THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Larry B. Hyman, Jr.
Circuit Court Judge

APPELLATE CASE NO. 2015-001868

SKYDIVE MYRTLE BEACH, INC. .....Appellant

v.

HORRY COUNTY.....Respondent

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STATEMENT OF ISSUES ON APPEAL

Ia. Whether the circuit court correctly denied Appellant's waiver/counterclaim argument when Appellant did not raise this argument to the magistrate, which means it is not preserved.

Ib. Whether the Court should affirm the denial of the waiver argument-lack of preservation notwithstanding-when Horry County's claim for summary ejectment was not a compulsory counterclaim to Appellant's separate lawsuit seeking money damages.

II. Whether the circuit court and the magistrate correctly held Rule 12(b)(8), SCRCP, which applies when another action is pending between the same parties, did not bar the County from proceeding with summary ejectment at the same time Appellant was pursuing a separate suit for damages.

III. Whether Appellant received due process when the circuit court and the magistrate correctly followed the rules of court.

IV. Whether the circuit court and the magistrate correctly found a landlord-tenant relationship between Appellant and the County and that Appellant did not have a right to continue occupying the County's property.

V. Whether the circuit court correctly held that the ejectment order was no longer stayed when the magistrate's order explains its stay will expire at the conclusion of the circuit court appeal.

STATEMENT OF THE CASE

On June 5, 2014, Respondent Horry County, as a landlord, applied in Magistrate's Court for a Rule to Vacate/Eject Appellant Skydive of Myrtle Beach, Inc. from an airplane hangar ("Hangar 7") on Horry County's commercial airport property pursuant to S.C. Code Ann. §27-37-20. The grounds for the application were that Appellant was occupying Horry County's property without permission or authority from Horry County.

The ejectment proceeding was filed by Horry County to obtain possession of its own property. The only issue before Magistrate was whether Appellant could be ejected

from the property. Horry County did not make any claims for damages, back rent, or damages to its property.

Before the magistrate issued a writ of ejectment, Appellant appeared on June 13, 2014, and responded to the Rule to Vacate/Eject with a Motion to Remove the proceeding from magistrate's court pursuant S.C. Code Ann. §22-3-30 on the grounds that the same proceeding was pending in circuit court between Appellant and Horry County together with several individuals. Appellant also alleged the underlying facts were in dispute. [Motion to Remove].

On June 13, 2014, the magistrate gave formal notice that a hearing would be held on Appellant's motion to remove on July 2, 2014. Appellant's Motion to remove was heard and denied on July 2, 2014.

On that same day in presence of the attorneys of both parties' attorneys the Magistrate set a trial date of July 23, 2014. The Magistrate subsequently confirmed this date via Formal notice, in writing. [Magistrate's Summons dated July 8, 2014]

Ten days later by a letter dated July 18, 2014, Appellant moved for reconsideration of the magistrate's denial of its Motion to Remove. Appellant also requested in that same letter that if reconsideration were denied, Appellant be granted a continuance, a jury trial and an opportunity to answer and file counterclaims. The County's Attorney received this letter the day before the scheduled trial. The magistrate gave formal written notice to Appellant and Respondent that a hearing would be held on

Appellant's motion to reconsider on July 23, 2014, the same day as the scheduled hearing on the Rule to Vacate/Eject. [Magistrate's Summons dated July 21, 2014].

Appellant and Horry County appeared with their attorneys and witnesses on July 23, 2014. Appellant first argued its Motion to Reconsider. The magistrate denied all of Appellant's motions. The magistrate then heard Horry County's Rule to Vacate/Eject as originally scheduled back on July 2, 2014.

The magistrate made a factual finding that Horry County's Rule to Vacate/Eject involved strictly a landlord-tenant dispute and that Appellant was occupying Horry County's property without Horry County's consent. On July 23, 2014, Appellant was ordered to vacate Horry County's building.

Appellant duly filed its notice of appeal to Circuit Court on July 25, 2014. [Notice of Civil Appeal dated July 25, 2014] On August 1, 2014, Appellant obtained an order from the Magistrate staying execution of the ejectment upon payment of rent established by the Magistrate until the matter could be determined in Circuit Court.

The appeal was heard by Circuit Court Judge Larry B. Hyman on May 6, 2015, who dismissed Appellant's appeal and affirmed the magistrate's order requiring Appellant to vacate the premises. [Order of Judge Larry B. Hyman, dated May 26, 2015] Thereafter, Appellant filed a Motion to Reconsider which was also denied. Appellant duly filed its appeal of Judge Hyman's May 26 order to the Court of Appeals.

On September 16, 2015, Horry County issued a seventy-two (72) hour notice of intent to eject Appellant on the grounds that a supersedeas order and bond were required in order to stay the ejectment. [September 16, 2015 Battle Email].

On September 17, 2015, Appellant filed a Notice of Motion for Emergency Injunction and Stay of Ejectment. [Motion for Emerg. Inj. & Stay]. Judge Hyman conducted a hearing on September 22, 2015.

On October 13, 2015, Judge Hyman denied Appellant's Motion for Injunction and Stay of Ejectment. [October 13, 2015 Order]. Appellant served a timely Rule 59(e) motion to reconsider the October 13, 2015 Order. [October 23, 2015 Motion to Reconsider], and on November 19, 2015, Judge Hyman denied Appellant's Motion to Reconsider. [November 19, 2015 Order]. Appellant filed a second notice of appeal to the Court of Appeals but did not seek supersedeas from the court. The Appeals were consolidated by Consent. Appellant has now vacated the county's building.

STANDARD OF REVIEW

The Court of Appeals will presume that an affirmance by a Circuit Court of a magistrate's judgment was made upon the merits where the testimony is sufficient to sustain the judgment of the magistrate and there are no facts that show the affirmance was influenced by an error of law. *Burns v. Wannamaker,* 281 S.C. 352, 357, 315 S.E.2d 179, 182 (Ct.App.1984). Specifically, "[i]n ejectment proceedings first heard in magistrate's court, the Court of Appeals is without jurisdiction to reverse the findings of fact of the circuit court if there is any supporting evidence." *Vacation Time of Hilton*

Head Island, Inc. v. Kiwi Corp., 280 S.C. 232, 233, 312 S.E.2d 20, 21 (Ct.App.1984). "Unless we find an error of law, we will affirm the judge's holding if there are any facts supporting his decision."

The Court of Appeals still retains de novo review of whether the facts show the circuit court's affirmance was controlled or affected by errors of law. Our Supreme Court, in *Stanford v. Cudd*, 93 S.C. 367, 370, 76 S.E. 986, 987 (1913), held that where the testimony is sufficient to sustain a judgment of the magistrate's court, and it is affirmed on appeal to the circuit court, this court will assume the circuit court affirmed the judgment on the merits, in the absence of facts showing the affirmance was controlled or affected by errors of law. *Bowers v. Thomas*, 373 S.C. 240, 244-45, 644 S.E.2d 751, 753 (Ct. App. 2007).

The burden of proof is on the Appellant to convince the Court of Appeals that the lower court was in error. *See Conran v. Joe Jenkins Realty, Inc.,* 263 S.C. 332, 334, 210 S.E.2d 309, 310 (1974)

STATEMENT OF FACTS

Horry County owns Hangar 7 at Grand Strand Airport in North Myrtle Beach. In 2012, Horry County leased Grand Strand Airport to Grand Strand Aviation, LLC d/b/a Ramp 66.

In May of that year, Ramp 66 entered an agreement with Appellant Skydive Myrtle Beach, Inc. to provide services for tandem parachute jumps for Appellant's

customers and to provide other business services to be performed by Ramp 66. [See Skydive Myrtle Beach, Inc. Letter Agreement dated May 12, 2012]. The Ramp 66 agreement provided for Appellant to use a minimum of 2500 square feet in the "bird hangar" (now known as Hangar 7) for use during daylight hours without payment 365 days a year. [¶5, Id] Payment for Ramp 66's business services to Appellant were based upon a percentage of Appellant's gross income. [Id.] This agreement stated it would remain in effect through the existence of an underlying lease agreement between Ramp 66 and Horry County and it was scheduled to end in 2020. However, the lease agreement between Ramp 66 and Horry County terminated by mutual agreement of the parties in 2013. Horry County paid Ramp 66 $800,000 to buy out the remainder of its lease for the airport.

On September 13, 2013, Horry County through its Department of Airports entered a space use agreement (Hangar 7 permit) with Appellant permitting Appellant to use the approximately 6800 square feet of space in Hangar 7 twenty-four hour a day seven days a week. The agreement between Appellant and Horry County was scheduled to end January 31, 2014. Appellant's payment for the use of Hangar 7 was a monthly payment of One Thousand Two Hundred & 00/100 ($1200.00) dollars per month. [Space Use Permit] Horry County reserved the right to adjust the amount of the payment for use of Hangar 7 upon thirty days' notice to Appellant. [Id] Horry County was not required to provide any business services to Appellant other than the use of Hangar 7. [Id]

The Hangar 7 permit contained the following language: "This permit constitutes the entire agreement of the parties with respect to the subject matter hereof and supersedes all previous agreements, representations and understandings concerning the same, whether written or oral. The provisions of the Permit may be modified, amended or waived only by written instrument executed by the County and Company." [¶ 14 Id] The Hangar 7 permit was duly signed by Horry County and Appellant. Again it expired by its own terms on January 31, 2014. [Id]

On February 19, 2014, Horry County offered to enter a second agreement with Appellant. [Letter to Skydive Myrtle Beach, Inc. dated February 19, 2014 with attached 2d Space Use Permit] Appellant refused to accept the agreement offered by Horry County and on February 28, 2014, Appellant filed suit against Horry County alleging fraud, conspiracy, breach of contract, defamation, trespass and unfair trade practices, etc. The lawsuit is captioned *Skydive Myrtle Beach, Inc. (f/k/a Skydive Myrtle Beach, LLC) v. Horry County & Horry County Department of Airports, H. Randolph Haldi, Pat Apone, Tim Jackson and Jack Teal,* C/A No. 2014-CP-26-01193. Horry County duly answered with a qualified general denial and several affirmative defenses. Even though Appellant refused to accept the agreement offered by Horry County, Appellant refused to vacate Hangar 7.

By a letter dated April 28, 2014, attorneys for Horry County gave Appellant written notice of termination. The letter also gave notice to Appellant that if Appellant and Horry County had not reached an agreement by May 27, 2014, Horry County would bring legal action to eject Appellant from Horry County's property. [April 28, 2014,

Letter Foley & Lardner] Horry County and Appellant did not reach an agreement, but Appellant still refused to vacate the premises.

On June 5, 2014, Horry County elected to bring summary ejectment proceedings under S.C. Code Ann. §27-37-20 and filed an application in magistrate's court for a Rule to Vacate/Eject Appellant from Hangar 7. In response, Appellant filed a Motion to Remove the case under Rule 12 (b) (8), SCRCP on the ground that Appellant's lawsuit in circuit court was the same lawsuit between the same parties. The summary ejectment proceeding was assigned to Magistrate Christopher J. Arakas. Judge Arakas denied Appellant's Motion to Remove and Appellant's subsequent motion for reconsideration. [Magistrate's Return]

The summary proceeding was tried on July 23, 2014, and Appellant was ordered to vacate the premises. [Id] Appellant appealed and obtained an order in magistrate's court which according to its terms stayed the ejectment until the appeal was decided in circuit court. The circuit court dismissed Appellant's appeal and refused to grant a stay of Appellant's ejectment while Appellant's sought review in this court.

ARGUMENTS

Ia. The circuit court correctly denied Appellant's waiver/counterclaim argument because Appellant did not raise this argument to the magistrate, which means it is not preserved.

Appellant claims Horry County's Rule to Vacate/Eject was a compulsory counterclaim that should have been pled in response to Appellant's lawsuit filed in circuit court. Appellant claims Horry County's failure to include a Rule to Vacate/Eject as a

counterclaim in its answer to Appellant's circuit court lawsuit results in a forfeiture of Horry County's right to eject Appellant from its property.

Counterclaims arising out of the same transaction or occurrence that are the subject of the action are 'compulsory' under Rule 13(a) and are barred by res judicata or estoppel by judgment if not asserted. *Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 62, 566 S.E.2d 863, 865 (Ct. App. 2002). However, the plea of res judicata is an affirmative defense and must be pled. *S. Carolina Dep't of Soc. Servs. v. Foggie,* 271 S.C. 109, 110, 245 S.E.2d 423, 423 (1978). The defense of preclusion by a former judgment is an affirmative defense which ordinarily must be specially pleaded. *Beatty v. National Surety Co.*, 132 S.C. 45, 128 S.E. 40 (1925); Lindler *v. Baker*, 280 S.C. 130, 311 S.E.2d 99 (Ct.App.1984); cf., Rule 8(c), S.C.R.Civ.P.; *Wagner v. Wagner*, 286 S.C. 489, 491-92, 335 S.E.2d 246, 247 (Ct. App. 1985).

Appellant did not raise Waiver or the Rule about Compulsory Counterclaims in the Magistrate's proceedings. The first time Appellant argued Rule 13, SCRCP and the issue of waiver was when Appellant moved under Rule 59(e), SCRCP, to have Judge Larry B. Hyman reconsider his order dismissing Appellant's appeal from magistrate's court. Prior to that time, Appellant was arguing that its pending lawsuit in circuit court was the same as Horry County's Rule to Vacate\Eject and should be dismissed under Rule 12(b) (8), SCRCP. [See Appellant's Notice of Appeal dated July 25, 2014].This argument is different than the Waiver argument Appellant is making now.

Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide the Court with a platform for meaningful appellate review. *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2012). "It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Furthermore, a party cannot use a Rule 59(e) motion to advance an issue the party could have raised to the lower court prior to judgment, but did not. *Hickman v. Hickman*, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct.App.1990); Stevens *& Wilkinson v. City of Columbia*, 409 S.C. 563, 567, 762 S.E.2d 693, 695 (2014). *Gartside v. Gartside* (G.App. 2009) 383 S.C. 35, 677 S.E.2d 621 (A party cannot use a motion to alter or amend a judgment to present to the lower court an issue the party could have raised prior to judgment but did not.)

Ib. Even if the waiver argument was preserved, and it is not, the Court should affirm because Horry County's claim for summary ejectment was not a compulsory counterclaim to Appellant's separate lawsuit, which principally seeks money damages.

Appellant's attempt to impose a Rule 13(a), SCRCP compulsory counterclaim forfeiture in a Rule to Vacate/Eject is similar to other tenant's unsuccessful attempts to plead questionable title to oust the magistrate from jurisdiction in statutory ejectment proceedings. Courts have rejected such attempts. *State ex rel. Nesbitt v Marshall* (1884) 24 SC 507. *Swygert v Goodwin* (1890) 32 SC 146, 10 SE 933.

In *Bamberg Banking Company v. Matthews*, 132 S.C. 130, 128 SE 718 (1925), The Supreme Court declared that an allegation of fraud in the procurement of the lease

will not oust a Magistrate's jurisdiction over an ejectment action. ("A tenant cannot oust the magistrate of jurisdiction in [summary ejectment proceedings] ... by the assertion of a superior title in himself ...."); id. at 475–76, 10 S.E.2d at 6 (Otherwise any tenant, by merely denying the landlord's title or by asserting superior title in himself or in another, could oust the magistrate of jurisdiction and frustrate the plain and salutary object of the statute."). *Wimberly v Shorter*, 204 S.C. 558, 30 SE 2d 593 (1944).

An ejectment proceeding under Section 27-37-20 is a summary proceeding created by the legislature to provide landlords and tenants with an efficient procedure. It is not a legal action to try title. Appellant's attempt to impose a requirement that summary ejectment proceedings be pled in every lawsuit involving landlord-tenant disputes would defeat the purpose of the Statute and unduly limit the Statutory Rights of both tenants and landlords. For example in a long term lease, there may be a dispute over who is responsible for making certain repairs to the property. If the tenant sued for a declaratory judgment to determine repair responsibilities, Appellant's logic requires the landlord to bring a counterclaim and evict the tenant or forever lose its rights to do so. There is nothing in the Statute suggesting the General Assembly intended such a result.

II. The circuit court and the magistrate correctly held 12(b)(8), SCRCP, which applies when another action is pending between the same parties, did not bar the County from proceeding with Summary ejectment at the same time Appellant was pursuing a separate suit for damages against the County and certain county officers.

STANDARD OF REVIEW

The appellate court applies the same standard of review as the circuit court in scrutinizing the application of Rule 12(b) (8), SCRCP. *Capital City Ins. Co. v. BP Staff, Inc.,* 382 S.C. 92, 99, 674 S.E.2d 524, 528 (Ct.App.2009). A defendant may seek dismissal of an action pursuant to Rule 12(b)(8) when another action is pending between the same parties for the same claim. *Cricket Cove Ventures, LLC v. Gilland*, 390 S.C. 312, 320, 701 S.E.2d 39, 44 (Ct. App. 2010). The trial court must base its ruling solely on allegations set forth in the complaint. *Id.*

DISCUSSION

In South Carolina, dismissal under Rule 12(b)(8) may be proper when there is (1) another action pending, (2) between the same parties, (3) for the same claim. Rule 12(b)(8), SCRCP. The rule has historic ties to a former statute providing a defendant a similar opportunity to demur. Our Supreme Court traditionally interpreted that statute narrowly, stating that it only applied when there was identity of parties, causes of action and relief. *S.C. Public Serv. Comm'n v. City of Rock Hill*, 268 S.C. 405, 408, 234 S.E.2d 228, 229 (1977). This approach is consistent with modern day practice other Courts apply to rules similar to our Rule 12(b)(8). See, e.g., Beatty *v. Liberty Mut. Ins. Group*, 893 N.E.2d 1079, 1084 (Ind.App.Ct.2008) (applying 12(b)(8) dismissal "where the parties, subject matter, and remedies are precisely the same, and it also applies when they are only substantially the same."). This Court has explained the rule is interpreted narrowly such that the claim must be precisely or substantially the same in both proceedings in order for the drastic remedy of dismissal to be appropriate under Rule

12(b) (8). *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 105-06, 674 S.E.2d 524, 531-32 (Ct. App. 2009).

A. Identity of Parties.

To prevail on a motion to dismiss pursuant to Rule 12(b)(8), Appellant must show that the actions in question were between the same parties in their same capacities. *Cricket Cove Ventures, LLC v. Gilland*, 390 S.C. 312, 316-29, 701 S.E.2d 39, 41-48 (Ct. App. 2010). In Appellant's circuit court case, Appellant brought various claims against Horry County as well as agents and employees of Horry County, in their individual capacities. The summary ejectment case is limited to Horry County, the landlord, bringing suit to eject Appellant from the County's property. The *Cricket Cove Ventures* court found that parties sued in their individual capacities did not meet Rule's 12(b) (8) "same parties" requirement when those parties were sued in their official capacities in another action. *Id.* Appellant's Rule 12(b)(8) appeal fails because the lawsuit in circuit court and the Rule to Vacate/Eject do not involve precisely or substantially the same parties as required by that rule. *Id.* Also see, *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 106, 674 S.E.2d 524, 532 (Ct. App. 2009).

The present case is on point with *Connecticut Nat. Bank v. Wilson*, 284 S.C. 415, 416, 326 S.E.2d 657, 658 (1985), which predates the adoption of Rule 12(b)(8). In that action to collect on three promissory notes, the plaintiff-appellant, Connecticut National Bank, sued the defendant-respondent, Walter W. Wilson, Jr., a resident of Beaufort, South Carolina, in the S.C. Court of Common Pleas. This action was instituted

approximately two months after the commencement of an action in the United States District Court of Connecticut by Wilson and thirty-three other plaintiffs against the same bank. The Connecticut action claimed violations of the Securities Exchange Act, fraud and negligence, and sought rescission of various promissory notes. The Notes included the same Promissory notes at issue in State court. The Supreme Court held the parties, objects, issues, causes of action, and relief involved in the South Carolina action were not identical with those in the Connecticut action. *Id.* The same reasoning applies here.

Even though *Wilson,* was decided in 1985, the applicability of cases predating the adoption of Rule 12 (b)(8) was addressed in *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 106, 674 S.E.2d 524, 532 (Ct. App. 2009):

> The rule has historic ties to a former statute providing a defendant a similar opportunity to demur; our supreme court traditionally interpreted that statute narrowly, stating that it only applied when there was identity of parties, causes of action and relief. We find this approach consistent with modern day practice under rules similar to our Rule 12(b)(8). Accordingly, we interpret the rule narrowly such that the claim must be precisely or substantially the same in both proceedings in order for the drastic remedy of dismissal to be appropriate under Rule 12(b)(8). *Id.* Also see *Trial Handbook for South Carolina Lawyers* § 4:34

B. Identity of Claims.

The sixteen separate claims brought in Appellant's circuit court lawsuit and the Rule to Vacate/Eject action brought by Horry County in magistrate's court are fundamentally different. Fifteen of Appellant's sixteen claims seek damages for various alleged acts of individuals and Horry County. Those prayers for relief demand judgment against all of the defendants, jointly and severally, for actual damages allegedly incurred by Appellant, for the reasonable value of the labor, materials and equipment allegedly

furnished by Appellant, certain consequential damages, and attorney fees as well as costs. [Complaint 2014-CP-26-1193]. Appellant's other prayers for relief demand that all of the defendants be enjoined and restrained from future tortious interference with Appellant's allegedly legitimate right to conduct non-emergency parachute operations, as well as a Writ of Mandamus against the Airport requiring it to negotiate in good faith and perform various other actions.

In the Rule to Vacate/Eject, Horry County only sought to regain possession of its property by a summary proceeding in magistrate's court as expressly authorized by section 27-37-20. As indicated in *Wilson*, Appellant's Rule 12(b)(8) motion should fail because Appellant's claims and the object of Appellant's circuit court lawsuit are not identical with the claims and object of Horry County in Horry County's Rule to Vacate/Eject. Also see: *Cricket Cove Ventures, LLC v. Gilland*, 390 S.C. 312, 316-29, 701 S.E.2d 39, 41-48 (Ct. App. 2010); *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 106, 674 S.E.2d 524, 532 (Ct. App. 2009).

Appellant claims its complaint in circuit court alleges a leasehold interest in Hangar 7 from which it was being improperly ejected by Horry County. This is not so. First, no ejectment proceeding had been initiated by Horry County when Appellant's complaint was filed. Second, Appellant asked for damages because it alleged individual defendant H. Randolph Haldi had written a retaliatory eviction notice by sending a letter and a new proposal for the use of Hangar 7. As Appellant represented to the magistrate, Appellant's facts derive from an alleged tort rather than landlord-tenant or commercial

lease. [P. 2, Appellant's Attorney's Letter to the Hon. Christopher J. Arakas, dated July 18, 2014].

Horry County further respectfully disagrees with Appellant's statement that there is *de facto* identity of parties because all parties were represented by the same counsel in both actions and the individual defendants were dismissed from the circuit court action. First, Battle Law Firm, LLC, represents Horry County and Horry County Department of Airports, but Aiken, Bridges, Elliott, Tyler & Saleeby, P.A. represents the individual defendants. Further, the circuit court action has been stayed because Appellant is appealing the dismissal of the individual defendants. See: *Skydive of Myrtle Beach, Inc. (f/k/a Skydive Myrtle Beach, LLC) Appellant, v. Horry County, Horry County Department of Airports, H. Randolph Haldi, Pat Apone, Tim Jackson and Jack Teal, Respondents of whom H. Randolph Haldi, Pat Apone and Jack Teal are Respondents, Appellate Case No. 2014-002491.*

Horry County is not judge shopping. While it is true Horry County could have brought a Rule to Vacate/Eject proceeding under Section 27-37-20 in circuit court, Horry County is not required to seek possession of its property through filing a counterclaim in Appellant's circuit court action. That would unnecessarily delay the Court's possessory rights until after all of Plaintiff's claims were adjudicated by jury trial and all appeals exhausted. See *Metro. Life Ins. Co. v. Stuckey,* 194 S.C. 469, 475, 10 S.E.2d 3, 5–6 (1940).

Appellant's circuit court case is nearly two years old. Discovery in Appellant's circuit court case has been stayed during the appeal of the dismissal of the individual defendants, which is still pending. It seems as though Appellant's circuit court lawsuit will continue on for several more years before the merits of Appellant's circuit court claims are reached, given Appellant's demonstrated practice of seeking reconsideration and appealing every adverse decision. [See Transcript of Record, *passim*]. The County should not have to wait to repossess its property, and the law does not require the County to do so.

III. The circuit court and the magistrate correctly followed the rules of court and Appellant received due process.

A. Justice of the case.

Appellant claims this Court should reverse the circuit court and vacate the magistrate's order because the magistrate's ruling was controlled by technical rulings. [Appellant's Brief p. 18] Appellant claims reversal is necessary to "give justice of the case without regard to technical errors and defects which do not affect the merits." [Appellant's Brief p. 22] Horry County respectfully disagrees.

It is an undisputed fact that Appellant occupied Horry County's property from January 31, 2014 until October 22, 2015, as a result of Appellant's legal maneuvers. Two judges, on two occasions, have looked at "the merits and the justice" of Appellant's occupation and determined that Appellant does not have the right to occupy Horry County's property and Appellant should be ejected. Appellant has also filed a complaint with the Federal Aviation Administration alleging unlawful discriminatory conduct

relating to the occupancy and use of the Lease Interest, federal law, and the recognized aeronautical activity of skydiving. [Notice of Appeal dated July 25, 2014]. Appellant's FAA complaint was dismissed without prejudice. [Notice of Appeal dated July 25, 2014].

B. Magistrate Court's Timeline.

June 5, 2014	Horry County files Rule to Vacate/Eject in Magistrate's Court. Horry County sends electronic notice to Appellant's Attorney.
June 13, 2014	Appellant files answer and moves to remove case to circuit court.
June 13, 2014	Magistrate Summons noticing hearing date of July 2, 2014 Motion to Remove.
July 2, 2014	Appellant's Motion to remove is heard and denied. Magistrate, in presence of the attorneys chooses July 23, 2014 for the bench trial.
July 8, 2014	Magistrate's Summons giving notice of Bench Trial on Horry County's Rule to Vacate/Eject
July 18, 2014	Date on letter from Appellant asking magistrate to reconsider denial of Motion to Remove to circuit court and asking for continuance as well as Jury Trial.
July 22, 2014	Date Appellant's letter actually received by Horry County.
July 23, 2014	Appellant's Motion's heard and denied.
July 23, 2014	Bench trial as scheduled on Horry County's Rule to Vacate/Eject.

July 25, 2014 Appellant files Notice of Appeal to Circuit Court.

C. Magistrate's Rules of Procedure.

Appellant claims the response he filed in magistrate's court was not an answer and that he should have been given time to file an answer when his motion was denied. Under the magistrate's rules an "Answer" is defined as the paper filed by the party responding to the complaint. *Rule 1, SCRMC.* Appellant's response in the form of a Motion to Remove was Appellant's answer under the Rule's definition of an answer.

Appellant cites Rule 2 and claims that because the Magistrate court rules of procedure do not provide for motions, the Magistrate should have applied the Rules of Civil procedure and their altered time scheme to his response. Horry County disagrees. Appellant could and should have filed any counterclaims and any request for a jury trial with its Motion to Remove. Further, circuit court rules of civil procedure would not have altered the result for Appellant. The service of a motion permitted under Rule 12 alters the periods of time for filing responsive pleadings unless a different time is fixed by order of the Court. Rule 12 (a), SCRCP. The time of the bench trial was set by formal order of the magistrate on July 8, 2014. Appellant's attorney's own confusion on the application of court rules is not a reasonable basis for reversing the Magistrate's decision. See *Limehouse v. Hulsey*, 404 S.C. 93, 111, 744 S.E.2d 566, 576 (2013).

Appellant's request for a jury trial was untimely. If either party wants a jury trial, it must be requested in writing at least five (5) working days prior to the original date set

for trial. Rule 13, SCRMC. The original date set for trial was July 23, 2014. Appellant's motion to reconsider was dated July 18, 2014. Assuming for the sake of argument that the motion for reconsideration contained a request for a jury trial, the request was made only three working days before the original date set for trial, not five working days, as required by the Rule. The magistrate was correct to proceed with a bench trial on July 23, 2014.

IV. The Circuit Court and the Magistrate correctly found that a landlord tenant relationship existed between Appellant and Horry County and that Appellant did not have a right to continue occupying the County's property.

Horry County owns the airport property, and the County was leasing the airport property to Grand Strand Aviation, Inc. The letter agreement between Appellant and Grand Strand Aviation, Inc. expressly acknowledged that agreement was subject (meaning subordinate) to a different lease agreement between Horry County and Grand Strand Aviation, Inc. [See ¶ 8 Agreement, May 10, 2012]. The agreement explained Appellant's Relationship with Grand Strand Aviation, Inc. remained in effect through the lease agreement between Horry County and Grand Strand Aviation, Inc. unless both parties agreed to any changes in writing. Contrary to Appellant's claim, the phrase "both parties" referred to Horry County and Grand Strand Aviation, Inc. Horry County and Grand Strand Aviation, Inc.'s lease ended when Horry County paid Grand Strand Aviation, Inc. $800,000 to buy out the remainder of the airport property lease.

Appellant's agreement with Grand Strand Aviation was never recorded and Horry County was not a party to it. In order to give notice to third persons, any lease or agreement for the use or occupancy of real estate shall be recorded in the same manner as

a deed of real estate. *S.C. Code Ann. § 27-33-30.* Conveyances of lands shall be valid as to subsequent purchasers, without notice only when recorded. *Burnett v. Holliday Bros.*, 279 S.C. 222, 225, 305 S.E.2d 238, 240 (1983). Appellant claims that Horry County had notice of the 2012 agreement because Grand Strand Aviation was the agent of Horry County. That claim is false and Appellant has not offered any proof of that Grand Strand Aviation was Horry County's agent or that Horry County had actual notice of the 2012 agreement. Further, the 2012 agreement is not valid as to Horry County because it was for a period greater than one year and it was not signed by Horry County. To charge any person upon any contract or sale of lands, tenements or hereditaments or any interest in or concerning them the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some person thereunto by him lawfully authorized. *S.C. Code Ann. § 32-3-10, et. al.*

When Grand Strand Aviation, Inc.'s lease with Horry County ended, Appellant's agreement and relationship with Grand Strand Aviation, Inc. ended. Thereafter, Horry County and Appellant entered a different agreement that expired on January 31, 2014. Appellant signed this agreement, yet when the agreement expired on January 31, 2014, Appellant remained on the property as a hold over. After January 31, 2014, Horry County's relationship and rights in connection with Appellant's occupation of its property became governed by *S.C. Code Ann. § 27-35-40:*

> When a person enters upon or uses the premises of another without agreement or without the permission of the owner or by trespass the owner

> may at his option waive such tort and treat and deem such person a tenant at will. In such case the landlord shall have and be entitled to a reasonable rental for the use and occupation of such premises and all remedies for the enforcement of his rights in respect thereto as in other cases of tenancy at will. *S.C. Code Ann. § 27-35-40*

Appellant's claim that the agreement between Appellant and Grand Strand Aviation, Inc. was binding on Horry County is not accurate. Evidence that the agreement between Appellant and Grand Strand Aviation, Inc. ended is found in Appellant's signature on the Space Use Permit which plainly stated that it superseded all previous agreements. [¶14. Space Use Permit] Additional evidence that no written agreement existed between Appellant and Horry County in June of 2014, can be found in the deposition testimony of Aaron Holly, Appellant's president and owner. His testimony was introduced during the appeal hearing in circuit court. When asked if there was any written agreement that he was aware of that gave Appellant the right to occupy Hangar 7, Mr. Holly testified, "No, sir." [Tr. p 34]

Appellant claims a lease was created through the actions of the parties. [¶53 Complaint C/A 2014CP26-1193] If any agreement existed for the use of Hangar 7, it existed under *Section 27-35-40* and the agreement was a month to month tenancy. On April 28, 2014, Horry County through its attorney sent notice to Appellant that the Space Use Permit terminated. [Letter Foley & Lardner, April 28, 2014] Appellant was further notified that if it did not vacate the premises or enter a new mutually agreeable Space Use Permit or lease by May 27, 2014, Horry County would bring legal action for ejectment. [Id]. When Appellant refused to enter a new agreement or to vacate Hangar 7 after notice Horry County properly exercised its statutory rights.

The issues raised in connection with whether the Space Use Permit could replace the May 10, 2012 agreement between Appellant and Grand Strand Aviation, Inc. are not material to the appeal. Both of those agreements had ended when Horry County filed its Rule to Vacate/Eject Appellant from Hangar 7. Appellant's tenancy rights of any kind ended on May 27, 2014.

Even if the issue of whether the Space Use Permit could replace the May 10, 2012, agreement were relevant. Judge Hyman correctly found that under the doctrine of merger, the permit superseded and replaced any other agreement entered between Respondent or its predecessors and Appellant in connection with the use of Hangar 7. *Davis v. KB Home of S. Carolina, Inc.,* 394 S.C. 116, 127, 713 S.E.2d 799, 804 (Ct. App. 2011) aff'd in part, vacated in part, No. 2011-199587, 2014 WL 2535489 (S.C. Jan. 29, 2014) (employment application was superseded and rendered invalid by the presence of a merger clause in his subsequent employment agreement).

The express terms of the Ramp 66 agreement provided that Appellant would be permitted the use of a minimum of 2500 square feet in "Bird Hangar" for use during daylight hours without paying a fee. Appellant entered a new agreement with the County that permitted it to use 6800 square feet twenty four hours a day. In addition, Appellant agreed to pay the County $1200 per month for the use of 6800 square feet without limitation of the use to daylight hours. The new agreement expressly provided that the permit constituted the entire agreement of the parties with respect to the use of Hangar 7 and superseded all previous agreements, representations and understandings concerning

the same, whether written or oral. The consideration for the Hangar 7 agreement was that Appellant was permitted to occupy and use space in Hangar #7 subject to the restrictions and terms of the Hangar 7 agreement. One of the terms of the Hangar 7 agreement was that it replaced and superseded all other agreements whether written or oral. [Space Use Permit, dated September 13, 2013]

When a contract is unambiguous, clear and explicit, it must be construed according to the terms the parties have used, to be taken and understood in their plain, ordinary and popular sense. *Warner v. Weader*, 280 S.C. 81, 83, 311 S.E.2d 78, 79 (1983).

V. The circuit court correctly read the magistrate's order staying the ejectment to expire at the conclusion of the circuit court appeal, and this issue is moot because Appellant has vacated the premises.

As in the previous argument, Appellant's claims in connection with the application of the statute regarding stays are guided by factual errors. The terms for Appellant's Bond to Stay Execution on Appeal are clearly stated in the order itself. [Bond to Stay Execution on Appeal] Appellant's Request that the magistrate stay execution on the Judgment for Ejection asked for a stay until the matter was heard on appeal and decided by the Circuit Court. [Id.] The magistrate's order expressly stated that execution on the ejection was stayed until the action was heard on appeal and decided by the Circuit Court. [Id.] After the appeal of the Judgment of Ejection was decided by the Circuit Court, the Magistrate's order to stay execution on appeal ended according to its own terms. The Magistrate's unappealed order is the law of the case. *Judy v. Martin,* 381 S.C. 455, 674 S.E.2d 151 (2009).

Although Appellant duly appealed the circuit court order to the Court of Appeals, the general stay of execution found in Rule 241 SCACR does not apply because the present appeal involves an ejectment proceeding. See *United Dominion Realty Trust, Inc. v. Wal-Mart Stores, Inc.*, 307 S.C. 102, 413 S.E.2d 866 (Ct. App. 1992).

Horry County contends that *S.C. Code §27-37-130* is not applicable to the bond set in magistrate's court. The bond for which Appellant moved did not comply with the requirements of Section *27-37-130*. That statute requires a bond amount that is sufficient to cover all costs and damages which the landlord may sustain. The money paid by the Appellant only brought the past due rent current and obligated the Appellant to continue paying rent until the matter was decided by the Circuit Court. Appellant's rights were not conditioned for the payment of all costs and damages which the landlord may sustain, as required by the Statute [Bond to Stay Execution on Appeal].

Horry County also contends that Appellant's claims in **Argument V** in connection with the stay of Execution of the Judgment are moot because Appellant has vacated the premises. Appellant has not requested reinstatement to Hangar 7 as part of the relief sought in the present appeal, and, Appellant did not seek supersedeas in this Court. An appellate court will not pass on moot and academic questions or make an adjudication where there remains no actual controversy. *Jackson v. State*, 331 S.C. 486, 489 S.E.2d 915 (1997). Moot appeals differ from unripe appeals in that moot appeals result when intervening events render a case nonjusticiable. See *Jean Hoefer Toal, Shahin Vafai & Robert A. Muckenfuss, Appellate Practice in South Carolina 122* (1999).

"A case becomes moot when judgment, if rendered, will have no practical legal effect upon [the] existing controversy. This is true when some event occurs making it impossible for [the] reviewing Court to grant effectual relief." *Mathis v. South Carolina State Highway Dep't,* 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973). *Curtis v. State,* 345 S.C. 557, 567-68, 549 S.E.2d 591, 596 (2001).

CONCLUSION

Respondent Horry County respectfully requests that Appellant Skydive Myrtle Beach, Inc.'s appeal be Denied and the Circuit Court be affirmed.

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March 3, 2016

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Larry B. Hyman, Jr.
Circuit Court Judge

APPELLATE CASE NO. 2015-001868

SKYDIVE MYRTLE BEACH, INC. .....Appellant

v.

HORRY COUNTY.....Respondent

PROOF OF SERVICE

Teresa Phillips certifies that she is an employee with the Battle Law Firm, LLC, representing Respondent, and that she has mailed the Initial Brief and Designation of Matter of behalf of Respondent to the addressee shown this 3rd day of March, 2016, with the proper postage attached thereto.

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March 3, 2016

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
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Columbia, SC 29211

RE: Skydive v. Horry County Appeal
Appellate Case No.: 2015-001868

Dear Madam Clerk:

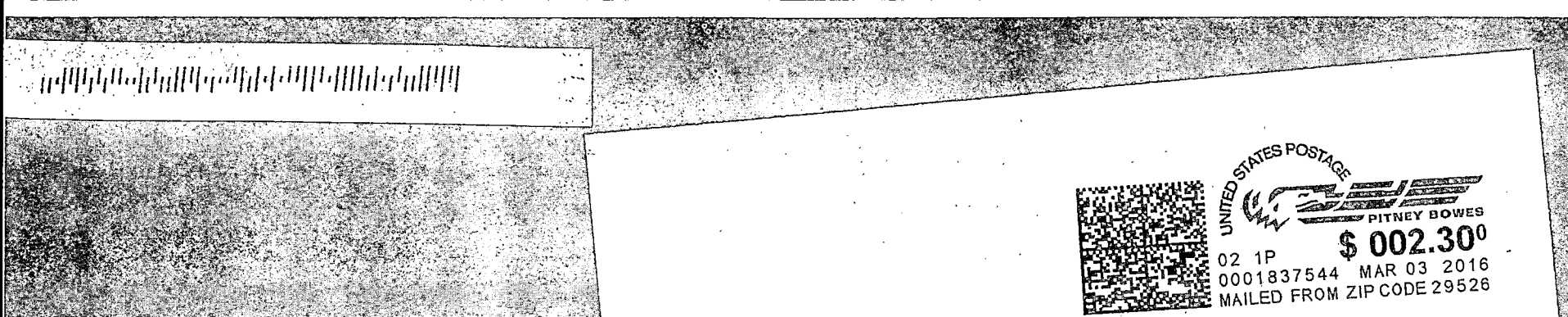
Enclosed please find Respondent's Initial Brief, Respondent's Designation of Matter and Proof of Service in the above referenced matter. By copy of this letter I am serving the attorneys for the Appellant with a copy of these documents. Please return a clocked copy of the Proof of Service. I have enclosed an extra copy of the Proof of Service, as well as a self-addressed, stamped envelope for your convenience.

Very truly yours,

Michael W. Battle

Enclosure stated

Cc: Robert Varnado
Robert Eastman
Arrigo Carotti



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