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

INITIAL REPLY BRIEF OF APPELLANT

Robert B. Varnado (SC Bar # 0007085)
Alexis M. Wimberly (SC Bar # 101611)
BROWN & VARNADO LLC
P.O. Box 1127
Mount Pleasant, South Carolina 29465
(843) 737-7300
Attorneys for Appellant

Other Counsel of Record:

Michael W. Battle, Esquire
Battle Law Firm, LLC
P.O. Box 530
Conway, SC 29528

Arrigo P. Carotti, Esquire
Horry County Attorney
1301 2nd Avenue
Conway, SC 29526
Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

RULES and STATUTES

OTHER AUTHORITIES

INTRODUCTION

The Appellant Skydive Myrtle Beach, Inc. ("Appellant" or "SDMB") submits this reply brief to address errors of law and citation of improper or unavailing authority in the Brief of Respondent filed by the Respondent Horry County ("Respondent" or "County").

ARGUMENT I(A)

The County first raises a preservation issue, contending that the first time SDMB raised the Rule 13, SCRCP issue was in a motion to reconsider to Judge Hyman. [Resp. Brief. p. 9]. This is incorrect. SDMB addressed the issue to Judge Hyman in its proposed order of May 11, 2015 [Appellant Prop. Orders]. Both this Court and our Supreme Court have indicated that Proposed Orders are sufficient to permit issue preservation. *Holmes v. East Cooper Community Hospital*, 408 S.C. 138, 160, 758 S.E.2d 483, 495 n. 16 (2014) (indicating issue preservation can be made in a proposed order); *Carolina Dep't of Transp. v. M & T Enter. of Mt. Pleasant, LLC,* 379 S.C. 645, 559, 667 S.E.2d 7, 15 n. 7 (Ct. App. 2008) (holding that an raised in a proposed order submitted to the circuit court, would have been preserved except for the appellant's failure to file a Rule 59(e), SCRCP, motion); *see also* Rule 5(b)(3), SCRCP (contemplating how proposed orders are to be exchanged); *Allen v. South Carolina Alcoholic Bev. Comm'n*, 321 S.C. 188, 192, 467 S.E. 2d. 450, 453 (Ct. App. 1996) (discussing procedural implications in case with proposed orders). Moreover, it is well-settled that until a final order is written and entered, a court has not made a final decision. Rule 58, SCRCP; *Ford v. State Ethics Comm'n*, 344 S.C. 642, 646, 545 S.E.2d 821, 823 (2001).

Because SDMB argued the matter to the Circuit Court prior to the May 29, 2016 Order [Prop. Order], and filed a timely Rule 59(e) motion thereto which covered the Rule

13 argument, the matter is preserved. *I'On, L.L.C. v. Town of Mt. Pleasant,* 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000).

As far as presentation to the Magistrate Court, to the extent this is required in light of S.C. Code Ann. § 18-7-170 ("the appellate court shall give judgment according to the justice of the case, without regard to technical errors and defects which do not affect the merits"), then SDMB submits that the Rule 12(b)(6) motion filed June 13, 2014 sufficiently raised the issue to the Magistrate. [6.14.14 Mot.]. As discussed in the Brief of Appellants and at Section III of this brief below, the lack of substantive due process in the Magistrate Court proceedings should further militate in Appellant's favor on this issue; SDMB was denied a fair opportunity to make a complete record.

ARGUMENT I(B)

The County next argues its ejectment action is not a compulsory counterclaim, but never explains why or cites to authority applying Rule 13, SCRCP. Instead the County argues that SDMB has "plead questionable title to out the magistrate from jurisdiction" and cites two cases from the 1890s. [Resp. Brief. p. 10]. This argument is incoherent. The nature of the Magistrate's ejectment action was predicated entirely on the applicability of the Space Use Permit. [Return]. There is no citation in the record how SDMB has plead questionable title or how two nineteenth century cases have any bearing. Likewise, it bears repeating that a Rule 13, SCRCP motion does not attack the jurisdiction of either the Circuit Court or the Magistrate; rather it concerns only whether the claim is precluded. Rule 13, SCRCP. Thus, the County's citation to pre-Rules of Civil Procedure authority (e.g., that a Magistrate cannot be deprived of jurisdiction in lease case involving allegations of fraud in the procurement or superior title [Resp. Brief. p. 10]). are also misplaced and inapposite. Rule 13, SCRCP.

Moreover, the County completely fails to address any of SDMB's arguments regarding "the logical relationship test" under Rule 13, SCRCP [App. Brief pp. 9-14], this Court is free to conclude this failure as tantamount to a confession SDMB's position is correct. *Turner v. South Carolina Dep't Environ. Control*, 377 S.C. 540, 547, 661 S.E.2d 118, 121 (Ct. App. 2008) ([if a] respondent fails to respond to an issue in his brief, the appellate court may treat the failure to respond as a confession that the appellant's position is correct.").

ARGUMENT II

A. Identity of Parties.

It is an undeniable fact that the County and SDMB are "identical" parties in both this appeal and in 14-CP-26-1193. Rather than own up to this fact, the County is fixated on the presence of additional defendants in 14-CP-26-1193 and cites case law for the proposition that the act of naming additional defendants is somehow probative. The texts of the cited cases, however, do not support the County's position.

In *Cricket Cove Ventures, LLC v. Gilland*, 390 S.C. 312, 701 S.E.2d 39 (Ct. App. 2010), the developer/plaintiff had previously brought a first suit against Horry County for declaratory judgment and for a writ of mandamus, and then filed a second, separate suit against two council members for civil conspiracy in their individual capacities. *Id.*, 390 S.C. at 317-319, 701 S.E.2d at 42-43. After filing the second suit, the developer-plaintiff then amended his first action to add the council-members as defendants in their official capacities. *Id.* The council members filed for dismissal, *inter alia*, under Rule 12(b)(8) which the trial court granted. *Id.* The Court of Appeals, however, reversed the 12(b)(8) dismissal due to the non-identity of parties – distinguishing between the claims against the

defendants in their individual capacities in the second case versus those against them their official capacities in the first. *Id.*, 390 S.C. at 322, 701 S.E.2d at 44-45.

Cricket Cove, however, has no bearing on the appeal at bar. The "identity of parties" requirement of Rule 12(b)(8) is satisfied by the fact the County and SDMB are identical parties in both the instant appeal and 14-CP-26-1193; nothing in *Cricket Cove* stands for the proposition – advanced by the County – that the presence of additional defendants in 14-CP-26-1193 means that SDMB and the County are no longer identical parties in both actions. *Cricket Cove* is simply not on point; there is no requirement in Rule 12(b)(8) for complete or total identity of *all* parties in both actions – just that there be identity of the *relevant* parties in both actions. Rule 12(b)(8), SCRCP. The other cases cited by the County likewise do not support its contention that SDMB must show "complete" identity of *all* parties in both suits rather than the identity of the relevant parties in both as advanced by SDMB. In *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 105-106, 674 S.E.2d 524, 531-532 (Ct. App. 2009), the Court's opinion turned on whether the claims were substantially the same in the two actions; there was no analysis concerning identity of parties. The same appears to be true for the pre-Rules of Civil Procedure "abatement" case of *Connecticut Nat'l Bank v. Wilson*, 284 S.C. 415, 416, 326 S.E.2d 657, 658 (1985).

B. Substantially Similar Claims.

Appellant would rely on its prior arguments – and the fact that the enforceability of the Space Use Permit was the ultimate issue being litigated in both this case and 14-CP-26-1193 – to meet the Rule 12(b)(8) requirement of demonstrating substantially similar claims. Rule 12(b)(8), SCRCP. Appellant submits that the pre-Rules of Civil Procedure abatement case of *Connecticut Nat'l Bank v. Wilson*, 284 S.C. at 416, 326 S.E.2d at 658

(1985), cited by the County, lacks continuing precedential value because its analysis focuses entirely on whether the claims are identical and contains no analysis concerning 'substantial similarity' which is required by Rule 12(b)(8) and central to *Capital City* and the authority which has followed it. *See,* 392 S.C. at 105-106, 674 S.E.2d at 531-532; *Cricket Cove*, 390 S.C. at 322, 701 S.E.2d at 44-45, Rule 12(b)(8), SCRCP.

ARGUMENT III

In its brief, the County argues the validity of the Magistrate's narrow, hyper-technical and overly-strict application of the Magistrate's Court Rules by citing the text of Rules 1, 2 and 13. [Resp. Brief pp. 18-19, §§ B-C]. The County, however, completely glosses over Appellant's due process arguments in summary, conclusory fashion with no citation to authority. [Resp. Brief pp. 17-18, § A].

In doing so, the County thus fails to offer any argument or authority to contradict SDMB's due process arguments, including: (I) its citation to S.C. Code Ann. § 18-7-170 ("the appellate court shall give judgment according to the justice of the case, without regard to technical errors and defects which do not affect the merits") [App. Brief p. 18]; (II) its argument that deprivation of its jury trial rights violated S.C. Const. Art. I, § 14 [App. Brief pp. 19-20]; (III) its citation to Rule 14, SCMCR, which guides the Magistrate to be lenient in granting continuances and liberal in permitting amendments. [App. Brief p. 20]; (IV) its argument that the Magistrate's failure to exercise discretion was an abuse of discretion under these facts [App. Brief p. 21]; and (V) all of which taken together constituted a deprivation of SDMB's substantive due process right to a fair trial on the merits. [App. Brief p. 22]. This Court should deem the County's failure to address any of the foregoing issues as a confession that SDMB's position is correct thereto. "If [a] respondent fails to respond to an issue in his brief, the appellate court may treat the failure to respond as a

confession that the appellant's position is correct." *Turner v. South Carolina Dep't Environ. Control*, 377 S.C. 540, 547, 661 S.E.2d 118, 121 (Ct. App. 2008).

Likewise, this Court should deem the County's position Section A, [Resp. Brief pp. 17-18] to be abandoned on appeal and not presented for review because it consists of cursory and conclusory statements without citation to authority. *Broom v. Jennifer J.*, 403 S.C. 96, 115, 742 S.E.2d 382, 391 (2013) ("Issues raised in a brief but not supported by authority may be deemed abandoned and not considered on appeal."); *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001); *see also, State v. Colf*, 332 S.C. 313, 322, 504 S.E.2d 360, 364 (Ct. App. 1998), *aff'd as modified*, 337 S.C. 622, 525 S.E.2d 246 (2000) ("An issue is also deemed abandoned if the argument in the brief is merely conclusory"); *First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (noting that when a party fails to cite supporting authority or when the argument is simply a conclusory statement, the party is deemed to have abandoned the issue on appeal).

ARGUMENT IV

In this section of its brief [Resp. Brief pp. 20-24], the County has also failed to address the following issues raised by SDMB in its brief: (I) the Space Use Permit is ambiguous, and the Circuit Court should have considered parol evidence [Resp. Brief. pp. 24-25]; (II) that the "Letter of Agreement" meets all the tests of a lease under South Carolina law [Resp. Brief. pp. 25-27]; (III) that novations are strictly construed against the drafter, so that the language of the Space Use Permit (for which no consideration was given by the County) did not result in a novation of the Letter of Agreement [Resp. Brief pp. 28-30]; and (IV) the parties did not intend a novation and that only a full evidentiary hearing

was suitable for the Circuit Court to have ruled there was a novation. [Resp. Brief. pp. 30-31].

As with Section III, this Court should deem the County's failure to address any of the foregoing issues as a confession that SDMB's position is correct in Section IV. "If [a] respondent fails to respond to an issue in his brief, the appellate court may treat the failure to respond as a confession that the appellant's position is correct."

The County's argument – apparently as an alternate, sustaining ground -- that it was not in an agency relationship with Ramp 66/Grand Strand Aviation [Resp. Brief p. 20] was not raised to the Circuit Court nor preserved in the record; equally specious is its argument that it is not bound by leases executed between Ramp 66 and airport tenants. [Resp. Brief pp. 20-21]. The County admits it paid $800,000.00 to buy-out Ramp 66/Grand Strand Aviation. [Resp. Brief p. 20]. It had knowledge and possession of the SDMB Lease. [Lease; Resp. Brief, p. 6]. Its new contention that it is a 'third party' that required protection under S.C. Code Ann. § 27-33-30 [Resp. Brief pp. 20-21] stretches the bounds of credulity under these facts. [Lease; Resp. Brief, p. 6].

ARGUMENT V

Abandonment.

With respect to the County's argument that the boiler-plate language on the Appeal Bond issued by the Magistrate somehow effects an analysis under Rules 241(b)(10), SCACR, SDMB relies on its detailed discussion in Argument V of its brief. [App. Brief pp. 33-39].

However, as with the previous Sections, the County has abandoned the issue by failing to offer any counter-argument to SDMB's extensive discussion of: (I) the text,

interpolation and construction of S.C. Code Ann. § 27-37-10 and Rule 241(b), SCACR [App. Brief. pp. 33-34, 35-38]; (II) the application of *Vacation Time of Hilton Head Island, Inc. v. Kiwi Corp.*, 280 S.C. 232, 312 S.E.2d 20 (Ct. App. 1987) to the text of S.C. Code Ann. § 27-37-130 [App. Brief. p. 34]; or (III) the impact of Rule 62(f), SCRCP [App. Brief. p. 38]. As before, this failure should be treated as a confession of the correctness of SDMB's position. *Turner*, 377 S.C. at 547, 661 S.E.2d at 121.

Turning to the County's proposition that the general stay under Rule 241, SCACR does not apply in ejectment proceedings [Res. Brief. p. 25], the only authority cited by the County is to *United Dominion Realty Trust, Inc. v. Wal-Mart Stores, Inc.*, 307 S.C. 102, 107-108, 413 S.E.2d 866, 869-870 (Ct. App. 1992). The *United Dominion* case, however, in no way stands for the proposition advanced by the County. *Id.* It does not touch on the applicability of Rule 241, SCACR at all. *Id.* The Court should deem this issue abandoned by the County. *Broom v. Jennifer J.,* 403 S.C. at 115, 742 S.E.2d at 391 ("Issues raised in a brief but not supported by authority may be deemed abandoned and not considered on appeal").

Ironically, however, with respect to the County's next argument that the bond failed to meet the requirements of S.C. Code Ann. § 27-37-130 by insufficiently covering all the County's costs and damages [Res. Brief. p. 25], *United Dominion* actually opposes the County's position. In *United Dominion*, Judge Goolsby held that the "[t]he amount of Wal–Mart's appeal bond was a matter committed to the sound discretion of the courts below (emphasis added)." *Id.*, 307 S.C. at 108, 413 S.E.2d at 870. It is undisputed in this appeal that the Magistrate set a bond which the Circuit Court twice refused to modify. [Tr.; Order]. Since the bond amount is discretionary, and the County neither cross-appealed

nor moved for reconsideration at either the Magistrate or Circuit Court level regarding the bond amount, its argument is specious. *United Dominion*, 307 S.C. at 108, 413 S.E.2d at 870. Based on the foregoing, the County has not articulated a cogent, compelling or legally supportable argument against SDMB.

Mootness.

The Court should reject the County's mootness argument, also, because it (a) the question is not moot; but (b) even if it were, the County fails to offer analysis under cases discussing the three general exceptions to the mootness doctrine. *E.g., Wachesaw Plantation East Community Services Ass'n, Inc. v. Alexander*, 414 S.C. 355, 778 S.E.2d 898 (2015).

First, there can be no doubt that the whole purpose of the appeal at bar is for SDMB to be able to resume its rightful occupancy of Hangar 7 and resume its lawful business. If the Court reverses the Circuit Court, that is the natural result. Thus, any matter that touches on occupancy rights is not moot. As it relates to the Appeal Bond, SDMB is hopeful the Court of Appeals will agree with its position and reinstate SDMB under the original Appeal Bond even if either party seek certiorari to the South Carolina Supreme Court. Thus, the fact the County succeeded in forcibly dispossessing SDMB from Hangar 7 does not render this appeal "of no practical legal effect" nor is the Court of Appeals "precluded from granting effectual relief." *S.C. Ret. Syst. Inv. Comm'n v. Loftis,* 402 S.C. 382, 384, 741 S.E.2d 757, 758 (2013).

Second, in *Wachesaw Plantation* Justice Beatty confirmed the three exceptions to mootness:

> "In the civil context, there are three general exceptions to the mootness doctrine First, an appellate court can take jurisdiction, despite mootness, if

> the issue raised is capable of repetition but evading review. Second, an appellate court may decide questions of imperative and manifest urgency to establish a rule for future conduct in matters of important public interest. Finally, if a decision by the trial court may affect future events, or have collateral consequences for the parties, an appeal from that decision is not moot, even though the appellate court cannot give effective relief in the present case."

Id., 402 S.C. at 384, 741 S.E.2d at 758 (internal citations and quotations omitted); *see also Abbeville School Dist. v. State*, 410 S.C. 619, 629-60, 767 S.E.2d 157, 162 (2014).

To the extent the Court believes Appellant's fifth appeal argument may be moot (which SDMB denies), then Appellant would respectfully argue that the first and third exceptions to mootness apply.

As to the first exception, there is an absence of any reported decisions on point; if landlords can successfully make the County's argument, then many commercial tenant-litigants with valid appeal bonds may be improperly dispossessed from tenancies at the conclusion of circuit court review in contravention of clear law. The need for clarity and direction from the Court of Appeals on Rule 241(b)(10), SCACR mandates review in the instant case for the benefit of commercial landlords and tenants, and courts, across the State. Thus, this Court should apply the first exception to mootness. *Cf. In Re McCracken*, 346 S.C. 87, 90, 551 S.E.2d 235, 237 (2001).

As to the third exception, there is ongoing litigation between the parties [2014-CP-26-1193]; thus, the circuit court's refusal to stay execution, along with determination of mootness by the Court of Appeals, both will result in collateral consequences in the ongoing case in terms of the County arguing at some future period that such litigation is moot as well, or that there is some preclusive effect on SDMB's damages claim. In addition, there is a high probability that the one or both of the parties might seek certiorari

to the Supreme Court, which means that the of the Circuit Court's error will affect future events, as well. Accordingly, the third exception to mootness is triggered also. *Cf. Curtis v. State*, 345 S.C. 557, 568, 549 S.E.2d 591, 597 (2001).

CONCLUSION

Based on the foregoing arguments and citation to authority, the Court should reject the erroneous positions advanced in the Brief of Respondent.

Respectfully submitted,

Robert B. Varnado (S.C. Bar # 0007850)
Alexis M. Wimberly (S.C. Bar # 101611)
BROWN & VARNADO LLC
P.O. Box 1127
Mount Pleasant, South Carolina 29465
(843) 737-7300
Attorneys for Appellant