THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas
R. Ferrell Cothran, Circuit Court Judge

Appellate Case No. 2017-000998
Civil Action No. 2015-CP-43-596

Paul Branco and Branco Investments,
Inc., d/b/a Great American Cookie Co., ... Respondents,

v.

Hull Storey Retail Group, LLC, and
Sumter Mall, LLC ..... Appellants.

INITIAL REPLY BRIEF OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

Statutes

Other Authorities

INTRODUCTION

In this commercial property dispute, Plaintiffs Paul Branco and Branco Investments, Inc. allege Sumter Mall, LLC and Hull Storey Retail Group, LLC tortiously interfered with Branco Investments' contract to sell its equipment and assets to a third party. The trial court, after a bench trial, ruled Hull Storey was liable for tortious interference with contract and awarded damages to Paul Branco. This ruling and award of damages erred for the reasons explained in Hull Storey's primary brief, and, as explained below, none of the responsive arguments made by Mr. Branco and Branco Investments justify or excuse the trial court's errors.

ARGUMENT

I. In cases tried before a judge without a jury, a party need not make a motion for judgment to preserve issues regarding the sufficiency of the evidence.

In their Response Brief, Mr. Branco and Branco Investments argue that because Hull Storey's trial counsel did not renew his motion for judgment at the conclusion of all evidence, Hull Storey and Sumter Mall "have waived the right for this Court to review any and all arguments raised in the appeal at bar." *See* Brief of Respondents at 7 (citing *Wallace v. Milliken & Co.*, 300 S.C. 553, 559, 389 S.E.2d 448, 451 (Ct. App. 1990)). This argument misapprehends the rules of issue preservation that apply to bench trials. Cases tried before a judge without a jury are subject to Rule 52, SCRCP, which clearly states a motion for judgment *is not required* to preserve a challenge to the sufficiency of the evidence:

> When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings *may thereafter be raised whether or not the party raising the question has made in the trial court an objection to such findings or has made a motion to amend them or a motion for judgment.*

Rule 52(b), SCRCP (emphasis added); *see also* Jean H. Toal *et al.*, APPELLATE PRACTICE IN SOUTH CAROLINA 75 (2d ed. 2002) ("In cases tried before a judge without a jury, a party need not make

a directed verdict motion to preserve for appeal an issue regarding the sufficiency of the evidence.") (citing *Norell Forest Prods. V. H&S Lumber Co.*, 308 S.C. 95, 99, 417 S.E.2d 96, 99 (Ct. App. 1992)).

Indeed, the very case upon which Mr. Branco and Branco Investments rely—*Wallace v. Milliken & Co.*—illustrates that an appellate court ***may*** review a challenge to the sufficiency of the evidence even if the defendant did not renew its motion for judgment at the conclusion of all evidence. *See Wallace*, 300 S.C. at 556–58, 389 S.E.2d at 450–51 (analyzing at length and ruling on the appellant's argument "that the evidence is insufficient to support a finding of retaliatory discharge"); *see also Wallace v. Milliken & Co.*, 305 S.C. 118, 123, 406 S.E.2d 358, 361 (1991) (analyzing and ruling on issue of whether the evidence was sufficient to support the trial court's rulings).[1] Accordingly, under Rule 52, SCRCP and applicable precedent, the absence of a renewed motion for judgment at the conclusion of all evidence has no bearing on Hull Storey's and Sumter Mall's ability to challenge the trial court's erroneous findings.

II. Each of the issues on appeal was either raised to the trial court or implicates jurisdiction and thus may be raised at any time.

In addition to the sweeping (and incorrect) preservation argument rebutted in Part I, *supra*, Mr. Branco and Branco Investments further argue that each of Hull Storey's issues on appeal are individually unpreserved. *See* Brief of Respondents at 8–10. As explained more fully below, their argument is incorrect because three of the issues on appeal were raised to and ruled on by the trial court, and the fourth implicates jurisdiction and may be raised at any time.

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[1] Mr. Branco and Branco Investments correctly note that a *separate* section of the Court of Appeals' opinion in *Wallace* held a party must renew his motion for judgment at the conclusion of all evidence if he wishes to later challenge the trial court's denial of his earlier motion for judgment. *See Wallace*, 300 S.C. at 559, 389 S.E.2d at 451. Hull Storey, however, has not challenged the trial court's denial of its motion for judgment. Rather, Hull Storey challenges the sufficiency of the evidence to support the trial court's findings. Such a challenge is permitted by Rule 52, SCRCP, and by *Wallace*, regardless of whether the motion for judgment was renewed or, for that matter, was ever made at all to the trial court.

As to Hull Story's first issue on appeal—that the contract at issue was dependent on contingencies that were never satisfied and thus there was never an enforceable contract with which to interfere—Mr. Branco and Branco Investments erroneously argue this "is simply not an argument that was ever raised prior to judgment and thus this issue is not preserved." *See* Brief of Respondents at 8. Contrary to their assertion, however, the issue of the unsatisfied contingencies, including the absence of a lease approval (whether in writing, as required by law, or otherwise), *was* expressly raised at trial:

> [Hull Storey's trial counsel:] Regarding the tortious interference with contract claim, there must be existence of a valid contract . . . . In this case, the contract that I believe the plaintiff is alleging was tortiously interfered with had multiple contingencies, one of which was that my client entered into a lease with Brooktenn. *Those parties never entered into a lease and that contingency was never met.*
>
> * * *
>
> [T]here were contingencies that they entered into a contract for lease, that Brooktenn entered into a contract for lease at the Sumter Mall before these other pieces could fall into place. *That did not occur; nor did the lease at the Florence Mall occur. So there was not a valid contract in that regard.*

Trial Tr. 167:18 to 168:17 (R. ___) (emphasis added); *see also id.* at 191:20–24 (R. ___) ("Q. And they did not sign this agreement, correct? A. Correct. Q. But they didn't sign any other lease agreements with you; is that correct? A. Correct."); *id.* at 96:11–12 (R. ___) ("So you didn't have a valid contract then, did you, if you got the contingency in there."); *id.* at 195:1–5 (R. ___) (discussing the agreement's contingencies and explaining that leases are "not valid deals until you have a legal document signed by both parties").[2] This issue was raised to and ruled upon by the trial court.

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[2] *See also* Answer of Hull Storey at pages 1 and 3 (R. ___) ("Plaintiff's claims are barred, in whole or in part, by the Statute of Fraud. . . . Plaintiff's claims are barred because certain conditions precedent were not met in order for its claims to ripen . . . Defendant further shows that no lease was entered between Brooktenn, LLC and Hull Storey Retail Group, LLC."); Answer of Sumter Mall at pages 1 and 3 (R. ___) (same).

As to Hull Story's second issue on appeal—that Hull Storey's actions were motivated and justified by its legitimate business interests—Mr. Branco and Branco Investments argue "the transcript is bereft of any preserved argument before the judge that a legitimate purpose and business interest existed." *See* Brief of Respondents at 8. Contrary to their assertion, the transcript contains multiple discussions explaining Hull Storey's and Sumter Mall's justifiable reasons for seeking the payment at issue. *See, e.g.*, Trial Tr. 185:3 to 187:6 (R. ___); Trial Tr. 191:25 to 192:11 (R. ___); Trial Tr. 65:23 to 66:9 (R. ___) (discussing Hull Storey's business interests that were explained to Mr. Branco as the basis for the payment requested). The fact that the transcript does not contain the precise phrase "legitimate business purpose" or "business justification" does not change the fact that the issue was raised to the trial court with sufficient clarity for the court to comprehend the issue. *See Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) (expressing concern about the "over-zealous application" of "error preservation rules" and discouraging a "hypertechnical application" of those rules resulting in appellate arguments being procedurally barred); *Herron v. Century BMW*, 395 S.C. 461, 470, 719 S.E.2d 640, 644 (2011) (finding appellate courts should remain "mindful of the need to approach issue preservation rules with a practical eye and not in a rigid, hyper-technical manner").

Likewise, Hull Storey's third issue on appeal—that the amount of the damages award lacked adequate or reliable evidentiary support—was likewise raised to the trial court. *See* Trial Tr. 128:1–22 (R. ___) (challenging Mr. Branco's unsupported and self-serving valuation of the equipment); Trial Tr. 165:12 to 66:10 (R. ___) (same); Trial Tr. 102:1 to 103:20 (same). There is no doubt Hull Storey challenged the dubious valuation of the equipment with sufficient clarity to preserve it for appellate review. *See Herron* and *Lewis*, *supra* (rejecting a "rigid" and "hyper-technical" approach to preservation). Furthermore, contrary to Branco's assertion, the fact that this

issue was not discussed during the oral motion for judgment is immaterial to preservation in a bench trial. *See* Part I, *supra*.

Hull Storey's fourth issue on appeal—that the trial court awarded judgment to the wrong party, and the party who purported to enter the contract at issue was legally non-existent and thus unable to contract[3]—is preserved for appellate review because it implicates the court's jurisdiction and thus may be raised at any time, including for the first time on appeal. The South Carolina Supreme Court has held that an action instituted by a non-existent entity is a nullity over which the court lacks jurisdiction, and that this failing may be raised at any time, including on appeal:

> [T]he the objection is really to the jurisdiction of the court, which may be entertained at any stage of the case, even *sua sponte* by this court.
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> * * *
>
> [I]f there is a lack of legal entity, the whole action fails. . . . "[I]f an action is brought in the name of that which under the *lex fori* has no legal entity, it is as if there was no plaintiff in the record and therefore no action before the court"; which presents an instance of want of jurisdiction.

Commercial & Savings Bank of Lake City v. Ward, 146 S.C. 77, 143 S.E. 546, 548 (1928) (citation and internal quotation marks omitted) (second ellipses in original); *see also Arnal v. Fraser*, 371 S.C. 512, 517 n.2, 641 S.E.2d 419, 421 n.2 (2007) ("Subject matter jurisdiction may be raised at any time, including on appeal.") (citing *State v. Downs*, 361 S.C. 141, 604 S.E.2d 377 (2004)). In sum, each of the issues on appeal was raised to the trial court or may be first raised now.

III. The contract's contingencies were never satisfied, and thus there was never an enforceable contract with which to interfere.

Despite claiming the Record contains a "cornucopia" of evidence that the Proposal for Purchase ripened into an enforceable contract, Mr. Branco's and Branco Investments' Brief fails

[3] The relevant facts and legal analysis are explained in greater detail in Hull Storey's primary brief. In short, Branco Investments was in forfeiture of its corporate existence from March 7, 2012 to July 1, 2015. Accordingly, it was legally non-existent at the time it purported to enter the contract with Brooktenn in 2013 and at the time it filed this lawsuit on March 5, 2015.

to identify a single document, a single line of testimony, or any evidence of any other type constituting or discussing the existence of a written lease agreement between Hull Storey and Brooktenn, LLC. Likewise, the Record is completely devoid of any evidence—documentary or otherwise—to establish that Brooktenn and Hull Storey entered into a lease with particularized terms and conditions.[4] Indeed, Mr. Branco and Branco Investments grudgingly concede that (i) leases are subject to the Statute of Frauds, and (ii) the Record is devoid of any written lease approval or agreement between Hull Storey and Brooktenn. *See* Brief of Respondents at 14. Similarly, the Trial Court's amended order of judgment acknowledges that Brooktenn and Branco never executed a lease. *See* Amend. Order of J. at 2 (R. ___). Because there was no written lease agreement, the contingency in the Proposal for Purchase was not satisfied, and thus the Proposal for Purchase was not an enforceable contract. *See generally* Brief of Appellant at 12–16.

A. The alleged "admissions" in Appellants' pleadings are irrelevant to the critical issue of whether Brooktenn obtained a lease agreement and, in any event, do not concede the agreement between Branco Investments and Brooktenn was an *enforceable* contract.

Mr. Branco and Branco Investments argue the Answers filed by Hull Storey and Sumter Mall contain an "admission" there was a "contract" between Brooktenn and Branco Investments.[5]

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[4] The Statute of Fraud requires that a lease be in writing and that "[t]he writing must reasonably identify the subject matter of the contract, sufficiently indicate a contract has been made between the parties, *and state with reasonable certainty the essential terms of the agreement.*" *Player v. Chandler*, 299 S.C. 101, 106, 382 S.E.2d 891, 895 (1989). (citing Restatement (Second) of Contracts, § 131 (1981)) (emphasis added); *see also In re Camelot Casino Cruises, Inc.*, 330 B.R. 263 (Banks. M.D. Fla. 2005) (applying South Carolina law) (holding a proposed commercial lease agreement was void under South Carolina's Statute of Frauds due to the absence of a writing stating "the essential terms of the contract with reasonable certainty").

[5] Inexplicably, the Respondents' brief essentially fails to acknowledge that tortious interference with a contract cannot stand upon the mere formation of a contract that is not yet binding. The well-established law of this State is that "[t]he right to recover for the unlawful interference with the performance of a contract presupposes the existence of a *valid, enforceable* contract." *Jackson v. Bi-Lo Stores, Inc.*, 313 S.C. 272, 277, 437 S.E.2d 168, 171 (Ct. App. 1993) (emphasis added); *see also BCD LLC v. BMW Mfg. Co. LLC*, 360 Fed. Appx. 428 (2010) (same) (quoting *Bi-Lo*).

See Brief of Respondents at 12 n.6 (and accompanying text); *id.* at 14–15. This argument fails for at least two reasons. First, the supposed "admission" is irrelevant to the critical question of whether Brooktenn ever obtained a lease agreement. The "admission" merely acknowledges that Branco Investments "entered into a contract" with Brooktenn, LLC, *i.e.*, the Proposal for Purchase.[6] *That agreement is not the one barred by the Statute of Frauds*, and thus this "admission" does nothing to establish or affirm the existence of a lease agreement upon which the enforceability of the Proposal for Purchase depends. Second, the Answers' acknowledgment that Branco Investments and Brooktenn had a contract is not an admission that the contract was *enforceable*.[7] Rather, the Answers simply recognize the Proposal for Purchase was a contract that would become enforceable if—and only if—certain future conditions occurred;[8] in other words, it was an "agreement to agree." Because the contingencies never came to pass, however, the contract never ripened into an *enforceable* contract.

The South Carolina Supreme Court has employed similar reasoning and terminology when discussing a contract that was unenforceable under the Statute of Frauds because it contemplated a future occurrence that never materialized. *See Fici v. Koon*, 372 S.C. 341, 347, 642 S.E.2d 602, 605 (2007) (using the term "contract" more than 30 times to describe a written agreement but

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[6] *See* Answer of Hull Storey at ¶ 17 (R. ___); Answer of Sumter Mall at ¶ 17 (R. ___).

[7] This is especially true in light of the fact that the Answers expressly denied liability for the claim and asserted that "Plaintiff's claims are barred because certain conditions precedent were not met in order for its claims to ripen." *See* Answer of Hull Storey at page 1 and at ¶¶ 20–21 (R. ___ and ___); Answer of Sumter Mall at page 1 and at ¶¶ 20–21 (R. ___ and ___).

[8] Indeed, the very title of the agreement—a "*Proposal* for Purchase"—indicates its conditional and contingent nature. In an apparent effort to avoid the use of this revealing name, Mr. Branco's and Branco Investments' brief instead refers to the agreement as an "Asset Purchase Agreement." *See* Brief of Respondents at 2 and *passim*.

nevertheless concluding that the "contract dated February 27 is nothing more than an agreement to agree which is unenforceable under the Statute of Frauds").

Furthermore, the case upon which Mr. Branco and Branco Investments rely—*Robert Harmon & Bore, Inc. v. Jenkins*, 282 S.C. 189, 318 S.E.2d 371 (Ct. App. 1984)—is distinguishable and, to the extent it sheds any light on this issue, it actually supports Hull Storey's position. *See* Brief of Respondents at 14–15. *Jenkins* is distinguishable from the instant proceeding in that the alleged admission in the defendant's Answer was a frank concession that the parties had an oral agreement and provided specific details of that agreement.[9] Here, in contrast, Hull Storey's and Sumter Mall's Answers did not concede the existence the disputed contract, namely the lease agreement between Brooktenn and Hull Storey, nor did the Answers supply the specific and necessary terms and conditions of that supposed agreement. Furthermore, even in *Jenkins*—a case in which the "admission" was significantly more damning than in the instant appeal—the Court nevertheless held it was *not* enough to establish the existence of a contract where no written contract had ever been executed. This was because even the level of detail in the Answer in *Jenkins* (which far exceeds the detail in the Answers in the instant lawsuit) was insufficient to serve as a writing memorializing a completed agreement:

> The written admission must contain *all the essential elements of the contract, and the terms and conditions must be stated with reasonable certainty*, that is, all material parts must be contained in the memorandum, and it is insufficient where it omits an essential term. . . .
>
> As to a writing relied on to establish a lease agreement in particular, the writing "must embody all the essential and material parts of the lease

[9] In *Jenkins*, the relevant portion of the Defendant's Answer contained a significant level of detail regarding the specific terms and conditions of the parties' oral agreement. *See Jenkins*, 282 S.C. at 192, 318 S.E.2d at 373 (noting the parties' discussions had contemplated a that the "'proposed lease would be for a period of five (5) years at a rental of Four Thousand Five Hundred ($4,500) dollars per month'") (quoting the defendants Answer). In contrast, the Answers in the case at bar are utterly silent as to the terms and conditions of the lease agreement.

> contemplated to be thereafter executed with such clarity and certainty as to show that the minds of the parties had met on all material terms.
>
> * * *
>
> Moreover, while the purported memorandum sufficiently identifies the premises to be leased, defines a term, and prescribes a rental and time and manner of its payment, . . . nowhere does the memorandum specify when the five-year term would begin.
>
> Under these circumstances, then, we cannot agree with the trial court that the answer of Jenkins and the Association provided a sufficient memorandum to remove the agreement from the statute of frauds.

Jenkins, 282 S.C. at 193–95, 318 S.E.2d at 374 (citations omitted). If the relatively detailed admission in the defendant's pleadings in *Jenkins* was insufficient to satisfy the Statute of Frauds, the *de minimis* pleadings in the instant lawsuit undoubtedly do not.

B. Respondents' arguments misapprehend the legal issue presented in this appeal.

In support of their argument that the Proposal for Purchase was an enforceable contract, Mr. Branco and Branco Investments argue that *that* agreement does not itself violate the Statute of Frauds. *See* Brief of Respondents at 13. Their argument misses the mark because it misapprehends the fundamental legal issue in this appeal. The issue before the trial court and before this Court is not whether the agreement between Branco Investments and Brooktenn, LLC was executed in written form. No one disputes that it was. But that fact should not be allowed to obscure the actual legal dispute here, namely that alleged discussions concerning a potential lease agreement between Brooktenn, LLC and Hull Storey were never reduced to a written document memorializing the terms of a an actual lease agreement between them . *That* is the relevant agreement that violates the Statute of Frauds, and in the absence of *that* written agreement, the contingencies of the Proposal for Purchase remain unsatisfied and render the Proposal for Purchase unenforceable.[10]

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[10] This conflation of the two contracts likewise renders Mr. Branco's and Branco Investments' reliance on S.C. Code Ann. § 36-2-201(1) fruitless. *See* Brief of Respondents at 13 n.7. That statute expressly states it applies only to contracts for the sale of goods worth more than $500. *See* S.C. Code Ann. § 36-2-201(1); *see also id.* § 36-2-102 ("[T]his Chapter applies to transactions in

Even a valid contract is unenforceable in the absence of the satisfaction of conditions precedent to performance. *See Worley v. Yarborough Ford*, 317 S.C. 206, 210, 452 S.E.2d 622 (1994) ("A condition precedent entails something that is essential to a right of action . . . . In contract law, the term connotes any fact other than the lapse of time, which, unless excused, must exist or occur before a duty of immediate performance arises.") (citations omitted). The Proposal for Purchase between Brooktenn and Branco contained a condition precedent, namely that Brooktenn must first obtain a, "satisfactory lease" from Hull Storey before any obligation arose to tender payment to Branco for the equipment. Because Brooktenn never satisfied that condition precedent, Branco Investments could not enforce the Proposal for Purchase and require Brooktenn to pay for Branco's equipment. Accordingly, the agreement between Brooktenn and Branco Investments was, and remains, unenforceable. Consequently, Mr. Branco and Branco Investments cannot establish the existence of an enforceable contract, which is a required element of a claim for tortious interference with a contract.

C. Respondents can neither raise the defense of estoppel nor establish its elements.

Mr. Branco's and Branco Investments' argue the doctrine of estoppel can overcome the absence of a written lease agreement between Brooktenn and Hull Storey. *See* Brief of Respondents at 14–15. Their argument, however, proves ineffective. "In order to overcome statutory requirements that an agreement be in writing, the party asserting estoppel must show that he suffered a definite, substantial, detrimental change of position in reliance on such agreement and that no remedy except enforcement of the bargain is adequate to restore his former position." *Player v. Chandler*, 299 S.C. 101, 106, 382 S.E.2d 891, 894 (1989). In contrast, "[i]t is *not*

goods."). Accordingly, that statute applies to the Proposal for Purchase (which included the sale of equipment for the baking and sale of cookies), but it is irrelevant to the question of whether a lease agreement ever existed between Brooktenn and Hull Storey.

sufficient to show merely that he has lost an expected benefit under the contract." *Atlantic Wholesale Co., Inc. v. Solondz*, 283 S.C. 36, 41, 320 S.E.2d 720, 723 (Ct. App. 1984) (citations omitted) (emphasis added).

Estoppel is inapplicable here for at least three reasons. First, the law is clear that "the party asserting estoppel" must show he detrimentally relied on the oral agreement. *See Player*, 299 S.C. at 106, 382 S.E.2d at 894 (emphasis added). Here, however, the Record is devoid of any evidence or testimony that Mr. Branco or Branco Investments made any change in position (much less a "substantial, detrimental" one) in response to or based on Hull Storey's alleged oral approval of Brooktenn's lease application.[11] Second, the defense of estoppel is to be asserted by a party to the unwritten contract.[12] Here, however, Mr. Branco and Branco Investments are attempting to assert estoppel to legitimize a purported unwritten lease agreement to which they were not a party, *i.e.*, the supposed oral lease agreement between Brooktenn and Hull Storey. Third, even if Mr. Branco and Branco investments were able to assert estoppel as third parties to the alleged lease agreement, they cannot establish the factors necessary to defeat the Statute of Frauds' requirement that lease

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[11] Mr. Branco and Branco Investments attempt to gloss over this fact by arguing that *Brooktenn* spent time and effort pursuing this deal rather than other ones. *See* Brief of Respondents at 14. Even assuming *arguendo* that there was Record evidence to support this argument (and Respondents point to none), it is nevertheless irrelevant because *Brooktenn isn't the party asserting estoppel.*

[12] This fact is illustrated in the cases cited above and finds further support in the rationale that prevents a third party from maintaining an action for the breach of another's contract. *See Clardy v. Bodolosky*, 383 S.C. 418, 383 S.C. 418 (2009) ("Generally, one not in privity of contract with another cannot maintain an action against him in breach of contract, and any damage resulting from the breach of a contract between the defendant and a third party is not, as such, recoverable by the plaintiff.") (internal citations omitted); *see also Walker v. Preacher.*, 188 S.C. 431, 199 S.E.2d 675 (1938) (analyzing the enforceability of an oral contract and noting "that the protection afforded by the statute is a personal privilege of the parties to the agreement"). In the instant appeal, because Mr. Branco and Branco Investments are strangers to the alleged agreement between Hull Storey and Brooktenn, they cannot avail themselves of the theory of estoppel to overcome the Statute of Frauds' requirement that a lease must be in writing to be enforceable.

agreements must be in writing. As noted above, "[i]t is *not* sufficient to show merely that he has lost an expected benefit under the contract." *Atlantic Wholesale*, 283 S.C. at 31, 320 S.E.2d at 723. Mr. Branco's and Branco Investment's hope of receiving the benefit of payment for the equipment in the event that Brooktenn and Hull Storey entered into a lease is not a sufficient basis to apply estoppel to overcome the application of the Statute of Frauds. Furthermore, Mr. Branco and Branco Investments did not seek specific performance of the lease between Brooktenn and Hull Storey and did not present evidence that "no remedy except enforcement of the bargain is adequate to restore his former position." Accordingly, Mr. Branco and Branco Investments cannot now claim Hull Storey is estopped from asserting the defense of the Statute of Frauds.

D. Respondents' reliance on distinguishable case law cannot mask the fact that the Proposal for Purchase contained an unsatisfied contingency.

Mr. Branco and Branco Investments next argue that the contingency in the Proposal for Purchase was satisfied merely by Brooktenn's *intent* to obtain a lease agreement and that the failure to actually do so does not affect the enforceability of the Proposal for Purchase. *See* Brief of Respondents at 15–16. In support of this argument, they rely exclusively on *McPeters v. Yeargin Const. Co.*, 290 S.C. 327, 350 S.E.2d 208 (Ct. App. 1986), a case that is significantly distinguishable because the agreement in *McPeters* did not involve an unsatisfied contingency. In *McPeters*, an employer made an oral offer to an employee that, if the employee stayed on the job and completed it on time, the employer would give him a sizeable bonus. *See McPeters*, 290 S.C. at 330, 350 S.E.2d at 210. The employee stayed on the job and finished the project on time, but the employer refused to pay the bonus. *Id.* The employee brought suit, arguing the parties' agreement was an enforceable contract because he had done everything the agreement required of him. *Id.* Accordingly, the issue in *McPeters* was simply whether the employer's oral offer and the employee's acceptance by way of full performance constituted an enforceable contract.

The contract in *McPeters* was *not* made contingent on any future event (other than the employee's acceptance by performance) and thus the issue in that case was *not* whether the contract was enforceable despite an unsatisfied contingency. Mr. Branco and Branco Investments try to gloss over this distinction by arguing that because the employer in *McPeters* did not have a set bonus policy and the payment of bonuses was discretionary, the agreement in *McPeters* must (according to Branco) have been contingent on the future exercise of discretion. *See* Brief of Respondent's at 15–16. The flaw in that argument, however, is that the *McPeters* Court expressly rejected it, stating the oral offer made by the employer was *not* conditioned on a future exercise of discretion. *See McPeters*, 290 S.C. at 331, 350 S.E.2d at 211 (rejecting the employer's argument "that the payment of any bonuses to Mr. McPeters and the other employees was necessarily discretionary" and noting instead that the testimony of the witnesses who were present when the oral offer was made "made no reference in their testimony to his having said the payment of bonuses would be discretionary").

In sum, *McPeters* involved a straightforward analysis of an oral offer and acceptance by performance—a contract that expressly was not made contingent on any future events. Here, in contrast, the Proposal for Purchase between Branco Investments and Brooktenn was expressly made contingent on future events—events that never occurred. Accordingly, the Proposal for Purchase, unlike the agreement in *McPeters*, never became enforceable.

IV. Hull Storey's conduct was justified.

As explained in Appellants' primary brief, even assuming there was a valid, enforceable contract between Branco Investments and Brooktenn (which there was not), Hull Storey cannot be liable for tortiously interfering with that contract because Hull Storey's actions were justified. *See* Brief of Appellants at 16–20. In response, Mr. Branco and Branco Investments rely on distinguishable case law and one snippet of testimony indicating Mr. Applebaum's (the principal

of Brooktenn) perception that Hull Storey's conduct was unfair. *See* Brief of Respondents at 18–20. Their reliance on *Webb v. Elrod*, 308 S.C. 445, 418 S.E.2d 559 (Ct. App. 1992) is unavailing. In that case, the Webbs bought two tracts of land from the Elrods. *Webb*, 308 S.C. at 446, 418 S.E.2d at 560. When the Webbs fell behind in their payments on the land, they sold lots on the land to third parties who purchased bonds for title and made monthly payments directly to the Elrods. *Id.* When the Webbs fell still further behind in their payments, Ms. Elrod contacted several of the third parties and advised them she would no longer accept payments from them and that she intended to foreclose on the Webbs' mortgages. *Id.* at 447, 418 S.E.2d at 560. The third parties then ceased making payments. The Webbs sued the Elrods, claiming this contact with the third parties had tortiously interfered with the Webbs' contracts with those third parties. *Id.* The Court of Appeals disagreed, holding the Elrod's exercise of a legal right did not constitute tortious interference, even if the result of that exercise was to cause third parties to renege on their contracts with the Webbs. *Id.* at 448, 418 S.E.2d at 561 ("The exercise in good faith of a legal right by a party to a contract affords no basis for an action by the second party for intentional interference with a contract even though the consequence of the exercise of the legal right by the first party is to cause a third party not to perform another contract with the second party.") (citations omitted).

Here too, like in *Webb*, Hull Storey's exercise of a legal right—the right to profit from the lease of its real estate by charging a tenant or prospective tenant an up-front payment of $20,000 in addition to ongoing monthly lease payments—cannot constitute interference with the Proposal for Purchase even if Brooktenn's response was to renege on that agreement. Nor does Mr. Applebaum's self-interested perception of unfairness transform this exercise of a legal right into something improper. The Record is devoid of any evidence that Hull Storey's conduct was motivated by a subjective intent or purpose of interfering with a contract, and thus Hull Storey cannot be liable for the exercise of its rights. *See id.*

V. The damages award rests on inadequate and unreliable evidence.

In an attempt to defend the trial court's award of damages in an amount based on speculation and conjecture, Mr. Branco and Branco Investments point to this Court's opinion in *Madren v. Bradford*, 378 S.C. 187, 661 S.E.2d 390 (Ct. App. 2008). *See* Brief of Respondents at 20–22. They ignore, however, *Madren's* admonition that "an amount of damages cannot be left to conjecture, guess, or speculation." *Madren*, 378 S.C. at 195, 661 S.E.2d at 395 (citation omitted). They further ignore a key distinction between *Madren* and the instant proceeding, namely that in *Madren* the plaintiff knew his cost basis in the parcel to be sold, from which the fact finder could calculate damages. *See id.* at 195–96, 661 S.E.2d at 395. In contrast, Mr. Branco testified that *he did not know* his cost basis in the equipment. *See* Trial Tr. 165:12 to 166:10 (R. ___) (Mr. Branco admitting he had no idea how much he'd paid for the equipment originally and admitting he had not created any estimate or undertaken any discernable process to reach his $70,000 estimate). Accordingly, the trial court's calculation of the damages amount rests on inadequate and unreliable evidence.

VI. The trial court erred by awarding damages arising from an agreement that Branco Investments lacked the capacity to enter and by awarding those damages to Mr. Branco, who was not a party to that agreement.

As explained in Hull Storey's primary brief, the trial court erred (i) by awarding damages to Mr. Branco, who was not a party to the Proposal for Purchase that was supposedly interfered with by Hull Storey, and (ii) by awarding damages in a lawsuit filed by Branco Investments while in forfeiture of its corporate status, and arising from a contract entered by Branco Investments while in forfeiture of its corporate status. *See* Brief of Appellants at 22–23. In response, Mr. Branco and Branco Investments raise four arguments, each of which is discussed briefly below.

First, Mr. Branco and Branco Investments argue that Hull Storey's brief impermissibly relied on materials outside of the Record. *See* Brief of Respondents at 23 n.8 (and accompanying

text). However, this Court may freely take judicial notice of matters of public record such as the publicly accessible business records posted by the Secretary of State. *See Cox v. Fleetwood Homes of Georgia, Inc.*, 329 S.C. 157, 160 n.2, 494 S.E.2d 462, 463 n.2 (Ct. App. 1997), rev'd on other grounds, 334 S.C. 55, 512 S.E.2d 498 (1999); *State v. Little*, 227 S.C. 60, 69, 86 S.E.2d 875, 879 (1955); *see also* Rule 201(b), SCRE.

Second, Mr. Branco and Branco Investments speculate that perhaps the administrative dissolution of Branco Investments might have been ineffective since—who knows?—there might have been a technical error in the administrative procedure of the dissolution. *See* Brief of Respondents at 23. This is mere speculation, and this Court should not give credence to conjecture that assumes (with no basis) that State employees and officers failed to properly perform their duties.

Third, Mr. Branco and Branco Investments argue that Branco Investments entry into the Proposal for Purchase was simply an effort to wind up and liquidate its business, which is permissible even for a dissolved corporation. *See* Brief of Respondents at 24. This assertion is belied, however, by the fact that Branco Investments subsequently sought and received reinstatement of its corporate status. If the attempt to sell its equipment and the filing of this lawsuit were merely the winding up and liquidation of Branco Investments business and affairs, there was no need to reactivate its corporate registration.

Finally, Mr. Branco and Branco Investments argue the trial court's error of awarding damages to the wrong plaintiff should be overlooked because it would be easy to correct on remand. *See* Brief of Respondents at 24. But while this error may be simple enough to correct on remand, it is nevertheless an error and Hull Storey submits that it is illustrative of the imprecision that infected the entirety of the trial court's analysis and ruling in this proceeding.

CONCLUSION

For the foregoing reasons, Appellants respectfully request this Court reverse the trial court's Amended Order of Judgment.

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September 18, 2018

HAND DELIVERED
The Honorable Jenny Abbott Kitchings
Clerk of Court
The South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

RE: Branco *et al.* v. Hull Storey Retail Group, LLC *et al.*
Appellate Case No. 20017-000998
Civil Action No. 2015-CP-43-596
Our File No. 53746/01500

Dear Ms. Kitchings:

In connection with the above captioned matter, enclosed please find an original and one copy of the Initial Reply Brief of Appellants, an original and one copy of a Notice of Appearance, a Firm check of $25 as the filing fee for the latter, and a Proof of Service. We ask that you file the originals and return clocked-in copies to us via our courier.

By copy of this letter I am serving a copy of Appellant's Initial Reply Brief on opposing counsel.

Very truly yours,

Miles Coleman

Miles E. Coleman

MEC:kmj
Enclosures
cc: Patrick M. Killen, w/enclosures
Derek Shoemake, w/enclosures
John S. Simmons, w/enclosures