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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

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

Opinion No. 5537
Heard March 5, 2018 – Filed July 11, 2018
Petition for Rehearing Denied September 20, 2018
Appellate Case No. 2018-001910

SKYDIVE MYRTLE BEACH, INC. .....Petitioner

v.

HORRY COUNTY.....Respondent

APPENDIX

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Skydive Myrtle Beach, Inc. v. Horry County
INDEX TO APPENDIX

Index to Appendix	i
ORDERS	
Writ of Ejectment (A10)	1
Bond to Stay Execution on Appeal (A11/R19)	2
Magistrate Return (A12/R20)	3
Order of June 3, 2014 (A6)	4
Form 4 Order of March 2, 2015 (A1)	6
Form 4 Order of May 6, 2015 (A2)	8
Order of May 27, 2015 Dismissing Magistrate Appeal (A3)	10
Order of July 16, 2015 Denying Motion to Reconsider (A4)	20
Order of September 30, 2014 [Case No. 14-CP-26-1193] (A5)	24
Form 4 Order of September 22, 2015 (A7)	26
Order of October 13, 2015 (A8)	28
Order of November 9, 2015 (A9)	32
PLEADINGS	
Complaint [Case No. 14-CP-26-1193] (A13/R31)	33
Answer [Case No. 14-CP-26-1193] (A15)	69
Application for Ejectment (A14)	76
Proof of Service on Appellant (A17)	77
Magistrate Summons of June 13, 2014 (A18)	78
Magistrate Summons of July 8, 2014 (A19)	79
Magistrate Summons of July 29, 2014 (A21)	80

Magistrate Summons of February 3, 2015 (A24) 81

Notice of Appeal to Court of Common Pleas (A21/R30) 82

MOTIONS AND MEMORANDA OF LAW

Motion to Remove (A16/R9) 86

Motion to Reconsider (Letter dated July 18, 2014) (R12) 88

Motion for Consolidation (14-CP-26-1193) (R18) 91

Appellant's Memorandum of Law in Opposition to Respondent's Motion for Modification of Bond Amount and for Temporary Restraining Order and Temporary Injunction (A27) 94

Memorandum of Law in Support of Injunctive Relief, to Exercise Exclusive Jurisdiction and to Consolidate All State Issues, and to Compel Discovery (A25) 111

Motion for Leave to File Motion for Relief from Judgment of the Magistrate's Court Decision Pursuant to Rule 12(b), SCMCR (A25) 137

Motion to Reconsider Order Dismissing Appeal (A29) 139

Motion for Emergency Injunction and Stay of Ejectment (A30/R25) 164

Motion to Reconsider Order Denying Appellant's Motion for Injunction and Stay of Ejectment (14-CP-26-1193) (R28) 179

Verified Petition for Supersedeas Bond (A31) 192

Memorandum of Law (in Support of Appellant's Verified Petition for Supersedeas Bond and Motion for Emergency Injunction (A32) 222

TRANSCRIPTS

Transcript of May 6, 2015 Hearing (A35/R21) 235

Transcript of September 22, 2015 Hearing (A36/R26) 302

OTHER DESIGNATED MATERIALS

Request for Joint Status Conference (A34) 321

Email from Respondents of September 16-18, 2015, and October 15, 2015 (A37) 324

Judge Hyman's Law Clerk's email dated October 15, 2015 (A38) 328

Case Information Sheet Eviction (R1) 331

PS Form 3811 Certified Return Receipt – Robert Eastman (R3) 332

Letter dated April 28, 2014, David Bannard to Robert Eastman (R4) 333

Grand Strand Airport Space Use Permit (R5) 335

Copy Sheet for Check 1332 Sky Dive Myrtle beach paid to the Order of Myrtle Beach Aviation - $4,800 dated 08/19/13 with notes (R6) 341

Operating Permit to Provide Skydiving and Non-Emergency Parachute Operations to the General Public at the Grand Strand Airport (R7) 342

Copy Certified Mail Receipt dated 4/02/14 and PS Form 3811 (R8) 346

Magistrate Summons dated July 21, 2014, (14CV261092444) (R12) 347

Letter to Office of Chief Counsel from Robert Eastman dated February 24, 2014 Re: Part 16 Formal Complaint (R14) 349

Letter to Office of Chief Counsel from David Bannard dated March 4, 2014 Re: Part 15 Formal Complaint (R16) 353

Letter from the US Department of Transportation, Randall Fiertz, dated March 18, 2014, to Robert Eastman (R17) 356

September 16, 2015 E-mail 72-hour Notice to Vacate Hangar 7 (R24) 358

Letter Agreement dated May 10, 2012 between Grand Strand Aviation/Ramp 66 and Sky Dive of Myrtle Beach (R32) 359

APPEAL MATERIALS

Final Brief of Appellant 362

Final Brief of Respondent 410

Final Reply Brief of Appellant 443

Opinion of Court of Appeals (Dismissal) 460

Petition for Rehearing 465

Brief Opposing Motion for Reconsideration 471

Order Denying Petition for Rehearing 475

STATE OF SOUTH CAROLINA)
) 2014CV261092444
COUNTY OF HORRY) CIVIL CASE NUMBER
)
) IN THE MAGISTRATE'S COURT
)
) WRIT OF EJECTMENT

Horry County
Po Box 1236
Conway, SC 29526

PLAINTIFF(S)
Vs
Skydive Myrtle Beach, Inc.
2800 Terminal Street
Conway, SC 29528

DEFENDANT(S)

TO THE SHERIFF/DEPUTY SHERIFF/CONSTABLE:

Upon Judgment of this Court, you are hereby Ordered to proceed to the premises located at **2800 Terminal Street Conway, SC 29528,** in accordance with S.C Code Sections 27-40-710, 27-40-735, and 27-37-160 as amended.

Announce your identity and purpose and serve on the defendant(s) and all occupants a copy of this Writ of Ejectment. Inform them they have **until Monday, July 28, 2014, to voluntarily vacate** the premises. **If the premises appear unoccupied and no one responds** to your announced identity and purpose, the Writ of Ejectment shall be served by securely attaching a copy of the Writ in a conspicuous place on the premises.

If after Monday, July 28, 2014, following the service or posting of the Writ, the occupants have not voluntarily vacated the premises, **a deputy sheriff may enter the premises** using only as much force as is necessary to effectuate the Ejectment.

Upon gaining access, you shall **remove from the premises any occupants and all items of personal property found on the premises. Such property may be deposited beside the public street or roadway.** All personal property removed from the premises and placed on a public street or roadway may be removed by the proper local government agency after forty eight (48) hours, excluding Saturdays, Sundays, and holidays. Such property may also be removed in the normal course of debris or trash collection before or after a period of forty eight (48) hours.

July 23, 2014

Myrtle Beach Magistrate Court

In accordance with the SC Rules for Magistrate Court, _____, certify that:
☐ I personally served a copy of this Writ on _____, an occupant of the rental unit.
☐ On _____, 20____, at _____, the rental unit appeared unoccupied and no one responded when I announced my identity and intentions. I attached a copy of this Writ to a conspicuous part of the premise. On _____, 20____, at _____, which was not less than 24 hours from the posting date and time, I returned to the rental unit for the purpose of ejectment.
☐ Under my supervision, I had all persons and personal property removed and evicted from the rental unit placing all personal property beside the roadside.
☐ The rental unit was unoccupied. The Tenant and all occupants had vacated the unit.
☐ Informed by Plaintiff that case is settled.

Date: _____, 20____

Sheriff/Deputy Sheriff/Constable

MV110

STATE OF SOUTH CAROLINA)
) 2014CV261092444
COUNTY OF HORRY) CIVIL CASE NUMBER
) MAGISTRATE'S COURT
)
) BOND TO STAY EXECUTION
) ON APPEAL

Horry County
Po Box 1236
Conway, SC 29526

LANDLORD

Vs

Skydive Myrtle Beach, Inc.
2800 Terminal Street
Conway, SC 29528

TENANT(S)

TO: Circuit Court

Now comes the Tenant(s) in the above entitled action and respectfully shows the Court that a Judgment of Execution was issued against the Tenant(s) and for the Landlord on July 23, 2014, by the Magistrate. Tenant(s) has appealed the Judgment to the Circuit Court.

Pursuant to the findings of the Magistrate, the Tenant(s) is obligated to pay rent in the amount of $1,200.00 per month, due on the 1st day of each month. An initial payment of $7200.00 was paid this date with monthly payments to follow.

Tenant(s) hereby undertakes to pay the periodic rent hereinafter due according to the aforesaid findings of the Court and moves the Circuit Court to stay execution on the Judgment for Ejectment until this matter is heard on appeal and decided by the Circuit Court.

Dated on August 1, 2014:

Tenant(s)

Upon execution of the above bond, execution on the Judgment of Ejectment is hereby stayed until the action is heard on appeal and decided by the Circuit Court. If Tenant(s) fails to make any rental payment within five days of the due date, upon application of the Landlord, the stay of execution shall dissolve, the appeal by the Tenant(s) to the Circuit Court on issues dealing with possession must be dismissed and the Sheriff may dispossess the Tenant(s).

Dated on August 1, 2014

JUDGE

Horry County
Myrtle Beach Magistrate Court
1201 21st Avenue North
Myrtle Beach, SC 29577
Phone: (843) 915-5293 Fax: (843) 444-6131

MV 125

Magistrate Return on Appeal

Case number: 2014-CP-26-9985

Plaintiff: Horry County, Att. Mike Battle

Defendant: Skydive Myrtle Beach, INC., Att. Robert Estman

COPY

On July 02nd, 2014 at approximately 11:00am all parties were present in the Courtroom for a Motion hearing requested by the defendant's attorney, Mr. Estman. Mr. Estman's Motion was that Summary Court had no jurisdiction to hear this case due to the amount involved, and that it should be sent up to Common Pleas where Skydive Myrtle Beach, INC., already has a case filed. Attorney Mike Battle, representing Horry County countered by saying that Summary Court has concurrent jurisdiction with Common Pleas in all Land Lord Tenant disputes, and that the only thing Horry County is addressing with the defendant is a Land Lord Tenant dispute over the tenant refusing to sign a lease. He further stated that currently there is no lease/agreement orally or in writing giving the defendant the right to be on/in the property owned by Horry County. That Horry County has presented the defendant with a lease/agreement and they have rejected it and refuse to sign it.

The Court respectfully denied the Motion made by attorney Estman, and announced that The Court does have concurrent jurisdiction with The Court of Common Pleas in matters dealing with Land Lord Tenant disputes. That this Court believes the action brought by Horry County is strictly a Land Lord Tenant dispute, and that the action already filed by the defendant in Common Pleas does not address the Land Lord Tenant issues brought by the plaintiff.

While both parties were present a date certain was set for July 23rd, 2014 for The Court to hear the Rule to Vacate action being brought by the plaintiff.

Attorney Estman 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 Estman, who requested The Court to reconsider its ruling/decision on the Motion he put forth on July 2nd, 2014. The Court heard from both parties. The Court again respectfully denied his Motion. At that point The Court moved directly into the action filed by Horry County, Rule To Vacate. Attorney Estman requested a Jury Trial and 30 days to file a Counter Claim. The Court denied both of his request. Neither one were filed/requested timely. The Counter Claim should have been filed within the 30 day time period to file The answer and Jury Trial 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. The Court found that based on the testimony and evidence issued 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 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.

Respectfully Submitted,

Chris Arakas, Summary Court Judge

07-30-14

HORRY COUNTY
2014 JUL 31 AM 8:05
PEBBIE JANE HUGGINS-WARD
CLERK OF COURT

Ines #2

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF HORRY
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2014CP2601193

PLAINTIFF(S)	DEFENDANT(S)
Skydive Myrtle Beach Inc Skydive Myrtle Beach LLC	Horry County Department of Airports Horry County H Randolph Haldi Pat Apone Tim Jackson Jack Teal
Submitted by: CLERK OF COURT	Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Voluntary Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☒ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):** ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

FILED
HORRY COUNTY
2014 JUN 4 AM 8:39
JEFFREY GRISWARD
CLERK OF COURT

IT IS ORDERED AND ADJUDGED: ☒ See attached order, (formal order to follow) ☐ Statement of Judgment by the Court:

Motion to dismiss taken under advisement. Proposed orders forthcoming from both attorneys within 10 days.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A	N/A	N/A

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge Larry B. Hyman, Jr.	2152 Judge Code	6/3/2014 Date

For Clerk of Court Office Use Only

This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on, to attorneys of record or to parties (when appearing pro se) as follows:

Robert Gerry Eastman 3980 South Tropical Trail Merritt Island, FL 32952	Michael Warner Battle PO Box 530 Conway, SC 29528-0530 Samuel F. Arthur III PO Drawer 1931 Florence, SC 29506
ATTORNEY(S) FOR THE PLAINTIFF(S)	ATTORNEY(S) FOR THE DEFENDANT(S)
Court Reporter Ronda Cummings	Melanie Huggins-Ward - Clerk of Court

CPFORM4Cm
SCCA SCRCP Form 4C (Revised 3/2013)

Mark #32

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF HORRY
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2014CP2604965

Skydive Myrtle Beach Inc	**Horry County of**
PLAINTIFF(S)	**DEFENDANT(S)**
Submitted by: CLERK OF COURT	**Attorney for:** ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):** ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other:

FILED 2015 MAY 13 PM 4:27

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☒ Statement of Judgment by the Court:

Appeal continued.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	**Judgment Against (List name(s) below)**	**Judgment Amount To be Enrolled (List amount(s) below)**
N/A	N/A	N/A

If applicable, describe the property, including tax map information and address, referenced in the order:

CPFORM4Cm
SCCA SCRCP Form 4C (Revised 3/2013)

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge	**Roger M. Young, Sr.**	**2134** **Judge Code**	3/2/2015 **Date**

For Clerk of Court Office Use Only

This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on, to attorneys of record or to parties (when appearing pro se) as follows:

Robert Gerry Eastman 3980 South Tropical Trail Merritt Island, FL 32952

ATTORNEY(S) FOR THE PLAINTIFF(S)

Alexis Mills Wimberly 103 Church Street Mount Pleasant, SC 29464
Robert Bratton Varnado PO Box 1127 103 Church Street Mt. Pleasant, SC 29465

Mike Battle

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter **Natalie Dahl**

Melanie Huggins-Ward - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

CPFORM4Cm
SCCA SCRCP Form 4C (Revised 3/2013)

Wed. #32-36

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF HORRY
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2014CP2604965

Skydive Myrtle Beach Inc	Horry County of
PLAINTIFF(S)	DEFENDANT(S)
Submitted by: CLERK OF COURT	Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

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☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):** ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

Motion to appeal denied.

Motion for joint status conference continued to be heard by Chief Admin Judge.

Motion on rule to show cause denied.

Motion for modification of bond amount denied.

Motion for TRO granted and denied in part.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A	N/A	N/A

CPFORM4Cm
SCCA SCRCP Form 4C (Revised 3/2013)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge Larry B. Hyman, Jr.	**2152**	5/6/2015
	Judge Code	**Date**

For Clerk of Court Office Use Only

This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on, to attorneys of record or to parties (when appearing pro se) as follows:

Robert Gerry Eastman 3980 South Tropical Trail Merritt Island, FL 32952

ATTORNEY(S) FOR THE PLAINTIFF(S)

Alexis Mills Wimberly 103 Church Street Mount Pleasant, SC 29464
Robert Bratton Varnado PO Box 1127 103 Church Street Mt. Pleasant, SC 29465
Michael Warner Battle PO Box 530 Conway, SC 29528-0530

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter Teresa Bautz

Melanie Huggins-Ward - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

CPFORM4Cm
SCCA SCRCP Form 4C (Revised 3/2013)

STATE OF SOUTH CAROLINA COUNTY OF HORRY Skydive Myrtle Beach, Inc., Appellant, vs. Horry County Respondent.	FOR THE FIFTEENTH JUDICIAL CIRCUIT IN THE COURT OF COMMON PLEAS CASE NO.: 2014-CP-26-4965 **ORDER DISMISSING** **MAGISTRATE'S APPEAL**

HORRY COUNTY
2015 MAY 29 PM 4:
MELANIE
CLERK OF COURT

The above captioned matter came before the court on the appeal of Skydive Myrtle Beach, Inc., (Appellant) from the Order of Eviction of the Honorable Christopher J. Arakas, Magistrate Judge. Judge Arakas evicted Appellant from Horry County's (Respondent) airplane hangar, Hangar 7, on the grounds that Appellant's tenancy had ended. Appellant raises two grounds on appeal. The first ground is substantive and raises the question of what document controlled the tenancy right of Appellant to occupy Hangar 7. The second ground is procedural and raises the question of whether Judge Arakas abused his discretion by conducting a non-jury bench trial on the eviction proceeding.

A hearing on the appeal was held before this Court on May 6, 2015, in the Horry County Courthouse. Present at the hearing were the Appellant and his attorneys, Robert G. Eastman and Robert B. Varnardo. Also, present were Respondent and its attorney, Michael W. Battle. After considering the Magistrate's Return, the briefs of the parties and oral arguments, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

1

1. Respondent Horry County is the landlord and owner of Hangar 7 at Grand Strand Airport CRE.
2. On May 10, 2012, Appellant Skydive Myrtle Beach, Inc. entered an agreement (jump agreement) with Grand Strand Aviation to provide tandem parachute jumps for Appellant from the Grand Strand Airport.
3. Paragraph 5 of the jump agreement provides: "There will be no packing fees charged to SkyDive MB. SkyDive shall be provided with **a minimum of 2,500 square feet during daylight hours** without fee seven days a week, including holidays, 365 days a year." *(emphasis added).*
4. Paragraph 18 of the jump agreement provides the agreement will remain in effect through Grand Strand Aviation's lease with Horry County Department of Airports through July 2020.
5. Grand Strand Aviation's lease with Horry County Department of Airports was terminated by agreement in 2013.
6. On September 13, 2013, Respondent Horry County through its Department of Airports entered a new commercial agreement with Appellant permitting Appellant to use the approximately 6800 square feet of space in Hangar 7 twenty four hours a day seven days a week until January 31, 2014. The fee for the use of the space in Hangar 7 was monthly payments of One Thousand Two Hundred & 00/100 ($1200.00) dollars per month. Respondent reserved the right to adjust the amount of the fee for use of the space upon thirty days' notice to Appellant.
7. Paragraph 14 of the Hangar 7 permit agreement provided: "This permit constitutes the entire agreement of the parties with respect to the subject matter hereof and supersedes all

previous agreements, representations and understandings concerning the same, whether written or oral. The provisions of the Permit may be modified, amended or waived only by written instrument executed by the County (Respondent) and Company (Appellant)." *(Parenthesis added).*

8. The Hangar 7 agreement was duly signed by Respondent and Appellant.
9. The Hangar 7 permit expired by its own terms on January 31, 2014.
10. Appellant is now occupying Hangar 7 without permission or authority from Respondent.
11. On or about June 5, 2014, Respondent duly served and filed in Magistrate's Court an Ejectment Proceeding/Rule to Vacate. On June 13, 2014, Appellant responded by filing a Motion to Remove pursuant to S.C. Code Ann. §22-3-30 contesting the Court's jurisdiction.
12. On July 2, 2014, Judge Christopher Arakas denied the Motion to Remove and set an original trial date for Respondent's Rule to Vacate for July 23, 2014.
13. Appellant did not file a second responsive pleading within 15 days of the denial of its Motion to Remove on by Judge Arakas on July 2, 2014.
14. On July 21, 2014, the Magistrate's office received a letter dated July 18, 2014, requesting that the Magistrate reconsider his order of July 2, 2014, or in the alternative grant Appellant a jury trial and permission to file a counterclaim. On July 23, 2014, Judge Arakas denied Appellant's request to reconsider his Motion to Remove and his request for a jury trial plus 30 days to file a counter claim. Judge Arakas denied both requests on the grounds that the requests were untimely. Judge Arakas tried the Respondent's Ejectment Action/Rule to Vacate in a nonjury trial and ruled in favor of the Respondent granting the eviction of the Appellant.

15. Judge Arakas found that the lease agreement between Respondent and Appellant had expired. Respondent is the rightful Landlord and did present Appellant with a new agreement/lease. Appellant did not agree with it and refused to sign the new agreement/lease. Therefore, Appellant had no legal right to be on the property or in the building.

CONCLUSIONS OF LAW

(Substantive Issues)

1. This Court has jurisdiction of the above captioned appeal. *SC R MAG CT Rule 18.*
2. The standard of review to be applied by a Circuit Court in an appeal of a magistrate's judgment is prescribed by *S.C. Code Ann. § 18-7-170 (1976)*: Upon hearing the appeal 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. In giving judgment the court may affirm or reverse the judgment of the court below, in whole or in part, as to any or all the parties and for errors of law or fact. *Hadfield v. Gilchrist, 343 S.C. 88, 92, 538 S.E.2d 268, 270 (Ct. App. 2000).*
3. Under the doctrine of merger, the Hangar 7 permit supersedes and replaces any other agreement entered between Respondent and Appellant or its predecessors in connection with the use of Hangar 7. *Davis v. KB Home of S. Carolina, Inc.*, 394 S.C. 116, 127, 713 S.E.2d 799, 804 (Ct. App. 2011) aff'd in part, vacated in part, No. 2011-199587, 2014 WL 2535489 (S.C. Jan. 29, 2014) (employment application were superseded and rendered invalid by the presence of a merger clause in his subsequent employment agreement).

4. Under S.C. Code Ann. §27–35–110, "[w]hen there is an express agreement, either oral or written, as to the term of the tenancy of a tenant for a term or for years such tenancy shall end without notice upon the last day of the agreed term."

5. Appellant's tenancy ended on January 31, 2014. Appellant's right to occupy Hangar 7 expired on January 31, 2014, and Appellant had no legal right to occupy Hangar 7. *SC Code Ann. §27–35–110.*

(Procedural Issues)

6. Magistrate Court rules of civil procedure shall govern all civil suits in the magistrates' court. If no procedure is provided by those rules, the court shall proceed in a manner consistent with the statutory law applicable to magistrates and with circuit court practice in similar situations but not inconsistent with these rules. *SC R MAG CT Rule 2;* Rule 81 *SCRCP.*

7. The defendant may reply to the plaintiff's complaint by filing a written statement in a form approved by the magistrate or by personally appearing and making an oral statement. This reply shall be called an "answer." A defendant shall file an answer and any appropriate counterclaims with the court within thirty (30) days from the first day after the date of service. *SC R MAG CT Rule 7.* "Answer" means the paper filed by the party responding to the complaint. *SC R MAG CT Rule 1.*

8. A defendant shall file an answer and any appropriate counterclaims with the court within thirty (30) days from the first day after the date of service. *SC R MAG CT Rule 7.*

9. Appellant waived its right to file a counterclaim by failing to file a counterclaim within thirty (30) days from the first day after the date of service. *SC R MAG CT Rule 7.* Any different ruling would be inconsistent with the mandates of *SC R MAG CT Rule 7.*

10. Even if the Court were to accept Appellant's claim that Appellant's Motion to Remove was a Rule 12 motion under the South Carolina Rules of Civil Procedure, Appellant would have been in default by July 21, 2014, when his request a jury trial and the right to file a counterclaim was filed in Magistrate's Court. The service of a motion permitted under Rule 12 SCRCP only alters the time to answer 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. *SCRCP 12.*

11. If either party wanted a jury trial, it must have been requested in writing at least five (5) working days prior to the original date set for trial. *SC R MAG CT Rule 13.*

12. Appellant waived its right to have a jury trial by failing to request one at least 5 working days prior to the original date set for trial.. *SC R MAG CT Rule 13. Also see Rule 38(d), SCRCP* (stating a party's failure to demand a jury trial as required by the rule constitutes a waiver of the right to a jury trial); *C & S Real Estate Servs. v. Massengale,* 290 S.C. 299, 300, 350 S.E.2d 191, 192 (1986); Also see *Cohen v. Creech,* No. 2013-UP-091, 2013 WL 8482385, (S.C. Ct. App. Feb. 27, 2013). Any different ruling would be inconsistent with the mandates of *SC R MAG CT Rule 13.*

13. The decision to grant or deny a continuance is a matter within the lower court's discretion. *Graybar Elec. Co. v. Rice,* 287 S.C. 518, 520, 339 S.E.2d 883, 884 (Ct.App.1986). Absent an abuse of discretion, the court's decision to deny a continuance will not be disturbed on appeal. *Hamm v. South Carolina Pub. Serv. Comm'n,* 312 S.C. 238, 241, 439 S.E.2d 852, 853 (1994); *A & I, Inc. v. Gore,* 366 S.C. 233, 243-44, 621 S.E.2d 383, 388 (Ct. App. 2005).

14. Judge Arakas did not abuse his discretion by proceeding with a nonjury trial on July 23, 2014 which had been scheduled and set for trial on July 2, 2014, and duly noticed to the parties on July 2, 2014. *Id.*

15. Judge Arakas correctly decided that Appellant has no legal right to occupy Hangar 7.

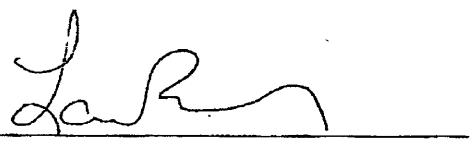
DISCUSSION

The Court has carefully reviewed the record, memorandums of authorities and arguments of counsel. The Court finds that the fact that the Hangar 7 agreement by which Appellant occupied the property expired in January of 2014 has not been refuted by Appellant. The jump agreement dated May 10, 2012, introduced at the hearing of the appeal was not a valid eight year lease agreement to occupy Hangar 7. The express terms of the jump agreement provided that Appellant would be permitted the use of a minimum of 2500 square feet in "Byrd Hangar" for use during daylight hours without paying a fee. Appellant entered a new agreement with Respondent that permitted it to use 6800 square feet without limitation of the use to daylight hours. In addition, Appellant agreed to pay Respondent $1200 per month for the use of 6800 square feet without limitation of the use to daylight hours. The new agreement expressly provided that the permit constituted the entire agreement of the parties with respect to the use of Hangar 7 and superseded all previous agreements, representations and understandings concerning the same, whether written or oral. When a contract is unambiguous, clear and explicit, it must be construed according to the terms the parties have used, to be taken and understood in their plain, ordinary and popular sense. *Warner v. Weader*, 280 S.C. 81, 83, 311 S.E.2d 78, 79 (1983). The Hangar 7 permit expired in January of 2014. Judge Arakas was correct in ruling Appellant had no right to occupy Hangar 7 and should be evicted.

Appellant claims it was denied procedural due process of law because Judge Arakas denied its attorneys' request to file a counterclaim and seek a jury trial. Under the Rules of Procedure for Magistrate's Court both requests were untimely. Appropriate counterclaims must be filed with the court within thirty (30) days from the first day after the date of service. *SC R MAG CT Rule 7.* Jury trials must be requested in writing at least five (5) working days prior to the original date set for trial. *SC R MAG CT Rule 13(c).* Appellant did not file a counterclaim within thirty days of the original date of service and Appellant's request for a jury trial was not made five (5) working days prior to the original date set for trial. Judge Arakas did not abuse his discretion by denying Appellant attorney's requests and proceeding to trial on the original date set for trial. *SC R MAG CT Rule 7 & Rule 13 (c);* also see *A & I, Inc. v. Gore,* 366 S.C. 233, 243-44, 621 S.E.2d 383, 388 (Ct. App. 2005).

This Court is charged with giving 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 (1976).* The merits of the present case are clear and this Court has ruled that the controlling Hangar 7 agreement by which the Appellant was allowed to occupy Hangar 7 expired in January 2014. Appellant has no legal right to occupy Hangar 7 and that conclusion and/or fact has not been refuted by the Appellant.

THEREFORE, IT IS HEREBY ORDERED, the appeal of Skydive Myrtle Beach, Inc., is hereby dismissed.



5-27, 2015

The Honorable Larry B. Hyman, Jr.
Judge Of The Fifteenth Judicial Circuit

STATE OF SOUTH CAROLINA COUNTY OF HORRY Skydive Myrtle Beach, Inc., Appellant, vs. Horry County Respondent.	FOR THE FIFTEENTH JUDICIAL CIRCUIT IN THE COURT OF COMMON PLEAS CASE NO.: 2014-CP-26-4965 **CERTIFICATE OF SERVICE**

I, Teresa M. Phillips, and employee of the law firm of Battle Law Firm, LLC., hereby certify that on May 29, 2015 have served a clocked copy of ***an Order Dismissing Magistrate's Appeal*** upon the attorneys of record in this action, by depositing the same in the United States mail, first-class postage pre-paid, to the following address:

Robert G. Eastman
Eastman & Associates, LLC
PO Box 180
Charleston, SC 29402

Robert B. Varnado
Brown & Varnado, LLC
PO Box 1127
Mt. Pleasant, SC 29465

Teresa M. Phillips

Teresa M. Phillips, Paralegal
BATTLE LAW FIRM, LLC
1200 Main Street
PO Box 530
Conway, SC 29528
(843) 248-4321 (tel)
(843) 248-4512 (fax)
Attorney for Respondent

STATE OF SOUTH CAROLINA COUNTY OF HORRY Skydive Myrtle Beach, Inc., Appellant, vs. Horry County Respondent.	FOR THE FIFTEENTH JUDICIAL CIRCUIT IN THE COURT OF COMMON PLEAS CASE NO.: 2014-CP-26-4965 **CERTIFICATE OF SERVICE**

I, Teresa M. Phillips, and employee of the law firm of Battle Law Firm, LLC., hereby certify that on May 29, 2015 have served a clocked copy of ***an Order Dismissing Magistrate's Appeal*** upon the attorneys of record in this action, by depositing the same in the United States mail, first-class postage pre-paid, to the following address:

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BATTLE LAW FIRM, LLC
1200 Main Street
PO Box 530
Conway, SC 29528
(843) 248-4321 (tel)
(843) 248-4512 (fax)
Attorney for Respondent

COPY

STATE OF SOUTH CAROLINA COUNTY OF HORRY Skydive Myrtle Beach, Inc., Appellant, vs. Horry County Respondent.	FOR THE FIFTEENTH JUDICIAL CIRCUIT IN THE COURT OF COMMON PLEAS CASE NO.: 2014-CP-26-4965 ORDER DENYING APPELLANT'S MOTION TO RECONSIDER DISMISSAL OF APPEAL

2015 JUL 21 AM 11:07
CLERK OF COURT
HORRY COUNTY, SC

The matter comes before the Court upon Appellant Skydive Myrtle Beach, Inc.'s Rule 59(e) SCRCP Motion to Reconsider this Court's Order dated May 27, 2015, dismissing Appellant's appeal from an ejectment order issued by Magistrate Judge Christopher Arakas. After considering the Appellant's motion and supporting memorandum together with Respondent's Response in Opposition to Appellant's Motion to Reconsider, the Court has decided to deny Appellant's Motion to Reconsider.

Appellant claims Horry County's Space Use Permit could not replace a May 12, 2010, agreement between Appellant and Ramp 66 to provide parachute jumps from Grand Strand Airport. Under the Ramp 66 agreement, Appellant was permitted to use a minimum of 2500 square feet in the "bird hangar" during daylight hours for no rent. The Ramp 66 agreement was to remain in effect through Grand Strand Aviation's lease with Horry County Department of Airports. Grand Strand Aviation's lease with Horry County Department of Airports was scheduled to run through July 2020. Ramp 66 and Horry County Department of Airports terminated the lease in 2013. Thereafter, Horry County Department of Airports and Appellant

entered a new agreement/space use permit for Hangar 7 which superseded all previous agreements, including the Ramp 66 agreement. Appellant's right to occupy Hangar 7 under the space use permit ended under express terms of the space use permit on January 31, 2014.

In its motion to reconsider Appellant claims its agreement with Ramp 66 was in fact a sublease which could not be replaced by a space use permit. However, Appellant has omitted the fact that its claimed sublease was not recorded in accordance with the notice requirements of S.C. Code Ann. § 27-33-30. Appellant further omitted citing the provision in paragraph 18 of the Ramp 66 agreement which allowed the agreement to be changed in any way upon written agreement of both parties. Appellant overlooked the significance of the fact that the space use permit was a written agreement signed by Horry County as successor to Ramp 66 and also signed by Appellant.

Appellant misconstrued the Ramp 66 agreement to mean the agreement gave Appellant the exclusive right to occupy 6800 square feet of Hangar 7 at all times including non-daylight hours through July of 2020. There is nothing is the plain language of the Ramp 66 agreement to support such a construction. As found by the Court the space use permit constituted a change to the Ramp 66 agreement. The new agreement superseded the Ramp 66 agreement and the new agreement only permitted Appellant to occupy Hangar 7 until January 31, 2014. After January 31, 2014, Appellant's right to occupy Hangar 7 ended.

The bottom line is that Appellant's right to occupy Hangar 7 during daylight hours under the Ramp 66 agreement ended when Appellant signed the space use permit. The space use permit expressly provided that Appellant's right to occupy Hangar 7 ended on January 31, 2014. Without a valid written lease agreement, Appellant's eviction from Hangar 7 is a foregone conclusion.

Appellant's procedural claims.

Each of Appellant's procedural claims was addressed in the Court Order Appellant seeks to set aside. Respondent would point out that each error Appellant assigned to the Magistrate was an alleged error in the exercise of the Magistrate's discretion. Further, the only benefit Appellant would have received if the Magistrate had decided the procedural motions in favor of the Appellant was a delay in the proceedings. Respondent contends the end result would have been the same.

Appellant's claim that it was entitled to a jury trial because it requested a jury trial five days prior to the date of the scheduled hearing is improper. Under the Magistrate's rules of procedure, Appellant was required to request a jury trial five (5) working days before the date of the scheduled hearing. *SC R MAG CT Rule 13.* When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays and holidays shall be excluded in the computation. *Rule 6 SCRCP.* Even if the Court were to count Friday, July 18, 2014, and Wednesday July 23, 2014, (original date scheduled for trial) as part of the five (5) working days, Appellant's request for a jury trial was not timely or in compliance with the Magistrate Court Rules because, excluding Saturday and Sunday, Appellant's request for a jury trial was less than five (5) working days before the original date the trial was scheduled. *Rule 6 SCRCP & SC R MAG CT Rule 13.*

Appellant's Rule 12(b) (8) Motion

Appellant's Rule 12(b) (8) motion was properly denied. First, the circuit court lawsuit which Appellant claims should have caused the Magistrate eviction to be dismissed was not between the same parties. *Cricket Cove Ventures, LLC v. Gilland,* 390 S.C. 312, 323, 701 S.E.2d 39, 45 (Ct. App. 2010). Appellant named Horry County, Horry County Department of Airports,

H. Randolph Haldi, Pat Apone, Tim Jackson and Jack Teal as defendants in the circuit court action. The Magistrate's eviction only involved Horry County and the Appellant. Second, Courts interpret the Rule 12(b) (8) narrowly such that the claim must be precisely or substantially the same in both proceedings in order for the drastic remedy of dismissal to be appropriate under Rule 12(b) (8). *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 106, 674 S.E.2d 524, 532 (Ct. App. 2009). In the circuit court proceeding, Appellant asserted fifteen separate causes of action for damages against the above named defendants. There was no eviction claim or defense in the circuit court action. Respondent contends that none of Appellant's fifteen causes of action were precisely or substantially the same as the eviction cause of action brought by the Respondent. Because the identities of the parties were not the same and the claims were not precisely or substantially the same, the Magistrate's denial of Appellant's Rule 12 (b) (8) motion was proper. *Id.*

NOW THEREFORE, for the reasons stated above and for the reasons stated in this Court's Order dated May 27, 2015, Appellant's Motion to Reconsider is hereby **DENIED**.

7-16-, 2015

The Honorable Larry B. Hyman, Jr.
Judge Of The Fifteenth Judicial Circuit

Jones #16

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF HORRY
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2014CP2601193

PLAINTIFF(S)	DEFENDANT(S)
Skydive Myrtle Beach Inc Skydive Myrtle Beach LLC	Horry County Department of Airports Horry County H Randolph Haldi Pat Apone Tim Jackson Jack Teal
Submitted by: CLERK OF COURT	Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):** ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☒ Statement of Judgment by the Court.

FILED
HORRY COUNTY
2014 DEC -6 AM 11:22
MARION E. GOGGINS-WARD
CLERK OF COURT

Motion to consolidate denied.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A	N/A	N/A

If applicable, describe the property, including tax map information and address, referenced in the order:

CPFORM4Cm
SCCA SCRCP Form 4C (Revised 3/2013)

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: **Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge Larry B. Hyman, Jr.	2152	9/30/2014
	Judge Code	**Date**

For Clerk of Court Office Use Only

This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on, to attorneys of record or to parties (when appearing pro se) as follows:

Robert Gerry Eastman 3980 South Tropical Trail Merritt Island, FL 32952	Michael Warner Battle PO Box 530 Conway, SC 29528-0530 Samuel F. Arthur III PO Drawer 1931 Florence, SC 29506
ATTORNEY(S) FOR THE PLAINTIFF(S)	**ATTORNEY(S) FOR THE DEFENDANT(S)**

Court Reporter Natalie Dahl	Melanie Huggins-Ward - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

CPFORM4Cm
SCCA SCRCP Form 4C (Revised 3/2013)

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF HORRY
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2014CP2604965

Skydive Myrtle Beach Inc	**Horry County of**
PLAINTIFF(S)	**DEFENDANT(S)**

Submitted by: **Attorney for:** ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):** ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other:

2015 SEP 22 AM 10:39
CLERK OF COURT

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

PLAINTIFF'S MOTION FOR EMERGENCY INJUNCTION UNDER ADVISEMENT. PARTIES GIVEN TO FRIDAY MORNING FOR FURTHER DISCOVERY.

This order ☐ ends ☒ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

2152 9/22/2015

CPFORM4Cm
SCCA SCRCP Form 4C (Revised 3/2013)

Circuit Court Judge **Judge Code** **Date**

For Clerk of Court Office Use Only

This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on , to attorneys of record or to parties (when appearing pro se) as follows:

Robert Gerry Eastman 3980 South Tropical Trail Merritt Island, FL 32952

ATTORNEY(S) FOR THE PLAINTIFF(S)

Alexis Mills Wimberly 103 Church Street Mount Pleasant, SC 29464
Robert Bratton Varnado PO Box 1127 103 Church Street Mt. Pleasant, SC 29465
Michael Warner Battle PO Box 530 Conway, SC 29528-0530

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

Melanie Huggins-Ward - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

CPFORM4Cm
SCCA SCRCP Form 4C (Revised 3/2013)

rec'd 10-15-15 Mail
BJ

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF HORRY)	CIVIL ACTION NO. 2014-CP-26-4965
SKYDIVE MYRTLE BEACH, INC.,)	
)	
Appellant,)	
)	ORDER DENYING APPELLANT'S MOTION FOR INJUNCTION AND STAY OF EJECTMENT
v.)	
)	
HORRY COUNTY,)	
)	
Respondent.)	

FILED
HORRY COUNTY
2015 OCT 15 PM 12:57
MELANIE HUGGINS EDWARD
CLERK OF COURT

THIS MATTER came to be heard before me on September 22, 2015, upon Appellant's Motion for Emergency Injunction and Stay of Ejectment dated September 17, 2015. Appearing on behalf of Appellant was Robert B. Varnado of Brown & Varnado, LLC; appearing on behalf of the Respondent was Arrigo P. Carotti, Horry County Attorney. In addition to the requests made in its Motion, Appellant alternatively requested at the hearing a stay of proceedings under Rule 62, SCRCP and/or a writ of supersedeas under Rule 241, SCACR. After reviewing this matter and the record as a whole, the submittals of counsel, and upon hearing arguments of counsel and being fully informed, for the reasons set forth below, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT:

Based on the evidence submitted before this court and the arguments of counsel, I find and conclude that:

1. Skydive Myrtle Beach, Inc. (SDMB) currently operates its business from a commercial aircraft hangar owned by Horry County.

2. Horry County brought an ejectment proceeding in Magistrate's Court and the

copy

Magistrate ordered the ejectment of SDMB after a bench trial on July 23, 2014.

3. SDMB appealed the Magistrate's decision to the Circuit Court, and on August 1, 2014, the Magistrate entered a Bond to Stay Execution on Appeal, which provided "execution on the Judgment of Ejectment is hereby stayed until the action is heard on appeal and decided by the Circuit Court."

4. On May 27, 2015, the Circuit Court issued an Order Dismissing Magistrate's Appeal, affirming the decision of the Magistrate.

5. In response to a subsequent Motion filed by Appellant, on July 16, 2015, the Circuit Court issued an Order Denying Appellant's Motion to Reconsider Dismissal of Appeal.

6. By Notice dated August 19, 2015, SDMB filed a Notice of Appeal of the Circuit Court's July 16, 2015 Order to the South Carolina Court of Appeals.

7. Horry County notified SDMB on September 16, 2015 that Horry County would proceed with the ejectment after the expiration of seventy-two (72) hours.

8. SDMB submitted its Motion for Emergency Injunction and Stay of Ejectment to this Court on September 17, 2015.

9. SDMB did not offer any affidavits or testimony to establish that it would suffer irreparable harm, that it has a likelihood of success on the merits, and that it does not have an adequate remedy at law if it is required to relocate its business.

10. Horry County, on the other hand, has presented evidence that it faces substantial risk while SDMB is allowed to continue to operate from property belonging to Horry County, including significant exposure to potential liability due to SDMB's continued misconduct as demonstrated by numerous and ongoing safety incidents threatening persons and property, and possible non-compliance with FAA requirements related to SDMB's continued hazardous activities on and about the property.

CONCLUSIONS OF LAW:

Based on the record herein, I conclude as follows:

1. Under South Carolina law, an injunction is a drastic remedy issued by the court in its discretion to prevent irreparable harm suffered by a party. Scratch Golf Co. v. Dunes W. Residential Golf Props., Inc., 361 S.C. 117, 121, 603 S.E.2d 905, 908 (2004). In order to be entitled to injunctive relief, an applicant must establish three elements: (1) irreparable harm; (2) a likelihood of success on the merits; and (3) absence of an adequate remedy at law. Denman v. City of Columbia, 387 S.C. 131, 140, 691 S.E.2d 465, 470 (2010). In that the Appellant did not establish that it would suffer irreparable harm, that it has a likelihood of success on the merits, and that it does not have an adequate remedy at law, Appellant is not entitled to an injunction preventing its ejectment from the property.

2. The 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.

3. Rule 241(b)(10), SCACR provides that appeals of ejectment proceedings are an exception to the automatic stay granted upon the filing of an appeal from the Circuit Court to the Court of Appeals, and therefore the ejectment is not automatically stayed by virtue of SDMB's appeal to the Court of Appeals.

4. SDMB alternatively requested at the hearing of this matter that the Court issue a writ of supersedeas under Rule 241, SCACR or a stay of proceedings under Rule 62, SCRCP to prevent Horry County from proceeding with ejectment; however, SDMB has not supported such requests with any showing that it would be entitled to such relief. In light of the fact that SDMB has had the benefit of a hearing on the merits and appellate review by the Circuit Court, and that

Horry County has demonstrated that it suffers substantial risk by virtue of SDMB's continuing operations from Horry County property, the Court has determined that it would be inappropriate to grant a stay or writ of supersedeas where the burden to Horry County significantly outweighs any potential damage to SDMB.

IT IS, THEREFORE, ORDERED AS FOLLOWS:

Appellant's Motion for Emergency Injunction and Stay of Ejectment, including the requests for writ of supersedeas and stay of proceedings made at oral argument, is **DENIED**.

IT IS SO ORDERED.

Honorable Larry B. Hyman, Jr., Presiding Judge
Fifteenth Judicial Circuit

Conway, SC

10-13-, 2015

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	CASE NO. 2014-CP-26-4965
SKYDIVE MYRTLE BEACH, INC.,	)	
Appellant,	)	
vs.	)	
HORRY COUNTY,	)	
Respondent.	)	

COPY

HORRY COUNTY
2015 NOV -9 PM 3:19
MELANIE HUGGINS-WARD
CLERK OF COURT

ORDER DENYING PETITION FOR SUPERSEDEAS

THIS MATTER CAME BEFORE the Court on the September 25, 2015 *Verified Petition for Supersedeas Bond to the Horry County Court of Common Pleas* ("Petition") filed by Appellant, Skydive Myrtle Beach, Inc. ("SDMB"). Based upon this Court's Order *Denying Appellant's Motion for Injunction and Stay of Ejectment* of October 13, 2015 (filed October 15, 2015), and having considered the grounds raised by SDMB in the Petition, arguments of counsel at the hearing of September 22, 2015, the memoranda of law submitted by the parties on September 25, 2015, and having reviewed the record and being fully informed,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the Petition should be, and the same is hereby, DENIED.

AND IT IS SO ORDERED.

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

this 4 day of Nov, 2015
at Conway, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF HORRY Skydive Myrtle Beach, Inc., Appellant, v. Horry County Respondent.	)	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT Case No.: 2014-CP-26-04965 **ORDER**

FILED
HORRY COUNTY
15 NOV 24 AM 11:40
[illegible]
CLERK OF COURT

On October 13, 2015, the Honorable Larry B. Hyman, Jr. signed an Order Denying Appellant's Motion for Injunction and Stay of Ejectment in this case. The appellant subsequently filed a Motion to Reconsider, Alter or Amend the Order of October 13, 2015. After reviewing the motion submitted by the appellant and the memorandum in opposition submitted by the respondent, the motion is denied.

IT IS SO ORDERED!

Honorable Larry B. Hyman Jr.

November 19, 2015

Conway, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

SKYDIVE MYRTLE BEACH, INC., Plaintiff(s)

vs.

HORRY COUNTY, HORRY COUNTY DEPARTMENT OF AIRPORTS, et. al. Defendant(s)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2014-CP - 26 - 1193

14 FEB 28 AM 10:20
CLERK OF COURT - HORRY

Submitted By: Robert G. Eastman
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NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (*Check all that apply*)

***If Action is Judgment/Settlement do not complete*

☒ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (*Check One Box Below*)

Contracts
- ☐ Constructions (100)
- ☐ Debt Collection (110)
- ☐ Employment (120)
- ☐ General (130)
- ☐ Breach of Contract (140)
- ☐ Other (199)

Torts - Professional Malpractice
- ☐ Dental Malpractice (200)
- ☐ Legal Malpractice (210)
- ☐ Medical Malpractice (220)
- Previous Notice of Intent Case # 20___-CP-_____-_____
- ☐ Notice/ File Med Mal (230)
- ☐ Other (299)

Torts - Personal Injury
- ☐ Assault/Slander/Libel (300)
- ☐ Conversion (310)
- ☐ Motor Vehicle Accident (320)
- ☐ Premises Liability (330)
- ☐ Products Liability (340)
- ☐ Personal Injury (350)
- ☐ Wrongful Death (360)
- ☐ Other (399)

Real Property
- ☐ Claim & Delivery (400)
- ☐ Condemnation (410)
- ☐ Foreclosure (420)
- ☐ Mechanic's Lien (430)
- ☐ Partition (440)
- ☐ Possession (450)
- ☐ Building Code Violation (460)
- ☐ Other (499)

Inmate Petitions
- ☐ PCR (500)
- ☐ Mandamus (520)
- ☐ Habeas Corpus (530)
- ☐ Other (599)

Administrative Law/Relief
- ☐ Reinstate Drv. License (800)
- ☐ Judicial Review (810)
- ☐ Relief (820)
- ☐ Permanent Injunction (830)
- ☐ Forfeiture-Petition (840)
- ☐ Forfeiture—Consent Order (850)
- ☐ Other (899)

Judgments/Settlements
- ☐ Death Settlement (700)
- ☐ Foreign Judgment (710)
- ☐ Magistrate's Judgment (720)
- ☐ Minor Settlement (730)
- ☐ Transcript Judgment (740)
- ☐ Lis Pendens (750)
- ☐ Transfer of Structured Settlement Payment Rights Application (760)
- ☐ Confession of Judgment (770)
- ☐ Petition for Workers Compensation Settlement Approval (780)
- ☐ Other (799)

Appeals
- ☐ Arbitration (900)
- ☐ Magistrate-Civil (910)
- ☐ Magistrate-Criminal (920)
- ☐ Municipal (930)
- ☐ Probate Court (940)
- ☐ SCDOT (950)
- ☐ Worker's Comp (960)
- ☐ Zoning Board (970)
- ☐ Public Service Comm. (990)
- ☐ Employment Security Comm (991)
- ☐ Other (999)

Special/Complex /Other
- ☐ Environmental (600)
- ☐ Automobile Arb. (610)
- ☐ Medical (620)
- ☐ Other (699)
- ☐ Pharmaceuticals (630)
- ☒ Unfair Trade Practices (640)
- ☐ Out-of State Depositions (650)
- ☐ Motion to Quash Subpoena in an Out-of-County Action (660)
- ☐ Sexual Predator (510)

Submitting Party Signature: Robert G Eastman **Date:** 28FEB2014

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	Case No. 2014-CP - 26 - 1193
SKYDIVE MYRTLE BEACH, INC., (f/k/a Skydive Myrtle Beach, LLC),	)	
Plaintiff,	)	SUMMONS
	)	Jury Trial Demanded
vs.	)	
HORRY COUNTY, HORRY COUNTY DEPARTMENT OF AIRPORTS, H. RANDOLPH HALDI, PAT APONE, TIM JACKSON and JACK TEAL	)	
Defendants.	)	

14 FEB 28 AM 10:20
CLERK OF COURT

TO THE DEFENDANTS ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to Answer the attached Complaint, a copy of which is now served upon you, within thirty (30) days after this service, exclusive of the day of service and the last day if it be a Saturday, Sunday or legal holiday, by serving a copy of your Answer on the Plaintiff or attorney below named at Post Office Box 180, Charleston, South Carolina 29402. You have the right to have an attorney advise you in this matter but you should contact an attorney prior to the expiration of your thirty (30) days to answer.

YOU ARE HEREBY GIVEN NOTICE FURTHER that if you fail to appear and defend and fail to answer the Complaint as required by this Summons within thirty (30) days after the service hereof, exclusive of the day of such service, the Plaintiff will ask for an Order of Default and an Order giving Plaintiff the relief sought in the attached

Complaint. If you fail to answer you may not be given notice of a date and time of the hearing in this matter

DATED this 28th day of FEBRUARY, 2014, at Charleston, South Carolina.

Robert G. Eastman, Esquire
SC Bar No. 75900
Attorney for the Plaintiff
Eastman & Associates, LLC
PO Box 180
Charleston, SC 29402
(843) 329-9657
Fax: (843) 723-0005

Charleston, South Carolina
February 27, 2014

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**FOR THE FIFTEENTH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	**Case No. 2014-CP - 26 - 1193**

SKYDIVE MYRTLE BEACH, INC., (f/k/a Skydive Myrtle Beach, LLC),

Plaintiff,

vs.

HORRY COUNTY, HORRY COUNTY DEPARTMENT OF AIRPORTS, H. RANDOLPH HALDI, PAT APONE, TIM JACKSON and JACK TEAL

Defendants.

COMPLAINT
Jury Trial Demanded

14 FEB 28 AM 10:20
CLERK OF COURT HORRY

COMES NOW, the Plaintiff, **SKYDIVE MYRTLE BEACH, INC.,** complaining of the Defendants, and alleges as follows:

JURISDICTION AND VENUE

1. Plaintiff, Skydive Myrtle Beach, Inc. ("DSMB" or "Plaintiff"), is a corporation organized and existing under the laws of the State of North Carolina and does business in Horry County, South Carolina through its agents, servants and/or employees.

2. Defendant Horry County (Defendant County) is a body politic and political subdivision of the State of South Carolina.

3. Defendant Horry County Department of Airports (Defendant Airport) is a body politic and corporate and political subdivision of the State of South Carolina that owns, manages, and operates property in Horry County, South Carolina.

4. Plaintiff is informed and believes that Defendant, H. Randolph Haldi (Defendant Haldi), is a citizen and resident of Horry County, South Carolina.

5. Plaintiff is informed and believes that Defendant, Pat Apone (Defendant Apone), is a citizen and resident of Horry County, South Carolina.

6. Plaintiff is informed and believes that Defendant, Tim Jackson (Defendant Jackson), is a citizen and resident of Horry County, South Carolina.

7. Plaintiff is informed and believes that Defendant, Jack Teal (Defendant Teal), is a citizen and resident of Horry County, South Carolina.

8. At all relevant times Defendants Haldi, Apone, Jackson and Teal were acting as agents of Defendants County and Airport.

9. Upon information and belief, Defendants Haldi, Apone, Jackson, and Teal are neither minors nor incompetent.

10. That as a direct and proximate result of the conduct of Defendants, the Plaintiffs have sustained substantial compensable losses including certain consequential damages, attorney fees and costs.

11. This Honorable Court has jurisdiction of the parties and the subject matter herein as set forth in S.C. Code Ann. § 36-2-803.

12. Venue is proper in this Honorable Court pursuant to S.C. Code Ann. §§ 15-7-20; 15-7-30.

STATEMENT OF FACTS

13. An at all relevant time, Ramp 66, LLC, (Ramp 66), a South Carolina Limited Liability Corporation, was acting as an agent of the County managing of Grand Strand Airport in North Myrtle Beach (CRE).

14. From April to May 2012 (Preliminary Period), SDMB gained access from Ramp 66 to the Hanger and began to make the hanger accessible for its aircraft and equipment.

15. During the Preliminary Period, SDMB expended over 936 man hours, $1,000.00 in supplies, power washing, clearing animal residue, abandoned parts, rubbish, and other unidentified refuse that had accumulated inside the Hanger from 17 years of nonuse.

16. In or about September 2013, SDMB was issued a citation for violations to the City of North Myrtle Beach fire code, notably, electrical concerns.

17. On or about February 5, 2014, Defendant Jack Teal entered Hanger 7 by force without notice or permission for no reasonable purpose.

18. On or about February 7, 2014, a meeting between SDMB, the Airport, representatives of the Air Traffic Control Tower (ATC) for CRE, and Defendants Jackson and Teal (Resolution Meeting) took place in the FBO Training Room.

19. During the Resolution Meeting, Defendant Jackson represented that he personally ensures he handles all maintenance requests for Airport tenants and that no requests from SDMB had been received.

20. On or about February 17, 2014, SDMB requested repairs to the Hanger via email to Defendant Jackson.

21. On or about February 19, 2014, SDMB together with Defendants Haldi, Apone, and Jackson, *inter alios*, attended a the Regional FAA Safety Day at Myrtle Beach International Airport (MYR),

22. On or about February 19, 2014, Defendant Haldi hand delivered a self-styled "[L]etter of [E]xplanation" and new Space Use Permit.

23. On or about February 19, 2014, Deputy County Attorney tendered a 72 hour eviction notice, *sua sponte* and without justification, to SDMB, if SDMB refused to agree to the new non-negotiable Space Use Permit, stating, "If [SDMB] declines to sign and return this Permit within [72 hours], you will need to vacate the premises immediately, as [the Airport] will change the locks and deny access to the premises as of the close of business on Saturday, February 22[, 2014]. *See* Exhibit 1.

24. On or about February 23, 2014, CRE FBO denied SDMBs initial request for aviation fuel at Defendant Jackson's written instruction. *See* Exhibit 2.

25. On or about February 23, 2014, CRE FBO contacted Defendant Jackson via phone for explanation or reconsideration.

26. On or about February 23, 2014, Defendant Jackson authorized refueling for SDMB. The delay was 30 minutes and disrupted SDMBs operations.

FOR A FIRST CAUSE OF ACTION
AS TO DEFENDANTS COUNTY AND AIRPORT
(Breach of Contract)

27. Plaintiff reincorporates and realleges each of the foregoing allegations as fully as if repeated herein verbatim.

28. On or about April 1, 2012, SDMB entered into an agreement to rent Hanger 7, 2800 Terminal Street, North Myrtle Beach, SC 29582, (Hanger) with Bob McGroarty, Owner, Ramp 66 and Manager CRE, whereby in exchange for 19% of Revenue (less internet sales), 25% of the probable 6,000 square feet hanger was available to SDMB for aircraft storage and business offices. The terms of the agreement were Ramp 66 would provide:

a. One airplane parking in Hanger;

b. Fuel discount;

c. Period of 8 years (the expiration of the Ramp 66/County term (Term)).

In exchange for the above, SDMB would agree to:

a. Non-competition with other business entities on the airport; and

b. Payment of nineteen percent (19%) of its Gross (non-internet) revenue.

29. From May 15, 2012, to August 1, 2013, SDMB and Ramp 66 performed their obligations of the contract without incident.

30. On or about August 1, 2013, the County resumed control of CRE.

31. On or about August 1 2013, Robert Wernersbach, representing the County, initiated discussions relating to a lease between the County and SDMB.

32. Mr. Wernersbach represented to SDMB that $1,500 was required immediately to continue business operations at CRE for a six month "Operating Permit" or SDMB would be removed from CRE premises.

33. SDMB paid the Operating Permit fees to the Airport.

34. In addition to an Operating Permit, Mr. Wernersbach represented to SDMB that an additional $2,500 per month Space Use Permit (Permit) was necessary or SDMB would be required to vacate the Hanger.

35. In or about September 2013, the Airport represented to SDMB that a lease was not possible until the County had "three readings before the County Council and voted upon" (or words to that effect) and the terms of the Permit would in effect become the terms of the longer term lease once approved by the County. In effect the Permit was an interim lease.

36. During the Negotiation Period, SDMB indicated that the condition of the Hanger was unserviceable in many respects, that repairs were needed, and in its current condition, required City/County/State requirements for business activities, i.e., insurance, fire inspection, electrical access, etc. were unobtainable.

37. During the Negotiation Period, the Airport represented to SDMB it would address the flooding, leaking roof, unserviceable doors (security), electrical deficiencies, lighting receptacle defects (2/9 lights functioning), animal and bird infestation, and other public safety issues identified by SDMB in its negotiation meeting.

38. On or about September 5, 2013, an electrical engineer company and Airport Maintenance personnel inspected the Hanger for the purpose of a service order.

39. During the inspection, the Airport indicated that the identified issues would be addressed and presented to the County for authorization to repair and remedy.

40. On or about September 10, 2013, (Negotiation Period), the Airport and SDMB tentatively agreed that in exchange for Hanger 7, SDMB would pay the Airport $1,200 per month.

41. On or about September 10, 2012, Airport acknowledged and accepted SDMBs earlier payments totalling $4,800 for $2,400 security deposit and $2,400 rent through September 30, 2013.

42. On or about September 13, 2013, SDMB executed an undated Space Use Permit whereby SDMB agreed to pay $1,200 per month for the Hanger until the County met its three readings and requested a copy of the fully executed Permit.

43. On or about September 13, 2013, the Airport acknowledged receipt of the SDMB executed agreement and indicated that it needed "a few weeks" to get a copy of the fully executed Permit returned to SDMB.

44. At all relevant times, SDMB has tendered paid a security deposit for $2,400 and $1,200 rent for the Hanger and the Airport has accepted the $1,200 checks, depositing same into its account.

45. At all relevant times, Defendants Airport and County have not answered SDMBs repair requests.

46. At all relevant times, neither the County nor the Airport have made any repairs to the Hanger.

47. At all relevant times, neither the Airport nor the County have presented SDMB with either an executed copy of the original Permit or a long-term Lease.

48. On or about September 2013, SDMB notified Defendants Airport and Jackson of the need for repairs and remedy without reply.

49. In or about September 2013, SDMB after fruitless attempts at remediating the identified fire and safety hazards with the Airport, initiated remedial steps to correct the problem and rectified the hazards.

50. In or about December 2013, SDMB expended $2,000 rectifying the issues identified in the fire report and paid the $215 fine.

51. At all times herein, SDMB reasonably relied on the Airport's assurances that a forthcoming long term-lease containing the essential terms of the Permit (i.e., $1,200/month, electric, parking, etc.), repairs to secure the hanger, electric access, lighting, *inter alia,* and paid its rent in a timely manner.

52. At all times relative herein, Defendant Jackson was an agent of the Airport, the Airport manager in charge of CRE, as well as the point of contact between the Airport and SDMB.

53. A contract for a leasehold interest exists through the actions of the parties, SDMBs occupations, repair, and use of Hanger 7, and the Airport's acceptance of rent and the County and Airport are estopped from denying a Lease exists.

54. Defendants County, Airport, and Haldi's actions amounted to a retaliatory eviction notice.

55. Defendants County, Airport, Apone, and Jackson's refusal to respond to SDMBs reasonable maintenance requests and other correspondence, are a breach of the duty to act in good faith while performing public duties and are a breach of material terms.

56. Defendants Airport and Jackson's refusal to make repairs to the hanger or allow SDMB to make repairs violate the implied duty of fair dealing.

57. Defendant Teal's unauthorized entry served no reasonable purpose as electrical outlets were easily accessible in the vacant adjoining hanger, less than 50 feet away, and the Defendant Teal and the Airport have unfettered access (the adjacent hanger is vacant and secured by an Airport lock its hanger door).

58. Defendant County, Airport, Haldi, Jackson's conduct, and actions are in breach of an implied agreement through course of conduct, the executed Permit, or both.

59. Defendants County, Airport, Haldi, Apone, Jackson, and Teal's breaches have damaged SDMB financially and operationally.

FOR A SECOND CAUSE OF ACTION
AS TO DEFENDANTS COUNTY AND AIRPORT
(Breach of Contract Accompanied by Fraudulent Act)

60. Plaintiff reincorporates and realleges each of the foregoing allegations as fully as if repeated herein verbatim.

61. Defendant Airport and SDMB entered into an Agreement on or about September 13, 2013, where the Airport would present the terms of a Space Use Permit to the County for three readings, bring back a long-term lease with similar terms, negotiate a new Letter of Agreement for Non-emergency parachute operations at CRE, make or allow repairs to the Hanger in exchange for SDMBs execution of a short term "Space Use Permit", $2,400 security deposit and $1,200 per month rent.

62. On information and belief, Defendants Airport, Apone, and Jackson intentionally, recklessly, and knowingly misrepresented the procedures for leasing Airport property.

63. On information and belief, Defendants Airport, Apone, and Jackson accepted SDMBs rent payments for the month of January, and February 2014.

64. Defendants represented to SDMB that a lease would be forthcoming.

65. Defendants continued failure to respond to SDMB multiple requests combined with its attempt to enforce regulations under the exclusive domain of the FAA as cover, failure to accept mail, respond to SDMBs allegations, or make any investigation constitute dishonesty in fact and unfair dealing.

66. Defendant's fraudulent acts occurred prior to, during and after the Permit period and breach of contract set forth herein.

FOR A THIRD CAUSE OF ACTION
AS TO DEFENDANTS COUNTY AND AIRPORT, HALDI, APONE, AND JACKSON
(Breach of Fiduciary Duty)

67. Plaintiff reincorporates and realleges each of the foregoing allegations as fully as if repeated herein verbatim.

68. SDMB and Airport entered into a fiduciary relationship whereby the Airport in consideration for a temporary Space Use Permit, the Airport would act as a Broker with the County and secure a long term lease for SDMB.

69. SDMB reasonably relied on the representations of the Airport and Defendant Jackson that a deal with the county would be brokered.

70. Defendants Apone and Jackson are public servants and employees of the Airport, which accepts federal grant monies from the Department of Transportation and FAA.

71. Public official reposes special confidence in another so that the latter, in equity and good conscious, is bound to act in good faith with due regard to the interests of one reposing the confidence.

72. As a fiduciary, the Airport and its agents induced the confidence placed in it by SDMB.

73. The continued combined actions and inactions by Defendants County, Airport, Haldi, Apone, Jackson, and Teal, are a breach of fiduciary duty to be fair, reasonable, negotiate in good faith, and deal honestly with SDMB.

FOR A FOURTH CAUSE OF ACTION
AS TO DEFENDANTS COUNTY, AIRPORT, HALDI, APONE, JACKSON, AND TEAL
(Civil Conspiracy)

74. Plaintiff reincorporates and realleges each of the foregoing allegations as fully as if repeated herein verbatim.

75. At all relevant times herein, Defendant Haldi acted as an agent of the County as its Property Manager.

76. At all relevant times herein, Defendant's Apone, Jackson, and Teal operated as agents of the Airport.

77. Upon information and belief, Defendants Haldi, Apone, Jackson, and Teal collectively acted to remove SDMB from CRE and interfere with its legitimate right to conduct aeronautical activities.

78. Defendants Jackson and Teal directly interfered with SDMBs parcel and mail delivery. Defendant Jackson left directions with his employees not to receive any parcels for Plaintiff; Defendant Teal received packages and locked them in a closet without informing Plaintiff, in effect wrongfully concealing them from Plaintiff.

79. The acts complained of herein satisfy the requisite "proof showing concert of action from which the natural or reasonable inferences arise that the acts were in furtherance of the common design of the alleged conspirators, is sufficient; at least to establish a *prima facie* case of conspiracy." *See Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 344 S.E. 2d 150, 153 (Ct.App. 1987).

80. The combined acts of Defendants County, Airport, Haldi, Apone, Jackson and Teal, including, *inter* alia, failure to answer SDMBs repeated multiple requests for repair, to permit repairs, to answer correspondence or email, concealment of packages and mail, failure to disclose the terms of the Letter of Agreement (LOA) between CRE ACT and the Airport, unauthorized entry into its place of business, refusal to refuel without clearance (unlike other business on site), interference with parking and dat to day activities were designed to ruin or damage the business of SDMB.

81. SDMBs business was closed to repair/inspect plane following unauthorized entry, equipment damage, loss of customers due to fuel issues, loss of business profit, fire department violations, wiring the hanger with electric, repairing doors, removing trash, water damage, etc. have resulted in Defendants combined malicious actions and omissions under cloak of state authority.

FOR A FIFTH CAUSE OF ACTION
AS TO DEFENDANTS COUNTY, AIRPORT, HALDI, APONE, AND JACKSON
(Constructive Fraud)

82. Plaintiff reincorporates and realleges each of the foregoing allegations as fully as if repeated herein verbatim.

83. Airport agents and Defendant Jackson misrepresented that three readings before the County council are required to secure a lease.

84. County Property Attorney and Defendant Haldi make no reference to this need in its letter as this is not a condition precedent to a lease with the County.

85. Defendant Jackson as Defendant Airport's manager, knew or ought to have known of the falsity.

86. This representation was material and played a role in SDMBs negotiations and agreement.

87. Defendants Airport and Jackson intended that the representation be acted upon.

88. SDMB had no knowledge or was ignorant of the falsity of this representation as it had never conducted business with Defendants prior to the allegations set forth herein.

89. SDMB reasonably relied on these representations as the truth.

90. SDMB had a right to rely upon a state politic organization operating under federal, state, and county charter to provide accurate, truthful statements with regard to leasing policies and procedures.

91. Together the acts of the Defendants have caused consequent and proximate injury to SDMBs business interests, its ability to lawfully operate, and conduct federally recognized aeronautical activities at an airport in receipt of federal grant block funding.

FOR A SIXTH CAUSE OF ACTION
AS TO DEFENDANTS COUNTY, AIRPORT, AND JACKSON
(Defamation)

92. Plaintiff reincorporates and realleges each of the foregoing allegations as fully as if repeated herein verbatim.

93. Defendant Jackson has intentionally and with reckless disregard to its falsity, informed other tenant businesses in both Myrtle Beach International (MYR) and Grand Strand Regional (CRE) airports false statements that were intended to impeach the honesty, integrity, virtue, or reputation, that exposed SDMB to public hatred, contempt, ridicule or to cause him to be shunned or avoided, or to injure SDMB in its office, business, or occupation.

94. On multiple times, Defendant Jackson did state:

a. that SDMB violates federal rules, regulations and statutes in wanton disregard, or words to that effect;

b. SDMB has been so egregious with regard to parking and Airport security measures, new parking prohibitions and security measures are necessary for the entire Airport jurisdiction, or words to that effect;

c. SDMB is a rogue operator that does not follow any rules relating to the ATC operations at CRE, or words to that effect; and

d. SDMB illegally conducts parachute operations, or words to that effect.

95. Defendant published these statements with actual or implied malice, knowing that they were false.

96. The statements themselves or the intent of the statements or words to that effect, concerns SDMB and its business interest.

FOR A SEVENTH CAUSE OF ACTION
AS TO DEFENDANTS COUNTY, AIRPORT, AND JACKSON
(Fraud and Misrepresentation)

97. Plaintiff reincorporates and realleges each of the foregoing allegations as fully as if repeated herein verbatim.

98. Defendant's Airport and Jackson represented to SDMB that a lease and repairs require county approval with three readings at the council meetings.

99. Defendants Airport and Jackson knew that statement was false or acted with reckless disregard for the truth intending that SDMB would be in a weaker bargaining position as a result.

100. SDMB did not know of the falsity, reasonably relied on the truth that a government organization would conduct itself properly and has been injured by this conduct.

FOR AN EIGHTH CAUSE OF ACTION
AS TO DEFENDANTS COUNTY, AIRPORT, HALDI, APONE, JACKSON AND TEAL
(Interference with Contractual Relationship)

101. Plaintiff reincorporates and realleges each of the foregoing allegations as fully as if repeated herein verbatim.

102. Defendants County, Airport, Haldi, Jackson, and Teal know about the Letter of Agreement (LOA) between MYR ATC, CRE ATC, SDMB, and the Airport for parachute operations and the Permit.

103. Defendant's County, Airport, Haldi, Apone, Jackson, and Teal are additionally aware of a LOA between Robinson Aviation, LLC d/b/a CRE ATC and the Airport (CRELOA) concerning and providing for exclusive jurisdiction of defined "Active Areas" of CRE airport.

104. Defendants County, Airport, Haldi, Apone, Jackson, and Teal did willfully, wantonly or with reckless disregard to the adverse impact of SDMB, conceal the terms of the CRELOA from SDMB in breach of the LOA terms.

105. Defendants' acts were intentional and effectively procured an unknowing breach of the Permit by SDMB, in that SDMB did not follow unpublished CRE protocol although at no time did SDMB violate any published Federal Regulation under Title 14.

106. There is no justification for Defendant's conduct; this appears designed in furtherance of a well-orchestrated plan to have SDMB removed from the CRE and Airport property.

107. This conduct has severely limited SDMB ability to safely operate at CRE, effectively blocked communication with the Airport, prevented SDMB from obtaining a lease, and caused damage to it pecuniary business interests.

FOR A NINTH CAUSE OF ACTION
AS TO DEFENDANTS COUNTY, AIRPORT, HALDI, APONE, AND JACKSON
(Negligence)

108. Plaintiff reincorporates and realleges each of the foregoing allegations as fully as if repeated herein verbatim.

109. As body politics, Defendants County and Airport owe a duty not to permit tortious conduct under the color of state authority from its administrators, management, executive, and staff employees to the public in general and SDMB in particular.

110. Defendants County, Airport, Apone, and Jackson violated this duty of care owed to SDMB by County, Airport, in that:

a. County Deputy Attorney/Property Manager attempted to interfere with SDMB legitimate right to conduct business on CRE and effectively coerce SDMB into executing a predatory lease within a 72 hour time frame; and

b. Airport Manager misconduct, includes but is not limited to: directly ordered SDMB mail and parcel delivery to be returned to sender, secretly stored in Airport property, failed to answer legitimate maintenance requests, slanderously spoke about SDMB conduct, interfered with SDMB business by limiting public access, refused to provide for published Airport Rules or Regulations, instructed line staff to illegally enter SDMBs business for no reasonable purpose.

111. Defendants County, Airport, Apone and Jackson actions and inactions and were a breach of its duty to properly supervise subordinates.

112. Defendants breach caused SDMB pecuniary loss, loss of good will, customers, caused additional expense for necessary inspections, and prevented the reasonable expectation of mail and parcel delivery at a leased commercial unit.

FOR A TENTH CAUSE OF ACTION
AS TO DEFENDANTS COUNTY, AIRPORT, HALDI, APONE, AND JACKSON
(Negligent Misrepresentation)

113. Plaintiff reincorporates and realleges each of the foregoing allegations as fully as if repeated herein verbatim.

114. Defendant Jackson falsely represented to SDMB that three readings of the terms in the Permit would be a necessary condition precedent of a long term lease to induce SDMB into accepting the Permit terms.

115. False representations by Property Manager echoing those of Airport manager and that the County will not negotiate a lease until SDMB executes a new nonnegotiable terms in order to increase the revenue to 24% of SDMBs gross receipts.

116. That Defendants County, Airport, Haldi, Apone, and Jackson unilaterally attempted to increase the revenue generated by the Hanger in bad faith.

117. Defendants County, Airport, Haldi, Apone, and Jackson possess special information and expertise with regard to letting County and Airport property and it was reasonable for SDMB to rely on the County and Airport officials with regard to County and Airport renting procedures.

118. Defendants County, Airport, Haldi, Apone, and Jackson, as state officials, had a duty or truthfulness and fair dealing owed to SDMB in all business transactions.

119. Defendants breached the duties of truthfulness and fair dealing by failing to exercise due care by concealing or distorting the procedures or steps necessary to secure a lease of Airport property.

120. SDMB justifiably relied on these representations and has suffered pecuniary loss as a direct and proximate result of reliance on these representations.

FOR AN ELEVENTH CAUSE OF ACTION
AS TO DEFENDANTS COUNTY, AIRPORT, APONE AND JACKSON
(Negligent Supervision)

121. Plaintiff reincorporates and realleges each of the foregoing allegations as fully as if repeated herein verbatim.

122. Defendant Teal intentionally entered SDMB business premises and caused the Hanger doors to be injured, made unpermitted electric use, and caused a shutdown SDMBs business, as unauthorized access to skydiving equipment requires full re inspection of al parachutes in the Hanger.

123. Defendant Jackson has harmed SDMB by slanderously publishing false statements about SDMB.

124. Defendants Airport, Apone, and Jackson each knew or had reason to know of the ability to control the Defendants Jackson and Teal.

125. Defendant Teal admitted that the unauthorized conduct had been done in the past. Defendant Jackson was also aware of this.

126. Defendant Airport and County should have known unsupervised activity could cause harm to SDMB.

FOR A TWELFTH CAUSE OF ACTION
AS TO DEFENDANTS COUNTY AND AIRPORT
(Promissory Estoppel)

127. Plaintiff reincorporates and realleges each of the foregoing allegations as fully as if repeated herein verbatim.

128. Defendant Airport, through its agent, and Defendant County, through its Property Manager, promised to enter into a long term lease with SDMB. The promise was unambiguous in its terms.

129. SDMB reasonably relied on this promise.

130. SDMB reliance was expected and foreseeable by the County and Airport (party that made the promise).

131. SDMB did not pursue other opportunities for alternate accomodations at CRE for its business based on these representations and spent considerable amounts of money and time repairing the unit.

132. SDMB has been financially injured as a result of its reasonable reliance on the promises of Defendants.

FOR THE THIRTEENTH CAUSE OF ACTION
AS TO DEFENDANTS COUNTY AND AIRPORT
(Quantum Meruit)

133. Plaintiff reincorporates and realleges each of the foregoing allegations as fully as if repeated herein verbatim.

134. Plaintiff has spent a considerable amount of time and money repairing Hanger 7, and has conferred a substantial benefit upon Defendant Airport.

135. Realization of that benefit by the defendant is evidences by virture of an unserviceable hanger, vacant for 17 years and without value, now generating monthly rent.

136. Retention by the Defendant Airport of the benefit under conditions that make it unjust to retain it without paying its value given the fact that repairs were required to bring the premises up to code.

FOR THE FOURTEENTH CAUSE OF ACTION
AS TO DEFENDANTS COUNTY, AIRPORT, APONE, JACKSON, AND TEAL
(Trespass)

137. Plaintiff reincorporates and realleges each of the foregoing allegations as fully as if repeated herein verbatim.

138. Plaintiff has been in legal possession of Hanger 7 since May 2012, paid all rent monies timely, attempted to negotiate a lease in good faith and Defendant Airport, has at all times cashed SDMBs prepaid rent payments before the expiration of the month.

139. On or about February 5, 2012, Defendant Teal voluntarily and without permission, entered SDMBs business location in Hanger 7

140. Unauthorized access required SDMB to inspect all gear and equipment, and shut down operations for a business day.

FOR THE FIFTEENTH CAUSE OF ACTION
AS TO DEFENDANTS COUNTY, AIRPORT, HALDI, APONE, JACKSON, AND TEAL
(Unfair Trade Practice Act Violation)

141. Plaintiff reincorporates and realleges each of the foregoing allegations as fully as if repeated herein verbatim.

142. Defendants County, Airport, Haldi, Apone, Jackson, and Teal violated the South Carolina Unfair Trade Practice Act by offending established public policy of government to operate openly with published rules and policies, equal treatment, and with conduct that offends established public policy and is immoral, unethical, oppressive, unscrupulous, or substantially injurious to customers.

143. The actions identified in this Complaint proximately caused injury and damages to the Plaintiff.

WHEREFORE, Plaintiffs pray that this Honorable Court grant them judgment as follows:

a. For the First Cause of Action against Defendants, jointly and severally, for all actual damages incurred by Plaintiff, for the reasonable value of the labor, materials and equipment furnished by Plaintiff, and certain consequential damages as actual damages and reasonable attorney fees and costs of this action;

b. For the Second Cause of Action against Defendants, jointly and severally, for all actual damages incurred by Plaintiff, for the reasonable value of the labor, materials and equipment furnished by Plaintiff, and certain consequential damages as actual damages, attorney fees and costs of this action;

c. For the Third Cause of Action against Defendants, jointly and severally, for all actual damages incurred by Plaintiff, for the reasonable value of the labor, materials and equipment furnished by Plaintiff, and certain consequential damages as actual damages, attorney fees and costs of this action;

d. For the Fourth Cause of Action against Defendants, jointly and severally, for all actual damages incurred by Plaintiff, for the reasonable value of the labor, materials and equipment furnished by Plaintiff, and certain consequential damages as actual

damages, attorney fees and costs of this action and punitive damages as the jury may award;

e. For the Fifth Cause of Action against Defendants, jointly and severally, for all actual damages incurred by Plaintiff, for the reasonable value of the labor, materials and equipment furnished by Plaintiff, and certain consequential damages as actual damages, attorney fees and costs of this action;

f. For the Sixth Cause of Action against Defendants, jointly and severally, for all actual damages incurred by Plaintiff, for the reasonable value of the labor, materials and equipment furnished by Plaintiff, and certain consequential damages as actual damages, attorney fees and costs of this action and punitive damages as the jury may determine;

g. For the Seventh Cause of Action against Defendants, jointly and severally, for all actual damages incurred by Plaintiff, for the reasonable value of the labor, materials and equipment furnished by Plaintiff, and certain consequential damages as actual damages, attorney fees and costs of this action;

h. For the Eighth Cause of Action against Defendants, jointly and severally, for all actual damages incurred by Plaintiff, for the reasonable value of the labor, materials and equipment furnished by Plaintiff, and certain consequential damages as actual damages, attorney fees and costs of this action;

i. For the Ninth Cause of Action against Defendants, jointly and severally, for all actual damages incurred by Plaintiff, for the reasonable value of the labor, materials and equipment furnished by Plaintiff, and certain consequential damages as actual damages, attorney fees and costs of this action;

j. For the Tenth Cause of Action against Defendants, jointly and severally, for all actual damages incurred by Plaintiff, for the reasonable value of the labor, materials and equipment furnished by Plaintiff, and certain consequential damages as actual damages, attorney fees and costs of this action;

k. For the Eleventh Cause of Action against Defendants, jointly and severally, for all actual damages incurred by Plaintiff, for the reasonable value of the labor, materials and equipment furnished by Plaintiff, and certain consequential damages as actual damages, attorney fees and costs of this action;

l. For the Twelfth Cause of Action against Defendants, jointly and severally, for all actual damages incurred by Plaintiff, for the reasonable value of the labor, materials and equipment furnished by Plaintiff, and certain consequential damages as actual damages, attorney fees and costs of this action;

m. For the Thirteenth Cause of Action against Defendants, jointly and severally, for all actual damages incurred by Plaintiff, for the reasonable value of the labor, materials and equipment furnished by Plaintiff, and certain consequential damages as actual damages, attorney fees and costs of this action;

materials and equipment furnished by Plaintiff, and certain consequential damages as actual damages, attorney fees and costs of this action;

n. For the Fourteenth Cause of Action against Defendants, jointly and severally, for all actual damages incurred by Plaintiff, for the reasonable value of the labor, materials and equipment furnished by Plaintiff, and certain consequential damages as actual damages, attorney fees and costs of this action;

o. For the Fifteenth Cause of Action against Defendants, jointly and severally, for all actual damages incurred by Plaintiff, for the reasonable value of the labor, materials and equipment furnished by Plaintiff, and certain consequential damages as actual damages, treble damages, and attorney fees and costs of this action;

p. That the Defendants be enjoined and restrained from future tortious interference with SDMBs legitimate right to conduct non-emergency parachute operations;

q. That the a Writ of Mandamus issue against Defendant Airport requiring it to negotiate in good faith the reasonable terms of a renewal CRE LOA with SDMB, Jacksonville, FL ATC (ZIX), MYR ATC, and CRE ATC as required by applicable federal regulations in order for SDMB to continue its aeronautical activity as defined by federal regulations;

r. That Defendants properly outfit, maintain, and repair the subject Hanger;

s. That the costs of this action be taxed against Defendants;

t. That pre- and post-judgment interest at the legally applicable rate be awarded Plaintiff;

u. For any such other and further relief as may be just and proper;

RESPECTFULLY SUBMITTED

Robert G. Eastman, Esquire
SC Bar No. 75900
Attorney for the Plaintiff
Eastman & Associates, LLC
PO Box 180
Charleston, SC 29402
(843) 329-9657
Fax: (843) 723-0005

Charleston, South Carolina
February 27, 2014

Exhibit 1

HORRY COUNTY
ATTORNEY'S OFFICE

H. Randolph Haldi
Deputy County Attorney/
Property Manager
1301 Second Avenue
Conway, South Carolina 29526
HaldiR@HorryCounty.org

Horry County
SOUTH CAROLINA
Committed to Excellence

Post Office Box 1236
Conway, South Carolina
29528-1236

Phone: (843) 915-5270
Fax: (843) 915-6270

Via Hand Delivery, First Class Mail, and Email transmission:
Aaron Holly: aholly@me.com
Robert G. Eastman: robertgeastman@msn.com
Skydive Myrtle Beach: mbskydiving@aol.com

February 19, 2014

Skydive Myrtle Beach, LLC
Attn: Mr. Aaron S. Holly
P.O. Box 2478
Wilmington, NC 28402

Re: Space Use Permit
Grand Strand Airport

Dear Mr. Holly,

This Office has recently been made aware of serious issues that have arisen regarding your business operations at Grand Strand Airport (CRE), causing several violations of the Space Use Permit dated September 13, 2013, which will be more fully addressed below. However, that Space Use Permit itself expired on January 31, 2014, and as such, you are currently occupying County property without any right or authorization.

As indicated above, during just the course of the prior Space Use Permit, Skydive Myrtle Beach has engaged in a pattern of incidents raising significant concerns as to the advisability of continuing to allow Skydive Myrtle Beach the use of County facilities, including:

- Weekend of October 18, 2013—Skydive Myrtle Beach hosted a poorly-controlled large crowd event, where numerous vehicles were parked inside the security fence and which event included food sales and alcohol consumption on County property;
- Weekend of October 18, 2013—motor home observed parked overnight inside the security fence adjacent to hangar used by Skydive Myrtle Beach;
- October 20, 2013—skydiver landed on taxiway, requiring medical assistance and emergency transport;

- October 21, 2013—tower reports to Horry County Department of Airports (HCDA) that over the weekend there were two "uncertified" night jumps, two jumps through clouds, and a jumper landing in the Barefoot Resort area that necessitated dispatch of emergency responders;

- October 27, 2013—HCDA informed that Aaron Holly improperly questioned tower protocol on an open ATCT frequency;

- November 13, 2013—incursion onto active runway when jumper who missed landing zone walked across runway, requiring FAA reporting and investigation;

- November 27, 2013—HCDA sends certified letter to Skydive Myrtle Beach to address issues regarding Skydive Myrtle Beach staff residing in hangar overnight and unrestrained dog seen repeatedly in ramp area, hangar space, and FBO building;

- December 23, 2013—tower informs HCDA that in a recent jump of 14 total jumpers, 11 ended up well outside the landing zone, with jumpers landing on various parts of the runway, taxiways, and Highway 31;

- January 20, 2014—tower informs HCDA that in a recent jump of 10 total jumpers, 4 ended up well outside the landing zone, with jumpers landing on various parts of the runway, taxiways, and the Barefoot golf course;

- January 20, 2014—tower informs HCDA that a GA aircraft was recently forced to make a 360-degree turn on short final approach after an errant skydiver flew over the runway;

- January 26, 2014—incursion onto active runway when Skydive Myrtle Beach personnel drive vehicle across runway without contacting the tower, requiring FAA reporting and investigation;

- February 9, 2014—HCDA personnel witness operation of two large propane grills in hangar and the sale of food for public consumption;

- Ongoing—HCDA personnel informed of jumps from helicopters with landings on public beach areas, in violation of designated landing zone and other terms set out in existing Letter of Agreement;

- Ongoing—continued bypassing of HCDA safety protocol by allowing unauthorized vehicles access to the airfield inside the security fence;

- Ongoing—violation of terms of the Space Use Agreement by making unauthorized modifications to the premises, including the installation of unapproved interior and exterior signage, removing electrical conduit from inside the hangar, installing unapproved flexible conduit and electrical outlets within the hangar, and other unauthorized and unapproved modifications to the premises.

This Office is also in receipt of a North Myrtle Beach Police Crime Report, dated February 7, 2014, the subject matter being stated as "Burglary/2800 Terminal St Hangar 7/Skydive Myrtle Beach," and detailing two alleged offenses – Burglary Third Degree and Utilities/Theft of electric current. We are also in receipt of an email from Robert G. Eastman, in which the following is stated, "...Mr. Jack Teal entered SDMB Hanger 7 without notice or authorization in effect committing criminal trespass. As indicated in the meeting the police would be contacted for insurance purposes....[A] Notice of Trespass

citation will be issued next week and any further unauthorized trespass's will be prosecuted and result in a trespass and burglary charge."

As indicated above, the prior Space Use Permit expired on January 31, 2014 and thus, at the time of the alleged burglary/trespass, Skydive Myrtle Beach was occupying Hangar 7 without any right or authorization. Even under the previous Space Use Permit, which provides a mere license to the user, the County retained the right to enter the Space (County-owned property) at any time for any reasonable purpose. The previous Space Use Permit also provided a fixed charge for electricity of $100.00 per month, regardless of usage, a utility in the name of, and paid by, the County. As you are aware, the complained entry was made to facilitate work being performed adjacent to the Hangar and undertaken to accommodate a request made by Skydive Myrtle Beach. Under these circumstances, the allegations made with respect to the Police Crime Report are untrue and baseless, and the assertions made by Mr. Eastman with respect to the allegations of criminal trespass represent either a misunderstanding or misuse of criminal law.

In light of the foregoing, Horry County is unwilling to offer Skydive Myrtle Beach a leasehold interest in the CRE hangar facility at this time. As an alternative, Horry County is willing to enter into a new, short term Space Use Permit, with the understanding that a violation of any of the terms contained in such Space Use Permit will result in Skydive Myrtle Beach being required to vacate the premises after 24-hour notice. Please understand that the new Space Use Permit will require:

- All jumps will be made in compliance with that Letter of Agreement between HCDA, Myrtle Beach ATCT, Strand FCT ATCT, and Skydive Myrtle Beach dated 5/11/12, and any subsequent amendments thereto as agreed to in writing by all parties;
- No unauthorized vehicles will be permitted inside the security fence;
- No overnight occupancy of any space subject to the agreement is permitted;
- Skydive Myrtle Beach will provide at least 10 days notice to HCDA of any events planned in which a crowd of more than 25 people would reasonably be expected;
- No outside vendors will be allowed without consent of HCDA, and will be subject to any restrictions or location requirements HCDA deems appropriate;
- No flammable substances permitted in any space subject to the agreement, including but not limited to, propane grills and alcohol;
- No modifications will be made to the space, and any modifications previously made without authorization or approval of HCDA will be removed and the premises returned to their condition prior to the modification;
- Fees for use of the space will be $1,200.00/month or 24% of gross revenues, whichever is greater; and
- Any breach of the agreement by Skydive Myrtle Beach will provide grounds for immediate termination and Skydive Myrtle Beach will vacate the premises within 24 hours after being provided written notice of such termination.

These terms are non-negotiable, and a copy of the new Space Use Permit is enclosed for your review and acceptance. If Skydive Myrtle Beach agrees to abide by these terms and there are no further incidents during the term of the agreement, the County will re-visit the potential to enter into a lease agreement with Skydive Myrtle Beach prior to expiration of the new Space Use Permit this summer. In

light of the fact that Skydive Myrtle Beach is currently occupying County property without authorization, the new Space Use Permit must be signed and returned to HCDA within 72 hours from the time it is delivered. If Skydive Myrtle Beach declines to sign and return this Permit within the time set forth, you will need to vacate the premises immediately, as HCDA will change the locks and deny access to the premises as of the close of business on Saturday, February 22.

We certainly hope to be able to maintain an on-going relationship with your skydiving operation, as we believe that such a properly conforming business is a welcome and beneficial use of the County's Grand Strand Airport. We also understand that based upon recent measures on your part, you have attempted to address and correct some conditions that have led to certain of these prior incidents at the airport. The County is appreciative of these efforts, but requires your full commitment in order to continue to allow Skydive Myrtle Beach the use of County-owned property.

Sincerely,

H. Randolph Haldi

Encl.

Cc: Chris Eldridge, Horry County Administrator
Arrigo Carotti, Horry County Attorney
Pat Apone, Horry County Director of Airports

GRAND STRAND AIRPORT
SPACE USE PERMIT

THIS SPACE USE PERMIT ("Permit") is made and entered into as of the ____ day of _____ 2014, by and between HORRY COUNTY, SOUTH CAROLINA, ACTING BY AND THROUGH ITS DEPARTMENT OF AIRPORTS ("County") and SKYDIVE MYRTLE BEACH, LLC ("Company"), a business entity formed and existing under the laws of the State of South Carolina, and authorized to do business in Horry County, South Carolina.

WITNESSETH

WHEREAS, County is the operator of the Grand Strand Airport ("Airport" or "CRE"); and

WHEREAS, Company desires to occupy and use space in Hangar #7 located on Grand Strand Airport property, to conduct its "Skydiving and Non-Emergency Parachute Operation" business; and

WHEREAS, County is willing to permit Company to occupy and use space in Hangar #7 at Grand Strand Airport, subject to the restrictions and terms provided herein:

NOW, THEREFORE, County and Company agree as follows:

1. Space Use. County hereby permits Company to occupy and use space in Hangar #7 consisting of 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 February 1, 2014, and it shall continue in force and effect until July 31, 2014, but no longer than, six (6) months from the date of commencement unless otherwise earlier terminated. Prior to actual physical occupancy of Space by Company, either party may terminate this Permit for any reason upon the giving at least five (5) days written notice to the other party. After actual physical occupancy of the Space by Company, either party may terminate this Permit for any reason by giving at least thirty (30) days written notice to the other party. Any act of default hereunder, including without limitation failure to pay fees when due, shall terminate any right, license or permission for use of Space immediately upon event of default, and Company will vacate the premises within 24 hours after receiving written notice of such default. This Permit shall not be renewed or extended, nor shall another such Permit be entered into between the same parties within twelve (12) months from the date of expiration of this Permit, without prior approval of Horry County Council.

3. Use. During the term hereof, Company shall occupy and use Space permitted by County solely in connection with its "Skydiving and Non-Emergency Parachute Operation" business at the Grand Strand Airport to the extent permitted by and fully in compliance with all applicable rules, regulations, and requirements of any Federal, State, City or County

regulatory agency having jurisdiction over the Company's operations, subject to all terms and conditions of this agreement. All skydiving operations will be made in compliance with that Letter of Agreement between the Horry County Department of Airports, Myrtle Beach ATCT, Strand FCT ATCT, and Skydive Myrtle Beach dated 5/11/12, and any subsequent amendments thereto, as agreed to in writing by all parties. Company's employees and customers will have reasonable access to and from and the right to use and occupy Space for the sole purpose of engaging in or furthering Company's business. Company's employees must be well groomed and neat in appearance at all times. The Director of Airports must approve all signs and displays to be erected on the Space. Company shall fully comply with all safety and security policies/directives as established by the Airport.

RESTRICTIONS/LIMITATIONS:

Only vehicles operated by staff members based at CRE and are employed *directly* for the Company and have been approved by the Director of Airports are permitted to park on the interior of the security fence (i.e. on the ramp). Company is limited to two (2) employee vehicles on Airport Property at one time and must park adjacent to the Space described in this Agreement.

Company will notify Horry County Department of Airports at least ten (10) days in advance of any events that could reasonably be expected to draw a crowd of more than twenty-five (25) people, and such events must be approved by the County Administrator or Director of Airports. Non-disclosure of any such planned event is a breach of this Agreement.

Overnight occupancy of any space described in this Agreement is strictly prohibited and will be considered an immediate violation of the Agreement.

No outside vendors will be allowed on Horry County property without the consent of the Horry County Department of Airports, and any allowed vendors will be subject to any restrictions, requirements, or locations that Horry County Department of Airports deems appropriate.

No flammable substances are permitted in any space subject to this Agreement, including but not limited to, propane grills and alcohol.

Company will not alter any portion of the Space, and any modifications previously made without authorization or approval of the Horry County Department of Airports will be removed and the premises returned to their condition prior to such modification. Any fees for repair of unapproved modifications or alterations will be the responsibility of the Company.

Company will abide by all HCDA rules, policies, and procedures for Grand Strand Airport (CRE), as may be adopted or amended from time to time.

4. **Fee; Default Interest; Late Payment; Security Deposit.**

A. Fee. As the Fee for occupancy and use of the Space, Company shall pay County monthly payments of One Thousand Two Hundred and No/100 dollars ($1,200.00) per month. Company shall pay said amounts without set-off or deduction, in advance and without demand on or before the first day of each month during the term hereof. In the event this Permit commences or terminates on other than the last day of any particular month, the Fee shall be prorated. County reserves the right to adjust such rate from time to time upon thirty (30) days written notice to the Company.

B. Gross Sales Percentage Fee. For each month during the term hereof and in addition to the monthly base occupancy and use of the Space fee, Company shall pay County, as additional fee, a monthly adjustment amount which shall be the difference, if any, between the monthly occupancy and use of the Space base fee to be paid during said month and twenty-four (24%) percent of the gross sales during each such occupancy month, whichever is greater.

Gross sales include, without limitation, the gross selling price of all merchandise, services, concessions, or privileges that occur in whole or in part, on the Space, or as a result of activities on or associated with the Space, during the term of this Permit including the gross charges of all services to customers or patrons performed by Company or any other person, entity, firm or corporation, in, upon, or through any part of the Space during the term of this Permit and all sales/services that are subject to the South Carolina amusement, sales, use or excise tax set forth in Title 12 of the South Carolina Code of Laws, 1976, as amended. Notwithstanding anything herein to the contrary, gross sales shall not include the amount of any amusement, sales, use or excise taxes paid by Company during such term of this Permit.

C. Payment of Fee and Gross Sales Percentage Fee. The Fee shall be paid in aid amounts without set-off or deduction, in advance and without demand on or before the first day of each month during the term hereof from and after the Commencement Date. The Gross Sales Percentage Fee, if due, shall be paid within ten (10) days of each month following a calendar month occurring from and after the Commencement Date through the expiration or termination of this Agreement, at which time Lessee shall provide Lessor, without demand, a statement of Gross Receipts for the prior calendar month together with the amount, if any, by which the Gross Sales Percentage Fee due for the previous calendar year exceeds the Fee.

D. Default Interest. If Company shall default in its payment of Fees or other charges required to be paid pursuant to this Permit, such unpaid amounts shall bear interest from the date of default at the rate of 1 ½ % per month.

E. Late Payment. Company acknowledges that the late payment by Company of any monthly installment of fees or other charges will cause County to incur certain costs and expenses not contemplated under this Permit, the exact amount of which are

difficult or impracticable to determine. Therefore, if any such amount owing is not received by county within ten (10) days following the due date thereof, Company shall immediately pay to County a late charge equal to 1 ½ % per month of such amount owing, in addition to any default interest which may be due as provided above. To the extent that any late charge provided for hereunder is determined to constitute interest, in no event shall such late charges, plus any other interest due on sums owed to County hereunder, ever exceed the maximum interest rate permitted by law.

F. Security Deposit. To assure the faithful performance of Company's obligations hereunder, Company shall remit a deposit in the form of cash, a letter of credit, or a payment bond issued by a reputable company licensed to issue such bonds in the State of South Carolina, in an amount equal to two (2) months of all applicable Fees to the County, which shall be remitted to the County prior to the Company's occupancy of the Space. In no event shall this security deposit be used as payment for any fee set forth in A, above, without the express written authorization of the Director of the Horry County Department of Airports.

5. **Utilities and Services.** County shall supply access to water, natural gas and electricity to the extent and capacity of the currently existing mains, lines, transformers, and panels. Company shall be solely responsible for the payment of all utility charges, telephone, trash removal, hazardous waste removal and other services used by Company in or on the Space, to include hook-up fees, advanced deposits or other such costs, regardless of whether the utility charge is incurred in the name of Company or County. Company shall accept transfer of all applicable utility meters to Company's name when so tendered by County. In the event Company incurs any utility charge in the name of County, Company shall reimburse County for the full amount of the charge within five (5) calendar days of the date of written notice to Company of the amount of the charge. County assumes no responsibility for interruption of such services for any reason whatsoever. Company agrees to pay County One Hundred & 00/100 Dollars ($100.00) per month as an additional fee, which may be adjusted periodically by the County for utilities. The utility fee is included in the monthly fee specified in paragraph 4A.

6. **Cleaning and Maintenance.** Company, at its sole cost and expense, shall keep the Space in a clean, neat and orderly condition at all times, and shall be responsible for maintaining all non-structural elements, including without limitation plumbing and HVAC. **Company understands that it is responsible for the conduct of its guests, permittees, invitees, and licensees on the premises. Company shall not store any personal property exterior to the building on the unimproved premises associated with the building. Company is prohibited from taking any action which would negate or void the warranty on the roofs of any building within its Space.**

7. **Alterations.** Company may not make any alteration, addition, or improvement to the Space without the prior written approval of the Director of Airports. Company shall submit a

written request for permission to perform such alterations, which shall include a description of the improvements, a site plan, and any other documentation requested by the Director of Airports to demonstrate the suitability of the improvements or alterations. Unless County elects otherwise, all permanent alterations, additions, or improvements to the Space shall become the property of County upon termination. In the event County so elects, such permanent alterations shall be removed by Company at its own cost and expense prior to date of termination. Company shall repair any damage to Space caused by such removal at its own cost. All agreed upon improvements must be made in a workmanlike manner, in accordance with all applicable statutes, ordinances, rules and regulations, including without limitation applicable building codes, and may be made only upon written approval of County's department of Airports after review of complete plans for such improvements.

8. **Right of Entry.** County shall have the right to enter the Space at any time for any reasonable purpose.

9. **Compliance with Law.**

A. General Compliance. Company will comply with all applicable statutes, ordinances, rules, regulations, orders and directives of any governmental authority, including County, in its occupancy and use of the Space.

B. Acceptance of Premises. **Company accepts the Space in its "as-is" condition and County has no obligation to improve, repair, restore, or alter any portion of the Space.** Company acknowledges that neither County nor any agent, employee, director or official of County has made any representation or warranty, except as otherwise expressly provided in this Permit, with respect to the Space including, without limitation, any representation or warranty with respect to the suitability or fitness of the building or any portion thereof for the conduct of Company's business. Important: Initial here to acknowledge _____

C. Jurisdiction of Other Agencies. If Company's activities and operations shall in any way fall within the jurisdiction or regulatory authority of other governmental agencies, including without limitation the South Carolina Department of Health and Environmental Control ("DHEC"), Company must secure and produce evidence of such agency's final approval of such operations or occupancy of Space. If such activities and operations fall outside DHEC's jurisdiction, Company shall procure and submit to County the statement of an appropriately authorized DHEC representative to that effect. Company acknowledges that its representations and warranties pursuant to this subsection are material to the County's agreement to permit the Company's use of the Space.

10. **Release and Indemnity.**

A. Release. Company hereby releases County from any liability to Company for any loss or damage to any property of Company, its officers, directors, employees, agents, customers, concessionaires, vendors, contractors or invitees, and for the death or injury of any officers, directors, employees, agents, customers, concessionaires, vendors,

contractors or invitees of Company, occasioned by theft, fire, acts of God, public enemy, injunction, riot, strike, insurrection, war, governmental body or authority including County, or any other matter beyond the control of County, or for any injury or damage or inconvenience which may arise through repair or alteration of any part of the Space, or failure to make repairs, or for any cause whatsoever, except the sole negligence or willful misconduct of County.

B. Indemnity. Company hereby releases and will defend, indemnify and hold harmless County, its departments, agencies, boards, commissions, committees, officers, directors, employees, and agents and assigns of any of them ("Indemnified Parties") from and against any and all liability, claims, penalties, fines, causes of action, suits, liens, losses, loss of use, damages, costs and expenses of any kind (including legal fees and litigation costs) which may be suffered by, accrued against, be charged to or be recoverable from the Indemnified Parties by reason of:

(1) any occurrence, in, upon, or at the Space, however caused, or any cause of action of any nature whatsoever, in law or equity, arising out of or incidental to this Permit or the use or occupancy of the Space; and/or

(2) any occupancy, use, or misuse of the Space, or the areas surrounding the Space, or the service areas, parking areas, pedestrian areas, pedestrian walks or driveways in or around the Space, by Company, its officers, directors, employees, agents, customers, concessionaires, vendors, contractors or invitees, including without limitation uses or misuses which may render the premises subject to the Americans with Disabilities Act in whole or in part; and/or

(3) any violation of any law, regulation or ordinance by Company or its employees, officers, directors, employees, agents, customers, concessionaires, vendors, contractors or invitees; and/or

(4) any occurrence arising in whole or in part out of the negligent act, or negligent failure to act, of Company, its officers, directors, employees, agents, customers, vendors, contractors or invitees.

The provisions of this section shall survive the expiration or early termination of this Permit.

C. **Environmental Indemnification**. Company shall also indemnify, defend (with counsel satisfactory to County), and hold County, its departments, agencies, council, boards, commissions, committees, members, officers, directors, employees, and agents and assigns of any of them harmless from and against any and all loss, cost, damage, expense, claim, cause of action, judgment, penalty, fine or liability, directly or indirectly, relating to or arising from the use, storage, release, discharge, handling or presence of Hazardous Materials on, under, or about the Space or the

Airport in violation of Company's obligations under this Permit ("Hazardous Materials Release"). This indemnification shall include, without limitation, (a) personal injury claims, (b) the payment of liens, (c) diminution in the value of the Space, or any building included therein, or any other property at the Airport, (d) damages for the loss or restriction on use of the Space or the Airport, (e) sums paid in settlement of claims, (f) actual attorneys' fees, consulting fees, court costs, and expert fees, (g) the cost of any investigation of site conditions, (h) the cost of any repair, cleanup, remedial, removal, or restoration work or detoxification if required by any governmental authority or deemed necessary in County's reasonable judgment, (i) and any fines associated with Company's activities. County shall have the right but not the obligation to join and participate in, and control, if it so elects, any legal proceedings or action initiated in connection with the Hazardous Materials Release. County may also negotiate, defend, approve, and appeal any action taken or issued by any applicable governmental authority with regard to a Hazardous Materials Release. Any costs or expenses incurred by County for which Company is responsible under this Paragraph or this Permit and has indemnified County, (i) shall be paid to County on demand, during the term of this Permit as additional fees; and (ii)from and after the expiration or earlier termination of the Permit shall be reimbursed by Company on demand. Company's obligations pursuant to the foregoing indemnity shall survive the expiration or termination of this Permit and shall bind Company's successors and assignees and inure to the benefit of County's successors and assigns.

11. **Insurance Required**. Company agrees to purchase and keep in force and maintain at all times during the term of this Permit, at its own expense, for the benefit of itself and County as additional named insured, a policy or policies of insurance, issued by an insurance company of generally recognized responsibility and licensed to do business in the State of South Carolina insuring against: (A) all liability for damage to or loss of Company's and its customer's property located on the Space, (B) liability for property damage and personal injury or death arising from acts or omissions of Company, its agents and employees, (C) liability for any damage or harm resulting from any release of any hazardous material, as that term is defined by the United States Environmental Protection Agency, including, but not limited to, costs of remediation or mitigation of such release of hazardous materials, and (D) Workers Compensation claims to the limits required by the State of South Carolina. Said insurance shall be maintained throughout the term of this Permit with an insurance company acceptable to County with liability limits of at least $2,000,000.00. The policy or policies shall contain a contractual liability endorsement expressly covering the indemnification provisions of Section 10 of this Permit. Company shall also purchase, at its own cost and in its sole discretion, such business interruption or other insurance to protect Company's interest in the event of major or minor damage or disaster to the Space.

This Permit shall not become effective until User shall provide to the HCDA a copy of certificate(s) evidencing the above insurance. The certificate of insurance shall provide that no material alteration, reduction, or termination of coverage shall occur without the

insurance carrier giving County at least thirty (30) days' written notice prior to such alteration, reduction, or termination.

12. **Subuse and Assignment.** Company shall not allow any other entity to occupy or use any of the Space without the written consent of the Horry County Department of Airports and no attempted assignment of this Permit by Company shall be effective.

13. **GOVERNING LAW.** THIS Permit SHALL BE GOVERNED BY AND CONSTRUED UNDER THE LAWS OF THE STATE OF SOUTH CAROLINA. This Permit is not subject to alternative dispute resolution except where ordered by a court of competent jurisdiction or required by operation of law. The forum for any action or claim brought as a result of this contract shall be the Court of Common Pleas, Horry County, 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 a written instrument executed by County and Company.

15. **Termination of Permit.** In the event of termination of this Permit by either Party, Company shall promptly cause to be removed all personal property from the Space. Any property left on Airport premises by Company and remaining there after the date on which Company either vacated the Space or should have vacated the Space according to the notice of termination sent by the terminating party, may be deemed, at the sole and exclusive option of the Airport, abandoned. Once so deemed, such property shall become the exclusive property of the County and may be disposed of as such in accordance with applicable statutes, ordinances, and County procedures. Alternatively, County may have such property removed, at Company's sole expense.

16. **Operating Permit**. The terms and conditions for both the "Space Use Permit" and the "Operating Permit" must be adhered to without default to either agreement. Default of any terms or conditions by either agreement, constitutes default on both the "Space Use Permit" and the "Operating Permit".

17. **Notices.** Any notices required or sent hereunder shall be in writing and shall be sent as follows:

As to County:

Horry County Department of Airports
1100 Jetport Road
Myrtle Beach, SC 29577
ATTN: Director of Airports

As to Company:

_____

_____

_____

Either party from time to time may change its address by written notice to the other party. Notices hereunder shall be deemed effective when delivered by hand delivery or overnight courier, or three days after deposit in the United States mail, first class, postage prepaid.

18. License. This Space Use 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 Company any interest in real property, but is a mere license, revocable at the will of the County.

WITNESS the signatures of the parties as of the date first written above.

ATTEST:

_____

HORRY COUNTY

By:_____

Its:_____

ATTEST:

_____

SKYDIVE MYRTLE BEACH, LLC

By:_____

Its:_____

Exhibit 2

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**FOR THE FIFTEENTH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	**Case No. 2014-CP**
SKYDIVE MYRTLE BEACH, INC., (f/k/a Skydive Myrtle Beach, LLC),	)	
Plaintiff,	)	**JURY TRIAL DEMANDED**
vs.	)	
HORRY COUNTY, HORRY COUNTY DEPARTMENT OF AIRPORTS, H. RANDOLPH HALDI, PAT APONE, TIM JACKSON and JACK TEAL	)	
Defendants.	)	

AFFIDAVIT OF BEN AUKER

BEFORE ME, the undersigned authority, duly authorized by law to take oaths and acknowledgments, on this day personally appeared BEN AUKER, to me well known, who being first duly sworn, deposes and says:

1. My name is Ben Auker, I am over the age of 18, and I have personal knowledge of the matters contained herein.

2. Your Affiant works for Skydive Myrtle Beach, Inc. (SDMB), as its pilot for parachute operations.

3. Your Affiant routinely personally requests for refueling services from Grand Strand Regional Airport (CRE) through its FBO.

4. For the first time, your Affiant was told by CRE FBO staff that the plane would not be refueled without Tim Jackson's approval because SDMB refused to execute a new Space Use Permit (direction from a note left inside the FBO).

5. Your Affiant informed SDMB management and the plane was subsequently refueled approximately 30 minutes following the initial request.

6. Under penalties of perjury, I declare that I have read the foregoing affidavit and the facts stated in it are true.

BEN AUKER

STATE OF SOUTH CAROLINA)
) SS
COUNTY OF HORRY)

BEFORE ME, the undersigned authority, personally appeared BEN AUKER who is personally known to me or who presented personally known as identification and who swears and deposes that he has read the Affidavit and that the same is true and correct to the best of his knowledge and belief.

SWORN TO AND SUBSCRIBED before me this 26th day of February, 2014.

ROBERT G. EASTMAN, ESQ.
Delaware Attorney ID 3356
Authorized by Statute
Uniform Law on Notarial Acts

EASTMAN & ASSOCIATES, LLC
PO Box 180
Charleston, SC 29402
(843) 329-9657
Fax (843) 723-0005
Attorney for Plaintiff
Skydive Myrtle Beach, Inc.

STATE OF SOUTH CAROLINA COUNTY OF HORRY Skydive Myrtle Beach, Inc, Plaintiff, vs. Horry County, Horry County Department of Airports, H. Randolph Haldi, Pat Apone, Tim Jackson and Jack Teal, Defendants.	FOR THE FIFTEENTH JUDICIAL CIRCUIT IN THE COURT OF COMMON PLEAS CASE NO.: 2014-CP-26-01193 **DEFENDANTS HORRY COUNTY & HORRY COUNTY DEPARTMENT OF AIRPORTS' ANSWER TO COMPLAINT**

TO PLAINTIFFS AND THEIR ATTORNEYS:

Defendants Horry County and Horry County Department of Airports, ("County"), by and through its undersigned counsel, hereby responds to Plaintiff's Complaint and would show this Honorable Court as follows:

AS A FIRST DEFENSE
(Failure to State a Claim)

1. Plaintiff's Complaint, in its entirety or in part, fails to state a claim or constitute a cause of action against the County upon which relief may be granted, and therefore, the Complaint should be denied in its entirety or in part.

FOR A SECOND DEFENSE
(Qualified General Denial)

2. Each and every allegation of the Complaint not hereinafter specifically and expressly admitted is hereby denied.

3. Responding to the allegations in paragraph 1 through 9, County admits same on information and belief.

4. County denies the allegations of paragraph 10.

5. Paragraphs 11 and 12 call for legal conclusions and do not require a response, to the extent that a response is required, County denies the same.

6. County denies the allegations of Paragraph 13.

7. Answering the allegations in paragraphs 14 and 15 of the complaint, County is without sufficient information to form a belief as to the allegations contained therein and therefore denies the same.

8. Answering the allegations in paragraphs 16 of the complaint, County would refer to the actual documents issued by the City of North Myrtle Beach for an accurate representation of what documents were issued and the reasons why those documents were issued.

9. County denies the allegations in paragraph 17.

10. Answering the allegations in paragraph 18 of the complaint, County is informed and believes a meeting between SDMB and airport representatives occurred on February 7, 2014 at the FBO Training Room.

11. County denies the allegations of Paragraphs 19 and 20.

12. County admits the allegations in Paragraph 21 and 22.

13. Answering the allegations in paragraph 23 of the complaint, County denies the same and would refer to Exhibit 1 for a true and accurate representation of its contents.

14. County denies the allegations of Paragraphs 24 through 26.

15. Answering the allegations in paragraph 27 of the complaint, County repeats and realleges the responses set forth hereinabove.

16. County denies the allegations in Paragraph 28 and would further show that the actual agreement dated April 1, 2012, would be a more accurate representation of any alleged agreement between the parties.

17. Answering the allegations in paragraph 29 of the complaint, County is without sufficient information to form a belief as to the allegations contained therein and therefore County denies the same.

18. County admits the allegations in Paragraph 30.

19. Answering the allegations in paragraphs 31 through 40 of the complaint, County is without sufficient information to form a belief as to the allegations contained therein and therefore denies the same.

20. Answering the allegations in paragraph 41 of the complaint, County is informed and believes the same are true.

21. Answering the allegations in paragraph 42 of the complaint, County admits that SDMB signed a space use permit but County would refer to the actual permit for an accurate representation of its contents.

22. Answering the allegations in paragraph 43 of the complaint, County denies the same.

23. Answering the allegations in paragraph 44 of the complaint, County is without sufficient information to form a belief as to the allegations contained therein and therefore denies the same.

24. Answering the allegations in paragraphs 45 through 69 of the complaint, County denies the same.

25. Answering the allegations in paragraph 70 of the complaint, County admits the same.

26. County denies the allegations in Paragraphs 71 through 74.

27. County admits the allegations in Paragraphs 75 through 76.

28. County denies the allegations in Paragraphs 77 through 143.

FOR A THIRD DEFENSE
(Tort Claims Act)

29. County realleges each and every allegation as set forth hereinabove verbatim.

30. County is a governmental entity of the State of South Carolina, immune from suit except to the extent immunity has been waived by the S.C. Tort Claims Act, the provisions of which must be strictly construed in favor of limiting liability of the County according to S.C. Code Ann. Sec. 15-78-20(f), and the County is immune and exempt from liability for the losses alleged by Plaintiffs, which are denied, pursuant to the provisions of S.C. Code Ann. §15-78-20(a), and §15-78-60 and, in the event the case is submitted to a trier of fact, the County is entitled to a special verdict apportioning liability of joint tortfeasors, as provided in S.C. Code Ann. §15-78-100; and, if damages are recoverable, which is denied, the County is entitled to the statutory limits and exclusions on damages provided in S.C. Code Ann. §15-78-120, and, to set-off for any damages paid or payable to Plaintiff or Plaintiff's assigns from any other source.

31. The County pleads said immunities, exemptions from liability, limitations and exclusions on damages, entitlement to special verdict, and set-off as set forth above, as a defense to Plaintiff's claims which should be dismissed, denied, limited and/or set-off accordingly.

FOR A FOURTH DEFENSE
(Comparative Negligence)

32. The allegations contained in the previous paragraphs are herein realleged as if set out verbatim.

33. If there was any negligent, careless, reckless, willful, wanton, or grossly negligent, act or omission, which is expressly denied, any injuries or damages allegedly sustained by the Plaintiff, which are also denied, were due to and caused by the Plaintiffs own acts of negligence, carelessness, recklessness, willfulness, wantonness, or gross negligence. These acts or omissions

more proximately and directly caused any alleged injuries and damages to Plaintiff and Defendant pleads the Plaintiffs comparative negligence, carelessness, recklessness, willfulness, wantonness, and gross negligence as a complete bar or limit to Plaintiff's claim, and Defendant pleads the superseding and intervening fault of other persons as a bar or limit to Plaintiff's claim.

FOR A FIFTH DEFENSE
(Statute of Frauds)

34. The allegations contained in the previous paragraphs are herein realleged as if set out verbatim.

35. Pursuant to S.C. Code Ann. § 32-3-10 (4), all tenement contracts must be signed and in writing in order to bring an action.

36. Any contract between the County and Plaintiff expired on January 21, 2014.

37. No new contract was signed and approved by the County.

38. Promissory Estoppel may not be used to circumvent the writing requirements of the Statute of Frauds.

39. As a consequence, all claims based on contractual obligations of the parties should be dismissed.

AS A SIXTH DEFENSE
(Failure to Exhaust Administrative Remedies)

40. The allegations of the preceding defenses are restated as if set forth verbatim.

41. The Plaintiff has administrative remedies under state law and federal law, which it has not exhausted prior to bringing this action, and therefore, one or more of their claims should be dismissed.

AS A SEVENTH DEFENSE
(Intra-Corporate Conspiracy Doctrine)

42. The allegations of the preceding defenses are restated as if set forth verbatim.

43. All other Defendants are agents or subsidiaries of Horry County and were acting within the scope of their employment at all times.

44. There can be no civil conspiracy amongst these individuals. As a result these claims should be dismissed.

AS AN EIGHTH DEFENSE
(Privilege)

45. The allegations of the preceding defenses are restated as if set forth verbatim.

46. Any act or delict of Defendant, whether a statement, communication or otherwise, was committed in the scope of its office and duty as a municipal government, and in good faith, and therefore conditionally or qualifiedly privileged and not actionable, and the Complaint should therefore be dismissed.

AS A TENTH DEFENSE
(Authorized to be on Premises)

47. The allegations of the preceding defenses are restated as if set forth verbatim.

48. At all times County owned the property in question and as the owner County had an owner's rights in connection with the property. As a consequence, Plaintiff's claim for trespass should be barred.

AS AN ELEVENTH DEFENSE
(Equitable Defenses)

49. The allegations of the preceding defenses are restated as if set forth verbatim.

50. Plaintiff's claims for breach of contract, breach of contract accompanied by a fraudulent act, quantum meruit, fraud and misrepresentation, constructive fraud and promissory estoppel are barred by the doctrines of unclean hands, waiver, estoppel and/or laches.

WHEREFORE, having fully answered the Complaint, it is prayed that the same be dismissed, for costs, and for such other relief as may be just and proper.

Michael Warner Battle SC Bar # 00584
M. Kirk Battle SC Bar # 79699
THE BATTLE LAW FIRM, LLC
1200 Main St.
PO Box 530
Conway, SC 29528
(843)248-4321

Mach 18, 2013

CERTIFICATE OF SERVICE
The undersigned herby certifies that a true copy of the foregoing pleading has been served upon opposing counsel by mailing a copy properly addressed with sufficient postage affixed thereto this 18th day of March, 2013

Secretary to:
Battle Law Firm, LLC
P.O. Box 530
Conway, SC 29528
Attorney's for HCA HC Airports

STATE OF SOUTH CAROLINA	CIVIL CASE NUMBER
COUNTY OF HORRY	IN THE MAGISTRATE'S COURT
HORRY COUNTY PLAINTIFF(S)	
VS.	APPLICATION FOR EJECTMENT (Eviction)
SKYDIVE MYRTLE BEACH, INC. DEFENDANT(S)	

I, HORRY COUNTY, plaintiff in this action, state that I am the landlord-lessor of premises within the jurisdiction of Magistrate Christopher J. Arakas which is described as: (address and description of premises – apartment, house, etc.)

North Myrtle Beach Aviation
Hangar #7
2800 Terminal Street
North Myrtle Beach, SC, 29528

I further state that, with regard to the above described premises, a landlord-tenant relationship exists between myself and the defendant SKYDIVE MYRTLE BEACH, INC., the tenant-lessee, as evidenced by the following: (Attach lease papers or other written proof.)

See attached.

Grounds for this ejectment are one or more of the following:

- ☐ The tenant fails or refuses to pay the rent when due or when demanded; or
- ☒ The term of tenancy or occupancy has ended; or
- ☐ The terms or conditions of the lease have been violated as follows:

Sworn to before me
this 5th day of June, 2014.

Magistrate or Notary Public for South Carolina

My Commission expires 7-1-2023

Michael W. Battle
PLAINTIFF (or his attorney)

MYRTLE BEACH MAGISTRATE'S OFFICE
2014 JUN -5 PM 4:27
DISTRICT #5

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

2014CV261092444
CIVIL CASE NUMBER
MAGISTRATE'S COURT
RULE TO VACATE OR SHOW CAUSE

Horry County
Po Box 1236
Conway, SC 29526

PLAINTIFF(S)

Vs

Skydive Myrtle Beach, Inc. Brett Miller
2800 Terminal Street
Conway, SC 29528

DEFENDANT(S)

Upon the application of the plaintiff listed above, which states:

THE TERMS OF THE TENANCY OR OCCUPANCY HAVE ENDED

You the defendant(s) or lessee(s) of the premises located at the address listed above, and all others, are ordered to vacate the premises immediately pursuant to S.C. Code of Laws Section 27-37-10 or contact the: Myrtle Beach Magistrate Court, 1201 21st Avenue North Myrtle Beach, SC 29577 (843) 915-5293, within ten (10) days excluding date of service, for the purpose of showing why you and all occupants should not be ejected from these premises.

FAILURE TO VACATE THE PREMISES OR TO RESPOND WITHIN TEN (10) DAYS MAY RESULT IN THE ISSUANCE OF A WRIT OF EJECTMENT.

Thursday, June 05, 2014

JUDGE, Myrtle Beach Magistrate Court

Personally appeared before me, the undersigned deponent, being duly sworn, says that he attempted to serve the Rule to Vacate or Show Cause on Skydive Myrtle Beach, Inc. on:

DATE	TIME	INITIALS
1.		
2.		
3.		

DATE OF SERVICE 6/17/14

TIME OF SERVICE 4:25 pm

SETTLED/DATE

VACANT/DATE

PERSON SERVED & RELATIONSHIP IF NOT DEFENDANT: Richard Miller

Sworn to and subscribed before me
This _____ day of _____, 20___.

NOTARY PUBLIC OR JUDGE

T. Ford

SIGNATURE OF SERVER

On _____ I DEPOSITED IN THE UNITED STATES MAIL IN AN ENVELOPE ADDRESSED TO THE DEFENDANT(S) ABOVE WITH FIRST CLASS POSTAGE AFFIXED THERETO, A COPY OF THIS DOCUMENT.

MAGISTRATE'S CLERK

MV 61

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

Robert Eastman
Po Box 180
Charleston, SC 29402

MAGISTRATE SUMMONS

Be advised that a Motion has been filed in the below listed case. Therefore, you are hereby summoned to be and appear personally in the Horry County Myrtle Beach Magistrate Court Court, located at 1201 21st Avenue North, , Myrtle Beach, SC, 29577 on July 2, 2014 at 11:00 AM to serve as a plaintiff/defendant/attorney/witness in a Motion Hearing in the case of:

Horry County **Vs** **Skydive Myrtle Beach, Inc.**

PLAINTIFF(S) **DEFENDANT(S)**

CIVIL CASE #: 2014CV261092444.

HEREIN FAIL NOT, ON PAIN OF FORFEITING THE LAWFUL PENALTY IN SUCH CASE MADE AND PROVIDED.

Judge

Horry County
Myrtle Beach Magistrate Court
1201 21st Avenue North
Myrtle Beach, SC 29577
Phone: (843) 915-5293 Fax: (843) 444-6131

June 13, 2014

MV 46

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

Robert Eastman
Po Box 180
Charleston, SC 29402

MAGISTRATE SUMMONS

You are hereby summoned to be and appear personally in the Court of the Myrtle Beach Magistrate Court, located at 1201 21st Avenue North Myrtle Beach, SC 29577 on July 23, 2014 at 11:00 AM to serve as a party in a Bench Trial in the case of:

RE: Horry County Vs Skydive Myrtle Beach, Inc.

PLAINTIFF(S) DEFENDANT(S)

Civil Case Number: 2014CV261092444, Rule to Vacate $40.

HEREIN FAIL NOT, ON PAIN OF FORFEITING THE LAWFUL PENALTY IN SUCH CASE MADE AND PROVIDED.

JUDGE

Myrtle Beach Magistrate Court
1201 21st Avenue North
Myrtle Beach, SC 29577
Phone: (843) 915-5293 Fax: (843) 444-6131

July 8, 2014

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

Robert Eastman
Po Box 180
Charleston, SC 29402

CIVIL BOND HEARING
MAGISTRATE SUMMONS

You are hereby summoned to be and appear personally in the Court of the **Myrtle Beach Magistrate Court**, located at **1201 21st Avenue North Myrtle Beach, SC 29577** on **August 1, 2014** at **2:00 PM** to serve as a party in a Bench Trial in the case of:

RE: Horry County **Vs** **Skydive Myrtle Beach, Inc.**

PLAINTIFF(S) **DEFENDANT(S)**

Civil Case Number: **2014CV261092444, Rule to Vacate $40.**

HEREIN FAIL NOT, ON PAIN OF FORFEITING THE LAWFUL PENALTY IN SUCH CASE MADE AND PROVIDED.

~~JUDGE~~

Myrtle Beach Magistrate Court
1201 21st Avenue North
Myrtle Beach, SC 29577
Phone: (843) 915-5293 Fax: (843) 444-6131

July 29, 2014

MV 42

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

Robert Eastman
Po Box 180
Charleston, SC 29402

MAGISTRATE SUMMONS

You are hereby summoned to be and appear personally in the Court of the **Myrtle Beach Magistrate Court**, located at **1201 21st Avenue North Myrtle Beach, SC 29577** on **February 10, 2015** at **9:00 AM** to serve as a party in a Bench Trial in the case of:

RE: Horry County **Vs** **Skydive Myrtle Beach, Inc.**

PLAINTIFF(S) **DEFENDANT(S)**

Civil Case Number: **2014CV261092444, Rule to Vacate $40.**

HEREIN FAIL NOT, ON PAIN OF FORFEITING THE LAWFUL PENALTY IN SUCH CASE MADE AND PROVIDED.

~~JUDGE~~

Myrtle Beach Magistrate Court
1201 21st Avenue North
Myrtle Beach, SC 29577
Phone: (843) 915-5293 Fax: (843) 444-6131

February 3, 2015

MV 42

STATE OF SOUTH CAROLINA	)	2014-CP-26- 4965
	)	COMMON PLEAS CASE NUMBER
COUNTY OF HORRY	)	
	)	2014CV261092444
	)	MAGISTRATE CIVIL CASE NUMBER
SKYDIVE MYRTLE BEACH, INC.,	)	
	)	
APPELLANTS,	)	IN THE COURT OF COMMON PLEAS
	)	
vs.	)	NOTICE OF CIVIL APPEAL
	)	
HORRY COUNTY,	)	
	)	
RESPONDENT.	)	
	)	

FILED
HORRY COUNTY
2014 JUL 25 AM 9:29
MELANIE HUGGINS-WARD
CLERK OF COURT

The Defendant, SKYDIVE MYRTLE BEACH, INC., hereby gives notice of appeal from the judgment of the magistrate's court in the above action, to the Circuit Court of Common Pleas, in the county of HORRY.

This notice of appeal is made subsequent to personal notice of the judgment which was received on the 23rd day of JULY, 2014.

MYRTLE BEACH
MAGISTRATE'S OFFICE
2014 JUL 23 PM 2:51
STATE SC

The appellant's exceptions to the judgment of the magistrate are set forth as follows:

1. On February 28, 2014, Appellant, Skydive Myrtle Beach, Inc. (SDMB), filed action in This Honorable Court, *Skydive Myrtle Beach, Inc., v. Horry County, Horry County Department of Airports, J. Randolph Haldi, Pat Apone, Tim Jackson, and Jack Teal*, Case No. 2014-CP-26-1193 (State Complaint) alleging fifteen causes of action including a claim of retaliatory eviction from its business located at Grand Strand Airport, 2800 North Myrtle Beach, SC (Lease Interest) as part of its Breach of Contract claim in its First Cause of Action in the State Complaint.

2. In the State Complaint action, Appellant, Skydive Myrtle Beach, Inc., requested a jury trial, discovery is ongoing and to date, Appellant has not had the opportunity to depose or review documents relating to its claims.

3. On or about February 24, 2014, Appellant Skydive Myrtle Beach, Inc. filed a complaint with the Federal Aviation Administration (FAA) against Respondents, *inter alia*,

unlawful discriminatory conduct relating to the occupancy and use of the Lease Interest, federal law, and the recognized aeronautical activity of skydiving. *See* Exhibit 1.

4. On March 4, 2014, through its Boston attorneys, Foley and Lardner LLP, Respondent entered appearance before the FAA and moved to dismiss the FAA Complaint. *See* Exhibit 2.

5. On March 18, 2014, the FAA dismissed without prejudice Appellant's FAA complaint for incompleteness. *See* Exhibit 3.

6. On April 28, 2014, after unsuccessfully attempting to negotiate in good-faith a replacement long-term lease with the Respondent, a Massachusetts Attorney feloniously practiced law in South Carolina by sending Appellant a Notice of Termination Letter. *See* Exhibit 4.

7. On June 5, 2014, in spite of the pending action in this Honorable Court, Respondent filed its action for ejectment before the Hon. Christopher J. Arakas in the Myrtle Beach Magistrate's Court, *Horry County v. Skydive Myrtle Beach, Inc*, C.A. 2014-CV-26-1092444 (Ejectment Action). *See* Exhibit 5.

8. On June 13, 2014, Respondent filed a Motion to Remove the Ejectment to the Court of Common Please pursuant to S.C. Code Ann. § 22-3-30 and South Carolina Rules of Civil Procedure (SCRCP) 12(b)(8) in the Ejectment Action. *See* Exhibit 6.

9. On or about June 18, 2014 (filed June 24, 2014), Appellant filed a Motion for Consolidation, Injunctive Relief and a Request for an Emergency Hearing before this Honorable Court in its State Complaint action. *See* Exhibit 7.

10. On July 2, 2014, The Hon. Christopher J. Arakas denied Appellant's motion to remove.

11. On July 11, 2014, the Myrtle Beach Magistrate's Court mailed a Summons dated July 8, 2014, to Appellant's attorney for a Bench Trial on July 23, 2014. *See* Exhibit 8.

12. On July 15, 2014, Appellant's attorney contacted the Magistrate's Office and was advised that any request for reconsideration, opportunity to file an answer, counterclaim and request for a jury trial should be raised at the "Rule to Vacate" hearing scheduled for July 23, 2014.

13. On July 18, 2014, Appellant requested the Hon. J. Arakas to reconsider its motion to remove or issue a written Order denying same or grant Appellant opportunity to file an Answer and Counterclaim and have a jury trial for the Ejectment Action if denied. *See* Exhibit 9 (without enclosures).

14. On July 23, 2014, Appellant's Motion to Remove, request for jury trial, opportunity to Answer, and prepare for trial were denied. A bench trial in Magistrate's Court resulted in Respondent's favor and a Writ of Ejectment against Appellant was issued. *See* Exhibit 10.

15. The Notice of Termination issued to Appellant is defective as it came from an attorney not licensed to practice law in South Carolina, Respondent is ably represented by South Carolina Counsel and any legal Notice of Termination should have come from a licensed South Carolina attorney to have legal effect pursuant to SC Code Ann. §§ 40-5-80 and 40-5-310.

16. Appellants properly questioned the jurisdiction of the Magistrate's Court within the period to file an Answer, a Counterclaim, and request a jury trial, under South Carolina Rules of Magistrates Court (SCRMC) Rules 7(b) and 13(c) should have been tolled until Appellants Motion to Remove in the Ejectment Action was heard.

17. Pursuant to SCRMC 2, this action should have been dismissed under South Carolina Rules of Civil Procedure (SCRCP) 12(b)(8) as Appellant has raised the matters in This Honorable Court, requested a jury trial, discovery has commenced and Appellant was not in receipt of any discovery from Respondent.

18. The decision to deny Appellant's Motion to Remove, file an interlocutory appeal, answer, counterclaim or conduct discovery on the grounds that Appellant did not file an answer, counterclaim and request a jury trial within the time allotted denied Appellant, SDMBs attempt to exercise its legal rights guaranteed by the United States and South Carolina Constitutions to have a jury trial, an opportunity to prepare for trial and present its case adequately before a neutral and detached tribunal.

19. WHEREFORE, Appellant SDMB respectfully requests this Honorable Court to:

a. Vacate the judgment of the Magistrate's Court;

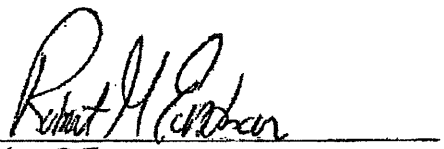
b. Set aside the Writ of Ejectment;

c. Enjoin Respondent from filing additional complaints in any other forum;

d. Award reasonable attorney's fees; and

e. Any such other further relief as this Honorable Court deems just and proper.

Eastman & Associates, LLC



Robert G. Eastman
Attorney for Plaintiff
SC Attorney ID 75900
PO Box 180
Charleston, SC 29402
email: robertgeastman@msn.com
(843) 329-9657

Charleston, SC

Dated: July 25, 2014

STATE OF SOUTH CAROLINA)
) IN THE MAGISTRATE'S COURT
COUNTY OF HORRY)

Case No.
2014-CV-26-109-2444

HORRY COUNTY

Plaintiff,

vs.

SKYDIVE MYRTLE BEACH, INC.,

Defendants.

MOTION TO REMOVE

MYRTLE BEACH MAGISTRATE'S OFFICE
2014 JUN 13 PM 1:18
DISTRICT #6

TO: MICHAEL W. BATTLE, COUNSEL FOR PLAINTIFF:

YOU WILL PLEASE TAKE NOTICE, that the undersigned, Robert G. Eastman, as attorney for Defendant, Skydive Myrtle Beach, Inc., will move before the Magistrate, Christopher J. Arakas, or Presiding Judge or Magistrate of the Horry County Magistrate, located in Conway, South Carolina, not less than ten (10) days, or at such time as may be scheduled by the court, for an order dismissing the Plaintiff's Application for Ejectment against Defendant Skydive Myrtle Beach, Inc., pursuant to S.C Code Ann. § 22-3-30, on the grounds that Defendant filed an action on or about February 28, 2014, in the Court of Common Pleas, *Skydive Myrtle Beach, Inc. v. Horry County, et. al.* Case No. 2014-CP-26-1193, alleging *inter alia*, breach of contract with an existing lease in which Plaintiff has privity of contract, damages exceeding the jurisdictional limit of this Honorable Court, that this action in Common Pleas is active, Plaintiff, Horry County has accepted service and jurisdiction of Horry County Court of Common Pleas, the underlying facts are in dispute and rejected as characterized by Defendant Skydive Myrtle Beach, Inc., discovery is ongoing, and this matter should be removed to Horry County Court of Common Pleas.

ROBERT G. EASTMAN
SC Bar No. 75900
Attorney for Plaintiff
PO Box 180
Charleston, SC 29402
(843) 329-9657
robertgeastman@msn.com

ATTORNEY FOR DEFENDANT
SKYDIVE MYRTLE BEACH, INC.

Charleston, South Carolina
June 13, 2014

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the above and foregoing has been furnished to attorneys for Plaintiff Horry County by personally depositing same in a United States Postal Service mail box, postage prepaid, addressed to the following persons on this 13th day of June 2014,

Michael W. Battle, Esq.
Battle Law Firm, LLC
PO Box 530
Conway, SC 29528

ROBERT G. EASTMAN
SC Bar No. 75900
Attorney for Plaintiff
PO Box 180
Charleston, SC 29402
(843) 329-9657

EASTMAN & ASSOCIATES, LLC

ATTORNEYS AT LAW

POST OFFICE BOX 189
CHARLESTON, SOUTH CAROLINA 29402
USA

PHONE: (843) 327-9657
FAX: (843) 723-0003

ROBERT C. EASTMAN
ADMITTED IN DC, FL, GA, MD, SC, PA & SC

July 18, 2014

The Hon. Christopher J. Arakas
Horry County
Myrtle Beach Magistrate's Court
1201 21st Avenue North
Myrtle Beach, SC 29577

Re: *Horry County v. Skydive Myrtle Beach, Inc.*, 2014-CV26-1092444; Request for Reconsideration – Motion to Remove

Dear Judge Arakas:

Defendant Skydive Myrtle Beach, Inc., (SDMB) respectfully requests this Honorable Court to reconsider its Motion to Remove this action to the pending action in the Court of Common Pleas, *Skydive Myrtle Beach, Inc. v. Horry County Department of Airports, et al.*, C.A. 2014-CP-26-1193, *filed* (February 14, 2014). SDMB requests this Honorable Court to reconsider and grant its motion based on principles of judicial economy, equity, and in the interests of justice.

Alternatively, SDMB requests a written Order denying removal, a jury trial and thirty (30) days within which to file its Answer and associated counterclaims against the plaintiff and all necessary parties.

The actions in this court, the Court of Common Pleas, and before the Federal Aviation Administration (FAA) while lengthy and seemingly complex, involve a simple trespass by a county employee, a trespass complaint to the county by a tenant victim, and a retaliatory answer in the style of a new lease and unsubstantiated claims of violations of unpublished county rules. The predatory lease provisions effectively operate as an eviction due to grossly inflated rent terms, the greater of 24% of its monthly gross or $1,200 per month, acceptance of which would drive SDMB out of business. *See* Exhibit A, at Exhibit 5.

Although the county no longer wishes SDMB to occupy its Hangar number 7, it also unreasonably refuses to give permission for SDMB to operate from another serviceable suitable hangar on the opposite end of the airfield from a willing private party which would allow SDMB to continue its skydiving business.

Essentially, the county is using all the machinations of county government to remove SDMB from operating a business at its federally funded airport. Should SDMB be removed from the airport, its business will effectively be closed, hundreds of thousands of dollars investment and twenty plus jobs will be lost.

Following an unsuccessful attempt to resolve the lease and trespass issues, SDMB filed a formal Complaint with the FAA alleging discriminatory conduct prohibited by federal law and requested FAA intervention to resolve the issues with the county. *See* Exhibit A.

Because of continued harassment by the county, SDMB also filed its complaint with the Court of Common Pleas, alleging fifteen counts of action, including retaliatory eviction by the county in Magistrate's Court. *See* Exhibit A, at Exhibit 5. In its state complaint, damages were unspecified but at Deposition, Plaintiff's owner and CEO alleged $5 million dollars for damages.

In March 2014, Plaintiff's FAA formal Complaint was dismissed without prejudice for technicalities. Following the FAA dismissal, SDMB was served a copy of the action for ejectment in this Honorable Court, in spite of attempting to resolve the matters with the county in "good faith". SDMB refiled its FAA Complaint after its offer to mediate was rejected by the county and this action for ejectment was filed.

SDMB filed its complaint more than 120 days prior to plaintiff's action for ejectment. discovery in that case is ongoing, and a jury trial has been demanded in a superior court, the Court of Common Pleas.

As all of the facts in this action derive from a tort rather than landlord-tennant or commercial lease as Plaintiff argued in Magistrate's Court, this matter belongs in the Court of Common Pleas, not Magistrate's Court. The intent of the legislature in providing jurisdiction relating to all tenant disputes was not to wrestle jurisdiction from a superior court for facts that arose *after* the filing of the initial complaint in the Court of Common Pleas in February 2014.

Should this Honorable Court deny SDMB's request for reconsideration, SDMB respectfully asks for thirty (30) days within which to file an Answer and Counterclaim pursuant to South Carolina Rules of Magistrates Court (SCRMC) Rules 7, and 9, and a jury trial pursuant to SCRMC Rule 13(c) and reasonable discovery for all legal issues identified in its answer and counterclaims.

SDMB continues to be amenable to the original terms of the lease but would rather vacate to another available location on the Grand Strand Airport within a reasonable time (7 days). SDMB has always paid its bills in a timely manner, been in compliance with all published rules and regulations, local, state, and federal law and desires no more than to

conduct its lawful enterprise free from arbitrary county interference thinly disguised as safety concerns. While much of SDMBs complaint involves both federal state law, the FAA has exclusive jurisdiction relating to aeronautical activities and safety, therefore FAA will determine those matters.

Thank you for your attention to this matter. Should you have any questions, please do not hesitate to contact me.

Respectfully submitted,

Robert G. Eastman

Cc: [illegible]

Enc: [illegible]

RGE/ab

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	Case No. 2014-CP-26-1193

SKYDIVE MYRTLE BEACH, INC., (f/k/a Skydive Myrtle Beach, LLC),

Plaintiff,

vs.

HORRY COUNTY, HORRY COUNTY DEPARTMENT OF AIRPORTS, H. RANDOLPH HALDI, PAT APONE, TIM JACKSON and JACK TEAL

Defendants.

JURY TRIAL DEMANDED

FILED
HORRY COUNTY
2014 JUN 24 AM 10:49
MELANIE HUGGINS-WARD
CLERK OF COURT

MOTION FOR CONSOLIDATION REQUEST FOR INJUNCTIVE RELIEF, AND EMERGENCY HEARING

1. On or about June 5, 2014, Defendant Horry County filed an Application for Eviction against Plaintiff, Skydive Myrtle Beach, Inc. (SDMB), in Myrtle Beach Magistrate's Court, *Horry County v. Skydive Myrtle Beach, Inc.*, C.A. 2014-CV-26-109-2444, (Eviction Complaint) a copy of which is attached hereto as Exhibit 1.

2. On or about June 7, 2014, Federal Aviation Administration (FAA) inspectors inspected SDMB and revealed that FAA had received multiple unsubstantiated complaints relating to federal aviation regulations. *See* Exhibit 2, Affidavit of Aaron Holly.

3. FAA investigations took place during working hours and caused SDMB operations several hours delay and financial harm.

4. This Honorable Court has subject matter jurisdiction relating to all allegations of fact presented by Defendant in its Eviction Complaint, Defendants have been served in this action, have answered Plaintiff's fifteen count Complaint alleging, *inter*

alia, the existence of a long-term lease, breach of contract and facts that are contradictory to Defendant's allegations identified in its Eviction Complaint, and this Honorable Court has exercised its jurisdiction in this matter.

5. Plaintiff has requested a jury trial in this Honorable Court to determine all contested facts and has continued to present payments to Defendant for Hangar No, 7 since Defendant prematurely resumed control of the Grand Strand Airport in August 2013; and deliberating the veracity of contested underlying facts relating to any eviction identified by Defendant's Eviction Complaint is the purview of a jury in this Honorable Court.

6. Piecemeal litigation in multiple venues as Defendant is currently attempting to pursue by filing an Application for Ejectment in Magistrate's Court and reporting unsubstantiated allegations to the FAA is causing judicial waste, excessive attorney fees and expenses, and has no legitimate purpose other than to harass Plaintiff in its proper exercise of legal remedies and business pursuits.

7. Plaintiff has moved (in Myrtle Beach Magistrate's Court) to Remove Defendant Horry County's Eviction Complaint to this Honorable Court pursuant to S.C. Code Ann. § 22-3-30, judicial economy, and constitutional reasons. *See* Exhibit 3.

8. Defendant's repeated allegations and complaints in multiple venues are a waste of judicial economy, continuous, improper, without merit, unduly burdensome, and causing Plaintiff irreparable harm.

9. Plaintiff has no adequate remedy at law to prevent Defendant's actions in other forums and will suffer and continue to suffer irreparable harm unless this Honorable Court grants injunctive relief.

10. This motion may further be supported by affidavits and/or a supporting memorandum of law that may be submitted at or prior to the hearing of this motion.

WHEREFORE, Plaintiff, respectfully request this Honorable Court to:

A. Grant Plaintiff's Request for an Emergency Hearing;

B. Enjoin Defendants Horry County and Horry County Department of Airports from filing future Complaints to FAA or other state venues;

C. Remove the Eviction Complaint from Myrtle Beach Magistrate's Court to this Honorable Court;

D. Award Plaintiff, reasonable attorney fees together with costs associated with this motion; and

E. Such other further relief as this Honorable Court deems necessary.

BY:



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Merritt Island, FL

June 18, 2014

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY)	CASE NO.: 2014-CP-26-4965
)	
SKYDIVE MYRTLE BEACH, INC.)	
)	
Appellant,)	**APPELLANT'S MEMORANDUM OF LAW IN OPPOSITION TO RESPONDENT'S MOTION FOR MODIFICATION OF BOND AMOUNT AND MOTION FOR TEMPORARY RESTRAINING ORDER AND TEMPORARY INJUNCTION**
v.)	
HORRY COUNTY)	
)	
Respondent.)	

TO: THE HONORABLE LARRY B. HYMAN, JR., SOUTH CAROLINA CIRCUIT COURT JUDGE:

COMES NOW THE Appellant Skydive Myrtle Beach, Inc., by and through its undersigned counsel, who would submit the following Memorandum of Law in Opposition to Respondent's Motion for Modification of Bond Amount, filed on February 11, 2015 and Respondent's Motion for Temporary Restraining Order and Temporary Injunction, filed February 10, 2015.

RELEVANT FACTUAL AND PROCEDURAL HISTORY

On June 5, 2014, Respondent Horry County ("County") filed an ejectment action against Appellant, Skydive Myrtle Beach, Inc. ("SDMB"), in the Horry County Magistrate Court.

On July 2, 2014, the Horry County Magistrate denied SDMB's June 18, 2014 motion to remove this action to the Circuit Court. On July 18, 2014, SDMB requested a reconsideration of its Motion to Remove.

On July 23, 2014, then Horry County Magistrate denied SDMB's Motion for Reconsideration, Request Leave to Answer Complaint, File Counterclaims and Jury Trial. On the same day, the Court then conducted a Bench Trial and issued a Writ of Ejectment against

SDMB.

SDMB filed a timely appeal to this Court on July 29, 2014 – the case at hand. Immediately following the Appeal, Horry County Magistrate conducted an appeal bond hearing on August 1, 2014, pursuant to S.C. Code § 27-37-130. The County, through its counsel, appeared at the August 1, 2014 hearing and had an opportunity to be heard on the size and sufficiency of the appeal bond. At that time, specific mention was made by County's counsel to the Ramp Renovation project, but no materials or affidavits were submitted to Horry County Magistrate and the Court did not accept it is a basis for an appeal bond.

Accordingly, the Horry County Magistrate issued a Stay of Execution on the payment of a bond of $1,200.00 per month by SDMB to the County ("Stay") – equal to the monthly rent. The Magistrate did not require SDMB to sign any new space use permit with the County.

The County did not file a timely motion to alter or amend/reconsider the Stay within five (5) days pursuant to Rule 19(d) of the South Carolina Magistrate Court's Rules, or Rule 59(e) of the South Carolina Rules of Civil Procedure [applicable via Rule 2, SCMCR and/or Rule 81, SCRCP]. The County did not cross-appeal, either.

In late January, 2015, the County attempted to force SDMB into entering into a new Space Use Permit to park a SDMB aircraft on the ramp.

When SDMB demurred, on February 3, 2015, the County filed a motion to increase the appeal bond by $358,000.00 – nearly six (6) months after Horry County Magistrate issued the Stay – claiming that the CRE Ramp Renovation project requires work in front of Hangar 7 to commence on February 16, 2015. This was the first written notice of the Phase 2 Ramp Rehabilitation work received by SDMB – contrary to the County's unsupported assertions.

On February 10, 2015, the Horry County Magistrate denied County's motion on the grounds that it lacked jurisdiction to make a determination in the instant matter.

Immediately thereafter, counsel for the County filed a Motion for Temporary Restraining Order and Temporary Injunction before this Court. On February 11, 2015, a second Motion for Modification of Bond Amount was filed in Horry County Circuit Court.

Both of these motions at bar rest entirely on the argument that SDMB refuses to accept accommodation – by moving his plane onto the rehabilitated ramp area for the duration of the construction. In his affidavit, however, SDMB owner Aaron Holly has specifically averred that he will accommodate the County by moving his airplane from Hangar 7 to the area on the tarmac specifically contemplated for the same.

Additionally, Appellant anticipates Respondent will make the argument that Appellant must sign a Space Use Permit in order to fully accommodate. However, both Motions are silent on any need for execution of a new Space Use Permit.

LEGAL ARGUMENT AND ANALYSIS

1. Acceptance of Accommodation

This Honorable Court should deny the Respondent's Motion for Temporary Restraining Order and Motion for Temporary Injunction because SDMB has agreed to accommodate and move its plane to the rehabilitated ramp area designated by Defendant. See Appellant's Affidavit, attached hereto as Exhibit A.

A case becomes moot when judgment, if rendered, will have no practical legal effect upon existing controversy. *Byrd v. Irmo High Sch.,* 321 S.C. 426, 431, 468 S.E.2d 861, 864 (1996); *Mathis v. South Carolina State Highway Dep't,* 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973). Because SDMB has agreed to accommodation in a way that does not require Greenwald Construction to demobilize, or to interfere with the work of Greenwald Construction , these Motions are moot as the court's judgment will have no legal effect upon an existing controversy.

a. Terms of Space Use Agreement Currently Subject of Ongoing Litigation

Appellant anticipates Respondent will argue that in order to fully accommodate Respondent's wishes, Appellant must sign a Space Use Permit.

First, the County's attorney, Mr. Battle, concedes in his memorandum of law that "Appellant's decision of whether to remain in Hagar # 7 or sign a space use permit and comply with the conditions of the permit is not material to the pending Temporary Restraining Order [sic]." If it's not material, then it doesn't matter.

Second, the motions and affidavit of Mr. Haldi are silent as to the necessity of a Space Use Permit. If signature of a Space Use Permit were truly a necessity, it would be contained in the motion. See Rule 7(b), SCRCP which requires that motions "shall state with particularity the grounds therefore, and shall set forth the relief of order sought."

Third, the Minimum Standards that would be contained in such a document are currently in the basis of ongoing litigation between the parties both in the circuit court (2014-CP-26-1193) and before the Federal Aviation Authority. To voluntarily accede to these standards would result in the County moving to dismiss SDMB's lawsuits or allow the HCDA Director a clear path to unilaterally call on law enforcement to eject SDMB before the appeal hearing – which is the County's real goal.

Fourth, Respondent has failed to demonstrate with any specificity why Appellant must sign a Space Use Agreement in order to accommodate the work of Greenwald. In fact, the Horry County Attorneys' office is adamant that the Minimum Standards are already in full force and effect; if that is the case, then why require any signature at all. Additionally, Grand Strand Airport has produced a document (attached at Exhibit B) that shows the precise parking area for the plane and access to Hangar 7 to which SDMB has agreed. Thus, the Space Use Permit concept is purely legalistic, and not a practical requirement.

Fifth, no Space Use Permit has ever been provided to Appellant's counsel, only alluded

to in Respondent's Memorandum in support of these Motions.

Sixth, while S.C. Code Ann. §27-40-800(d) may provide a procedure for the Circuit Court to raise the bond on appeal from the Magistrate Court, it does not provide a mechanism to impose new relief such as forcing a party to sign a Space Use agreement. Since this issue was never argued before the Magistrate Court during the time Judge Arakas had jurisdiction, it is not properly before the Circuit Court. *Indigo Assoc. v. Ryan Invest. Co.*, 314 S.C 519, 431 S.E.2d 271 (Ct. App. 1984)(holding that the Circuit Court, acting as an appellate court in a case heard by the Magistrate, cannot consider questions that have not been presented to the magistrate); see Toal, APPELLATE PRACTICE IN SOUTH CAROLINA, 2D (2002), p. 26.

Finally, the Affidavit of Aaron Holly states that SDMB will meet accommodation set forth in both Motions and move his plane to the rehabilitated ramp area. SDMB has been operating under an appeal bond that allows it to use Hanger #7 without a written agreement in place – per Horry County Magistrate Judge Christopher Arakas' Order – effective August 1, 2014.

Judge Arakas's Appeal Bond did not require Appellant to execute any additional documents with the HCDA during the pendency of the appeal. SDMB has been operating at Grand Strand Airport from August 1, 2014 through February 16, 2015 without any signed lease or Space Use Permit. Any claim that this results in discrimination against other tenants at the Airport is a red herring – clearly there is a judicial exception for matters on appeal. Moreover, the very Minimum Standards give the HCDA authority to waive any requirement. There is no reason why SDMB should be compelled to change its legal position when the Space Use permit has no bearing on the Greenwald work or SDMB's accommodation.

Based on the foregoing, there is no compelling equitable or legal reason why SDMB is required to sign any new document.

2. Delay, Unclean Hands, Laches

Respondent's Motions should fail on the merits. The County has known about the commencement of Phase II of the CRE Ramp Renovation project for months, perhaps years, but sat on these motions until two weeks before the work was scheduled to commence. In his memorandum, Mr. Battle says SDMB was notified of the same far in advance, but has provided no documents which substantiate that. Moreover, Mr. Holly denies it.

Under the doctrine of laches, if a party, knowing his rights, does not seasonably assert them, but by unreasonable delay causes his adversary to incur expenses or to enter into obligations or otherwise detrimentally change his position, then equity will ordinarily refuse to enforce those rights. *Mazloom v. Mazloom*, 382 S.C. 307, 675 S.E.2d 746 (Ct. App. 2009) *aff'd*, 392 S.C. 403, 709 S.E.2d 661 (2011).

It is clear that the County is using the instant motion to avoid litigation and to strong-arm SDMB into signing new agreements that would effectively exonerate the County from its improper acts and force SDMB to accept *ultra vires* regulations.

3. Injunctive Relief is Not Proper Under These Facts

Notwithstanding the aforementioned argument that Appellant has agreed to accommodate Respondent's requests, injunctive relief is not proper as Respondent has failed to show irreparable harm and an adequate remedy at law exists.

The party seeking an injunction has the burden of demonstrating facts and circumstances warranting an injunction. *Strategic Res. Co. v. BCS Life Ins. Co.*, 367 S.C. 540, 627 S.E.2d 687 (2006). To obtain a preliminary injunction, a party must demonstrate (1) irreparable harm, (2) a likelihood of success on the merits, and (3) the absence of an adequate remedy at law. *Grosshuesch v. Cramer*, 367 S.C. 1, 623 S.E.2d 833 (2005). An injunction is a drastic equitable remedy courts may use in their discretion in order to prevent irreparable harm to a party; due to

its drastic and extraordinary nature, courts should issue injunctions with caution and only where no adequate remedy exists at law. *Hampton v. Haley*, 403 S.C. 395, 743 S.E.2d 258 (2013).

a. No Irreparable Harm

Whether "a wrong is irreparable, in the sense that equity may intervene, and whether there is an adequate remedy at law, are questions that ***are not decided by narrow and artificial rules.***" *Peek v. Spartanburg Reg'l Healthcare Sys.*, 367 S.C. 450, 626 S.E.2d 34 (Ct. App. 2005) (*emphasis added*) *holding modified for other reasons in Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 694 S.E.2d 15 (2010); *see also Kirk v. Clark*, 191 S.C. 205, 211, 4 S.E.2d 13, 16 (1939).

Here, Respondent contends that there exists irreparable harm – substantial damages to the County. However, Respondent fails to show any irreparable harm if Appellant moves his plane to the designated rehabilitated ramp area. Furthermore, Respondent has failed to show how they will be irreparably harmed if Appellant does not sign the Space Use agreement. Respondent further contends that irreparable harm exists as "Appellant cannot afford to pay the potential damages." See "Respondent's Memorandum in Support of Motion for Temporary Restraining Order and Temporary Injunction." The inability to pay is not a proper basis for irreparable harm.

b. Adequate Remedy At Law

"The adequacy of a legal remedy is a pragmatic determination based upon the certainty of fixing damages, the practicality of obtaining relief and the efficiency of the legal remedy in the particular circumstances." *Columbia Broadcasting Sys., Inc. v. Custom Recording Co.*, 258 S.C. 465, 189 S.E. 2d 305, cert. denied, 409 U.S. 1007 (1972); *quoted by* Flanagan at 533. Our Courts have found that where damages can be ascertained, there is an adequate remedy at law. See generally *Milliken & Co. v. Morin*, 386 S.C. 1, 9, 685 S.E.2d 828, 833 (Ct. App. 2009) *aff'd as modified*, 399 S.C. 23, 731 S.E.2d 288 (2012).

Here, Respondent contends there is no adequate remedy at law. However, Respondent has plead, with specificity, in the body of the Motions at issue an exact monetary amount they believe they will suffer from should Appellant fail to move from Hanger #7. As such, even the County must acknowledge there is an adequate remedy at law.

c. Balance of the Equities

While "balancing the equities" is no longer required before enforcing an injunction, courts have inherent power to do all things reasonably necessary to insure that just results are reached to fullest extent possible. *Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 587, 694 S.E.2d 15, 17 (2010) ("the balancing requirement is subsumed by the irreparable harm and inadequate remedy at law components of the three-part test) ; *Ex parte Dibble*, 279 S.C. 592, 310 S.E.2d 440 (Ct. App. 1983).

No temporary restraining order shall be granted to suspend the general and ordinary business of an individual, partnership, association or corporation. SCRCP 65. An injunction should be carefully considered and granted only when ***legal rights are invaded or legal duties wantonly neglected***. *Transcon. Gas Pipe Line Corp. v. Porter*, 252 S.C. 478, 482, 167 S.E.2d 313, 315 (1969); James F. Flanagan, *South Carolina Civil Procedure* 531 (3rd Ed. 2010) (*emphasis added*).

Here, Appellant has already agreed to move his plane to the area designated by Respondent. As such, this Motion for Injunction is essentially moot. Assuming, *in arguendo*, that Respondent seeks to enjoin Appellant from operating his plane out of Grand Strand Airport, he will lose his business (See Holly Affidavit). Under SCRCP 65, granting this motion for this purpose would be improper. Assuming, *in arguendo*, Respondent is seeking an injunction as a back-door way to force Appellant to sign the Space Use agreement, this action is improper as Respondent has not moved for a mandatory injunction nor has it pleaded or demonstrated the

requirement for a Space Use Permit in its Court papers.

Therefore, this Honorable Court should deny Respondent's Motion for Temporary Restraining Order and Temporary Injunction as Appellant has agreed to accommodate Respondent's request that he move his plane to the area shown on Exhibit B. He should not be faced with losing his business or waiving his legal arguments in other venues in order to accommodate the County, when he has already agreed to accommodation.

d. Additional Factors.

Additionally, the purpose of an injunction is to enjoin someone from taking an act that would cause irreparable harm. To the extent the County wishes to force Mr. Holly to sign a new agreement, that would turn equitable relief on its head. Finally, there is an issue whether the Circuit Court, sitting as an appellate court, can entertain an action for injunctive relief never presented to the Magistrate. *Indigo Assoc. v. Ryan Invest. Co.*, 314 S.C 519, 431 S.E.2d 271 (Ct. App. 1984).

4. No Grounds to Increase Bond, Either

Here, Respondent has moved under S.C. Code Ann. §27-40-800(d), which states, in part:

> "If either party disputes the amount of the payment or the due date in the undertaking, the aggrieved party may move for modification of the terms of the undertaking before the circuit court. Upon the motion and upon notice to all interested parties, the court shall hold a hearing as soon as is feasible after the filing of the motion and determine what modifications, if any, are appropriate. No judgment for ejectment may be executed pending a hearing on the motion, provided the tenant complied with the terms of the undertaking." S.C. Code Ann. § 27-40-800(d).

This statute also provides that it is sufficient to stay execution of a judgment for ejectment that the tenant sign an undertaking that he will pay to the landlord the **amount of rent**, determined by the magistrate. S.C. Code Ann. § 27-40-800.

All of the same arguments against granting injunctive relief also apply to this motion, First, the County is asking this honorable court to increase the appeal bond to an amount far and

above the amount of rent that was determined by the Magistrate on the sole basis that Appellant has declined to accommodate the County and is frustrating Greenwald from commencing its work. The Affidavit of Holly shows this is not the case however.

Moreover, the County has not shown why it waited until the eleventh hour to seek a change in the bond, nor can it explain away the application of waiver, unclean hands and laches. Additionally, the "emergency" is entirely of the County's own making. It executed the contract after the August 1, 2015 appeal bond while it knew the appeal was still ongoing.

While the Court of Appeals has held that appeal bonds are committed to the sound discretion of the courts below" [i.e., the Magistrate Court and Circuit Court], *United Dominion Realty Trust, Inc. v. Wal-Mart Stores, Inc.*, 307 S.C. 102, 108, 413 S.E.2d 866, 870 (1992), the Appellant submits that to allow a $358,000.00 bond to be imposed **now** is unconstitutionally excessive – especially after it has agreed to move its plane.

Moreover, the absence of language in S.C. Code Ann. § 27-40-800 allowing an amount far exceeding the amount of rent, and in light of SDMB's willingness to move its plane, would be an abuse of discretion for this honorable Court to grant. An abuse of discretion occurs when the conclusions of the trial court are either controlled by an error of law or are based on unsupported factual conclusions. *South Carolina Dep't of Transp. v. Revels*, 766 S.E.2d 700 (S.C. 2014).

CONCLUSION

Based on these legal arguments, SDMB respectfully requests that this Court deny Respondent's Motion for Modification of Bond Amount and deny Respondent's Motion for Restraining Order and Temporary Injunction.

BROWN & VARNADO LLC

By: _____

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and

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robertgeastman@msn.com

Co-Council for Defendant(s)

February 17, 2015
Mount Pleasant, South Carolina

EXHIBIT A

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY)	CASE NO.: 2014-CP-26-1193
)	
SKYDIVE MYRTLE BEACH, INC.)	
)	
Plaintiff(s))	
)	**AFFIDAVIT OF AARON S. HOLLY**
v.)	
)	
HORRY COUNTY)	
)	
Defendant(s))	
)	

PERSONALLY APPEARED BEFORE me, Aaron Scott Holly, who first being duly sworn would depose and say as follows:

1. I am an adult over eighteen years old (18) and am competent to make this affidavit.

2. I am the owner of Skydive Myrtle Beach, INC (SDMB) which operates out of Hangar #7 at Grand Strand Airport located at 2800 Terminal Street, North Myrtle Beach, SC, 29582.

3. It was only on February 3, 2015 that I was informed that Greenwald Construction Company ("Greenwald") would commence phase II of the Ramp Rehabilitation project at the Grand Strand Airport on or immediately after February 16, 2015.

4. Based on my personal conversations with the Greenwald project manager, Greenwald's work will prevent me from using Hangar 7 as a hangar for my plane during the approximately eight weeks it will take Greenwald to complete the project.

5 I am willing to reach an accommodation with Horry County and the Horry County Department of Airports ("HCDA") to move my plane from Hangar 7 into an area previously designated by HCDA for this purpose, so long as I am not required to sign a space-use agreement.

6. I also require 24/7 access to my plane; 24/7 pedestrian access to Hangar 7 where I keep my business office and conduct parachute training and packing; and reasonable access for my van from Terminal Street to my plane so that I can transport customers, parachutes and other equipment as needed to conduct my business.

7. I expect to rent another, slightly-larger plane in March, 2015 and would need HCDA to guarantee the same access for the new plane.

8. My current use of Hangar 7 was permitted by Horry County Magistrate Judge Christopher Arakas effective August 1, 2014 without requiring me to execute any additional documents with the HCDA during the pendency of this appeal.

9. An appeal bond increase of $358,000.00 and/or an injunction against my interference with Greenwaald are both unnecessary because I am willing to reach an accommodation with Horry County and the HCDA that would not interfere with the Greenwald project.

10. If required to post a $358,000.00 surety bond and/or being enjoined from operating a plane out of the Grand Strand Airport, I believe I will lose my business.

11. I am not attempting to "hold up" the Greenwald project. The improvements will be beneficial to my continued operations. It is unfair, however, for the County to use this project – the commencement date for which was withheld from me until the eleventh hour – as a way to leverage me into signing an agreement that undercuts my lawsuits and administrative actions against the County.

12. I consider these motions as part of a pattern of continued harassment which has greatly impacted my ability to conduct business, and has tarnished my reputation in the skydiving community by accusing me of breaking rules which I believe to be invalid. I consider this further prejudicial and discriminatory treatment by Horry County and the HCDA.

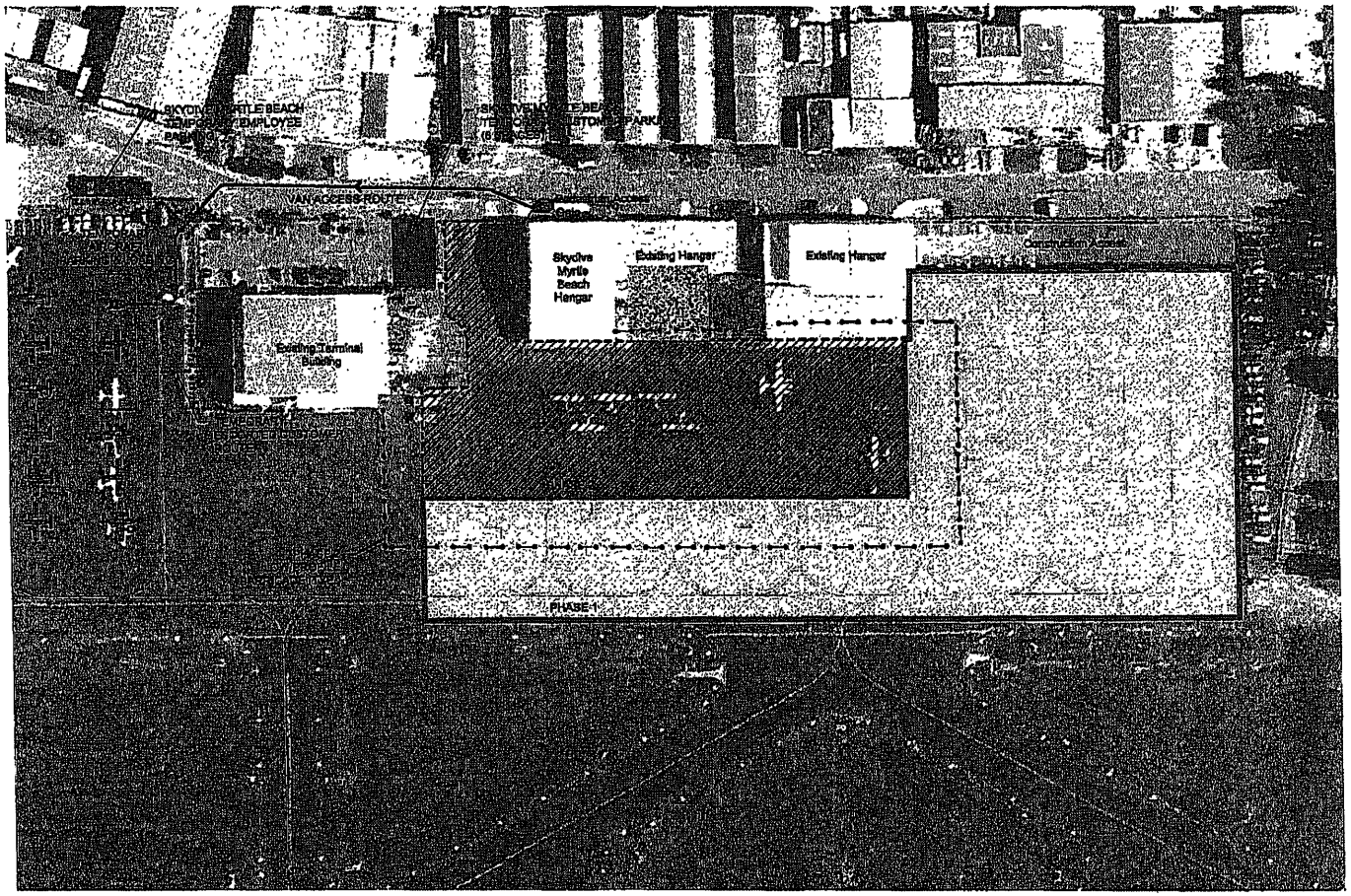
FURTHER AFFIANT SAITH NOT.

Aaron S. Holly

SWORN TO AND SUBSCRIBED BY ME
this 16th day of February, 2015.

Notary Public for the State of South Carolina
My Commission Expires: 12/05/2018

EXHIBIT B





LEGEND

Parked Aircraft

Skydive Myrtle Beach Aircraft

TENANT ACCESS ALTERNATIVES

Skydive Myrtle Beach will be provided temporary parking spaces for their employees and their customers as shown. Overflow parking should be brought to the attention of Horry County Department of Airports (HCDA) to ease with parking congestion.

Skydive Myrtle Beach will be provided a temporary aircraft parking and loading zone as shown. The preferred access route is utilizing the existing van operation to move customers from the existing Skydive Myrtle Beach hangar to the aircraft parking and loading position. The alternative access route is to escort customers on foot from the Skydive Myrtle Beach hangar through the Existing Terminal Building to the temporary aircraft parking and loading position.

NOTES

1. Phase 2 of the Grand Strand Airport Ramp Rehabilitation Schedule II is scheduled to commence on March 2, 2015. Phase 2 is scheduled to be completed May 10, 2015.

grand strand AIRPORT

RAMP REHAB SCHEDULE II - TENANT ACCESS
SKYDIVE MYRTLE BEACH
DECEMBER 2014

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the within ***Appellant's Memorandum of Law*** upon all parties to these matters either by hand delivery or depositing a true copy of the same in the U.S. mail, proper postage prepaid, addressed to counsel of record as follows, and also by email if so indicated:

Michael W. Battle, Esquire — via Email
Battle Law Firm, LLC
Post Office Box 530
Conway, SC 29528
Attorney for Respondent(s)

Arrigo P. Carotti, Esquire — via Email
H. Randolph Haldi, Esquire
Horry County Attorney's Office
1301 2nd Avenue
Conway, South Carolina 29526)

2015 FEB 17 AM 9:12
CLARE HUGGINS-WARD
CLERK OF COURT
COUNTY

Robert B. Varnado, Esq.

February 17, 2015

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**FIFTEENTH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	**Case No. 2014-CP-26-1193**
SKYDIVE MYRTLE BEACH, INC., (f/k/a Skydive Myrtle Beach, LLC),	)	
Plaintiff,	)	**PLAINTIFF'S MEMORANDUM OF LAW IN SUPROT OF ITS MOTION FOR INJUNCTIVE RELIEF, TO EXERCISE EXCLUSIVE JUURISDICTION AND CONSOLIDATE ALL STATE ISSUES, AND TO COMPEL DISCOVERY**
v.	)	
HORRY COUNTY, HORRY COUNTY DEPARTMENT OF AIRPORTS, H. RANDOLPH HALDI, PAT APONE, TIM JACKSON, and JACK TEAL	)	
Defendants.	)	

TO: THE HON. ROGER M. YOUNG, CIRCUIT COURT JUDGE:

COMES NOW the Plaintiff Skydive Myrtle Beach, Inc., (SDMB) by and through its undersigned counsel, who would submit the following memorandum of law in support of its Motion for Injunctive Relief, to Exercise Exclusive Jurisdiction and Consolidate all state issues[1] in this action in this Honorable Court and to Compel Discovery dated October 14, 2014, and filed on October 20, 2014.

Pursuant to South Carolina Rules of Civil Procedure (SCRCP) Rules 37, 42, and 65, Plaintiff SDMB respectfully requests this Honorable Court to Order Defendants Horry County (County) and Horry County Department of Airports (HCDA) to produce documents requested on July 8, 2014, consolidate any and all issues relating to SDMB's appeal of Myrtle Bach Magistrate's Court styled *Horry County v. Skydive Myrtle Beach, Inc.*, Case No.

[1] SDMB has also filed a formal complaint before the Federal Aviation Administration (FAA) alleging prohibited discrimination of a federally recognized aeronautical activity styled *Skydive Myrtle Beach, Inc. v. Horry County Department of Airports*, FAA Docket No. 16-14-05 *filed* on July 2, 2014 and *docketed* by FAA on July 28, 2014.

2014CV261092044, and timely appealed to the Horry County Court of Common Pleas on July 29, 2014, styled *Skydive Myrtle Beach, Inc. v. Horry County*, Case No. 14-CP-26-4965 (Appeal), and enjoin the County and HCDA from enforcing a County Ordinance 115-14 (enacted January 20, 2015) promulgating *ultra vires* regulations styled "*Minimum Standards and Requirements for Aeronautical Activities at Grand Strand Airport (CRE)* [sic] *Conway Horry County Airport (HYW), and Twin City Airport (5J9)*" (Illegal Regulations).

Statement of Relevant Facts and Procedural History

On May 10, 2012, SDMB entered into an eight-year long-term lease with Ramp 66, an agent for HCDA to let Hangar 7 at Grand Strand Airport (GSA), North Myrtle Beach, South Carolina. During the fifteen month period preceding HCDA's resumption of GSA control, SDMB conducted several thousand skydives without incident or complaints.[2]

In August 2013, HCDA resumed primary control of GSA from Ramp 66. Since resuming control of GSA, HCDA and its proxy, GSA Air Traffic Control (CRE), have initiated over 100 documented complaints relating to a federally regulated aeronautical activity, skydiving. SDMB has and continues to maintain that it operates in strict compliance with all federal regulations and published state, local rules and regulations.[3]

The current actions by the County and HCDA are part of a continuous ongoing pattern of harassment utilizing governmental mechanizations and actions that create the appearance of legitimate state action but amount to an illegal attempt to remove SDMB from GSA without

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[2] HCDA did investigate a taxi crossing by a skydiver authorized to cross active areas pursuant to Part 105 of Title 14 Code of Federal Regulations after receiving a complaint from the local privately operated Aircraft Control Tower (CRE). No action by FAA was initiated against SDMB for this incident.

[3] The online code of Horry County Ordinances has not posted the Illegal Regulations as of February 27, 2015. *See* https://www.municode.com/library/sc/horry_county/codes/code_of_ordinances?nodeId=COOR_CH3AI (accessed 1852, February 27, 2015).

cause, drain its financial resources and are demonstrative of the pattern of harassment articulated in its *Complaint*. Demonstrative of this illegal pattern of harassment are the following:

- At a lease negotiation in early September 2013, SDMB informed HCDA that it intended to increase its fall skydiving operations with a kick-off weekend event in October. HCDA officials immediately objected to the event and demanded proof of compliance with all state and local governmental organizations (permits, security plans, crowd control, etc,). SDMB drafted a multipage "Operation Order" addressing HCDA's stated concerns and had the North Myrtle Beach fire inspector inspect Hangar 7 pursuant to SDMB's application for a city operating permit. The inspection resulted in multiple deficiencies with Hangar 7 mostly related to electrical concerns. SDMB requested repairs from HCDA and failed to take action.

- In October 2013, SDMB obtained all necessary permits, notified FAA, North Myrtle Beach, HCDA, and local neighbors that increased customer traffic was expected for the event. Included in the planning, was a food truck and live band.

- On October 17-20, 2013, Horry County Sheriff's attended SDMB's kick-off event at the direction of HCDA. The Sherriff directed SDMB:

  a. to use a vehicular gate access to the hangar;

  b. to have its customers use street parking and vacate the FBO public parking area;

  c. to remove a contracted food cart from County property due to an "open flame" regulatory prohibition on airport property;

  d. to stop its customers from smoking due to County smoking ban on County property; and

  e. to enforce an open container prohibition policy on county property. (Horry County Sheriffs remained on duty during the event.)

- On November 27, 2013, by certified mail,[4] HCDA accused SDMB of overnight occupancy and having an unrestrained dog that created a safety

[4] Since HCDA had instructed GSA to refuse mail for SDMB, the letter was not received by SDMB until January 2014, when it was delivered by hand.

concern. The letter stated each was a violation of HCDA rules and a future violation would result in termination of SDMB's Space Use Permit.[5]

- On January 6, 2014, SDMB denied overnight occupancy and stated it was unaware of these policies; it admitted an employee's dog was unrestrained[6] at times like other dogs at GSA and SDMB pledged it would not permit dogs to be unrestrained in the future. SDMB also advised HCDA that its mail delivery was being disrupted at HCDA direction.

- On February 5, 2014, a HCDA GSA lineman admitted unauthorized access to Hangar 7 to permit contract workers access to an electric outlet. SDMB requested a meeting with HCDA to clear up issues (between SDMB, HCDA, and CRE).

- On February 7, 2014, SDMB, HCDA, and CRE met. At the meeting, HCDA refused to discuss SDMB's complaints of HCDA unauthorized entry. SDMB stated it would have to file a police report for aircraft and liability insurance purposes since parachutes and the jump aircraft are required to be secure from unauthorized personnel. A police report was filed, but SDMB did not prosecute, stating it only wanted the unauthorized entries by HCDA to stop.

- On February 10, 2014, HCDA GSA manager arrived at Hangar 7, instructed SDMB customers to stop using the gate (although HCDA police had instructed this practice), complained of a propane grill operation,[7] overtly followed skydivers to a helicopter all the while taking pictures and creating a public scene during prime operating hours.

- On February 11, 2014, CRE finally provided SDMB a Letter of Agreement (LOA) which specified procedures for crossing "active" areas of GSA.[8]

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5 HCDA and SDMB had entered into a temporary six-month "bridge lease" while HCDA was waiting for the Horry County Council to approve a long-term lease.

6 Unrestrained pets are common at GSA as private plane owners often are observed with unrestrained pets from the aircraft to the FBO.

7 A propane grill is often used by CRE and HCDA staff at the GSA tower and FBO.

8 14 CFR § 139.329 requires an airport operator (HCDA) to inform and instruct all airport tenants about existing LOA and existing SOPs annually.

- On February 19, 2014, County Deputy Attorney Haldi expressed the County's "significant concerns," implying that SDMB routinely violated county and airport rules and consequently, denied SDMB's existing least terms and presented a take-it-or-leave-it lease with restrictive terms and a seventy-two (72) hour acceptance deadline.

- On February 21, 2014, SDMB requested copies of County rules it was alleged to have violated and informed the County that SDMB was operating within the rules promulgated by the FAA *which has exclusive jurisdiction to regulate skydiving operations.*

- On February 23, 2014, HCDA initially refused fuel service to SDMB aircraft because SDMB had refused to sign the newly presented Space Use Permit (SPU).

- On February 25, 2014, HCDA GSA employees refused to accept and returned a parcel addressed to SDMB from Mirage Container, Inc., a Florida corporation.

- On February 28, 2014, SDMB filed suit in the Court of County Pleas (CCP) alleging *inter alia* retaliatory eviction, harassment, civil conspiracy, fraud, and defamation.

- On March 8, 2014, SDMB discovered that the Hangar 7 door lock, located within the GSA fence-line, had been tampered with during the night (a foreign object was broken off into the locking mechanism. (The HCDA lineman who admitted unauthorized entry was on duty that evening).

- On March 12, 2014, the Horry County Airport Advisory Committee passed Illegal Regulations relating to GSA.

- On March 18, 2014, Horry County filed an Answer to SDMB's CCP Complaint but did not include any counter-claims or allegations relating to SDMB's allegations.

- On March 20, 2014, HCDA issued a notice cancelling the former practice of accepting tenant mail at the FBO and announced a driver training class for GSA.[9]

[9] The purpose of this class was to instruct tenants about the LOA and SOPs relating to active runway areas and unrestricted areas at GSA.

- On March 25 and 27, 2014, after a thirty minute wait, SDMB staff were informed that the driver training classes were cancelled. *HCDA has never rescheduled the classes.*

- On April 1, 2014, HCDA dumped a truckload of peat moss into the area used by SDMB staff to park personally owned vehicles (POVs).

- On April 3, 2014, anticipating passage by sub-committee the next day, a memo to Horry County Council recommended passage of Illegal Regulations recently drafted for GSA.

- On April 4, 2014, HCDA and Horry County Attorney Arrigo Carotti presented Illegal Regulations regulating the activities at Grand Strand Airport to the Horry County Administration Committee admitting that no rules existed for Grand Strand Airport and rules were needed as HCDA "was now involved in litigation."

- On April 15, 2014, Ordinance 36-14 (Illegal Regulations) passed its first reading before the Horry County Council.

- On April 28, 2014, HCDA through its Boston attorneys issued a "Notice of Termination" letter and threatened removal procedures.

- On May 6, 2014, Horry County Council passed the second reading of Ordinance 36-14 and held a public hearing[10] at which no one participated or spoke to the council.

- On May 14, 2014, HCDA reported "incursions" involving skydivers crossing taxiway and SDMB's refusal to attend a driving class[11] about airport SOPs to FAA.

- On May 15, 2014, HCDA began recording "Unusual Incident" (violations) per unpublished and pending Illegal Regulations.

- On May 20, 2014, Horry County Council passed Ordinance 36-14 adopting Illegal Regulations at Grand Strand Airport.

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10 Contrary to Horry County Ordinance 2-21 (fifteen (15 day notice), the SC Administrative Procedure Act (APA) (30 day notice), and FAA guidance on minimum standards promulgation (participation of aeronautical activities in drafting), no notice was provided to SDMB, an interested party, or the public generally. At least forty eight (48) hours' notice of the Agenda is required by County Ordinance 2-21(a).

11 *But see* March 25 and 27, 2014, *supra.*

- On June 5, 2014, a Writ of Ejectment was filed in Myrtle Beach Magistrate's Court.

- On June 13, 2014, a Motion to Remove the Ejectment proceeding under South Carolina Rules of Civil Procedure (SCRCP) Rule 12(b(8) and for lack of jurisdiction (excess of $7.500.00) was filed in the Magistrate's Court and a Motion to Consolidate[12] under SCRCP 42(a) was filed in the CCP.

- On June 27, 2014, SDMB customers and staff observed HCDA employees following skydivers from the landing zone (LZ) to the hangar and surreptitiously taking pictures of Hangar 7 from behind bushes.

- On June 29, 2014, HCDA employees were observed following skydivers during drops from the LZ to the hangar.

- On July 2, 2014, the Myrtle Beach Magistrate's Court denied SDMB's motion to remove Horry County's Application for Ejectment to the Circuit Court and consolidate the matter with this action.

- On July 8, 2014, SDMB requested production of documents to HCDA including, *inter alia,* rules and regulations pertaining to GSA.

- In early July 2014, Horry County zoning officials entered SDMB's private pilot lounge (located atop of a warehouse directly across the street from GSA) and took pictures of the lounge.

- On July 18, 2014, SDMB requested reconsideration of its denial and thirty days to file an answer, counter-claim, conduct discovery and to have a jury trial should the Magistrate's court deny its request for reconsideration.

- On July 23, 2014, the Myrtle Beach Magistrate's Court denied: SDMB's motion to remove; request to answer the complaint; conduct discovery; and have a jury trial. SDMB was subsequently issued a Writ of Ejectment following a Bench Trial.

- On July 25 2014, SDMB appealed the Myrtle Beach Magistrate's Court decision and filed a date-stamped copy of the Appeal with the Myrtle Beach Magistrate's Court.

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[12] On August 26, 2014, the CCP Motion Roster scheduled a hearing for September 30, 2014. The motion was denied since the case was on appeal from the Magistrate's court.

- On July 29, 2014, the Myrtle Beach Magistrate's Court denied counsel's request for rescheduling or telephonic appearance for an August 1, 2014, Bond Hearing (counsel for SDMB was in Florida and unavailable).

- On August 1, 2014, SDMB appeared *pro se* before the Myrtle Beach Magistrate's Court which issued a Bond to Stay Execution on Appeal authorizing SDMB to remain in Hangar 7 pending the decision on appeal provided SDMB continues monthly payments of $1,200.00 on the first of each month.

- On August 16, 2014, an anonymous call to the North Myrtle Beach Police department about beach landings generated a police report. No arrests were made.

- On September 1, 2014, SDMB was required to vacate its pilot lounge after receipt of a zoning violation.

- On September 30, 2014, a hearing before the circuit court on SDMB's motion to consolidate was denied as moot since the matter had been litigated in the Magistrate's Court and appealed to the circuit court. SDMB's request for injunctive relief relating to its allegations of HCDA harassment was also denied.

- On October 7, 2014, HCDA advised SDMB that it would not be able to utilize Hangar 7 during its Rehabilitation Project and would be required to execute a "Space Use Permit" in order to operate and park its aircraft at GSA.

- On October 8, 2014, SDMB advised HCDA that it had authorization to use Hangar 7 to store its aircraft per the Stay Order, advised HCDA that it was required to hangar its aircraft under a lease agreement, and could store its aircraft in Hangar 1, provided HCDA consent. Although Hangar 1 was available for immediate occupancy, HCDA rejected this request and advised SDMB that hangaring its aircraft was "not HCDA's responsibility."

- On October 14, 2014, SDMB filed a Request for Emergency Hearing, Motion to Compel and Injunctive relief with the CCP.

- On October 25, 2014, SDMB's leased aircraft was removed by the owner due to anticipated loss of use of Hangar 7.

- On October 28, 2014, HCDA sent SDMB a copy of "proposed" Illegal Regulations and invited SDMB to a "town hall" meeting to discuss the proposed rules.

- On October 30, 2014, HCDA reiterated in a "Town Hall Meeting" with SDMB that GSA had no effective regulations or rules in effect and "noted" SDMB's objections to penalties and skydiving regulations proposed by HCDA at the meeting.

- On November 3, 2014, SDMB sent HCDA its comments and objections to the "proposed" regulations as related to skydiving.

- On November 13, 2014, HCDA's Boston attorneys provided "Minutes" from the County Council and for the first time identified County Ordinance 36-14 enacting the Illegal Regulations for GSA.

- On December 5, 2014, Horry County Administration Committee approved an ordinance amending the Illegal Regulations.

- On December 8, 2014, Horry County Council, at its Regular Council Meeting, unanimously adopted Ordinance 115-14 (first reading) revising the Illegal Regulations passed in May.

- During Christmas week, Horry County and HCDA's first submission of requested documents were produced. The bulk of documents requested, including regulations or other rules, was not produced.

- On December 30, 2014, SDMB discovered Horry County Council's official online minutes.

- On January 6, 2015, Horry County Council held a "public review" of County Ordinance 115-14 amending the Illegal Regulations and passed the second reading. No public input relating to the Illegal Regulations was received.

- On January 9, 2015, through its Boston attorneys, HCDA objected to SDMB's supplementation of the record (inclusion of County Council minutes).

- On January 20, 2014, Horry County Council amended the minimum rules to include selective and discretionary power to enforce the Illegal Regulations at GSA together with the power to fine and ban violators from

operating at any Horry County Airport (any law enforcement officer has authority to enforce the rules).

- On January 30, 2015, CCP Motions Calendar scheduled a hearing on SDMB's Motion to Compel and Injunctive Relief for March 2, 2015.

- On February 3, 2015, the County filed a motion to increase the appeal bond by $358,000.00 – nearly six (6) months after Horry County Magistrate issued the Stay – claiming that the CRE Ramp Renovation project requires work in front of Hangar 7 to commence on February 16, 2015. Contrary to the County's unsupported assertions, this was the first written notice of the start date for Phase 2 Ramp Rehabilitation received by SDMB.

- On February 10, 2015, the Horry County Magistrate denied County's motion on the grounds that it lacked jurisdiction to make an adjustment to a Bond determination of an appealed matter. That same day, counsel for the County filed a Motion for Temporary Restraining Order and Temporary Injunction. On February 11, 2015, counsel for the County filed a Motion for Modification of Bond Amount. Both were filed in Horry County Circuit Court.

- On February 17, 2015, this Honorable Court denied Horry County's request for bond increase, Temporary Restraining Order and Injunctive Relief holding that the *status quo ante* should be preserved, SDMB should execute a Space Use Permit (without affecting its legal objections), be permitted to use Hangar 7 during the rehabilitation period, and keep its aircraft on the tarmac during the construction period.

Legal Argument and Analysis

1. **The County and HCDA should be enjoined from interfering with SDMB's skydiving operation to preserve the *status quo***

"A party seeking injunctive relief 'must demonstrate irreparable harm, a likelihood of success on the merits, and the absence of an adequate remedy at law. An injunction is a drastic remedy issued by the court in its discretion to prevent irreparable harm suffered by the plaintiff.'" *Rawlinson Rd. Homeowners Ass'n Inc. v. Jackson*, 395 S.C. 25, 35, 716 S.E.2d 337

(S.C. App. 2011) *quoting Denman v. City of Columbia*, 387 S.C. 131, 141-41, 691 S.E.2d 465-470 (2010).

A preliminary injunction preserves the *status quo* and prevents irreparable harm to the party requesting it. *Compton v. South Carolina Dep't of Corr.*, 392 S.C. 361, 366, 709 S.E.2d 639, 642 (S.C., 2011) *Powell v. Immanuel Baptist Church*, 261 S.C. 219, 221, 199 S.E.2d 60, 61 (1973). The complete loss of a business constitutes irreparable harm. *Peek v. Spartenburg Regional Healthcare System*, 367 S.C. 450, 455-56, 626 S.E.2d 34, 37 (Ct. App. 2005). Illegal Regulations were introduced to the County Council in response to this litigation just over a month following the filing of plaintiff's complaint with this Honorable Court. One month after being served with Plaintiff's Complaint, County Attorney admitted that no policy or standards governed GSA and a "full blown effort to get those [Illegal Regulations] drafted so they could have something in place at [GSA]." County Administration Committee Meeting *Minutes*, at 14-15 (April 4, 2014). In contravention of the South Carolina Administrative Procedure Act (APA) and in less than six weeks, the County enacted first version (County Ordinance 36-14) of the Illegal Regulations on May 20, 2014.[13]

A. Procedural Posture

Under a pending Order issued in the Appeal, this Honorable Court ordered SDMB to sign a "County approved" Space Use Permit (SPU). Section 9 A. of the SPU requires SDMB to comply fully with all applicable, Airport regulations and County Ordinances which include the Illegal Regulations.[14] Under the Illegal Regulations, four violations in a twelve month period

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[13] *See infra*, Section 4.

[14] SDMB argues that the Illegal Regulations should be struck down by this Honorable Court *in toto*. SDMB anticipates that the County will attempt to enforce the Illegal Regulations in the Myrtle Beach Magistrate's Court while this matter is pending. If the trend in setting hearings continues, SDMB anticipates that a decision will be made before a Consolidation motion in this court could be heard necessitating another appeal in circuit court and

result in a permanent bar from operating at any County or HCDA airport. Once signed, the Order, although intended to preserve the *status quo ante*, SDMB is conceivably in violation of multiple sections if the Illegal Regulations.

B. Illegal Regulations

Currently, HCDA and SDMB are at an impasse in the negotiation of a Letter of Agreement (LOA) with the FAA and GSA tower. Accordingly, SDMB is operating under a dated LOA pending resolution of SDMB's FAA Part 16 formal complaint. Illegal Regulations Section Six, H.1.d. (require a current LOA).

SDMB is required to monitor GSA conditions "to ensure all Skydivers will be able to land safely within the designated Landing Zone [(LZ)]."[15] *Id.*, at I.d.f. Skydiving is inherently dangerous and, as in any other aeronautical activity, conditions are not entirely controllable or predictable. The boundaries for the current LZ are in dispute and have changed as originally defined in the dated LOA, and SDMB has been the subject of many Unusual Incident Reports (UIRs) completed by HCDA. As part of the FAA record, there are over twenty UIRs alleging off LZ landings, and these could be used as a basis for removal or cessation under Section 10 of the Illegal Regulations.

HCDA continues to refuse to authorize electrical repairs to be made to Hangar 7 by SDMB or any contractor. It is poorly lighted (three of nine ceiling lamps function), an open, unheated hangar with no restrooms, rooms, lounge or office and poor or no insulation. Currently Section H.2.d renders Hangar 7 unsuitable for skydiving.

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rendering the pending motion to consolidate in this action moot since the matter was heard below and is on appeal, similar to the application for a writ of ejectment filed in July of last year.

[15] Part 105 of Title 14, Code of Federal Regulations have no such restrictions and authorize parachute landing anywhere on airport property. The FAA does make recommendations and encourages the designation of a suitable landing area. FAA has not established violations for missing a designated LZ.

HCDA also requires the purchase of additional "Apron space" (2.e), to have a "qualified" manifestor and safety officer (4.b); and limits operations to daylight hours (6) and prohibits landing at alternative LZs off airport property (1.g). Federal regulations do not require these restrictions to conduct parachute operations.

As set forth herein, the Illegal Regulations are preempted by federal law, unconstitutional under the South Carolina Constitution, promulgated in contravention of the APA and local County notice ordinance and *ultra vires*.

C. Multiple Actions Relating to Common Questions of Fact and Law

SDMB initiated this action against HCDA and Horry County following multiple unsuccessful attempts to resolve and comply with a sea of unpublished mandates by HCDA and Horry County that have included enforcement of unwritten "rules" by Sherriff's deputies, multiple complaints to the FAA, accusations of regulatory violations of HCDA rules by the Horry County Attorney, fire code infractions, zoning violations, creation of an unannounced UIR and "Mandatory Occurrence Report" (MOR) GSA reporting system, and unannounced but promulgated Illegal Regulations, drafted, presented to, and passed by Horry County Council without SDMB input.

The multiplicity of litigation caused by piecemeal litigation and anticipated enforcement of the Illegal Regulations will financially bankrupt SDMB and the Order of the Court requiring a "temporary" SUP to be executed by SDMB provides for preservation of the *status quo ante* but opens the door to an enforcement proceeding if the Illegal Regulations are enforced.

Since this action began, SDMB has been haled into the Myrtle Beach Magistrate's Court multiple times. Due to the accelerated scheduling at the magistrate's court, SDMB, did not have the opportunity to have its Motion to consolidate the action in this Honorable Court before a

bench trial was conducted after denying SDMB's Motion to Remove the action to the circuit court as part of this action. Counsel for SDMB could not attend the Bond Hearing in the magistrate's court on two days' notice since he was out of state. SDMB therefore represented itself *pro se* at the bond hearing.

With eight days' notice, last month, SDMB was summoned before the magistrate's court for a Request for Increase in Appeal Bond. Counsel of record was unavailable due to the birth of his first child and SDMB was forced to hire co-counsel to appear on short notice.[16]

With less than three days' notice, SDMB was required to appear before this Honorable Court (in its companion case) to defend a request for emergency Injunctive Relief, **less than two weeks before SDMB's hearing for injunctive relief (filed more than four months earlier).** Additionally, SDMB has been presented with Illegal Regulations, threatened with enforcement for failure to comply with the Illegal Regulations, and the target of multiple HCDA investigations and reports of violations filed with the FAA.

D. Unclean Hands, Waiver, and Laches

In February 2014, Horry County Attorney alleged that HDCA rules and policies were violated by SDMB. In its response, SDMB denied most allegations, identified compliance with existing federal regulations, and requested the rules referred to by the allegations. This constitutes a SC FOIA request. No rules have ever been produced by HC or HCDA until a "town hall" meeting was held on October 30, 2014.

Since articulating formal accusations in February 2014, HCDA has quietly presented new airport Illegal Regulations (MSTD) to the Horry County Airport Advisory Committee on March 12, 2014 without any notice to SDMB or the public. On April 4, 2014, the MSTD were

[16] Counsel for SDMB requested a continuance for this hearing. The request was not granted and co-counsel successfully argued that the magistrate's court lacked jurisdiction to entertain the matter pending the resolution of a timely filed appeal with the circuit court.

presented to the Horry County Administration Committee which approved the rules without public comment. On April 15, 2014, Horry County passed the first reading of Ordinance 36-14 unanimously without any comment or discussion.

No notice of any public hearing (other than online publication of a council agenda forty-eight hours prior to regularly scheduled meetings) has ever been held for the initial rules passed in May 2014, or the revised rules as required by Horry County Ordinance 2-21(e)(1)(c) (15 days) and the South Carolina Administrative Procedures Act (APA) (30 days). *See* SC Code Ann. § 1-23-110.

HCDA and the County's failure to produce the Illegal Regulations in February 2014, and in discovery, in contradiction to the South Carolina FOIA and SCRCP, should operate as a bar to any attempt to enforce these post-litigation Illegal Regulations. In failing to raise the Illegal Regulations in its Answer, HCDA and the County waived their right to enforce them one year after the filing of this action under the doctrines of waiver and laches.

2. The Illegal Regulations are Preempted by Federal Law

"The FAA shall develop plans and policy for the use of navigable airspace to ensure the safety of aircraft and efficient use of airspace." FAA Order 5190.6B (9/30/2009), note 37 *citing* 49 USC § 40103(b). "The FAA, not the sponsor, is the authority to approve or disapprove aeronautical restrictions based on safety and/or efficiency at federally obligated airports." Order 5190.6B, 14.3. "Prohibitions and limits are within the sponsor's proprietary power only to the extent that they are consistent with the sponsor's obligations to provide access to the airport on reasonable and not unjustly discriminatory terms and other applicable federal law. 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)).

FAA has promulgated regulations relating to skydiving in 14 CFR Part 105. The Illegal Regulations, as passed by the County, conflict with the FAA regulations in that they require the FAA to "approve" a Drop Zone[17]; define procedures for skydiving at the airport"; conduct a safety and efficiency study (if HCDA determines the need); maintain a manifest of all skydivers for three years; monitor weather and "ensure . . . all skydivers will be able to land safely within the designated Landings Zone"; prohibit skydivers from entering taxiways without radio permission; and authorize the HCDA director to "impose such additional reasonable restrictions or conditions on Commercial Skydiving operations from time to tome as the Director, in his or her discretion, may deem to be necessary in order to ensure the safe and efficient operation of the Airport." *See generally*, Illegal Regulations, § 6.H, Skydiving Operator.

3. The Illegal Regulations are contrary to SC Constitution Article 1, Section 22.

Under the South Carolina state constitution,

> No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard; nor shall he be subject to the same person for both prosecution and adjudication; nor shall he be deprived of liberty or property unless by a mode of procedure prescribed by the General Assembly, and he shall have in all such instances the right to judicial review.

[17] FAA defines a dropzone as any pre-determined area in which a person plans to land during a parachute drop. 14 CFR § 105.3. FAA regulations do not require FAA to authorize a designated landing zone and the county cannot preface permission based on assigning a federal agency to perform a duty not anticipated by Congress or the Department of Transportation.

S.C. CONST. ART. I, § 22

The South Carolina Supreme Court has explained this provision:

[I]n recognition of the increasing number of governmental powers delegated to administrative agencies, South Carolina Constitution article I, § 22 was added to the 1895 Constitution in 1970 as a safeguard for the protection of liberty and property of citizens. *South Carolina Ambulatory Surgery Center Association, et. al. v. South Carolina Workers Compensation Commission*, 389 SC 380, ___, 699 S.E.2d 146, 152 (2010), *rehearing denied* (internal quotations and citations omitted). "[T]he purpose of Section 22 is to ensure adjudications are conducted by impartial administrative bodies. Partiality exists where, among others, an adjudicator has *ex parte* information as a result of a prior involvement in the case, a 'will to win.'" *Garris v. Gov. Bd. of SC Reinsurance*, 333 S.C. 432, 444, 511 S.E.2d 48 (1998), *quoting Ross v. Medical Univ. of South Carolina*, 328 S.C. 51, 69, 492 S.E.2d 62, 72 (1997).

In *Garris*, the Supreme Court articulated the proposition that the South Carolina Constitution prohibits agency employees "who participate in the investigation or prosecution of a [regulated entity to participate] as a member or observer [and] may not participate as adjudicators of that [regulated entity]'s case at a subsequent hearing." *Id.*, at 446, 511 S.E.2d at ___.

The Illegal Regulations are subservant to existing agreements as terms of existing agreements govern. Illegal Regulations, §1.C. The Director definition includes a privilege to "delegate HCDA staff as [deemed] necessary. *Id.*, at § 2, page 8.

If HCDA arbitrarily grants an exception to the Illegal Regulations similarly situated citizens cannot present argument or complaint. Under §3.1.d. "shall not prevent the exercise of

rights expressly granted by HCDA in written agreements between HCDA and the person to whom such rights have been granted."

Before this Honorable Court, HCDA and the County, through its attorney, argued that the Illegal Regulations required **all users of HCDA airports to execute a "County approved" Space Use Permit.** Under the Illegal Regulations, §3.2.c. A signed Space Use Permit is required in form reasonably satisfactory to HCDA, not the County.

The Illegal Regulations are replete with discretionary authority and subjective interpretations. In fact, SDMB is the only entity responsible for the conduct of members of the public styled as "customers" as determined by HCDA. As such, it is clear that the façade of legitimate exercise of state and governmental authority is being applied in an arbitrary and capricious manner and as part of HCDA and the County's ultimate goal, to remove SDMB from GSA.

Since the Director is the point of contact for any problems, complaints, or concerns and is the ultimate adjudicator in any allegation of the subjective violation of its Illegal Regulations, the Illegal Regulations are unconstitutional on their face and should be struck down, overturned and found *ultra vires* by this Honorable Court.

4. The Illegal Regulations Were Promulgated in Violation of the Notice and Comment Provisions in the APA and County Law

HCDA is an "agency" as defined by the South Carolina Administrative Procedure Act (APA). An agency "means each state board, commission, department, executive department or officer, other than the legislature or the courts, authorized by law to make regulations or to determine contested cases." S.C. Code Ann. 1-23-10(1). In *Garris*, the Supreme Court was not persuaded by an agency's argument that it was a private body, in receipt of no state money and subject to regulation by a state agency. The Supreme Court held that when an agency "meets the

rule-making component of the APA definition." *Garris*, 333 S.C. at 440, 511 S.E. at ____. HCDA, like the agency in *Garris*, is an organization created by statute. *See* 1974 S.C. Acts 2336 (No. 1096). It is axiomatic that HCDA could not promulgate any regulations unless it had rulemaking authority and thus is an "agency" as defined by the APA and interpreted by the Supreme Court in *Garris*. Thus, HCDA must meet the requirements of the APA when promulgating regulations.

The APA requires an agency drafting regulations to provide a drafting period, notice of the drafting period, a preliminary assessment report, not less than a thirty day notice of a public hearing to receive data, views, or arguments orally and in writing, a narrative and text of the proposed regulations, statutory authority for promulgation, fiscal impact statement, statement of the need for the regulations, "the location where a person may obtain . . . a detailed statement of the rationale which shall state the basis for the regulation . . . and shall identify any studies, reports, policies, or statements of professional judgment or administrative need relied upon in developing the regulation." SC Code Ann. § 1-23-110.

Although HCDA cited no statutory authority, under the Illegal Regulations, an airport operator may promulgate regulations when "**HCDA . . . Director, reserves the right to impose such additional reasonable restrictions or conditions on Commercial Skydiving operations from time to time as the Director, in his or her *discretion*, may deem to be necessary.**" Illegal Regulations, § 6.H.1.i. (emphasis supplied). *See also*, S.C. Code Ann. § 55-90-190(2) (requiring, *inter alia*, statutory authority for new regulations). Although the South Carolina legislature did not address minimum standards, it did instruct airport operators with procedures for zoning regulations. *See* S.C. Code Ann. § 55-9-320 (directing operators to S.C. Ann. § 6-29-760). Operators are required to mail notice directly to "groups that have expressed an interest in

being informed of zoning regulations." *See* S.C. Code Ann. § 6-29-760(A) (also requiring at least fifteen days' notice of time and place for a public hearing in a newspaper of general circulation in the municipality or county, if no established procedures exist).

Additionally, County Code § 2-21(a) county regular meetings are scheduled for the first and third Tuesdays of each month, and an agenda is required to be published forty-eight hours prior to the meeting, but sub-section (e) requires public hearings to "advertised by applicable law" – no less than fifteen (15) days' notice if no controlling law. County Code § 2-22(e)(1)(c) requires public hearings when penalties are included in the regulation. In the absence of "applicable law, public hearings shall be advertised in a newspaper of general circulation in the community at least fifteen (15) days prior to such hearing." County Code § 2-22(e)(2). No advertisement of the Illegal Regulations has been identified or discovered by SDMB.[18]

Here, the County's legislative record is devoid of any evidence of a drafting period, notice of drafting period, statutory authority, fiscal impact study, preliminary assessment reports and any supporting reports or other documentation. The only evidence in the record is the recorded minutes and a cover letter from HCDA. In the County minutes, the County Attorney represented that the Illegal Regulations were in response to "recent issues which have already occurred at Grand Strand Airport, which have now involved them in litigation." *See* County Administration Committee *Minutes* at page 15 (April 4, 2014). HCDA offered that the Illegal Regulations "were submitted to the Airport Advisory Committee, and approved at their meeting on March 12, 2014" as authority to the County Council. *See Memo* from HCDA dated April 3, 2014, included in the County Agenda dated April 15, 2014.

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[18] SDMB conducted a search of the Sun newspaper and no notice was had for the months of March, April, November, December 2014, or January 2015.

Ostensibly, the County and HCDA attempted to comply with the Public Hearing requirements of County Code § 2-22(e)(1)(c) by including a Public Hearing on the Agenda for the second reading of County Ordinance 36-14. County Ordinance 36-14 passed the second reading on May 6, 2014, with a public hearing identified on the County agenda. However, County minutes for this meeting, state, "no one spoke at the public hearing."

5. HCDA and the County Have Failed to Meet Discovery Obligations

In light of the history between opposing counsel, Plaintiff's counsel reasonably believes that consultation relating to discover issues with opposing counsel would have served no useful purpose and that any documents would have been produced in a manner that would be financially unfeasible for Plaintiff. Additionally, although publically available online at the County Council video archive, HCDA and the County have not identified or produced any rules or regulations[19] relating to GSA.

In response to the County and HCDA's multiple allegations of rule infractions since resuming control of GSA, SDMB has requested applicable rules and regulations from both the County and HCDA multiple times without any response from either. On July 8, 2014, SDMB proffered the following Interrogatory to defendants:

> 14. List all policies, rules, memoranda, or procedures relating to tenant conduct and training on all Horry County airport property for the last (7) years (including but not limited to all operational activity at Conway, Loris, CRE, and MYR airports).

[19] On October 28, 2014, HCDA attached a copy of the current Illegal Regulations as part of its invitation to a "town hall" meeting to discuss the regulations less than forty-eight hours later, on October 30, 2014. During the "town hall," HCDA represented to SDMB that no formal rules governing GSA were currently in effect. However, just two weeks later in its *Rebuttal* to SDMB's pleading before the FAA, through its Boston attorneys, HCDA proffered Horry County Ordinance 36-14 enacted by Horry County on May 20, 2014 as evidence that rules had in fact been in place since May 20, 2014.

Predictably the defendant's response was not helpful and almost 100 days late. On October 16, 2014, their response was "[t]he answer will be provided in accordance with Rule 33(c) SCRCP Option to Produce Records."

> On July 8, 2014, SDMB requested production of:
>
> 8. Any and all policy or policies, rules, memoranda, or procedures relating to training tenants on HCDA policies, rules, or regulations relating to all Horry County airport property located at the Conway, Loris, CRE or MYR airports; and
>
> 10. All Federal Aviation Administration (FAA) Report of Violation report, citations, records, investigative reports, file memoranda, field notes, notes, external and internal emails relating to any report of violations, communications between FAA, its agents, CRE tower reports, HCDA Unusual Activity Reports, or other written or electronic reports, statements, recordings, photographs, notes or other information involving the Plaintiff Skydive Myrtle Beach filed pursuant to federal, state, local Horry County, or HCDA statute, rule, regulation, or policy and their responses thereto.

Again, defendant's response produced nothing and was also almost 100 days late. On October 16, 2014, their response was, "[e]xcept for privileged documents, Horry County will produce the documents in electronic form or in the manner which complies with Rule 34(b), SCRCP."

On February 4, 2015, HCDA filed a Motion for Protective Order for "improper discovery efforts" by SDMB. These "efforts" were not articulated in the Motion. Although policies, standards and regulations, have been repeatedly requested orally, electronically, in writing, and in discovery, none have been identified or produced by defendants – despite presenting Illegal Regulations to the County Council as early as April 3, 2014. In spite of this, on County accused SDMB of "being the only group that consistently refuses to comply with County rules" on February 25, 2015.[20]

Under the South Carolina Freedom of Information Act (SCFOIA), S.C. Code Ann. § 30-4-10, *et seq.* (1976 as amended), a SCFOIA request requires no form and is considered approved

[20] Email from County Attorney Arrigo Carotti to William A Postal, Law Clerk for The Hon. Larry B. Hyman, February 25, 2015 (1448).

unless objection is received by the requestor within fifteen (15) days of the request. S.C. Code Ann. § 30-4-30(c). Although SDMB has requested rules, formally, informally, orally and in writing, none have been produced or identified.

It is clear that the defendants have been utilizing the mechanizations of state power and government to strong-arm SDMB into making agreements that are prohibited under federal, state, and local law to vacate its business and leave Horry County.

Conclusion

Based on these legal arguments, SDMB respectfully requests this Court to strike the Illegal Regulations *in toto* and issue injunctive relief precluding Defendants' continuous pattern of enforcement amounting to harassment and for this Honorable Court to retain jurisdiction over any future complaints raised by HDCA or the County to be under the exclusive jurisdiction of This Honorable Court, except that any issues relating to matters of under the exclusive jurisdiction of FAA.

Eastman & Associates, LLC

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Attorney for Plaintiff
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(843) 723-0005 (fax)
robertgeastman@msn.com

Merritt Island, Florida

Dated: _____, 2015

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**FIFTEENTH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	**Case No. 2014-CP-26-1193**

SKYDIVE MYRTLE BEACH, INC., (f/k/a Skydive Myrtle Beach, LLC),

Plaintiff,

v.

HORRY COUNTY, HORRY COUNTY DEPARTMENT OF AIRPORTS, H. RANDOLPH HALDI, PAT APONE, TIM JACKSON, and JACK TEAL

Defendants.

VERIFICATION



COMES NOW personally appeared before me, Aaron Holly, who being duly sworn, deposed and states that he is the chief operating officer and president of Plaintiff Skydive Myrtle Beach, Inc., that he has read the Motion filed with this Honorable Court on or about October 20, 2014, and the attached *Memorandum of Law in Support of its Motion for Injunctive Relief and to Compel Discovery*, that the statements contained therein are true and correct as to his own knowledge, except as to those allegations based upon information and belief, and as to those he believes them to be true and correct.

Aaron S. Holly

STATE OF SOUTH CAROLINA)
) SS
COUNTY OF HORRY)

BEFORE ME, the undersigned authority, personally appeared AARON S. HOLLY who is personally known to me or who presented personally known as identification and who swears and deposes that he has read the Verification and that the same is true and correct to the best of his knowledge and belief.

SWORN TO AND SUBSCRIBED before me this 2nd day of March, 2015.

ROBERT G. EASTMAN, ESQ.
Delaware Attorney ID 3356
Authorized by Statute
Uniform Law on Notarial Acts

Mar -2 AM 8:07

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the above and foregoing ***Memorandum of Law in Support of its Motion for Injunctive Relief and to Compel Discovery*** has been furnished to by hand to Mike Battle, Esquire attorney for Defendants Horry County and Horry County Department of Airports, and to Samuel T. Arthur, III, Esquire attorney for H. Randolph Aldi, Pat Apone, Tim Jackson, and Jack Teal, by personally depositing same in a United States Postal Service mail box, postage prepaid, addressed to the following persons on this 2 day of March 2015.

Michael W. Battle, Esq.
Battle Law Firm, LLC
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Conway SC 29528

Samuel T. Arthur, III, Esq.
Aiken Bridges, Elliott, Tyler & Saleeby, P.A
PO Box 1931
Florence, SC 29503

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robertgeastman@msn.com

STATE OF SOUTH CAROLINA COUNTY OF HORRY	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTEENTH JUDICIAL CIRCUIT CASE No. 2014-CP-26-4965
SKYDIVE MYRTLE BEACH, INC., Appellant, vs. HORRY COUNTY, Respondent.	)	MOTION FOR LEAVE TO FILE MOTION FOR RELIEF FROM JUDGMENT OF THE MAGISTRATE'S COURT DECISION PURSUANT TO RULE 12(b), SCMCR

HORRY COUNTY
FEB 11 AM 11:03
CLERK OF COURT

TO: DEFENDANT AND DEFENDANT'S COUNSEL MICHAEL W. BATTLE:

YOU WILL TAKE NOTICE that the undersigned, Robert G. Eastman, Esquire, as counsel for Skydive Myrtle Beach, Inc. (SDMB) will move before the Honorable Judge Larry B. Hyman at the Horry County Courthouse located at Conway, South Carolina, not less than ten (10) days hence, or at such time as may be scheduled by the court for Leave of this Honorable Court as the appellate tribunal, for leave to file the attached Motion for Relief From Judgment of the Magistrates Writ of Ejectment (Exhibit A) for the reasons articulated therein. Appellant's motion may be supported by such affidavits and memoranda as may be submitted by the Appellant.

BY: EASTMAN & ASSOCIATES, LLC

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and

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Alexis M. Wimberly, Esquire
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Co-Council for Defendants

HORRY COUNTY
2015 JUN -8 AM 11:03
CLERK OF COURT

Merritt Island, Florida

June 2, 2015

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the above and foregoing has been furnished to attorneys for Respondent Horry County by personally depositing same in a United States Postal Service mail box, postage prepaid, addressed to the following persons on this 2nd day of June, 2015.

Michael W. Battle, Esq.
Battle Law Firm, LLC
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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	CASE No. 2014-CP-26-4965
SKYDIVE MYRTLE BEACH, INC.,	)	
	)	
Appellant,	)	
	)	
vs.	)	NOTICE OF MOTION AND APPELLANT'S
	)	MOTION TO RECONSIDER
HORRY COUNTY,	)	
	)	
Respondent.	)	
	)	

FILED
2015 JUN -4 AM 11:12
MELANIE HUGGINS WEBB
CLERK OF COURT

TO: MICHAEL W. BATTLE, ESQUIRE, ATTORNEY FOR RESPONDENT:

PLEASE TAKE NOTICE that the Appellant Skydive Myrtle Beach, Inc. ("SDMB" or "Appellant"), by and through its undersigned counsel, will move before the Honorable Larry B. Hyman at the Horry County Courthouse, 1301 2nd Avenue, Conway, South Carolina 29526, in ten (10) days, or at such other time, dated and place as counsel may be heard, for an Order to pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure to reconsider its denial of Appellant's appeal as set forth in the Form 4 Order of May 6, 2015 (filed May 13, 2015) and the formal Order Dismissing Magistrate's Appeal of May 27, 2015 (filed May 29, 2015), attached herewith as Exhibits "A" and "B" respectively.

BACKGROUND

The matter came to hearing before the Court on May 6, 2015 by way of an appeal of a Magistrate's Court Judgment, along with SDMB's motion Joint Status Conference and motions for a rule to show cause, increase bond amount, and injunctive relief filed on behalf of Respondent, Horry County ("County" or "Respondent"). Appellant was represented by Robert G. Eastman,

Esquire and Robert B. Varnado, Esquire. Michael W. Battle, Esquire, appeared on behalf of Respondent.

The Court 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, and received by counsel for SDMB on Tuesday, May 26, 2015, which indicated "Motion to Appeal Denied" (hereinafter "Form 4 Order"). The Form 4 Order does not state that a formal order was forthcoming, although the Court had directed both parties to submit proposed formal orders setting forth their respective positions no later than Monday, May 11, 2015. SDMB's proposed order thereto is attached herewith as Exhibit "C".

On May 27, 2015, the Court executed a formal Order Dismissing Magistrate's Appeal, which was 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"). SDMB moves the Court to reconsider both orders simultaneously.

APPELLANT'S STATEMENT OF FACTS

SDMB is a skydiving business that has operated out of the Grand Strand Airport (GSA) located in North Myrtle Beach, South Carolina. The GSA is owned by 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" ("Lease"). 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.

APPELLANT'S STATEMENT OF THE CASE

SDMB filed a complaint against County, the Horry County Department of Airports ("HCDA"), 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.

Every allegation in SDMB's Primary Action is related to SDMB's leasehold interest in Hangar 7, located at GSA in North Myrtle Beach, South Carolina. The County answered on March 15, 2014 but did not counterclaim for ejectment or declaratory judgment of its rights.

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").

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 in 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).

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[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.

On June 19, 2014, SDMB filed a motion requesting identical relief (as that in its June 13, 2014, motion filed in the Magistrate's Action motion) with the Circuit Court in 14-CP-26-1193.

On July 2, 2014, the Magistrate 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." (See Magistrate's Return, dated July 30, 2014).

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.

On July 18, 2014, SDMB filed a timely motion to reconsider the denial 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 jurisdictional since limit of Magistrate's Court is $7,500.00 as set forth in S.C. Ann. § 23-3-3). 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.

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." (See Magistrate's Return). The hearing on the motion to reconsider was set for July 23, 2014 at 11:00 a.m.

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, following a thirty (30) minute recess, 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. The Magistrate then issued a Writ of Ejectment against SDMB.

Specifically, the Magistrates 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.

Magistrate's Court Return (Return), dated July 30, 2013.

On July 25, 2014, SDMB filed its timely appeal.

On August 1, 2014, a Bond Hearing was held in the Magistrate's Court with SDMB appearing *pro se*. 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.

STANDARD OF REVIEW FOR APPEALS FROM THE MAGISTRATE'S COURT

The South Carolina legislature articulated the standard of review for an appeal of a Magistrate's Court:

> Upon hearing the appeal 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. In giving judgment the court may affirm or reverse the judgment of the court below, in whole or in part, as to any or all the parties and for errors of law or fact.

S.C. Code Ann. § 18-7-170 (1976)

The South Carolina Supreme Court has opined:

> On appeal from the magistrate court, the circuit court may make its own findings of fact. Where the circuit court has affirmed the magistrate court decision, this court looks to whether the circuit court order is "controlled by an error or law or is unsupported by the facts." "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 can be no facts that show the affirmance was influenced by an error of law."

A & I, Inc. v. Gore, 366 S.C. 233, 239, 321 S.E.2d 383, 386 (2005) (citations omitted). The Circuit Court may reverse in whole or in part any issues of law or fact. *Id.*

LEGAL ARGUMENT AND ANALYSIS

The Court should alter or amend both the Form 4 Order and/or the Formal Order because: (I) the Magistrate committed reversible error by failing to apply the rules of court and to afford SDMB its due process protections; (II) The Magistrate made other procedural errors of law by

denying SDMB's Rule 12(b)(8), SCRCP motion and allowing a claim to go forward that had been waived under Rule 13(a), SCRCP by the County not presenting it in its counterclaim; (III) the Magistrate erred by allowing the terms of an at-will, revocable 90-day license to supersede, modify, and suspend rights and obligations of the County under an eight (8) year, long-term lease.

I. Failure to Apply Rules of Court Correctly and Procedural Due Process.

The Court should alter or amend the Form 4 Order and/or the Formal Order because the Magistrate's ruling is based largely on technical issues despite the fact that the South Carolina legislature and courts have unequivocally stated and made clear: "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." *See, A & I Gore, supra quoting* S.C. Code Ann. § 18-7-170 (emphasis supplied).

County's counsel argued that SDMB did not properly file a timely answer, counterclaim or jury request under the court's rules, in reliance on Magistrate Rules 9(a), SCRMC, (30 days to file an answer) and on Rules 15(a) (unfair prejudice), 38(b) (jury demand waived if nor raised 10 days after last pleading), SCRCP. At the Appeal hearing, the County argued that the concurrent jurisdiction of the Magistrate's Court on a simple landlord tenant eviction proceeding was procedurally fair, constitutional, and a valid exercise of jurisdiction by the Magistrate's Court as intended by the legislature and courts of South Carolina.

The Court should alter or amend its orders because such findings require a technical reading of the South Carolina Rules of Magistrate's Court or Civil Procedure. However, even if the Court were to adopt such a stringent technical reading of the rules, as posited by County, its arguments still fail for the following reasons.

First, as to the finding that SDMB was untimely under the court rules for filing an amendment, answer or counterclaim, Magistrate's Court Rules do not mandate this result.

Rule 2, SCRMC states:

> These rules shall govern all civil suits in the magistrates court. If no procedure is provided by these rules, the court shall proceed in a manner consistent with the statutory law applicable to magistrates and with circuit court practice in similar situations but not inconsistent with these rules

Rule 7(a), SCRMC states:

> The defendant may reply to the plaintiff's complaint by filing a written statement in a form approved by the magistrate or by personally appearing and making an oral statement. This reply shall be called an "answer." If the defendant personally appears within the specified time period and makes an oral answer, it shall be reduced to writing. The court or court personnel shall assist the defendant in reducing the answer to writing if the court determines assistance is required. The defendant's answer may deny in total or in part any or all of the material allegations made in the plaintiff's complaint, and/or allege any new matter constituting a defense. The court shall deliver a copy of the answer to the plaintiff in a manner provided for in Rule 8.

Rule 10, SCRMC prohibits a party failing to file an answer to introduce evidence or testify, it is limited to cross-examination only. Rule 13(a), SCRMC states:

> Trials should be conducted in an informal manner and the South Carolina Rules of Evidence shall apply but shall be relaxed in the interest of justice. In the trial of a civil action, in which one or both parties are unrepresented by legal counsel, the court shall question the parties and witnesses in order to assure that all claims and defenses are fully presented.

Rule 13(c), SCRMC provides for a jury trial if demanded at least five (5) working days before a bench trial.

Rule 14, SCRMC states:

> 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 when necessary to serve the ends of justice. However, except in unusual circumstances, no party shall be allowed more than one continuance in any case and all continuances must have the specific approval of the court. Continuances shall be for as short a period as possible, and, where feasible, the wishes of the party not requesting the continuance shall be considered in scheduling a new hearing date. Raising a claim, defense, or counterclaim for the first time at trial shall constitute grounds for a continuance when necessary to serve the ends of justice.

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 by motion exists. 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;

SDMB was personally served with the Application for Ejectment on June 17, 2014 so a responsive pleading was due on or before July 18, 2014. See Rule 3 (date of event not included in computation) and Rule 7(a). 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);[2] *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).

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[2] The second Rule 12(b) filing was also timely under Rule 12(a)(1). On July 2, 2014, SDMB was notified by a bench ruling that its initial 12(b) motion was denied. Pursuant to Rules 6(a) (date of event not included in time computation) and 12(a)(1), SDMB's answer was due on July 18, 2014.

Thus, SDMB filed a timely and responsive motion pursuant to Rule 12(b), SCRCP (as applicable via Rule 2, SCRMC). Accordingly, the Magistrate erred as a matter of law in ruling that SDMB was out of time in making responsive pleadings/motions, which constitutes grounds for reversal. The same holds true for the jury trial request, which was submitted five (5) days in advance of the trial date. Depriving SDMB of its right to a jury trial is also an error as a matter of law warranting reversal. Thus, this Court should not affirm on this ground (*see* Formal Order, pp. 6-7).

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). Because SDMB filed a timely motion to reconsider the original motion, the Magistrate only completed resolution of the Rule 12 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 not affirm on this ground, either (see Formal Order, pp. 6-7).

Additionally, Rule 14, SCRMC requires a continuance when matters are raised at a hearing in the first instance. Here, the Magistrate erred by denying a continuance, when a continuance was proper. There was no requirement that the Magistrate rush the case to conclusion, especially in light of its unique procedural posture. Forcing a bench trial on July 23 amounts to an abuse of discretion. The Court should alter or amend its Order because the County's contention that it would have been prejudiced "by [SDMB]'s late attempts at amendment" and unduly prejudicial under Rule 15(a), SCRCP are without merit. Furthermore, the County should have filed a compulsory counterclaim in the Primary Action and should have requested separate trials under the Rules 13 and 42, SCRCP.

South Carolina recognizes 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 therefore denied Appellant substantive due process in his property rights to Hangar 7. *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").

Accordingly, since the Magistrate's ruling is governed by procedural issues, this Court should alter or amend its Order because of the statutory requirement to "give justice of the case without regard to technical errors and defects which do not affect the merits," and hold that the foregoing errors of the Magistrate warrant reversal.

II. Additional Procedural Errors of Law.

The Court should also alter or amend the Form 4 Order and/or the Formal Order because of the following substantive irregularities with the Magistrate's Court.

A. Rule 12(b)(8) Motion to Dismiss

Notwithstanding the foregoing procedural defects, the Magistrate erred by denying SDMB's Rule 12(b)(8) motion as a matter of law. In South Carolina, dismissal under Rule 12(b)(8) may be proper when there is (1) another action pending, (2) between the same parties, (3) for the same claim. *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 106, 674 S.E.2d 524, 531 (Ct. App. 2009). While the rule is to be construed narrowly, the *Capital City* Court held that the rule is extended to where the claims are substantially the same." *Id.*, 382 S.C. at 106, 674 S.E.2d at 531-532.

Here, SDMB initiated 14-CP-26-1193 on February 28, 2014, alleging, *inter alia*, that it had a leasehold interest in Hangar 7 from which it was being improperly evicted by the County. The County answered in 14-CP-26-1193 on March 18, 2014, but then instituted the Magistrate action on June 13, 2014, and obtained an ejectment six weeks later on July 23, 2014.

Thus, there can be no doubt that SDMB has met its burden under Rule 12(b)(8). The two primary parties are identical in both the Primary Action 14-CP-26-1193 and the Magistrate Action – i.e., SDMB and the County [the other Defendants in 14-CP-26-1193, all agencies or agents of the County]. The subject matter is identical: i.e., what are the rights of SDMB and the County under the May 20, 2012, Lease and the 2013 Space Use Permit. The remedy is likewise the same in both contests – whether SDMB has a valid lease in Hangar 7 and can retain occupancy (i.e., whether it must vacate Hangar 7).

The County asserts that Magistrate Courts share concurrent jurisdiction with the Circuit Court concerning tenancies and leasehold rights. S.C. Code Ann. § 23-3-10(10), (14). This is undeniable. However, the requirements of Rule 12(b)(8) apply 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. *See* Rule 13(a), SCRCP (discussed at greater length in section B *infra*).

Accordingly, the Magistrate erred in not dismissing the Magistrate's Court action pursuant to Rule 12(b)(8). All issues regarding SDMB's leasehold interest were already properly been joined in 14-CP-26-1193. Basically, by going to the Magistrate, the County succeeded in doing an end-run around the Circuit Court in direct contravention of Rule 12(b)(8). For this reason, the Court should alter or amend its orders to find against the County on this issue.

B. . Rule 12(b)(6), Motion to Dismiss

SDMB's appeal also raises the issue of whether the County waived its right to file a Magistrate's claim in the first instance and whether the Magistrate erred as a matter of law in not granting SDMB's Rule 12(b)(6) motions.

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."

As established above, SDMB initiated 14-CP-26-1193 on February 28, 2014, alleging, *inter alia*, that it had a leasehold interest in Hangar 7 from which it was being improperly evicted by the County. The County answered in 14-CP-26-1193 on March 18, 2014, without a

counterclaim. It then brought the Magistrate Court action on June 13, 2014, without first seeking to amend its Answer in 14-CP-26-1193.

"By definition, a counterclaim is compulsory only if it arises out of the same transaction or occurrence as the opposing party's claim." *First Citizens Bank & Trust Co. v. Hucks,* 305 S.C. 296, 298, 408 S.E.2d 222, 223 (1991). The test for determining if a counterclaim is compulsory is whether there is a "logical relationship" between the claim and the counterclaim. *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.* 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, a defendant is precluded from asserting the claim in a subsequent action. "By definition, a counterclaim is compulsory only if it arises out of the same transaction or occurrence as the opposing party's claim." *Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 61, 566 S.E.2d 863, 865 (Ct. App. 2002 (quoting *First-Citizens Bank & Trust Co. v. Hucks,* 305 S.C. 296, 298, 408 S.E.2d 222, 223 (1991).

In *Beach Co. v. Twillman, Ltd.*, the Court of Appeals held that claims by a commercial tenant and commercial landlord arising out of the same lease agreement were logically related to one another. 351 S.C. 56, 61, 566 S.E.2d 863, 865 (Ct. App. 2002). 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." *Id.*, 351 S.C. at 61, 566 S.E.2d at 865. The same logical relationship applies in the instant case. SDMB's Circuit Court complaint 14-CP-26-1193 directly impacts its tenancy rights to Hangar 7, as does the County's Magistrate Court action. Both actions involve the same parties and determining rights under the same agreements, which ultimately

decide whether SDMB must vacate or stay in Hangar 7. Because of the clear, logical relationship of these claims, the County was obligated to bring its Magistrate's Action in 14-CP-26-1193 or else they waived their claim for ejectment. *Twillman,* 351 S.C. at 62, 566 S.E.2d at 865; *Hucks,* 305 S.C. at 298, 408 S.E.2d at 223; *Crestwood,* 328 S.C. at 217, 493 S.E.2d at 835. Consequently, the Magistrate erred as a matter of law in not dismissing the Magistrate's Court case under Rule 12(b)(6).

Consequently, this Court should alter or amend its orders because the Magistrate erred on these additional grounds and denied SDMB its right to fully litigate its actions relating to the validity of two competing leasehold interests in Hangar 7 and whether the parties intended to negate a long-term eight year lease for a temporary 90-day license, the crux of SDMB's legal complaints.

III. Lease and Permit.

The Court should alter or amend Form 4 Order and/or the Formal Order because SDMB demonstrated that the Lease was modified for a short period during the period of license agreement styled as s Space Use Permit (Permit). 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.

In opposition, the County argued that (i) the 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[3]; and (iii) that the Lease was not a lease at all.

Under the South Carolina cannons of contractual construction:

> 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.*
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> *Bazzle v. Green Tree Financial Corp.*, 351 S.C. 244, 262, 569 S.E.2d 349 (2002) (emphasis supplied).

"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 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

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[3] 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.

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[4] 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.

In relevant paragraphs, the Permits states:

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

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[4] The "Bird Hangar" was the nick name for Hangar 7. Hangar 7 had been used as a storage space for abandoned gear and equipment for at least 17 years before SDMB executed the Lease. Pigeons and other birds had used the Hangar as a nesting area and Ramp 66 was not using the Hangar for any purpose other than an onsite junkyard, thus the nickname. As SDMB cleared the trash, it was able to increase its useful area.

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.

At the hearing, 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. This is contrary to case law.

"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* ¶ 5, Lease; (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.

Assuming *arguendo* that the terms of the Lease and Permit are enforceable agreements under South Carolina law, the central issue before the 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." Lease ¶ 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." Permit ¶ 14.

At the hearing, the County also argued that the integration clause in the Permit was a novation that supersedes the Lease. Thus, even if the agreement is a valid lease, its terms were superseded by the Permit.

As discussed, *supra,* in South Carolina, a contract is strictly construed against the drafter of the agreement. *See, Bazzle, supra.* The plain language of the Space Use Permit can only be interpreted as 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. The 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." ¶18, Permit. The Court should also be mindful that SDMB has also received no consideration for its remainder long-term leasehold interest.[5]

At the hearing County argued that the Permit's integration clause, ¶14, assumed and superseded the Lease. Paragraph 14 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 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.

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." Lease at ¶ 18.

The County also argued that the Permit created a novation. 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. Weinberg*, 373 S.C. 209, 644 S.E.2d 740 (Ct. App. 2007) *aff'd*, 383 S.C. 583, 681 S.E.2d 875 (2009). There must be an intention by both parties

[5] 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

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, 620 S.E.2d 86 (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 (Bankr. D.S.C. Mar. 5, 2010). If the intent is to modify, and not nullify, then there is not a novation. *Wellman, Inc. v. Square D Co.*, 366 S.C. 61, 73, 620 S.E.2d 86, 92 (Ct. App. 2005). There can be no novation unless both parties so intend. *Superior Automobile Ins. Co. v. Maners*, 261 S.C. 257, 199 S.E.2d 719 (1973); *Pee Dee State Bank v. Prosser*, 295 S.C. 229, 367 S.E.2d 708 (Ct.App.1988); *Adams v. B & D, Inc.*, 297 S.C. 416, 419, 377 S.E.2d 315, 317 (1989).

Accordingly, the Court should alter or amend its orders because of the Permit's plain meaning and any ambiguity 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 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 consideration exists for a short-term license modification of the Lease, it is axiomatic that a smaller legal interest cannot supersede a lager property interest.

Finally, it appears that the County did not disclose the Lease prior to the July 23, 2014 bench trial, which would have been valuable to the Magistrate to review (*See* Section IV below).

The Court should alter or amend its orders because when considering the various arguments presented by the parties, the plain meaning of the competing agreements and interests of justice could be interpreted in several different directions. Thus, the interests of justice require a full hearing on the merits relating to the Lease and Permit. The court has a duty to "give judgment according to the justice of the case" and should hold 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.

IV. SDMB's Rule 60(b)(2) Motion.

Finally, the Court should alter or amend its Order because of the fact the Magistrate was deprived of the opportunity to review the original lease. At the May 6, 2015, hearing, as an exhibit to its Memorandum in Support of Appeal (Support Memo) and Rule 60(b)(2) Motion for Relief From Judgment Due to Newly Discovered Evidence (Relief Motion), SDMB introduced a copy of the Lease between County's agent Ramp 66 and SDMB. The County availed itself of discovery in that action by taking of SDMB's deposition, but did not provide a copy of the lease to SDMB in the Magistrate's Action – with its first disclosure by County's attorneys in Boston, Massachusetts, on October 22, 2014, in an action before the Federal Aviation Administration (FAA) styled *Skydive Myrtle Beach, Inc. v. Horry County Department of Airports,* FAA Docket No. 16-14-05 (originally filed Feb. 24, 2014, dismissed as incomplete on Mar. 18, 2014, re-filed July 1, 2014, docketed by FAA on July 25, 2014).[6] County did not object to the Lease's introduction into evidence at the hearing on any grounds. The County has been on notice of an action involving a lease between SDMB and its agent since February 28, 2014, and has had in its possession since, presumably May 10, 2012, a copy of the fully executed Lease.

CONCLUSION

For the reasons hereinabove set forth, the Court should alter or amend its Order because the Magistrate's Court committed reversible error in both fact and law. Therefore, SDMB's Appeal of the Magistrate's Court decision dated July 23, 2014, should be reversed and the decision should be vacated, and the County's Petition for Writ of Ejectment is consolidated with 14-CP-26-1143 for final disposition.

BY: BROWN & VARNADO, LLC

[6] The only issue before FAA is whether the actions of the County are discriminatory under federal law. The Lease was admitted attached to a Rule 60(b)(2) motion and as part of SDMB's Memorandum in Support of Appeal without objection from County. *See* 42 U.S.C. § 4107(a); FAA Grant Assurance 22.



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and

Robert G. Eastman, Esq.
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PO Box 180
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(843) 329-9657
(843) 723-0005 fax
robertgeastman@msn.com

Co-Counsel for Defendants

Mount Pleasant, SC

June 3, 2015

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the above and foregoing has been furnished to attorneys for Respondent Horry County by personally depositing same in a United States Postal Service mail box, postage prepaid, addressed to the following persons on this ___ day of June, 2015.

Michael W. Battle, Esq.
Battle Law Firm, LLC
PO Box 530
Conway, SC 29528

FILED
HORRY COUNTY
2015 JUN -4 AM 11:53
CLAIRE HIGGINS-WARD
CLERK OF COURT

Robert B. Varnado, Esquire
Alexis M. Wimberly, Esquire
Brown & Varnado, LLC
103 Church Street
PO Box 1127
Mt. Pleasant, SC 29464
(843) 737-7300
(843) 654-5109 fax
rvarnado@brown-varnado.com

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF HORRY	)	CASE NO. 2014-CP-26-4965
	)	
SKYDIVE MYRTLE BEACH, INC.,	)	
	)	
Appellant,	)	NOTICE OF MOTION AND MOTION FOR
	)	EMERGENCY INJUNCTION AND
v.	)	STAY OF EJECTMENT
	)	
HORRY COUNTY,	)	
	)	
Respondent.	)	
	)	

HORRY COUNTY
SEP 16 AM 11:03

TO: MICHAEL W. BATTLE, ESQUIRE, ATTORNEY FOR RESPONDENT:

PLEASE TAKE NOTICE that the Appellant Skydive Myrtle Beach, Inc. ("SDMB" or "Appellant"), by and through its undersigned counsel and pursuant to Rules 62 and 65, SCRCP; Rules 205 and 241, SCACR; and S.C. Code Ann. §§ 27-37-130, 27-40-800 and 27-40-780, will move for emergency relief before the Honorable Larry B. Hyman at the Horry County Courthouse, 1301 2nd Avenue, Conway, South Carolina 29526, on Friday, September 18, 2015, or before the Presiding Judge of the Horry County Court of Common Pleas at such other time, dated and place as counsel may be heard, for an *Emergency Order for Injunctive Relief* and *Stay of Ejectment/Execution* against Horry County ("County") and the Horry County Department of Airports ("HCDA") to preclude the County and HCDA from forcibly ejecting SDMB from Hangar 7 at the Grand Strand Airport (GSA), North Myrtle Beach, South Carolina, on or after Saturday, September 19, 2015 at 3:25 p.m.

Appellant's motion may be supported by such affidavits and memoranda as may be submitted by the Appellant, and is based on the following facts and/or materials and/or citations to authority:

copy

1. On August 1, 2014, the Horry County Magistrate's Court issued a *Bond to Stay Execution on Appeal* whereby, SDMB would pay Horry County $1,200.00 per month to continue occupancy pending the appeal before the circuit court. [*See* Exhibit 1].

2. On May 5, 2015, the Honorable Larry B. Hyman, Presiding Judge of the Horry County Court of Common Pleas, denied SDMB's appeal from the Horry County Magistrate's Court but also denied Respondent's request to modify or revoke the Magistrate's Bond.

3. On August 19, 2015, SDMB timely filed its appeal with the South Carolina Court of Appeals. [*See* Exhibit 2].

4. On September 17, 2015 and September 18, 2015, SDMB's counsel received two (2) emails from counsel for Horry County threatening to eject SDMB from Hangar 7 at the GSA a in seventy-two hours, or on or after Saturday, September 19, 2015 at 2:35 p.m., and threatening prosecution for trespass should SDMB continue occupancy. [*See* Exhibits 3 and 4].

5. The Appellant herewith submits an *Undertaking Pursuant to S.C. Code Ann. § 37-40-800.* [*See* Exhibit 5].

6. Exhibits 1 and 4, of themselves and taken together, satisfy the conditions required under both Rule 241(b)(10), SCACR, and S.C. Code Ann. §§ 27-37-130, 27-40-800, for a stay of ejectment and/or execution.

7. Pursuant to SC. Code Ann. § 27-37-130, "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 filed by the magistrate and conditioned for the payment of all costs and damages which the landlord may sustain thereby." (Emphasis supplied). As stated above, the magistrate issued a bond to stay execution on appeal on August 1, 2014, SDMB has signed an acknowledgement to pay that amount and has done so continuously. [*See* Exhibit 1].

8. Pursuant to S.C. Code Ann. § 27-40-800(b): "[i]t is sufficient to stay execution of a judgment for ejectment that the tenant sign an undertaking that he will pay to the landlord the amount of rent, determined by the magistrate in accordance with Section 27-40-780, as it becomes due periodically after the judgment was entered. Any magistrate, clerk, or circuit court judge shall order a stay of execution upon the undertaking."

9. Pursuant to S.C. Code Ann. § 27-40-800(f)(1),

> Upon appeal to the Supreme Court or to the court of appeals, it is sufficient to stay execution of a judgment for ejectment that the tenant sign an undertaking that he will pay to the landlord the amount of rent, determined by order of the judge of the circuit court, as it becomes due periodically after judgment was entered. The judge of the court having jurisdiction shall order stay of execution upon the undertaking.

10. S.C. Code Ann. § 27-40-780 grants the Court the jurisdiction to enjoin a landlord from unreasonably threatening or making demands for entry, without requiring posting of a bond and providing for the recovery of attorneys' fees and actual damages.

11. Because Judge Hyman at the hearing on May 5, 2015 denied Respondent's motion to modify or set aside the Bond issued by the Magistrate, and because the County did not appeal or move to alter or amend the same, and the thirty day period to appeal has expired [Rule 203, SCACR], the Circuit Court's decision confirming the bond at $1,200.00 per month is now the "law of the case."

12. The conditions required to stay execution and ejectment have been strictly observed by SDMB. Rule 241(b), SCACR. Thus, pursuant to S.C. Code Ann. §§ 27-37-130, 27-40-800, along with Rule 241, SCACR, and Rule 62, SCRCP, the County has no legal right to *sua sponte* issue a seventy-two hour order to vacate under threat of criminal prosecution.

13. SDMB has a justiciable claim and a vested appeal with the court of appeals. It is also seeking leave of the court, to have the underlying judgment set aside for newly discovered evidence, and a new trial. It has signed a Bond issued by the magistrate and continued by this Honorable Court and met all the conditions therein.

14. SDMB would suffer irreparable harm by the closure of its business if the County is allowed to proceed with ejectment and has no adequate remedy at law. Thus, SDMB is entitled to injunctive relief and/or a protective order on an emergency basis.

15. The Court should stay any attempt by the County or HCDA to eject SDMB without order of the Court and strict compliance with S.C. Code Ann. §§ 27-37-130, 27-40-800.

16. SDMB should receive its reasonable attorneys' fees and costs incurred in presenting this motion, along with any actual damages sustained by the County's threats and/or actions. Pursuant to Rule 11, the undersigned consulted with opposing counsel prior to this motion.

By: _____

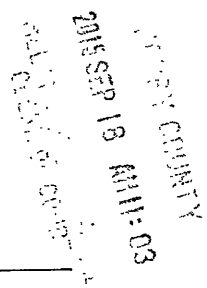
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and
Robert G. Eastman, Esquire
Eastman & Associates, LLC
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Charleston, SC 29402
(843) 329-9657
robertgeastman@msn.com
Co-Counsel for Appellants

September 17, 2015
Mount Pleasant, South Carolina

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the within ***Notice of Motion and Motion for Emergency Injuction and Stay of Ejectment*** upon all parties to these matters either by hand delivery or depositing a true copy of the same in the U.S. mail, proper postage prepaid, addressed to counsel of record as follows, and also by email if so indicated:

VIA US MAIL, E-MAIL AND FACSIMILE
Michael W. Battle, Esquire
Battle Law Firm, LLC
Post Office Box 530
Conway, SC 29528
Attorney for Respondent(s)



Robert B. Varnado

September 17, 2015

EXHIBIT 1

STATE OF SOUTH CAROLINA	)	**2014CV261092444**
	)	CIVIL CASE NUMBER
COUNTY OF HORRY	)	**MAGISTRATE'S COURT**
	)	
	)	**BOND TO STAY EXECUTION**
	)	**ON APPEAL**

Horry County
Po Box 1236
Conway, SC 29526

LANDLORD

Vs

Skydive Myrtle Beach, Inc.
2800 Terminal Street
Conway, SC 29528

TENANT(S)

TO: Circuit Court

Now comes the Tenant(s) in the above entitled action and respectfully shows the Court that a Judgment of Execution was issued against the Tenant(s) and for the Landlord on July 23, 2014, by the Magistrate. Tenant(s) has appealed the Judgment to the Circuit Court.

Pursuant to the findings of the Magistrate, the Tenant(s) is obligated to pay rent in the amount of $1,200.00 per month, due on the 1st day of each month. An initial payment of $7200.00 was paid this date with monthly payments to follow.

Tenant(s) hereby undertakes to pay the periodic rent hereinafter due according to the aforesaid findings of the Court and moves the Circuit Court to stay execution on the Judgment for Ejectment until this matter is heard on appeal and decided by the Circuit Court.

Dated on August 1, 2014:

Tenant(s)

Upon execution of the above bond, execution on the Judgment of Ejectment is hereby stayed until the action is heard on appeal and decided by the Circuit Court. If Tenant(s) fails to make any rental payment within five days of the due date, upon application of the Landlord, the stay of execution shall dissolve, the appeal by the Tenant(s) to the Circuit Court on issues dealing with possession must be dismissed and the Sheriff may dispossess the Tenant(s).

Dated on August 1, 2014

JUDGE

Horry County
Myrtle Beach Magistrate Court
1201 21st Avenue North
Myrtle Beach, SC 29577
Phone: (843) 915-5293 Fax: (843) 444-6131

MV 125

EXHIBIT 2

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit County Judge

RECEIVED
AUG 24 2015
SC Court of Appeals

Case No. 2014-CP-26-4965

Skydive Myrtle Beach, Inc. ..... **Appellant,**

v.

Horry County ..... **Respondent.**

NOTICE OF APPEAL

Skydive Myrtle Beach, Inc. appeals the Order of the Honorable Larry B. Hyman, Jr., dated July 16 , 2015. Appellant has received a copy of the Order by electronic mail and by letter dated July 22, 2015 from counsel for Appellant Horry County, Michael W. Battle, Esquire, on July 27, 2015.

August 19, 2015

Robert G. Eastman, Esquire
Eastman & Associates, LLC
3980 South Tropical Trail
Merritt Island, FL 32952
(843) 329-9657
Council for Appellant

Other Counsel of Record:

Michael W. Battle, Esquire
Battle Law Firm, LLC
PO Box 530
Conway, SC 29529
(843) 248-4321

Council for Respondent

Robert B. Varnado, Esquire
Alexis M Wimberly, Esquire
Brown & Varnado, LLC
103 Church Street
PO Box 1127
Mt. Pleasant, SC 29465
(843) 737-7300
Co-council for Appellant

150720.sdmb.hcda.nos.lease

EXHIBIT 3

Rob Varnado

From: Mike Battle <MBattle@battlelawsc.com>
Sent: Wednesday, September 16, 2015 3:25 PM
To: robertgeastman@msn.com; Rob Varnado
Cc: Carotti, Arrigo; Haldi, Randy (haldir@HorryCounty.org)
Subject: Horry County v SDMB

Gentlemen,

This will serve as notice to your client to vacate the premises of Hangar 7 at CRE within 72 hours. We do not believe the bond set in magistrate's court covers appeals from Circuit Court to the Court of Appeals. Since your client has failed to post an appeal bond as required by Section 27-37-130, Code of Laws of S.C., Rule 62, SCRCP, Rule 241, SCACR, and in the very "Bond to Stay Execution on Appeal" issued in the Magistrate's Court, your client should vacate the premises peaceably. Please contact me if you have any questions.

Michael W, Battle
Attorney for Horry County

Please be advised that this e-mail and any files transmitted with it are confidential attorney-client communications or may otherwise be privileged or confidential and are intended solely for the individual or entity to whom they are addressed. If you are not the intended recipient, please do not read, copy or retransmit this communication but destroy it immediately. Any unauthorized dissemination, distribution or copying of this communication is strictly prohibited.

MICHAEL W. BATTLE
BATTLE LAW FIRM, LLC
P.O. BOX 530
1200 MAIN STREET
CONWAY, SOUTH CAROLINA 29528
(843)248-4321
mbattle@battlelawsc.com

EXHIBIT 4

Rob Varnado

From: Carotti, Arrigo <CarottiA@HorryCounty.org>
Sent: Thursday, September 17, 2015 11:48 AM
To: Robert Eastman
Cc: Haldi, Randy; 'Mike Battle'; Rob Varnado
Subject: RE: Horry County v SDMB

Do what you feel you have to do. This is to reiterate that on behalf of Horry County, and pursuant to Order of Ejectment, Skydive Myrtle Beach, Inc. has been given notice that it has seventy-two (72) hours from the time of Mike Battle's email below (Wednesday, September 16, 2015 at 3:25 p.m.) to vacate entirely Hangar 7 at Grand Strand Airport (CRE). At the end of that time period, Horry County will secure the premises, and anyone affiliated with Skydive Myrtle Beach, Inc. found therein without express authorization from Horry County will be considered trespassers, and handled accordingly.

Kind regards,

Arrigo P. Carotti | County Attorney
Horry County Government
Horry County Attorney's Office
1301 2nd Avenue, Conway, South Carolina 29526
Tel (843) 915-7412 (direct) | Fax (843) 915-6270 | carottia@horrycounty.org
www.horrycounty.org

From: Robert Eastman [mailto:robertgeastman@msn.com]
Sent: Thursday, September 17, 2015 11:44 AM
To: 'Mike Battle'; rvarnado@brown-varnado.com
Cc: Carotti, Arrigo; Haldi, Randy
Subject: RE: Horry County v SDMB

Mr. Battle:

We disagree. This is an appeal of an appeal. The Bond is still in place and J. Hyman refused your request to modify or revoke the bond at the hearing on May 6, 2015. The 30 day period to appeal his decision has lapsed. Therefore, our client will continue to meet its obligations under the bond and remain on the premises.

In light of the foregoing as well as the County's two failed attempts to modify the bond before Judge Hyman, SDMB takes the position that your notice to vacate is legally improper and frivolous. If required to litigate, via emergency motion in either the Circuit Court and/or Court of Appeals, we will seek imposition of sanctions against the County and HCDA.

Consider this correspondence our consultation with you regarding the same pursuant to Rule 11, SCRCP.

Thank you for your attention to this matter. Should you have any questions, please do not hesitate to contact me.

EXHIBIT 5

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	)	CASE NO. 2014-CP-26-4965
SKYDIVE MYRTLE BEACH, INC.,	)	
Appellant,	)	UNDERTAKING PURSUANT TO S.C. CODE ANN. § 37-40-800
v.	)	
HORRY COUNTY,	)	
Respondent.	)	

COMES NOW THE Appellant, SKYDIVE MYRTLE BEACH, INC., who by and through its undersigned attorneys and pursuant to S.C. Code Ann. § 37-40-800 and Rule 241(b)(10), SCACR, who would: (I) continue to undertake to pay the $1,200.00 monthly rate set by Horry County Magistrate Judge on August 1, 2014 (attached herewith as Exhibit A), as confirmed by the Honorable Larry B. Hyman, Presiding Judge of the Horry County Court of Common Pleas during the pendency of this litigation; and (II) hereby undertakes to pay the periodic rent hereinafter due according to the aforesaid findings of the Court and moves the circuit court to stay execution on the judgment for ejectment until this matter is heard on appeal and decided by the court of appeals. Appeal in the instant matter was served August 19, 2015 (attached herewith as Exhibit B).

This the 17th day of September, 2015.

SKYDIVE MYRTLE BEACH, INC.
By: Aaron Holly, President
Tenant

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	CASE NO. 2014-CP-26-4965
SKYDIVE MYRTLE BEACH, INC.,	)	
	)	
Appellant,	)	
	)	NOTICE OF MOTION AND MOTION
vs.	)	OF APPELLANT TO RECONSIDER, ALTER OR
	)	AMEND THE ORDER OF OCOTBER 13, 2015
HORRY COUNTY,	)	
	)	
Respondent.	)	
	)	

TO: COUNSEL OF RECORD FOR RESPONDENT, HORRY COUNTY:

PLEASE TAKE NOTICE that the Appellant Skydive Myrtle Beach, Inc. ("SDMB"), by and through its undersigned counsel and pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, will move before the Honorable Larry B. Hyman, Jr., South Carolina Circuit Court Judge ten days from today at the Horry County Courthouse, 1301 2nd Avenue, Conway, South Carolina 29526, or at such other time, date and place as counsel may be heard, in order to respectfully request that the Court reconsider, alter or amend its *Order Denying Appellant's Motion for Injunction and Stay of Ejectment* ["Order"] dated October 13, 2015 (and filed October 15, 2015), of written notice was received by Appellant on October 15, 2015 on the following grounds:

1. **The Magistrate Appeal Bond Has Not Expired and Does Not Expire.**

In paragraphs 2 and 3 of the Order, the Court accepted the County's argument that SDMB was required to obtain a new Supersedeas Bond to stay ejection from Hangar 7, based on the contention that an Appeal Bond issued under S.C. Code Ann. § 27-37-130 expires when the Circuit Court affirms the Magistrate Court's ruling.

The County's position, however, is unsupported by the text of the statute, rules, case law and principles of statutory construction. The court should therefore reconsider, alter and amend its Order 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 only 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). This begs the question why our Supreme Court would adopt a rule that references the applicability of § 27-37-130 in determining whether a Circuit Court order is stayed on appeal to the Court of Appeals *if it expires after the Circuit Court issues a binding judgment like the County argues?* 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)" – meaning that the 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.

Fourth, 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).[1] 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. § 37-27-130 to only to the Circuit Court level of an appeal 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).

---

[1] '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).

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. 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.

The County's argument that the text of the Bond has some bearing on its duration (which was advanced by the County for the first time following the hearing on September 22, 2015 in its filings of September 25) is also without merit. The fact that the bond states that the stay lasts "until the action is heard on appeal and decided by the Circuit Court" cannot limit S.C. Code Ann. § 27-37-130 without being an violation of separation of powers. S.C Const. Art. 1 § 8, or otherwise is an instance where the Magistrate Court lacked subject matter jurisdiction to make such a limitation. *Katzburg v. Katzburg*, 410 S.C. 184, 187, 764 S.E.2d 3, 5 (Ct. App. 2014). The Magistrate's Bond cannot limit Rule 241, SCACR either.

For these reasons, the Court should reverse itself on Paragraphs 2 and 3 of its conclusions of law and find that the Magistrate's Bond remains in full force and effect.

2. A Stay is in Effect Pursuant to Rule 241, SCACR and Rule 62(f), SCRCP, without need of SDMB to seek one.

Having demonstrated that S.C. Code Ann. § 27-37-130 remains in effect throughout the entire process of appellate review, then based on the following facts and legal analysis SDMB

submits it is not required to seek a supersedeas bond under Rule 241, SCACR or Rule 62, SCRCP because a stay remains in full force and effect. To the extent this is required by the Order, then SDMB asks the Court to reverse itself on paragraph 4 of its Conclusion of Law, in which the Court analyzes whether a supersedeas or stay under Rule 241, SCACR or Rule 62 has bearing on the case.

The central question before this Court boils down to whether the "exception" of Rule 241(b)(10), SCACR applies to preclude a stay– i.e., whether the conditions are such that SDMB is not entitled to a stay – even though SDMB is in full compliance with a valid Appeal Bond under § 27-37-130.

Rule 241, SCACR is contained within "Part Two" of the Appellate Court Rules. Thus, by operation of Rule 101(a), SCACR, 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."

In other words, if an exception may apply – and there is not going to be a stay because of the exception – the Court must inquire into whether all the specific conditions which would preclude a stay "have been strictly complied with." When the words of Rule 241(b) are given their plain and ordinary meaning[2], then the exception at Rule 241 (b)(10) only applies if SDMB never applied for an Appeal Bond pursuant to S.C. Code Ann. § 27-37-130 and/or is 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.

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.

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.

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.

---

[2] "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).

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.

f. On August 19, 2015, SDMB filed Notice of Appeal of the Court's Order of May 5, 2015. 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.

The conditions which would result SDMB not having a stay (e.g., the Magistrate failed to grant a timely Appeal Bond' or the Appellant did not or could not make the required payments) have not been strictly complied with. Rule 241(b), SCACR. The stay on "appeal" provided by § 27-37-130 is rendered meaningless when the Appellant remains in strict compliance with the Appeal Bond. 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.

This outcome is supported by Rule 62(f), SCRP, 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.

3. It was the County's Burden to File a Petition to Lift the Stay.

Since there is a stay in effect under S.C. Code Ann. § 27-37-130 and Rule 241(b), SCACR, then the burden was on the County to file a petition seeking to lift the stay – which it has not done as of the filing of the Order. 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. SDMB submits, however, that the confirmation of the Appeal Bond at $1,200.00 per month is now the law of the case.[3] Moreover, because SDMB has filed a timely and 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

4. The County's Arguments Based on "Safety Cocerns" Are Inapplicable.

At the hearing on September 22, 2015, the Court was correct to question whether the County was being disingenuous in attempting to use purported safety concerns as a grounds to oppose *Supersedeas*. The Federal Aviation Administration ("FAA") has exclusive jurisdiction to determine matters of aeronautical safety an parachute operations; *See* 49 U.S.C. § 40103 (FAA shall develop plans and policy for the use of navigable airspace to ensure the safety of aircraft and efficient use of airspace); 49 U.S.C. § 47107(a) (sponsor will make its airport available as an airport for public uses on reasonable terms and without unjust discrimination to all types, kinds, and classes of aeronautical activities); FAA Grant Assurance 22, *Economic Nondiscrimination*; FAA Airport Compliance Manual, FAA Order 5190.6B (09/30/2009), Ch. 14.3 ("The FAA, not

[3] 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. Thus, 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).

the sponsor, is the authority to approve or disapprove aeronautical restrictions based on safety and/or efficiency at federally obligated airports").

Issues with safety have no bearing on an appeal bond, since regulating the skydiving industry is the sole prerogative of the FAA – not the County. Moreover, all the "safety violations" elucidated by the County have never been served on SDMB; SDMB contends they are self-serving statements made to create issues between the FAA and SDMB. Additionally, the County cannot show any actual harm; instead it attempts to alarm the Court with unsubstantiated hypothetical and speculative injuries. The affidavit submitted by Respondent was purely speculative as to potential damages, so it should not be considered. *Coker v. Cummings*, 381 S.C. 45, 55, 671 S.E.2d 383, 388 (Ct. App. 2008)(affirming trial court's right to disregard speculative affidavits). Such lack of proof is ineffective to show any true, current and provable injury to the County. Damages recoverable in action on injunction bond include all actual damages sustained by reason of wrongful issuance of injunction, that is, such damages as are the direct, natural, and proximate result of injunction, and in such actions, general rules governing measurement of damages ordinarily apply. *See Hyler v. Wheeler*, 240 S.C. 386, 126 S.E.2d 173 (1962).

5. Bond Amount is the Law of the Case.

As established in footmote 3, the County never appealed the Appeal Bond to the Circuit Court. The County twice petitioned the Circuit Court to modify the bond; the first was denied from the bench on March 2, 2015 and again on May 6, 2015 in a Form 4 Order. The County never sought reconsideration [or appealed or cross-appealed to the Court of Appeals] either the Circuit Court's rulings denying the County's request to increase the bond. Having failed to appeal the Appeal Bond, or appeal to the Court of Appeals the two times the Circuit Court denied petitions to modify the same, the $1,200.00 monthly bond as the adequate remedy

became 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). The County cannot now attack what has become the law of the case.

6. Irreparable Harm

The Verified Petition for Writ of Supersedeas Bond, filed by the Court's September 25 deadline, establishes at paragraph 13, p. 4, the sworn testimony Respondent incorrectly states is lacking from Appellant – that ejecting SDMB from Hangar 7 would work an irreparable harm. But in any event, the South Carolina Courts and Fourth Circuit Court of Appeals have made it abundantly clear that the loss of a business or business goodwill is an irreparable harm – which was the clear result of not staying ejectment. Whether "a wrong is irreparable, in the sense that equity may intervene, and whether there is an adequate remedy at law, are questions that ***are not decided by narrow and artificial rules.***" *Peek v. Spartanburg Reg'l Healthcare Sys.,* 367 S.C. 450, 626 S.E.2d 34 (Ct. App. 2005) (*emphasis added*) *holding modified for other reasons in Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.,* 387 S.C. 583, 694 S.E.2d 15 (2010); *see also Kirk v. Clark,* 191 S.C. 205, 211, 4 S.E.2d 13, 16 (1939). "Irreparable injury" as used in law of injunction, does not necessarily mean that injury is beyond possibility of compensation in damages. *Bethel M. E. Church v. City of Greenville,* 211 S.C. 442, 45 S.E.2d 841 (1947).

In *Peek,* a physician was faced with a shut-down of her medical practice. The Court of Appeals rejected the argument that money damages alone were an adequate remedy for the physician. It upheld the trial court's injunction and ruled that "the complete loss of a professional practice can be irreparable harm." 367 S.C. at 455, 626 S.E.2d at 37. A footnote in *Peek* is particularly helpful on how this issue has been decided in other jurisdictions:

> Other appellate courts have upheld injunctive relief to prevent the loss of a business or business goodwill. *District of Columbia v. E. Trans–Waste of Md., Inc.*, 758 A.2d 1, 15 (D.C.2000) ("While economic loss does not, in and of itself, constitute irreparable harm, such harm will be found if economic loss threatens the very existence of [plaintiff's] business."); *Campbell Inns, Inc. v. Banholzer, Turnure & Co.*, 148 Vt. 1, 527 A.2d 1142, 1146 (1987) ("The potential loss of a business satisfies the irreparable harm requirement for the issuance of an injunction."); *IAC, Ltd. v. Bell Helicopter Textron, Inc.*, 160 S.W.3d 191, 200 (Tex.App. 2005) ("Loss of business goodwill or loss that is not easily calculated in pecuniary terms is sufficient to show irreparable injury for purposes of obtaining a temporary injunction.").

Similarly, in *Insurance Fin. Services, Inc. v. South Carolina Ins. Co.*, 271 S.C. 289, 291, 247 S.E.2d 315, 317 (1978), the South Carolina Supreme Court ruled that a termination of agency relationship that would merely *hurt* plaintiff's business constituted an irreparable harm. Additionally, in *Entrepreneur Media, Inc. v. JMD Entm't Grp., LLC*, the Court held that damage to a business's reputation and goodwill "may fairly be characterized as 'irreparable' in nature." 958 F. Supp. 2d 588, 596 (D. Md. 2013); *Innovative Value Corp. v. Bluestone Fin., LLC*, No. DKC 2009–0111, 2009 WL 3348231 (D.Md. Oct. 15, 2009).

"The adequacy of a legal remedy is a pragmatic determination based upon the certainty of fixing damages, the practicality of obtaining relief and the efficiency of the legal remedy in the particular circumstances." *Columbia Broadcasting Sys., Inc. v. Custom Recording Co.*, 258 S.C. 465, 189 S.E. 2d 305, cert. denied, 409 U.S. 1007 (1972); *quoted by* Flanagan at 533. Our courts have determined that irreparable injury does not mean that the injury is beyond the possibility of compensation in damages. *Bethel M. E. Church*, 211 S.C. 442 (1947); Flanagan at 533. In *Peek* the Court found that while courts do often award monetary damages when a plaintiff can no longer work, such damages are usually the only possible remedy; but where monetary damages are not the only option and injunctive relief is a better remedy – it can be awarded. 367 S.C. 450, 457, 626 S.E.2d 34, 38 (Ct. App. 2005).

As a result, the Court should reconsider, or amend its Paragraph 9 of its finding of fact as to no evidence of irreparable harm, and the corresponding finding in Paragraph 1 of the conclusions of law as well as the conclusion SDMB failed to establish an inadequate legal remedy.

CONCLUSION

For the reasons hereinabove set forth, SDMB respectfully submits that the Court alter, amend and reconsider its *Order Denying Appellant's Motion for Injunction and Stay of Ejectment.*

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Co-Counsel for Defendants

Mount Pleasant, SC
October 23, 2015

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the within ***Notice of Motion and Motion to Reconsider, Alter or Amend the Order of October 13, 2015*** upon all parties to these matters either by hand delivery or depositing a true copy of the same in the U.S. mail, proper postage prepaid, addressed to counsel of record as follows, and also by email if so indicated:

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Battle Law Firm, LLC
Post Office Box 530
Conway, SC 29528

Attorneys for Respondent(s)

VIA E-MAIL AND U.S. MAIL
Arrigo P. Carotti, Esquire
Horry County Attorney
1301 2nd Avenue,
Conway, South Carolina 29526

Robert B. Varnado

October 23, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

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

Appellate Case No. 2015-001868
Circuit Court Case No. 2014-CP-26-4965

Skydive Myrtle Beach, Inc. ..... Appellant,

v.

Horry County ..... Respondent.

VERIFIED PETITION FOR SUPERSEDEAS BOND TO THE HORRY COUNTY COURT OF COMMON PLEAS

TO: THE HONORABLE LARRY B. HYMAN, JR., PRESIDING JUDGE OF THE HORRY COUNTY COURT OF COMMON PLEAS :

COMES NOW THE Appellant-Petitioner Skydive Myrtle Beach, Inc. ("SDMB" or "Appellant"), by and through its undersigned counsel and pursuant to Rule 62(d) of the South Carolina Rules of Civil Procedure and Rule 241(d) of the South Carolina Rules of Appellate Procedure, and subject to its reservation of rights, herewith submits the instant *Verified Petition for Supersedeas Bond* based on the reasons and legal argument and analysis articulated therein:

STATEMENT OF RELEVANT FACTS AND PROCEDURAL HISTORY

1. This matter arises out of an action to eject SDMB from Hangar 7 at the Grand Strand Regional Airport, filed in the Horry County Magistrate's Court ("Magistrate"), which was granted by the Magistrate on July 23, 2014.

copy

2. Thereafter, on August 1, 2014, the Magistrate issued a timely and effective Bond to Stay Proceedings ("Appeal Bond"), pursuant to S.C. Code Ann. § 27-37-130, requiring monthly payments of $1,200.00 per month. The terms of the Appeal Bond reflect the original monthly rental rate extant prior to litigation and preserve the *status quo ante*.

3. The County never appealed the Appeal Bond to the Circuit Court. The County twice petitioned the Circuit Court to modify the bond; the first was denied from the bench on March 2, 2015 and again on May 6, 2015 in a Form 4 Order. The County never sought reconsideration [or appealed or cross-appealed to the Court of Appeals] either of the Circuit Court's rulings denying the County's request to increase the bond.

4. SDMB has continued to make the monthly payments in accordance with the Appeal Bond of $1,200.00 per month for occupancy of Hangar 7. From August, 2014 to June, 2015 this was done by check each month. Effective June, 2015, the County and SDMB agreed to a direct deposit system. SDMB made the September, 2015 by monthly payment direct transfer, which the County accepted. SDMB intends to make the October, 2015 payment as well.

5. The Circuit Court affirmed the Magistrate's ruling on May 5, 2015. SDMB filed a timely motion to reconsider pursuant to Rule 59(e), SCRCP, which was denied July 16, 2015 (and received July 22, 2015).

6. Appellant has filed a timely Notice of Appeal with Proof of Service that has been filed with both the Circuit and Appellate court on August 19, 2015.

7. On September 16 and 17, 2015, the County's counsel advised SDMB's attorneys via email that the County intended to eject SDMB from Hangar 7 on the afternoon of Saturday 19, 2015 under threat of criminal conviction for trespass. The County alleged that the Magistrate's Appeal Bond has expired and a *Supersedeas Bond* is necessary to stay proceedings;

8. SDMB submitted an Emergency Motion for Temporary Injunction and Motion to Stay on September 17, 2015 (filed September 18, 2015) in which it argued that a stay was in effect and no *Supersedeas Bond* was required.

9. The Court agreed to an emergency hearing on September 22, 2015, at 10:00 a.m. at the Horry County Courthouse.

10. In light of the same, the County consented not to proceed with ejectment pending the Court's ruling. At the hearing, the Court heard the argument of counsel and requested proposed orders and supporting materials be submitted on the morning of Friday, September 25, 2015.

11. SDMB argues that its continued compliance with a valid Appeal Bond pursuant to S.C. Code Ann. § 27-37-130 creates a stay through every level of Appeal, including from the Magistrate's Court to the Circuit Court and from the Circuit Court to the South Carolina Court of Appeals. *See* Rule 241(b) and (b)(10), SCACR; *Vacation Time of Hilton Head Island, Inc. v. Kiwi Corp.*, 280 S.C. 232, 233, 312 S.E.2d 20 (Ct. App. 1987); S.C. Code Ann. § 27-37-130. There is no authority that limits the application of S.C. Code Ann. § 27-37-130 simply to the first level of an ejectment appeal (from the Magistrate's Court to the Circuit Court). SDMB believes this Petition is unnecessary, but makes it in order to protect its interests – reserving all rights to assert that the Court's order is in fact stayed.

12. Rule 62(d), SCRCP permits a *Supersedeas Bond* to issue "at or after the time of filing, the notice of appeal." Rule 241(d)(1), SCACR requires Appellant to move before the lower court unless there are "extraordinary circumstances." Rule 241(d)(3), SCAR sets forth the following requirements:

a. Verified petition;

b. Certified copy of the court order; and

c. Copy of the Notice of Appeal with Proof of Service;

13. A seventy-two (72) hour ejectment Order would force Appellant's business to shut down and cause irreparable harm to SDMB. The County, by contrast, would suffer no prejudice as it would continue to receive the $1,200.00 monthly Appeal Bond payments arising out of (a) the Appeal Bond it never appealed to the Circuit Court; and (b) having failed to appeal to the Court of Appeals the two times the Circuit Court denied petitions to modify the same. *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).

14. The County's argument that safety concerns preclude granting of a Supersedeas Bond are entirely misplaced.

15. The Federal Aviation Administration ("FAA") has exclusive jurisdiction to determine matters of aeronautical safety and parachute operations; *See* 49 U.S.C. § 40103 (FAA shall develop plans and policy for the use of navigable airspace to ensure the safety of aircraft and efficient use of airspace); 49 U.S.C. § 47107(a) (sponsor will make its airport available as an airport for public uses on reasonable terms and without unjust discrimination to all types, kinds, and classes of aeronautical activities); FAA Grant Assurance 22, *Economic Nondiscrimination*; FAA Airport Compliance Manual, FAA Order 5190.6B (09/30/2009), Ch. 14.3 ("The FAA, not the sponsor, is the authority to approve or disapprove aeronautical restrictions based on safety and/or efficiency at federally obligated airports").

16. Issues with safety have no bearing on an appeal bond, since skydive safety is the prerogative of the FAA not the County. Moreover, all the "safety violations" elucidated by the County have never been served on SDMB; SDMB contends they are self-serving statements made

to create issues between the FAA and SDMB. It should be noted, however, that these alleged safety issues are the only matters which the County offered to the Court at the September 22, 2015, hearing

17. Additionally, the "Anti Head Tax Act" prohibits a State or political subdivision "from collecting a tax, fee, head charge, or other charge on – an individual travelling in air commerce; . . . or the gross receipts from that air commerce or transportation." 49 U.S.C. § 40116(b)(1), (4). This would preclude the County from arguing it is entitled to an increased bond based on the License Agreement.

WHEREFORE, Appellant requests this Honorable Court:

a. to issue a *Supersedeas Bond* with the same terms and conditions as those determined by the Magistrate's Appeal Bond (*see* Ex. 2) following a full hearing on the merits;

b. to stay execution of any Writ of Ejectment pending the decision of the South Carolina Court of Appeals;

c. in the alternative, to stay the Writ of Ejectment while SDMB addresses the matter with the South Carolina Court of Appeals;

d. such further relief as this court deems just.

(Signature block on the next page)

By: _____

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and

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Co-Counsel for Appellant-Petitioner

September 24, 2015
Mt. Pleasant, SC 29464

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the within ***Verified Petition for Supersedeas Bond to the Horry County Court of Common Pleas*** upon all parties to these matters either by hand delivery or depositing a true copy of the same in the U.S. mail, proper postage prepaid, addressed to counsel of record as follows, and also by email if so indicated:

VIA E-MAIL AND U.S. MAIL
Michael W. Battle, Esquire
Battle Law Firm, LLC
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Attorney for Respondent(s)

VIA E-MAIL AND U.S. MAIL
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Horry County Attorney
1301 2nd Avenue,
Conway, South Carolina 29526

Robert B. Varnado

September 25, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit County Judge

Case No. 2014-CP-26-4965
Appellate Case No. 2015-001868

Skydive Myrtle Beach, Inc. ..... Appellant,

v.

Horry County ..... Respondent.

VERIFICATION

Personally appeared before me, Arron Scott Holly, who being duly sworn, deposes and states that he is the President of Skydive Myrtle Beach, Inc.; that he has read the attached Motion, that the statements contained therein are true and correct as to his own knowledge, except as to those allegations based upon information and belief, and as to those he believes them to be true and correct.

Aaron S Holly

AARON SCOTT HOLLY
President, Skydive Myrtle Beach, Inc.

Sworn to me this 24
Day of September, 2015

Maryann T Wright

Notary Public for
State of North Carolina
My Commission Expires: 04-22-2017

MARYANN T. WRIGHT
NOTARY PUBLIC
WAKE COUNTY, NC

Scanned by CamScanner

Exhibit 1

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit County Judge

RECEIVED
AUG 24 2015
SC Court of Appeals

Case No. 2014-CP-26-4965

Skydive Myrtle Beach, Inc. ..... Appellant,

v.

Horry County ..... Respondent.

NOTICE OF APPEAL

Skydive Myrtle Beach, Inc. appeals the Order of the Honorable Larry B. Hyman, Jr., dated July 16, 2015. Appellant has received a copy of the Order by electronic mail and by letter dated July 22, 2015 from counsel for Appellant Horry County, Michael W. Battle, Esquire, on July 27, 2015.

August 19, 2015

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit County Judge

Case No. 2014-CP-26-4965

Skydive Myrtle Beach, Inc. ..... Appellant,

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Horry County ..... Respondent.

NOTICE OF APPEAL

Skydive Myrtle Beach, Inc. appeals the Order of the Honorable Larry B. Hyman, Jr., dated July 16, 2015. Appellant has received a copy of the Order by electronic mail and by letter dated July 22, 2015 from counsel for Appellant Horry County, Michael W. Battle, Esquire, on July 27, 2015.

August 19, 2015

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Exhibit 2

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit County Judge

RECEIVED
AUG 24 2015
SC Court of Appeals

Case No. 2014-CP-26-4965

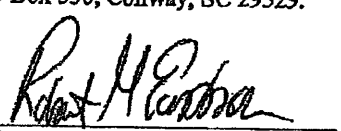
Skydive Myrtle Beach, Inc. ..... Appellant,

v.

Horry County ..... Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Horry County by depositing a copy of it in the United States Mail, postage prepaid, on August 19, 2015, addressed to the attorney of record, Michael W. Battle, Esquire, Battle Law Firm, LLC, PO Box 530, Conway, SC 29529.



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit County Judge

Case No. 2014-CP-26-4965

Skydive Myrtle Beach, Inc. ..... Appellant,

v.

Horry County ..... Respondent.

FILED
HORRY COUNTY
2015 AUG 25 AM 9:36
MELANIE HUGGINS-WARD
CLERK OF COURT

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Horry County by depositing a copy of it in the United States Mail, postage prepaid, on August 19, 2015, addressed to the attorney of record, Michael W. Battle, Esquire, Battle Law Firm, LLC, PO Box 530, Conway, SC 29529.

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Co-council for Appellant

Exhibit 3

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Skydive Myrtle Beach, Inc.,

Appellant,

vs.

Horry County

Respondent.

FOR THE FIFTEENTH JUDICIAL CIRCUIT
IN THE COURT OF COMMON PLEAS
CASE NO.: 2014-CP-26-4965

ORDER DISMISSING

MAGISTRATE'S APPEAL

HORRY COUNTY
2015 MAY 29 PM 4:
MELANIE LAND
CLERK OF COURT

RECEIVED
AUG 24 2015
SC Court of Appeals

The above captioned matter came before the court on the appeal of Skydive Myrtle Beach, Inc., (Appellant) from the Order of Eviction of the Honorable Christopher J. Arakas, Magistrate Judge. Judge Arakas evicted Appellant from Horry County's (Respondent) airplane hangar, Hangar 7, on the grounds that Appellant's tenancy had ended. Appellant raises two grounds on appeal. The first ground is substantive and raises the question of what document controlled the tenancy right of Appellant to occupy Hangar 7. The second ground is procedural and raises the question of whether Judge Arakas abused his discretion by conducting a non-jury bench trial on the eviction proceeding.

A hearing on the appeal was held before this Court on May 6, 2015, in the Horry County Courthouse. Present at the hearing were the Appellant and his attorneys, Robert G. Eastman and Robert B. Varnardo. Also, present were Respondent and its attorney, Michael W. Battle. After considering the Magistrate's Return, the briefs of the parties and oral arguments, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Respondent Horry County is the landlord and owner of Hangar 7 at Grand Strand Airport CRE.
2. On May 10, 2012, Appellant Skydive Myrtle Beach, Inc. entered an agreement (jump agreement) with Grand Strand Aviation to provide tandem parachute jumps for Appellant from the Grand Strand Airport.
3. Paragraph 5 of the jump agreement provides: "There will be no packing fees charged to SkyDive MB. SkyDive shall be provided with a **minimum of 2,500 square feet during daylight hours** without fee seven days a week, including holidays, 365 days a year." *(emphasis added).*
4. Paragraph 18 of the jump agreement provides the agreement will remain in effect through Grand Strand Aviation's lease with Horry County Department of Airports through July 2020.
5. Grand Strand Aviation's lease with Horry County Department of Airports was terminated by agreement in 2013.
6. On September 13, 2013, Respondent Horry County through its Department of Airports entered a new commercial agreement with Appellant permitting Appellant to use the approximately 6800 square feet of space in Hangar 7 twenty four hours a day seven days a week until January 31, 2014. The fee for the use of the space in Hangar 7 was monthly payments of One Thousand Two Hundred & 00/100 ($1200.00) dollars per month. Respondent reserved the right to adjust the amount of the fee for use of the space upon thirty days' notice to Appellant.
7. Paragraph 14 of the Hangar 7 permit agreement provided: "This permit constitutes the entire agreement of the parties with respect to the subject matter hereof and supersedes all

previous agreements, representations and understandings concerning the same, whether written or oral. The provisions of the Permit may be modified, amended or waived only by written instrument executed by the County (Respondent) and Company (Appellant)." *(Parenthesis added).*

8. The Hangar 7 agreement was duly signed by Respondent and Appellant.

9. The Hangar 7 permit expired by its own terms on January 31, 2014.

10. Appellant is now occupying Hangar 7 without permission or authority from Respondent.

11. On or about June 5, 2014, Respondent duly served and filed in Magistrate's Court an Ejectment Proceeding/Rule to Vacate. On June 13, 2014, Appellant responded by filing a Motion to Remove pursuant to S.C. Code Ann. §22-3-30 contesting the Court's jurisdiction.

12. On July 2, 2014, Judge Christopher Arakas denied the Motion to Remove and set an original trial date for Respondent's Rule to Vacate for July 23, 2014.

13. Appellant did not file a second responsive pleading within 15 days of the denial of its Motion to Remove on by Judge Arakas on July 2, 2014.

14. On July 21, 2014, the Magistrate's office received a letter dated July 18, 2014, requesting that the Magistrate reconsider his order of July 2, 2014, or in the alternative grant Appellant a jury trial and permission to file a counterclaim. On July 23, 2014, Judge Arakas denied Appellant's request to reconsider his Motion to Remove and his request for a jury trial plus 30 days to file a counter claim. Judge Arakas denied both requests on the grounds that the requests were untimely. Judge Arakas tried the Respondent's Ejectment Action/Rule to Vacate in a nonjury trial and ruled in favor of the Respondent granting the eviction of the Appellant.

15. Judge Arakas found that the lease agreement between Respondent and Appellant had expired. Respondent is the rightful Landlord and did present Appellant with a new agreement/lease. Appellant did not agree with it and refused to sign the new agreement/lease. Therefore, Appellant had no legal right to be on the property or in the building.

CONCLUSIONS OF LAW

(Substantive Issues)

1. This Court has jurisdiction of the above captioned appeal. *SC R MAG CT Rule 18.*
2. The standard of review to be applied by a Circuit Court in an appeal of a magistrate's judgment is prescribed by *S.C. Code Ann. § 18-7-170 (1976)*: Upon hearing the appeal 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. In giving judgment the court may affirm or reverse the judgment of the court below, in whole or in part, as to any or all the parties and for errors of law or fact. *Hadfield v. Gilchrist, 343 S.C. 88, 92, 538 S.E.2d 268, 270 (Ct. App. 2000).*
3. Under the doctrine of merger, the Hangar 7 permit supersedes and replaces any other agreement entered between Respondent and Appellant or its predecessors in connection with the use of Hangar 7. *Davis v. KB Home of S. Carolina, Inc.*, 394 S.C. 116, 127, 713 S.E.2d 799, 804 (Ct. App. 2011) aff'd in part, vacated in part, No. 2011-199587, 2014 WL 2535489 (S.C. Jan. 29, 2014) (employment application were superseded and rendered invalid by the presence of a merger clause in his subsequent employment agreement).

4. Under S.C. Code Ann. §27–35–110, "[w]hen there is an express agreement, either oral or written, as to the term of the tenancy of a tenant for a term or for years such tenancy shall end without notice upon the last day of the agreed term."

5. Appellant's tenancy ended on January 31, 2014. Appellant's right to occupy Hangar 7 expired on January 31, 2014, and Appellant had no legal right to occupy Hangar 7. *SC Code Ann. §27–35–110.*

(Procedural Issues)

6. Magistrate Court rules of civil procedure shall govern all civil suits in the magistrates' court. If no procedure is provided by those rules, the court shall proceed in a manner consistent with the statutory law applicable to magistrates and with circuit court practice in similar situations but not inconsistent with these rules. *SC R MAG CT Rule 2;* Rule 81 *SCRCP.*

7. The defendant may reply to the plaintiff's complaint by filing a written statement in a form approved by the magistrate or by personally appearing and making an oral statement. This reply shall be called an "answer." A defendant shall file an answer and any appropriate counterclaims with the court within thirty (30) days from the first day after the date of service. *SC R MAG CT Rule 7.* "Answer" means the paper filed by the party responding to the complaint. *SC R MAG CT Rule 1.*

8. A defendant shall file an answer and any appropriate counterclaims with the court within thirty (30) days from the first day after the date of service. *SC R MAG CT Rule 7.*

9. Appellant waived its right to file a counterclaim by failing to file a counterclaim within thirty (30) days from the first day after the date of service. *SC R MAG CT Rule 7.* Any different ruling would be inconsistent with the mandates of *SC R MAG CT Rule 7.*

10. Even if the Court were to accept Appellant's claim that Appellant's Motion to Remove was a Rule 12 motion under the South Carolina Rules of Civil Procedure, Appellant would have been in default by July 21, 2014, when his request a jury trial and the right to file a counterclaim was filed in Magistrate's Court. The service of a motion permitted under Rule 12 SCRCP only alters the time to answer 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. *SCRCP 12.*

11. If either party wanted a jury trial, it must have been requested in writing at least five (5) working days prior to the original date set for trial. *SC R MAG CT Rule 13.*

12. Appellant waived its right to have a jury trial by failing to request one at least 5 working days prior to the original date set for trial. . *SC R MAG CT Rule 13. Also see Rule 38(d), SCRCP* (stating a party's failure to demand a jury trial as required by the rule constitutes a waiver of the right to a jury trial); *C & S Real Estate Servs. v. Massengale,* 290 S.C. 299, 300, 350 S.E.2d 191, 192 (1986); Also see *Cohen v. Creech,* No. 2013-UP-091, 2013 WL 8482385, (S.C. Ct. App. Feb. 27, 2013). Any different ruling would be inconsistent with the mandates of *SC R MAG CT Rule 13.*

13. The decision to grant or deny a continuance is a matter within the lower court's discretion. *Graybar Elec. Co. v. Rice,* 287 S.C. 518, 520, 339 S.E.2d 883, 884 (Ct.App.1986). Absent an abuse of discretion, the court's decision to deny a continuance will not be disturbed on appeal. *Hamm v. South Carolina Pub. Serv. Comm'n,* 312 S.C. 238, 241, 439 S.E.2d 852, 853 (1994); *A & I, Inc. v. Gore,* 366 S.C. 233, 243-44, 621 S.E.2d 383, 388 (Ct. App. 2005).

14. Judge Arakas did not abuse his discretion by proceeding with a nonjury trial on July 23, 2014 which had been scheduled and set for trial on July 2, 2014, and duly noticed to the parties on July 2, 2014. *Id.*

15. Judge Arakas correctly decided that Appellant has no legal right to occupy Hangar 7.

DISCUSSION

The Court has carefully reviewed the record, memorandums of authorities and arguments of counsel. The Court finds that the fact that the Hangar 7 agreement by which Appellant occupied the property expired in January of 2014 has not been refuted by Appellant. The jump agreement dated May 10, 2012, introduced at the hearing of the appeal was not a valid eight year lease agreement to occupy Hangar 7. The express terms of the jump agreement provided that Appellant would be permitted the use of a minimum of 2500 square feet in "Byrd Hangar" for use during daylight hours without paying a fee. Appellant entered a new agreement with Respondent that permitted it to use 6800 square feet without limitation of the use to daylight hours. In addition, Appellant agreed to pay Respondent $1200 per month for the use of 6800 square feet without limitation of the use to daylight hours. The new agreement expressly provided that the permit constituted the entire agreement of the parties with respect to the use of Hangar 7 and superseded all previous agreements, representations and understandings concerning the same, whether written or oral. When a contract is unambiguous, clear and explicit, it must be construed according to the terms the parties have used, to be taken and understood in their plain, ordinary and popular sense. *Warner v. Weader*, 280 S.C. 81, 83, 311 S.E.2d 78, 79 (1983). The Hangar 7 permit expired in January of 2014. Judge Arakas was correct in ruling Appellant had no right to occupy Hangar 7 and should be evicted.

Appellant claims it was denied procedural due process of law because Judge Arakas denied its attorneys' request to file a counterclaim and seek a jury trial. Under the Rules of Procedure for Magistrate's Court both requests were untimely. Appropriate counterclaims must be filed with the court within thirty (30) days from the first day after the date of service. *SC R MAG CT Rule 7.* Jury trials must be requested in writing at least five (5) working days prior to the original date set for trial. *SC R MAG CT Rule 13(c).* Appellant did not file a counterclaim within thirty days of the original date of service and Appellant's request for a jury trial was not made five (5) working days prior to the original date set for trial. Judge Arakas did not abuse his discretion by denying Appellant attorney's requests and proceeding to trial on the original date set for trial. *SC R MAG CT Rule 7 & Rule 13 (c);* also see *A & I, Inc. v. Gore,* 366 S.C. 233, 243-44, 621 S.E.2d 383, 388 (Ct. App. 2005).

This Court is charged with giving 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 (1976).* The merits of the present case are clear and this Court has ruled that the controlling Hangar 7 agreement by which the Appellant was allowed to occupy Hangar 7 expired in January 2014. Appellant has no legal right to occupy Hangar 7 and that conclusion and/or fact has not been refuted by the Appellant,

THEREFORE, IT IS HEREBY ORDERED, the appeal of Skydive Myrtle Beach, Inc., is hereby dismissed.



SEPT., 2015

The Honorable Larry B. Hyman, Jr.
Judge Of The Fifteenth Judicial Circuit

Exhibit 4

COPY

STATE OF SOUTH CAROLINA COUNTY OF HORRY Skydive Myrtle Beach, Inc., Appellant, vs. Horry County Respondent.	FOR THE FIFTEENTH JUDICIAL CIRCUIT IN THE COURT OF COMMON PLEAS CASE NO.: 2014-CP-26-4965 ORDER DENYING APPELLANT'S MOTION TO RECONSIDER DISMISSAL OF APPEAL

RECEIVED
AUG 2015
SC Court of Appeals

The matter comes before the Court upon Appellant Skydive Myrtle Beach, Inc.'s Rule 59(e) SCRCP Motion to Reconsider this Court's Order dated May 27, 2015, dismissing Appellant's appeal from an ejectment order issued by Magistrate Judge Christopher Arakas. After considering the Appellant's motion and supporting memorandum together with Respondent's Response in Opposition to Appellant's Motion to Reconsider, the Court has decided to deny Appellant's Motion to Reconsider.

Appellant claims Horry County's Space Use Permit could not replace a May 12, 2010, agreement between Appellant and Ramp 66 to provide parachute jumps from Grand Strand Airport. Under the Ramp 66 agreement, Appellant was permitted to use a minimum of 2500 square feet in the "bird hangar" during daylight hours for no rent. The Ramp 66 agreement was to remain in effect through Grand Strand Aviation's lease with Horry County Department of Airports. Grand Strand Aviation's lease with Horry County Department of Airports was scheduled to run through July 2020. Ramp 66 and Horry County Department of Airports terminated the lease in 2013. Thereafter, Horry County Department of Airports and Appellant

entered a new agreement/space use permit for Hangar 7 which superseded all previous agreements, including the Ramp 66 agreement. Appellant's right to occupy Hangar 7 under the space use permit ended under express terms of the space use permit on January 31, 2014.

In its motion to reconsider Appellant claims its agreement with Ramp 66 was in fact a sublease which could not be replaced by a space use permit. However, Appellant has omitted the fact that its claimed sublease was not recorded in accordance with the notice requirements of S.C. Code Ann. § 27-33-30. Appellant further omitted citing the provision in paragraph 18 of the Ramp 66 agreement which allowed the agreement to be changed in any way upon written agreement of both parties. Appellant overlooked the significance of the fact that the space use permit was a written agreement signed by Horry County as successor to Ramp 66 and also signed by Appellant.

Appellant misconstrued the Ramp 66 agreement to mean the agreement gave Appellant the exclusive right to occupy 6800 square feet of Hangar 7 at all times including non-daylight hours through July of 2020. There is nothing is the plain language of the Ramp 66 agreement to support such a construction. As found by the Court the space use permit constituted a change to the Ramp 66 agreement. The new agreement superseded the Ramp 66 agreement and the new agreement only permitted Appellant to occupy Hangar 7 until January 31, 2014. After January 31, 2014, Appellant's right to occupy Hangar 7 ended.

The bottom line is that Appellant's right to occupy Hangar 7 during daylight hours under the Ramp 66 agreement ended when Appellant signed the space use permit. The space use permit expressly provided that Appellant's right to occupy Hangar 7 ended on January 31, 2014. Without a valid written lease agreement, Appellant's eviction from Hangar 7 is a foregone conclusion.

Appellant's procedural claims.

Each of Appellant's procedural claims was addressed in the Court Order Appellant seeks to set aside. Respondent would point out that each error Appellant assigned to the Magistrate was an alleged error in the exercise of the Magistrate's discretion. Further, the only benefit Appellant would have received if the Magistrate had decided the procedural motions in favor of the Appellant was a delay in the proceedings. Respondent contends the end result would have been the same.

Appellant's claim that it was entitled to a jury trial because it requested a jury trial five days prior to the date of the scheduled hearing is improper. Under the Magistrate's rules of procedure, Appellant was required to request a jury trial five (5) working days before the date of the scheduled hearing. *SC R MAG CT Rule 13.* When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays and holidays shall be excluded in the computation. *Rule 6 SCRCP.* Even if the Court were to count Friday, July 18, 2014, and Wednesday July 23, 2014, (original date scheduled for trial) as part of the five (5) working days, Appellant's request for a jury trial was not timely or in compliance with the Magistrate Court Rules because, excluding Saturday and Sunday, Appellant's request for a jury trial was less than five (5) working days before the original date the trial was scheduled. *Rule 6 SCRCP & SC R MAG CT Rule 13.*

Appellant's Rule 12(b) (8) Motion

Appellant's Rule 12(b) (8) motion was properly denied. First, the circuit court lawsuit which Appellant claims should have caused the Magistrate eviction to be dismissed was not between the same parties. *Cricket Cove Ventures, LLC v. Gilland*, 390 S.C. 312, 323, 701 S.E.2d 39, 45 (Ct. App. 2010). Appellant named Horry County, Horry County Department of Airports,

H. Randolph Haldi, Pat Apone, Tim Jackson and Jack Teal as defendants in the circuit court action. The Magistrate's eviction only involved Horry County and the Appellant. Second, Courts interpret the Rule 12(b) (8) narrowly such that the claim must be precisely or substantially the same in both proceedings in order for the drastic remedy of dismissal to be appropriate under Rule 12(b) (8). *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 106, 674 S.E.2d 524, 532 (Ct. App. 2009). In the circuit court proceeding, Appellant asserted fifteen separate causes of action for damages against the above named defendants. There was no eviction claim or defense in the circuit court action. Respondent contends that none of Appellant's fifteen causes of action were precisely or substantially the same as the eviction cause of action brought by the Respondent. Because the identities of the parties were not the same and the claims were not precisely or substantially the same, the Magistrate's denial of Appellant's Rule 12 (b) (8) motion was proper. *Id.*

NOW THEREFORE, for the reasons stated above and for the reasons stated in this Court's Order dated May 27, 2015, Appellant's Motion to Reconsider is hereby **DENIED**.

7-16-, 2015

The Honorable Larry B. Hyman, Jr.
Judge Of The Fifteenth Judicial Circuit

Exhibit 5

STATE OF SOUTH CAROLINA)
) 2014CV261092444
COUNTY OF HORRY) CIVIL CASE NUMBER
) MAGISTRATE'S COURT
)
) BOND TO STAY EXECUTION
) ON APPEAL

Horry County
Po Box 1236
Conway, SC 29526

LANDLORD

Vs

Skydive Myrtle Beach, Inc.
2800 Terminal Street
Conway, SC 29528

TENANT(S)

TO: Circuit Court

Now comes the Tenant(s) in the above entitled action and respectfully shows the Court that a Judgment of Execution was issued against the Tenant(s) and for the Landlord on July 23, 2014, by the Magistrate. Tenant(s) has appealed the Judgment to the Circuit Court.

Pursuant to the findings of the Magistrate, the Tenant(s) is obligated to pay rent in the amount of $1,200.00 per month, due on the 1st day of each month. An initial payment of $7200.00 was paid this date with monthly payments to follow.

Tenant(s) hereby undertakes to pay the periodic rent hereinafter due according to the aforesaid findings of the Court and moves the Circuit Court to stay execution on the Judgment for Ejectment until this matter is heard on appeal and decided by the Circuit Court.

Dated on August 1, 2014:

Tenant(s)

Upon execution of the above bond, execution on the Judgment of Ejectment is hereby stayed until the action is heard on appeal and decided by the Circuit Court. If Tenant(s) fails to make any rental payment within five days of the due date, upon application of the Landlord, the stay of execution shall dissolve, the appeal by the Tenant(s) to the Circuit Court on issues dealing with possession must be dismissed and the Sheriff may dispossess the Tenant(s).

Dated on August 1, 2014

JUDGE

Horry County
Myrtle Beach Magistrate Court
1201 21st Avenue North
Myrtle Beach, SC 29577
Phone: (843) 915-5293 Fax: (843) 444-6131

MV 125

5747

BROWN & VARNADO LLC
GENERAL OPERATING ACCOUNT
103 CHURCH STREET
MOUNT PLEASANT, SC 29464
843-737-7300

FIRST RELIANCE BANK
Lexington, SC 29072
www.firstreliance.com
67-800-532

9-24-15

PAY TO THE ORDER OF Horry County Clerk of Court $ 25.00

Twenty-five + no/100 DOLLARS

Security features. Details on back.

MEMO File No. 6247-motion

AUTHORIZED SIGNATURE

⑈005747⑈ ⑆053208008⑆04100006691⑈

BROWN & VARNADO LLC OPERATING ACCOUNT 5747

BROWN & VARNADO LLC OPERATING ACCOUNT 5747

PRODUCT DLT104 USE WITH 91663 ENVELOPE

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	CASE NO. 2014-CP-26-4965
SKYDIVE MYRTLE BEACH, INC.,	)	
	)	
Appellant,	)	
	)	SKYDIVE MYRTLE BEACH'S
vs.	)	MEMORANDUM OF LAW
	)	
HORRY COUNTY,	)	
	)	
Respondent.	)	
	)	

TO: THE HONORABLE LARRY B. HYMAN, JR., CIRCUIT COURT JUDGE:

COMES NOW THE Appellant-Petitioner Skydive Myrtle Beach, Inc. ("SDMB") who would respectfully submit the following Memoradum of Law for the Court's consideration following the September 20, 2015 hearing before the Circuit Court.

1. **THE MAGISTRATE APPEAL BOND HAS NOT EXPIRED.**

The County's argument that SDMB is required to obtain a new Supersedeas Bond to stay ejection from Hangar 7 is based entirely on the argument that an Appeal Bond issued under S.C. Code Ann. § 27-37-130 expires when the Circuit Court affirms the Magistrate's Court's ruling – in other words, argues the County, it applies only during an appeal from the Magistrate's Court to the Circuit Court.

The County's position, however, is unsupported 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.

copy

> 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 only to appeals only from Magistrate's Court to Circuit Court. In fact, because the General Assembly provided **dual jurisdiction** of the Magistrate's 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). This begs the question why our Supreme Court would adopt a rule that references the applicability of § 27-37-130 in determining whether a Circuit Court order is stayed on appeal to the Court of Appeals *if it expires after the Circuit Court issues a binding judgment like the County argues*? 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)" – meaning that the 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's 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).[1] 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. § 37-27-130 to only to the Circuit Court level of an appeal 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

[1] "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).

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. 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.

Absent the bare argument of counsel, the County has no specific legal basis to the contrary. On the other hand, SDMB can point to the weight of statutes, case law and principles of statutory construction to support its position.

2. A Stay is in Effect Pursuant to Rule 241, SCACR and Rule 62(f), SCRCP.

Having demonstrated that S.C. Code Ann. § 27-37-130 remains in effect throughout the entire process of appellate review, then based on the following facts and legal analysis SDMB submits it is not required to seek a Supersedeas bond under Rule 241, SCACR or Rule 62, SCRCP because a stay remains in full force and effect. **The central question before this Court boils down to whether the "exception" of Rule 241(b)(10), SCACR applies to preclude a stay– i.e., whether the conditions are such that SDMB is <u>not</u> entitled to a stay – even though SDMB is in full compliance with a valid Appeal Bond under § 27-37-130.**

Legal Analysis of Rule 241, SCACR.

Rule 241 is contained within "Part Two" of the Appellate Court Rules. By operation of Rule 101(a), SCACR, 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."

In other words, if an exception may apply – and there is not going to be a stay because of the exception – the Court must inquire into whether all the specific conditions which would preclude a stay "have been strictly complied with."

When the words of Rule 241(b) are given their plain and ordinary meaning[2], then the exception at Rule 241 (b)(10) only applies if SDMB never applied for an Appeal Bond pursuant to S.C. Code Ann. § 27-37-130 and/or is 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.

[2] "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).

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.

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.

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.

f. On August 19, 2015, SDMB filed Notice of Appeal of the Court's Order of May 5, 2015. 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 S.C. Code Ann. § 27-37-130.

The conditions which would result SDMB not having a stay (e.g., the Magistrate failed to grant a timely Appeal Bond or the Appellant did not or could not make the required payments) have not been strictly complied with. Rule 241(b), SCACR. The stay on "appeal" provided by S.C.

Code Ann. § 27-37-130 is rendered meaningless when the Appellant remains in strict compliance with the Appeal Bond. Thus, SDMB is entitled to the full benefit of the stay of execution afforded it by a valid Appeal Bond issued pursuant to S.C. Code Ann. § 27-37-130 in which it is in full compliance.

This outcome is supported by Rule 62(f), SCRP, 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.

3. It is the County's Burden to File a Petition to Lift the Stay.

Since there is a stay in effect under S.C. Code Ann. § 27-37-130 and Rule 241(b), SCACR, then the burden is on the County to file a petition seeking to lift the stay – which it has not done as of the filing of this memorandum of law. 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. SDMB submits, however, that the confirmation of the Appeal Bond at $1,200.00 per month is now the law of the case.[3] Moreover, because SDMB has filed a timely and

[3] 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. Thus, 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.

4. Alternatively, SDMB Has Filed a Petition for Supersedeas Bond.

While SDMB believes all of its foregoing positions are legally correct, out of an abundance of caution and to do everything in its power to protect its business from being shuttered, SDMB has now filed a Verified Petition for Writ of Supersedeas Bond ("Petition") pursuant to Rule 241(d), SCACR and Rules 62(d) and (g), SCRCP.

SDMB's Petition is compliant with the technical requirements of Rule 241(d). There is no time limit that SDMB has violated in seeking the Petition and no prejudice to the County in it being sought at this time.

The purpose of a Writ of Supersedeas is to preserve the jurisdiction of the court or to prevent a contested matter from becoming moot by preserving the status quo. *Melton v. Walker*, 209 S.C. 330, 40 S.E.2d 161 (1946). Supersedeas can be granted when necessary to avoid irreparable injury or a miscarriage of justice. 4 C.J.S. *Appeal and Error* § 417 (1993); 15 S.C. Jurisprudence. *Appeal and Error § 55*. Rule 62(d) SCRCP requires a bond which "may be given at or after the time of filing the notice of appeal or of procuring the order allowing the Supersedeas as the case may be. The stay is effective when the Supersedeas bond is approved by the court." The amount of the appeal bond is a matter committed to the sound discretion of the trial court. Toal, APPELLATE PRACTICE IN SOUTH CAROLINA 2d, p. 163.

Here, the irreparable harm faced by SDMB is the loss of its business. Skydiving is a federally regulated aeronautical activity governed by Title 14 Code of Federal Regulations, Part 105 industry. A Skydiving business needs to operate from an airport. Pursuant to 49 U.S.C. 47107 and FAA Grant Assurance 22, "[t]he sponsor of any airport developed with federal financial

assistance is required to operate the airport for the use and benefit of the public and to make it available to all types, kinds, and classes of aeronautical activity." Ch. 14.2, FAA Airport Compliance Manual, FAA Order 5190.6B (09/30/2009). Its planes require a hangar; it needs a sheltered area to pack parachutes and train customers. "The FAA, not the sponsor, is the authority to approve or disapprove aeronautical restrictions based on safety and or efficiency at federally obligated airports. *Id,* at Ch. 14.3. If the County successfully ejects SDMB from Hangar 7, it will not only make the appeal completely moot but it prohibit a federally recognized aeronautical activity from conducting authorized parachute operations and will absolutely drive SDMB out of business.

Under South Carolina law, the loss of a business is deemed an irreparable injury. *Peek v. Spartanburg Reg'l Healthcare Sys.*, 367 S.C. 450, 454-55, 626 S.E.2d 34, 36 (Ct. App. 2005) *holding modified by Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 694 S.E.2d 15 (2010). In *Peek*, a physician was faced with a shut-down of her medical practice. The Court of Appeals rejected the argument that money damages alone were an inadequate remedy for the physician and ruled that "the complete loss of a professional practice can be irreparable harm." 367 S.C. at 455, 626 S.E.2d at 37. A footnote in *Peek* is particularly helpful on how this issue has been decided in other jurisdictions:

> Other appellate courts have upheld injunctive relief to prevent the loss of a business or business goodwill. *District of Columbia v. E. Trans–Waste of Md., Inc.*, 758 A.2d 1, 15 (D.C.2000) ("While economic loss does not, in and of itself, constitute irreparable harm, such harm will be found if economic loss threatens the very existence of [plaintiff's] business."); *Campbell Inns, Inc. v. Banholzer, Turnure & Co.*, 148 Vt. 1, 527 A.2d 1142, 1146 (1987) ("The potential loss of a business satisfies the irreparable harm requirement for the issuance of an injunction."); *IAC, Ltd. v. Bell Helicopter Textron, Inc.*, 160 S.W.3d 191, 200 (Tex.App. 2005) ("Loss of business goodwill or loss that is not easily calculated in pecuniary terms is sufficient to show irreparable injury for purposes of obtaining a temporary injunction.").

Similarly, in *Insurance Fin. Services, Inc. v. South Carolina Ins. Co.*, 271 S.C. 289, 291, 247 S.E.2d 315, 317 (1978), the South Carolina Supreme Court ruled that a termination of agency relationship that would merely *hurt* plaintiff's business constituted an irreparable harm. Additionally, in *Entrepreneur Media, Inc. v. JMD Entm't Grp., LLC*, the Court held that damage to a business's reputation and goodwill "may fairly be characterized as 'irreparable' in nature." 958 F. Supp. 2d 588, 596 (D. Md. 2013); *Innovative Value Corp. v. Bluestone Fin., LLC*, No. DKC 2009–0111, 2009 WL 3348231 (D.Md. Oct. 15, 2009).

The $1,200.00 month Appeal Bond set by Judge Arakas on August 1, 2014 keeps the parties in the same position *status quo ante*. This is a complicated case with complex legal theories. A businessperson's livelihood is at stake. SDMB should be allowed to present its arguments to the Court of Appeals before the book is closed on this case. That will be impossible from a financial and business position if the Court finds no stay and/or rejects a Supersedeas.

Thus, SDMB asks that if the Court believes there is a question as to whether there is a statutory stay, that it exercise its discretion and grant a Supersedeas Bond in the same amount as set by Judge Arakas - $1,200.00 per month – payable on the same terms and conditions.

5. The County's Arguments Based on "Safety Concerns" Are Inapplicable Here.

The Court was correct to question whether the County was being disingenuous in attempting to use purported safety concerns as grounds to oppose *Supersedeas*. The Federal Aviation Administration ("FAA") has exclusive jurisdiction to determine matters of aeronautical safety and parachute operations; *See* 49 U.S.C. § 40103 (FAA shall develop plans and policy for the use of navigable airspace to ensure the safety of aircraft and efficient use of airspace); 49 U.S.C. § 47107(a) (sponsor will make its airport available as an airport for public uses on reasonable terms and without unjust discrimination to all types, kinds, and classes of aeronautical

activities); FAA Grant Assurance 22, *Economic Nondiscrimination*; FAA Airport Compliance Manual, FAA Order 5190.6B (09/30/2009), Ch. 14.3 ("The FAA, not the sponsor, is the authority to approve or disapprove aeronautical restrictions based on safety and/or efficiency at federally obligated airports").

Issues with safety have no bearing on an appeal bond, since regulating the skydiving industry is the sole prerogative of the FAA – not the County. Moreover, all the "safety violations" elucidated by the County have never been served on SDMB; SDMB contends they are self-serving statements made to create issues between the FAA and SDMB. Additionally, the County cannot show any actual harm; instead it attempts to alarm the Court with unsubstantiated hypothetical and speculative injuries. Such lack of proof is ineffective to show any true, current and provable injury to the County. Damages recoverable in action on injunction bond include all actual damages sustained by reason of wrongful issuance of injunction, that is, such damages as are the direct, natural, and proximate result of injunction, and in such actions, general rules governing measurement of damages ordinarily apply. *See Hyler v. Wheeler*, 240 S.C. 386, 126 S.E.2d 173 (1962).

It should be noted, however, that these alleged safety issues are the only matters which the County offered to the Court at the September 22, 2015, hearing. If the County argues that it is deprived the value of the tenancy under the License Agreement, SDMB would point to the fact that the "Anti Head Tax Act" prohibits a State or political subdivision "from collecting a tax, fee, head charge, or other charge on – an individual travelling in air commerce; . . . or the gross receipts from that air commerce or transportation." 49 U.S.C. § 40116(b)(1), (4). This would preclude the County from arguing it is entitled to an increased bond predicated on the License Agreement.

CONCLUSION

For the reasons hereinabove set forth, SDMB respectfully submits that the Court should maintain the Appeal Bond at $1,200.00 month, whether as a result of a valid statutory stay or by granting the Verified Petition for Supersedeas Bond at the same amount.

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September 25, 2015

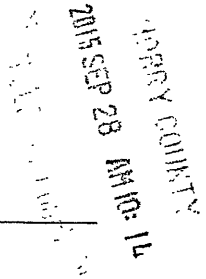
CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the within ***Memorandum of Law Regarding Stay and Superedeas*** upon all parties to these matters either by hand delivery or depositing a true copy of the same in the U.S. mail, proper postage prepaid, addressed to counsel of record as follows, and also by email if so indicated:

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Robert B. Varnado

September 25, 2015

State of South Carolina)
) Court of Common Pleas
County of Horry) 2014-CP-26-04965

Skydive Myrtle Beach, Inc.
vs.
County of Horry

Transcript of Record

ORIGINAL

May 6, 2015
Conway, South Carolina

BEFORE:

Honorable Larry W. Hyman, Judge.

APPEARANCES:

Robert G. Eastman, Esq.
Robert B. Varnado, Esq.
Attorney for the Plaintiff

Michael W. Battle, Esq.
Attorney for the Defendant

Teresa J. F. Bautz, RPR
Official Court Reporter

(The hearing commenced at approximately 1:49 p.m.)

THE COURT: Skydive Myrtle Beach versus Horry County. Okay. All right, the first motion we have is, looks like an appeal filed by Skydive Myrtle Beach. Who has that?

MR. EASTMAN: Your Honor, Robert Eastman, Skydive Myrtle Beach.

THE COURT: All right, sir.

MR. EASTMAN: Your Honor, if I may approach the bench, I have a memorandum in support of our appeals, and I also have --

THE COURT: Is this a magistrate's appeal or something?

MR. EASTMAN: Yes, sir.

THE COURT: Okay, all right.

MR. EASTMAN: I have a memorandum in support of, I'd like to have that introduced into the record.

THE COURT: All right.

MR. EASTMAN: I have a copy for counsel. I also have a Rule 62(b) judgment filed today to introduce newly discovered evidence of a lease which was produced by the County in a federal aviation complaint on October 22nd, we'd like to have introduced as well.

THE COURT: All right. Let me hear from you, sir.

MR. EASTMAN: Your Honor, this appeal takes place

from a magistrate's court ruling which we believe initially from the outset was filed in error in the magistrate's court four months approximately after the initial filing of the Plaintiff which we will style as the primary action.

THE COURT: One second. Angie, do you have that magistrate's appeal file? That should be a separate file.

THE CLERK: It should be in there, judge, it's not.

THE COURT: I wouldn't think it would be in here. That would be an entirely different matter.

MR. EASTMAN: Your Honor, I attached a copy of the magistrate's return as part of Exhibit 2 to the memorandum we --

THE COURT: Okay. Well, excellent, then I have it.

MR. EASTMAN: Yes, sir.

THE COURT: All right. Let me hear from you, sir.

MR. EASTMAN: Yes, sir. As I was saying, Your Honor, initially, this case is not quite as it may seem on first appearance. This revolves from a case that was initially filed in the Court of Common Pleas styled 2014-CP-26-1193 in which Skydive Myrtle Beach alleged approximately 15 counts against the County, several of

which involved allegations of a breach of a lease agreement between Skydive Myrtle Beach and the County agent, Ramp 66. Ramp 66 up until August of 2013 or July of 2013, I don't know yet, Your Honor, we haven't gotten full discovery on that at this point, somewhere last summer, Your Honor, Skydive Myrtle Beach -- or I'm sorry, Ramp 66 relinquished the control of its eight-year interest, the remaining interest of the 2020 lease it had between the County to run Grand Strand Airport.

Prior to that in 2012 as part of its allegations in the underlying action 1193, Skydive Myrtle Beach alleged that in May of 2012 we did not have a copy of this contract which is attached here as Exhibit 1 -- or I'm sorry, Your Honor, yes, it's Exhibit 1.

Skydive Myrtle Beach entered into a long-term, eight-year lease with the County's agent, Ramp 66, in May 2012. That lease was until, under clause 18, either party agreed to modify it in writing or 2020.

If we move forward, sometime in 2014 as alleged in its underlying action 1193, Skydive Myrtle Beach had requested copies of the executed lease agreements from Ramp 66, they had never received one. And they didn't receive one until 22 October this year -- or last year, Your Honor, 2014.

However, as part of its complaint in 1193, they alleged we had an eight-year -- Skydive Myrtle Beach had an eight-year lease with the County's agent. When the County took over, they took over subject to the terms of this eight-year lease. Now, the County took over in 2013 last summer, August, and was entered into a license arrangement in the form of a document called a space use permit.

The purpose of the space use permit was to bridge the time within which the County needed to present a replacement lease for this 2012 original eight-year lease between Ramp 66 and Skydive Myrtle Beach. What happened somewhere along the line, as was testified below, is the lease or the renewed, rewritten lease under the County format was somehow slipped through the cracks and was never presented to Skydive Myrtle Beach last year. During the pendency of the waiting, Skydive Myrtle Beach executed the license in the County approved format to clear up their paperwork, was my client's understanding.

He had a temporary space use permit which is styled under paragraph 18 of the permit that did not create or modify any leasehold interest, and it was just a license pending the presentation -- my client's understanding was the presentation of a new long-term

lease to replace the existing one between him and the agent, Ramp 66. For some reason, that didn't take place. He never received a proffer of a long-term lease from the County.

During the course of -- he executed the space use permit in September. It was valid until 31 January with no later than 31, which allowed for the license term between the County as he was waiting. There happened to be some events that took place that were causing tension between the way in which my client had operated his Skydive business and the way in which the County felt he should operate his skydiving business, which resulted in the necessity of my client filing a claim in state court alleging 15 causes of action to include a breach of a lease agreement, interference with contractual relations being the lease and several other things.

But underlying all of this was the fact that this lease agreement between Ramp 66 and Skydive Myrtle Beach was being interfered with. During the course of the waiting period in the space use permit, along came an allegation that Skydive Myrtle Beach was operating in violation or, as it was styled in the County's letter from the County attorney, there were serious concerns of the County giving rise to the need for a

new space use permit with more restrictive terms to include terms that interfered with its skydiving operations to conduct it safely, and also stated in the letter if this is a take it or leave it -- in other words an adhesion license -- and if you don't leave within 72 hours or execute this agreement, your -- we're going to go ahead and take eviction proceedings.

We entered into a --

THE COURT: Well, what was the status of the 2012 eight-year contract?

MR. EASTMAN: As far as Skydive Myrtle Beach is concerned, Your Honor, the Skydive Myrtle Beach contract and lease between Ramp 66 and Skydive Myrtle Beach was still in effect. It had not been modified.

THE COURT: All right. But let me see if I'm following you.

MR. EASTMAN: Yes, sir.

THE COURT: 2012?

MR. EASTMAN: Yes, sir.

THE COURT: Ramp 66 is operating whatever he's leasing for the County.

MR. EASTMAN: Yes, sir.

THE COURT: The County's agent. Ramp 66 enters into an eight-year lease.

MR. EASTMAN: Yes, sir.

THE COURT: With Skydive Myrtle Beach, okay. The County then terminates its arrangement with Ramp 66, and the County takes back over; right?

MR. EASTMAN: I'm not clear what the terms were with the County, but the County did take back over. My understanding is that they --

THE COURT: So the County's back in the saddle?

MR. EASTMAN: Yes, sir.

THE COURT: Okay. In the meantime, the County and Skydive Myrtle Beach essentially says something like, let's get it all cleaned up and let's go ahead and get your contract with us.

MR. EASTMAN: That's correct, sir.

THE COURT: And so they said we're going to do this space use agreement to kind of cover the interim, and we're going to get back to you with a new contract; okay, right?

MR. EASTMAN: Yes, sir, under the essential terms that were already agreed to.

THE COURT: Essentially, okay.

MR. EASTMAN: Yes, sir, under a --

THE COURT: Does that not in itself indicate an agreement between Skydive Myrtle Beach and the County, at least in theory, to void the 2012 contract and enter into a new contract?

MR. EASTMAN: No, sir, not at all.

THE COURT: I'm not saying that there was ever a meeting of the minds as to what the new contract would be, but in spirit did they agree that they were going to -- I mean, why did they need a new contract?

MR. EASTMAN: The County represented to my clients, he testified to at his deposition, that a new contract was needed between the County and Skydive Myrtle Beach for their paperwork purposes. They needed one in their approved format and that the format that existed between Ramp 66 was insufficient.

THE COURT: Okay, all right. Go on, then. All right.

MR. EASTMAN: We would -- simply stated, Your Honor, that was just an agreement to enter into good faith negotiations to rewrite the existing agreement under the format approved by the County, similar terms acceptable to Skydive Myrtle Beach for a similar period of time.

THE COURT: Would it be different in some way?

MR. EASTMAN: Absolutely, Your Honor.

THE COURT: Well, if it's going to be different in some way, I mean, isn't that like a novation?

MR. EASTMAN: No, sir. The terms that were presented to Skydive Myrtle Beach were incredibly

different, Your Honor.

THE COURT: I understand that, I understand. But let's go back to the day that Mr. County walks into Myrtle Beach Skydive and says, Mr. Myrtle Beach Skydive, we've taken over.

MR. EASTMAN: Yes, sir.

THE COURT: We need to reformat this contract. We'll talk about the terms later. Is that kind of what happened?

MR. EASTMAN: That's my understanding, something similar to that, yes, sir.

THE COURT: Okay, all right. Does that not indicate that they said, when you said, we'll negotiate the terms later, we're changing the contract, or the contract is subject to change, or the contract may be different from what you have now?

Or should they just have said, Mr. Skydive, here, I'm Mr. County, and I brought by this new contract and it just reformats the same terms and all that you had. But let's sign it together and, you know, you got six years left, let's just say it's for the same term and same conditions and responsibilities.

I mean, I'm a little confused. Was it a situation -- and maybe it's just you and I are using different terms.

MR. EASTMAN: Yes, sir.

THE COURT: Is it where we're saying, all we need to do is Ramp 66 out, let's make sure that we have an understanding, let's just change the names on the contract, same terms, same conditions, we both sign it, and you have a contract directly with the County now?

Or did they come in and say, Ramp 66 is out and we're willing to rent to you, but we need to negotiate some terms and we'll sign them later. Which happened or which was supposed to happen?

MR. EASTMAN: My understanding, having spoken to my client and having participated in his deposition, or witnessing his deposition rather, is that the former was supposed to take place. Similar terms and a similar period of time were supposed to be --

THE COURT: All right, let's change that to same terms and same period.

MR. EASTMAN: Absolutely, sir. Then we'll change it to the same terms.

THE COURT: I want to make sure we're using the right words, because I can see why they -- there's two reasons for this. Either the County wasn't pleased with the contract, or perhaps Skydive wasn't pleased with the contract and said we're going to enter into a total new contract. That's a novation.

MR. EASTMAN: Yes, sir.

THE COURT: Or they just came back and said, we got to properly format the contract we have.

MR. EASTMAN: That's what I believe took place. They said they needed to put it into a format that was acceptable to them.

THE COURT: The contract that they had?

MR. EASTMAN: Yes, sir, a County approved format. We've since learned that through some of the discovery answers that --

THE COURT: Okay.

MR. EASTMAN: -- they needed a County approved format.

THE COURT: Okay, all right. And go on now; now what happened?

MR. EASTMAN: Well, sir, because Skydive Myrtle Beach did not have a copy of this contract, the underlying, the original contract, I'll style it as the Ramp 66/Skydive Myrtle Beach contract, what we did -- what Skydive Myrtle Beach did have was a copy of the space use permit which he did execute in good faith to wait on the new lease to come forthwith, the same terms as the original lease in the County approved format.

THE COURT: Why did you have to have that?

MR. EASTMAN: Your Honor, he was told -- my client

was told by the County that if he didn't have this paperwork signed, he was going to have to pack his business up and leave.

THE COURT: He had a contract.

MR. EASTMAN: I understand, Your Honor. My client's not a lawyer.

THE COURT: Mr. Battle, your clients bullying people again?

MR. BATTLE: No, Your Honor.

THE COURT: Okay. That's all I need to know. Go on, sir.

MR. EASTMAN: Well, sir, Skydive Myrtle Beach did not have a copy of this contract at the time it signed its lease. Didn't have a copy of this contract until October 22nd, Your Honor. And to be quite honest with the Court, I didn't -- I didn't get to it, it's involved in another proceeding before the FAA, until this month, I just relocated it, I just for the first time.

But if it was presented to us before an FAA proceedings on October 22nd, but needless to say, in June 5th, the County took it upon themselves to file an action for ejectment based on the space use permit, which was actually a license, it was no lease. It was a license that expired 31 January or no longer than an

additional term up until six months, which I believe would have been April.

THE COURT: So they sued to evict --

MR. EASTMAN: That's correct, Your Honor.

THE COURT: -- on the space use agreement?

MR. EASTMAN: That's correct, Your Honor.

THE COURT: Which is a bridge agreement?

MR. EASTMAN: That's correct, Your Honor. My client testified at the hearing below. We requested -- first off, we requested a motion -- a motion to file to remove was filed in lieu of an answer, that was denied. I filed a motion to reconsider, the motion to reconsider was granted. I filed a motion to reconsider within the 15 days under 12(a) to file a responsive pleading, it was granted.

We held a 23 July motion for reconsideration hearing at 11 o'clock, 11:30 in the morning. That was denied, Your Honor. During -- in both the written motion filed on the 18th of July and before the bench, I requested leave of the Court to file an answer in the event that it was dismissed that we have leave of the Court to file an answer, to conduct discovery and also to have a jury trial. Those requests were also denied.

And at about 1300, we had a bench hearing. Testimony was taken where my client testified orally as

to the existence of this agreement. None was presented. The Court held that the space use permit indicated that the Skydive Myrtle Beach did not have an interest in the leasehold property and a Writ of Ejectment was issued.

THE COURT: All right. And your grounds are?

MR. EASTMAN: My grounds for appeal are that the improper -- the full evidence, number one, the full evidence wasn't before the trial. Number two, that had the Court followed its own rules --

THE COURT: Are you talking about, are you making a motion under Rule 62 for after discovered evidence?

MR. EASTMAN: Yes, sir. The Rule 62(b) motion has been filed -- (b)2 motion has been filed with the Court today together with -- that was part of the -- with the memo. So that's a motion to set aside the judgment.

We also had asked this Court in the underlying action which is part of our joint conference motion here later today, Your Honor, the real truth of the matter is under Rule 42, had the County wanted to proceed, the question -- the facts, circumstances and everything about this entire underlying case which a plaintiff has the right to file before the circuit court, should have never been tried in the -- it was improperly tried in the magistrate's court and --

THE COURT: Let me ask you this, why was it tried in magistrate's court? I've been hearing stuff on this for a year and a half.

MR. EASTMAN: Yes, sir. That's correct, sir. And by the time I came to this Court, I had filed a motion for consolidation under Rule 42, Your Honor. And that -- I filed that motion on the 18th of June with this Court. I did not get calendared until the 30th of September, at which point the action for ejectment had already been had, and the case had been held against us.

This Court said that the issue for consideration was moot, as there had already been a trial and a hearing below, and we would have to wait to have the appeal heard. We've all along, Skydive Myrtle Beach states today and stated before that all of this should have been joined in one action. In fact, Your Honor, if you look at the docket record, there's almost 25 entries generated due to the fact that this has been filed before the magistrate's court, when this all could have been settled here in this court in one action. It's caused a considerable amount of resources and expenditure and legal fees which could have just been settled here.

THE COURT: You've a made a 62(b) motion and

you've made -- what are your other grounds?

MR. EASTMAN: 42(b), Your Honor. And that's part of our joint status conference that all of these actions --

THE COURT: No. I mean grounds for your appeal.

MR. EASTMAN: Oh, I'm sorry, Your Honor. 12(b)(8), we would also set forth that our constitutional rights to a jury trial where usurped by the magistrate's court? We did not -- we did not have under Rule 14 of the magistrate's court's rules, if a grounds even at trial -- first off, we under 12(a) should have had an opportunity after the motion for reconsideration denying -- denying our motion to remove to the circuit court, we should have had under 12(a) 15 days within which to file an answer and a counterclaim. That was denied.

Another under Rule 14 of the magistrate's rules, we should have had an opportunity for a continuance to at least prepare for trial, Your Honor. We haven't even had -- we have not even had discovery in the underlying primary action. We had no opportunity for discovery. The County had the benefit of deposing Skydive Myrtle Beach on the 24th of June. They had full discovery, they asked for discovery with their answer. Full discovery was presented to them in the

form of document evidence in April, so they had their whole case before them.

They knew we didn't have this. And had this been properly sent to the circuit court, I don't even think that action would have been filed because here we are with the lease, newly discovered, Your Honor.

THE COURT: Okay. All right. Let me hear you on the appeal, Mr. Battle.

MR. BATTLE: Yes, Your Honor.

THE COURT: Mr. Battle, why was it heard in the magistrate's court when there was an action pending here?

MR. BATTLE: Because Mr. Eastman had filed 17 causes of action for damages, none of them dealt with the lease. The magistrate has jurisdiction over landlord/tenant actions, we wanted to put --

THE COURT: So you're saying the lease was not or the eviction was not before the circuit court?

MR. BATTLE: Not at all, Your Honor, wasn't part of it.

THE COURT: Okay. Go ahead.

MR. BATTLE: The two simple reasons why they should be evicted, and it's a very simple case, the first one is their lease term has expired, and that's right what the magistrate ended.

THE COURT: Well, let me ask you this, did they enter into an eight-year lease in 2012 through Ramp 66?

MR. BATTLE: They entered into a lease that said, it will be canceled when Horry County buys the property or takes over the property. This is not a lease agreement he's got right here, this is a use agreement. There's no rent payment --

THE COURT: Which one are you talking about?

MR. BATTLE: The one he's just handed up under Rule 60. This is not a lease agreement, this is an ability to --

THE COURT: Are you -- he's used the term use agreement, and he's used the term lease. Lease, I thought he was talking about some document entered into between Skydive Myrtle Beach and Ramp 66 sometime in 2012.

MR. BATTLE: Yes, sir.

THE COURT: It looks like May 10th of 2012.

MR. BATTLE: Yeah. But this is not the lease agreement --

THE COURT: It's the same document?

MR. BATTLE: It's the same document he just handed up. This is an agreement to provide tandem parachute jumps from Grand Strand Airport, nothing to do with hangar seven. And this whole issue is to evict Skydive

Myrtle Beach from hangar seven.

THE COURT: Okay.

MR. BATTLE: It has nothing to do with his use of the airport.

THE COURT: Does it describe property in it or --

MR. BATTLE: No, sir. Doesn't have a rent term in it, doesn't have any -- doesn't have any -- has a term for this agreement, but it doesn't have anything to do with hangar seven or even mentions hangar seven, as best I could read it.

THE COURT: Let me hear you on that issue.

MR. EASTMAN: Simply stated, Your Honor, paragraph five is very clear. It's, there will be packing -- Skydive Myrtle Beach shall be provided with a minimum of 2500 square feet in the bird hangar. The document with which Mr. Battle is talking about is the document that was provided as Exhibit 1 at the Plaintiff's deposition. And that is an unexecuted agreement dated May 2013. He doesn't have a copy of the executed agreement.

THE COURT: All right, let me say this.

MR. EASTMAN: Bird hangar is hangar seven.

THE COURT: This is what I'm looking for right here, I think paragraph 18. This agreement remains in effect through Grand Strand Aviation's lease. That's

Ramp 66; right, Grand Strand Aviation?

MR. BATTLE: I'm not sure about that.

MR. EASTMAN: Yes, sir.

THE COURT: Okay, all right. This agreement remains in effect through Grand Strand Aviation's lease with Horry County Department of Airports through July of 2020, unless both parties agree to change -- to changes in writing. Should Grand Strand Aviation lease be extended, renewed or otherwise modified beyond July of 2020, Skydive Myrtle Beach has the right to extend this agreement on the terms to that lease at Skydive Myrtle Beach's option.

Now, is that what you were talking about, Mr. Battle, when you said that it ends if the -- when the agreement with the County ends; is that what it means?

MR. BATTLE: No, sir. It ends when the County takes over when the --

THE COURT: I don't read it that way. I mean, it says, this agreement remains in effect through Grand Strand Aviation's lease with Horry County Department of Airports through July of 2020.

MR. BATTLE: Yeah. But the lease agreement had specific, I believe, language that says that when we take over the operations, they have to go into new --

different agreements with the County. All the other people have done the same. And this is --

THE COURT: I mean, the agreement with who?

MR. BATTLE: Horry County.

THE COURT: I mean, Grand Strand Aviation's or?

MR. BATTLE: Grand Strand Aviation's lease with Skydive Myrtle Beach --

THE COURT: Okay.

MR. BATTLE: -- has a provision --

THE COURT: You just called it a lease.

MR. BATTLE: Not -- there's two documents, there's one document not before you. One is a separate written document like that that is a lease agreement.

THE COURT: Between?

MR. BATTLE: Grand Strand Aviation and Skydive Myrtle Beach.

THE COURT: Okay.

MR. BATTLE: That's not it. That just refers to it. Do you see any rent in there?

THE COURT: Well, where is the lease? I mean, wouldn't it be better if I looked at the lease, the lease itself?

MR. BATTLE: Yes, sir. I have --

THE COURT: Rather than a letter that -- this seems to be a letter that people would exchange

confirming the intent to enter the lease and setting forth the basics of the agreement and essentially indicating that the lease would follow, and we'll formalize it. That's the kind of thing that it looks like this is. You know, this is what we would -- a memorandum of agreement.

Now, did a lease follow?

MR. BATTLE: It's my understanding --

MR. EASTMAN: I'm sorry.

THE COURT: Do we have a lease?

MR. EASTMAN: No, sir, we don't. We've asked for one, we've been asking for one since 20 --

THE COURT: I misspoke. Did your clients sign a lease?

MR. EASTMAN: My understanding is they --

THE COURT: Is there a document out --

MR. EASTMAN: I don't have any written evidence, Your Honor. I do have the testimony from my client to me that --

THE COURT: Well, let me ask Mr. Battle. Apparently you have seen one?

MR. BATTLE: Yes, sir, I have seen one. And I didn't bring it with me because this completely caught me by surprise that he would claim that this was the lease agreement. I have testimony from Mr. Holly in

his deposition, says --

THE COURT: But, you know, I'm asked to -- this is an appeal from a magistrate's ruling for ejectment or order of ejectment which is directly affected by the terms of the lease. Don't I need to look at the lease?

MR. EASTMAN: This is the lease, Your Honor.

THE COURT: Okay, good.

MR. BATTLE: This is the space use permit that is a lease agreement.

THE COURT: All right. Is that what we're talking about with Ramp 66?

MR. EASTMAN: No, sir.

MR. BATTLE: No, sir.

MR. EASTMAN: That's the license. If you look at the terms under paragraph 18 of that document right there, it says by its terms it's not a lease.

THE COURT: This is what I'm getting at, gentlemen, this is what I'm getting at. Maybe I'm missing the point here, but from everything I have heard, everything I have heard, it would seem or I believe that Myrtle Beach Skydiving or Skydive Myrtle Beach and the aviation, what is it?

MR. EASTMAN: Grand Strand Aviation.

THE COURT: Grand Strand Aviation, signed some document that they both have been referring to as a

lease. And I don't know if that document survived the takeover by the County, survived the disassociation of Grand Strand Aviation and the County. I don't know if it was specific to any particular piece of property. I don't know if it was specific as to any time.

If that was in place, if that's what controlled, I don't think that this space use permit really means anything, unless it's some sort of novation or agreement to modify the terms of that lease. I need that lease.

MR. EASTMAN: Yes, Your Honor. And that's precisely the error of law below which Skydive Myrtle Beach is complaining about, which is why this case should have been before this Court that can have a firm handle of all of the facts because all of these facts are interrelated.

And contrary to Mr. Battle's reading of our complaint, we did allege a retaliatory eviction attempt by the County in its correspondence. So the fundamental issues in the underlying action in 1193 involve the lease term and agreement which are questions of fact for this Court to handle.

THE COURT: What are you speaking from, the use agreement?

MR. BATTLE: No, sir.

THE COURT: The use permit or the --

MR. BATTLE: Hangar seven. This is all this is about.

THE COURT: -- initial? Did you allege that there was no lease or?

MR. BATTLE: I alleged that this what you have in front of you is the lease.

THE COURT: Okay, wait a minute, wait a minute, let me see. What I have in front of me, which is the space use permit?

MR. BATTLE: Yes, sir.

THE COURT: Or the letter?

MR. BATTLE: Space use permit.

THE COURT: Agreement?

MR. BATTLE: Space use permit is what gave him the authority to occupy that property. His lease was canceled with Grand Strand Aviation when Horry County became the operator of the business.

THE COURT: All right, all right, all right, that's the issue right there. By what document was it -- was that initial -- you seem to agree that they did have a lease with Grand Strand Aviation or whatever that entity was, that there was some sort of lease.

MR. BATTLE: Yes, sir.

THE COURT: Okay. But your position is it was

terminated by its own terms --

MR. BATTLE: Yes, sir.

THE COURT: -- whenever the County disassociated with Grand Strand Aviation?

MR. BATTLE: That's correct.

THE COURT: All right, okay. Now, what I need to know is does anybody have a copy of that lease agreement?

MR. BATTLE: I will provide you with a copy. I will look for it and find it, I'm sure I've got it in --

THE COURT: I've got somebody standing up in the back. He looks like he's going to plead.

MR. HALDI: I hate to interrupt, I'm Randy Haldi, I'm from the Horry County Attorney's office. With regards to the lease, when Horry County took over the operations of Ramp 66, no lease was ever provided to the County. We didn't find any lease between -- signed copy of any lease between them. There was some letters back and forth, similar to what you have but no terms.

THE COURT: But Mr. Battle says he's seen it.

MR. HALDI: I think he's seen an unsigned letter that's similar to what they've seen before. What the County did at that point, Your Honor, was entered into that space use agreement that has a supremacy clause

that says, this is the only agreement between these parties, between Horry County and this Skydive Myrtle Beach.

That term was limited and since -- has since expired. That must be --

THE COURT: Well, see, this is what I'm trying to figure out here.

MR. HALDI: I understand.

THE COURT: That -- this in essence is a novation, then; right?

MR. HALDI: Yes, sir.

THE COURT: Okay. You want a novation. It's like we had an agreement, but we're changing it all.

MR. HALDI: Yes, sir.

THE COURT: This is going to be the new agreement that we have.

MR. HALDI: Yes, sir.

THE COURT: They're taking the position it's a novation. You're taking the position it's a bridge the gap until we can re-formalize the original agreement. Was that the issue before the magistrate and upon which he ruled?

MR. EASTMAN: Your Honor, if I may, the issue before the magistrate was Skydive Myrtle Beach could prove no property interest in hangar seven.

THE COURT: Was that true?

MR. EASTMAN: No, Your Honor. We did not have this. And for the County to --

THE COURT: Wait a minute, wait a minute. Please.

MR. EASTMAN: Yes, sir.

THE COURT: I'm confused enough.

MR. EASTMAN: Okay.

THE COURT: Don't say -- don't stick up a document and say this. Are you talking about this letter?

MR. EASTMAN: Your Honor, I will refer to the May 12th, 2012 --

THE COURT: Okay.

MR. EASTMAN: -- as a lease agreement. This is called an -- we will style this as an original lease between Ramp 66 and Skydive Myrtle Beach. It was for a term of -- for the bird hangar under paragraph five for a term of a fixed monthly amount that was determined --

THE COURT: All right. Let me ask you this. Where does it describe -- okay, that's like number five, paragraph five?

MR. EASTMAN: Yes, sir. That would be the premises --

THE COURT: That would be 2500 square feet in the bird hangar.

MR. EASTMAN: That was a slang for the bird

hang -- hangar seven at the time, Your Honor.

THE COURT: Okay.

MR. EASTMAN: It was unoccupied, Skydive Myrtle Beach came in, renovated it and cleaned it up. But it was referred to for the last 30 years or so as the bird hangar.

THE COURT: And Mr. Battle?

MR. BATTLE: Yes, sir.

THE COURT: It seems to identify what they're leasing. It seems to have an arrangement for compensation by and between Skydive Myrtle Beach for at least things that they're supposed to do. And it is signed by E.R. Lee, Andrew E.R. Lee, Skydive, and it's signed by Robert P. McGroth or McGarthy of Grand Strand Aviation. And it says it's agreed May 10th, 2012 by Grand Strand Aviation doing business at Ramp 66 and Skydive Myrtle Beach.

Now, can you tell me, Mr. Battle, why that would not constitute a lease?

MR. BATTLE: All right, sir. Could I see the unsigned one?

MR. EASTMAN: Certainly.

THE COURT: I have a copy of the signed one.

MR. BATTLE: I would like the unsigned one.

THE COURT: I mean, that seems to constitute --

maybe that is the lease, and there's not another document.

MR. BATTLE: Your Honor, this is what I was referring to as I believe was the lease. That is a lease agreement. It's not signed, according to Mr. Holly.

THE COURT: That's not what I'm even looking at. What is this?

MR. BATTLE: If you look at the paragraph that I was referring to, I believe it is that.

THE COURT: Help me, Mr. Battle.

MR. BATTLE: I apologize.

THE COURT: Maybe you can find it.

MR. BATTLE: If I could read it. The term of this agreement extends through the end of Ramp 66 lease with Horry County July 31, 2020 or such time as Horry County terminates its lease with Grand Strand Aviation as a result of the sale to the County or default. After one year, Ramp 66 reserves the right to increase the hangar rent as long as increase is in conjunction with and the amount is percentage wise the same as other tenants' hangers' rents. That's what I thought was the lease.

THE COURT: But have you seen this?

MR. BATTLE: No, sir, I have not seen that. But this is not -- there's no -- that's what was control --

this is an agreement to --

THE COURT: This is not signed. This is nothing.

MR. EASTMAN: Yes, sir.

THE COURT: As far as I'm concerned, no one has signed this.

MR. BATTLE: But here's the point. We then have -- that's what his understanding was of what the correspondence was. We then have the space use permit. This here is a tandem parachute jump thing, and this is -- and I don't see anywhere where it says Skydive will pay so much per rent, they will provide so much for this that -- you know, it just refers generally to a lease agreement.

THE COURT: Well, it talks in terms of who paid what percentage of this and who would do what percentage of that. It says specifically that they have 2500 square feet in the bird hangar. It sets out the obligations of each party. And that signed one says that it will last -- I mean, it's different, it's different from this one that you have, this unsigned one. It's just different. And heaven knows where that came from.

MR. BATTLE: Came from Ramp 66. Your Honor, I ask you, how much rent are they supposed to pay?

THE COURT: Well, it's not cash. It says here...

MR. EASTMAN: Paragraph six, Your Honor.

THE COURT: Paragraph six. It says, Ramp 66 shall pay Skydive 86 percent of the income shown on the invoice, internet sales and merchandise. Was the money being paid to Ramp 66?

MR. BATTLE: Yes, sir.

MR. EASTMAN: Your Honor, if I may --

THE COURT: So Ramp 66 was retaining 14 percent of the gross?

MR. BATTLE: Yes, sir. That was for administering their business.

MR. EASTMAN: Less internet sales, Your Honor. The bulk of the sales are done over the internet.

THE COURT: I mean, Mr. Battle, I don't know that they had to pay any specific amount if they have this mutually beneficial agreement here. Skydive has to maintain liability insurance.

MR. BATTLE: Your Honor, in order to have an enforceable agreement, you've got to have terms that would identify what the agreement is.

THE COURT: Well, I think this is fairly clear.

MR. BATTLE: If you would first look at the space use permit and what it provides, and then also I would like to read to you some of the testimony from Mr. Holly from his deposition. It's very short.

THE COURT: Okay. Now, who is Mr. Holly?

MR. BATTLE: He is the person who is the president and owner of Skydive Myrtle Beach.

THE COURT: Okay, all right.

MR. EASTMAN: Would you please identify where you are reading at.

MR. BATTLE: I'm sorry, page 37, beginning on line 20.

MR. EASTMAN: Thank you.

MR. BATTLE: Okay. So is there any written agreement that you are aware of that gives you the right to occupy hangar seven? His answer, no, sir. Maybe other than some canceled checks up until the point right before and some correspondence prior to the point where we received 72 hours, take it or leave it or get out, and so that's what it is.

Your Honor, he is now paying under bond agreement that the magistrate found $1200 a month for his rent. That's not sufficient. That's not what the other people are doing. Well, he has entered into a space use permit. The reason he entered into a space use permit is because in order to have a lease approved, County Council has passed by ordinance a requirement that the lease be approved by County Councilmen.

Now, what that space use permit did was that gave

him authority to occupy, and he agreed, to occupy that property until January of 2014. That property -- that lease, that agreement expired.

Now, if you're going to let that letter be an agreement, certainly that space use permit would supersede it. The point that we're going to --

THE COURT: Let me ask you this, what consideration was given by the County for this novation?

MR. BATTLE: What consideration was given, they paid rent.

THE COURT: Yeah, what did the County do for them to get them to agree to this obvious change? I mean, all of a sudden you went from having an eight-year lease to, as I see it --

MR. EASTMAN: 90 days.

THE COURT: -- to six months and having to pay for -- and, you know, you look at this as space use. It says he gets to use space in hangar seven consisting of 6800 square feet. Maybe that's it, he got more space.

MR. BATTLE: He did get more space. Instead of the 2500, he got 6800.

THE COURT: What position did the County take at the magistrate's hearing on this lease; did the County take a position that the lease had expired?

MR. BATTLE: Yes, sir.

THE COURT: The lease was defaulted upon, what did the County do?

MR. BATTLE: The County's position was we had this agreement for him to use that property, it expired, we tried to enter into a new agreement with him, he refused. He's completely refused to sign anything. He refuse -- he considers the minimum standards for safety on that airport to be invalid and not applying to him. And after this hearing we've got a rule to show cause why he shouldn't be in contempt for not believing that yours was sufficient.

The magistrate was aware of all claims about Ramp 66 in the agreement. He was aware of all of the -- and he in his order addressed the issues, and basically he doesn't have an agreement. There's no signed agreement that would give him the right to lease that or occupy that hangar seven. If he occupies, he only has a right to occupy 2500 feet. He's occupying 6800 square feet.

THE COURT: Counsel, tell me, why?

MR. EASTMAN: Sir?

THE COURT: Why would you -- would your client not only sign this agreement but apparently make the payments under it, looks like here he paid the security deposit, permit fee and for two months, why would he do

that?

MR. EASTMAN: Your Honor, my client, several things had changed on the ground. This has been a bit of a learning curve for my client with regard to skydiving. He had lost --

THE COURT: Well, if he's smart enough to jump out of a perfectly good airplane and not get killed, you're an intelligent person.

MR. EASTMAN: Sir, and during the course of when he first took over the hangar, the hangar had been unoccupied for since, I think, World War II or Korea. He had initiated a grand cleanup, he cleaned the deck. And what took over the course of since the original agreement was signed in May of 2012 until the County took over was a course of dealing between himself and Mr. McGarty whereby in exchange for his cleaning up the hangar, he got more space and more exclusive. And the it ended up at the end where my client and Bob McGarty did orally agree to pay a fixed term.

Now, my understanding when Mr. Holly and Skydive Myrtle Beach entered into the preliminary talks with the County was that the $1200 fixed rate pretty much was close to what was actually a taking place. Although it wasn't written and modified, the course of dealing did modify the contract between Ramp 66 and my

client, that was memorialized in the space use permit also with the understanding that because of the nature of certain electrical problems and structural issues with hangar seven, that that price may or may not go up when the lease was presented because certain repairs were needed.

So this was nothing more than a good faith attempt of my client to show his good faith to operate within Horry County under the approved Horry County format. All he wanted to do was conduct a legal skydiving operation and move on with business.

THE COURT: And I understand that. And there was a way to do that. And, you know, if I had a contract or a lease agreement with Mr. Postal, and Mr. Postal sold the property and new owners came into play, I could see some benefit in going down to the clerk of court's office with the new owner and saying, look, we all acknowledge that this agreement is binding on both of us. And is there some way we could have it so indexed so that it would -- I would say, I want to make sure my lease is clear to anybody searching title of the new owner.

I could see something like that. You know, I want to sign this lease again and same terms, and let's make sure that there's no dispute between us, that being me

and the new owner.

But whenever you undertake to change the terms, you abandon essentially the new lease. You change it, essentially every aspect of it. You have created a new contract, you've abandoned the old contract. There was a superiority?

MR. BATTLE: Yes, sir, paragraph 14.

THE COURT: Paragraph 14. Clearly says, This permit constitutes the complete agreement of the parties with respect to the subject matter of, hereof, and supersedes all previous agreements, representations and understandings concerning the same, whether written or oral. The provisions of the permit may be modified, amended or waived only by written instrument executed by the County and company.

MR. BATTLE: That's correct.

THE COURT: I think that it is clear that the magistrate deemed the Grand Strand Airport space use permit to be the controlling document under which Skydive Myrtle Beach occupied the premises.

MR. BATTLE: Correct.

THE COURT: And therefore, any other evidence -- and I so find as well -- evidence of the agreement entered into May 10th or May 17th have no effect. And the fact that there may have been an after

determined -- after discovered copy of the May 10th what is purported to be a lease, would have had no effect on the magistrate's. And I would deny the appeal.

All right. Let's go on to the --

MR. BATTLE: Your Honor, could I add one other ground to that at this time?

THE COURT: Yes.

MR. BATTLE: Under his bond, he was required to pay $1200 at the beginning of each month. He has not made May's payment. It is my understanding --

THE COURT: Well, didn't you take his security deposit?

MR. BATTLE: No, sir, we -- the magistrate set the bond, and I'm not trying to collect that.

THE COURT: Well, when he began, when he began, I'm looking at a space use permit thing here. And I have here a check dated May the 9th, 2013, which I believe was --

MR. BATTLE: If I may interrupt, Your Honor.

THE COURT: Yeah.

MR. BATTLE: I'm not seeking to get the money from him. I'm just adding an additional ground that the bond should be dissolved because, according to the terms of the magistrate's bond, he is in violation of

that, and that requires dismissal of the appeal also.

THE COURT: Okay. But I do see here a check that they for a $2400 security deposit.

MR. BATTLE: Correct.

THE COURT: And two permits that he's paid in advance.

MR. BATTLE: Thank you.

THE COURT: All right.

MR. EASTMAN: Your Honor, if I may?

THE COURT: Yes, sir.

MR. EASTMAN: I would just request that the Court have a -- I don't believe -- I understand the ruling on the substantive matter of the lease, Your Honor. However, I don't believe the Court has had an opportunity to rule on our procedural arguments, thereby --

THE COURT: Okay. Let me hear you on those.

MR. EASTMAN: Yes, Your Honor.

THE COURT: Or refresh me.

MR. EASTMAN: Your Honor, I would like to remind the Court that this action should have all been heard together. As you can see, it's rather complex. The fact that we haven't had discovery in this Court and we just discovered this evidence shows that all of this should have been ruled consolidated or removed to the

circuit court. It was improperly before the magistrate's court also.

THE COURT: And I'll agree with you. However, in matters concerning landlord and tenant, the magistrate's court does -- at one time the magistrate's court had exclusive jurisdiction.

MR. EASTMAN: Yes, sir.

THE COURT: And it was just recently or within the last few years that the circuit court and the magistrate's court have concurrent jurisdiction. But it is concurrent.

MR. EASTMAN: I understand, sir. And under 12(b)(8) the Court below improperly ruled that this Court should be dismissed. The parties were the same, there was Skydive Myrtle Beach versus the County.

THE COURT: And what should be dismissed? I'm sorry.

MR. EASTMAN: The appeal should have been dismissed pursuant to Rule 12(b)(8) at the magistrate's court hearing, as another action before the circuit court was pending, 1193, which did allege a lease agreement between my client in May and --

THE COURT: I'm sorry, I lost you. I thought you said that --

MR. EASTMAN: I'm sorry, Your Honor. The

ejectment action of the --

THE COURT: Not the appeal?

MR. EASTMAN: -- in the magistrate's court should have been dismissed pursuant to Rule 12(b)(8) of the Rules of Civil Procedure. The parties were the same. The parties of interest were Skydive Myrtle Beach and the County. The subject matter was the same being the lease, which is clear. And the action was filed by my client in this Court requesting a jury trial. He has not had the opportunity to discovery.

And under Rule 12(a) when the dispositive motion was made to deny my client the ability to remove it to this Court, he was not afforded the opportunity to file an answer, to file a counterclaim, to have discovery. However, the County had the benefit of full discovery, client had --

THE COURT: Well, explain that in a little more detail to me, please.

MR. EASTMAN: Which part?

THE COURT: Why he was not permitted to file an answer. Was he under default?

MR. EASTMAN: Your Honor, the County objected. At the time of the motion, the County again in the motion, it was raised we would request permission in the event that our motion is denied --

THE COURT: That was a motion to?

MR. EASTMAN: That was a motion to remove, Your Honor, to the circuit court for the pending action under 1193. Under the motion, should the -- it was alternatively pled that should Skydive Myrtle Beach's motion be denied by this Court, that the Skydive Myrtle Beach be granted leave to file an answer, a counterclaim, have the opportunity to conduct discovery, a right to a jury trial and have a fair trial, Your Honor.

However, I think this Court would agree that a hearing on the motion at 11 o'clock and a subsequent bench trial at which my client had no testimony, he didn't have the benefit of this lease signed by the parties for the Court to consider because he hasn't had the opportunity to have discovery, given the fact that the County had full discovery, full disclosure, it was improper. It was denial of his due process rights, Your Honor.

And as this Court's well aware, it's the Plaintiff that has the opportunity to choose his forum, not the Defendant. And the filing of the ejectment action should have properly been done with a Rule 42 motion to this Court, knowing full well that my client claimed there was an underlying agreement for the lease of

hangar seven, there was an interference with that right of lease, that the parties were the same and that this would be complicated matters better tried for judicial economy and the retrial of the issues.

Now, we have my client effectively denied his right to a jury, his right to be prepared and the right to a fair trial, Your Honor. In addition, he's had to appear -- he's had to appear several times pro se due to the fact that my schedule was in conflict on two days notice. I was in Florida, I couldn't even appear at the hearing.

So I would ask that on due process reasons alone, Your Honor, that that was inappropriate. He did not -- we did not have an opportunity for a full and fair trial on the merits and by virtue of the discovery of this after the fact. And it's absurd for the County to object about this document, not knowing about it, when it's the County that produced this document and gave it to us in the FAA proceeding.

This county, this County Department of Airports produced this in the FAA. And you'll see in the lower right-hand side, it's styled HCDA, five zeros and a one. That's their bates numbering systems where their Boston law firm properly gave us a copy of the lease, which we have in fact requested multiple times from the

County in both the 1193 action, we didn't have an cpportunity for discovery below.

And I would just argue, Your Honor, that just on a procedural grounds, and a Rule 12.

THE COURT: And what difference would that lease have made?

MR. EASTMAN: I believe that would have made all the difference in the world, Your Honor, because this lease is still in effect. There is an opportunity to brief if this -- there's a reasonable difference of minds, whether or not this is a novation. We would state that that license is not a lease, that license was limited to the terms of a 90-day license. It was operated in good faith.

The County paid Ramp 66 $800,000 for its remaining eight-year interest and gave Skydive Myrtle Beach a Writ of Ejectment. This is where we are, Your Honor. My client just asked for a reasonable opportunity to be heard.

THE COURT: Mr. Battle?

MR. BATTLE: He has a reasonable opportunity to be heard in the civil action which is still pending and which is still very much alive. The 12(b)(8) motion was properly denied. I've addressed that in the brief, the judge addressed it in his thing, but let me just

briefly tell you why.

THE COURT: All right.

MR. BATTLE: Skydive named five additional people in the underlying action and the civil action that was filed against us for the causes of action, the 17 causes of action.

THE COURT: The Common Pleas action?

MR. BATTLE: The Common Pleas action has seven -- I mean, had five additional parties that were not named in here. The claims were not the same. There was not a claim for an ejection or eviction in that particular action, and this was a petition for Horry County. All of the claims that he made primarily dealt with damages and how we've injured him, slander, liable and all that sort of stuff.

And what his intention is is to try to tie this appeal up and to that particular action, so it will be three or four years down the road before we have any action on our ejectment while he continues to go through here. We feel like we're entitled to the ejectment action as it stands. The 12(b)(8) was denied. The counterclaims and those sorts of things, he was out of time on those.

He made his answer, and then five days before the trial that had been set and he'd been provided proper

notice of, he tries to say I'd like -- he requested a right to trial to file an answer and a counterclaim.

So for those reasons, the judge says no, this is an ejectment action. Here you are, this is the governing document, and you don't have an agreement.

THE COURT: How about his right to a jury trial?

MR. BATTLE: He waived it under Rule 38. He never -- when he made his initial pleading, he says, all I want to do is a motion to dismiss and then did not ask for a jury trial. He never asked for a jury trial until five days before or less than five days before the actual trial was scheduled in front of the judge.

THE COURT: What was the basis of his motion to dismiss; was it a 12(b)?

MR. BATTLE: It was a 12(8). Actually, it was a motion to remove, he wanted to remove it. He didn't style it properly. But that's what his motion was, a motion to remove it to circuit court, to remove the eviction action to circuit court.

THE COURT: Well, what's the magistrate rule on requesting a jury trial?

MR. BATTLE: I think you -- let me go back up here. I believe you have to do it in your pleading or within the time for answering the pleadings.

MR. EASTMAN: Eight days, Your Honor -- or five days, five working days, Your Honor, under the magistrate court rules, but also under Rule 12.

THE COURT: All right, read the rule to me.

MR. EASTMAN: I have, sir.

THE COURT: That -- five days doesn't tell me five days from when or what.

MR. EASTMAN: The magistrate rule, one moment, sir.

THE COURT: I recall there is a rule, but it's been so long.

MR. EASTMAN: I'm sorry, Your Honor, I was in...

THE COURT: No. Take your time.

MR. EASTMAN: It's Rule 13, Your Honor, and it's Rule 13(c).

THE COURT: Okay. What does it say?

MR. EASTMAN: And Rule 13(c) states that if either party wants a jury trial, it must be requested in writing at least five working days prior to the original date set. However, under Rule 2, which posits the Rules of Civil Procedure, our request to have this thing removed under 12(b)(8), under Rule 12(a), when a Rule 12(b)(8) for actions that are pending, you have 15 days within which to file responsive pleadings, so we should have had time. And then if you look at Rule 14,

I believe it is --

THE COURT: You're not telling me about times. Your motion to remove was denied, okay.

MR. EASTMAN: Yes, sir. And then under --

THE COURT: It's your position under Rule 2 that you have what time?

MR. EASTMAN: No, sir. Under Rule 2, when there's not a rule that governs the magistrate's court, which there isn't for the Rule 12(b), the Rule 12(b) motion governs under Rules of Civil Procedure. Rule 12(a) requires -- allows the opportunity for 15 days to file an answer and counterclaim or pleadings to the complaint when that motion is denied. Also under Rule 14 --

THE COURT: Okay. And what happened in violation of that?

MR. EASTMAN: Your Honor, in 30 minutes we had a bench trial is what happened.

THE COURT: Is that right, Mr. Battle?

MR. BATTLE: Your Honor, he filed -- there is no such thing -- those motions and stuff he filed at a pleading in -- within the right time to the motion for ejection, which basically said, you don't have jurisdiction, it should be in circuit court. We objected to that, the judge heard that motion.

And then he also filed within the five days before the actual trial was scheduled, he filed a request to file an answer and a counterclaim. And both of those were denied. So our position is that his response to our ejectment action --

THE COURT: Was he in default?

MR. BATTLE: Yes, sir. Unless -- no, he wasn't in default because I took the position and allowed him, rather than saying he was in default to say, okay, that request or motion to remove was your response. Magistrate's court doesn't have motions, you know, a Rule 12(b)(6) motion or --

THE COURT: Well, I mean, aren't they made applicable to the family -- I mean, to the magistrate's court?

MR. EASTMAN: Under Rule 2, Your Honor, magistrate's Rule 2 they are.

THE COURT: I mean, aren't they made applicable to the magistrate's court?

MR. BATTLE: They are made applicable under the -- if this is not an applicable rule from the...

THE COURT: So he could make a Rule 12(8)?

MR. EASTMAN: Under -- Your Honor, under 12(b) motion, it was a substantive motion, that was denied. Under Rule 12(a) when that happens, we have 15 days

within which to file an answer. That did not in fact take place. Additionally, under the --

THE COURT: How many days later was it -- or how much longer was it before it was tried?

MR. EASTMAN: An hour. Your Honor, and not only that, under Rule 14 of the magistrate's court rules there is a provision under Rule 14 which allows for continuances when these issues are raised for the first time at a -- when you present yourself at trial.

So if I would have -- no responsive pleading would have been made and my client would have made a defense at that point, he would have been offered a continuance under Rule 14 as grounds to prepare his case.

THE COURT: How long had your motion been pending?

MR. EASTMAN: Your Honor, the time within which the Writ of Ejectment was filed until the Writ of Ejectment was issued was less than six weeks, Your Honor.

THE COURT: How long was your motion pending?

MR. EASTMAN: My motion was pending --

THE COURT: Did you just show up at the time of trial and move?

MR. EASTMAN: Yes, sir. I filed a motion, in fact, the Defendant was served on the 17th of June, I did get -- received an e-mail copy, but the Defendant

was served on the 17th. I filed a motion on the 8th of June, Your Honor. That was initially heard on --

THE COURT: What motion was that?

MR. EASTMAN: A motion to remove, Your Honor.

THE COURT: Okay.

MR. EASTMAN: 15 days later I filed a motion for reconsideration.

THE COURT: Wait, wait, you're jumping.

MR. EASTMAN: Yes, sir.

THE COURT: Eight days later you filed a motion to remove it?

MR. EASTMAN: Yes, sir.

THE COURT: Okay.

MR. EASTMAN: Under 12(b)(8).

THE COURT: When was that heard?

MR. EASTMAN: That was heard July 2nd, Your Honor, at which point --

THE COURT: Okay. So your first opportunity to have that motion heard was when the case was called?

MR. EASTMAN: There was a hearing on the motion, Your Honor, called, yes, sir.

THE COURT: All right, okay.

MR. EASTMAN: On my motion.

THE COURT: It was denied, and you immediately had your hearing -- I mean, the trial?

MR. EASTMAN: No, sir. No, sir. What we did is at that point --

THE COURT: I am totally lost.

MR. EASTMAN: I'm sorry, Your Honor. There were several court appearances, there was two court appearances. The initial --

THE COURT: Look where I'm try going to. I want to know when your client got served, how many days it was before you filed a motion to remove it, how many days it was before there was a hearing on that, and how much time in days or hours it was before the trial occurred. Okay, that's where I'm trying to go.

MR. EASTMAN: Your Honor, before the client was served, I was given an electronic copy. I immediately filed a motion to remove.

THE COURT: Okay.

MR. EASTMAN: On the 8th, I believe it was the 8th of June.

THE COURT: And that was a few days later?

MR. EASTMAN: Yes, sir.

THE COURT: Okay, all right.

MR. EASTMAN: That was before my client was served, before the time within which to file.

THE COURT: Okay.

MR. EASTMAN: I filed a motion to remove.

THE COURT: Okay, all right.

MR. EASTMAN: I did have a hearing on that on July 2nd.

THE COURT: Okay, all right. A hearing, and that would be about three weeks later?

MR. EASTMAN: Yes, sir. That hearing denied -- that denied my motion --

THE COURT: Okay.

MR. EASTMAN: -- to remove.

THE COURT: Okay.

MR. EASTMAN: I renewed my motion and reconsideration motion 15 days later.

THE COURT: Okay.

MR. EASTMAN: At which point --

THE COURT: Could have been about the 17th or so.

MR. EASTMAN: It was, I believe, the 18th, Your Honor.

THE COURT: Okay, all right.

MR. EASTMAN: I'm not counting the day --

THE COURT: Okay, okay.

MR. EASTMAN: It was within the rules, Your Honor.

THE COURT: All right, about the 8th?

MR. EASTMAN: Yes, sir. That motion was granted for reconsideration. The motion to consider was -- the motion for reconsideration was granted.

THE COURT: Okay.

MR. EASTMAN: On, I believe, over counsel's objection on the 21st, that was -- I was given a phone call by the Court, and on the 23rd I was told we were going to have a hearing on our motion.

THE COURT: So you went to a hearing on it?

MR. EASTMAN: Yes, sir. We had a hearing on the motion at 11 o'clock. The motion was denied again, and trial took place that afternoon. I was not prepared for trial. I did not -- I thought we were just going for the motion hearing.

THE COURT: Okay. So there's no doubt, Mr. Battle, that that motion under current court practice would have told the time in which he had to answer; would it not?

MR. BATTLE: He had a -- I get confused too with all this stuff, but he -- we filed the action on June the 5th. He filed a something on, I believe, June the 13th. It was denied the right to move or no discovery. Then on July 23rd he made a motion to reconsider. That motion to reconsider was heard on July the 23rd, and the trial was heard on July the 23rd.

You know, I don't -- in magistrate's court I don't believe that, you know, that his time was told and that the magistrate correctly made the decision that you

can't do this at the last minute and then come up and demand a jury trial.

THE COURT: Well, I thought it was the hearing was set for his motion to reconsider.

MR. BATTLE: His motion -- I think this hearing was set for his motion to reconsider the denial of his motion for -- motion to remove to circuit.

THE COURT: That's right. And we are a still on that issue, and he's filed a motion to reconsider. The Court's convened to hear that motion. And then what I'm hearing from him is the Court then denied his motion to reconsider and said, I stand by my ruling, we're going to trial. And he requested a continuance in which to answer.

MR. BATTLE: And what had been scheduled before that time and he had been given notice of that was the trial had been scheduled, he'd been sent notice of the scheduled trial on as early as July 8th.

THE COURT: All right. Tell me what rule you moved on; was it 12(b)(6), what was it, what was the basis of your original motion to remove it?

MR. EASTMAN: Your Honor, it involves -- it was initially it was a jurisdictional amount --

THE COURT: This is what I'm looking for.

MR. EASTMAN: Yes, sir.

THE COURT: I want you to find something that tells me that the filing of that motion told your time to answer. That's the key here.

MR. EASTMAN: Yes, sir. I believe that that's --

THE COURT: The time to answer told. That's all.

MR. EASTMAN: Hang on one second, Your Honor.

THE COURT: Okay.

MR. EASTMAN: Thank you.

THE COURT: You find me something that says your answer was told, and I will reverse this. That's how important this is. So please don't go off on something else.

MR. EASTMAN: Yes, sir.

THE COURT: Just that one issue.

MR. EASTMAN: I aye, sir.

THE COURT: All right.

MR. EASTMAN: Your Honor, I would argue that the 12 Rules of Civil Procedure, 12(a)(1), which states the original motion was a multiple alleged jurisdictional grounds that exceeded the jurisdictional amount of $7500. It alleged a 12(b)(8) motion for the same action pending in circuit court, and it also requested consolidation under Rule 42.

And under Rule 12(a)(2) -- or I'm sorry, Rule 12(a)(1), if the Court denies a motion or postpones its

disposition until a trial on the merits, the responsive pleadings shall be served within 15 days after notice of the Court's action. The notice of the Court's action was that morning, Your Honor. We'd argue we should have had 15 days. And that in fact holds the period.

THE COURT: Mr. Battle, let me hear from you.

MR. BATTLE: If you would refer to the magistrate's return, he explains exactly what he did.

THE COURT: And where is that?

MR. BATTLE: I'll give you a copy.

THE COURT: I thought I had it. Okay. Mr. Eastman, did in fact the Court set this for a date certain back on July the 2nd?

MR. EASTMAN: Your Honor, that's not the way I recall it. I did receive a summons from the Court. I thought that, in fact, that was the reason for the delay, I was waiting for a written order to -- I was going to file -- I was considering the filing of a interlocutory appeal with regard to the Rule 12(b)(8). However, I opted to file a motion for reconsideration in lieu of that.

I do have a summons which I did receive which is the first time I received notice. It was -- I have a postmarked letter dated July 11th with the summons

dated July 8th. And, Your Honor, that's the first time I heard of a bench trial, at which point it was still within the time period I requested a reconsideration which was granted.

THE COURT: All right.

MR. EASTMAN: And we never got to the 18th.

THE COURT: Okay, all right. I'm going to give you each until Monday morning to submit a proposed order to me. I think that my ruling on the appeal will essentially -- well, you want a joint status conference?

MR. EASTMAN: Yes, sir.

THE COURT: On the -- a motion for a joint status conference.

MR. BATTLE: I don't think it's necessary. I don't think -- I don't want to get tied up.

THE COURT: That's on the general sessions case.

MR. BATTLE: The Common Pleas case.

THE COURT: Well, the Common Pleas case. Well, that would be a matter for you to take up before the chief judge anyway.

MR. BATTLE: Yes, sir, it would.

THE COURT: So I'll carry that over to Judge John's docket. The rule to show cause and the motion for bond modification are going to be essentially

matters that would be ruled on following my determination of the appeal; would they not?

MR. BATTLE: Not the rule to show cause.

THE COURT: What is the rule to show cause?

MR. BATTLE: That's a declaration or a request for a contempt proceeding. We entered into this order, you might remember we had a temporary injunction. And we asked that he not interfere with the construction. He did interfere with the construction, it cost the County approximately $5,036 whereby he rolled the airplane across land that had already been compacted and leveled, contrary to the express instructions of the County whose pilot talked to Ms. Heather Solemon -- Ms. Heather Holly, talked with her, said we need to do a one-hour check.

She said, well, I'm sorry, we cannot move that fence, you cannot go back across it, construction's under way. They waited until 9:40 at night, they did it anyway. We have several witnesses and affidavits in there where they would cross through the construction area, bring back -- pull back the fences, use the Port-A-Potties. You have affidavits from Mr. Holly and some of his people that admit that, they admit that they rolled the plane across the construction area.

And we've got -- we'll present testimony if you

want it or affidavits that the -- they have interfered with construction, contrary to the reason we came and got a temporary injunction from you. There was no excuse for what they did, and there was no reason for it.

THE COURT: All right, Mr. Eastman, let me hear you on that.

MR. VARNADO: Your Honor, may I address that one?

THE COURT: Yes, sir.

MR. VARNADO: Your Honor, may it please the Court, Rob Varnado, also attorney for Skydive Myrtle Beach. Your Honor may recall you first met me when I came and actually appeared at this motion. And I have a memorandum. I was hoping that we wouldn't have to have a hearing.

THE COURT: Who issued the rule to show cause?

MR. VARNADO: Mr. Battle asked this Court to issue the rule to show cause.

THE COURT: Did I issue it?

MR. BATTLE: You issued a temporary injunction. You ordered us to allow them to do their work and then them not interfere with our construction, because we were --

THE COURT: Okay.

MR. BATTLE: -- it was a multi-million dollar

construction improvement project, federally funded.

THE COURT: All right.

MR. VARNADO: Your Honor, there's no contempt here. Mr. Battle has talked about things which are not in evidence, one, in his affidavits. So we have a situation here where he seeks this Court to impose constructive contempt for a contempt which happened outside the presence of the Court. Your Honor issued an order on March the 2nd, and it said -- and we have a hearing, judge, and basically you're like, listen, I want you two to cooperate. I want this Skydive to continue its operation, and I don't want you to interfere with Greenwall Construction.

So the Greenwall Construction work lasted about eight weeks. It finished last month, all right. Mr. Battle wants to have two incidents be grounds for contempt, and it doesn't meet the high standard of contempt which is clear and convincing evidence of intentional, willful disregard of the Court's order. It's not there.

On March the 13th, the County says that a pile in the group of skydivers crossed into the work area. They don't say really where, they don't say really how, said to the plane, I don't -- we deny that ever happened. But even if it did happen, there's no

evidence in the March 13 that it interfered at all with Greenwall.

And then on March the 17th we had to do a _ FAA-required inspection. So every hundred hours you fly a plane, you're supposed to do your FAA-required hundred hours. It requires some maintenance, sometimes small, sometimes big. We go to the County, hey, we need to do this, no, can't do it on the ramp. Then we need to go into our hangar, please, no, not you -- no, we don't want to have that happen either.

So we rolled the plane at night, at 9:40 at night, into the hangar where it stayed. Greenwall wasn't working, no evidence of any kind of interference at all with Greenwall.

Now, Mr. Battle is talking about $5,000. That's nowhere in his petition. That's nowhere in his -- that's the first time we've heard of it that it cost $5,000. And they haven't produced evidence of any of that. So over an eight-week period the County is fussing about a group of skydivers maybe using the Port-A-Potty. And then they're fussing about --

THE COURT: Using the Port-A-Potty, Mr. Battle?

MR. BATTLE: Your Honor, I've got two witnesses here that I'm perfectly willing and ready to call, we've prepared for this hearing. This is a situation

where we had a level packed surface to pour the slab on just like you would pour a slab on a house.

THE COURT: And you completely blocked the hangar; didn't you?

MR. BATTLE: Yes, sir.

THE COURT: All right. I'm not going to hold them in contempt, they got to do business too.

MR. BATTLE: But --

THE COURT: I'm just not going to do it, Mr. Battle, I'm not going to do it, period. I'm not finding them in contempt. If it happens again, bring it back, okay, I'm putting you on notice. It's too much squabbling going on here. Let's stick to the issues.

Now, the motion for a joint status conference, that's something for the chief to hear. The rule to show cause, I'm denying it. Motion for bond modification, what is that?

MR. BATTLE: That's my motion, Your Honor.

THE COURT: All right. What is it?

MR. BATTLE: I would like to increase the amount of the bond. I had made that motion --

THE COURT: How much bond have they got?

MR. BATTLE: They are paying $1200 a month rent, that's all they're doing. And they are behind on May's

rent.

MR. VARNADO: Your Honor, I've just talked to Mr. Holly, he says he sent the May rent in.

THE COURT: I'm not increasing the bond.

MR. VARNADO: Thank you, Your Honor.

THE COURT: We're not going to do that. We're not going to make it any harder for them to work. And I want proposed orders by Monday, 5 o'clock.

MR. VARNADO: Yes, Your Honor.

MR. EASTMAN: Yes, Your Honor.

THE COURT: All right, thank you.

MR. EASTMAN: Thank you, Your Honor.

(WHEREUPON, the hearing concluded at approximately 3:13 p.m.)

(End of Transcript of Record.)

CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

I, TERESA J.F. BAUTZ, Official Court Reporter for the Fifteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Horry County, South Carolina, on the 5th day of November, 2015.

I FURTHER CERTIFY that I am neither of kin, counsel nor interest to any party hereto.

TERESA J.F. BAUTZ, RPR
Official Court Reporter

State of South Carolina)
) Court of Common Pleas
County of Horry) 2014-CP-26-04965

Skydive Myrtle Beach, Inc.)
)
vs.) Transcript of Record
)
County of Horry)

September 22, 2015
Conway, South Carolina

BEFORE:

Honorable Larry W. Hyman, Judge.

APPEARANCES:

Robert B. Varnado, Esq.
Attorney for the Plaintiff

Arrigo P. Carotti, Esq.
Attorney for the Defendant

COPY

Teresa J. F. Bautz, RPR
Official Court Reporter

(The hearing commenced at approximately 9:55 a.m.)

THE COURT: All right, good morning, please be seated. I look at the file, and I see that we have a notice of motion and motion for emergency injunction and stay of ejectment. I assume that was filed by appellant Skydive; is that correct?

MR. VARNADO: Yes, Your Honor.

THE COURT: And now, tell me why I should grant that relief.

MR. VARNADO: Your Honor, thank you for arranging this motion. I'm Rob Varnado, one of the attorneys of record for Skydive. Mr. Eastman here resides in Florida and could not be here on short notice. Your Honor, factually, you gave a order on May 29 of 2015, which we timely asked you to alter or amend, reconsider. And after your denial of the same, we filed a timely appeal to the South Carolina Court of Appeals. So your order is on appeal.

THE COURT: Well, would that not require a supersedeas from the Court of Appeals?

MR. VARNADO: I would submit that --

THE COURT: Tell me why not.

MR. VARNADO: -- it would not, Your Honor, because the stays are governed by Rule 241 of the South Carolina Appellate Court Rules. 241(a) sets forth the

general rule that orders are generally stayed except for the exceptions. Subsection (b) of that rule, and I do have a copy if Your Honor doesn't have one.

THE COURT: Please hand it up.

MR. VARNADO: Yes, sir. May I approach, Your Honor?

THE COURT: Certainly. Thank you very much.

MR. VARNADO: You're welcome. Here's one for your clerk too. Your Honor, I printed this out from Westlaw this morning. So (a) sets forth the general rule, and (b) sets forth the exceptions, and (b)(10) covers ejectment actions.

THE COURT: (B) what?

MR. VARNADO: (B)(10), Your Honor, which would be at the bottom of the first pages of the handout which I've just given to you.

THE COURT: Okay.

MR. VARNADO: All right. And when you read (b) at the top, the exceptions to the general rule are found in statutes, court rules, and in case law. Where specific conditions must be met before the exception applies, those conditions must be strictly complied with. So that's in (b).

And then when you look at (b)(10), it talks about ejectment orders as provided in South Carolina code

annotated section 27-37-130 and 27-40-800. So the Title 27 of South Carolina 37 governs commercial leases, ejectment of commercial tenants. 27-40, that's in the residential Landlord Tenant Act.

THE COURT: Which would not be applicable here.

MR. VARNADO: I don't think so, judge. But to the extent it might apply, we have complied with its provision --

THE COURT: Okay.

MR. VARNADO: -- and 800 by doing an undertaking saying that we would continue to pay the bond. So, Your Honor, it's appellant's position, it's always contemplated that when this Court, when Your Honor, sits in an appellate capacity from a magistrate judge, you sit in an appellate role making findings of law and your own conclusions of fact should you so do so. And the tenant has a right then to go on to appeal to the Court of Appeals if all the dates and times are met timely. And there's no indication of that whatsoever.

So, Your Honor, if you read 241 and you read 27-37-130, it's the magistrate who sets the bond, and Judge Eracus set a bond equal to the rent. Now, twice the parties appeared before you, once in February -- I forget the exact date, I think it was mid February, and once on May 6th, the last hearing we had, judge. And

both times the County asked you to increase the bond, and both times you denied their petition to increase the bond.

So what Skydive Myrtle Beach would submit is that the South Carolina Appellate Court Rules and statutes govern this precise situation. As long as the magistrate's bond remains in effect, it governs the appeal. And the magistrate's bond has remained in effect.

And in fact, Your Honor, on two occasions, informally in your order, I think, or at least at the May 6th hearing, has it funded, and that is being paid. And Mr. Holly, my client's here, and we even -- there was an issue right after the hearing and Mr. Battle and I got on the phone and we set up an electronic draft. And, in fact, the September payment has been made.

So we have the County in the face of a valid stay, because we've met the requirements of 27-37-130, giving us 72 hours notice or they're going to eject. We would respectfully submit that if anyone was going to do a supersedeas, it would need to be the County because the bond, which Your Honor has confirmed, remains in place.

And there is a case, I think it's the town of Hilton Head case, and I don't have the exact citation, I could find it, Your Honor. But it contemplates

ejectment actions, if they started in magistrate court like this one did, and they come to the circuit court, then they can go to the South Carolina Court of Appeals. So that's the path for an appeal, and we're on that path. Judge Eracus' order of the bond remains in effect. We are paying it, Your Honor has confirmed it.

We would submit that we don't need to file a supersedeas, that the stay continues to remain in effect. But if anyone needs to file supersedeas, it's the County. But if we're wrong, we would respectfully request that you would go ahead and continue to keep that bond in place and that I would orally ask for supersedeas now.

Is it really -- my client's businesses would be shut down. Now, we understand your ruling, we understand that you ruled against us, we understand your reason and we respect it, but we're just complying with our rights to take it to the Court of Appeals.

THE COURT: All right. Let me hear from, will it be Mr. Battle or Mr. Carotti?

MR. CAROTTI: Mr. Carotti, Your Honor. Thank you.

THE COURT: All right.

MR. CAROTTI: Chapter 37 of Title 27 deals with magistrate court proceedings and ejectment actions,

including appeals from magistrate's court to the circuit court, not from the circuit court to the Court of Appeals.

THE COURT: Well, then, what rules --

MR. CAROTTI: That's a different set of rules.

THE COURT: What rules then do you --

MR. CAROTTI: Rule 62 South Carolina Rules of Civil Procedure and Rule 241 of the South Carolina Appellate Court Rules. And to answer your judge's question which remained unanswered, 241(d)(1) provides that an application for an order for supersedeas must first be made to the lower court. So this would be the proper venue for this Court to decide on the matter of supersedeas. But it decides on the matter of supersedeas after an appeal has been filed. No such application previously has been made by the appellant. There is no supersedeas in place, there is no stay in place, sections of the code that are cited by my learned opposing counsel --

THE COURT: Run that by me one more time, Mr. Carotti.

MR. CAROTTI: Yes, sir.

THE COURT: You're saying that there's been no appeal filed?

MR. CAROTTI: No, sir. There has been an appeal

filed, but no motion under either Rule 62 South Carolina Rules of Civil Procedure or Rule 241 South Carolina Appellate Court Rules for supersedeas or a stay pending appeal to the Court of Appeals.

The magistrate's court bond that he granted, according to its very terms which were correct and under Chapter 37 of Title 27 was only good through the pendency of appeal in circuit court, not for any appeal thereafter. And there is no law supporting that, it's a different set of rules, Your Honor. There is currently no supersedeas or no stay of the judgment that was entered.

THE COURT: But haven't you agreed to continue the bond?

MR. CAROTTI: Absolutely.

THE COURT: Electronic draft?

MR. CAROTTI: No, sir. There is no -- there was no procedure filed and nothing that I'm aware of that, first of all, allows the respondent to agree to circumvent the rules, or that there is evidence that we have agreed to do so. I know of nothing that we have agreed to do so, because we have constantly contested the amount of the bond and will do so today.

MR. VARNADO: Your Honor, I would, having heard Mr. Carotti's argument, I would say that the rule

governing an appeal from the circuit court to the South Carolina Court of Appeals is Rule 241 of the Appellate Court Rules, which contemplates that the bond in 27-37-130, if met, would be the procedure to obtain a stay. Mr. Carotti has cited to you Rule 62 of the South Carolina Rules of Civil Procedure. We would submit that that's inapplicable on an appeal from this court to the appellate court. The stay would be, say if Your Honor had issued a ruling within the time that Your Honor had the jurisdiction of the case, then you would have a Rule 62 motion.

So, with all due respect, again, Mr. Carotti is saying I need to file a supersedeas, but Rule 241(b)(10) would suggest that I don't. If I am wrong, however, my client's business is at stake. And I think that if I'm wrong on this law, if Your Honor says, I just disagree, while we respectfully disagree, I would say this, Mr. Battle and I did talk on the telephone, exchanged e-mails. Right after the last hearing there was an issue about whether or not a check had been received, and we agreed on an electronic debit system.

And my client, Mr. Holly, who owns Skydive Myrtle Beach is here with BB&T records, his bank records, showing that the drafts are being made. In fact, the September draft is being made.

Your Honor twice heard their request to amend the bond, twice rejected it. This is a -- judge, it's always difficult for the bench and counsel, but what goes up and what stays down when there's an appeal, obviously we can be here today to talk about a stay. We can be here today, if necessary, to talk about a supersedeas.

THE COURT: Well --

MR. VARNADO: Well, Rule 205 says that the things that are attached to the appeal then become the purview of the Court of Appeals.

THE COURT: Well, hasn't he, Mr. Carotti, actually moved for injunction; I mean, how about 62(c)?

MR. CAROTTI: And that's fine, Your Honor. If he is moving this Court today to rule on the matter of the stay or supersedeas, we concede that that's the proper procedure, that nothing has been in place heretofore that would provide him that supersedeas or stay. But if he's moving the Court today to do so, we're prepared to argue against it.

THE COURT: Okay. Well, as I look at your pleadings, counsel, I think that it amounts to a stay of proceedings under Rule 62(c), that's injunction pending appeal. That seems to be how your motion was styled. You asked for an emergency injunction, and you

also asked for stay. So C and D, I believe you could do either one.

Do you agree, Mr. Carotti, that this Court is the proper forum for such a motion?

MR. CAROTTI: Yes, sir, I do.

THE COURT: Do you agree with that, counsel?

MR. VARNADO: If Your Honor -- yes, I do agree with that.

THE COURT: Okay.

MR. VARNADO: Holding on to the original argument that Judge Eracus' bond would still remain in effect. If that is wrong, then yes, this Court retains the jurisdiction to go further.

THE COURT: Well, tell me, Mr. Carotti, you say that you oppose an injunction or a stay?

MR. CAROTTI: Oh, yes, sir.

THE COURT: Under 62(c) or (d). Okay, tell me about that.

MR. CAROTTI: We would submit that 62(d) is the applicable section as opposed to (c), because this is not an appeal taken from an injunction, it is an appeal taken from an ejectment. But regardless --

THE COURT: Well, (c) says, injunction pending appeal, when an appeal has been taken from an interlocutory or final judgment -- which we have --

resolving or denying an injunction. I see where you're talking about.

MR. CAROTTI: Yes, sir.

THE COURT: So you're saying it's (d), when an appeal is taken, a party by giving a supersedcas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this rule and the appellate court rules. The bond may be given at or after the time of filing the notice of appeal, so forth and so on.

Well, doesn't that by implication invoke perhaps 27-37-130?

MR. VARNADO: You haven't heard my argument before that it would apply, 27-37-130 would apply from the jump. If where Your Honor is going, I would say yes, if that makes sense. I'm trying to listen and understand where y'all was --

THE COURT: I think you just agreed with what I said.

MR. VARNADO: I did, I did.

THE COURT: All right. How about that, Mr. Carotti?

MR. CAROTTI: 27-37-130, and I have a copy of that here as well, Your Honor, if the Court please, it deals with appeals from the magistrate's court to the circuit court. It does not extend the right of a bond that is

issued by a magistrate's court to extend their argument.

THE COURT: How do we move then, counsel, how do we move onto that level? He says it doesn't affect it.

MR. VARNADO: With respect to my learned counsel's argument, it's Rule 241 which allows us to move, Your Honor. Rule 241(b)(10), yes, this statute 27-37-130 contemplates the initial jump from the magistrate's court to the circuit court, true. But Rule 241 governs appeals from the circuit court to the Court of Appeals. And Rule 241 and (b)(10) specifically contemplates 27-37-130. It would remain in effect.

But, Your Honor, we would submit that however it did, the Judge Eracus' bond, the bond that you confirmed twice in February and May, should still be the same bond, whether it's a 62(c) or (d) supersedeas, which we respectfully disagree, but if that was your ruling, that would be -- we think that should be the bond no matter what. It's the bond we're paying, it's the bond they've agreed, it's the bond they accepted this morning.

THE COURT: All right, this is what I want you to do -- have you argued fully?

MR. CAROTTI: No, Your Honor.

THE COURT: Go ahead.

MR. CAROTTI: They've mentioned, or opposing counsel has mentioned that this would put them out of business. And the bond that Judge Eracus set at $1200 contemplated rental only. The motion before the judge for an increase in that bond amount had to do with construction project at Grand Strand Airport, nothing more, nothing less. And that was superseded by the Court's formal order weeks later in which no supersedeas was granted, no stay was granted.

We are submitting, Your Honor, that if this tenant is allowed to stay and continue operations at the Grand Strand Airport, that may pose a greater threat to the community than some of the adult entertainment establishments --

THE COURT: What threat? What threat?

MR. CAROTTI: Here's the threat, Your Honor. As documented and confirmed by the FAA, between March of 2013 and August of this year there have been in excessing of 90 safety incidents involving skydiving operations at Grand Strand Airport, and the number appears to be increasing.

In the four months between March 15th of this year and August 4th of this year, we have documented and the FAA has determined that there were 39 unsafe skydiving operations involving in excess of 65 jumpers.

THE COURT: Before you decided you wanted them out, did you check on those?

MR. CAROTTI: We inherited them, Your Honor. We inherited The Skydive Group from the airport when we took over in July of 2013. They were operating under previous tenancy which had been terminated, and they have refused to enter into an agreement.

THE COURT: That's a little ingenuous, Mr. Carotti. I mean, you were in bed with Ramp 66, and Ramp 66 have authority to let you -- let them occupy the thing. I know I've ruled that there was essentially a novation, it was a change and you got a new agreement. And that's been my ruling.

But, you know, this is -- until you need it back, it wasn't really a problem with them operating.

MR. CAROTTI: May I continue, Your Honor?

THE COURT: Yes, sir, certainly.

MR. CAROTTI: Thank you. The 39 incidents in the four and a half months between March 15 and August the 4th, just one death as a result -- that's two a week, by the way, Your Honor -- just one death as a result would trigger a $600,000 cap under the Tort Claims Act. These incidents involve things such as jumpers landing in front of taxiing aircraft, in front of moving fuel trucks, within feet of a helicopter's rotating blades

as it prepared for take-off, on elevated fuel tanks, on nearby highways, Highway 17, and golf courses on public beaches, on runways, taxiways, aprons and various unrestricted areas of the airport. Some jumpers have actually run across the runway in front of landing aircraft.

Recently, on September 5th -- that's just a couple of weeks ago, Your Honor -- a jumper flew into the approach of runway five forcing the skydiver's own aircraft on final approach to perform a 360. And that's not the first time that skydivers have interfered with the flight path of incoming aircraft on final approach.

The FAA in a letter dated May 6th to the skydiving group, referred to these incidents as follows: These incidents in which jumpers have landed outside of the agreed upon landing zone appear to constitute an egregious and callous disregard for the safety of not only jumpers, but the safety and security of persons and property on the ground.

As a result of an audit conducted by the FAA and in a memorandum dated August 4, 2015, the FAA noted that these numerous Skydive Myrtle Beach parachutist jump operations, operation incidents demonstrate a disregard for the well-being of persons and property

that represents an intolerable hazard. And these events must be diminished or eradicated without delay in the interest of operational and public safety.

THE COURT: Can't the FAA close them down?

MR. CAROTTI: The FAA is in the process, Your Honor, but it's the federal government. It's the federal -- the federal government operates at its own pace, Your Honor. They continuing to investigate this.

THE COURT: Well, I dare say that lately it's they spend pretty much what they want to do.

MR. CAROTTI: The Skydive Group, Your Honor?

THE COURT: No, the federal government.

MR. CAROTTI: Oh, sorry.

THE COURT: With total disregard for the Constitution. Mr. Carotti, the question before me, the thing I want resolved -- and I'm going to give you to Friday to submit anything you want, I'm going to let you submit a memo, I want it by Friday morning -- is I want you to brief for me the issue of whether or not you're entitled to a stay, whether or not a stay is applicable and the rule that you think should apply and why, okay. Once I have that, I will resolve this issue, okay. Thank you very much, gentlemen.

MR. CAROTTI: Thank you, Your Honor.

MR. VARNADO: Thank you, Your Honor. Your Honor,

do both parties submit?

THE COURT: Both of you.

MR. VARNADO: Both on?

THE COURT: Both Friday morning. I want to know by Friday morning. Send it electronically to Taylor.

MR. VARNADO: Thank you, judge.

THE COURT: Okay. All right, thank you.

(The hearing concluded at approximately 10:17 a.m.)

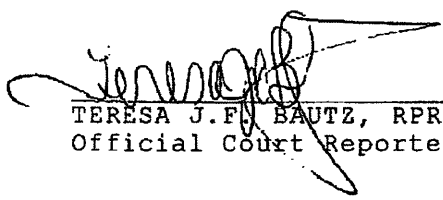
(End of Transcript of Record.)

CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

I, TERESA J.F. BAUTZ, Official Court Reporter for the Fifteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Horry County, South Carolina, on the 15th day of November, 2015.

I FURTHER CERTIFY that I am neither of kin, counsel nor interest to any party hereto.



TERESA J.F. BAUTZ, RPR
Official Court Reporter

STATE OF SOUTH CAROLINA COUNTY OF HORRY	)))	IN THE COURT OF COMMON PLEAS FOR THE FIFTEENTH JUDICIAL CIRCUIT Case No. 2014-CP-26-1193
SKYDIVE MYRTLE BEACH, INC., (f/k/a Skydive Myrtle Beach, LLC), Plaintiff, vs. HORRY COUNTY, HORRY COUNTY DEPARTMENT OF AIRPORTS, H. RANDOLPH HALDI, PAT APONE, TIM JACKSON, and JACK TEAL, Defendants.	)))))))))))	PLAINTIFF'S REQUEST FOR JOINT STATUS CONFERENCE PURSUANT TO SCRCP RULE 16

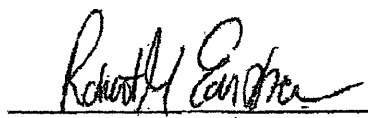
STATE OF SOUTH CAROLINA COUNTY OF HORRY	)))	IN THE COURT OF COMMON PLEAS FOR THE FIFTEENTH JUDICIAL CIRCUIT Case No. 2014-CP-26-4965
SKYDIVE MYRTLE BEACH, INC., Appellant, vs. HORRY COUNTY, Respondent.	)))))))))))	PLAINTIFF'S REQUEST FOR JOINT STATUS CONFERENCE PURSUANT TO SCRCP RULE 16

TO: DEFENDANTS AND DEFENDANTS' COUNSEL MICHAEL W. BATTLE:

YOU WILL TAKE NOTICE that the undersigned, Robert G. Eastman, as counsel for Skydive Myrtle Beach, Inc. (SDMB) will move before the Chief Judge for Administrative Purposes of the Horry County Court of Common Pleas, the Honorable Steven H. John at the Horry County Courthouse located at Conway, South Carolina, not less than ten (10) days hence, or at

such time as may be scheduled by the court for a status conference pursuant to Rule 16 of the South Carolina Rules of Civil Procedure (SCRCP) to Consolidate the primary action styled *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,* Case No. 14-CP-26-1193 (Primary Action)[1], and an appeal from a Horry County Magistrate's Court Writ of Ejectment[2] styled *Horry County v. Skydive Myrtle Beach,* Case No. 14-CP-26-4965 (Appeal). The Primary Action and Appeal each relate to common questions of law and fact, discovery is ongoing and incomplete, the matters are in controversy, and consolidation of the Primary Action with the Appeal is in the interests of judicial economy. The Honorable Roger M. Young continued the Appeal on March 2, 2015, and directed the parties to hold discuss the complexities of separate actions with the Horry County Administrative Judge due to common issues of fact, law, and judicial economy. Plaintiff's motion may be supported by such affidavits and memoranda as may be submitted by the Plaintiff.

BY: EASTMAN & ASSOCIATES, LLC



ROBERT G. EASTMAN
Eastman & Associates, LLC
SC Bar # 75900
PO Box 180
Charleston, SC 29402
(843) 329-9657
(843) 723-0005 fax
robertgeastman@msn.com

and

[1] The Primary Action consists of fifteen counts including allegations of retaliatory eviction and civil conspiracy to illegally remove Appellant's business from Respondent's airport.

[2] *Horry County v. Skydive Myrtle Beach, Inc.*, Case No. 2014CV261092044 (filed June 5, 2014).

Robert B. Varnado, Esquire
Alexis M. Wimberly, Esquire
Brown & Varnado, LLC
103 Church Street
PO Box 1127
Mt. Pleasant, SC 29465
(843) 737-7300
(843) 654-5109 fax
rvarnado@brown-varnado.com

Co-Council for Defendants

Merritt Island, FL

March 13, 2015

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the above and foregoing has been furnished to attorneys for Defendants Horry County and Horry County Department of Airports, H. Randolph Aldi, Pat Apone, Tim Jackson, and Jack Teal, by personally depositing same in a United States Postal Service mail box, postage prepaid, addressed to the following persons on this 13th day of March, 2015.

Michael W. Battle, Esq.
Battle Law Firm, LLC
PO Box 530
Conway, SC 29528

Samuel T. Arthur, III, Esq.
Aiken, Bridges, Elliott, Tylar & Saleeby, P.A
PO Box 1931
Florence, SC 29503

ROBERT G. EASTMAN
SC Bar No. 75900
Attorney for Plaintiff
PO Box 180
Charleston, SC 29402
(843) 329-9657

Rob Varnado

From: Carotti, Arrigo <CarottiA@HorryCounty.org>
Sent: Thursday, September 17, 2015 11:48 AM
To: Robert Eastman
Cc: Haldi, Randy; 'Mike Battle'; Rob Varnado
Subject: RE: Horry County v SDMB

Do what you feel you have to do. This is to reiterate that on behalf of Horry County, and pursuant to Order of Ejectment, Skydive Myrtle Beach, Inc. has been given notice that it has seventy-two (72) hours from the time of Mike Battle's email below (Wednesday, September 16, 2015 at 3:25 p.m.) to vacate entirely Hangar 7 at Grand Strand Airport (CRE). At the end of that time period, Horry County will secure the premises, and anyone affiliated with Skydive Myrtle Beach, Inc. found therein without express authorization from Horry County will be considered trespassers, and handled accordingly.

Kind regards,

Arrigo P. Carotti | County Attorney
Horry County Government
Horry County Attorney's Office
1301 2nd Avenue, Conway, South Carolina 29526
Tel (843) 915-7412 (direct) | Fax (843) 915-6270 | carottia@horrycounty.org
www.horrycounty.org

From: Robert Eastman [mailto:robertgeastman@msn.com]
Sent: Thursday, September 17, 2015 11:44 AM
To: 'Mike Battle'; rvarnado@brown-varnado.com
Cc: Carotti, Arrigo; Haldi, Randy
Subject: RE: Horry County v SDMB

Mr. Battle:

We disagree. This is an appeal of an appeal. The Bond is still in place and J. Hyman refused your request to modify or revoke the bond at the hearing on May 6, 2015. The 30 day period to appeal his decision has lapsed. Therefore, our client will continue to meet its obligations under the bond and remain on the premises.

In light of the foregoing as well as the County's two failed attempts to modify the bond before Judge Hyman, SDMB takes the position that your notice to vacate is legally improper and frivolous. If required to litigate, via emergency motion in either the Circuit Court and/or Court of Appeals, we will seek imposition of sanctions against the County and HCDA.

Consider this correspondence our consultation with you regarding the same pursuant to Rule 11, SCRCP.

Thank you for your attention to this matter. Should you have any questions, please do not hesitate to contact me.

robertgeastman@msn.com

From:	Aaron Holly <aholly@me.com>
Sent:	Friday, September 18, 2015 9:30 AM
To:	Robert Eastman
Cc:	thomas.winston@faa.gov
Subject:	Fwd: CRE Parachute Operations - Safety Risk Management Panel

Interesting. Never have heard of one of these before.

Aaron.

Sent from my iPhone

Begin forwarded message:

> **From:** Tom.Moyer@faa.gov
> **Date:** September 18, 2015 at 08:12:57 EDT
> **To:** cre@rvainc.com, Rickey.Washington@faa.gov, Jim.Koon@faa.gov, John.CTR.Stiers@faa.gov, ruth.e.maestre@faa.gov, howard.v.hollis@faa.gov, Brian.Creasy@faa.gov, TerreriJ@HorryCounty.org, David@1BAA.com, Celeste@EHJGroup.com, GovRelations@USPA.org, Dianne.Sanders@faa.gov, Larry.Ayers@faa.gov
> **Cc:** Mark.S.Clark@faa.gov, Randy.Hyman@faa.gov, michael.wagner@faa.gov, Daniel.Jones@faa.gov, Paul.Lore@faa.gov, david.knight@RVAinc.com, AponeP@HorryCounty.org, aholly@me.com, mbskydiving@aol.com
> **Subject: CRE Parachute Operations - Safety Risk Management Panel**
>
> **To Line :**
> Ray, Glenn (RVA) <CRE@RVAinc.com>; Ayers, Larry (FAA) <Larry.Ayers@faa.gov>; Washington, Rickey (FAA) <Rickey.Washington@faa.gov>; Koon, Jim (FAA) <Jim.Koon@faa.gov>; Stiers, John CTR (FAA) <John.CTR.Stiers@faa.gov>; Maestre, Ruth E (FAA) <Ruth.e.Maestre@faa.gov>; Hollis, Howard V (FAA) <Howard.v.Hollis@faa.gov>; Creasy, Brian (FAA) <Brian.Creasy@faa.gov>; Sanders, Dianne (FAA) <Dianne.Sanders@faa.gov>; <Jason Terreri (HCDA) <TerreriJ@HorryCounty.org>; <David@1BAA.com>; <Celeste@EHJGroup.com>; <GovRelations@USPA.org>;
>
> **CC Line:**
> Knight, David (RVA) <David.Knight@RVAinc.com>; Clark, Mark S (FAA) <Mark.S.Clark@faa.gov>; Hyman, Randy (FAA) <Randy.Hyman@faa.gov>; Wagner, Michael (FAA) <Michael.Wagner@faa.gov>; Jones, Daniel (FAA) <Daniel.Jones@faa.gov>; Lore, Paul (FAA) <Paul.Lore@faa.gov>; Apone, Patricia <AponeP@HorryCounty.org>; Holly, Aaron < aholly@me.com; mbskydiving@aol.com>
>
> You are invited to participate in a Safety Risk Management Panel (SRMP) concerning a potential existing hazard in the National Airspace System (NAS) at Grand Strand Airport (CRE). The SRMP is scheduled to be held on ***October 7-8, 2015 at Myrtle Beach International Airport (MYR) at the MYR FBO conference room located at 1250 Airdrome Avenue, Myrtle Beach, SC 29577.*** The SRMP will convene each day at 8:00AM concluding no later than 4:30PM.

The purpose of the SRM Panel will be to identify any hazards or risk associated with parachute operations at CRE and to conduct a safety analysis as required.

The panel will be comprised of stakeholders who will be supported by subject matter experts. If your name is found on the "to" line of this message, we are requesting your participation as a panel stakeholder member. As such, you will be invited to apply your expertise in this matter, be involved in the panel discussions, and have a voice in the final safety case document.

If your name is found in the "cc" line, we're inviting you as a subject matter expert. In this role you will observe the SRM panel and provide subject matter expertise to the panel stakeholder members when requested. As a subject matter expert, you will not be participating in the panel discussions unless called upon by the panel facilitator or change proponent to give your expertise on the subject at hand. Although your feedback and expertise will most definitely help guide the panel's conversations and decisions, you will not have a voice in the final safety case document.

The SRM panel will follow the process outlined in ATO SMS manual 4.0, and is being co-facilitated by Tom Moyer and Larry Ayers of the Eastern Service Center, Quality Control Group, Organizational Evaluations Team.

Agenda:

- Orientation briefing on Safety Risk Management
- Briefing on the parachute operations
- Begin SRM process to include potential hazard identification
- Analyze the risk
- Assess the risk
- Treat the risk
- Review of SRM documentation and follow-up actions

Please RSVP to Tom Moyer @ Tom.Moyer@faa.gov and Larry Ayers @ Larry.Ayers@faa.gov by Close of Business Monday, September 28, 2015.

Tom Moyer, Safety Risk Management Specialist
Organizational Evaluations Team, AJV-E11
ATO Quality Control Group
Eastern Service Center
Office Phone: (404) 305-6973
Fax: (404) 305-6270

robertgeastman@msn.com

From: Carotti, Arrigo <CarottiA@HorryCounty.org>
Sent: Thursday, October 15, 2015 2:01 PM
To: Rob Varnado; Robert Eastman
Cc: Mike Battle
Subject: RE: SkyDive Myrtle Beach v. Horry County Order

The County is unwilling to extend the deadline past 5:00 p.m. tomorrow.

Regards,

Arrigo P. Carotti | County Attorney
Horry County Government
Horry County Attorney's Office
1301 2nd Avenue, Conway, South Carolina 29526
Tel (843) 915-7412 (direct) | Fax (843) 915-6270 | carottia@horrycounty.org
www.horrycounty.org

From: Rob Varnado [mailto:rvarnado@brown-varnado.com]
Sent: Thursday, October 15, 2015 1:50 PM
To: Carotti, Arrigo; Robert Eastman
Cc: Mike Battle
Subject: RE: SkyDive Myrtle Beach v. Horry County Order

Arrigo -

Since there are no jumping operations ongoing, we would request until 5:00 p.m. on Monday, October 19 to vacate - which seems reasonable in light of the circumstances and would be three days from notification of Judge Hyman's decision. Kindly reconsider your deadline of tomorrow. Thank you in advance for your professional courtesies.

Best regards,

Rob

From: Carotti, Arrigo [mailto:CarottiA@HorryCounty.org]
Sent: Thursday, October 15, 2015 1:42 PM
To: Rob Varnado; Robert Eastman
Cc: Mike Battle
Subject: RE: SkyDive Myrtle Beach v. Horry County Order

Please see attached. Your client has until 5:00 p.m. tomorrow, Friday, October 16, 2015 to vacate entirely Hangar 7 at Grand Strand Airport (CRE). At the end of that time period, Horry County will secure the premises, and anyone affiliated with Skydive Myrtle Beach, Inc. found therein without express authorization from Horry County will be considered trespassers, and handled accordingly.

Kind regards,

Arrigo P. Carotti | County Attorney
Horry County Government
Horry County Attorney's Office
1301 2nd Avenue, Conway, South Carolina 29526
Tel (843) 915-7412 (direct) | Fax (843) 915-6270 | carottia@horrycounty.org
www.horrycounty.org

From: Hyman, Larry B. Law Clerk (Taylor Pipkin) [mailto:lhymanlc@sccourts.org]
Sent: Thursday, October 15, 2015 10:27 AM
To: Rob Varnado; Carotti, Arrigo; Mike Battle
Cc: Robert Eastman
Subject: RE: SkyDive Myrtle Beach v. Horry County Order

Yes, that is the one.

Thanks,
Taylor

K. Taylor Pipkin
Law Clerk
The Honorable Larry B. Hyman Jr.
1301 Second Avenue, Suite 3B71
Conway, South Carolina 29526
(843) 915-6706

From: Rob Varnado [mailto:rvarnado@brown-varnado.com]
Sent: Thursday, October 15, 2015 10:26 AM
To: Hyman, Larry B. Law Clerk (Taylor Pipkin); Carotti, Arrigo; Mike Battle
Cc: Robert Eastman
Subject: RE: SkyDive Myrtle Beach v. Horry County Order

Good morning Taylor -
Just to confirm, is the the attached pdf the Order the one that Judge Hyman signed?
Thank you and with best regards,
Rob

Robert B. Varnado
Brown & Varnado LLC
103 Church Street (29464)
P. O. Box 1127
Mt. Pleasant, SC 29465
843-737-7300 (Office)
843-737-7301(Direct Dial)
843-654-5109 (Fax)
rvarnado@brown-varnado.com

Please consider the environment before printing this e-mail

CIRCULAR 230 DISCLOSURE: To ensure compliance with requirements imposed by the IRS, we inform you that any US Federal Tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the internal revenue code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein. This advice may not be forwarded (other than within the taxpayer to which it has been sent) without our express written consent.

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From: Hyman, Larry B. Law Clerk (Taylor Pipkin) [mailto:lhymanlc@sccourts.org]
Sent: Thursday, October 15, 2015 10:07 AM
To: Carotti, Arrigo; Mike Battle; Rob Varnado
Subject: SkyDive Myrtle Beach v. Horry County Order

Good morning,

Judge Hyman has signed Mr. Carotti's order denying appellant's motion for injunction and stay of ejectment, and the signed copy has been mailed to Mr. Carotti. Please let me know if you have any questions.

Thanks,
Taylor Pipkin

Law Clerk
The Honorable Larry B. Hyman Jr.
1301 Second Avenue, Suite 3B71
Conway, South Carolina 29526
(843) 915-6706

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Please consider the environment before printing this e-mail

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From: Hyman, Larry B. Law Clerk (Taylor Pipkin) [mailto:lhymanlc@sccourts.org]
Sent: Thursday, October 15, 2015 10:07 AM
To: Carotti, Arrigo; Mike Battle; Rob Varnado
Subject: SkyDive Myrtle Beach v. Horry County Order

Good morning,

Judge Hyman has signed Mr. Carotti's order denying appellant's motion for injunction and stay of ejectment, and the signed copy has been mailed to Mr. Carotti. Please let me know if you have any questions.

Thanks,
Taylor Pipkin

Law Clerk
The Honorable Larry B. Hyman Jr.
1301 Second Avenue, Suite 3B71
Conway, South Carolina 29526
(843) 915-6706

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Horry County
Myrtle Beach Summary Court
1201 21st Avenue North
Myrtle Beach, S C 29577
(843) 915-5293

COPY

MYRTLE BEACH MAGISTRATE'S OFFICE
2014 JUN -5 PM 4:26
DISTRICT #6

CASE INFORMATION SHEET

EVICTION

CASE: _____ DATE FILED: 6-5-14

PLAINTIFF (YOU)

NAME/ADDRESS: Harry County
P.O Box 1236
Conway, SC 29526

HOME PHONE: _____
email
EMPLOYER: mbattle@battlelawsc.com
FAX #: 248-4512
WORK PHONE: 248-4321
CELL PHONE: _____

ATTORNEY: Michael W. Battle

DEFENDANT (THEM)

NAME/ADDRESS: Skydive MB, Inc
North MB Aviation, Hangar #7
2800 Teminal St.
NMB, SC 29582

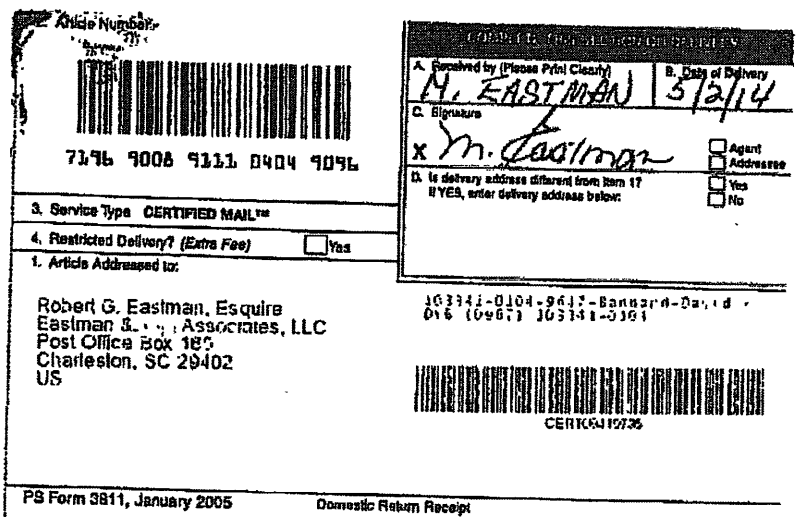
HOME PHONE: _____
email
EMPLOYER: robertgeastman@msn.com
FAX #: 843-723-0005
WORK PHONE: 843-379-9657
CELL PHONE: _____

ATTORNEY: Robert G. Eastman

AMOUNT OF LAWSUIT: $ Ejectment

Reason/Explanation of suit:
The term of tenancy has ended & tenant refuses to leave.

RETURN THIS AND ALL ATTACHED FORMS TO CIVIL CLERK



Article Number

7196 9008 9111 0404 9096

A. Received by (Please Print Clearly) M. EASTMAN

B. Date of Delivery 3/2/14

C. Signature

X M. Eastman

Agent
Addressee

D. Is delivery address different from item 1?
If YES, enter delivery address below:

Yes
No

3. Service Type CERTIFIED MAIL™

4. Restricted Delivery? (Extra Fee) Yes

1. Article Addressed to:

Robert G. Eastman, Esquire
Eastman & [illegible] Associates, LLC
Post Office Box 185
Charleston, SC 29402
US

103341-0104-9611-Bannard-David
016 (0967) 103341-0104

CERTGN19736

PS Form 3811, January 2005 Domestic Return Receipt

FOLEY

FOLEY & LARDNER LLP

ATTORNEYS AT LAW
111 HUNTINGTON AVENUE
BOSTON, MASSACHUSETTS 02199
617.342.4000 TEL
617.342.4001 FAX
WWW.FOLEY.COM

WRITER'S DIRECT LINE
617.342.4033
dbarnard@foley.com EMAIL

CLIENT/MATTER NUMBER
103341-0104

April 28, 2014

Via Certified Mail and Email (robertgeastman@msn.com)

Robert G. Eastman, Esq.
Eastman & Associates, LLC
P.O. Box 180
Charleston, SC 29402

Re: Operating Permit and Space Use Permit

Dear Mr. Eastman:

Your client, Skydive Myrtle Beach, Inc. ("SDMB"), has been unlawfully occupying Hangar No. 7 at Grand Strand Airport ("CRE") since January 31, 2014, in violation of the terms of the Operating Permit dated August 1, 2013 (the "Operating Permit") between SDMB and Horry County, South Carolina (the "County"), acting by and through the Horry County Department of Airports ("HCDA") and the County's policies. HCDA has offered SDMB commercially reasonable terms to continue to use the space under a standard Space Use Permit. SDMB has rejected the terms of the Space Use Permit. By the terms of the Operating Permit, it may be terminated by either SDMB or the County upon at least thirty days' notice.

This letter shall serve as a **notice of termination** of the Operating Permit. The County has previously notified SDMB that if SDMB did not execute HCDA's standard form of Space Use Permit by April 15, 2014, HCDA would be forced to take legal action to remove your client from Hangar No. 7. Your letter dated April 18, 2014 stated that SDMB "cannot agree to the material change of the Space Use Permit," without identifying the suggested "material change". As SDMB has refused to execute a Space Use Permit in the County's standard form and thereby remains the only commercial enterprise operating at CRE without a valid agreement, SDMB has violated, and continues to violate, the terms of its Operating Permit. Unless SDMB executes a Space Use permit in the form provided by HCDA's Director of Airports, with the reduced percentage rent of ten percent (10%) as set forth in my letter to you dated April 7, 2014, the Operating Permit will terminate on May 27, 2014 and the County will bring legal action to eject your client from CRE.

If SDMB is not a party to a valid Space Use Permit and Operating Permit, SDMB may not base its aircraft or its skydiving operations at CRE. However, as long as SDMB operates in accordance with all applicable laws, including the letter of agreement among SDMB, the Federal Aviation Administration ("FAA"), the CRE tower and HCDA, SDMB may continue to use the aeronautical facilities at CRE, including the landing zone, as a transient operator. However, without a valid Space Use Permit, SDMB must vacate Hangar No. 7 and may not base its aircraft at CRE.

You have also requested that HCDA schedule a meeting among SDMB, the FAA and other relevant parties to finalize the terms of a revised Letter of Agreement ("LOA") relating to SDMB's skydiving operations at CRE. HCDA has communicated with the FAA regarding the status of a revised LOA and has been informed by appropriate FAA staff that a revised and updated LOA is undergoing review by FAA, but that as SDMB's requested scope of operations has changed, the FAA's Jacksonville Center must also review

and approve the current draft of the LOA. I understand that the Jacksonville Center is expected to complete their review relatively soon. Once that review is complete, I further understand that the local FAA staff and HCDA will contact you and your client to attempt to resolve any open issues. In the meantime, SDMB should continue to operate under the existing LOA.

As Ms. Apone's letter stated, it is the County's policy that no one may occupy space at the HCDA's airports unless they have entered into a Space Use Permit or a lease agreement with HCDA. SDMB's Space Use Permit expired January 31, 2014. If your client chooses not to execute HCDA's standard form of Space Use Permit, HCDA will not negotiate a lease with your client. However, HCDA remains ready, willing and able to enter into its standard form of Spaced Use Permit with your client and, following that, to negotiate in good faith with the goal of entering into a mutually acceptable lease of Hangar No. 7 at Grand Strand Airport.

Very truly yours,

David Y. Bannard

DYB;

Cc: Patricia Apone, Arrigo Carotti, Esq., H. Randolph Haldi, Esq.

CRE
SDMB

C017

GRAND STRAND AIRPORT
SPACE USE PERMIT

THIS SPACE USE PERMIT ("Permit") is made and entered into as of the 18TH day of September 2013, by and between HORRY COUNTY, SOUTH CAROLINA, ACTING BY AND THROUGH ITS DEPARTMENT OF AIRPORTS ("County") and SKYDIVE MYRTLE BEACH, LLC ("Company"), a business entity formed and existing under the laws of the State of North Carolina, and authorized to do business in Horry County, South Carolina.

WITNESSETH

WHEREAS, County is the operator of the Grand Strand Airport ("Airport"); and

WHEREAS, Company desires to occupy and use space in Hangar #7 located on Grand Strand Airport property, to conduct its "Skydiving and Non-Emergency Parachute Operation" business; and

WHEREAS, County is willing to permit Company to occupy and use space in Hangar #7 at Grand Strand Airport subject to the restrictions and terms provided herein:

NOW, THEREFORE, County and Company agree as follows:

1. Space Use. County hereby permits Company to occupy and use space in Hangar #7 consisting of 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 actual physical occupancy of Space by Company, either party may terminate this Permit for any reason upon the giving at least five (5) days written notice to the other party. After actual physical occupancy of the Space by Company, either party may terminate this Permit for any reason by giving at least thirty (30) days written notice to the other party. Any act of default hereunder, including without limitation failure to pay fees when due, shall terminate any right, license or permission for use of Space immediately upon event of default. This Permit shall not be renewed or extended, nor shall another such Permit be entered into between the same parties within twelve (12) months from the date of expiration of this Permit, without prior approval of Horry County Council.

3. Use. During the term hereof, Company shall occupy and use Space permitted by County solely in connection with its " Skydiving and Non-Emergency Parachute Operation " business at the Grand Strand Airport to the extent permitted by and fully in compliance with all applicable rules, regulations, and requirements of any Federal, State, City or County regulatory agency having jurisdiction over the Company's operations, subject to all terms and conditions of this agreement. Company's employees and customers will have reasonable access to and from and

DEPOSITION EXHIBIT 2 - Holly Dtm 6-24-14

the right to use and occupy Space for the sole purpose of engaging in or furthering Company's business. Company's employees must be well groomed and neat in appearance at all times. The Director of Airports must approve all signs and displays to be erected on the Space. Company shall fully comply with all safety and security policies/directives as established by the Airport.

4. **Fee; Default Interest; Late Payment; Security Deposit.**

A. 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. Company shall pay said amounts without set-off or deduction, in advance and without demand on or before the first day of each month during the term hereof. In the event this Permit commences or terminates on other than the last day of any particular month, the Fee shall be prorated. County reserves the right to adjust such rate from time to time upon thirty (30) days written notice to the Company.

B. Default Interest. If Company shall default in its payment of Fees or other charges required to be paid pursuant to this Permit, such unpaid amounts shall bear interest from the date of default at the rate of 1 ½ % per month.

C. Late Payment. Company acknowledges that the late payment by Company of any monthly installment of fees or other charges will cause County to incur certain costs and expenses not contemplated under this Permit, the exact amount of which are difficult or impracticable to determine. Therefore, if any such amount owing is not received by county within ten (10) days following the due date thereof, Company shall immediately pay to County a late charge equal to 1 ½ % per month of such amount owing, in addition to any default interest which may be due as provided above. To the extent that any late charge provided for hereunder is determined to constitute interest, in no event shall such late charges, plus any other interest due on sums owed to County hereunder, ever exceed the maximum interest rate permitted by law.

D. Security Deposit. To assure the faithful performance of Company's obligations hereunder, Company shall remit a deposit in the form of cash, a letter of credit, or a payment bond issued by a reputable company licensed to issue such bonds in the State of South Carolina, in an amount equal to two (2) months of all applicable Fees to the County, which shall be remitted to the County prior to the Company's occupancy of the Space. In no event shall this security deposit be used as payment for any fee set forth in A, above, without the express written authorization of the Director of the Horry County Department of Airports.

5. Utilities and Services. County shall supply access to water, natural gas and electricity to the extent and capacity of the currently existing mains, lines, transformers, and panels. Company shall be solely responsible for the payment of all utility charges, telephone, trash removal, hazardous waste removal and other services used by Company in or on the Space, to include hook-up fees, advanced deposits or other such costs, regardless of whether the utility charge is

incurred in the name of Company or County. Company shall accept transfer of all applicable utility meters to Company's name when so tendered by County. In the event Company incurs any utility charge in the name of County, Company shall reimburse County for the full amount of the charge within five (5) calendar days of the date of written notice to Company of the amount of the charge. County assumes no responsibility for interruption of such services for any reason whatsoever. Company agrees to pay County One Hundred & 00/100 Dollars ($100.00) per month as an additional fee, which may be adjusted periodically by the County for utilities. The utility fee is included in the monthly fee specified in paragraph 4A.

4. Cleaning and Maintenance. Company, at its sole cost and expense, shall keep the Space in a clean, neat and orderly condition at all times, and shall be responsible for maintaining all non-structural elements, including without limitation plumbing and HVAC. Company understands that it is responsible for the conduct of its guests, permittees, invitees, and licensees on the premises. Company shall not store any personal property exterior to the building on the unimproved premises associated with the building. Company is prohibited from taking any action which would negate or void the warranty on the roofs of any building within its Space.

5. Alterations. Company may not make any alteration, addition, or improvement to the Space without the prior written approval of the Director of Airports. Company shall submit a written request for permission to perform such alterations, which shall include a description of the improvements, a site plan, and any other documentation requested by the Director of Airports to demonstrate the suitability of the improvements or alterations. Unless County elects otherwise, all permanent alterations, additions, or improvements to the Space shall become the property of County upon termination. In the event County so elects, such permanent alterations shall be removed by Company at its own cost and expense prior to date of termination. Company shall repair any damage to Space caused by such removal at its own cost. All agreed upon improvements must be made in a workmanlike manner, in accordance with all applicable statutes, ordinances, rules and regulations, including without limitation applicable building codes, and may be made only upon written approval of County's department of Airports after review of complete plans for such improvements.

6. Right of Entry. County shall have the right to enter the Space at any time for any reasonable purpose.

9. Compliance with Law.

A. General Compliance. Company will comply with all applicable statutes, ordinances, rules, regulations, orders and directives of any governmental authority, including County, in its occupancy and use of the Space.

B. Acceptance of Premises. Company accepts the Space in its "as-is" condition and County has no obligation to improve, repair, restore, or alter any portion of the Space. Company acknowledges that neither County nor any agent, employee, director or official of County has made any representation or warranty, except as otherwise expressly provided in this Permit, with respect to the Space including, without limitation, any representation or warranty with

respect to the suitability or fitness of the building or any portion thereof for the conduct of Company's business.

C. Jurisdiction of Other Agencies. If Company's activities and operations shall in any way fall within the jurisdiction or regulatory authority of other governmental agencies, including without limitation the South Carolina Department of Health and Environmental Control ("DHEC"), Company must secure and produce evidence of such agency's final approval of such operations or occupancy of Space. If such activities and operations fall outside DHEC's jurisdiction, Company shall procure and submit to County the statement of an appropriately authorized DHEC representative to that effect. Company acknowledges that its representations and warranties pursuant to this subsection are material to the County's agreement to permit the Company's use of the Space.

10. Release and Indemnity.

A. Release. Company hereby releases County from any liability to Company for any loss or damage to any property of Company, its officers, directors, employees, agents, customers, concessionaires, vendors, contractors or invitees, and for the death or injury of any officers, directors, employees, agents, customers, concessionaires, vendors, contractors or invitees of Company, occasioned by theft, fire, acts of God, public enemy, injunction, riot, strike, insurrection, war, governmental body or authority including County, or any other matter beyond the control of County, or for any injury or damage or inconvenience which may arise through repair or alteration of any part of the Space, or failure to make repairs, or for any cause whatsoever, except the sole negligence or willful misconduct of County.

B. Indemnity. Company hereby releases and will defend, indemnify and hold harmless County, its departments, agencies, boards, commissions, committees, officers, directors, employees, and agents and assigns of any of them ("Indemnified Parties") from and against any and all liability, claims, penalties, fines, causes of action, suits, liens, losses, loss of use, damages, costs and expenses of any kind (including legal fees and litigation costs) which may be suffered by, accrued against, be charged to or be recoverable from the Indemnified Parties by reason of:

(1) any occurrence, in, upon, or at the Space, however caused, or any cause of action of any nature whatsoever, in law or equity, arising out of or incidental to this Permit or the use or occupancy of the Space; and/or

(2) any occupancy, use, or misuse of the Space, or the areas surrounding the Space, or the service areas, parking areas, pedestrian areas, pedestrian walks or driveways in or around the Space, by Company, its officers, directors, employees, agents, customers, concessionaires, vendors, contractors or invitees, including without limitation uses or misuses which may render the premises subject to the Americans with Disabilities Act in whole or in part; and/or

(3) any violation of any law, regulation or ordinance by Company or its employees,

arising from acts or omissions of Company, its agents and employees, (C) liability for any damage or harm resulting from any release of any hazardous material, as that term is defined by the United States Environmental Protection Agency, including, but not limited to, costs of remediation or mitigation of such release of hazardous materials, and (D) Workers Compensation claims to the limits required by the State of South Carolina. Said insurance shall be maintained throughout the term of this Permit with an insurance company acceptable to County with liability limits of at least $2,000,000.00. The policy or policies shall contain a contractual liability endorsement expressly covering the indemnification provisions of Section 10 of this Permit. Company shall also purchase, at its own cost and in its sole discretion, such business interruption or other insurance to protect Company's interest in the event of major or minor damage or disaster to the Space.

This Permit shall not become effective until User shall provide to the HCDA a copy of certificate(s) evidencing the above insurance. The certificate of insurance shall provide that no material alteration, reduction, or termination of coverage shall occur without the insurance carrier giving County at least thirty (30) days' written notice prior to such alteration, reduction, or termination.

12. Subuse and Assignment. Company shall not allow any other entity to occupy or use any of the Space without the written consent of the Horry County Department of Airports and no attempted assignment of this Permit by Company shall be effective.

13. GOVERNING LAW. THIS PERMIT SHALL BE GOVERNED BY AND CONSTRUED UNDER THE LAWS OF THE STATE OF SOUTH CAROLINA. This Permit is not subject to alternative dispute resolution except where ordered by a court of competent jurisdiction or required by operation of law. The forum for any action or claim brought as a result of this contract shall be the Court of Common Pleas, Horry County, 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 a written instrument executed by County and Company.

15. Termination of Permit. In the event of termination of this Permit by either Party, Company shall promptly cause to be removed all personal property from the Space. Any property left on Airport premises by Company and remaining there fifteen days after the date on which Company either vacated the Space or should have vacated the Space according to the notice of termination sent by the terminating party, may be deemed, at the sole and exclusive option of the Airport, abandoned. Once so deemed, such property shall become the exclusive property of the County and may be disposed of as such in accordance with applicable statutes, ordinances, and County procedures. Alternatively, County may have such property removed, at Company's sole expense.

16. Operating Permit. The terms and conditions for both the "Space Use Permit" and the "Operating Permit" must be adhered to without default to either agreement. Default of any

terms or conditions by either agreement, constitutes default on both the "Space Use Permit" and the "Operating Permit".

17. Notices. Any notices required or sent hereunder shall be in writing and shall be sent as follows:

As to County:

Horry County Department of Airports
11 00 Jetport Road
Myrtle Beach, SC 29577
ATTN: Director of Airports

As to Company:

Skydive Myrtle Beach LLC
P.O. Box 2478
Wilmington, NC 28402
Attn: Aaron S. Holly

Either party from time to time may change its address by written notice to the other party. Notices hereunder shall be deemed effective when delivered by hand delivery or overnight courier, or three days after deposit in the United States mail, first class, postage prepaid.

18. License. This Space Use 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 Company any interest in real property, but is a mere license, revocable at the will of the County.

WITNESS the signatures of the parties as of the date first written above.

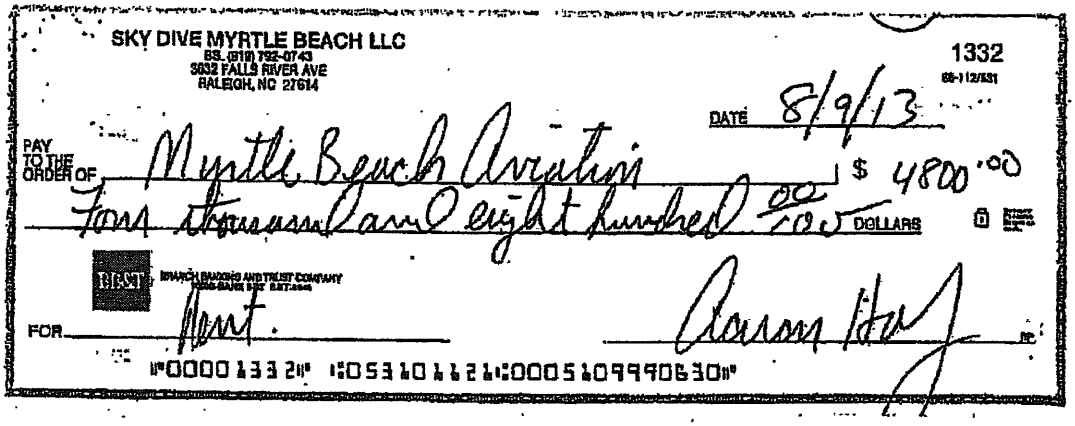
ATTEST:

HORRY COUNTY
By:
Its: ASST. AIRPORT DIRECTOR

ATTEST:

SKYDIVE MYRTLE BEACH, LLC
By:
Its: Owner

7



SKY DIVE MYRTLE BEACH LLC
BS: (919) 792-0743
3032 FALLS RIVER AVE
RALEIGH, NC 27614

1332
55-112/531

DATE 8/9/13

PAY TO THE ORDER OF Myrtle Beach Aviation $ 4800.00

Four thousand and eight hundred 00/100 DOLLARS

BB&T BRANCH BANKING AND TRUST COMPANY

FOR Rent.

Aaron Hall

⑈0000133 21⑈ ⑆053101121⑆0005109990630⑈

CRE - SKY DIVER MB

- THIS CHECK REFLECTS:
  - SECURITY DEPOSIT (2 MONTHS X $1,700) = $3,400.-
  - PERMIT FEE FOR AUGUST 2012 ($1,700) = $1,700.-
  - PERMIT FEE FOR SEPTEMBER 2012 ($1700) = $1,700.-

  $4,800.-

- DEPOSIT TO CRE FOR SECURITY & PERMIT PAYMENTS

- END -

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

OPERATING PERMIT TO PROVIDE SKYDIVING AND NON-EMERGENCY PARACHUTE OPERATIONS TO THE GENERAL PUBLIC AT THE GRAND STRAND AIRPORT

THIS OPERATING PERMIT, made and entered into this 15th day of August, 2013 by and between Horry County, a body politic ("County"), owner and operator of the Grand Strand Airport ("Airport") in North Myrtle Beach, South Carolina and Skydive Myrtle Beach, LLC a corporation organized and existing under the laws of North Carolina ("Company"), shall govern the relationship of the parties, wherein County agrees to permit Company to perform "Skydiving and Non-Emergency Parachute Operations" at the Grand Strand Airport as to the terms and conditions set forth below:

WITNESSETH:

WHEREAS, County is the owner and operator of the Airport, located in North Myrtle Beach, South Carolina; and

WHEREAS, Company is engaged to perform "Skydiving and Non-Emergency Parachute Operations" at the Grand Strand Airport based on the terms and conditions set forth below; and

WHEREAS, Company wishes to use the aeronautical facilities of the Grand Strand Airport in connection with its "Skydiving and Non-Emergency Parachute Operations" at the Grand Strand Airport; and

WHEREAS, the terms and conditions for both the "Space Use Permit" for the space in Hangar #7 at the Grand Strand Airport and the "Operating Permit" must be adhered to without default to either agreement. Default of any terms or conditions by either agreement, constitutes default on both the "Space Use Permit" or lease and the "Operating Permit".

NOW, THEREFORE, in consideration of the promises hereinafter contained, County and Company agree as follows:

1. **Term of Permit.** The term of this Permit shall be a period of six (6) months, and shall run from August 1, 2013 through January 31, 2014. Thereafter, this Permit shall automatically be extended/renewed on a month-to-month basis upon the same terms and conditions contained herein, with the exception of fee payment as set forth below, unless terminated under the provisions of this paragraph. Either party may terminate this Permit at any time by serving written notice upon the other party at least thirty (30) days in advance of the effective date of termination.

2. **Permit Area; Use.** Company may use the permitted facilities at the Airport solely in connection with its business of providing "Skydiving and Non-Emergency Parachute Operations" at the Grand Strand Airport.

3. **Permit Fee.** Company will pay County a non-refundable annual fee of Three Thousand ($3,000.00) Dollars, which will be pro-rated for six (6) months in the amount of Fifteen Hundred Dollars ($1,500.00), which allows Company to operate which will be at the discretion of the Airport Director, payable on or before August 1, 2013. After the initial term, this Permit will continue on a month-to-month basis unless otherwise terminated, Company to pay to County $1/12^{th}$ of the annual fee set forth above without demand, and without set-off or deduction, in advance of or before the first day of each month the Permit may continue. County reserves the right to adjust such fee from time to time upon thirty (30) days written notice to the Company. In the event the Permit terminates on other than the last day of any particular month, the fee shall be prorated. Failure to pay by the first of each month shall constitute an event of default. Late payment charges of one and one-half percent (1½%) will be assessed on all overdue accounts after the tenth (10^{th}) day of each month, payment of which will not excuse default.

4. **Space Use Premises.** The County hereby permits Company to occupy and use space in Hangar #7 consisting of approximately Two Thousand-Five Hundred (2,500) square feet, together with any surrounding curtilage and parking ("Space") to be utilized for Company's "Skydiving and Non-Emergency Parachute Operations to the General Public".

5. **Laws, Rules, Regulations and Procedures.** Company shall observe and comply with all Federal, State and local laws, rules, and regulations, all County and City ordinances, and business license requirements, and all directives of the Horry County Department of Airports, which now exist or which may be hereinafter be enacted or adopted. Company will obtain, and provide upon request copies to the County, through its Department of Airports, all licenses, permits and authorizations, as may be necessary and proper, at Company's sole cost.

6. **Hold Harmless and Indemnification.** Company shall protect, defend (with counsel satisfactory to County), indemnify, and hold County, its Council members, advisory board members, officers, agents, employees and assignees harmless from and against any and all claims, debts, liabilities, losses, judgments, penalties, fines, costs, damages, expenses (including reasonable attorney fees, court costs and expert fees), or demands arising by reason of injury or death of any person or damage to any property, or any cause of action of any nature whatsoever, in law or equity, arising out of or incidental to this Permit or the use of the Airport, or the acts or omissions of Company or Company's directors, officers, agents, employees, contractors, subcontractors or licensees; however, said indemnity shall not apply to any injury, death, or damage caused by the sole negligence or willful misconduct of County. The provisions of this section shall survive the expiration or early termination of this Permit.

7. **Environmental Indemnification.** Company shall indemnify, defend (with counsel satisfactory to County), and hold County, its council members, officers, employees, agents, assigns, and any successors to County's interest in the Airport, harmless from and against any and all loss, cost, damage, expense (including reasonable attorney fees), claim, cause of action, judgment, penalty, fine or liability, directly or indirectly, relating to or arising from the use, storage, release, discharge, handling, or presence of Hazardous Materials on, under, or about the Airport in violation of Company's obligations under this Permit ("Hazardous Materials Release"). This indemnification shall include without limitation (a) personal injury claims, (b) the payment of liens, (c) diminution in the value of the Airport, (d) damages for the loss or restriction on use of the Airport, (e) sums paid in settlement of claims, (f) actual attorneys' fees, consulting fees, and expert

fees, (g) the cost of any investigation of site conditions, and (h) the cost of any repair, cleanup, remedial, removal, or restoration work or detoxification if required by any governmental authorities or deemed necessary in County's reasonable judgment. County shall have the right but not the obligation to join and participate in, and control, if it so elects, any legal proceedings or action initiated in connection with the Hazardous Materials Release. County may also negotiate, defend, approve, and appeal any action taken or issued by any applicable governmental authorities with regard to a Hazardous Materials Release. Any costs or expenses incurred by County for which Company is responsible under this Paragraph or for which Company has indemnified County, (i) shall be paid to County on demand, during the term of this Permit as an additional fee; and, (ii) from and after the expiration or earlier termination of the Permit shall be reimbursed by Company on demand. Company's obligations pursuant to the foregoing indemnity shall survive the expiration or termination of this Permit and shall bind Company's successors and assignees and inure to the benefit of County's successors and assignees.

8. **Insurance**. Company agrees to carry and keep in force a policy or policies of public liability insurance throughout the term of this Permit, with an insurance company or companies of recognized responsibility and acceptable to the County, covering the bodily injury and property damage liability that Company has agreed by this Permit to hold the County, its Council members, directors, agents, officers, and employees harmless against and to indemnify. Company agrees to carry and keep in force such insurance with limits of liability for death, personal injury and property damage in an aggregate sum equal to not less than two million ($2,000,000.00) Dollars. Said policy or policies shall name the County as an additional insured to the extent of the indemnification obligation hereunder. A certificate or certificates evidencing such insurance coverage shall be filed with the County prior to the date Company commences use of the Airport and said certificate or certificates shall provide that such insurance coverage will not be canceled, reduced or materially changed without at least thirty (30) days prior written notice to the County. At least thirty (30) days prior to the expiration of any such policy, a certificate showing that such insurance coverage has been renewed or extended shall be filed with the County. If such coverage is canceled, reduced or materially changed, Company shall, within ten (10) days after receipt of written notice, file with the County a certificate or certificates showing that the required insurance has been reinstated or provided through another insurance company or companies.

9. **Non-Discrimination.**

A. Company warrants that it will undertake an affirmative action program in conformance with 14 CFR Part 152, Subpart E, to insure that no person shall, on the grounds of race, creed, color, national origin, or sex, be excluded from participating in any employment, contracting, or leasing activities covered in 14 CFR Part 152, Subpart E. Company assures that no person will be excluded on such grounds from participating in or receiving the services or benefits of any program or activity covered by Subpart E. Company further agrees that it will require that its covered sub-organizations provide assurances to Company that they similarly will undertake affirmative action programs and that they will require like assurances from their sub-organizations, as required by 14 CFR Part 152, Subpart E.

B. Company agrees to comply with any affirmative action plan or steps or equal employment opportunity required by 14 CFR part 152, subpart E, as part of the affirmative action program, and by any Federal, State, or local agency or court, including those resulting from a conciliation

may be modified, amended or waived only by a written instrument executed by County and Company.

14. Notice. Whenever any notice is required by this Permit to be made, given or transmitted to the parties hereto, such notice shall be deemed to have been given if enclosed in an envelope with sufficient postage attached, and sent by certified mail and deposited in the United States Mail addressed to:

A. As to Horry County:

Horry County Department of Airports
1100 Jetport Road
Myrtle Beach, SC 29577
Attention: Director of Airports

B. As to Company:

Skydive Myrtle Beach LLC
~~P.O. Box 2478~~ 3032 Falls River Ave.
~~Wilmington, NC 28402~~ Raleigh, N.C. 27614
Attn: Aaron S. Holly

15. No Possessory Interest in Premises. Company is not granted any possessory interest or license in any premises at the Grand Strand Airport under this Permit.

IN WITNESS THEREOF, the parties have caused this Permit to be executed by their duly authorized officers the day and year first above-written.

ATTEST:
Cynthia Nye

HORRY COUNTY
By: _____
Its: 8/22/2013

ATTEST:
_____

SKYDIVE MYRTLE BEACH
By: Aaron Holly
Its: OWNER

7005 1820 0006 7237 8220

U.S. Postal Service™
CERTIFIED MAIL™ RECEIPT
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OFFICIAL USE

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Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees	$ 7.19

Postmark Here

4-2-14

Sent To: Robt. G. Eastman, Esq.
Street, Apt. No.; or PO Box No. P.O. Box 180
City, State, ZIP+4 Charleston, SC 29402

PS Form 3800, June 2002 See Reverse for Instructions

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Robert G. Eastman, Esq.
Eastman & Associates, LLC
P.O. Box 180
Charleston, SC 29402

COMPLETE THIS SECTION ON DELIVERY

A. Signature
X M Eastman ☐ Agent ☐ Addressee

B. Received by (Printed Name) M E Eastman C. Date of Delivery 4/10/14

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type
☒ Certified Mail® ☐ Priority Mail Express™
☐ Registered ☑ Return Receipt for Merchandise
☐ Insured Mail ☐ Collect on Delivery

4. Restricted Delivery? (Extra Fee) ☐ Yes

2. Article Number (Transfer from service label) 7005 1820 0006 7237 8220

PS Form 3811, July 2013 Domestic Return Receipt

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

Michael Battle
Po Box 530
Conway, SC 29526

MOTION HEARING TO RECONSIDER MAGISTRATE SUMMONS

Be advised that a Motion has been filed in the below listed case. Therefore, you are hereby summoned to be and appear personally in the Horry County Myrtle Beach Magistrate Court Court, located at 1201 21st Avenue North, , Myrtle Beach, SC, 29577 on July 23, 2014 at 11:00 AM to serve as a plaintiff/defendant/attorney/witness in a Motion Hearing in the case of:

Horry County **Vs** **Skydive Myrtle Beach, Inc.**

PLAINTIFF(S) **DEFENDANT(S)**

CIVIL CASE #: 2014CV261092444.

HEREIN FAIL NOT, ON PAIN OF FORFEITING THE LAWFUL PENALTY IN SUCH CASE MADE AND PROVIDED.

Judge

Horry County
Myrtle Beach Magistrate Court
1201 21st Avenue North
Myrtle Beach, SC 29577
Phone: (843) 915-5293 Fax: (843) 444-6131

July 21, 2014

MV 46

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EASTMAN & ASSOCIATES, LLC

ATTORNEYS AT LAW

Heidehausweg 39
79868 Feldberg-Falkau
GERMANY

POST OFFICE BOX 180
CHARLESTON, SOUTH CAROLINA 29402
USA

PHONE: (843) 329-9657
FAX: (843) 723-0065
robertgeastman@msn.com

ROBERT G. EASTMAN
ADMITTED IN DE, FL, GA, MD, MI, PA, & SC

February 24, 2014

Office of the Chief Counsel
Attention: FAA Part 16 Docket Clerk
AGC-600
Federal Aviation Administration
800 Independence Avenue, SW
Washington, DC 20591

Re: Part 16 Formal Complaint
Skydive Myrtle Beach, Inc. v. Horry County Department of Airports

Dear Sir or Madame:

1. Complainant, Skydive Myrtle Beach, Inc. (SDMB), a North Carolina Corporation doing business in Horry County, South Carolina conducts a Federal Aviation Administration (FAA) aeronautical activity, skydiving, at Grand Strand Airport (CRE) in North Myrtle Beach, SC.

2. SDMB rents a hanger, purchases fuel, and otherwise pays fees to Defendant, Horry County Department of Airports (HCDA).

3. On or about May 15, 2012, SDMB negotiated a Letter of Agreement (LOA) with the local Air Traffic Control CREATC, Myrtle Beach Control Tower MYRATC, and HCDA whereby all parties agreed to allow SDMB to conduct Non-emergency Parachute Operations.

4. Mike Laplerre HCDA, Ricardo Washington MYRATC, and Glenn Ray CREATC agreed to the LOA electronically.

5. On or about May 1, 2013, the HCDA representative Robert Wernersbach, MYRATC (Ricardo Washington), and Glenn Ray agreed to the identical terms in the original LOA electronically.

6. On or about February 7, 2014, a meeting was held between MYRATC (Glenn Ray), HCDA (Tim Jackson, Manager), and SDMB in an attempt to resolve perceived airport issues at SDMB's invitation. Representatives from MYRATC could not attend but were provided minutes from the meeting

7. On or about February 7, 2014, SDMB asked the parties for protocol with regard to active taxiway crossing procedures, as it could not find them in the Federal Air Regulations (FARs). During the conversations it was discovered that, although CREATC and HCDA had a LOA with active taxiway procedures, neither party had provided SDMB the terms or procedures. SDMB requested a copy from both CREATC and HCDA. CREATC described the procedures to SDMB and promised a copy of the LOA early the next week. SDMB incorporated the procedures as part of its normal routine and trained its personnel.

8. On or about February 7, 2014, all parties to the meeting and were invited to attend SDMBs proposed Safety Day to learn about its parachute operations and the applicable standards and FARs associated with sport parachuting or skydiving. CREATC (Glenn Ray) accepted its invitation and said CREATC looks forward to attending.

9. On or about February 10, 2014, CREATC (Glenn Ray) and SDMB discussed the terms of the new SDMB LOA, and Mr. Ray provided SDMB a copy of the LOA between the HCDA/CRE LOA describing the procedures.

10. On or about February 19, 2014, the FAA held its annual safety meeting at MYR. In attendance were SDMB, CREATC, MYRATC, and HCDA representatives as well as representatives from the Columbia, SC FAA or the state FAA officials.

11. On or about February 19, 2014, SDMB, CREATC, and MYRATC discussed the terms of the proposed LOA, *inter alia*, and discussed moving forward with a new LOA to include Jacksonville Center. In a very positive discourse, emails were exchanged with procedures that could possibly improve operations between ATC and SDMB collectively.

12. On or about February 19, 2014, HCDA, through its attorney, HCDA served SDMB a take-it-or-leave it lease, with a 72 hour eviction (close of business Saturday, February 23, 2014) notice in the event that the SDMB refused to accept the terms. See Attached letter and "Space Use Permit" dated February 19, 2014.

13. On or about February 20, 2014, SDMB received a phone call from Jacksonville ATC, and discussed the terms of the new LOA and strategy moving forward.

14. On or about February 21, 2014, HCDA received SDMB's response to the allegations identified in its February 19, 2014, letter – rejecting the proposed Permit terms.

15. To date no communication between HCDA and SDMB relating to the LOA has taken place, and no communication is expected in the future. HCDA has, in the past, and continues to cite allegations and rules which it has neither produced nor

provided. HCDA refused to communicate or respond to repeated requests for a productive resolution to problems, and now is attempting to coerce SDMB into a lease so egregious that it amounts to constructive eviction.

16. SDMB respectfully requests a formal "Part 16 Proceeding" in accordance with 14 CFR § 16.23 (78 FR 56135, September 12, 2013, effective November 12, 2013).

17. On or about February 23, 2014 (1316 EST), HCDA, under the direction of a note from Mr. Tim Jackson, refuse fuel service to SDMB aircraft. After receiving a phone call from CRE FBO staff, Mr. Jackson apparently reversed himself and fuel service resumed. This required a 30 minute break in operations and loss of customers.

18. SDMB respectfully submits that the HCDAs refusal treat SDMB similarly to comparably situated airport tenants, refusal to repair its facilities (or allow SDMB to repair), refusal to negotiate the terms of a LOA in good faith, and attempted removal of SDMB from its facilities, collectively and individually, constitutes prohibited discrimination as codified in applicable US Code, Department of Transportation regulations and FAA regulations and policies.

19. SDMB appreciates the cooperation from Jacksonville, Myrtle Beach, and North Myrtle Beach ACTs and looks forward to a continued working relationship in resolving the issues identified herein.

I look forward to hearing from you in the near future. Thank you for your attention to this matter. Should you have any questions, please do not hesitate to contact me.

Very truly yours,

Robert G. Eastman

Encl.: Feb. 19, 2014, Letter from Horry County Deputy County Attorney
Feb. 21, 2014, Letter from SDMB

cc: Aaron Holly (via email)
Pat Apone, Director Horry County Department of Airports

RGE/kb

140222.sdmb.hcda.faa.complaint

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Complaint on the following persons at the following addresses and facsimile numbers by first class US Postal Service.

Office of the Chief Counsel
Attention: FAA Part 16 Docket Clerk
AGC-600
Federal Aviation Administration
800 Independence Avenue, SW
Washington, DC 20591

Pat Apone, Director
Horry County Department of Airports
1100 Jetport Road
Myrtle Beach, SC 29577

Dated this 24th day of February, 2014.

Robert G. Eastman, Esq.
For Skydive Myrtle Beach, Inc.

FOLEY

FOLEY & LARDNER LLP

ATTORNEYS AT LAW
111 HUNTINGTON AVENUE
BOSTON, MASSACHUSETTS 02199
617.342.4000 TEL
617.342.4001 FAX
WWW.FOLEY.COM

WRITER'S DIRECT LINE
617.342.4033
dbannard@foley.com EMAIL

CLIENT/MATTER NUMBER
103341-0104

March 4, 2014

VIA ELECTRONIC MAIL

Office of the Chief Counsel
ATTN: FAA Part 16 Docket Clerk
AGC-600
Federal Aviation Administration
800 Independence Avenue, SW
Washington, DC 20591
9-AWA-AGC-Part-16@faa.gov

Re: *Skydive Myrtle Beach, Inc. v. Horry County Dep't of Airports*
Part 16 Complaint Filed February 24, 2014

Dear Sir/Madam:

We represent the Horry County Department of Airports ("HCDA") in connection with matters relating to Skydive Myrtle Beach, Inc. ("SDMB"). A copy of this letter is also being provided to counsel for SDMB.

On February 24, 2014, SDMB filed the attached Part 16 Complaint against our client with the Federal Aviation Administration (the "FAA") (the "Complaint"). To the best of our knowledge, the FAA has not yet docketed the Complaint.

We respectfully submit that the Complaint should be dismissed without prejudice pursuant to 14 C.F.R. Part 16 § 16.27, because SDMB failed to "initiate and engage in good faith efforts to resolve the disputed matter informally" with HCDA prior to filing the Complaint, as required by Part 16 § 16.21. As one would expect, the Complaint does not contain the required certification that such good faith efforts were made. *See id.* § 16.21(b).

After the Complaint was filed, the HCDA contacted SDMB and requested that SDMB dismiss the Complaint without prejudice and engage in good faith negotiations regarding the matters set forth therein. As the attached correspondence shows, SDMB has refused to dismiss the Complaint.

On behalf of the HCDA, we therefore respectfully request that the FAA dismiss the Complaint, without prejudice, until such time as SDMB complies with its obligations under § 16.21.

Pursuant to Part 16 § 16.13(h)(3), the persons designated by HCDA to receive electronic pleadings are myself, at dbannard@foley.com, and my colleagues Jeffrey Blease, at

jblease@foley.com, and Jaclyn Piltch, at jpiltch@foley.com. Please feel free to contact any of us with questions.

Very truly yours,

David Y. Barnard

DYB:jvp

Enclosures

cc: Robert G. Eastman, Esq., Counsel for Skydive Myrtle Beach, Inc.
Patricia Apone, Airport Director
Arrigo Carotti, Esq., County Attorney
H. Randolph Haldi, Esq., Deputy County Attorney
Jeffrey R. Blease, Esq., Foley & Lardner LLP
Jaclyn V. Piltch, Esq., Foley & Lardner LLP
(all with enclosures)

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing letter regarding the Skydive Myrtle Beach, Inc. Part 16 Complaint on the following persons at the following email addresses, by electronic mail in accordance with 14 CFR Part 16 § 16.13(h):

Office of the Chief Counsel
ATTN: FAA Part 16 Docket Clerk
AGC-600
Federal Aviation Administration
800 Independence Avenue SW
Washington, DC 20591
9-AWA-AGC-Part-16@faa.gov

Robert G. Eastman, Esq.
Eastman & Associates, LLC
P.O. Box. 180
Charleston, SC 29402
robertgeastman@msn.com

Counsel for Skydive Myrtle Beach, Inc.

David Y. Bannard, Esq.

Dated: March 4, 2014

4834-5206-7865.1

U.S. Department of Transportation
Federal Aviation Administration

Airport Compliance and Management Analysis

800 Independence Ave., SW.
Washington, DC 20591

March 18, 2014

Robert G. Eastman, Esq.
Eastman & Associates, LLC
P.O. Box 180
Charleston, SC 29402

Dear Mr. Eastman:

Re: Skydive Myrtle Beach, Inc. v. Horry County Department of Airports,
FAA Docket No. 16-14-01

The above-captioned complaint, filed by you on behalf of Skydive Myrtle Beach, Inc. (SDMB), against the respondent the Horry County Department of Airports (HDCA), has been determined to be incomplete under 14 CFR Part 16.

Pursuant to 14 CFR, § 16.21, prior to filing a Part 16 complaint, a person directly and substantially affected by the alleged noncompliance must engage in good faith efforts to resolve the disputed matter informally with those individuals or entities believed responsible for the noncompliance. A complaint under this part will not be considered unless it certifies that,

> (1) The complainant has made substantial and reasonable good faith efforts to resolve the disputed matter informally prior to filing the complaint; and
> (2) There is no reasonable prospect for practical and timely resolution of the dispute.

Furthermore,

(c) The *certification* ... shall include a brief description of the party's efforts to obtain informal resolution but shall not include information on monetary or other settlement offers made but not agreed upon in writing by all parties. Such efforts to resolve informally should be relatively recent and be demonstrated by pertinent documentation. There is no required form or process for informal resolution, but in each case the requirements to resolve the matter informally must meet the requirements of this paragraph... (emphasis added). You submitted a complaint citing the respondent's "refusal to negotiate the terms of a LOA [Letter of Agreement] in good faith" and stating that the respondent "refused to communicate or respond to repeated requests for a productive resolution to problems." However, the documentation you provided does not

demonstrate a failure to "communicate or respond." You include two letters, one, dated February 19, 2014, from the Horry County Attorney's Office outlining "serious issues" with SDMB's business operations and the expiration of its permit, and a second, dated February 21, 2014, from yourself to the Horry County Attorney's Office noting a "significant misunderstanding and communication issue." The letter further asserts that "[h]istorically numerous phone calls, visits, and emails [from SDMB] have been either lost, ignored, or simply unanswered" by HDCA. However, you provide no records of telephone calls or visits, and no copies of the emails mentioned. The complaint, therefore, does not contain the "pertinent documentation" required by 14 CFR, § 16.21(c) to demonstrate substantial and reasonable good faith efforts to resolve the disputed matter informally. Please note that in accordance with 14 CFR, 16.23(b)(2), complaints must be served "along with all documents then available in the exercise of reasonable diligence, offered in support of the complaint ...."

Moreover, the complaint also does not include documentation that complainant has met the requirement that there be "no reasonable prospect for practical and timely resolution of the dispute." The February 19, 2014 letter from the Horry County Attorney's Office offers terms for a new space use permit. Such a letter alone does not suggest that there is no reasonable prospect for resolution of this dispute. In addition to not providing complete documentation showing reasonable good faith efforts and/or the lack of reasonable prospect for practical and timely resolution of the dispute, you have failed to include the certification required by 14 CFR, § 16.21(b) and described by 14 CFR, § 16.21(c). The statement that respondent "refused to communicate or respond to repeated requests for a productive resolution to problems" is insufficient to meet the regulation's requirements. The complainant must include an express certification within the complaint or as a separate attachment.

The complaint is dismissed without prejudice as incomplete under 14 CFR, § 16.27. The complainant may file a new complaint that corrects the deficiencies noted above. Part 16 Docket No. 16-14-01 is closed.

Should you have any questions on this matter please contact Jessie Di Gregory, in the Office of the Chief Counsel at (202) 267-3199.

Sincerely,

Randall Fiertz
Director of Airport Compliance and
Management Analysis

cc: Pat Apone
Horry County Department of Airports
FAA Part 16 Proceedings Docket

Rob Varnado

From: Mike Battle <MBattle@battlelawsc.com>
Sent: Wednesday, September 16, 2015 3:25 PM
To: robertgeastman@msn.com; Rob Varnado
Cc: Carotti, Arrigo; Haldi, Randy (haldir@HorryCounty.org)
Subject: Horry County v SDMB

Gentlemen,

This will serve as notice to your client to vacate the premises of Hangar 7 at CRE within 72 hours. We do not believe the bond set in magistrate's court covers appeals from Circuit Court to the Court of Appeals. Since your client has failed to post an appeal bond as required by Section 27-37-130, Code of Laws of S.C., Rule 62, SCRCP, Rule 241, SCACR, and in the very "Bond to Stay Execution on Appeal" issued in the Magistrate's Court, your client should vacate the premises peaceably. Please contact me if you have any questions.

Michael W, Battle
Attorney for Horry County

Please be advised that this e-mail and any files transmitted with it are confidential attorney-client communications or may otherwise be privileged or confidential and are intended solely for the individual or entity to whom they are addressed. If you are not the intended recipient, please do not read, copy or retransmit this communication but destroy it immediately. Any unauthorized dissemination, distribution or copying of this communication is strictly prohibited.

MICHAEL W. BATTLE
BATTLE LAW FIRM, LLC
P.O. BOX 530
1200 MAIN STREET
CONWAY, SOUTH CAROLINA 29528
(843)248-4321
mbattle@battlelawsc.com

SkyDive Myrtle Beach, LLC
P.O. Box 2478
Wilmington, NC 28402

May 10, 2012

This letter constitutes the complete agreement between SkyDive Myrtle Beach, LLC (SkyDive MB) and Grand Strand Aviation, Inc. dba Ramp 66. The agreement is for SkyDive Myrtle Beach, LLC to provide tandem parachute jumps from the Grand Strand Airport.

All jumpers will check in and pay at the Ramp 66 front desk, except those jumpers who have registered and previously paid SkyDive Myrtle Beach, LLC directly online. Personal checks will not be accepted. The paid invoice will constitute the ticket for the jumpers. The invoice number will provide priority of who is next in line for the jump. Schedules will be monitored and maintained by SkyDive MB. Jumpers will pay for their jump prior to the jump. SkyDive MB will establish and publish rates for all jumps.

1. It is agreed that Ramp 66 will sell fuel to SkyDive MB at $.25 cents below the price posted for JetA fuel.
2. Any aircraft maintenance labor requested by SkyDive MB will be charged at the rate of $5.00 below the posted labor rate.
3. Any aircraft parts purchased through Ramp 66 will be charged at the rate of cost plus 20% + freight.
4. There will be no Tie Down fees, or other fees, charged to SkyDive MB.
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 in the "bird hanger" 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.
7. Ramp 66 will pay Horry County Department of Airports 5% of the gross income it receives directly from jumpers on all jumps.
8. Ramp 66 will assume all credit card charges without fee to SkyDive MB
9. Ramp 66 will assume business license costs unless the city of North Myrtle Beach changes their current position that parachute operations falls under the business license of Ramp 66.
10. SkyDive MB will maintain a minimum of $1,000,000 Airport Liability Insurance in effect and name Grand Stran Aviation, Inc. and Horry County Department of Aviation as additional insured. A copy of the Certificate of Insurance will be provided to Ramp 66.
11. Ramp 66 agrees to charge fuel and other services to SkyDive MB LLC. This bill will be paid weekly.
12. SkyDive MB agrees to comply with all applicable federal statutes and all regulations and all regulations including, but not limited to, those promulgated by the Federal Aviation Administration while conducting all parachute jumps.
13. SkyDive MB agrees to comply with all applicable local, state and local statutes, rules and regulations including, but not limited to, those relating to tax, fire, building and safety matters.

14. SkyDive MB agrees to comply with all applicable local, state and federal environmental statutes and regulations, including but not limited to, requirements for the disposal of waste oil and other potentially hazardous substances.
15. At the end of each year Ramp 66 will provide SkyDive MB a Form 1099 showing the gross income directly paid to Ramp 66, excluded internet sales and merchandise sales paid directly to SkyDive MB are its separate responsibility to report to Internal Revenue Service.
16. Grand Strand Aviation and Horry County hereby expressly disclaim any and all liability for the parachute operation. SkyDive MB hereby waives any and all claims it may have against Grand Strand Aviation and Horry County, its shareholders, officers, directors or other agents for any and all personal injury, property damage or other damages it may incur by virtue of utilizing Grand Strand Aviation's leased property or the Grand Strand Airport.
17. SkyDive MB hereby agrees to indemnify and hold harmless from and against all claims, actions, causes of action, damages, costs, and other requests for compensation, arising out of, or caused by, SkyDive MB actions. This indemnity specifically includes, but is not limited to, damages to Grand Strand Aviation's leased property.
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.
19. Grand Strand Aviation reserves the right to cancel this agreement if SkyDive MB does not materially comply with the terms of this agreement. Likewise, SkyDive MB reserves the right to cancel this agreement should Grand Strand Aviation does not materially comply with the terms of this agreement.
20. Grand Strand Aviation, Inc., its officers, directors, employees and shareholders agree not to directly not indirectly compete with SkyDive MB, and shall not operate any competing parachute jumping or similar operation anywhere within the county in which Myrtle Beach and North Myrtle Beach are located for a period of eight years after this agreement expires, is not extended, or is cancelled by either party. In the event this noncompete clause and agreement are litigated, the prevailing party shall recover its attorney fees.

Agreed May 16, 2012, by Grand Strand Aviation, Inc. dba Ramp 66 and SkyDive Myrtle Beach, LLC by the parties below who are authorized to enter into this agreement.

Andrew E.R. Lee , Officer
SkyDive Myrtle Beach, LLC

Robert P. McGroarty, Secretary/Treasurer
Grand Strand Aviation, Inc.

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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

RECEIVED
SEP 09 2016
SC Court of Appeals

APPELLATE CASE NO. 2015-001868

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

v.

HORRY COUNTY..... Respondent

FINAL BRIEF OF APPELLANT

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

Other Counsel of Record:
Michael W. Battle, Esquire
Battle Law Firm, LLC
P.O. Box 530
Conway, SC 29528

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

TABLE OF CONTENTS

Table of Contents i

Table of Authorities ii

Statement of the Case 1

Standard of Review 7

Statement of Issues on Appeal 8

Argument 9

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 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 9

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 14

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 18

IV. The circuit court was guided by the 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 22

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. 32

Conclusion 39

TABLE OF AUTHORITIES

CASES — Page(s)

Adams v. B & D, Inc., 297 S.C. 416, 377 S.E.2d 315 (1989) 30

Allen-Parker Co. v. Lollis, 257 S.C. 266, 185 S.E.2d 739 (1971) 31

Baker v. Gold Seal Liquors, Inc., 417 U.S. 467, 94 S.Ct. 2504 (1974) 10

Beach Co. v. Twillman, Ltd., 351 S.C. 56,
566 S.E.2d 863 (Ct. App. 2002) ..... *passim*

Benya v. Gamble, 282 S.C. 624, 321 S.E.2d 57 (Ct. App. 1984) 29

Berkebile v. Outen, 311 S.C. 50, 426 S.E.2d 760 (1993) 23

Bowers v. Thomas, 373 S.C. 240, 644 S.E.2d 751 (Ct. App. 2007) 7, 34

Bradley v. Hullander, 272 S.C. 6, 249 S.E.2d 486 (1978) 31

Brown v. Leverette, 291 S.C. 364, 353 S.E.2d 697(1987) 10

Capital City Ins. Co. v. BP Staff, Inc., 382 S.C. 92,
674 S.E.2d 524 (Ct. App. 2009) 14-15

Carolina Amusement Co. v. Connecticut Nat. Life Ins. Co.,
313 S.C. 215, 437 S.E.2d 122 (Ct. App. 1993) 29

Crestwood Golf Club, Inc. v. Potter, 328 S.C. 201,
493 S.E.2d 826 (1997) 9, 11-12

Coleman v. Mariner Health Care, Inc., 407 S.C. 346,
755 S.E.2d 450 (2014) 31

Columbia East Assoc. v. Bi-Lo, Inc., 299 S.C. 515,
386 S.E.2d 259 (Ct. App. 1989) 24

Cooper v. Moore, 351 S.C. 207, 569 S.E.2d 330 (2002) 34-35

Ellis v. Taylor, 316 S.C. 245, 449 S.E.2d 487 (1994) 24

First–Citizens Bank & Trust Co. v. Hucks,

305 S.C. 296, 408 S.E.2d 222 (1991) 12

Hagy v. Pruitt, 331 S.C. 213, 500 S.E.2d 168 (Ct. App. 2009) 21

Hamm v. South Carolina Pub. Serv. Comm'n,
312 S.C. 238, 439 S.E.2d 852 (1994) 20

Hill v. National Transportation Safety Board,
886 F.2d 1275, 1279 (10th Cir. 1989) 23

Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000) 34

In re Boston, No. C/A 09-09099-JW, 2010 WL 5128960 at p. 2
(Bankr. D.S.C. Mar. 5, 2010) 30

In re Morrison, 321 S.C. 370, 468 S.E. 2d 651 (1996) 39

Judy v. Martin, 674 S.E.2d 151, 381 S.C. 455 (2009). 39

Klutts Resort Realty, Inc. v. Down'Round Dev. Corp.,
268 S.C. 80, 232 S.E.2d 20 (1977) 25

Koontz v. Thomas, 333 S.C. 702, 511 S.E.2d 407 (Ct. App. 1999) 25

Lancaster Cnty. Bar Ass'n v.S.C. Comm'n on Indigent Def.,
380 S.C. 219, 670 S.E.2d 371 (2008) 17, 34

Maxwell v. Genez, 356 S.C. 617, 591 S.E.2d 26 (2003) 37

McNair v. United Energy Distributors, 390 S.C. 44,
699 S.E.2d 723 (Ct. App. 2010) 7

Moore v. Weinburg, 373 S.C. 209, 644 S.E.2d 740 (Ct. App. 2007) 30

Mullinax v. Bates, 317 S.C. 394, 453 S.E.2d 894 (1995) 10

Myrtle Beach Lumber Co., Inc. v. Willoughby,
276 S.C. 3, 274 S.E.2d 423 (1981) 24

Nash v. Tindall Corp., 375 S.C. 36, 650 S.E.2d 81 (Ct. App. 2007) 13

North Carolina Fed. Sav. & Loan Ass'n v. DAV Corp.,
298 S.C. 514, 381 S.E.2d 903 (1989) 10, 12

Northwest Airlines, Inc. v. American Airlines, Inc.,
989 F.2d 1002 (8th Cir. 1993) 12-13

Parks v. Characters Night Club, 345 S.C. 484,
548 S.E.2d 605 (Ct. App. 2001) 7

Pee Dee State Bank v. Prosser, 295 S.C. 229,
367 S.E.2d 708 (Ct. App. 1988) 30

Penton v. J.F. Cleckley Co., 326 S.C. 275, 280,
486 S.E.742, 745 (1997) 25

Perry v. Bullock, 409 S.C. 137, 761 S.E.2d 251 (2014) 35

Poston v. Holmes Ins. Co., 191 S.C.314, 4 S.E.2d 26 (1939) 17

Q Int'l Courier Inc. v. Smoak, 441 F.3d 214 (4th Cir. 2006) 10

Ranucci v. Crain, 409 S.C. 493, 763 S.E.2d 189 (2014) 34-35

Redwend Ltd. P'ship v. Edwards,
354 S.C. 459, 581 S.E.2d 496 (Ct.App. 2003) 31

Robert Harmon and Bore, Inc., v. Jenkins,
282 S.C. 189, 318 S.E.2d. 371 (Ct. App. 1984) 27

S. Atl. Fin. Servs., Inc. v. Middleton, 356 S.C. 444,
590 S.E.2d 27 (2003) 24

Samples v. Mitchell, 329 S.C. 105, 495 S.E.2d 213 (Ct. App. 1997) 20-21

Sparrow v. Nerzig, 228 S.C. 277, 89 S.E.2d 718 (1955) 9

Southern Const. Co. v. Pickard, 371 U.S. 57, 83 S.Ct. 108 (1962) 9

Stark Truss Co. v. Superior Constr. Corp., 360 S.C. 503,
602 S.E.2d 99 (Ct. App. 2004) 37

Slack v. James, 364 S.C. 609, 614 S.E.2d 636 (2005) 31

State v. Cooper, 342 S.C. 389, 536 S.E.2d 870 (2000) 26, 36

Superior Automobile Ins. Co. v. Maners,

261 S.C. 257, 199 S.E.2d 719 (1973) 30

Terry v. Terry, 400 S.C. 453, 734 S.E.2d 646 (2012) 36

Tillman v. Oakes, 398 S.C. 245, 728 S.E.2d 45 (Ct. App. 2012) 36

Vacation Time of Hilton Head Island, Inc. v. Kiwi Corp.,
280 S.C. 232, 312 S.E.2d 20 (Ct. App. 1987) 34-35

Wachovia Bank, N.A. v. Blackburn, 407 S.C. 321,
755 S.E.2d 437 (2014) 10

Wellman, Inc. v. Square D Co., 366 S.C. 61,
620 S.E.2d 86 (Ct. App. 2005) 30

Wells Fargo Bank, N.A. v. Smith, 398 S.C. 487,
740 S.E.2d 328 (Ct. App. 2012) 10

Wheeler v. Globe Rutgers Fire Ins. Co. of City of N.Y.,
125 S.C. 320, 325, 118 S.E.2d 609, 610 (1923) 25

Williams v. Watkins, 380 S.C. 319, 681 S.E.2d. 87 (Ct. App. 2009) 21

Worsley Cos. v. Town of Mt. Pleasant, 339 S.C. 51, 528 S.E.2d 657 (2000) 21

STATUTES

S.C. Const. Art. I, § 14 20

Rule 205 SCACR 39

Rule 241, SCACR ..... *passim*

Rule 5, SCRCP 19

Rule 8, SCRCP 21

Rule 12, SCRCP ..... *passim*

Rule 13, SCRCP ..... *passim*

Rule 15, SCRCP 20-21

Rule 42, SCRCP.....21

Rule 62, SCRCP.....38

Rule 2, SCRMC.....18, 19, 20

Rule 3, SCRMC.....19

Rule 7, SCRMC.....19

Rule 8, SCRMC.....19

Rule 9, SCRMC.....19

Rule 14, SCRMC.....*passim*

49 USC § 40116.....23

S.C. Code Ann. § 14-8-200.....35

S.C. Code Ann. § 18-7-170.....*passim*

S.C. Code Ann. § 23-3-10.....17

S.C. Code Ann. § 27-33-10.....*passim*

S.C. Code Ann. § 27-33-30.....32

S.C. Code Ann. § 27-33-40.....33

S.C. Code Ann. § 27-37-130.....*passim*

S.C. Code Ann. § 27-40-800.....36

OTHER AUTHORITIES

15 S.C. Jurisprudence Appeal and Error § 55.....36

James F. Flanagan, *South Carolina Civil Procedure* (3d ed. 2010).....15

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.

[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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APPELLATE CASE NO. 2015-001868

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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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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TABLE OF CONTENTS

Table of Contents.....i

Table of Authorities.....ii

Statement of Issues on Appeal.....1

Statement of the Case.....1

Standard of Review.....4

Statement of Facts.....5

Argument.....8

Ia. The circuit court correctly denied Appellant's waiver/counterclaim argument because Appellant did not raise this argument to the magistrate, which means it is not preserved.....8

lb. Even if the waiver argument was preserved, and it is not, the Court should affirm because Horry County's claim for summary ejectment was not a compulsory counterclaim to Appellant's separate lawsuit, which principally seeks money damages.....10

II. The circuit court and the magistrate correctly held I 2(b)(8),SCRCP, which applies when another action is pending between the same parties, did not bar the County from proceeding with summary ejectment at the same time Appellant was pursuing a separate suit for damages against the County and certain county officers.....11

III. The circuit court and the magistrate correctly followed the rules of court and Appellant received due process.....17

IV. The Circuit Court and the Magistrate correctly found that a landlord tenant relationship existed between Appellant and Horry County and that Appellant did not have a right to continue occupying the County's property.....20

V. The circuit court correctly read the magistrate's order staying the ejectment to expire at the conclusion of the circuit court appeal, and this issue is moot because Appellant has vacated the premises.....24

Conclusion.....26

TABLE OF AUTHORITIES

CASES Page(s)

Bamberg Banking Company v. Matthews, 132 S.C. 130, 128 SE 718(1925).....10

Beach Co. v. Twillman Ltd., 351 S.C. 56, 62, 566 S.E.2d 863, 865(Ct.App.2002).....9

Beatty v. Liberty Mut. Ins. Group, 893 N.E.2d 1079, 1084 (Ind.App.Ct.2008).....12

Beatty v. National Surety Co., 132 S.C. 45, 128 S.E. 40 (1925).....9

Bowers v. Thomas, 373 S.C. 240, 244-45, 644 S.E. 2d 751,753 (Ct.App.2007).....5

Burnett v. Holiday Bros., 279 S.C. 222, 225, 305 S.E.2d 238, 240(1983).....21

Bums v. Wannamaker, 281 S.C.352, 357, 315 S.E.2d 179, 182(Ct. App. 1984) 4

Capital City Ins. Co. v. BP Staff, Inc., 382 S.C. 92,99, 674 S.E.2d 524, 528 (Ct. App 2009).....12

Capital City Ins. Co. v. BP Staff, Inc., 382 S.C. 92, 106, 674 S.E.2d 524, 532 (Ct. App. 2009).....13, 15

Connecticut Nat. Bank v. Wilson, 284 S.C. 415, 416,326 S.E.2d 657,658 (1985).....13

Conran v. Joe Jenkins Realty, Inc. 263,S.C. 332, 334, 210 S.E.20 309,310 (1974).....5

Cricket Cove Ventures, LLC v. Gilland, 390 S.C.312,320, 701 S.E.2d, 39, 44 (Ct. App. 2010).....12

Cricket Cove Ventures, LLC v. Gilland, 390 S.C. 312,316-29,701 S.E.2d 39, 41-48 (Ct. App 2010).....13, 15

Curtis v. State, 345 S.c. 557, 567-9/,549 S.E.2d 591,596 (2001).....26

Davis v KB Home of S. Carolina, Inc., 394 S.C.116,127, 713 S.E.2d 799,804 (Ct. App. 2011).....23

Gartside v. Gartside,(S.C. App 2009) 383 S.C. 35,677 S.E.2d 621.....10

Herron v. Century BMW, 395 S.C.461, 465, 719 S.E.2d 640, 642 (2012).....10

Hickman v. Hickman, 301 S.C. 455, 456, 392 S.E.2d 481,482 (Ct. App. 1990).....10

Jackson v. State, 331 S.C. 486, 489 S.E.2d 915 (1997).....25

Judy v. Martin, 381 S.C. 455, 674 S.E.2d 151(2009).....24

Limehouse v.Hulsey, 404 S.C. 93, 111, 744 S.E.2d 566,576 (2013).....19

Lindler v. Baker, 280 S.C. 130, 311 s.e. 20, 99 (Ct.App. 1984).....9

Mathis v. South Carolina State Highway Dep't, 260 S.C.344, 346, 195 S.E.2d 713,715 (1973).....26

Metro. Life ins. Co. v. Stuckey, 194 S.C. 469,475, 10 S.E.2d 3, 5-6 (1940).....16

S. Carolina Dep't of Soc. Servs. v. Foggie, 271 S.C. 109,110, 245 S.E.2d 423 (1978).....9

S.C. Public Serv. Comm'n v. City of Rock Hill, 268 S.C. 405,408, 234 S.E.2d 228,229 (1977).....12

Stanford v. Crude!, 93 S.C. 367,370, 76 S.E. 986, 987 (1913).....5

State ex rel. Nesbitt v. Marshall (1984) 24 SC 507.....10

Stevens & Wilkinson of S. Carolina, Inc. v. City of Columbia, 409 S.C. 563,567, 762 S.E.2d 693, 695 (2104).....10

Swygert v. Goodwin (1980) 32 SC 146, 10SE 933.....10

United Dominion Realty T111st, Inc. v. Wal-Ma,1Stores, Inc.,307 S.C.102, 413 S.E.2d 866 (Ct. App. 1992).....25

Vacation Time of Hilton Head Island, Inc. v. Kiwi Corp., 280 S.C. 232,233,312, s.e.20 20, 21 (Ct. App. 1984).....4, 5

Wagner v. Wagner, 286 S.C. 489, 491-92, 335 S.E.2d 246,247 (Ct. App. 1985).....9

Wanzer v. Weader, 280 S.C. 81, 83, 311 S,E.2d 78, 79 (1983).....24

Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1988).....10

Wimberly v. Shorter, 204 S.C. 558, 30 S.E.2d 593 (1944).....11

STATUTES

Rule 1, SCRMC.....19

Rule 59 (e), SCRCP.....4, 9-10

Rule 12 (b)(8), SCRCP.....8,9,11-15

Rule 12 (a), SCRCP.....19

Rule 13, SCRMC.....20

Rule 13 (a), SCRCP.....9-10

Rule 8 (c), S.C.R. Civ. P.....9

Rule 13, SCRMC.....20

Rule 241 SCACR.....25

S.C. Code Ann. §27-33-30.....21

S.C. Code Ann §32-3-10.....21

S.C. Code Ann §27-35-40.....21, 22

S.C. Code Ann § 22-3-30.....2

S.C. Code Ann §27-37-20.....1, 8, 11, 15-16

S.C. Code Ann. § 27-37-130.....25

OTHER AUTHORITIES

Trial Handbook for South Carolina Lawyers § 4:34.....14

STATEMENT OF ISSUES ON APPEAL

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

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

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

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

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

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

STATEMENT OF THE CASE

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

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

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

Before the magistrate issued a writ of ejectment, Appellant appeared on June 13, 2014, and responded to the Rule to Vacate/Eject with a Motion to Remove the proceeding from magistrate's court pursuant S.C. Code Ann. §22-3-30 on the grounds that the same proceeding was pending in circuit court between Appellant and Horry County together with several individuals. Appellant also alleged the underlying facts were in dispute. [Rp86]

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

On that same day in presence of the attorneys of both parties' attorneys the Magistrate set a trial date of July 23, 2014. The Magistrate subsequently confirmed this date via formal notice, in writing. [Rp79]

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

Appellant's motion to reconsider on July 23, 2014, the same day as the scheduled hearing on the Rule to Vacate/Eject. [Rp347]

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

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

Appellant duly filed its notice of appeal to Circuit Court on July 25, 2014. Rp82. On August 1, 2014, Appellant obtained an order from the Magistrate staying execution of the ejectment upon payment of rent established by the Magistrate until the matter could be determined in Circuit Court.

The appeal was heard by Circuit Court Judge Larry B. Hyman on May 6, 2015, who dismissed Appellant's appeal and affirmed the magistrate's order requiring Appellant to vacate the premises. [Rp10]. Thereafter, Appellant filed a Motion to Reconsider which was also denied. Appellant duly filed its appeal of Judge Hyman's May 26 order to the Court of Appeals.

On September 16, 2015, Horry County issued a seventy-two (72) hour notice of intent to eject Appellant on the grounds that a supersedeas order and bond were required in order to stay the ejectment. [Rp324].

On September 17, 2015, Appellant filed a Notice of Motion for Emergency Injunction and Stay of Ejectment. [Rp164]. Judge Hyman conducted a hearing on September 22, 2015.

On October 13, 2015, Judge Hyman denied Appellant's Motion for Injunction and Stay of Ejectment. [Rp28]. Appellant served a timely Rule 59(e) motion to reconsider the October 13, 2015 Order. [Rp179] and on November 19, 2015, Judge Hyman denied Appellant's Motion to Reconsider. Appellant filed a second notice of appeal to the Court of Appeals but did not seek supersedeas from the court. The Appeals were consolidated by consent. Appellant has now vacated the county's building.

STANDARD OF REVIEW

The Court of Appeals will presume that an affirmance by a Circuit Court of a magistrate's judgment was made upon the merits where the testimony is sufficient to sustain the judgment of the magistrate and there are no facts that show the affirmance was influenced by an error of law. *Burns v. Wannamaker*, 281 S.C. 352, 357, 315 S.E.2d 179, 182 (Ct.App.1984). Specifically, "[i]n ejectment proceedings first heard in magistrate's court, the Court of Appeals is without jurisdiction to reverse the findings of fact of the circuit court if there is any supporting evidence." *Vacation Time of Hilton Head Island, Inc. v. Kiwi Corp.*, 280 S.C. 232, 233, 312 S.E.2d 20, 21 (Ct.App.1984).

"Unless we find an error of law, we will affirm the judge's holding if there are any facts supporting his decision."

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

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

STATEMENT OF FACTS

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

In May of that year, Ramp 66 entered an agreement with Appellant Skydive Myrtle Beach, Inc. to provide services for tandem parachute jumps for Appellant's customers and to provide other business services to be performed by Ramp 66. [Rp359].

The Ramp 66 agreement provided for Appellant to use a minimum of 2500 square feet in the "bird hangar" (now known as Hangar 7) for use during daylight hours without payment 365 days a year. [Rp359]. Payment for Ramp 66's business services to Appellant were based upon a percentage of Appellant's gross income. [Rp359]. This agreement stated it would remain in effect through the existence of an underlying lease agreement between Ramp 66 and Horry County and it was scheduled to end in 2020. However, the lease agreement between Ramp 66 and Horry County terminated by mutual agreement of the parties in 2013. Horry County paid Ramp 66 $800,000 to buy out the remainder of its lease for the airport.

On September 13, 2013, Horry County through its Department of Airports entered a space use agreement (Hangar 7 permit) with Appellant permitting Appellant to use the approximately 6800 square feet of space in Hangar 7 twenty-four hour a day seven days a week. [Rp335]. The agreement between Appellant and Horry County was scheduled to end January 31, 2014. Appellant's payment for the use of Hangar 7 was a monthly payment of One Thousand Two Hundred & 00/100 ($1200.00) dollars per month. [Rp336]. Horry County reserved the right to adjust the amount of the payment for use of Hangar 7 upon thirty days' notice to Appellant. [Rp336]. Horry County was not required to provide any business services to Appellant other than the use of Hangar 7. [Rp335].

The Hangar 7 permit contained the following language: "This permit constitutes the entire agreement of the parties with respect to the subject matter hereof and supersedes all previous agreements, representations and understandings concerning the

same, whether written or oral. The provisions of the Permit may be modified, amended or waived only by written instrument executed by the County and Company." [Rp339]. The Hangar 7 permit was duly signed by Horry County and Appellant. Again it expired by its own terms on January 31, 2014. [Rp340]

On February 19, 2014, Horry County offered to enter a second agreement with Appellant. [R p 53] Appellant refused to accept the agreement offered by Horry County and on February 28, 2014, Appellant filed suit against Horry County alleging fraud, conspiracy, breach of contract, defamation, trespass and unfair trade practices, etc. The lawsuit is captioned *Skydive Myrtle Beach, Inc. (f/k/a Skydive Myrtle Beach, LLC) v. Horry County & Horry County Department of Airports, H. Randolph Haldi, Pat Apone, Tim Jackson and Jack Teal,* C/A No. 2014-CP-26-01193.[R p 33] Horry County duly answered with a qualified general denial and several affirmative defenses. [R p 69]. Even though Appellant refused to accept the agreement offered by Horry County, Appellant refused to vacate Hangar 7.

By a letter dated April 28, 2014, attorneys for Horry County gave Appellant written notice of termination.[Rp333] . The letter also gave notice to Appellant that if Appellant and Horry County had not reached an agreement by May 27, 2014, Horry County would bring legal action to eject Appellant from Horry County's property. [Rp334] Horry County and Appellant did not reach an agreement, but Appellant still refused to vacate the premises.

On June 5, 2014, Horry County elected to bring summary ejectment proceedings under S.C. Code Ann. §27-37-20 and filed an application in magistrate's court for a Rule to Vacate/Eject Appellant from Hangar 7. [Rp76]. In response, Appellant filed a Motion to Remove the case under Rule 12 (b) (8), SCRCP on the ground that Appellant's lawsuit in circuit court was the same lawsuit between the same parties. [Rp86] . The summary ejectment proceeding was assigned to Magistrate Christopher J. Arakas. Judge Arakas denied Appellant's Motion to Remove and Appellant's subsequent motion for reconsideration. [Rp3].

The summary proceeding was tried on July 23, 2014, and Appellant was ordered to vacate the premises. [Rp3]. Appellant appealed and obtained an order in magistrate's court which according to its terms stayed the ejectment until the appeal was decided in circuit court. [Rp 82]. The circuit court dismissed Appellant's appeal and refused to grant a stay of Appellant's ejectment while Appellant's sought review in this court. [Rp10, 20, and 32.]

ARGUMENTS

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

Appellant claims Horry County's Rule to Vacate/Eject was a compulsory counterclaim that should have been pled in response to Appellant's lawsuit filed in circuit court. Appellant claims Horry County's failure to include a Rule to Vacate/Eject as a counterclaim in its answer to Appellant's circuit court lawsuit results in a forfeiture of Horry County's right to eject Appellant from its property.

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

Appellant did not raise Waiver or the Rule about Compulsory Counterclaims in the Magistrate's proceedings. The first time Appellant argued Rule 13, SCRCP and the issue of waiver was when Appellant moved under Rule 59(e), SCRCP, to have Judge Larry B. Hyman reconsider his order dismissing Appellant's appeal from magistrate's court. Prior to that time, Appellant was arguing that its pending lawsuit in circuit court was the same as Horry County's Rule to Vacate\Eject and should be dismissed under Rule 12(b) (8), SCRCP. [Rp 82].This argument is different than the waiver argument Appellant is making now.

Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide the Court with a platform for meaningful appellate review. *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2012). "It is

axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Furthermore, a party cannot use a Rule 59(e) motion to advance an issue the party could have raised to the lower court prior to judgment, but did not. *Hickman v. Hickman*, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct.App.1990); Stevens *& Wilkinson v. City of Columbia*, 409 S.C. 563, 567, 762 S.E.2d 693, 695 (2014). *Gartside v. Gartside* (G.App. 2009) 383 S.C. 35, 677 S.E.2d 621 (A party cannot use a motion to alter or amend a judgment to present to the lower court an issue the party could have raised prior to judgment but did not.)

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

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

In *Bamberg Banking Company v. Matthews*, 132 S.C. 130, 128 SE 718 (1925), The Supreme Court declared that an allegation of fraud in the procurement of the lease will not oust a Magistrate's jurisdiction over an ejectment action. ("A tenant cannot oust the magistrate of jurisdiction in [summary ejectment proceedings] ... by the assertion of a superior title in himself ...."); id. at 475–76, 10 S.E.2d at 6 (Otherwise any tenant, by

merely denying the landlord's title or by asserting superior title in himself or in another, could oust the magistrate of jurisdiction and frustrate the plain and salutary object of the statute."). *Wimberly v Shorter*, 204 S.C. 558, 30 SE 2d 593 (1944).

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

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

STANDARD OF REVIEW

The appellate court applies the same standard of review as the circuit court in scrutinizing the application of Rule 12(b) (8), SCRCP. *Capital City Ins. Co. v. BP Staff,*

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

DISCUSSION

In South Carolina, dismissal under Rule 12(b) (8) may be proper when there is (1) another action pending, (2) between the same parties, (3) for the same claim. Rule 12(b)(8), SCRCP. The rule has historic ties to a former statute providing a defendant a similar opportunity to demur. Our Supreme Court traditionally interpreted that statute narrowly, stating that it only applied when there was identity of parties, causes of action and relief. *S.C. Public Serv. Comm'n v. City of Rock Hill*, 268 S.C. 405, 408, 234 S.E.2d 228, 229 (1977). This approach is consistent with modern day practice other Courts apply to rules similar to our Rule 12(b)(8). See, e.g., Beatty *v. Liberty Mut. Ins. Group*, 893 N.E.2d 1079, 1084 (Ind.App.Ct.2008) (applying 12(b)(8) dismissal "where the parties, subject matter, and remedies are precisely the same, and it also applies when they are only substantially the same."). This Court has explained the rule is interpreted narrowly such that the claim must be precisely or substantially the same in both proceedings in order for the drastic remedy of dismissal to be appropriate under Rule 12(b) (8). *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 105-06, 674 S.E.2d 524, 531-32 (Ct. App. 2009).

A. Identity of Parties.

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

The present case is on point with *Connecticut Nat. Bank v. Wilson*, 284 S.C. 415, 416, 326 S.E.2d 657, 658 (1985), which predates the adoption of Rule 12(b)(8). In that action to collect on three promissory notes, the plaintiff-appellant, Connecticut National Bank, sued the defendant-respondent, Walter W. Wilson, Jr., a resident of Beaufort, South Carolina, in the S.C. Court of Common Pleas. This action was instituted approximately two months after the commencement of an action in the United States District Court of Connecticut by Wilson and thirty-three other plaintiffs against the same bank. The Connecticut action claimed violations of the Securities Exchange Act, fraud and negligence, and sought rescission of various promissory notes. The Notes included

the same promissory notes at issue in State court. The Supreme Court held the parties, objects, issues, causes of action, and relief involved in the South Carolina action were not identical with those in the Connecticut action. *Id.* The same reasoning applies here.

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

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

B. Identity of Claims.

The sixteen separate claims brought in Appellant's circuit court lawsuit and the Rule to Vacate/Eject action brought by Horry County in magistrate's court are fundamentally different. Fifteen of Appellant's sixteen claims seek damages for various alleged acts of individuals and Horry County. Those prayers for relief demand judgment against all of the defendants, jointly and severally, for actual damages allegedly incurred by Appellant, for the reasonable value of the labor, materials and equipment allegedly furnished by Appellant, certain consequential damages, and attorney fees as well as costs. [Rp 33]. Appellant's other prayers for relief demand that all of the defendants be enjoined and restrained from future tortious interference with Appellant's allegedly legitimate right to conduct non-emergency parachute operations, as well as a Writ of

Mandamus against the Airport requiring it to negotiate in good faith and perform various other actions.

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

Appellant claims its complaint in circuit court alleges a leasehold interest in Hangar 7 from which it was being improperly ejected by Horry County. This is not so. First, no ejectment proceeding had been initiated by Horry County when Appellant's complaint was filed. Second, Appellant asked for damages because it alleged individual defendant H. Randolph Haldi had written a retaliatory eviction notice by sending a letter and a new proposal for the use of Hangar 7. As Appellant represented to the magistrate, Appellant's facts derive from an alleged tort rather than landlord-tenant or commercial lease. [Rp 88].

Horry County further respectfully disagrees with Appellant's statement that there is *de facto* identity of parties because all parties were represented by the same counsel in both actions and the individual defendants were dismissed from the circuit court action.

First, Battle Law Firm, LLC, represents Horry County and Horry County Department of Airports, but Aiken, Bridges, Elliott, Tyler & Saleeby, P.A. represents the individual defendants. Further, the circuit court action has been stayed because Appellant is appealing the dismissal of the individual defendants. See: *Skydive of Myrtle Beach, Inc. (f/k/a Skydive Myrtle Beach, LLC) Appellant, v. Horry County, Horry County Department of Airports, H. Randolph Haldi, Pat Apone, Tim Jackson and Jack Teal, Respondents of whom H. Randolph Haldi, Pat Apone and Jack Teal are Respondents, Appellate Case No. 2014-002491.*

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

Appellant's circuit court case is nearly two years old. Discovery in Appellant's circuit court case has been stayed during the appeal of the dismissal of the individual defendants, which is still pending. It seems as though Appellant's circuit court lawsuit will continue on for several more years before the merits of Appellant's circuit court claims are reached, given Appellant's demonstrated practice of seeking reconsideration and appealing every adverse decision. [See Transcript of Record, *passim*]. The County

should not have to wait to repossess its property, and the law does not require the County to do so.

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

A. Justice of the case.

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

It is an undisputed fact that Appellant occupied Horry County's property from January 31, 2014 until October 22, 2015, as a result of Appellant's legal maneuvers. Two judges, on two occasions, have looked at "the merits and the justice" of Appellant's occupation and determined that Appellant does not have the right to occupy Horry County's property and Appellant should be ejected. Appellant has also filed a complaint with the Federal Aviation Administration alleging unlawful discriminatory conduct relating to the occupancy and use of the lease interest, federal law, and the recognized aeronautical activity of skydiving. [Rp 82]. Appellant's FAA complaint was dismissed without prejudice. [Rp 82].

B. Magistrate Court's Timeline.

June 5, 2014	Horry County files Rule to Vacate/Eject in Magistrate's Court. Horry County sends electronic notice to Appellant's Attorney.

June 13, 2014	Appellant files answer and moves to remove case to circuit court.
June 13, 2014	Magistrate Summons noticing hearing date of July 2, 2014 Motion to Remove.
July 2, 2014	Appellant's Motion to remove is heard and denied. Magistrate, in presence of the attorneys chooses July 23, 2014 for the bench trial.
July 8, 2014	Magistrate's Summons giving notice of Bench Trial on Horry County's Rule to Vacate/Eject
July 18, 2014	Date on letter from Appellant asking magistrate to reconsider denial of Motion to Remove to circuit court and asking for continuance as well as Jury Trial.
July 22, 2014	Date Appellant's letter actually received by Horry County.
July 23, 2014	Appellant's Motion's heard and denied.
July 23, 2014	Bench trial as scheduled on Horry County's Rule to Vacate/Eject.
July 25, 2014	Appellant files Notice of Appeal to Circuit Court.

C. Magistrate's Rules of Procedure.

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

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

Appellant's request for a jury trial was untimely. If either party wants a jury trial, it must be requested in writing at least five (5) working days prior to the original date set for trial. Rule 13, SCRMC. The original date set for trial was July 23, 2014. Appellant's motion to reconsider was dated July 18, 2014. Assuming for the sake of argument that the motion for reconsideration contained a request for a jury trial, the request was made only three working days before the original date set for trial, not five working days, as required by the Rule. The magistrate was correct to proceed with a bench trial on July 23, 2014.

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

Horry County owns the airport property, and the County was leasing the airport property to Grand Strand Aviation, Inc. The letter agreement between Appellant and Grand Strand Aviation, Inc. expressly acknowledged that agreement was subject (meaning subordinate) to a different lease agreement between Horry County and Grand Strand Aviation, Inc. [Rp 359]. The agreement explained Appellant's Relationship with Grand Strand Aviation, Inc. remained in effect through the lease agreement between Horry County and Grand Strand Aviation, Inc. unless both parties agreed to any changes in writing. Contrary to Appellant's claim, the phrase "both parties" referred to Horry County and Grand Strand Aviation, Inc. [R p 359] Horry County and Grand Strand Aviation, Inc.'s lease ended when Horry County paid Grand Strand Aviation, Inc. $800,000 to buy out the remainder of the airport property lease. [R p 280]

Appellant's agreement with Grand Strand Aviation was never recorded and Horry County was not a party to it. In order to give notice to third persons, any lease or agreement for the use or occupancy of real estate shall be recorded in the same manner as a deed of real estate. *S.C. Code Ann. § 27-33-30.* Conveyances of lands shall be valid as to subsequent purchasers, without notice only when recorded. *Burnett v. Holliday Bros.*, 279 S.C. 222, 225, 305 S.E.2d 238, 240 (1983). Appellant claims that Horry County had notice of the 2012 agreement because Grand Strand Aviation was the agent of Horry County. That claim is false and Appellant has not offered any proof of that Grand Strand Aviation was Horry County's agent or that Horry County had actual notice of the 2012 agreement. Further, the 2012 agreement is not valid as to Horry County because it was for a period greater than one year and it was not signed by Horry County. To charge any

person upon any contract or sale of lands, tenements or hereditaments or any interest in or concerning them the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some person thereunto by him lawfully authorized. *S.C. Code Ann. § 32-3-10, et. al.*

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

> When a person enters upon or uses the premises of another without agreement or without the permission of the owner or by trespass the owner may at his option waive such tort and treat and deem such person a tenant at will. In such case the landlord shall have and be entitled to a reasonable rental for the use and occupation of such premises and all remedies for the enforcement of his rights in respect thereto as in other cases of tenancy at will. *S.C. Code Ann. § 27-35-40*

Appellant's claim that the agreement between Appellant and Grand Strand Aviation, Inc. was binding on Horry County is not accurate. Evidence that the agreement between Appellant and Grand Strand Aviation, Inc. ended is found in Appellant's signature on the Space Use Permit which plainly stated that it superseded all previous agreements. [Rp335] Additional evidence that no written agreement existed between

Appellant and Horry County in June of 2014, can be found in the deposition testimony of Aaron Holly, Appellant's president and owner. His testimony was introduced during the appeal hearing in circuit court. When asked if there was any written agreement that he was aware of that gave Appellant the right to occupy Hangar 7, Mr. Holly testified, "No, sir." [Rp268]

Appellant claims a lease was created through the actions of the parties. [Rp40] If any agreement existed for the use of Hangar 7, it existed under *Section 27-35-40* and the agreement was a month to month tenancy. On April 28, 2014, Horry County through its attorney sent notice to Appellant that the Space Use Permit terminated. [Rp333] Appellant was further notified that if it did not vacate the premises or enter a new mutually agreeable Space Use Permit or lease by May 27, 2014, Horry County would bring legal action for ejectment. [Rp333]. When Appellant refused to enter a new agreement or to vacate Hangar 7 after notice Horry County properly exercised its statutory rights.

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

Even if the issue of whether the Space Use Permit could replace the May 10, 2012, agreement were relevant. Judge Hyman correctly found that under the doctrine of

merger, the permit superseded and replaced any other agreement entered between Respondent or its predecessors and Appellant in connection with the use of Hangar 7. *Davis v. KB Home of S. Carolina, Inc.*, 394 S.C. 116, 127, 713 S.E.2d 799, 804 (Ct. App. 2011) aff'd in part, vacated in part, No. 2011-199587, 2014 WL 2535489 (S.C. Jan. 29, 2014) (employment application was superseded and rendered invalid by the presence of a merger clause in his subsequent employment agreement).

The express terms of the Ramp 66 agreement provided that Appellant would be permitted the use of a minimum of 2500 square feet in "Bird Hangar" for use during daylight hours without paying a fee.[Rp359]. Appellant entered a new agreement with the County that permitted it to use 6800 square feet twenty four hours a day. In addition, Appellant agreed to pay the County $1200 per month for the use of 6800 square feet without limitation of the use to daylight hours.[Rp335] The new agreement expressly provided that the permit constituted the entire agreement of the parties with respect to the use of Hangar 7 and superseded all previous agreements, representations and understandings concerning the same, whether written or oral. [Rp339]. The consideration for the Hangar 7 agreement was that Appellant was permitted to occupy and use space in Hangar #7 subject to the restrictions and terms of the Hangar 7 agreement. One of the terms of the Hangar 7 agreement was that it replaced and superseded all other agreements whether written or oral. [Rp339]

When a contract is unambiguous, clear and explicit, it must be construed according to the terms the parties have used, to be taken and understood in their plain,

ordinary and popular sense. *Warner v. Weader*, 280 S.C. 81, 83, 311 S.E.2d 78, 79 (1983).

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

As in the previous argument, Appellant's claims in connection with the application of the statute regarding stays are guided by factual errors. The terms for Appellant's Bond to Stay Execution on Appeal are clearly stated in the order itself. [Rp2] Appellant's Request that the magistrate stay execution on the Judgment for Ejection asked for a stay until the matter was heard on appeal and decided by the Circuit Court. [Rp2]. The magistrate's order expressly stated that execution on the ejection was stayed until the action was heard on appeal and decided by the Circuit Court. [Rp2]. After the appeal of the Judgment of Ejection was decided by the Circuit Court, the Magistrate's order to stay execution on appeal ended according to its own terms. The Magistrate's unappealed order is the law of the case. *Judy v. Martin,* 381 S.C. 455, 674 S.E.2d 151 (2009).

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

Horry County contends that *S.C. Code §27-37-130* is not applicable to the bond set in magistrate's court. The bond for which Appellant moved did not comply with the requirements of Section *27-37-130.* That statute requires a bond amount that is

sufficient to cover all costs and damages which the landlord may sustain. The money paid by the Appellant only brought the past due rent current and obligated the Appellant to continue paying rent until the matter was decided by the Circuit Court. Appellant's rights were not conditioned for the payment of all costs and damages which the landlord may sustain, as required by the Statute [Rp2].

Horry County also contends that Appellant's claims in Argument V in connection with the stay of Execution of the Judgment are moot because Appellant has vacated the premises. Appellant has not requested reinstatement to Hangar 7 as part of the relief sought in the present appeal, and, Appellant did not seek supersedeas in this Court. An appellate court will not pass on moot and academic questions or make an adjudication where there remains no actual controversy. *Jackson v. State*, 331 S.C. 486, 489 S.E.2d 915 (1997). Moot appeals differ from unripe appeals in that moot appeals result when intervening events render a case nonjusticiable. See *Jean Hoefer Toal, Shahin Vafai & Robert A. Muckenfuss, Appellate Practice in South Carolina 122* (1999). "A case becomes moot when judgment, if rendered, will have no practical legal effect upon [the] existing controversy. This is true when some event occurs making it impossible for [the] reviewing Court to grant effectual relief." *Mathis v. South Carolina State Highway Dep't*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973). *Curtis v. State*, 345 S.C. 557, 567-68, 549 S.E.2d 591, 596 (2001).

CONCLUSION

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

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July 21, 2016

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

RECEIVED
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SC Court of Appeals

APPELLATE CASE NO. 2015-001868

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

v.

HORRY COUNTY.....Respondent

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

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TABLE OF CONTENTS

Table of Contents i

Table of Authorities ii

Argument 1

I. Introduction 1

II. Argument I(A) – Preservation of Rule 13 Argument 1

III. Argument 1(B)—Merits of Rule 13 Argument 2

IV. Argument II – Merits of Rule 12(b)(8) Argument 3

A. Identity of Parties 3

B. Substantially Similar Claims 4

V. Argument III – Appellant's Due Process 5

VI. Argument IV – Landlord Tenant Issues 6

VII. Argument V – Automatic Stay 7

A. Abandonment 7

B. Mootness 9

Conclusion 11

TABLE OF AUTHORITIES

Page(s)

CASES

Abbeville School Dist. v. State, 410 S.C. 619, 767 S.E.2d 157 (2014) 10

Allen v. South Carolina Alcoholic Bev. Comm'n, 321 S.C. 188, 467 S.E. 2d. 450 (Ct. App. 1996) 1

Broom v. Jennifer J., 403 S.C. 96, 742 S.E.2d 382 (2013) 6, 8

Capital City Ins. Co. v. BP Staff, Inc., 382 S.C. 92, 674 S.E.2d 524 (Ct. App. 2009), ... 4

Carolina Dep't of Transp. v. M & T Enter. of Mt. Pleasant, LLC, 379 S.C. 645, 667 S.E.2d 7 (Ct. App. 2008) 1

Connecticut Nat'l Bank v. Wilson, 284 S.C. 415, 326 S.E.2d 657 (1985). 4, 5

Cricket Cove Ventures, LLC v. Gilland, 390 S.C. 312, 701 S.E.2d 39 (Ct. App. 2010)) ..... passim

Curtis v. State, 345 S.C. 557, 549 S.E.2d 591 (2001) 11

First Sav. Bank v. McLean, 314 S.C. 361, 444 S.E.2d 513 (1994) 6

Ford v. State Ethics Comm'n, 344 S.C. 642, 545 S.E.2d 821, 823 (2001) 1

Glasscock, Inc. v. U.S. Fid. & Guar. Co., 348 S.C. 76, 557 S.E.2d 689 (Ct. App. 2001); 6

Holmes v. East Cooper Community Hospital, 408 S.C. 138, 758 S.E.2d 483 (2014) 1

In Re McCracken, 346 S.C. 87, 551 S.E.2d 235 (2001) 10

I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716, 724 (2000) 2

State v. Colf, 332 S.C. 313, 504 S.E.2d 360 (Ct. App. 1998) 6

S.C. Ret. Syst. Inv. Comm'n v. Loftis, 402 S.C. 382, 741 S.E.2d 757 (2013). 9

Turner v. South Carolina Dep't Environ. Control, 377 S.C. 540, 661 S.E.2d 118 (Ct. App. 2008) ..... passim

United Dominion Realty Trust, Inc. v. Wal-Mart Stores, Inc., 307 S.C. 102, 413 S.E.2d 866 (Ct. App. 1992) 8, 9

Vacation Time of Hilton Head Island, Inc. v. Kiwi Corp., 280 S.C. 232, 312 S.E.2d 20 (Ct. App. 1987) 8

Wachesaw Plantation East Community Services Ass'n, Inc. v. Alexander, 414 S.C. 355, 778 S.E.2d 898 (2015) 9, 10

RULES and STATUTES

Rule 5(b)(3), SCRCP 1

Rule 12(b)(8), SCRCP ..... passim

Rule 13, SCRCP ..... passim

Rule 58, SCRCP 1

Rule 62(f), SCRCP 8

Rule 241(b)(10), SCACR ..... passim

S.C. Code Ann. § 18-7-170 2

S.C. Code Ann. § 27-33-30 7

S.C. Code Ann. § 27-37-10 8

OTHER AUTHORITIES

S.C. Const. Art. I, § 14 5

INTRODUCTION

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

ARGUMENT I(A)

The County first raises a preservation issue, contending that the first time SDMB raised the Rule 13, SCRCP issue was in a motion to reconsider to Judge Hyman. [Resp. Brief. p. 9]. This is incorrect. SDMB addressed the issue to Judge Hyman in its proposed order of May 11, 2015. [R. pp. 406-407]. Both this Court and our Supreme Court have indicated that Proposed Orders are sufficient to permit issue preservation. *Holmes v. East Cooper Community Hospital*, 408 S.C. 138, 160, 758 S.E.2d 483, 495 n. 16 (2014) (indicating issue preservation can be made in a proposed order); *Carolina Dep't of Transp. v. M & T Enter. of Mt. Pleasant, LLC*, 379 S.C. 645, 559, 667 S.E.2d 7, 15 n. 7 (Ct. App. 2008) (holding that an issue raised in a proposed order submitted to the circuit court, would have been preserved except for the appellant's failure to file a Rule 59(e), SCRCP, motion); *see also* Rule 5(b)(3), SCRCP (contemplating how proposed orders are to be exchanged); *Allen v. South Carolina Alcoholic Bev. Comm'n*, 321 S.C. 188, 192, 467 S.E. 2d. 450, 453 (Ct. App. 1996) (discussing procedural implications in case with proposed orders). Moreover, it is well-settled that until a final order is written and entered, a court has not made a final decision. Rule 58, SCRCP; *Ford v. State Ethics Comm'n*, 344 S.C. 642, 646, 545 S.E.2d 821, 823 (2001).

Because SDMB argued the matter to the Circuit Court prior to the May 29, 2016 Order [R. pp. 406-407], and filed a timely Rule 59(e) motion thereto which covered the

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

As far as presentation to the Magistrate Court, to the extent this is required in light of S.C. Code Ann. § 18-7-170 ("the appellate court shall give judgment according to the justice of the case, without regard to technical errors and defects which do not affect the merits"), then SDMB submits that the Rule 12(b)(6) motion filed June 13, 2014 sufficiently raised the issue to the Magistrate. [R. pp. 86]. As discussed in the Brief of Appellants and at Section III of this brief below, the lack of substantive due process in the Magistrate Court proceedings should further militate in Appellant's favor on this issue; SDMB was denied a fair opportunity to make a complete record.

ARGUMENT I(B)

The County next argues its ejectment action is not a compulsory counterclaim, but never explains why or cites to authority applying Rule 13, SCRCP. Instead the County argues that SDMB has "plead questionable title to out the magistrate from jurisdiction" and cites two cases from the 1890s. [Resp. Brief. p. 10]. This argument is incoherent. The nature of the Magistrate's ejectment action was predicated entirely on the applicability of the Space Use Permit. [R. p. 3]. There is no citation in the record how SDMB has plead questionable title or how two nineteenth century cases have any bearing. Likewise, it bears repeating that a Rule 13, SCRCP motion does not attack the jurisdiction of either the Circuit Court or the Magistrate; rather it concerns only whether the claim is precluded. Rule 13, SCRCP. Thus, the County's citation to pre-Rules of Civil Procedure authority (e.g., that a Magistrate cannot be deprived of jurisdiction in lease case involving allegations of fraud in the procurement or superior title [Resp. Brief. p. 10]) are also misplaced and inapposite. Rule 13, SCRCP.

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

ARGUMENT II

A. Identity of Parties.

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

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

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

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

B. Substantially Similar Claims.

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

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

ARGUMENT III

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

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

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

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

ARGUMENT IV

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

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

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

The County's argument – apparently as an alternate, sustaining ground – that it was not in an agency relationship with Ramp 66/Grand Strand Aviation [Resp. Brief p. 20] was not raised to the Circuit Court nor preserved in the record; equally specious is its argument that it is not bound by leases executed between Ramp 66 and airport tenants. [Resp. Brief pp. 20-21]. The County admits it paid $800,000.00 to buy-out Ramp 66/Grand Strand Aviation. [Resp. Brief p. 20]. It had knowledge and possession of the SDMB Lease. [R. pp. 359-361; Resp. Brief, p. 6]. Its new contention that it is a 'third party' that required protection under S.C. Code Ann. § 27-33-30 [Resp. Brief pp. 20-21] stretches the bounds of credulity under these facts. [R. pp. 359-361; Resp. Brief, p. 6].

ARGUMENT V

A. Abandonment.

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

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

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

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

Ironically, however, with respect to the County's next argument that the bond failed to meet the requirements of S.C. Code Ann. § 27-37-130 by insufficiently covering all the County's costs and damages [Res. Brief. p. 25], *United Dominion* actually opposes the County's position. In *United Dominion*, Judge Goolsby held that "[t]he amount of Wal-Mart's appeal bond was a matter committed to the sound discretion of the courts below (emphasis added)." *Id.*, 307 S.C. at 108, 413 S.E.2d at 870. It is undisputed in this appeal that the Magistrate set a bond which the Circuit Court twice refused to modify. [R. pp. 8, 300 line 4]. Since the bond amount is discretionary, and the County neither cross-appealed

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

B. Mootness.

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Respectfully submitted,



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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

RECEIVED
SEP 09 2016
SC Court of Appeals

APPELLATE CASE NO. 2015-001868

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

v.

HORRY COUNTY..... Respondent

CERTIFICATE OF COUNSEL

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

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September 8, 2016

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

RECEIVED
SEP 09 2016
SC Court of Appeals

APPELLATE CASE NO. 2015-001868

SKYDIVE MYRTLE BEACH, INC.....Appellant

v.

HORRY COUNTY,..... Respondent

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the ***Final Reply 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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September 8, 2016
Mount Pleasant, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Skydive Myrtle Beach, Inc., Appellant,

v.

Horry County, Respondent.

Appellate Case No. 2015-001868

Appeal From Horry County
Larry B. Hyman, Jr., Circuit Court Judge

Opinion No. 5573
Heard March 5, 2018 – Filed July 11, 2018

DISMISSED

Robert Bratton Varnado and Alexis Mills Wimberly, both of Brown & Varnado, LLC, of Mt. Pleasant, for Appellant.

Michael Warner Battle, of Battle Law Firm, LLC, and Arrigo Paul Carotti, of Conway, for Respondent.

LOCKEMY, C.J.: In this appeal from a magistrate's order ejecting Skydive from a hangar at Grand Strand Airport, Skydive asserts the circuit court erred by denying its appeal of the ejectment order because: (1) ejectment was a mandatory counterclaim that should have been pursued in the pending circuit court case; (2) Rule 12(b)(8), SCRCP, required the ejectment be brought with the pending circuit court case; (3) the magistrate improperly applied its rules of court; (4) and the Space Use Permit did not supersede the prior eight-year long lease. Skydive also

asserts the circuit court erred in finding its ruling was not automatically stayed during the appeal. We dismiss this appeal as moot.

FACTS

Skydive is a skydiving business that operated out of the Grand Strand Airport (GSA) located in North Myrtle Beach, SC. On May 10, 2012, Skydive entered into an agreement with Ramp 66, the operator of the GSA, which allowed Skydive to operate its business at the GSA. Skydive would be allowed usage of a minimum of 2,500 square feet in the "bird hangar" for use during daylight hours, seven days a week. In exchange, Ramp 66 would collect all ticket fees from Skydive's customers and keep 14% of the total revenue. The parties also agreed, "This agreement remains in effect through [Ramp 66's] lease with Horry County Department of Airports through July 2020 unless both parties agree to any changes in writing."

Ramp 66's lease with Horry County (the County) terminated by agreement in 2013. On September 13, 2013, Skydive entered into a Space Use Permit (SUP) with the County. Pursuant to the SUP, the County agreed to allow Skydive to occupy and use 6,800 square feet in the bird hangar. In exchange, the County would receive a flat $1,200 per month fee. The SUP, by its terms, expired January 31, 2014. The SUP also contained a clause indicating: "This Permit constitutes the entire agreement of the parties with respect to the subject matter hereof and supersedes all previous agreements, representations and understandings, concerning the same, whether written or oral."

After signing the SUP, Skydive requested several items at the bird hangar be repaired. According to Skydive, the County never responded to those requests. As a result of these and other actions, the relationship between Skydive and the County soured. Subsequently, the County provided Skydive with another SUP in February, 2014, but Skydive refused to sign it. On February 28, 2014, Skydive filed an action in the court of common pleas alleging sixteen causes of action including breach of contract, breach of contract accompanied by a fraudulent act, and violation of the South Carolina Unfair Trade Practices Act. The County answered that complaint on March 18, 2014.[1]

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[1] That case is currently on appeal after the circuit court granted a motion to dismiss certain parties from the action. *Skydive Myrtle Beach, Inc. v. Horry County*, Op.

On June 5, 2014, the County filed an application for ejectment in the magistrate's court. The County asserted, "[t]he term tenancy or occupancy has ended." On June 13, 2014, Skydive's attorney filed a motion to remove the case from the magistrate's court to the circuit court. Skydive asserted the same facts and issue were pending in the circuit court action and the case should be removed from the magistrate's court. On July 2, 2014, the magistrate heard argument on the motion to remove and denied it. The magistrate also notified both parties it would hear the rule to vacate on July 23, 2014.

On July 18, 2014, Skydive sent the magistrate a letter asking the magistrate to reconsider its ruling on the motion to remove. Skydive also requested, "[s]hould this [h]onorable [c]ourt deny [Skydive's] request for reconsideration, [Skydive] respectfully asks for thirty (30) days within which to file an Answer and Counterclaim . . . and a jury trial . . . and reasonable discovery." During the hearing on July 23, the magistrate denied Skydive's motion for reconsideration, motion for a continuance to file an answer and counterclaims, and motion for a jury trial. The magistrate found the request to file an answer and counterclaims and the request for a jury trial were not submitted within the proper time periods for them to be considered. The magistrate then held a hearing on the merits and found Skydive did not have a legal right to be on the property and ordered it be ejected.

Skydive appealed the magistrate's decision to the circuit court. On August 1, 2014, the magistrate issued an appellate bond, allowing Skydive to continue occupying the property and requiring Skydive to continue paying the County $1,200 per month in rent "until the action is heard on appeal and decided by the [c]ircuit [c]ourt."

The circuit court heard Skydive's appeal on May 6, 2015. The circuit court dismissed Skydive's appeal, finding the parties modified their previous agreement when the parties signed the SUP and that the SUP expired by its terms on January 31, 2014. The circuit court also found the magistrate properly applied its rules in denying Skydive's requests for a continuance and for a jury trial as those requests were made out of time. Skydive requested the circuit court reconsider its decision, but that motion was denied.

No. 2017-UP-118 (Ct. App. filed March 8, 2017), *cert granted, S.C. Sup. Ct. Order dated Mar. 7, 2018.*

On September 17, 2015, Skydive requested the circuit court stay its ejectment during the appeal to this court. Skydive argued the magistrate's court order stayed the proceedings to their final conclusion and the circuit court should issue a writ of supersedeas pursuant to Rule 241, SCACR. The circuit court noted the language in the magistrate's court order stated: "Upon execution of the above bond, execution on the Judgment of Ejection is hereby stayed until the action is heard on appeal and decided by the [c]ircuit [c]ourt." The circuit court found the magistrate's stay expired by its own terms after it dismissed Skydive's appeal, and the circuit court denied Skydive's request for a supersedeas pending appeal to this court. Skydive never requested this court stay its ejection pending appeal. In October 2015, Skydive vacated the bird hangar at GSA. This appeal followed.

STANDARD OF REVIEW

When reviewing a circuit court's adjudication of an appeal of an ejectment action in magistrate's court, this court reviews the order under a limited standard of review in 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 Distribs.*, 390 S.C. 44, 49, 699 S.E.2d 723, 726 (Ct. App. 2010).

ANALYSIS

"This court does not concern itself with moot or speculative questions." *Sloan v. Greenville Cty.*, 380 S.C. 528, 535, 670 S.E.2d 663, 667 (Ct. App. 2009). "An appellate court will not pass judgment on moot and academic questions; it will not adjudicate a matter when no actual controversy capable of specific relief exists." *Id.* "A case becomes moot when judgment, if rendered, will have no practical effect upon the existing controversy." *Id.* "Mootness also arises when some event occurs making it impossible for the reviewing court to grant effectual relief." *Id.*

In 1951, our supreme court dismissed as moot an appeal of an ejectment action when the tenant notified the court it vacated the home. *Berry v. Zahler*, 220 S.C. 86, 87, 66 S.E.2d 459, 459 (1951). There, the property owner brought an ejectment action against the tenants "upon the allegation that they were holding over after the expiration of their lease." *Id.* The court determined, "Under the circumstances, the issue, which was the right to possession of the premises, has become moot, and the appeal will not be considered." *Id.*

In this ejectment case, the sole issue is the right to possession of the bird hangar. Skydive has not possessed the property in almost three years. As in *Berry*, there is nothing more for this court to consider once the party appealing has vacated the premises. Accordingly, we dismiss this appeal as moot.

CONCLUSION

Based on the foregoing, the appeal is

DISMISSED.

WILLIAMS and KONDUROS, JJ., concur.

01376

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

RECEIVED
JUL 25 2018
SC Court of Appeals

APPELLATE CASE NO. 2015-001868

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

v.

HORRY COUNTY..... Respondent

PETITION FOR REHEARING

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Arrigo P. Carotti, Esquire
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Attorneys for Respondent

Pursuant to Rules 221 and 240 of the South Carolina Rules of Appellate Procedure, the Appellant Skydive Myrtle Beach ("Appellant" or "Skydive") petitions the Court of Appeals for rehearing on its opinion, filed July 11, 2018, dismissing the appeal on the basis of mootness.

INTRODUCTION

The Court bases its entire opinion on an almost 70-year old case – *Berry v. Zahler*, 220 S.C. 86, 66 S.E.2d 459 (1951) – which was cited by neither party in their briefs. The main distinction between *Berry* and the case at bar, however, is that Skydive did not *voluntarily* give up the tenancy to Hangar 7; SDMB was forced out by operation of the County's police powers.

Not only is *Berry* inapposite and distinguishable, but the Court further errs by ignoring the three general exceptions to the mootness doctrine set forth in modern cases, such as *Wachesaw Plantation East Community Services Ass'n, Inc. v. Alexander*, 414 S.C. 355, 778 S.E.2d 898 (2015). These three exceptions were argued by Appellant in its reply brief but play no part in this Court's opinion.

Accordingly, the appeal should not have been dismissed. The case was either not moot and/or one of three exceptions applied, and the appeal should have proceeded on the Appellant's appeal issues.

ARGUMENT

In *Berry*, the plaintiff-tenants prevailed in their appeal from the magistrate's court; the circuit court, however, remanded the case for a new magistrate's trial. *Berry*, 220 S.C. at 87, 66 S.E.2d at 459. Rather than be satisfied with the result, however, the plaintiff-tenants appealed to the Supreme Court saying that the circuit court erred in not dismissing the proceedings outright in their favor. *Id.*, 220 S.C. at 87, 66 S.E.2d at 459-460. Then, inexplicably, the plaintiff-tenants

voluntarily "vacated the premises and delivered possession to the landlord." *Id.*, 220 S.C. at 87, 66 S.E.2d at 460.

In this case, however, Skydive did not voluntarily give up possession of Hangar 7 but instead was forced out after receiving an email dated September 16, 2015. (R. p. 358). The County attorney, in following up on this email, specifically relied upon the police power of Horry County to back up his request. Thus, there was nothing *voluntary* about the Appellant's dispossession from Hangar 7.

Consequently, the holding of *Berry* as used by this Court simply is not valid.

The Court notes that Skydive never filed for a stay of Judge Hyman's ejectment ("Skydive never requested this court stay its ejection pending appeal"). (Opinion, p. 4). Such a motion would be made pursuant to Rule 241, SCACR. *See* Toal, et al., APPELLATE PRACTICE IN SOUTH CAROLINA 3D (SC Bar 2016), at pp. 372, 340-345. However, under Rule 241(b)(4), SCACR, suits for dispossession of real property are automatically excepted from the "automatic stay" in Rule 241(a). Thus, while Skydive could have sought a stay, it was not required to do so in order to perfect this appeal. *See generally*, Rule 241, SCACR.

Finally, it should be noted that *Berry* predates the adoption of the current South Carolina Appellate Court Rules [first effective September 1, 1990]. To the extent the holding of Berry conflicts with the effect of Rule 241, SCACR, then the rule would govern. Rule 102(a), SCACR ("Effective Date and Repealer").

There can be no doubt that the whole purpose of the appeal at bar was for Skydive to be able to resume its rightful occupancy of Hangar 7 and resume its lawful business. If the Court had accepted one or more of Skydive's appeal grounds, and reversed the Circuit Court, that is the natural result. The fact the County succeeded in forcibly dispossessing SDMB from Hangar 7

does not render this appeal "of no practical legal effect" nor is the Court of Appeals "precluded from granting effectual relief." *S.C. Ret. Syst. Inv. Comm'n v. Loftis,* 402 S.C. 382, 384, 741 S.E.2d 757, 758 (2013). It should be noted that the passage of three (3) years is immaterial in the appeal, in that it otherwise was filed and perfected on time.

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

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

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

To the extent the Court believes Appellant's appeal arguments are moot (which Skydive denies), then Appellant would respectfully argue that the first and third exceptions to mootness apply.

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

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

In addition, there is a high probability that one or both of the parties might seek certiorari to the Supreme Court, which means that the Circuit Court's error will affect future events, as well. Accordingly, the third exception to mootness is triggered also. *Cf. Curtis v. State*, 345 S.C. 557, 568, 549 S.E.2d 591, 597 (2001).

CONCLUSION

For these reasons, Skydive respectfully asks for rehearing, and for this Court to rule on the merits of Skydive's appellate arguments contained in its Final Initial Brief.

Respectfully submitted,

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Attorney for Appellant

July 24, 2017

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

RECEIVED
JUL 25 2018
SC Court of Appeals

APPELLATE CASE NO. 2015-001868

SKYDIVE MYRTLE BEACH, INC.....Appellant

v.

HORRY COUNTY,..... Respondent

PROOF OF SERVICE

The undersigned attorney hereby certifies that a true copy of the ***Petition for Rehearing*** 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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July 24, 2018
Mount Pleasant, South Carolina

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

RECEIVED
SEP 07 2018
SC Court of Appeals

RESPONSE OPPOSING MOTION FOR RECONSIDERATION

September 5, 2018

Michael W. Battle, (SC Bar # 584)
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(843-248-4321)

Attorneys for Respondent Horry County

Respondent Horry County respectfully opposes Appellant Skydive Myrtle Beach, Inc.'s (SDMB) petition for rehearing. This Court correctly found that the sole issue on appeal was the right of possession of Bird Hangar pending the SDMB's appeals. This Court further found that SDMB had not possessed the Bird Hangar for a period of three years. SDMB does not dispute those findings in its Petition for Rehearing. This Court properly found that the no controversy capable of specific relief existed and a judgment would not have any practical effect upon the sole issue on appeal. Therefore the appeal was moot. *Sloan v. Greenville Cty.*, 380 S.C. 528, 670 S.E.2d 663 (Ct. App. 2009)

SDMB claims it did not voluntarily give up possession of Bird Hangar, and the mootness doctrine as applied in *Berry v Zahler* 220 S.C. 86, 66 SE 2d 459 (1951) should not apply to SDMB. Horry County disagrees with SDMB's claim that it did not voluntarily give up possession of Bird Hangar. As noted by this Court, SDMB never filed a petition for a supersedeas or stay with this Court after the circuit court ruled the magistrate court's stay was dissolved and affirmed the magistrate's order of ejectment. After the circuit court entered its final order, SDMB's rights were governed by SCACR 241(b) (10) (Ejectment orders are an exception to a general stay). In a case subject to an exception to the general stay, any party may move for an order imposing a supersedeas of matters decided in the order, judgment, decree or decision on appeal after service of the notice of appeal. SCACR 241(a). Horry County contends that SDMB's decision to vacate the property instead of filing a petition in this Court for supersedeas or stay was voluntary and Horry County's actions were proper under the magistrate's order of ejectment. At all times during this appeal SDMB has been represented by competent attorneys.

SDMB claims that the mootness doctrine should not be applied in the present case

because landlords in commercial ejectment cases could defeat the rights of commercial tenants on appeal under a magistrate's appeal bond by repeatedly enforcing the circuit court's denial of the appeal of the magistrate court's order of ejectment. Horry County contends SCACR 241 contains a clear procedure for staying lower court ejectment orders pending appeal in the appellate courts. SDMB did not avail itself of that procedure but instead vacated the property upon demand by Horry County.

SDMB makes a general claim that the mootness doctrine should not be applied because the Court's decision will have some improper collateral consequences on other pending litigation previously filed between the parties [2014-CP-26-1193]. SDMB claims the present decision will allow Horry County to argue that such litigation is now moot or that there is some preclusive effect on SDMB's damages claims. The relation of the issues in the present case and 2014-CP-26-1193 was raised before the magistrate in SDMB's motion to dismiss on the grounds that the present case should be dismissed because 2014-CP-26-1193 was pending in circuit court at the time the present ejectment action was filed. The magistrate denied SDMB's motion to dismiss and found the ejectment action was independent of 2014-CP-26-1193. The magistrate's order is the law of the present case.

CONCLUSION

For the forgoing reasons, Respondent Horry County respectfully requests that SDMB's Petition for Rehearing be denied.

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Attorneys for Respondent Horry County

September 5, 2018

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

RECEIVED
SEP 07 2018
SC Court of Appeals

Appeals Case No. 2015-001868

Horry County.....Respondent,

v.

Skydive Myrtle Beach, Inc.....Appellant.

PROOF OF SERVICE

Michael W. Battle certifies that he is an attorney with the Battle Law Firm, LLC, attorneys for Respondent Horry County and that he has mailed Respondent's Opposing Motion for Reconsideration to the addresses shown this 5th day of September 2018, with proper postage attached thereto.

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September 5, 2018

The South Carolina Court of Appeals

Skydive Myrtle Beach, Inc., Appellant,

v.

Horry County, Respondent.

Appellate Case No. 2015-001868

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

C. J.

J.

J.

Columbia, South Carolina

cc:
Robert Bratton Varnado, Esquire
Michael Warner Battle, Esquire
Alexis Mills Wimberly, Esquire
Arrigo Paul Carotti, Esquire
The Honorable Larry B. Hyman, Jr.

FILED
Sept. 20, 2018

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

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

APPELLATE CASE NO. 2015-001868

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

v.

HORRY COUNTY..... Respondent

PROOF OF SERVICE – APPENDIX

The undersigned attorney for Appellants hereby certifies that a true copy of the ***Appendix*** in the above-referenced matter has been served on all counsel of record by sending a copy via U.S. Mail on this the 22nd day of October 22, 2018 to the following:

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