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

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Skydive Myrtle Beach, Inc., ("SDMB") is a skydiving business that operated out of the Grand Strand Airport ("GSA") located in North Myrtle Beach, South Carolina. The GSA is owned by Horry County (the "County"). For many years, the County employed Grand Strand Aviation d/b/a/ Ramp 66 ("Ramp 66") as its agent to administer GSA.

On May 10, 2012, Ramp 66 entered into an eight (8) year lease with SDMB for the rental of "Bird Hangar" which is now known as "Hangar 7". [R. pp. 359-361]. At some point thereafter, SDMB lost its copy of the Lease.

In 2013, the County terminated its agency relationship with Ramp 66 and assumed direct oversight of GSA through the Horry County Department of Airports ("HCDA"), a County agency. Thereafter, HCDA presented a "Space Use Permit" to SDMB, which SDMB executed on September 13, 2013. [R. pp. 335-341].

SDMB filed a complaint against the County, the HDCA and individual defendants (county personnel) on February 28, 2014, ("Primary Action" or "14-CP-26-1193")[1] alleging fifteen causes of action arising from County's conduct against SDMB which included, *inter alia*, allegations of breach of a lease contract, breach of a lease contract accompanied by a fraudulent act, civil conspiracy, fraud, interference with a contractual relationship, and attempted retaliatory eviction. [R. pp. 33-68].

Every allegation in SDMB's Primary Action is related to SDMB's leasehold interest in Hangar 7. The County answered on March 15, 2014 but did not counterclaim

[1] *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. 2014-CP-26-1193.

for ejectment or declaratory judgment of its rights, nor did it move to amend its Answer. [R. pp. 69-75].

However, on June 5, 2014, the County filed an Application for Ejectment against SDMB in the Myrtle Beach Magistrate's Court, styled as *Horry County v. Skydive Myrtle Beach, Inc.,* CA No. 2014CV261092444 ("Magistrate's Action"). [R. pp. 1, 3, 78].

On June 13, 2014, SDMB moved for the Magistrate's Action to be dismissed or consolidated with the Primary Action based on the following grounds: S.C. Code Ann. § 23-3-30 (magistrate jurisdiction limited to $7,500.00); Rules 12(b)(1) and (2), SCRCP (subject matter and personal jurisdiction); Rule 12(b)(8), SCRCP (another action pending between same parties and same subject matter); and Rule 42, SCRCP (judicial economy, common questions of law and fact require consolidation). [R. p. 86]. It should be noted that formal service on SDMB was not effected on SDMB until four days later June 17, 2014. [R. p. 77].

On July 2, 2014, the Magistrate orally denied SDMB's Motion to Dismiss – holding that the Magistrate's Court had concurrent jurisdiction to determine an action that was "strictly a Land Lord [sic] Tenant dispute, and that the action already filed by the defendant in Common Pleas does not address." [R. p. 3]. On July 11, 2014, the Magistrate's Court mailed SDMB a Summons dated July 8, 2014, setting a bench trial at 11:00 a.m. for July 23, 2014. [R. p. 7].

On July 18, 2014, SDMB filed a timely Motion to Reconsider the denial of its 12(b) Motion to Dismiss the Magistrate's Action pursuant to: (1) Rule 12(b)(8), SCRCP (Primary Action filed); (2) Rule 12(b)(1) and (2) (no subject matter and personal jurisdiction since limit of Magistrate's Court is $7,500.00 as set forth in S.C. Ann. § 23-3-3). [R. pp. 88-89].

In the event SDMB's 12(b) motions were denied, SDMB also requested alternate relief: (1) to consolidate all matters under Rule 42, SCRCP in the interests of judicial economy to avoid undue expense for common issues of fact and law in the Primary Action; (2) time to file its answer and counter-claim pursuant to Rule 12(a)(1), SCRCP ("if the Court denies the [12(b)(1), (2), or (8)] motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 15 days after notice of the Court's action"); (3) thirty days continuance pursuant to Rule 14, SCRMC (the "court shall be lenient in the allowance of changes or amendments to complaints, answers, and counterclaims, and in granting continuances of trials for good cause shown. . . . Raising a claim, defense, or counterclaim for the first time at trial shall constitute grounds for continuance when necessary to serve the ends of justice."); and (4) a Jury Trial pursuant to Rule 13(c), SCRMC. [Id.].

On July 21, 2014, over County's objection, the Magistrate allowed a hearing on SDMB's motion to reconsider when "both parties [would be] present in the courtroom." [R. p. 3]. The hearing on the motion to reconsider was set for July 23, 2014 at 11:00 a.m. [Id.].

At the July 23, 2014, hearing, the Magistrate's Court denied SDMB's Motion to Reconsider along with its requests for continuance, time to file an answer and counterclaim, and a jury trial. Significantly, thirty minutes later the Magistrate Court then conducted a full bench trial less than an hour after denying the motion to reconsider, over SDMB's objection and requests for continuance. [R. p. 3]. The Magistrate then issued a Writ of Ejectment against SDMB. [R. p. 1].

Specifically, the Magistrate's Return states:

> Attorney Eastman requested The Court to reconsider its ruling/decision on the Motion he put forth. The Court advised both parties that it would hear his Motion of Reconsideration on July 23rd with both parties present in the courtroom.
>
> On July 23rd, again both parties appeared. The Court heard from attorney Eastman who requested the Court to reconsider its ruling/decision on the Motion he put forth. The Court again respectfully denied his Motion. At that point [sic] The Court moved directly into the action filed by Horry County, Rule to Vacate. Attorney Eastman Requested a Jury Trial and 30 days to file a Counter Claim [sic]. The Court denied both of his request [sic]. Neither one were [sic] filed/requested timely. The Counter Claim [sic] should have been filed within the 30 day time period to file The answer and jury Trial [sic] should have been requested five days prior to the court date of July 23rd, 2014. The Court heard testimony from both sides and there witness [sic]. The Court found that based on the testimony and evidence issued [sic] that the agreement/lease between Skydive Myrtle Beach and Horry County did in fact expire January 1st, 2014. That Horry County is the rightful land lord [sic] and did present Skydive Myrtle Beach with a new agreement/lease. That Skydive Myrtle Beach did not agree with it, and refused to sign the new agreement/lease. Therefore Skydive Myrtle Beach has no legal right to be on the property or in the building. Eviction was granted.

[R. p. 3].

On July 25, 2014, SDMB filed its timely appeal to the circuit court. [R. p. 82]. Importantly, on August 1, 2014, a Bond Hearing was held in the Magistrate's Court with SDMB appearing *pro se.*[2] The Court issued a bond requiring SDMB to pay back-rent and remain current on its Hangar 7 occupancy at the $1,200.00 per month rate as previously agreed between the parties. [R. p. 2].

[2] On July 30, 2015, the Magistrate denied SDMB's request for continuance due to schedule conflict and unavailability. Counsel for SDMB was in Florida and could not attend due to schedule conflict on less than two days' notice. [R. pp. 137; 80].

On March 2, 2015, counsel for SDMB presented argument that the Appeal should be consolidated with the Primary Action and filed written memorandum of law under the Primary Action caption. [R. pp. 111-136]. The court continued the appeal and ordered SDMB to request a joint status conference. [R. pp. 6-7].

On March 13, 2015, SDMB filed a Request for a Joint Status Conference in both the Primary Action and Appeal. [R. p. 321].

On May 6, 2015, the appeal came to a hearing before the Horry County Court of Common Pleas, the Honorable Larry B. Hyman, Jr. presiding, along with SDMB's motion for Joint Status Conference, as well as Respondent's motions for a rule to show cause, increase bond amount, and injunctive relief. After hearing oral argument, Judge Hyman then directed the parties to submit proposed orders for his consideration no later than May 11, 2015, which counsel for both parties timely accomplished. [R. pp. 396-418, 388-395]. In the meantime, Judge Hyman executed a Form 4 Order dated May 6, 2015, filed with the Clerk of Court on May 13, 2015, mailed to counsel of record on May 20, 2015 (received by counsel for SDMB on Tuesday, May 26, 2015), in which he indicated "Motion to Appeal Denied" (hereinafter "Form 4 Order"). [R. pp. 8-9].

Appeal # 1 – Dismissal of Appeal

The Form 4 Order did not state that a formal order was forthcoming; however, within ten (10) days of its service, on May 27, 2015, Judge Hyman executed a formal *Order Dismissing Magistrate's Appeal*, filed May 29, 2015, served via U.S. Mail that same date, and received by counsel for SDMB via email also on May 29, 2015 ("Formal Order"). [R. pp. 10-19].

Out of an abundance of caution, SDMB moved the Court to reconsider both orders (i.e., the Form 4 Order and the Final Order) simultaneously by a timely Rule 59(e) Motion to Reconsider served June 3, 2015. [R. pp. 139-163]. Judge Hyman signed an Order Denying Appellant's Motion to Reconsider Dismissal of Appeal on July 16, 2015, which was filed July 21, 2016 and received by Appellant on July 27, 2015. [R. pp. 20-23]. Appellant's Notice of Appeal thereto was timely served on August 19, 2015.

Appeal # 2 – Supersedeas/Stay

On September 16, 2015, the County issued a seventy-two (72) hour notice of intent to eject SDMB from GSA on the grounds that a supersedeas bond was required since the appeal was denied. [R. p. 358].

On September 17, 2015, SDMB filed a Notice of Motion for Emergency Injunction and Stay of Ejectment. [R. pp. 164-178]. Judge Hyman conducted a hearing on September 22, 2015 and directed the parties to file any additional, supporting memoranda and materials by September 25, 2015. [R. p. 302].

On September 25, 2015, the Appellant filed a Supplemental Memorandum of Law which raised and analyzed the matters contained in Section III of this brief; Respondent filed a supplemental memorandum of law as well. [R. pp. 419-431, 432-438].

On October 13, 2015, Judge Hyman signed an Order Denying Appellant's Motion for Injunction and Stay of Ejectment, which was filed October 15, 2015 and received by Appellant the same date. [R. pp. 28-31]. On October 23, 2015, Appellant served a timely Rule 59(e) motion to reconsider the October 13, 2015 Order. [R. pp. 179-191].

On November 19, 2015, Judge Hyman denied SDMB's Motion to Reconsider the October 13, 2015 Order which was received by Appellant's counsel that same day electronically, but not filed with the clerk of court until November 24, 2015. [R. p. 32B].

Out of an abundance of caution, Appellant had additionally filed a September 25, 2015, *Verified Petition for Supersedeas Bond to the Horry County Court of Common Pleas.* [R. p. 192]. On November 4, 2015, Judge Hyman issued an Order Denying Petition for Supersedeas Bond which was filed November 9, 2015, of which written notice was received November 16. [R. p. 32].

Accordingly, Appellant served its Notice of Appeal # 2 on November 20, 2015. Following a motion to consolidate, the Court of Appeals consolidated these two appeals by an Order dated December 30, 2015.

STANDARD OF REVIEW

Whereas the circuit court maintains a broad scope of review in deciding an appeal of a magistrate's order, the South Carolina Court of Appeals, when reviewing the circuit court's adjudication of an appeal of an ejectment proceeding in magistrate's court, does so under a more limited standard, under which (1) findings of fact are to be upheld if there is any supporting evidence and (2) absent an error of law, the circuit court's holding is to be affirmed. *McNair v. United Energy Distributors*, 390 S.C. 44, 49-50, 699 S.E.2d 723, 726 (Ct. App. 2010); *Bowers v. Thomas,* 373 S.C. 240, 244, 644 S.E.2d 751, 753 (Ct. App. 2007). Where the circuit court has affirmed the magistrate court decision, this court looks to whether the circuit court order is "controlled by an error of law or is unsupported by the facts." *Parks v. Characters Night Club,* 345 S.C. 484, 490, 548 S.E.2d 605, 608 (Ct. App. 2001). "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 magistrate's judgment and there are no facts that show the affirmance was influenced by an error of law." *Id.*

STATEMENT OF ISSUES ON APPEAL

I. Was the circuit court guided by errors of law in not reversing or vacating the magistrate's order by virtue of the fact the Respondent's magistrate action was a mandatory counterclaim in ongoing circuit court litigation, which the Respondent waived under Rule 13(a), SCRCP by not pleading it in the circuit court?

II. Was the circuit court guided by errors of law in not reversing or vacating the magistrate's order by virtue of Rule 12(b)(8), SCRCP?

III. Was the circuit court guided by errors of law in failing to reverse or vacate the magistrate's order for his improper application of the rules of court – which deprived SDMB of its due process protections?

IV. Was the circuit court guided by the same error of law as the magistrate in ruling that the Space Use Permit (a temporary, revocable 90-day license between the parties, without consideration) had superseded, modified and novated a prior eight (8) year, long-term lease between them?

V. Did the circuit court commit an error of law in holding that its ruling was not automatically stayed during the pendency of the instant appeal?

ARGUMENT I

The circuit court was guided by errors of law in not reversing or vacating the magistrate's order by virtue of the fact the Respondent's magistrate case was a mandatory counterclaim in ongoing circuit court litigation, which the Respondent waived under Rule 13(a), SCRCP by not pleading it in the circuit court.

Rule 13(a), SCRCP provides that: "[a] pleading shall state as a [compulsory] counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction." Rule 13(a), SCRCP.

The purpose of Rule 13(a) is "to prevent multiplicity of actions and to achieve resolution in a single lawsuit of all disputes arising out of common matters." *Beach Co. v. Twillman*, 351 S.C at 56, 61, 566 S.E.2d 863, 865 (citing *Southern Const. Co. v. Pickard*, 371 U.S. 57, 60, 83 S.Ct. 108, 109 (1962)), in which the United States Supreme Court held that Rule 13(a) "was particularly directed against one who failed to assert a counterclaim in one action and then instituted a second action in which that counterclaim became the basis of the complaint."). The South Carolina Supreme Court, as far back as 1955, held that Rule 13(a)'s purpose was to prevent "undesirable possibility presented under the original rule whereby a party having a ... compulsory counterclaim could avoid stating it ... by bringing an independent action in another court." *Sparrow v. Nerzig,* 228 S.C. 277, 283, 89 S.E.2d 718, 721 (1955) (quoting Rule 13, SCRCP, advisory committee's notes on amendments).

In *Crestwood Golf Club, Inc. v. Potter,* 328 S.C. 201, 217, 493 S.E.2d 826, 835 (1997), the South Carolina Supreme Court unequivocally established that if a compulsory

counterclaim is not raised in the first action, then a defendant is precluded from asserting the claim in a subsequent action. *Accord Baker v. Gold Seal Liquors, Inc.,* 417 U.S. 467, 477 n. 1, 94 S.Ct. 2504 (1974); *Q Int'l Courier Inc. v. Smoak,* 441 F.3d 214, 219 (4th Cir. 2006).[3]

In *North Carolina Fed. Sav. & Loan Ass'n v. DAV Corp.*, 298 S.C. 514, 571, 381 S.E.2d 903, 905 (1989) our Supreme Court adopted the "logical relationship" test to determine whether a counterclaim is compulsory or permissive. *See also Mullinax v. Bates,* 317 S.C. 394, 396, 453 S.E.2d 894, 985 (1995). Whether a counterclaim is logically related to the initial claim depends upon the facts of each case. *Id.* "By definition, a counterclaim is compulsory only if it arises out of the same transaction or occurrence as the opposing party's claim." *Wachovia Bank, N.A. v. Blackburn*, 407 S.C. 321, 331, 755 S.E.2d 437, 442 (2014) (citing *Wells Fargo Bank, N.A. v. Smith*, 398 S.C. 487, 495, 740 S.E.2d 328, 332-333 (Ct. App. 2012;) *see also Twillman*, 351 S.C. at 61, 566 S.E.2d at 865. "Claims that arise out of separate transactions or occurrences than the subject matter of the opposing party's claims are, instead, permissive." *Blackburn*, 407 S.C. at 331, 755 S.E.2d at 442; Rule 13, SCRCP.

When the logical relationship test is applied in the case at bar, it becomes patently clear that the County's magistrate ejectment action is logically related, and arises out of the same transactions and occurrences, which are the subject of Appellant's lawsuit in 14-CP-26-1193.

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[3] The Reporter's Note notes that South Carolina's Rule 13(a) is the same as the federal rule on counterclaims. Accordingly, this Court may rely on federal law to interpret our Rule 13. *See Brown v. Leverette,* 291 S.C. 364, 366–67, 353 S.E.2d 697, 698–99 (1987) (utilizing federal law to interpret a state rule that tracked the language of the corresponding federal rule); *Twillman*, 351 S.C. 56, 62, 566 S.E.2d 863, 865-866.

For example, the Complaint in 14-CP-26-1193 filed February 28, 2014 sets forth numerous allegations that the County breached its lease agreement with Appellant. At ¶ 23 of the "Factual Allegations," Appellant detailed how the County sought to eject it from Hangar 7 in February, 2014. The first and second causes of action [R. pp. 33-38, ¶¶ 28-66] go into heavy detail for the period of 2012-2014 as to the County obtained the Space Use Permit under what Appellant contends were false pretenses; how the County failed to make repairs to Hangar 7 despite promises to do so; and how the County failed to present a new long-term lease to Appellant. The remaining allegations are all in a similar vein. [R. pp. 33-68]. The prayer not only seeks monetary damages but to obtain an order requiring the County to cease interfering with Appellant's operations.

Moreover, every cause of action in 14-CP-26-1193 directly bears on Appellant's tenancy rights to Hangar 7 – so does the County's Magistrate Court action. [R. pp. 33-68, 3]. Every cause of action in 14-CP-26-1193 attacks the County's right to enforce the Space Use Permit – which is the very document that it took to the magistrate to enforce. In 14-CP-26-1193, the Appellant contends the County breached its landlord tenant obligations; in the magistrate action, by contrast the County contended that the Appellant was in breach. [R. pp. 33-68, 3].

Accordingly, the inescapable conclusion is that both actions involve the same parties, seeking to determine their rights vis-à-vis Hangar 7, under the same lease agreements and arrangements, all of which ultimately bore on whether SDMB must vacate or stay in Hangar 7. Due to the clear, logical relationship of these claims, the County was obligated to bring its eject claim as a counterclaim within 14-CP-26-1193 or else it forever waived it. *Twillman,* 351 S.C. at 62, 566 S.E.2d at 865; *Crestwood,* 328 S.C. at 217, 493

S.E.2d at 835; *First–Citizens Bank & Trust Co. v. Hucks,* 305 S.C. 296, 298, 408 S.E.2d 222, 223 (1991).

Because the County answered the Complaint in 14-CP-26-1193 on March 18, 2014, without a counterclaim, and then brought a separate magistrate action on June 13, 2014, without even seeking leave to amend its Answer in 14-CP-26-1193 [R. pp. 33-68, 69-76], the provisions, policy and purpose of Rule 13(a) was therefore violated when it filed the magistrate action. *Crestwood,* 328 S.C. at 217, 493 S.E.2d at 835; *Hucks,* 305 S.C. at 298, 408 S.E.2d at 223.

Case law unequivocally supports Appellant's argument. In *Twillman, Ltd., supra,* the Court of Appeals specifically held that claims by a commercial tenant and commercial landlord **arising out of the same lease agreement** would be logically related to one another. 351 S.C. 56, 61, 566 S.E.2d 863, 865 ("Beach's complaint alleges Twillman is in breach of the lease agreement. Twillman's counterclaim alleges a breach of the same agreement by Beach. As we find these claims are logically related to each other, we agree Twillman's counterclaim is compulsory"). The *Twillman* holding that competing claims in a lease dispute are logically related and therefore would constitute a mandatory counterclaim – which is exactly what is presented in the appeal at bar – is entirely consistent with our Supreme Court's finding of "logical relationships" in similar commercial relationships for the purpose of determining if counterclaims were mandatory. *See e.g., DAV Corp.,* 298 S.C. 514, 518–19, 381 S.E.2d 903, 905 (finding a logical relationship between an action on a note brought by the lender to foreclose and the validity of a purported oral agreement modifying the note alleged by the borrower); *Hucks,* 305 S.C. at 298, 408 S.E.2d at 223 (finding a logical relationship between a trustee regarding the

administration of a trust and a legal counterclaim alleging that the trustee breached a fiduciary duty).

Applying *Twillman* to the facts here, it is clear that the circuit court erred as a matter of law in not vacating the magistrate's court case, just as the magistrate erred in failing to dismiss the proceedings under Rule 12(b)(6) when the Appellant raised it to the magistrate on June 13, 2014. [R. p. 78]. Tellingly, the circuit court entirely ignored Appellant's Rule 13 argument in its orders. [R. pp. 10-19, 20-23]. Rule 13 should be enforced under its plain and ordinary meaning. ("[r]ules of procedure, like statutes, should be given their plain meaning."); *Twillman*, 351 S.C. at 61, 566 S.E.2d at 865. For this initial reason, this Court should reverse the circuit court and vacate the magistrate's ruling.

There is yet another issue in the instant appeal that cannot be ignored. Respondent's filing of the magistrate action in Myrtle Beach while the circuit court action was already pending in Conway unquestionably constitutes "forum shopping" or "judge shopping" – which is a violation of public policy and repugnant to an orderly judicial system. *Cf. Nash v. Tindall Corp.*, 375 S.C. 36, 42, 650 S.E.2d 81, 84 (Ct. App. 2007). Appellant submits this is true whether it involves out-of-state litigants coming to South Carolina, or South Carolinian litigants manipulating the system within our own State.

Here, the County avoided litigating its ejectment claim in the circuit court; instead, it arranged to appear before one of its own magistrates to obtain the relief it wanted. The fact that the circuit court and magistrate court have co-equal jurisdiction over landlord-tenant disputes [S.C. Code Ann. § 23-3-10(10), (14)] is irrelevant – Rule 13(a) is designed to prevent a multiplicity of actions in courts of equal jurisdiction. Perhaps it is time for South Carolina to articulate a "first filing" rule similar to federal courts. *Northwest Airlines,*

Inc. v. American Airlines, Inc., 989 F.2d 1002, 1005 (8th Cir. 1993) ("The well-established rule is that in cases of [federal] concurrent jurisdiction 'the first court in which jurisdiction attaches has priority to consider the case.'"). Regardless, if a claim is waived in litigation in a court of competent jurisdiction, the party seeking to advance that waived claim (in a second court) should not be heard to argue "well, it's a court of equal jurisdiction." Such an argument violates the clear intent of Rule 13(a) and would encourage, rather than prevent, judge shopping. Appellant submits that this Court should use this opportunity to drive home that judge shopping is repugnant to public policy and one of the chief justifications for strictly enforcing Rule 13(a), SCRCP.

ARGUMENT II

The circuit court was guided by errors of law in not reversing or vacating the magistrate's order by virtue of Rule 12(b)(8), SCRCP.

The circuit court also erred by not vacating the magistrate's order by operation of Rule 12(b)(8), SCRCP [allowing a party to seek dismissal if "another action is pending between the same parties for the same claims"]. The Court of Appeals has held that 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. *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 106, 674 S.E.2d 524, 531 (Ct. App. 2009).

While Rule 12(b)(8) is to be construed narrowly, the *Capital City* Court held that the rule is extended to where the claims are *substantially* the same (emphasis added)." 382 S.C. at 106, 674 S.E.2d at 531-532. There is no requirement in the text of the rule requiring identity of parties or subject matter; such a reading, in fact, would not only contravene *Capital City* but go against the plain and ordinary meaning of the Rule 12(b)(8). "[R]ules of procedure, like statutes, should be given their plain meaning." *Twillman*, 351 S.C. at 61,

566 S.E.2d at 865; *Cf.* James F. Flanagan, *South Carolina Civil Procedure*, p. 105 (3d ed. 2010).

Here, SDMB initiated 14-CP-26-1193 against the County, and County agencies and officials, on February 28, 2014. [R. pp. 33-68]. Therein, it alleged, *inter alia*, that Appellant had a leasehold interest in Hangar 7 from which it was being improperly ejected by the County by virtue of the Space Use Permit. [Id.] On March 18, 2014, the County answered in 14-CP-26-1193 – without a counterclaim as established above. [R. pp. 69-75]. The County then instituted a separate magistrate action on June 13, 2014, and obtained an ejectment six weeks later on July 23, 2014, successfully arguing to the magistrate the applicability of the Space Use Permit. [R. pp. 3, 1]. Thus, there can be no doubt that SDMB has met its burden under Rule 12(b)(8) by virtue of a separate action involving the **same two parties and the same claim**, all which meet the test in both the text of the rule and *Capital City*.

The fact that there were *other* Defendants in 14-CP-26-1193 [which the circuit court relied on to deny relief under Rule 12(b)(8)] is irrelevant as a matter of law; the rule does not require identical parties like *res judicata*, merely that the second action be between the same parties who are litigating in the first action – which is the case here. [R. pp. 20-23]. In any event, the co-Defendants in 14-CP-26-1193 were all agencies or agents of the County, represented by the same counsel in both actions, all making common defenses; moreover, the County succeeded in having the individual defendants dismissed. Thus, there is a *de facto* identity of parties.

Taken to its logical conclusion, the circuit court's requirement of identity of parties creates an absurd result. The following analogy is illustrative: Imagine a construction

defect case pending in the court of common pleas where the plaintiff-homeowner sues multiple contractors and design professionals as defendants, including a plumber; one of the claims, *inter alia*, is that the plumber recorded an invalid mechanic's lien; would this Court permit the defendant plumber to appear before another judge and file a new case against the plaintiff to enforce his lien (which should have been a mandatory counter-claim in the common pleas case) – saying it was "ok" because there was no longer identity of parties? That is basically the logic applied in the appeal at bar. Thus, the circuit court's point about "other defendants" is meritless. [R. pp. 10-19, 20-24].

Similarly, the fact that 14-CP-26-1193 had multiple causes of action – which was dispositive to the circuit court – is irrelevant when considered against the fact that one of the claims in 14-CP-26-1193 concerns the applicability of the Space Use Permit and whether the County could eject SDMB, which is the basis of the magistrate action. The circuit court is guided by an error of law when it holds that there must be identity of causes of action. [R. pp. 10-19, 20-24]. The foregoing analogy of the construction defect case applies here as well; the homeowner is litigating many claims and theories in his common pleas case, including the validity of the plumber's lien, but the plumber argues that his new case does not run afoul of Rule 12(b)(8) because there is no longer identity of subject matter, and therefore, his right to enforce the lien is not "substantially similar" to the homeowner's argument that the lien is invalid as advanced in the first case. Once again, the circuit court's reasoning leads to absurd results. "In construing a statute, this Court will reject an interpretation when such an interpretation leads to an absurd result that could not have been intended by the legislature." *Lancaster Cnty. Bar Ass'n v.S.C. Comm'n on Indigent Def.,* 380 S.C. 219, 222, 670 S.E.2d 371, 373 (2008).

Likewise, it is an error of law for the circuit court to make an *a priori* finding that the claims were not "substantially similar" when the 14-CP-26-1193 parties were litigating the rights of SDMB and the County over the 2013 Space Use Permit, which is the basis of the magistrate claim. [R. pp. 10-19, 20-24]. Judge Hyman does not explain why the claims are not substantially similar; he disregards that both the basis of the claims and the remedy is the same in both contests – whether SDMB has a valid lease in Hangar 7 and can retain occupancy in the face of the Space Use permit. This further militates in favor of dismissal under Rule 12(b)(8).

The fact that magistrate court shares concurrent jurisdiction with the circuit court over tenancies and leasehold rights, while undeniable, is once again entirely irrelevant. S.C. Code Ann. § 23-3-10(10), (14). Rule 12(b)(8) applies regardless of jurisdiction – in fact, the principle behind the rule exists to prevent two cases from proceeding between the same parties in the same jurisdiction. *Cf. Poston v. Holmes Ins. Co.,* 191 S.C.314, 3217-18, 4 S.E.2d 261, 262 (1939). ("[A]n action may be pleaded in abatement of a second suit only when between the same parties and in the *same jurisdiction* and with the same object."). The fact that the County could have brought a counterclaim for ejectment in its March 15, 2014 Answer in 14-CP-26-1193 only advances SDMB's argument here. *See* Rule 13(a), SCRCP (discussed in section I *infra*).

Accordingly, the circuit court and the magistrate both erred in not dismissing the Magistrate's court action pursuant to Rule 12(b)(8) — even when the rule is strictly construed. All issues regarding SDMB's leasehold interest were already properly joined in 14-CP-26-1193. Once again, by going to the magistrate, the County's judge shopping resulted in an end-run around the circuit court in direct contravention of Rule 12(b)(8). For

this additional reason, this Court should reverse the circuit court and vacate the magistrate's ruling.

ARGUMENT III

The circuit court was guided by errors of law in failing to reverse or vacate the magistrate's order for his improper application of the rules of court – which deprived SDMB of its due process protections.

This Court should reverse the circuit court and vacate the magistrate's order because the magistrate's ruling was controlled by technical rulings – all to Appellant's detriment and all of which deprived Appellant of its due process rights – despite the fact that the South Carolina legislature and courts have unequivocally stated and made clear when reviewing magistrate rulings, "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." S.C. Code Ann. § 18-7-170 (emphasis added).

The magistrate's court rules do not contain a specific procedure for contesting jurisdiction or to remove an action filed between the parties in another forum. Pursuant to Rule 2, SCRMC, the magistrate's court looks to the SCRCP for guidance. Under Rule 12(b)(1), (2), and (8), SCRCP, motions to dismiss for (1) lack of subject matter jurisdiction, (2) lack of personal matter jurisdiction and (8) another action pending between the parties in another forum, may be made in lieu of an answer. Under Rule 12(a)(1), SCRCP:

> The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the Court: (1) if the Court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 15 days after notice of the Court's action;

Even though the Application for Ejectment was filed June 5, 2014, SDMB was not personally served with it until June 17, 2014. [R. p. 77]. As such, a responsive pleading

was due on or before July 18, 2014. *See* Rule 3, SCRMC (date of event not included in computation); Rule 7(a), and 9 SCRMC. The circuit court ignores this fact, and appears to calculate all deadlines from June 5 without any basis in fact [R. pp. 10-19, 20-24], which constitutes reversible error.

SDMB filed its first 12(b) motion with the Magistrate on June 13, 2014, and its second 12(b) motion was filed on July 18, 2014, each within the proscribed period set forth in Rule 7(a); *see also* Rule 8(b), SCRMC and Rule 5(b)(1), SCRCP (Delivery and service by mail of all pleadings and papers after the service of the original summons and complaint is complete upon mailing). The circuit court also ignores these facts even though Appellant advanced them at all times through the process. [R. pp. 94-111, 362-388, 396-418, 139-163]. Likewise, the circuit court ignored that the magistrate allowed Appellant to argue the second motion to dismiss. [Id.].

Thus, SDMB filed a timely and responsive motion pursuant to Rule 12(b), SCRCP (as applicable via Rule 2, SCRMC). Accordingly, both the circuit court and the magistrate erred as a matter of law in ruling that SDMB was out of time in making responsive pleadings/motions – which again constitutes grounds for reversal of the circuit court and for vacating the magistrate's order.

The same holds true for the jury trial request, which was submitted five (5) days in advance of the trial date; the circuit court claims the request was out of time because the five (5) day period included an intervening Saturday and Sunday in contravention of Rule 2, SCRMC. Such nitpicking is inconsistent with the purposes of S.C. Code Ann. § 18-7-170 and, at a minimum, should have been grounds for a continuance under Rule 14, SCRMC. Depriving SDMB of its right to a jury trial is a severe abuse of discretion

warranting reversal. S.C. Const. Art. I, § 14 ("[t]he right of trial by jury shall be preserved inviolate."). Thus, this Court should not affirm the circuit court on this ground.

Of equal or greater significance is the fact SDMB should have had fifteen (15) days to file an answer and counterclaim, pursuant to Rule 12(a)(1), SCRCP (as applicable via Rule 2, SCRMC) when the magistrate ruled on the second motion to dismiss. Because SDMB filed a timely motion to reconsider the original motion to dismiss and the magistrate entertained it, the magistrate only completed resolution of the Rule 12, SCRCP motions to dismiss on the day of the trial, without affording SDMB its opportunity to answer and counterclaim. By denying SDMB its procedural right to an answer and counterclaim, the Magistrate was clearly in error which is further grounds for reversal. Thus, this Court should reverse the circuit court on this ground.

Additionally, Rule 14, SCRMC, guides the magistrate to be lenient with a continuance when matters are raised at a hearing in the first instance, and to be liberal in granting amendments. Here, the magistrate erred by denying a continuance, along with denying amendment, when both continuance and amendment were proper. There was no requirement that the magistrate rush the case to conclusion – literally minutes after ruling against the second motion to dismiss – especially in light of the unique procedural posture of the case. Forcing a bench trial on the afternoon of July 23, under these facts, amounts to an abuse of discretion. *Hamm v. South Carolina Pub. Serv. Comm'n,* 312 S.C. 238, 241, 439 S.E.2d 852, 853 (1994) (absent an abuse of discretion, the court's decision to deny a continuance will not be disturbed on appeal); *Samples v. Mitchell,* 329 S.C. 105, 495 S.E.2d 213 (Ct. App. 1997) (the failure to exercise discretion, however, is itself an abuse of discretion).

Likewise, the circuit court's conclusion that delay would not have mattered is also erroneous, especially in light of the fact that County should have filed a compulsory counterclaim in the Primary Action and should have requested separate trials under the Rules 13 and 42, SCRCP. [R. pp. 10-19, 20-24].

South Carolina recognizes that a court's obligation is to provide a forum for a fair and just resolution of disputes between parties. *See Williams v. Watkins*, 380 S.C. 319, 327, 681 S.E.2d. 87, 96 (Ct. App. 2009) ("law favors the resolution of disputes based upon all parties having their day in court."); *Hagy v. Pruitt*, 331 S.C. 213, 221, 500 S.E.2d 168, 172 (Ct. App. 2009); *see also* 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); Rule 14, SCRMC (court shall be lenient in the allowance of changes or amendments to complaints, answers, and counterclaims, and in granting continuances of trials for good cause shown when necessary to serve the ends of justice); and Rule 8(f), SCRCP (all pleadings shall be so construed as to do substantial justice to all parties).

The magistrate's rulings, as affirmed by the circuit court, therefore denied Appellant substantive due process in his property rights to Hangar 7 in an arbitrary and capricious manner. *Worsley Cos. v. Town of Mt. Pleasant,* 339 S.C. 51, 56, 528 S.E.2d 657, 660 (2000) (noting "[s]ubstantive due process prohibits a person from being denied life, liberty or property for *arbitrary* reasons" and that "[a] plaintiff must show that he was *arbitrarily and capriciously* deprived of a cognizable property interest rooted in state law"). But for the County's judge shopping expedition, Appellant should never have had to litigate in the magistrate court.

But for the magistrate's refusal to dismiss the case under 12(b)(6) [litigating a waived counterclaim from an ongoing action] and 12(b)(8) [the same parties litigating the same claim in a pending action], SDMB should not have had to go to trial in the magistrate's court in the first place. The County and the magistrate pushed every rule and interpretation as far they could be pushed in the County's favor, while ignoring rules and precepts that would have guaranteed Appellant's rights and resulted in a fair trial. The circuit court erred in affirming the magistrate as a result.

Accordingly, since the magistrate's ruling is governed by procedural shortcomings, this Court should reverse the circuit court and vacate the magistrate's ruling because of the statutory requirement to "give justice of the case without regard to technical errors and defects which do not affect the merits."

ARGUMENT IV

The circuit court was guided by the same error of law as the magistrate in ruling that the Space Use Permit (a temporary, revocable 90-day license between the parties, without consideration) had superseded, modified and novated a prior eight (8) year, long-term lease between them.

If the Court of Appeals elects not to reverse the circuit court and/or vacate the magistrate's order based on the myriad of procedural issues discussed in sections I through III *supra*, it should still reverse the circuit court on its error of law concerning the Space Use Permit.

From the outset, it is important to note that Appellant contends the Space Use Permit was obtained under fraudulent, deceptive and unfair means, in breach of contractual arrangements and contrary to the County's representations, promises and assurances – which is the basis of the Complaint in 14-CP-26-1193 [R. pp. 33-68]. Appellant will also advance the argument in 14-CP-26-1193 that the Space Use Permit is an illegal contract

which is unenforceable due to violation of the Anti-Head Act, 49 USC § 40116. An illegal contract is unenforceable. *Berkebile v. Outen,* 311 S.C. 50, 53 n. 2, 426 S.E.2d 760, 762 n. 2 (1993). [4]

In its pre-hearing submissions, SDMB demonstrated that the Lease was modified for a short period during the period of license agreement styled as a Space Use Permit. [R. pp. 335-340]. SDMB showed: (a) that some terms were modified to reflect the current course of dealing between the SDMB and Ramp 66: (b) that it had cleaned out the remainder junk from Hangar 7, thus increasing its square footage available; (c) that Ramp 66 no longer accepted payment for its customers and was receiving a fixed payment rather than a share as articulated in the Lease; (d) that the temporary Permit terms articulated the existing modification of its May 2012 Lease with Ramp 66 (the increased Hangar 7 available area and monthly terms since SDMB had cleared the remainder area of the hangar from debris over the preceding year); (e) the Permit was merely a temporary articulation of good faith between itself and the County for a forthcoming long-term replacement lease on a County-approved form; (f) that SDMB relied on the assurances of the County that the format changes would not be materially altered (except the current modifications evidenced by course of dealing); and (g) that the Lease terms were not superseded by the unenforceable Permit. [R. pp. 111-136; 396-418;139-163].

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[4] "The general rule is that courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution." *Twillman,* 351 S.C. at 64, 566 S.E.2d at 866-67. Pursuant to federal law, an airport "may not levy or collect a tax, fee, head charge or other charge on (1) an individual traveling in air commerce; . . . or (4) the gross receipts from that air commerce or transportation. 49 USC § 40116(b). Skydiving operations fall under the definition of "air commerce" because they use aircraft that directly "affect or may endanger safety in interstate air commerce" under 49 USC § 10102(a)(3). As such, any revenues based on "gross receipts" of SDMB's air commerce activity or skydiving. *See also, Hill v. National Transportation Safety Board,* 886 F.2d 1275, 1279 (10th Cir. 1989) (a flight containing a skydiver within one State does not permit a state to tax under the exception to this prohibition contained in 49 USC § 40116(c)).

In opposition, the Respondent argued that: (i) the Space Use Permit was a novation that, by its terms, integrated the Lease, and that once the Permit expired, any interest in Hangar 7 reverted to the County; (ii) that an at-will, revocable, short-term Permit, granting no leasehold interest, with an integration clause for which no consideration was paid supersedes a long-term, irrevocable leasehold property interest in Hangar 7 without consideration or SDMB's written consent[5]; and (iii) that the Lease was not a lease at all. [R. pp. 388-395]. In its May 29, 2015 Order, the circuit court adopted the County's arguments, which Appellant submits is an error of law for the following reasons.

Under principles of contractual construction in South Carolina:

> Generally, if the terms of a contract are clear and unambiguous, this Court must enforce the contract according to its terms regardless of its wisdom or folly. *Ellis v. Taylor,* 316 S.C. 245, 449 S.E.2d 487 (1994). Ambiguous language in a contract, however, should be construed liberally and interpreted strongly in favor of the non-drafting party. *Myrtle Beach Lumber Co., Inc. v. Willoughby*, 276 S.C. 3, 274 S.E.2d 423 (1981). After all, the drafting party has the greater opportunity to prevent mistakes in meaning. It is responsible for any ambiguity and should be the one to suffer from its shortcomings. *Id.*

S. Atl. Fin. Servs., Inc. v. Middleton, 356 S.C. 444, 447, 590 S.E.2d 27, 29 (2003) (emphasis added).

"Where a contract is silent as to a particular matter, and ambiguity thereby arises, parol evidence may be admitted to supply the deficiency and establish the true intent." *Columbia East Assoc. v. Bi-Lo, Inc.,* 299 S.C. 515, 519-20, 386 S.E.2d 259, 261-62 (Ct. App. 1989); *Wheeler v. Globe Rutgers Fire Ins. Co. of City of N.Y.,* 125 S.C. 320, 325, 118 S.E.2d 609, 610 (1923). Under the parol evidence rule, extrinsic evidence is inadmissible

[5] The County paid $800,000.00 to Ramp 66 for its remainder term of its lease with HCDA for GSA. County admitted no consideration was paid for the Permit at the hearing. [R. pp. 235-301].

to vary or contradict the terms of a contract. *Penton v. J.F. Cleckley Co.,* 326 S.C. 275, 280, 486 S.E.742, 745 (1997). "However, if a contract is ambiguous, parol evidence is admissible to ascertain the true meaning and intent of the parties." *Koontz v. Thomas,* 333 S.C. 702, 709, 511 S.E.2d 407, 411 (Ct. App. 1999). An ambiguous contract is a contract capable of being understood in more than one way or a contract unclear in meaning because it expresses its purpose in an indefinite manner. *Klutts Resort Realty, Inc. v. Down'Round Dev. Corp.,* 268 S.C. 80, 89, 232 S.E.2d 20, 25 (1977).

In relevant parts, the Lease states:

> 5. There will be no packing fees or any other fees charged to Skydive MB. Skydive MB shall be provided with a minimum of 2,500 square feet[6] in the "bird hangar" for use during daylight hours without fee seven days a week, including holidays, 365 days a year.
>
> 6. Ramp 66 shall pay Skydive MB 86% of the income shown on the invoice (internet sales and merchandise sales are excluded as they shall be paid directly to Skydive MB), less the Airport fee, for all jumps. Payment shall be remitted to Skydive MB on a daily basis.
>
> * * *
>
> 18. This agreement remains in effect through Grand Strand Aviation's lease with Horry County Department of Airports through July 2020 unless both parties agree to any changes in writing. Should the Grand Strand Aviation Lease be extended, renewed, or otherwise modified beyond July 2020, Skydive MB has the right to extend this agreement on these terms to that lease at Skydive MB's option.

[R. pp. 359-361].

In relevant paragraphs, the Space Use Permit states:

> **1. Space Use.** County hereby permits Company to Occupy and use space in Hangar #7 consisting of

[6] The "Bird Hangar" was the nick name for Hangar 7.

approximately 6,800 square feet of space, together with any surrounding curtilage and parking ("Space") to be utilized for Company's "Skydiving and Non-Emergency Parachute Operation" business.

2. Term. The term of this Permit shall commence on August 1, 2013, and it shall continue in force and effect until January 31, 2014, but no longer than, six, (6) months from the date of commencement unless otherwise earlier terminated. Prior to the date of actual physical occupancy of the Space by Company, either party may terminate this Permit for any reason, by the giving at least five (5) days written notice to the other party. After physical occupancy of the space by the Company, either party may terminate this Permit for any reason by giving at least thirty (30) days written notice to the other party.

* * *

3. Fee. As the Fee for occupancy and use of the Space, Company shall pay County monthly payments of One Thousand Two Hundred & 00/100 ($1,200.00) dollars per month.

* * *

13. GOVERNING LAW. THIS PERMIT SHALL BE GOVERNED BY AND CONSTRUED UNDER THE LAWS OF THE STATE OF SOUTH CAROLINA.

* * *

14. Entire Agreement/Amendment. This Permit constitutes the complete 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 by County and Company.

* * *

18. License. This Permit is intended by the parties, and shall be interpreted as, a license to use the designated Space, and shall under no circumstances be deemed or

> construed as a lease of real property, nor shall the relationship between the parties, as to the designated Space, be deemed that of landlord and tenant. This Permit is not a contract and does not give, assign, or otherwise transfer from the County to the [SDMB] any interest in real property, but is a mere license, revocable at the will of the Company.

[R. pp. 335-340].

At the hearing, the County argued that the Lease was styled as a "Letter of Agreement" and could not be construed as a valid lease agreement in South Carolina. [R. pp. 252-254]. The circuit court was persuaded by this argument, but called it a "Jump Agreement" and declared it was "not a valid eight-year lease agreement to occupy Hangar 7." [R. pp. 10-19].

This ruling is contrary to case law, however. "The essential terms and conditions of a lease agreement include [1] a definite agreement as to the extent and the boundary of the property to be leased, [2] a definite agreement as to the terms of the lease, and [3] a definite agreement as to the rental and the time and manner of its payment." *Robert Harmon and Bore, Inc., v. Jenkins,* 282 S.C. 189, 193-94, 318 S.E.2d. 371, 374 (Ct. App. 1984). Under the terms of the Lease, there was: (1) a description of the rented premises, *see* Lease ¶ 5; (2) an agreement as to the terms, *see* Lease ¶ 18; and (3) an agreement as to the rental payment time and manner *see* Lease ¶ 18. [R. pp. 359-361]. Consequently, the Lease is a valid, definite agreement. *Jenkins*, 282 at 193-194, 318 S.E.2d at 374.

Assuming *arguendo* that the terms of the Lease and Space Use Permit are enforceable agreements under South Carolina law, the central issue before the circuit court turned on whether the terms are clear – or ambiguous – and should be narrowly interpreted against the County as the drafter of each agreement.

The Lease terms remained in effect until "July 2020 unless both parties agree to any changes in writing." [R. p. 360, ¶ 18]. The Permit's integration clause states that "The Permit constitutes the complete 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 by County and Company." [R. p. 339 ¶ 14].

At the hearing, the County also argued that the integration clause in the Permit was a novation that supersedes the Lease. The circuit court agreed. [R. pp. 4-5, 15-16]. As discussed above, however, in South Carolina, a contract is strictly construed against the drafter of the agreement.

The plain language of the Space Use Permit can only be interpreted as the first step in a good faith attempt by both parties to rewrite a new long-term lease in a County-approved format. SDMB had a leasehold interest in Hangar 7 – which it never intended to surrender. The Space Use Permit is revocable, at-will, and by its own terms: "shall under no circumstances be deemed or construed as a lease of real property, nor shall the relationship between the parties, as to the designated space, be deemed that of landlord tenant." [R. p. 340, ¶18]. The Court should also be mindful that SDMB has also received no consideration for its remainder long-term leasehold interest. [7] As a result, this Court should reverse the circuit court here as a matter of law.

[7] According to Myrtle Beach Online, the County paid Ramp 66 up to $800,000.00 for the remainder interest in its lease. Myrtle Beach Online March 21, 2013, available at http://www.myrtlebeachonline.com/opinion/editorials/article16644680.html

At the hearing County argued that the Permit's integration clause, ¶14, assumed and superseded the Lease and the Court agreed. [R. pp. 252-254, 15-16]. Paragraph 14, however, states that the "Permit constitutes the complete agreement of the parties with respect to the subject matter hereof." The subject matter of the Permit did include a license to occupy Hangar 7 for a fixed monthly rate of $1,200.00 per month. It also stated that no interest in real property was created and no landlord tenant relationship was created. The agreement was short term and revocable at will by the County.

Most importantly, no consideration was paid or received for executing the Space Use Permit. Quite simply, "[a] contract exists where there is an agreement between two or more persons upon sufficient consideration either to do or not to do a particular act." *Carolina Amusement Co. v. Connecticut Nat. Life Ins. Co.,* 313 S.C. 215, 220, 437 S.E.2d 122, 125 (Ct. App. 1993) (quoting *Benya v. Gamble,* 282 S.C. 624, 628, 321 S.E.2d 57, 60 (Ct. App. 1984)). The absence of consideration kills the Space Use Permit outright.

Thus, an interpretation that the integration clause of a revocable, at-will, short-term agreement for a hangar (Permit) would supersede SDMB's existing long-term, real property interest (Lease) exceeds legal analysis and defies common sense. Strictly construed, the Permit's integration clause is limited to discussions relating to a temporary "license" not a property or leasehold interest as County would have this court construe the Permit. Had the Permit intended to supersede the Lease, it would have so stated. Furthermore, the Lease could not be modified "unless both parties agree to any changes in writing." [R. p. 360, ¶ 18].

The County also argued that the Permit created a novation which the circuit court concluded as well. [R. pp. 252-254, 15-16]. A novation is an agreement between all parties

concerned for the substitution of a new obligation between the parties with the intent to extinguish the old obligation. *Moore v. Weinburg*, 373 S.C. 209, 217-219, 644 S.E.2d 740, 744-745 (Ct. App. 2007) *aff'd*, 383 S.C. 583, 681 S.E.2d 875 (2009). There must be an intention by both parties to create a novation, and the party asserting a novation has the burden of proving it. *Id.* An addendum that modifies a pre-existing agreement, but does not extinguish it, is not a novation. *Id.* The circumstances attending the transaction alleged to be a novation must show the intention to substitute a new obligation in place of the existing one. *Wellman, Inc. v. Square D Co.,* 366 S.C. 61, 73, 620 S.E.2d 86, 92 (Ct. App. 2005). The parties must intend to create a novation; the mere modification of the original Contract does not constitute intention to create a novation. *In re Boston*, No. C/A 09-09099-JW, 2010 WL 5128960 at p. 2 (Bankr. D.S.C. Mar. 5, 2010). If the intent is to modify, and not nullify, then there is not a novation. *Wellman,* 366 S.C. at 73, 620 S.E.2d at 92. There can be no novation unless both parties so intend. *Superior Automobile Ins. Co. v. Maners,* 261 S.C. 257, 263, 199 S.E.2d 719, 722 (1973); *Pee Dee State Bank v. Prosser*, 295 S.C. 229, 234, 367 S.E.2d 708, 711 (Ct. App. 1988); *Adams v. B & D, Inc.,* 297 S.C. 416, 419, 377 S.E.2d 315, 317 (1989).

Accordingly, the Court should reverse the circuit court because the of Space Use Permit's plain meaning; if there is any ambiguity, it is resolved against County as the drafter of the Permit. SDMB has alleged fraud, misrepresentation, and intentional interference with a contractual agreement against the County and requested a jury trial in 14-CP-25-1193. [R. pp. 33-68]. In South Carolina, "[n]either the parol evidence rule nor a merger clause in a contract prevents one from proceeding on tort theories of negligent misrepresentation and fraud." *Slack v. James,* 364 S.C. 609, 616, 614 S.E.2d 636, 640

(2005). Also, if the "Entirety" clause creates an ambiguity as to merger, the law is clear that any ambiguity in such a clause is construed against the drafter. *Coleman v. Mariner Health Care, Inc.,* 407 S.C. 346, 355, 755 S.E.2d 450, 455 (2014). "It is axiomatic that there exists a well-established exception to the parol evidence rule which allows extrinsic evidence by the party attacking an instrument on the ground of fraud." *Redwend Ltd. P'ship v. Edwards*, 354 S.C. 459, 471, 581 S.E.2d 496, 502-03 (Ct. App. 2003) (*citing Bradley v. Hullander*, 272 S.C. 6, 249 S.E.2d 486 (1978) and *Allen-Parker Co. v. Lollis*, 257 S.C. 266, 185 S.E.2d 739 (1971)).

Assuming *arguendo*, that some consideration exists for a short-term license modification of the Lease, it is axiomatic that a smaller legal interest cannot supersede a larger property interest. Moreover, there is zero evidence SDMB intended the Space Use Permit to be a novation; it was tricked into signing it based on false pretenses and fraud. [R. pp. 33-68]. Thus, the interests of justice require a full hearing on the merits relating to the Lease and Permit to prove lack of intent, fraud and introduce parol evidence. The circuit court had a duty to "give judgment according to the justice of the case" and should have held that the issues relating to the Lease and Permit were not handled properly in the magistrate court and should be fully litigated in the circuit court. Under the Permit, any action by the County to sue for ejectment based on the Permit matured on January 31, 2014, under paragraph 2 of the Permit.

Although concurrent jurisdiction exists in the Magistrate's Court, it was reversible error under these facts and circumstances to deny SDMB's otherwise proper motions and hold a bench trial on July 23, 2014. To rule otherwise would deprive SDMB of its constitutionally protected right to seek judicial relief in a forum of its choosing for an

alleged injury; deprive SDMB of its constitutional right to substantive due process; deprive SDMB of the benefit of its jury request; and under the doctrines of *res judicata* effectively remove any opportunity to be heard on central issue before this court – i.e., whether its equitable and legal rights in Hangar 7 and otherwise have been violated.

Finally, the Court should reject some of the additional findings of the circuit court in the July 16, 2015 Order. [R. pp. 20-23]. There is no requirement to record a lease under S.C. Code Ann. § 27-33-30, except as to provide notice to third parties; it was an error of law to find the failure to record the Lease somehow voids it in a dispute between the parties to it. [Id. p. 2]. There are no third parties involved. Moreover, contrary to the Court's ruling, SDMB did not overlook paragraph 18 of the Lease, nor the fact the parties signed the Space Use Permit. [Id.]. These were fully addressed by Appellant. [R. pp. 111-136; 396-418;139-163].

Simply put, the temporary Space Use Permit – voidable, made without consideration, induced by fraud and with no evidence of intent on the part of SDMB that it be a novation – is not effective to overcome the valid Lease, or to serve as ground to eject Appellant when it expired. Accordingly, this Court should reverse the circuit court on this ground.

ARGUMENT V

The circuit court committed an error of law in holding that its ruling was not automatically stayed during the pendency of the instant appeal.

In the Order of October 13, 2015 the circuit court ruled that "[t]he Bond Staying Execution on Appeal issued by the Magistrate pursuant to S.C. Code Ann. § 27-37-130 does not remain in effect through all appeals but rather expired by its own terms, and as a matter of law upon the final determination of the Circuit court, and is no longer in effect."

[R. pp. 28-31]. The circuit court cited Rule 241(b)(10), SCACR apparently for the proposition that because there is an exception to the automatic stay in ejectment actions, then the exception is absolute and automatic. *Id.* The circuit court confirmed its ruling on this point once again in the Order of November 9, 2015. [R. p. 32]. The circuit court's determination, however, is not supported by the text of the statute, rules, case law and principles of statutory construction for the following reasons.

First, nothing in the text of S.C. Code Ann. § 27-37-130 limits its application solely to the "first level" of appellate proceedings from the magistrate court to the circuit court:

> An appeal in an ejectment case will not stay ejectment unless at the time of appealing the tenant shall give an appeal bond as in other civil cases for an amount to be fixed by the magistrate and conditioned for the payment of all costs and damages which the landlord may sustain thereby. In the event the tenant shall fail to file the bond herein required within five days after service of the notice of appeal such appeal shall be dismissed by the trial magistrate.

S.C. Code Ann. § 27-37-130. Likewise, none of the other provisions of Title 27, Chapters 33-37, restrict application of this legislation to appeals only from Magistrate Court to Circuit court. In fact, because the General Assembly provided **dual jurisdiction** of the magistrate and circuit courts in landlord tenant actions [S.C. Code Ann. § 27-33-40], the County's position contravenes the legislature's intent. There is no actual statutory provision that supports the County's position on § 27-37-130.

Second, the provisions of Rule 241, SCACR (which governs stays and supersedeas in appeals from the circuit court to the Court of Appeals) **specifically reference § 27-37-130**. *See* Rule 241(b)(10), SCACR. This begs the question: why would our Supreme Court adopt Rule 241(b)(10) if the applicability of § 27-37-130 *expires after the Circuit court issues a binding judgment?* This would lead to an absurd result. *See, Lancaster Cnty. Bar Ass'n v.S.C. Comm'n on Indigent Def.,* 380 S.C. 219, 222, 670 S.E.2d 371, 373 (2008) ("In

construing a statute, this Court will reject an interpretation when such an interpretation leads to an absurd result that could not have been intended by the legislature.").

Third, the South Carolina Court of Appeals, in *Vacation Time of Hilton Head Island, Inc. v. Kiwi Corp.*, 280 S.C. 232, 233, 312 S.E.2d 20 (Ct. App. 1987) specifically analyzed "the situation of an *appeal* from magistrate's court to the court of common pleas *to an appellate court* (emphasis added)" – which is precedent that this Court treats all levels of appellate review in any ejectment action as one appeal. The *Vacation Time* case continues to be cited with approval. *Bowers v. Thomas*, 373 S.C. 240, 644 S.E.2d 751 (Ct. App. 2007). Applying the *Vacation Time* holding to the text of S.C. Code Ann. § 27-37-130, it makes perfect sense that the word "appeal" in the statute applies throughout the entire process of appellate review – not just the part of the appeal from the magistrate court to the court of common pleas.

Finally, the same result is mandated by principles of statutory construction. *See Ranucci v. Crain,* 409 S.C. 493, 500, 763 S.E.2d 189, 192 (2014).[8] The plain, ordinary and common sense meaning of "appeal" means the entire process of appeal – including review by the Court of Appeals of the decisions of the circuit court. *See* S.C. Code Ann. § 14-8-200. The usual and customary meaning of the word "appeal" covers **all** levels of appellate review. Thus, it would be an impermissible "subtle or forced construction" to limit the operation of S.C. Code Ann. § 27-37-130 to only to the Circuit court level of an appeal

[8] 'The cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the legislature. When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning. In interpreting a statute, '[w]ords must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation.'" *Ranucci,* 409 S.C. at 500, 763 S.E.2d at 192 (internal citations omitted). Under the 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, 85, 533 S.E.2d 578, 581 (2000). When the terms of a statute are clear, the court must apply those terms according to their literal meaning. *Cooper v. Moore,* 351 S.C. 207, 212, 569 S.E.2d 330, 332 (2002).

when that limitation is absent from the statutory text and flies in the face of the plain and ordinary meaning of the word appeal. *Ranucci,* 409 S.C. at 500, 763 S.E.2d at 192 (2014) (in interpreting a statute, words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation); *Vacation Time*, 280 S.C. at 233, 312 S.E.2d at 20 (Ct. App. 1987). This interpretation is further mandated by the fact "appeal" is an undefined term anywhere in Chapters 33, 35 and 37 of Title 27. *See Perry v. Bullock*, 409 S.C. 137, 140-141, 761 S.E.2d 251, 253 (2014) ("When interpreting an undefined statutory term, the Court must look to its usual and customary meaning."); *see also* S.C. Code Ann. § 27-33-10.

Accordingly, when an ejectment action commences in the Magistrate Court, and has been timely and lawfully appealed up through the Circuit court to the Court of Appeals, then a valid Appeal Bond given under S.C. Code Ann. § 27-37-130 should and will continue to apply. Rule 241(b)(10), SCACR. Therefore, when a valid Appeal Bond is in place, ejection is stayed throughout the entire process of appellate review so long as the tenant-appellant adheres to the bond established by the Magistrate/Trial Judge. *Id.*

Having demonstrated that S.C. Code Ann. § 27-37-130 remains in effect throughout the entire process of appellate review of an ejectment action, then based on the forgoing facts and legal analysis, SDMB would not be required to seek a superseades bond under Rule 241, SCACR or Rule 62, SCRCP because a stay remains in full force and effect. The terms of the bond itself purporting to stay in effect only during the appeal to the circuit court are irrelevant, erroneous and/or non-binding against the weight of the foregoing authority.

Rule 241, SCACR is contained within "Part Two" of the Appellate Court Rules. Thus, by operation of it is one of the rules that "governs practice and procedure in appeals, petitions, and motions in ... the Court of Appeals." Rule 241(a) provides that: "[a]s a general rule, the service of a Notice of Appeal in a civil matter acts to automatically stay matters decided in the order on appeal, and to automatically stay the relief ordered in the appealed order, judgment, or decree." Rule 241, SCACR; *see also State v. Cooper*, 342 S.C. 389, 399, 536 S.E.2d 870, 876 (2000) (citing former Rule 225, SCACR which is now Rule 241, SCACR.); *Terry v. Terry*, 400 S.C. 453, 459, 734 S.E.2d 646, 649 (2012). *See also* 15 S.C. Jurisprudence Appeal and Error § 55.

Rule 241(b) states that certain exceptions to this general rule are found in statutes, court rules, and case law. *Id.; see also Tillman v. Oakes,* 398 S.C. 245, 254, 728 S.E.2d 45, 50 (Ct. App. 2012). Importantly, 241(b) goes on to provide: "[w]here specific conditions must be met before the exception applies, those conditions must be strictly complied with." Here, the exception at (b)(10) is most applicable and covers "[e]jectment orders as provided in S.C. Code Ann. § 27-37-130 and S.C. Code Ann. § 27-40-800." Thus, for an exception to apply, the circuit court must inquire into whether all the specific conditions which would preclude a stay "have been strictly complied with." The circuit court in this matter, however, failed to make this inquiry. [R. pp.. 28-32; R. p. 32].

When the words of Rule 241(b) are given their plain and ordinary meaning[9], then the exception at Rule 241 (b)(10) only applies if SDMB never applied for an Appeal Bond

[9] "If a rule's language is plain, unambiguous, and conveys a clear meaning, interpretation is unnecessary and the stated meaning should be enforced." *Maxwell v. Genez,* 356 S.C. 617, 620, 591 S.E.2d 26, 27 (2003); *see also Stark Truss Co. v. Superior Constr. Corp.,* 360 S.C. 503, 508, 602 S.E.2d 99, 102 (Ct. App. 2004) (stating where the language of a court rule is clear and unambiguous, the court is obligated to follow its plain and ordinary meaning without resort to forced construction to limit or expand the rule).

pursuant to S.C. Code Ann. § 27-37-130 and/or was out of compliance with the Appeal Bond. Any other interpretation is nonsensical or stretches the plain and ordinary meaning of the text of Rule 241. In other words, Rule 241(b) is not an automatic exception as the circuit court seems to accept; it only is an exception if Appellant meets the criteria for the exception to kick-in. Respondent has failed to show the exception applies and the circuit court erroneously applies the exception when the criteria were not met. Thus, SDMB is entitled to the full benefit of the stay of execution afforded it by a valid Appeal Bond issued pursuant to § 27-37-130 in which it is in full compliance.

The following undisputed facts are relevant to demonstrate that (a) the Appeal Bond is valid and (b) SDMB has been in full compliance therewith:

a. On August 1, 2014, within the time period established by § 27-37-130, Horry County Magistrate Judge Arakas timely established the Appeal Bond of $1,200.00 per month which is in every way compliant with the statute. [R. p. 2].

b. SDMB has met its monthly obligation to pay the Appeal Bond. SDMB paid the Appeal Bond by check each month until June, 2015. At that time the County and SDMB agreed to an electronic transfer procedure. Significantly, the County received and accepted the September, 2015 bond payment. [R. pp. 193-194].

c. SDMB's compliance with the appeal bond has continued since issuance of the Court's Order of May 5, 2015, throughout the post-judgment motion process, and up through the present day.

d. The County has never attacked the validity or the timeliness of the Appeal Bond, nor has it argued to the Court that SDMB has violated the Appeal Bond. The County never appealed the Appeal Bond to the circuit court.

e. At the hearings before this Court in both February and May, 2015, the County did petition the Court to increase the Appeal Bond. On both occasions, the Court denied the request and kept the bond at $1,200.00 per month. The County never asked for reconsideration of these denials, nor did it cross-appeal to the Court of Appeals. [R. pp. 235-301, 302-320, 10-19, 20-23].

f. On August 19, 2015, SDMB filed Notice of Appeal of the Court's Order of May 5, 2015. [NOA # 1]. The County has advanced no argument that the Notice of Appeal is either procedurally defective or untimely.

Accordingly, since August, 2014, it is undisputed that SDMB has remained in full compliance with a valid Appeal Bond issued pursuant to S.C. Code Ann. § 27-37-130. By adhering to the terms of the Appeal Bond, SDMB is accorded a statutory stay by operation of § 27-37-130.

This outcome is supported by Rule 62(f), SCRCP, which governs supersedeas bonds emanating from the circuit court. It states the "[t]he provisions of this Rule 62 shall be considered as cumulative to and not superseding the right of any party to a stay of execution accorded by statute ...". Accordingly, the County's argument that a new bond is required by Rule 62 is rejected by the plain text of that very rule. SDMB has been accorded a stay of execution by operation of S.C. Code Ann. § 27-37-130. No new Supersedeas Bond is required. Rule 241(b), SCACR; Rule 62(f), SCRCP.

From SDMB's perspective, this whole process appears to be nothing more than an obvious attempt for the County to get a "third bite" at the apple to increase the bond amount in the hopes of driving SDMB out of business by any means, and thus ending the appeal process.[10] SDMB submits, however, that the confirmation of the Appeal Bond at $1,200.00 per month is now the law of the case. [11] Moreover, because SDMB has filed a timely and

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[10] On October 15, 2015, the date the October 13, 2015 Order denying supersedeas and injunctive relief from ejectment, the County issued a twenty-four (24) hour notice to vacate Hangar 7. [R. p. 358]. SDMB was forced to vacate Hangar 7 on October 16, 2015.

[11] Because the County never appealed the issue of the Appeal Bond to the circuit court, nor sought reconsideration the circuit court's rulings denying its request to increase the bond or appealed to the Court of Appeals, the $1,200.00 Appeal Bond is the "law of the case." *See In re Morrison,* 321 S.C. 370, 372 n.2, 468 S.E. 2d 651, 652 n. 2 (1996) (an unappealed ruling becomes the law of the case and precludes further consideration of the issue on appeal); *cited with approval, Judy v. Martin,* 674 S.E.2d 151, 154, 381 S.C. 455, 459 (2009).

facially-valid Notice of Appeal, the Court of Appeals now has exclusive jurisdiction over the Appeal Bond because it is necessarily a matter affected by the appeal. Rules 205, 241, SCACR.

CONCLUSION

SDMB respectfully requests that this Honorable Court reverse the circuit court's ruling as it is based on numerous procedural errors and errors of law, furthermore, SDMB respectfully requests that this Honorable Court vacate the magistrate's judgment based on its errors of law.

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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

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

v.

HORRY COUNTY..... Respondent

CERTIFICATE OF COUNSEL

The undersigned certified that this ***Final Brief of Appellant*** complies with Rule 211(b), SCACR.

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September 8, 2016

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the ***Final Brief of Appellant*** in the above referenced case has been served upon counsel of record by mailing a copy in an envelope properly addressed with postage prepaid on this day to the following:

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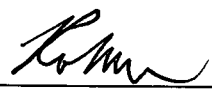

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