THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Mikell R. Scarborough, Master-In-Equity

Case No. 2014-CP-10-7481
Appellate Case No. 2015-002259

Lee & Associates Charleston, LLC, Respondent,

v.

Chicora Gardens Holdings, LLC, Chicora Life Center, LC, and Jeremy Blackburn,

Of whom, Chicora Gardens Holdings, LLC and Chicora Life Center, LC are Appellants.

INITIAL BRIEF OF APPELLANTS

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TABLE OF CONTENTS

Table of Authorities iii

Statement of Issues on Appeal 1

Statement of the Case and Facts 3

Summary Judgment Standard 5

Arguments:

1. THE LOWER COURT ERRED IN FINDING THAT THE AGENCY AGREEMENT IS UNAMBIGUOUS BECAUSE IT CONTAINS IRRECONCILABLE COMMISSION RATES AS WELL AS MATERIAL TERMS CAPABLE OF SEVERAL REASONABLE MEANINGS.. 6

A. The Lower Court erred in ruling that the Agreement is unambiguous, when it simultaneously found that it was unable to interpret or reconcile several different commission rate provisions.. 8

B. The Lower Court erred in finding that the Agreement is unambiguous because Sections 23 and 4a contain mutually exclusive terms capable of different meanings.. 13

C. The Lower Court erred in finding that the Agreement is unambiguous because it failed to assign meaning to the material term, "ratified"........................... 15

2. THE LOWER COURT ERRED IN FINDING THAT THE LEASE IS AN "ENFORCEABLE INSTRUMENT" BECAUSE IT IS EXPLICITLY CONDITIONED ON, AND WOULD ONLY BECOME EFFECTIVE AFTER, THE OCCURRENCE OF EVENTS WHICH HAVE YET TO OCCUR 16

3. THE LOWER COURT ERRED IN FINDING THAT THE AGREEMENT DOES NOT CONTAIN A TERMINATION PROVISION AND THAT NO GENUINE ISSUES OF MATERIAL FACT EXIST AS TO THE APPELLANTS' DEFENSES OF TERMINATION AND PRIOR MATERIAL BREACH, BECAUSE THE APPELLANTS SUBMITTED AFFIDAVITS SUPPORTING BOTH DEFENSES...20

4. THE LOWER COURT ERRED WHEN IT FAILED TO APPLY THE MANDATED STRICT CONSTRUCTION STANDARD IN ITS ANALYSIS OF THE MECHANIC'S LIEN STATUTE RELIED ON BY THE RESPONDENT...23

5. THE LOWER COURT ERRED IN FINDING THAT "LICENSED SERVICES" WHICH END MONTHS PRIOR TO THE PROCUREMENT OF A LEASE NEVERTHELESSS "RESULT IN" THE PROCUREMENT OF THAT LEASE 24

6. THE LOWER COURT ERRED IN FINDING THAT ACQUISITION AND FORECLOSURE OF THE RESPONDENT'S MECNAHIC'S LIEN WAS APPROPRIATE WHEN THE LEASE IS NEITHER ENFORCEABLE NOR GENERATING INCOME....................30

7. THE LOWER COURT ERRED IN FINDING THAT THE RESPONDENT IS ENTITLED TO ATTORNEY'S FEES BECAUSE IT MADE THIS RULING PRIOR TO DETERMINING WHICH PARTY IS THE "PREVAILING PARTY," AS DEFINED BY THE MECHAINIC'S STATUTE RELIED ON BY THE RESPONDENT....................33

Conclusion 35

TABLE OF AUTHORITIES

CASES

Ballenger Corp. v. City of Columbia, 286 S. C. 1, 331 S.E.2d 365 (Ct.App. 1985)................17

Baughman v. American Tel. & Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991)......................6

Blakeley v. Rabon, 266 S.C. 68, 72, 221 S.E.2d 767, 769 (1976).....................................7

Brown Paper Mill Co., Inc. v. Irvin, 8 Cir., 146 F.2d 232, 235.......................................17

Bruce v. Blalock, 241 S.C. 155, 160, 127 S.E.2d 439, 441 (1962)................................8, 16

Butler Contracting, Inc. v Court St., L.L.C. 369 S.C. 121, 631 S.E.2d 252 (2006)....23, 24, 25, 30

Case Associates, Ltd. v. Gerngross, 305 S.C. 6, 9, 406, S.E.2d 162, 164 (1991)...........7, 14, 16

Clo–Car Trucking Co. v. Clifflure Estates of S.C., Inc., 282 S.C. 573, 320 S.E.2d 51 (Ct.App.1984)..23

Cobb v. Gross, 291 S.C. 550, 354 S.E.2d 573 (Ct.App. 1987)...................................17, 18

Ellie, Inc. v. Miccichi, 358 S.C.78, 594 S.E.2d 485 (S.C.App. 2004).............................7, 19

Ellis v. Taylor, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994)......................................8

Farr v. Duke Power Co., 265 S.C. 356, 362, 218 S.E.2d 431, 433 (1975)..................7, 14, 16

Ferguson Fire and Fabrications, Inc. v. Preferred Fire Protection, L.L.C., et. al.

409 S.C. 331, 762 S.E.2d 561 (S.C. 2014)...23

Fuller v. Bradley Contracting Co., 183 A.D. 6, 170 N.Y.S. 320, 328...............................17

Hamerick v. Cooper River Lumber Co., 223 S.C. 119, 74 S.E.2d 575 (1953)......................17

Hancock v. Mid-South Mgmt. Co., Inc., 381 S.C. 326, 673 S.E.2d 801 (2009)..................6, 22

Heins v. Heins, 344 S.C. 146, 158, 543 S.E.2d 224, 230 (Ct.App.2001).............................7

Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000)..23

Jordan v. Security Group, Inc., 311 S.C. 227, 230, 428 S.E.2d 705, 707 (1993)...............7, 19

Lee v. Univ. of S.C., 407 S.C. 512, 757 S.E.2d 394 (2014)..7

Lincoln v. Aetna Cas. & Sur. Co., 300 S.C. 188, 386 S.E.2d 801, 803 (Ct.App. 1989)............15

Prestwick Golf Club, Inc. v. Prestwick Ltd. P'ship 331 S.C. 385, 390, 503 S.E.2d 184, 187 (Ct.App.1998)..8

S.C. Dep't of Natural Res.s v. Town of McClellanville, 345 S.C. 617, 550 S.E.2d 299 (2001)......7

Segal Brokerage Co., Inc. v. Lloyd L. Hughes, Inc., 9 Cir., 96 F.2d 208, 210......................17

Shelley Constr. Co. v. Sea Garden Homes, Inc., 287 S.C. 24, 336 S.E.2d 488 (Ct.App.1985)..23, 24, 25, 26, 30

Smith-Cooper v. Cooper, 344 S.C. 289, 295, 543 S.E.2d 271, 274 (Ct.App.2001).............8, 17

SSI Med. Servs., Inc. v. Cox, 301 S.C. 493, 392 S.E.2d 789 (1990)..................................6

Summer v. Carpenter, 328 S.C. 36, 492 S.E.2d 55 (1997)..6, 21

Superior Auto. Ins. Co. v. Maners, 261 S.C. 257, 263, 199 S.E.2d 719, 722 (1973)................8

Tupper v. Dorchester County, 326 S.C. 318, 487 S.E.2d 187 (1997)................................6

STATUTES

S.C. Code § 29-5-10 (1976)..31, 34

S.C. Code § 29-5-20 (1976)..25, 34,

S.C. Code § 29-5-21 (1976)..3, 23-27, 30-32, 34

S.C. Code § 29-5-90 (1976)..32

STATEMENT OF ISSUES ON APPEAL

1. DID THE LOWER COURT ERR IN FINDING THAT THE AGENCY AGREEMENT IS UNAMBIGUOUS WHEN IT CONTAINS IRRECONCILABLE COMMISSION RATES AS WELL AS MATERIAL TERMS CAPABLE OF SEVERAL REASONABLE MEANINGS?

   A. Did the Lower Court err in ruling that the Agreement is unambiguous, when it simultaneously found that it was unable to interpret or reconcile several different commission rate provisions?

   B. Did the Lower Court err in holding that Agreement is unambiguous, when Sections 23 and 4a contain mutually exclusive terms capable of different meanings?

   C. Did the Lower Court err in finding that the Agreement is unambiguous when it failed to assign meaning to the material term, "ratified?"

2. DID THE LOWER COURT ERR IN FINDING THAT THE LEASE IS AN "ENFORCEABLE INSTRUMENT," WHEN IT IS EXPLICITLY CONDITIONED ON, AND WOULD ONLY BECOME EFFECTIVE AFTER, THE OCCURRENCE OF EVENTS WHICH HAVE YET TO OCCUR?

3. DID THE LOWER COURT ERR IN FINDING THAT THE AGREEMENT DOES NOT CONTAIN A TERMINATION PROVISION AND THAT NO GENUINE ISSUES OF MATERIAL FACT EXIST AS TO THE APPELLANTS' DEFENSES OF TERMINATION AND PRIOR MATERIAL BREACH, WHEN THE APPELLANTS SUBMITTED AFFIDAVITS SUPPORTING BOTH DEFENSES?

4. DID THE LOWER COURT ERR WHEN IT FAILED TO APPLY THE MANDATED STRICT CONSTRUCTION STANDARD IN ITS ANALYSIS OF THE MECHANIC'S LIEN STATUTE RELIED ON BY THE RESPONDENT?

5. DID THE LOWER COURT ERR IN FINDING THAT "LICENSED SERVICES" WHICH END MONTHS PRIOR TO THE PROCUREMENT OF A LEASE NEVERTHELESSS "RESULT IN" THE PROCUREMENT OF THAT LEASE?

6. DID THE LOWER COURT ERR IN FINDING THAT ACQUISITION AND FORECLOSURE OF THE RESPONDENT'S MECNAHIC'S LIEN WAS APPROPRIATE WHEN THE LEASE IS NEITHER ENFORCEABLE NOR GENERATING INCOME?

7. DID THE LOWER COURT ERR IN FINDING THAT THE RESPONDENT IS ENTITLED TO ATTORNEY'S FEES PRIOR TO DETERMINING WHICH PARTY IS THE "PREVAILING PARTY," AS DEFINED BY THE MECHAINIC'S LIEN STATUTE RELIED ON BY THE RESPONDENT?

STATEMENT OF THE CASE AND FACTS

The Appellant, Chicora Gardens Holdings, LLC purchased the Old Navy Hospital ("Hospital"), located at 3600 Rivers Avenue, in North Charleston, South Carolina, from the City of North Charleston, by virtue of a contract and deed executed on January 16, 2014.[1] On February 21, 2014, Chicora and the Respondent, Lee & Associates Charleston, LLC ("Lee") entered into a one-year agency agreement ("Agreement"), under which Lee was to provide a suite of services tailored toward attracting, targeting and securing a tenant for the Hospital. *see* Agreement.

Several months later, on June 30, 2014, Chicora and the County of Charleston ("County") executed a lease ("Lease") for an initial term of 25 years, at an annual rental amount of $1,177,044, or $29,426,100 over the life of the initial 25-year term.[2] Lease, pp. 1-3.

The Lease states that the initial 25-year term will begin on the "Effective Date," which is defined as "the date [the County] takes possession of [the Hospital] and all of the following events have occurred..." Lease, p. 2. The Lease then lists no less than five contingencies that would need to be met before triggering the "Effective Date." *Id.* To date, the County has yet to take occupancy of the Hospital, thus there is no "Effective Date." As a result, the County has not made a single rental payment to Chicora.

On August 6, 2014, Lee filed a mechanic's lien on the Hospital, pursuant to Section 29-5-21 of the South Carolina Code of Laws, in the amount of $138,000. Lee's lien is based on its

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[1] The Hospital was later transferred to the Appellant, Chicora Life Center, LC. Both entities played a role in the events giving rise to the underlying action, thus both were named defendants. For the purposes of this brief, the Appellants will be collectively referred to as "Chicora."

[2] Notwithstanding the below mentioned fact that the entire County has yet to take occupancy of the Hospital, this base rent has become irrelevant, due to the County relocating several departments or divisions, which would have contributed to this base rent.

claim that, pursuant to Sections 23 and 4a of the Agreement, it is entitled to half of a 1% commission, $147,130.50 (1% x $29,426,100 = $294,261 / 2 = $147,130.50), as a result of Chicora and the County executing the Lease.[3] Compl., p. 3; Pl's Mot. Summ. J., p. 2; Tr., p. 8. Lee claims that the other half is due upon occupancy of the Hospital by the County. *Id.*

On August 29, 2014, Chicora posted a cash bond in the amount of $179,400 to clear the Hospital of the mechanic's lien. Lee then filed suit on December 8, 2104, asserting that it was entitled to foreclose on this bond; to breach of contract damages in the amount of $294,261, half of which ($147,130.5) Lee alleged is owed now, with the other half being owed when the County takes occupancy of the Hospital; and several other causes of action unrelated to this appeal. *see* Compl. Chicora filed an amended answer on February 11, 2015, alleging a breach of contract counterclaim; dissolution of lien counterclaim; other claims unrelated to this appeal; and several defenses to Lee's claims, including prior material breach of contract and termination of the Agreement. *see* Am. Answer and Countercl.

On May 1, 2015, Lee moved for summary judgment on its breach of contract and foreclosure of lien claims. On September 3, 2015, Chicora replied to Lee's motion and filed a cross-motion for summary judgment on its dissolution of lien counterclaim and on the Lee's defamation claim, which is not upon on appeal.

On October 8, 2015, the Honorable Mikell R. Scarborough, Master-In-Equity for Charleston County ("Lower Court"), presided over oral arguments in support of these cross-motions. In their respective briefs and during oral arguments, the parties disagreed, based on differing interpretations of material terms in the Agreement, on whether Lee was entitled to a

[3] The discrepancy between the lien amount ($138,000) and the amount Lee now claims is currently due ($147,130.50) is not based on a miscalculation but, instead, on the fact that, when Lee filed its mechanic's lien, it did not have a copy of the Lease.

commission following the execution of the Lease by Chicora and the County. Chicora also asserted that Lee failed to market the Hospital pursuant to the Agreement, which amounted to a material breach and prompted Chicora to terminate the Agreement prior to its execution of the Lease. Lee contested this termination and disputed whether the Agreement even allowed for termination. Lee further claimed that it should be entitled to foreclose on it mechanic's lien because it performed numerous services that resulted in the procurement of the Lease, while Chicora maintained that any services Lee provided were indirect, ancillary and otherwise ceased months prior to the execution of the Lease. Chicora also argued that Lease did not give rise to Lee's right to acquire and foreclose on a mechanic's lien. *see* Pl.'s Mot. Summ. J.; Defs' Motions Summ. J.; Pl's Resp. to Defs' Mot. Summ. J.; Defs.' Resp. to Pl.'s Mot. Summ. J.; Tr.

On October 16, 2015, the Lower Court issued an order ("Order") granting the Respondent's motion for summary judgment on both its breach of contract and foreclosure of lien claims. The Lower Court, however, was unable to calculate damages, due to its inability to reconcile several plausible commission rates. It found that a "damages hearing" was necessary for the purpose of determining damages, including the attorney's fees and costs.[4] Order, p. 14. On October 30, 2015, the Appellants served notice of this appeal on the South Carolina Court of Appeals and attorneys for the Respondent.

SUMMARY JUDGMENT STANDARD

A trial court should grant a motion for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if

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[4] While not a delineated issue on appeal, it should be noted by this Court that the Lower Court classified the forthcoming trial as a "damages hearing," suggesting that the final step in this action is to assign monetary damages. This fails to consider that there exists unresolved issues of liability with respect to certain claims, including the aforementioned defamation cause of action. Also, the Lower Court found that Lee was entitled to an undetermined amount of attorney's fees. As discussed below, this was also done in error.

any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." S.C.R.C.P. 56(c); *see also Tupper v. Dorchester County*, 326 S.C. 318, 487 S.E.2d 187 (1997). Under Rule 56(c), the party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact. *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991). Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. Rather, the non-moving party must come forward with specific facts showing there is a genuine issue for trial. S.C.R.C.P 56(e); *SSI Med. Servs., Inc. v. Cox*, 301 S.C. 493, 392 S.E.2d 789 (1990). In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party. *Summer v. Carpenter*, 328 S.C. 36, 492 S.E.2d 55 (1997). Moreover, to withstand a motion for summary judgment "in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence." *Hancock v. Mid-South Mgmt. Co., Inc.*, 381 S.C. 326, 673 S.E.2d 801 (2009).

ARGUMENTS

I. THE LOWER COURT ERRED IN FINDING THAT THE AGENCY AGREEMENT IS UNAMBIGUOUS BECAUSE IT CONTAINS IRRECONCILABLE COMMISSION RATES AS WELL AS MATERIAL TERMS CAPABLE OF SEVERAL REASONABLE MEANINGS.

Throughout the Order, the Lower Court states that the Agreement is unambiguous [5], despite the fact that it contains several plausible commission rates and contradictory material terms, the former of which the Lower Court was unwilling and unable to reconcile at the

[5] Order, pp. 4, 5, 19

summary judgment level. Order, pp. 13-14. Because the Lower Court was unable to assign meaning to these commission rate provisions, and because there still exist undefined material terms, the Lower Court erred as a matter of law when it found that the Agreement is unambiguous. The Lower Court, therefore, should have sought to discover the intention of the parties, instead of awarding summary judgment to Lee.

When interpreting a contract, the duty of the court is to give effect to the intent of the parties. *Lee v. Univ. of S.C.*, 407 S.C. 512, 757 S.E.2d 394 (2014). Whether an ambiguity exists in the language of a contract is a question of law. *S.C. Dep't of Natural Res.s v. Town of McClellanville*, 345 S.C. 617, 550 S.E.2d 299 (2001). And "whether a contract is ambiguous is to be determined from the entire contract and not from isolated portions of the contract." *Farr v. Duke Power Co.*, 265 S.C. 356, 362, 218 S.E.2d 431, 433 (1975). However, "where a contract is ambiguous or capable of more than one construction, the question of what the parties intended becomes one of fact, and the question should be submitted to the jury." *Case Associates, Ltd. v. Gerngross*, 305 S.C. 6, 9, 406, S.E.2d 162, 164 (1991).

In *Ellie, Inc. v. Miccichi*, 358 S.C.78, 594 S.E.2d 485 (S.C.App. 2004), the South Carolina Court of Appeals engaged in a thorough analysis of the legal mechanics of contract interpretation, as it relates to the determining the existence or non-existence of ambiguity, stating:

> If its language 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. *Jordan v. Security Group, Inc.*, 311 S.C. 227, 230, 428 S.E.2d 705, 707 (1993); *Blakeley v. Rabon*, 266 S.C. 68, 72, 221 S.E.2d 767, 769 (1976). "Where an agreement is clear and capable of legal interpretation, the courts only function is to interpret its lawful meaning, discover the intention of the parties as found within the agreement, and give effect to it." *Heins v. Heins*, 344 S.C. 146, 158, 543 S.E.2d 224, 230 (Ct.App.2001). The court must enforce an unambiguous contract according to its terms, regardless of the contracts wisdom or

> folly, or the parties failure to guard their rights carefully. *Ellis v. Taylor*, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994). To discover the intention of a contract, the court must first look to its language--if the language is perfectly plain and capable of legal construction, it alone determines the documents force and effect. *Superior Auto. Ins. Co. v. Maners*, 261 S.C. 257, 263, 199 S.E.2d 719, 722 (1973). However, where an agreement is ambiguous, the court should seek to determine the parties intent. *Smith-Cooper v. Cooper*, 344 S.C. 289, 295, 543 S.E.2d 271, 274 (Ct.App.2001); *Prestwick Golf Club, Inc. v. Prestwick Ltd. P'ship* 331 S.C. 385, 390, 503 S.E.2d 184, 187 (Ct.App.1998). A contract is ambiguous when it is capable of more than one meaning or when its meaning is unclear. *Bruce v. Blalock*, 241 S.C. 155, 160, 127 S.E.2d 439, 441 (1962). In ascertaining intent, the court will strive to discover the situation of the parties, along with their purposes at the time the contract was entered.

Id. at 93 – 94, 594 S.E.2d at 493. Essentially, if a contract, or material terms contained therein, is capable of more than one reasonable meaning or interpretation, then that contract is ambiguous. *see Id.*

A. <u>The Lower Court erred in ruling that the Agreement is unambiguous, when it simultaneously found that it was unable to interpret or reconcile several different commission rate provisions.</u>

Lee's breach of contract cause of action ultimately turns on (1) whether it is entitled to half of an unidentified commission at execution of the Lease; and (2) the actual value of that commission. The Lower Court has attempted to separate the two issues, and, in regard to the latter, the Lower Court refused to assign meaning to contradictory commission provisions, holding, "[Lee] is entitled to a commission to be determined at a subsequent [damages] hearing." Order, p. 14. Despite not being able to reconcile several different commission rates, the Lower Court still ruled that Chicora was liable under Lee's breach of contract claim. *Id.* In effect, the Lower Court assigned liability under an "unambiguous" contract, while admitting that the Agreement's various commission rates are capable of more than one meaning, thus ambiguous. Because the commission rates create ambiguity in the Agreement, the Lower Court should not

have held that the Agreement is unambiguous, and, as a result, it should not have ruled on the issue of breach of contract liability.

To illustrate just how ambiguous the various commission rates are, consider the following analysis: Lee's breach of contract cause of action is based on its claim that, upon execution of the Lease, it was entitled to half of 1% of all rents due under the Agreement. In making this claim, Lee relies on two sections of the Agreement, Section 23 and Section 4a. Section 23 of the Agreement states, in pertinent portion,

> Both Client and Agent hereby acknowledge Client has had discussions with potential tenants ("Excluded Entities") for the Property which are set forth on Exhibit "B" attached hereto and made a part hereof. In the event a lease is fully executed with any Excluded Entity on or before October 31, 2014, Client shall pay Agent a commission in accordance with the following schedule:
>
> a) From the Effective Date to April 30, 2014: 50/100 percent (0.50%)
> b) From May 1, 2014 to June 30, 2014: one percent (1%)
> c) From July 1, 2014 to August 31, 2014: one and 50/100 percent (1.50%)
> d) From September 1, 2014 to October 31, 2014 two percent (2.0%)
> e) After October 31, 2014: two and 50/100 percent (2.50%)

Agreement, p.7. The purpose of this section is to provide <u>lower</u> commission rates for potential tenants with whom Chicora had previous discussions, a fact that Lee admitted during summary judgment oral arguments and that the Lower Court found in the Order. Tr., p. 9; Order, p. 2. Included on the list of "Excluded Entities" was the County. Agreement, Exhibit "B". There is no dispute that, if a commission is determined to have been earned, then Section 23 applies, in some yet-to-be-determined manner.

Section 23 is silent as to when a commission is earned, so to assert its current claim to half of this 1% commission, Lee combines Section 23 with selected language (italicization added) from Section 4a of the Agreement. Section 4a states in relevant part,

> The Client, upon entering into any lease, agreement, or arrangement granting space to any new tenant during the term of this Agreement, shall pay to Agent a fee calculated at four percent (4.0%) of all fixed base rentals due under the first five (5) years of the initial term plus two percent (2.0%) of all fixed base rentals due under the second five (5) years of the initial term of all such new leases for new tenants based upon the initial term of any such lease, or based upon the initial term of the lease with existing tenants for expansion space, *fifty percent (50%) of the above fee to be paid, in cash, at lease or amendment execution,* and fifty percent (50%) to be paid in cash upon occupancy by tenant.

Agreement, p. 2. All the above language is completely contained in a single sentence from Section 4a.

Lee picks language from Sections 4a and 23 to create a best case scenario commission rate: 1% of all rents during the entire 25-year term. There is a significant flaw in Lee's calculation, however, because Section 23 makes no reference to a commission based on the entire initial term of the Lease. On the other hand, Section 4a clearly considers a limitation on Lee's commission, calling for a rate of 4% of rents due during the first five years of the initial term of a lease and 2% of rents due during the second five years of the initial term of the same lease (i.e., Lee would earn commission based on only ten years of any initial term). The Lease contains an initial term of 25 years, leaving a 15 year gap. To close this gap, Lee assumes Section 23 applies to the entire 25 years, and uses Section 4a to claim half of that commission. Chicora has continually noted that Section 4a limits commission to 10 years, and, if Lee is using language from 4a to bolster its claim for half of its allegedly earned commission, then it, too, should be bound by the 10-year commission limitation. Tr., pp. 22-24, 49.

To counter Chicora's argument, Lee has maintained that the 1% language of Section 23 stands on its own and cannot be harmonized with the 10-year limitation language of Section 4a. Pl's Resp. to Defs' Mot. Summ. J. Lee is effectively arguing that Chicora cannot plug the 1%

language into Section 4a, which clearly calls for commission on only 10 years of the initial term of any lease entered into by Chicora and a tenant. Throughout this litigation, however, Lee has attempted to harmonize the two sections, specifically, by continuing to claim that it is due half of its commission upon execution of the Lease. *see* Complaint; Pl.'s Mot. Summ. J.; Tr. The language Lee relied and continues to rely on to make a claim to half of it allegedly earned commission is contained in Section 4a. In fact, this language is contained in the same sentence as the language regarding a commission on 10 years of the initial term of the Lease. In fact, Lee is the party who is picking and choosing the language of 4a that it wants to. Chicora is merely attempting to hold Lee to Lee's interpretation of the Agreement.

More importantly, Lee's interpretation of Sections 4a and 23 runs afoul of the very purpose of Section 23. Lee has stated on record that the purpose of Section 23 and the "Excluded Entities" list was to consider a lower commission rate in the event the tenant was one with whom or with which Chicora had previous discussions. Tr., p. 9. This type of provision is not uncommon and squarely grounded in logic: If Lee had to do less work to secure a tenant, then it should earn less commission.

A very simple hypothetical illustrates Lee's blatant flaw in its current claim to $147,130.50. Assume that the County was not on the "Excluded Entity" list, with all other facts of this case remaining the same. Under this scenario, Lee's claim clearly would have been made pursuant to Section 4a. Section 4a calls for a commission of 4% of rents due during the first five years of the Lease (i.e., 5 years x $1,177,044 x 4% = $235,408.80) and two percent of rents due during the second five years of the Lease (i.e., 5 years x $1,177,044 x 2% = $117,704.40), for a total of $353,112.20. Given that Lee claims it is currently entitled to half, also based on Section 4a, it then would have filed a lien for $176,556.10. Now assume that, like the actual facts of this

case, the County was an "Excluded Entity." But instead of a June 30, 2014, Lease execution date, assume an execution date of one day later, or July 1, 2014, thus triggering a 1.5% commission rate. Under Lee's interpretation of Section 23, which ignores Section 4a's time limitation, Lee would be have been entitled to half of $441,391.50 (25 years x $1,177,044 x 1.5%), or $220,695.75. Lee's method of calculating commission allows for more to be claimed following a lease entered into with a tenant on the "Excluded Entities" list, the very purpose of which is to provide for a lower commission.

If, on the other hand, you were to combine Sections 23 and 4a, [6] which seems logical given Lee's urging to use Section 4a to claim half of its allegedly earned commission, then the following rate would apply: 1% of the first five years rent (i.e., 1% x $5,885,200 = $58,852) and 1% of the second five years of rent (i.e., 1% x $5,885,200 = $58,852), totaling $117,704. Again, Lee's lien was based on half of the commission it alleged it is now due, or $58,852.[7]

Obviously, each possible commission rate would dramatically affect the damages that Lee may be awarded ($147,130.50, as claimed by Lee, or $58,852, as asserted by Chicora, which, again, represents Lee's highest possible value). Given the disparity in these figures and the Lower Court's inability to reconcile Sections 23 and 4a, it is clear that the end commission rate is the heart of the Agreement. Arguably, there is no more material term than the commission rate. Despite a clear, and admitted, ambiguity, the Lower Court nevertheless held that the Agreement is unambiguous and that Lee "is entitled to judgment as to liability of its breach of contract claim." Order, p. 14.

[6] This entire analysis assumes that Sections 23 and 4a are to be read together in some manner. In Section II.B. below, Chicora asserts that it may or may not have been the parties intent to combine the sections of the Agreement.
[7] Arguably, this value is high, since Section 4a calls for a sliding scale of Lee's commission, under which the percentage is reduced in the second five years of the initial term of a lease. If you follows this model, then Lee would only be entitled to 0.5% of the second five years of the Lease, reducing the above $58,852 figure.

The Lower Court's inability to determine a commission rate should have precluded a finding that the Agreement is unambiguous and should have precluded a ruling in Lee's favor with respect to the issue of liability. The Lower Court completely failed to consider the possibility that the commission rate provisions are so ambiguous as to render the entre contract unenforceable. If this were in fact the scenario, then there would exits two contradictory findings: (1) Chicora is liable under an unambiguous, enforceable contract, which the Lower Court actually held; and (2) the Agreement is so ambiguous, with respect to the commission rates or values, as to render it unenforceable in its entirety, which is still possible, especially considering the above analysis, which shows the vast disparity in possible commission calculations.

The Lower Court determined that it could not reconcile various commission rates contained in the Agreement; therefore, it admitted that the commission provisions are capable of more than one meaning. Assumingly, the "damages hearing" would serve the purpose of discovering the parties' intent with respect to the commission rate provisions. However, ambiguity in these provisions opens the door for the entire Agreement to be unenforceable. An unenforceable Agreement would obviously negate the Lower Court's ruling that Chicora is liable under Lee's breach of contract claim. Therefore, the Lower Court erred as a matter of law when it found (1) that the Agreement is unambiguous and (2) that Chicora was liable under the Agreement.

B. <u>The Lower Court erred in finding that the Agreement is unambiguous because Sections 23 and 4a contain mutually exclusive terms capable of different meanings.</u>

As stated above, Lee's breach of contract cause of action is based on its claim that, upon execution of the Lease, it was entitled to half of 1% of all rents due under the Agreement. To make this claim, Lee combined language from Sections 23 and 4a. Notwithstanding the above

discussed ambiguity surrounding the interplay of these two sections, is it also unclear from the Agreement whether Section 4a, specifically the language Lee uses to make a claim to half of its allegedly earned commission, even applies to Section 23. Section 23 is silent as to any language that would suggest half is due upon execution of the Lease. To justify its current breach of contract claim and below discussed mechanic's lien, Lee was forced to lift language from Section 4a. Because Section 4a and Section 23 of the Agreement contain mutually exclusive language, which could either be read separately or read together, as was done by the Lower Court to assign liability, the Agreement is capable of more than one meaning.

The Agreement is ambiguous, as "determined from the entire contract and not from isolated portions of the contract." *Farr v. Duke Power Co.*, 265 S.C. 356, 362, 218 S.E.2d 431, 433 (1975). One section, 23, makes no mention of when commission is due, while another, 4a, states that half is due at execution. Read as a whole, the Agreement is ambiguous.

The Lower Court should have held a trial to determine the parties' intent, with respect to how, if at all, Sections 23 and 4a work together. *Case Associates, Ltd. v. Gerngross*, 305 S.C. 6, 9, 406, S.E.2d 162, 164 (1991). This Court should reverse the Lower Court's decision on the issue of the Agreement's ambiguity, in addition to the Lower Court's ruling that Chicora is liable under Lee's breach of contract claim, and remand the case for further proceedings to determine the parties' intent.

C. <u>The Lower Court erred in finding that Agreement is unambiguous because it failed to assign meaning to the material term, "ratified"</u> [8]

The Agreement is also ambiguous because it still remains unclear what effect Section 15g has on Lee's claim to half of its commission, which Lee asserts was due upon "execution" of the Lease. Section 15g states, "Commission shall be deemed earned and payable to [Lee] when a tenant has entered into a ratified lease..." Chicora has argued that "ratified" means an enforceable, revenue generating lease. Tr., pp. 21, 25-28. While the exact meaning of "ratified" is unknown, it is obvious that the parties did not intend for the term to be interchangeable with "execution," which is specifically used in Section 4a of the Agreement. *Id.* Agreement, p. 2.

The Lower Court was also confused as the meaning of "ratified." It asked the parties at oral arguments what it would take to get the Agreement ratified. Tr., p. 27. Unfortunately, that ended the Lower Court's inquiry, as it did nothing to distinguish between "ratified" and "executed," stating in the Order,

> Ratification, as it relates to the law of agency, means the express or implied adoption and confirmation by one person of an act or contract performed or entered into in his behalf by another who at the time assumed to act as his agent. <u>Lincoln v. Aetna Cas. & Sur. Co.</u>, 300 S.C. 188, 386 S.E.2d 801, 803 (Ct.App. 1989). Ratification exists upon the concurrence of three elements; (1) acceptance by the principal of the benefits of the agent's acts, (2) full knowledge of the facts, and (3) circumstances or an affirmative election indicating an intention to adopt the unauthorized arrangements. <u>Id.</u> Thus, ratification occurs when the agent enters an unauthorized contract, and the principal must accept or "ratify" the contract. Since in this case the principal, Chicora Gardens, entered the lease, ratification is neither required nor relevant.

[8] Ratification of the Lease could also be considered a condition precedent to Lee earning a commission. Specific conditions precedent found in the Agreement and the Lease are discussed below. However, the meaning of ratification, within the Agreement, is unknown. Without knowing the meaning of ratification, it is impossible to determine whether it, as a condition precedent, has been met, in addition to whether there exist genuine issues of material fact as to fulfillment of this condition precedent. Therefore, the issue of ratification has to be analyzed within the issue of ambiguity.

Order., p. 7.

First, agency law has no bearing on this case, thus how ratification is defined in agency law offers nothing to resolve the meaning of the term in the Agreement. Second, even if it does apply, the Lower Court still failed because its analysis addresses only Chicora's ratification, without mention to the County.

Ratification is clearly required, and, to date, the term remains undefined by the Lower Court. Whether the Agreement "is ambiguous is to be determined from the entire contract and not from isolated portions of the contract." *Farr v. Duke Power Co.*, 265 S.C. 356, 362, 218 S.E.2d 431, 433 (1975). Read as a whole, the Agreement clearly requires two separate things, execution and ratification. These are mutually exclusive terms, the meaning of which are subject to several reasonable interpretations, thus the Agreement is ambiguous. *see Bruce v. Blalock*, 241 S.C. 155, 160, 127 S.E.2d 439, 441 (1962).

Given this ambiguity, the Lower Court erred as a matter of law when it held that the Agreement is unambiguous and when it assigned liability on Lee's breach of contract claim. Again, this Court should remand this case to determine the parties' intent. *Case Associates, Ltd. v. Gerngross*, 305 S.C. 6, 9, 406, S.E.2d 162, 164 (1991).

II. THE LOWER COURT ERRED IN FINDING THAT THE LEASE IS AN "ENFORCEABLE INSTRUMENT" BECAUSE IT IS EXPLICITLY CONDITIONED ON, AND WOULD ONLY BECOME EFFECTIVE AFTER, THE OCCURRENCE OF EVENTS WHICH HAVE YET TO OCCUR.

This Court should reverse the Lower Court's ruling on Lee's breach of contract claim because Section 4a of the Agreement as well as the Lease both contain conditions, which have not been met and which prevent any commission being owed to Lee. With respect to the Lease,

these contingencies may create ambiguity, requiring exploration into the intent of Chicora and the County. The Lower Court erred as a matter of law in finding that Chicora was liable for breach of contract.

The law governing contracts between brokers and owners of property is established, as outlined by the South Carolina Supreme Court in *Hamerick v. Cooper River Lumber Co.*, 223 S.C. 119, 74 S.E.2d 575 (1953):

> It is equally well settled that the broker and owner "may make such a contract for the broker's services as is agreeable to them, and may make the payment of the broker's commission dependent upon the full performance of the contract of purchase or sale, or postpone the payment of the commission, or make the broker's right to the commission contingent upon the happening of future events". *Brown Paper Mill Co., Inc. v. Irvin*, 8 Cir., 146 F.2d 232, 235. In *Segal Brokerage Co., Inc. v. Lloyd L. Hughes, Inc.*, 9 Cir., 96 F.2d 208, 210, the Court said: "Where the obligation of the principal to pay commissions depends upon the performance of conditions precedent, the broker takes the risk of nonperformance on the part of the customer. As said in *Fuller v. Bradley Contracting Co.*, 183 A.D. 6, 170 N.Y.S. 320, 328, 'a broker may bind himself not to demand payment unless the contract is actually carried out. Such agreements are lawful and proper, and not unusual.'"

Hamerick at 223 S.C. at 124 and 74 S.E.2d at 577. A contingency or condition precedent is "any fact, other than mere lapse of time, which, unless executed, much exist or occur before a duty of immediate performance by the promisor can arise." *Ballenger Corp. v. City of Columbia*, 286 S. C. 1, 331 S.E.2d 365 (Ct.App. 1985). *see Cobb v. Gross*, 291 S.C. 550, 354 S.E.2d 573 (Ct.App. 1987) (finding, "words and phrases such as 'if,' 'provided that,' 'when,' 'after,' 'as soon as,' and 'subject to' frequently are used to indicate that performance expressly has been made conditional.)

Again, Lee relies heavily on the above italicized language of Section 4a of the Agreement to assert that it entitled to half of a 1%, due at execution of the Lease. However, Lee's commission would only triggered after a delineated condition precedent is met. Section 4a states

further, [i]n all events, it is understood that no fee shall be deemed earned until and unless the lease or other agreement shall have become effective between the tenant and the Client by the execution of a contract or other enforceable instrument." Agreement, p. 2. The words "until" and "unless" align closely with similar conditional words mentioned by the Court in *Cobb v. Gross*. This clause is clear: Lee will not earn a commission until an "effective' and "enforceable instrument" is entered in to by Chicora and a tenant (i.e., the County).

Lee continually relied on the title of the Lease to argue that the Lease is an "effective" and "enforceable instrument." Tr., p. 32. The same argument was mirrored in the Order, when the Lower Court states, "It is titled 'lease.'" Order, p. 6. This blanket classification offers little to help determine whether the Lease is actually an "effective" and "enforceable instrument," which is required by the Agreement. To understand whether the Lease was an "effective" and "enforceable instrument," it is necessary to look to the plain language of the Lease.

Unfortunately, the Lease was not a contract under which the only remaining step was for the County to pay Chicora. At best, the Lease was an agreement to agree, because it had an undetermined start date and numerous prerequisites to the triggering of that start date. In Section 2, the Lease states that the 25-year lease will not begin until the "Effective Date." Lease, p. 2. The "Effective Date" was to be "the date Tenant takes possession of [the Hospital] and all of the following events have occurred..." *Id.* Section 2 then lists no less than five events that would have had to occur before the County would have agreed to take possession. Specifically, Chicora was to complete, to the satisfaction of the County, a number of "Tenant Improvements," prior to the "Effective Date" being met.

If a contract's "language 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." *Ellie, Inc. v. Miccichi*, 358 S.C.78, 594 S.E.2d 485 (S.C.App. 2004); *citing Jordan v. Security Group, Inc.*, 311 S.C. 227, 230, 428 S.E.2d 705, 707 (1993). The terms "Effective Date" are "plain" and "unambiguous." *Id.* And they are certainly "capable of only one reasonable interpretation," because the Lease defines them. *Id.* The Lease explicitly states that it will become effective at a later date, when all the conditions precedent are met. To date, the "Effective Date" has not been triggered. If the Lease is not effective, then it certainly is not an "enforceable instrument," which is required by the Agreement before Lee earns a commission.

Further evidence of the Lease being nothing more than an agreement to agree is the fact that it was left undecided which party, Chicora or the County, would cover the cost of certain Tenant Improvements. Exhibit B of the Lease states, "The Parties agree to negotiate in good faith to determine a mutually agreed upon amount over the Budget Cap and the respective financial obligations of the Parties for the same." Lease, p. 24. This clause is loaded with language that directly speaks to the unenforceability of the Lease. There has yet to be meeting of the minds with respect to costs in the millions.

Effectively, there are two agreements, both full of contingencies: (1) the Agreement, which contains a condition precedent to Lee earning a commission (i.e., the existence of an "enforceable" lease); and (2) the Lease, which contains numerous conditions precedent and other language that speaks directly to its unenforceability.

The Lease does not qualify as an "enforceable instrument." In the alternative, at the very least, the Lease, read as a whole, is ambiguous as to its enforceability. The Lower Court failed to even consider what may or may not have been the intent of Chicora and the County, when they entered the Lease. Is it an agreement to agree, as proposed by Chicora, or was it an "enforceable

instrument," as argued by Lee? Undisputed is the fact that the County has yet to approve the "Tenant Improvements," has yet to trigger the "Effective Date," and has yet to pay a single rent payment.

The Agreement contains a clear condition, which has not been met because of numerous delineated conditions contained in the Lease, which also have not been met. For these reasons, the Lower Court should not have ruled that Chicora is liable under Lee's breach of contract claim. In the alternative, these contingencies, contained in the Lease, at least create ambiguity. For these reasons, summary judgment was not appropriate on Lee's breach of contract claim, and this Court should reverse and remand this case for further proceedings.

III. THE LOWER COURT ERRED IN FINDING THAT THE AGREEMENT DOES NOT CONTAIN A TERMINATION PROVISION AND THAT NO GENUINE ISSUES OF MATERIAL FACT EXIST AS TO THE APPELLANTS' DEFENSES OF TERMINATION AND PRIOR MATERIAL BREACH, BECAUSE THE APPELLANTS SUBMITTED AFFIDAVITS SUPPORTING BOTH DEFENSES.

Chicora asserted the defenses of termination of the Agreement and Lee's prior material breach, and it offered affidavits to support these defenses. *see* Am. Answer and Countercl., Aff. of Douglas Durbano; Aff. of Jeremy Blackburn. The Lower Court completely disregarded the summary judgment standard when it failed to give proper weight to Chicora's affidavits.

As an initial matter, the Lower Court determined that the Lease "contains no provisions allowing for termination." Order, p. 7. The Lease clearly considers and allows for termination. Section 4d states, in relevant portion,

> Upon the expiration or termination of this Agreement or any extension or renewal thereof, Agent shall furnish to Client the names of prospective tenants to whom the Property was shown by Agent, Client, or any other person during the term of this Agreement (as the same may have been extended or renewed). Said list of names shall be furnished to Client no later than ten (10) days after the expiration or termination of this Agreement...In the event Agent shall fail to furnish to Client said names in a timely manner, the provisions of this section shall be null and void

> and of no further effect and Agent's right to continue to represent Client and to collect any commission form Client shall terminate as of the expiration or termination of the Agreement.

Agreement, p. 2. It is evident from this section that termination was available to either Lee or Chicora. The word "termination" or some variation is mentioned no less than six times throughout this section. Moreover, it is clear that the word "termination" was not intended to mean "expiration" because both words are included in the section and mentioned together at every instance. There is only one way to interpret the language in Section 4d of the Agreement. It grants either party the ability to terminate the Agreement before its expiration.

Also as an initial concern is the Lower Courts finding, in reference to Chicora's breach of contract defense, which is based on the assertion that Lee failed to market the Hospital, "[Chicora] has not pointed to any provision in the [Agreement] that was breached by [Lee]. Order, p. 8. This finding is blatantly absurd, considering the Statement of Purpose of the Agreement, which states that Lee is "to find prospective tenants for the [Hospital]." Agreement, p. 1. Moreover, the Agreement specifically calls for Lee to "market the Property in such manner and in such publications and other media as it deems appropriate for the marketing of the subject Property...In all events, the Agent agrees to advertise and promote the Property in the best interest of the Client." Agreement, p. 3.

In support of both its termination and prior material breach defenses, Chicora provided the Lower Court with affidavits. See Aff. of Douglas Durbano; Aff. of Jeremy Blackburn. Under the summary judgment standard, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party. *Summer v. Carpenter*, 328 S.C. 36, 492 S.E.2d 55 (1997). Moreover, to withstand a motion for summary judgment "in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a

mere scintilla of evidence." *Hancock v. Mid-South Mgmt. Co., Inc.*, 381 S.C. 326, 673 S.E.2d 801 (2009

The Lower Court ruled that "[t]hese affidavits do not create a genuine issue of fact for a number of reasons. First, the general disclaimer that [Lee] did not provide any services resulting in the procurement of a tenant is directly contradicted by the emails submitted by [Lee]." Order, p. 12. The Lower Court admits that evidence submitted by Chicora is "contradicted" by evidence offered by Lee. This conceded contradiction points directly to a "scintilla of evidence," in addition to the existence of genuine issues of material fact.

Later in the Order, the Lower Court states, "[b]ased on a review of the emails and the affidavits taken as a whole, there is no dispute that [Lee] provided services that led to the lease with [the County]." Order, p. 12. "Taken as a whole" clearly suggests that the Lower Court weighed all the evidence and found that Lee's was more compelling (i.e., it viewed the evidence in a light most favorable to Lee).

Chicora was the non-moving party and it brought forward evidence that created genuine issues of material fact, yet it was not afforded the appropriate summary judgment standard. The Lower Courts determination that two affidavits, which speak directly to contested defenses, do not amount to "a scintilla of evidence" should be very concerning to this Court. *Hancock v. Mid-South Mgmt. Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). Equally concerning should be the Lower Court's willingness to use the summary judgment level to weigh evidence, which is to occur at trial. In doing so, it viewed the evidence in a light most favorable to Lee, the moving party, which violates the summary judgment standard.

Viewed in a light most favorable to Chicora, there exist genuine issues of material fact as to Chicora's defenses of termination and Lee's prior material breach. This Court should reverse

the Lower Court's ruling and remand this case for further proceedings.

IV. THE LOWER COURT ERRED WHEN IT FAILED TO APPLY THE MANDATED STRICT CONSTRUCTION STANDARD IN ITS ANALYSIS OF THE MECHANIC'S LIEN STATUTE RELIED ON BY THE RESPONDENT.

The Lower Court analyzed the mechanic's lien statute, Section 29-5-21 of the South Carolina Code of Laws, under an incorrect standard, which led to its finding that Lee had met the requirements of the statute and a ruling in favor Lee with respect to its foreclosure of lien cause of action.

South Carolina courts have repeatedly held that mechanics' liens are creatures of statute which "may be acquired and enforced only in accordance with the terms and conditions set forth in the statutes creating them." *Ferguson Fire and Fabrications, Inc. v. Preferred Fire Protection, L.L.C., et. al.* 409 S.C. 331, 762 S.E.2d 561 (S.C. 2014). More importantly, our courts have held that mechanics' liens statutes must be "strictly followed." *Butler Contracting, Inc. v Court St., L.L.C.* 369 S.C. 121, 631 S.E.2d 252 (2006). *See Shelley Constr. Co. v. Sea Garden Homes, Inc.,* 287 S.C. 24, 336 S.E.2d 488 (Ct.App.1985) (stating mechanics' liens can only be "enforced in accordance with the conditions of the statute creating them"); *Clo–Car Trucking Co. v. Clifflure Estates of S.C., Inc.,* 282 S.C. 573, 320 S.E.2d 51 (Ct.App.1984) (stating the court is "not at liberty to depart from the plain meaning of [the] language" contained in the mechanic's lien statute). When operating under this plain meaning rule, "it is not the court's place to change the meaning of a clear and unambiguous statute." *Hodges v. Rainey,* 341 S.C. 79, 533 S.E.2d 578 (2000). (stating, "[w]here the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.") *Id.* Furthermore, courts are not "at liberty, under the guise of construction, to alter the plain language of the statute by adding

words which the Legislature saw fit not to include." *Shelley Constr. Co. v. Sea Garden Homes, Inc.*, 287 S.C. 24, 336 S.E.2d 488 (Ct.App.1985). *see Skiba v. Gessner*, 374 S.C. 208, 212, 648 S.E.2d 605, 606 (2007) (stating, "one's right to a mechanic's lien is wholly dependent upon the language of the statute creating it.")

In the Order, the Lower Court considered one of Chicora's primary arguments [9] against foreclosure, namely that Lee's "licensed services" did not "result in" the procurement of a lease, ultimately finding that that this argument is "unavailing in that it is based on an overly restrictive reading of the statute..." Order, p. 9. The Lower Court's ruling that Chicora's interpretation of Section 29-5-21 is "overly restrictive" and the applicable standard that mechanics' liens must be "strictly followed" cannot coexist. *Butler Contracting, Inc. v Court St., L.L.C.* 369 S.C. 121, 631 S.E.2d 252 (2006). Furthermore, the Lower Court does not cite any of the above cases, nor does it cite any case that references the fact that mechanics' lien statutes must be strictly construed.

It is entirely unclear what standard the Lower Court employed, but it seems obvious that it did not follow strictly the language of Section 29-5-21. This Court should remand the case for another review of the mechanic's lien statute under a strict construction analysis.

V. THE LOWER COURT ERRED IN FINDING THAT "LICENSED SERVICES" WHICH END MONTHS PRIOR TO THE PROCUREMENT OF A LEASE NEVERTHELESSS "RESULT IN" THE PROCUREMENT OF THAT LEASE.[10]

The Lower Court found that, to meet the legal requirements of Section 29-5-21 of the South Carolina Code of Laws, the duration and extent of Lee's "licensed services" were not

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[9] A more comprehensive discussion of this particular argument occurs in the following section. It was mentioned in this section for the purposes of highlighting the Lower Court's use of an incorrect standard in its dismissal of said argument.

[10] This section presumes that the Lease even qualifies as an instrument that warrants acquisition and foreclosure of Lee's lien. As argued above, the Lease is not yet an "enforceable instrument," for the purposes of Lee's breach of contract claim. The same assertion is made below, with respect to analysis under Section 29-5-21. In addition, the fact that the Lease is not producing income is also problematic to Lee's claim to foreclose the lien.

relevant, a ruling that runs afoul of the plain language of this mechanic's lien statute and of its duty to strictly follow that language.

This is case of first impression, as there exist no cases in which either the Supreme Court of South Carolina or this Court has taken up interpreting the relevant language of Section 29-5-21.[11]

Section 29-5-21 states, in pertinent portion,

> (B)(1) A real estate licensee who, by virtue of a written agreement with the owner, performs professional services for which he is licensed under Title 40 incident to marketing, developing, or improving commercial real estate preparatory to or as a part of a commercial real estate lease or rental transaction involving the commercial real estate, has furnished labor or material for the improvement of commercial real estate within the meaning of Section 29-5-20.
>
> (2) A real estate licensee shall not acquire a lien under this subsection unless:
>
> (a) the owner of the commercial real estate or the owner's authorized agent authorizes the real estate licensee, under the terms of a written agreement, to lease an interest in the commercial real estate; and
>
> (b) the real estate licensee or the real estate licensee's affiliated licensees provide licensed services that result, during the term of a written agreement described in item (1) of this subsection, in the procuring of a person or entity that rents or leases the commercial real estate or rents or leases an interest in the commercial real estate upon terms contained in a written agreement described in item (1) of this subsection.

S.C. Code § 29-5-21(B) (1976). As mentioned above, the requirements of this statute must be "strictly followed." *Butler Contracting, Inc. v Court St., L.L.C.* 369 S.C. 121, 631 S.E.2d 252 (2006). In addition, courts are not "at liberty, under the guise of construction, to alter the plain language of the statute by adding words which the Legislature saw fit not to include." *Shelley*

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[11] A few decisions have looked at the statute in making rulings about surveyors, but those are not relevant to this litigation or appeal.

Constr. Co. v. Sea Garden Homes, Inc., 287 S.C. 24, 336 S.E.2d 488 (Ct.App.1985).

Section 29-5-21(B)(2)(b) states, "[a] real estate licensee shall not acquire a lien under this subsection unless: the real estate licensee or the real estate licensee's affiliated licensees provide licensed services that *result.....in* (emphasis added) the procuring of a person or entity that rents or leases the commercial real estate..." S.C. Code § 29-5-21(B)(2)(b) (1976). The statute's plain language requires the licensee to provide services that "result in" a person who rents a property. The words "result in" assume some form of nexus between the "licensed services" and the procurement of a lease. Strictly followed, which is required, this language places a burden on a real estate licensee to actually generate a person or entity who actually rents a property.

The Lower Court completely dispelled with this "result[s] in" requirement, ultimately finding, "[e]ven if [Lee] was not directly involved in negotiations with [the County] after April 4, 2014, that does not change the fact that licensed services were provided, and a lease did result from those services." Order, p. 12.

Most concerning about this ruling is the Lower Court's willingness to assume the role of the Legislature when it, "under the guise of construction, [altered] the plain language of the [Section 29-5-21(B)(2)(b)] by adding words which the Legislature saw fit not to include." *Shelley Constr. Co. v. Sea Garden Homes, Inc.,* 287 S.C. 24, 336 S.E.2d 488 (Ct.App.1985). In effect, the Lower Court ruled that, even if Lee's services ceased nearly three months prior to the execution of the Lease, these services nevertheless "result[ed] in" the procurement of the Lease. The Lower Court's ruling sets a dangerous precedent, as it virtually eliminates the measure of accountability built into the statutes, namely the onus placed on the licensee to perform enough work to actually produce a person or entity who rents a property. Under the Lower Court's reconstruction of the statute, something less is required.

The Lower Court seemed to agree with Lee's argument that Lee was "involved in" the process and therefore had the right to foreclose on the mechanic's lien. Pl.'s Mot. Summ. J., pp. 6-7. But being "involved in" and providing services that "result in" a lease are very different standards. The latter is, of course, what is required in Section 29-5-21(B)(2)(b).

Moreover, while Lee argued in its motion for summary judgment that it was "involved in" the process to procure the Lease, it also admitted that it "arguably" did not have the right to file the lien. Pl.'s Mot. Summ. J., pp. 6-7. The fact that Lee admitted that it "arguably" did not have the right to file the lien likely should have been dispositive of this issue, at the summary judgment level.

It appears that Lee has confused its belief that it is owed commission under the Agreement with an undeserved right to file a mechanic's lien on the Hospital. In its motion for summary judgment, Lee states, "[t]he [Agreement] unambiguously manifests the parties' intent that [Lee] was to receive a commission on all leases entered during the term of the agreement, including any leases with [the County]. In short, it is a clear debt that is due and owing and, pursuant to S.C. Code § 29-5-21(B), [Lee] was entitled to a mechanic's lien on the [Hospital] to enforce their rights." Pl.'s Mot. Summ. J., p. 5. What Lee believes it is entitled to under the terms of the Agreement and what the relevant mechanic's lien statute requires are two significantly different issues. An agency agreement could provide for a commission under almost any scenario. But Section 29-5-21 is specific in it requirement that a licensee's services "result in" a person or entity who rents a property.

Lee's admission that it may not have been able to file a lien, its flawed logic with respect to interpreting Section 29-5-21, and the Lower Court's broad ruling all underscore (1) the lack of clarity of what is required by Section 29-5-21, given that no reported cases have interpreted the

statute; and (2) the uncertainty as to extent and duration of Lee's services, which suggests that genuine issues of material fact exist as to this issue.

In regards to the first point, Chicora maintains that a licensee's services have to "result in," or actually produce, a person or entity who rents a property. As to the second point, a little background is necessary to flesh out the issues surrounding the extent and duration of Lee's services.

As discussed below, the date stated by the Lower Court, April 4, 2014, has admittedly become a moving target, but it clear, from evidence in the record, that Lee ultimately ceased work on procuring the Lease well in advance of actual procurement of the Lease.

Any "involvement" that Lee did have in procuring the Lease was indirect and limited in duration, as the County communicated in March of 2014 that it would prefer to negotiate solely with Chicora. This is evidenced by numerous communications and interactions, including a string of e-mails between Lee and the County as well as between Lee and Chicora. Def. Mot. Summ. J., Def.'s Ex. C. On March 18, 2014, a representative from Lee, Robert Nuttall, sent an e-mail to the County requesting a meeting to discuss a potential lease. *Id.* The County refused, causing Nuttall to send several Chicora representatives an e-mail expressing his frustration. His e-mail stated, "Is there some reason the [C]ounty doesn't want to meet with Milton [another Lee representative] or me? First, they cancel the meeting we scheduled with them last week and now they have scheduled a one which doesn't include us after we tried to reschedule the one they canceled." *Id.* Chicora owner, Douglas Durbano, stated in his affidavit that it came to light during Chicora's negotiation with the County that certain County representatives had a personal dispute with certain Lee representatives. Aff. of Douglas Durbano, p. 2.

After this interaction between Lee and the County, it appears that Lee's subsequent

"involvement" was so indirect and inchoate that it did not rise to the level necessary to meet the statutory requirements of Section 21-5-21. Lee attached to its motion for summary judgment numerous e-mail exchanges between Lee and Chicora to prove that it was "involv[ed] in" procuring the Lease. Pl.'s Mot. Summ. J., Ex. 4. In its response to Lee's motion and in its cross-motion for summary judgment, Chicora notes that these e-mails and, thus, Lee's indirect "involvement" ended on or around April 4, 2014. Defs.' Res. to Pl.'s Mot. Summ. J., pp. 4-5; Defs.' Mot. Summ. J., pp. 5-6. The Lease, however, was signed on June 30, 2014, leaving a nearly three month gap of time in which Lee was not "involved." In response to this argument, Lee offered e-mails after April 4, 2014. Pl.'s Res. to Defs.' Mot. Summ. J., Exhibit 6. These e-mails are scant, to say the least, and still cease on or around May 7, 2014, leaving a nearly two month gap prior to procurement of the Lease. *Id.*

In reality, during this timeframe, it was the extensive efforts of Chicora that "result[ed] in" procurement of the Lease. Chicora offered as exhibits to its motion for summary judgment hundreds of e-mails from April 5, 2014 to June 30, 2014, in which Chicora and the County conducted in-depth negotiations regarding the Lease. Defs.' Mot. Summ. J., Ex. D. Chicora and the County exchanged numerous drafts of and revisions to the Lease, and they went back and forth over the language and small details of the Lease. Absent from these discussions were all Lee representatives, who weren't even included indirectly by virtue of being copied on the e-mail exchanges. *Id.* In the end, Lee wasn't even aware that Chicora had reached an agreement with the County, as evidenced by an e-mail from Nuttall on July 3, 2014, in which he requests a copy of the Lease. Defs.' Mot. Summ. J., Ex. F. This is also evidenced by the above discussed fact that Lee filed a lien on an incorrect lease rate, because it did not have a copy of the Lease.

It stands to reason that if Lee had provided services that "result[ed] in" procuring the

Lease, then it would have actually had a copy of the Lease, or at least one of the numerous drafts exchanged. The reality is that Lee was not included in negotiations with the County or drafting of the Lease for several months leading up to execution of the Lease. If Lee was not "involved in" this process, then its services in no way "result[ed] in" the procuring of the Lease.

The Lower Court held this analysis and Chicora's interpretation of Section 29-5-21 is "overly restrictive." Order, p. 9. As discussed above, the Lower Court applied an incorrect standard, when it should have "strictly followed" the language of Section 29-5-21. *Butler Contracting, Inc. v Court St., L.L.C.* 369 S.C. 121, 631 S.E.2d 252 (2006). To compound this error, the Lower Court found that Lee's services, which may or may not have ended months prior to lease procurement, did in fact "result in" the procurement of the Lease. This holding runs counter to the plain language of Section 29-5-21, which the Lower Court altered, "under the guise of construction." *Shelley Constr. Co. v. Sea Garden Homes, Inc.,* 287 S.C. 24, 336 S.E.2d 488 (Ct.App.1985). It also added words (namely Lee's proposed "involved in" language) that "the Legislature saw fit not to include." *Id.* In doing so, the Lower Court committed reversible error, which should be corrected by this Court. Chicora requests that this Court make a ruling to settle the uncertainty regarding the language of Section 29-5-21 and remand this case for further proceedings to determine whether the extent and duration of Lee's services meet this Court's rule of law.

VI. THE LOWER COURT ERRED IN FINDING THAT ACQUISITION AND FORECLOSURE OF THE RESPONDENT'S MECNAHIC'S LIEN WAS APPROPRIATE WHEN THE LEASE IS NEITHER ENFORCEABLE NOR GENERATING INCOME.

As stated above, this is a case of first impression, requiring analysis of a statute that has yet to be considered by either the Supreme Court of South Carolina or this Court.

Section 29-5-21(B)(2)(b) states, "the real estate licensee or the real estate licensee's

affiliated licensees provide licensed services that result, during the term of a written agreement described in item (1) of this subsection, in the procuring of a person or entity that *rents or leases the commercial real estate or rents or leases an interest in the commercial real estate upon terms contained in a written agreement described in item (1) of this subsection* (emphasis added). S.C. Code, § 29-5-21(B)(2)(b) (1976).

The italicized language presents two problems to Lee's foreclosure of lien claim. First, Lee was required to procure a person who leases the Hospital "upon the terms contained in a written agreement [i.e., the Agreement]. The Agreement requires an "enforceable instrument." As asserted throughout this brief, the Lease's "Effective Date," has not been reached, it is not enforceable, or "ratified," and Chicora has not received a single dollar in rental payments from the County.

Second, the words "rents or leases" are active terms, which assume a property is actually being leased and rent is actually being paid. These active verbs speak to the Legislature's intent and reflect the purpose of South Carolina's mechanics' lien statutes.

South Carolina's mechanics' liens statutes were established to offer a method of recourse to a person or entity who has not been paid for providing improvements to an owner's property. S.C. Code § 29-5-10 (1976) *et seq.* And the purpose of these statutes is to place each party on an equal footing whereby a laborer (or real estate licensee, in this case) is paid for the benefit he bestowed upon a property owner. *Id.* There is, of course, the underlying assumption that there exists an actual improvement to the property and that the owner has received some form of benefit, the nonpayment of which would result in him or her being unjustly enriched.

It seems highly unlikely that the Legislature intended to enable a real estate licensee, pursuant to Section 29-5-21, to acquire and foreclose a mechanic's lien by virtue of a lease that

(1) is not enforceable or effective and (2) is not actually generating any income for the owner. However, these are the circumstances present here.

In this case, when Lee learned of the existence of the Lease, it filed a lien to protect its interests. Lee has maintained that it had to file this lien because of the strict 90-day deadline imposed by Section 29-5-90, which states, "a lien shall be dissolved unless the person desiring to avail himself thereof, within ninety days after he ceases to labor on or furnish labor or materials for such building or structure." S.C. Code, § 29-5-90 (1976); *see* Tr., p. 44.

Chicora is fully aware of this requirement; however, in regard to this "ninety days of the job" filing deadline, Section 29-5-21 in no way resembles the prototypical mechanic's lien situation. A contractor, subcontractor or material supplier's last day on the job very tangible. He or she was either there or was not. But what action or event begin the licensee's 90-day window? Section 29-5-21 states that "during the term of a written agreement [i.e., the Agreement]," a tenant "rents or leases the commercial real estate [i.e., the Hospital]. S.C. Code § 29-5-21(B)(2)(b) (1976). Had the County had actually begun renting the Hospital during term the term of the Agreement, then Lee might have acquired the right to lien the Hospital.[12]

A Lease that is producing no income is simply not the type of agreement contemplated by the Legislature, when it drafted Section 29-5-21. For these reasons, the Lower Court should not have ruled that Lee is entitled to foreclosure on the lien. The Lower Court's ruling should be reversed, and this case should be remanded for further proceedings on this issue.

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[12] The word "might" was used because there still exists the requirement that Lee provide services that "result in" the person or entity who rents the Hospital. As argued above, Lee did not meet this burden.

VII. THE LOWER COURT ERRED IN FINDING THAT THE RESPONDENT IS ENTITLED TO ATTORNEY'S FEES BECAUSE IT MADE THIS RULING PRIOR TO DETERMINING WHICH PARTY IS THE "PREVAILING PARTY," AS DEFINED BY THE MECHAINIC'S LIEN STATUE RELIED ON BY THE RESPONDENT.

The Lower Court should not have ruled that Lee is entitled to attorney's fees without knowing the exact amount of damages. As mentioned above, the Lower Court was unwilling to award Lee damages until it holds a holds a hearing to determine the rate or value of Lee's commission. Despite the outstanding issue of damages, the Lower Court finds, "[Lee] is entitled to pursue its attorney's fees and costs and prejudgment interest." Order, p. 19; *see also* Order, p. 14. The Order makes no mention of Chicora's entitlement to attorney's fees and costs. *see* Order.

Under South Carolina mechanics' lien statutes, attorney's fees are awarded to the "prevailing party," which is discussed in Section 21-5-20 as follows:

> (C) Not less than fifteen days before the first term of court at which the trial is set, either party may file and serve on the other party an offer of settlement, and within ten days thereafter the party served may respond by filing and serving his offer of settlement. The offer shall state that it is made under this section and specify the amount, exclusive of interest and costs, which the party serving the offer is willing to agree constitutes a settlement of the lien. If the action is not reached for trial, then not less than fifteen days before the next term of court and subsequent terms of court at which the trial is set, either party may file and serve on the other party an offer of settlement or an amendment of a prior offer of settlement and, within ten days after that, the party served may respond by filing and serving his offer or amended offer of settlement. The offer supersedes any offer previously made under this section by the same party.
>
> An offer of settlement is considered rejected unless an acceptance in writing is filed and served on the party making the offer five days before the commencement of the term.
>
> If the offer or amended offer is rejected, it may not be referred to for any purpose at the trial but may be considered solely for the purpose of awarding costs and litigation expenses under this section.

> For purposes of the award of attorney's fees, the determination of the prevailing party is based on one verdict in the action. One verdict assumes some entitlement to the mechanic's lien and the consideration of compulsory counterclaims. The party whose offer of settlement is closer to the verdict reached is considered the prevailing party in the action. If the difference between both offers and the verdict is equal, neither party is considered to be the prevailing party for purposes of determining the award of costs and attorney's fees. If the plaintiff makes no written offer of settlement, the amount prayed for in his complaint is considered to be his final offer of settlement. If the defendant makes no written offer of settlement, the value of his counterclaim is considered to be his negative offer of settlement. If the defendant has not asserted a counterclaim, his offer of settlement is considered to be zero.

S.C. Code, § 29-5-20(C) (1976).[13] No settlement offers were filed and served, so the amount Lee claims, $147,130.50, is considered its final offer of settlement. Chicora asserted counterclaims, specifically breach of contract and dissolution of the mechanic's lien. Under its dissolution of lien counterclaim, Chicora obviously asserted that Lee is was not entitled to foreclose the lien, thus a settlement offer of zero. If the Lower Court were to award Lee a commission less than half of the amount it claimed, then Chicora, not Lee, is entitled to pursue attorney's fees and costs.[14]

Because the Lower Court failed to awarded damages, it should not have found that Lee is entitled to pursue attorney's fees. Moreover, Chicora may be considered the "prevailing party" within the meaning of the Section 21-5-20, thus entitled to attorney's fees. This Court should reverse the Lower Court's ruling and remand for further examination of this issue.

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[13] Section 29-5-10 of the South Carolina Code contains the same language. *see* S.C. Code, § 29-5-10(b) (1976). Chicora cites to Section 29-5-20 because Section 29-5-21, which is the primary statute under consideration in this appeal, also cites to Section 29-5-20. *see* S.C. Code § 29-5-21.

[14] In Section I.A. above, Chicora offers a calculation, which is still under consideration of the Lower Court, that would in fact bring Lee's commission under half of Lee's lien. If the Lower Court accepts Chicora's interpretation of the commission rates contained in the Agreement, then Chicora, not Lee is entitled to attorney's fees and costs.

CONCLUSION

For the reasons set forth above, the Appellants would respectfully request that this Court reverse all of the Lower Court's rulings, as to the issues raised in this brief, and remand this case for further proceedings.

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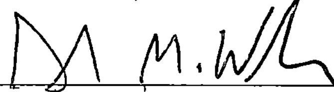

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Mikell R. Scarborough, Master-In-Equity

Case No. 2014-CP-10-7481
Appellate Case No. 2015-002259

Lee & Associates Charleston, LLC, Respondent,

v.

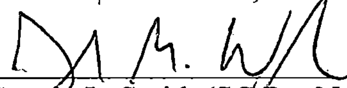
Chicora Gardens Holdings, LLC, Chicora Life Center, LC, and Jeremy Blackburn,

Of whom, Chicora Gardens Holdings, LLC and Chicora Life Center, LC are Appellants.

PROOF OF SERVICE

I certify that I have served the Initial Brief and Designation of Matter on the Respondent, Lee & Associates Charleston, LLC, by personally delivering a copy of it to the Respondent's attorneys of record, Joseph C. Wilson, IV and Carl E. Pierce, II, at their office, located at 321 East Bay Street, Charleston, South Carolina 29401, on January 18, 2016.

SMITH | CLOSSER, P.A.



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January 18, 2016