information in documents filed with the Supreme Court of South Carolina and the South Carolina Court of Appeals. Please note that the responsibility for insuring that information is redacted or sealed as required by this order rests with counsel and the parties. This office will not review filings for redaction or to determine if materials should be sealed.

Very truly yours,

CLERK

DES/lda

Enclosure

cc: Charles S. Altman, Esquire
Meredith L. Coker, Esquire
Stephen V. Futeral, Esquire
Thomas C. Nelson, Esquire
The Honorable Tanya Gee

CHARLESTON
28 BROAD STREET
P.O. BOX 993
CHARLESTON, SC 29402-0993
TELEPHONE: (843) 577-4000

www.ycrlaw.com

Other Office:
Columbia, SC

YOUNG CLEMENT RIVERS LLP
ATTORNEYS AT LAW

Elizabeth R. O'Neil
Paralegal

Direct Dial: (843) 724-6658
Direct Fax: (843) 579-2936
E-mail: eoneil@ycrlaw.com

December 17, 2010

VIA US MAIL
The Honorable Daniel E. Shearouse, Clerk of Court
South Carolina Supreme Court
P. O. Box 11330
Columbia, SC 29211-1330

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

Dear Mr. Shearouse:

Enclosed please find the original and seven (7) copies of the Petitioner's ***Petition for Writ of Certiorari*** in the above-referenced matter. I also enclose the original and two (2) copies of the ***Appendix to the Petition for Writ of Certiorari***, as well as, the original and two (2) copies of the *Proof of Service*.

Finally, I enclose our firm check in the sum of $100.00 to cover the filing fee. I would appreciate your filing these documents and returning one stamped copy of each to us in the enclosed self-addressed, stamped envelope.

Thank you, in advance, for your assistance with this.

Respectfully yours,

YOUNG CLEMENT RIVERS, LLP

Elizabeth R. O'Neil
Paralegal

ERO/ero
Enclosures
cc: Stephan V. Futeral, Esquire
Thomas C. Nelson, Esquire
The Honorable Tanya A. Gee, South Carolina Court of Appeals
Aubrey J. Wooddy, Jr., Esquire
Meredith Long Coker, Esquire
Charles S. Altman, Esquire

The Supreme Court of South Carolina

Sheep Island Plantation, LLC, Respondent,

v.

Bar-Pen Investments, LLC, Petitioner.

The Honorable Thomas L. Hughston, Jr.
Berkeley County
Trial Court Case No. 2006-CP-08-01650

ORDER

For good cause having been shown, the time for serving and filing the Petition for Writ of Certiorari and Appendix in the above entitled matter is hereby extended until December 17, 2010.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY _____
Clerk

Columbia, South Carolina

November 24, 2010

cc: Charles S. Altman, Esquire
Meredith L. Coker, Esquire
William L. Howard, Esquire
Russell G. Hines, Esquire
Stephen V. Futeral, Esquire
Thomas C. Nelson, Esquire
The Honorable Tanya Gee

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.

MOTION FOR EXTENSION OF TIME TO FILE/SERVE PETITION FOR A WRIT OF CERTIORARI

ALTMAN & COKER, LLC
Charles S. Altman
Meredith L. Coker
P.O. Box 265
Charleston, South Carolina 29402
Telephone: (843) 853-9907
Facsimile: (843) 853-9838

and

YOUNG CLEMENT RIVERS, LLP
William L. Howard
Russell G. Hines
28 Broad Street
Charleston, South Carolina 29401
Telephone: (843) 724-6669
Facsimile: (843) 579-1392
Attorneys for the Petitioner

TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF SOUTH CAROLINA

COMES NOW the petitioner, Bar-Pen Investments, LLC ("Bar-Pen"), by and through its undersigned counsel, pursuant to Rule 263(b), SCACR, and moves this Honorable Court for a 15-day extension of time to file/serve its petition for a writ of certiorari to the Court of Appeals in the above-captioned matter.

The Court of Appeals decided this matter by opinion filed August 4, 2010. Bar-Pen's timely petition for rehearing was denied by order filed November 2, 2010. (A copy of the Court of Appeals' Order Denying Petition for Rehearing is attached hereto as EXHIBIT A, which is incorporated herein by reference.) Pursuant to Rule 242(c), SCACR, a petition to this Court for a writ of certiorari to the Court of Appeals is currently due to be filed/served no later than December 2, 2010.

In light of other work-related time commitments, which include briefing deadlines in other appellate matters, as well as the approaching Thanksgiving holiday, the undersigned respectfully requests that Bar-Pen's deadline for filing/serving a petition for writ of certiorari to the Court of Appeals be extended by 15 days from December 2, 2010.

Prior to making this request, the undersigned corresponded with Thomas C. Nelson, Esquire, counsel for the respondent, Sheep Island

Plantation, LLC, and can advise the Court that Mr. Nelson has no objection. Further, the undersigned respectfully submits that the instant motion is consistent with the interests of justice.

WHEREFORE, Bar-Pen respectfully requests that this Honorable Court grant it an extension of 15 days' time to file/serve a petition for writ of certiorari to the Court of Appeals in this matter. With the requested extension, the new deadline for such petition would be December 17, 2010, according to the undersigned's calculations.

Further, to the extent that the Court is not inclined to grant the requested extension, the undersigned humbly requests that, if possible, notice of the Court's decision be transmitted via telephone or facsimile so that the undersigned may be able to submit a petition on Bar-Pen's behalf within the current time constraints.

<SIGNATURE BLOCK ON THE FOLLOWING PAGE>

Respectfully submitted,

ALTMAN & COKER, LLC
Charles S. Altman
Meredith L. Coker
P.O. Box 265
Charleston, South Carolina 29402
Telephone: (843) 853-9907
Facsimile: (843) 853-9838
and
YOUNG CLEMENT RIVERS, LLP

By: _____
William L. Howard
Russell G. Hines
28 Broad Street
Charleston, South Carolina 29401
Telephone: (843) 724-6669
Facsimile: (843) 579-1392
Attorneys for the Petitioner

Charleston, South Carolina

Dated: 11/22/10

The South Carolina Court of Appeals

Sheep Island Plantation, LLC, Appellant,

v.

Bar-Pen Investments, LLC, Respondent.

The Honorable Thomas L. Hughston, Jr.
Berkeley County
Trial Court Case No. 2006-CP-08-01650

ORDER DENYING PETITION FOR REHEARING

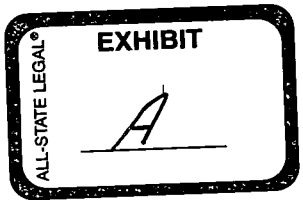
PER CURIAM: After a careful consideration of the Petition for Rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded and hence, there is no basis for granting a rehearing.

It is, therefore, ordered that the Petition for Rehearing and request for oral argument be denied.

John Cannon C. J.

Paul E. Thomas J.

Daniel F. Pieper J.



Columbia, South Carolina

cc: Stephen V. Futeral,Esquire
Thomas C. Nelson,Esquire
Charles S. Altman, Esquire
William L. Howard, Sr, Esquire

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.

PROOF OF SERVICE

ALTMAN & COKER, LLC
Charles S. Altman
Meredith L. Coker
P.O. Box 265
Charleston, South Carolina 29402
Telephone: (843) 853-9907
Facsimile: (843) 853-9838

and

YOUNG CLEMENT RIVERS, LLP
William L. Howard
Russell G. Hines
28 Broad Street
Charleston, South Carolina 29401
Telephone: (843) 724-6669
Facsimile: (843) 579-1392
Attorneys for the Petitioner

I, Russell G. Hines, of Young Clement Rivers, LLP, counsel for the petitioner above named, do hereby certify that I have served the petitioner's **Motion for Extension of Time to File/Serve Petition for a Writ of Certiorari** on the respondent, Sheep Island Plantation, LLC, by depositing a copy of the same in the United States Mail, postage prepaid, on November 22, 2010, addressed as follows to its counsel of record:

FUTERAL & NELSON, LLC
Stephan V. Futeral, Esquire
Thomas C. Nelson, Esquire
1004 Anna Knapp Blvd., 2nd Floor
Mt. Pleasant, SC 29464

I further certify that I have provided notice of the petitioner's **Motion for Extension of Time to File/Serve Petition for a Writ of Certiorari** to the Court of Appeals, filing the same therewith by depositing a copy of the aforementioned motion in the United States Mail, postage prepaid, on November 22, 2010, addressed as follows:

The Honorable Tanya Gee
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

<SIGNATURE BLOCK ON THE FOLLOWING PAGE>

YOUNG CLEMENT RIVERS, LLP

By: _____
Russell G. Hines

Charleston, South Carolina

Dated: 11/22/10

CHARLESTON
28 BROAD STREET
P.O. BOX 993
CHARLESTON, SC 29402-0993
TELEPHONE: (843) 577-4000

www.ycrlaw.com

Other Office:
Columbia, SC

YOUNG CLEMENT RIVERS LLP
ATTORNEYS AT LAW

Elizabeth R. O'Neil
Paralegal

Direct Dial: (843) 724-6658
Direct Fax: (843) 579-2936
E-mail: eoneil@ycrlaw.com

November 22, 2010

VIA US MAIL and FACSIMILE
The Honorable Daniel E. Shearouse, Clerk of Court
South Carolina Supreme Court
P. O. Box 11330
Columbia, SC 29211-1330

Re: *Appeal: 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 matter are the original and six copies of a Motion for Extension of Time to File/Serve Petition for a Writ of Certiorari. Also enclosed is our firm check in the amount of $25.00 to cover the cost of filing same. Kindly return one clocked copy to us in the self addressed stamped envelope provided.

Thank you, in advance, for your assistance with this.

Respectfully yours,

YOUNG CLEMENT RIVERS, LLP

Elizabeth R. O'Neil
Paralegal

ERO/ero
Enclosures
cc: Stephan V. Futeral, Esquire (via US Mail and Fax)
Thomas C. Nelson, Esquire (via US Mail and Fax)
The Honorable Tanya A. Gee, South Carolina Court of Appeals (via US Mail and Fax)
Aubrey J. Wooddy, Jr., Esquire (via email)
Meredith Long Coker, Esquire (via email)
Charles S. Altman, Esquire (via email)