

**MOTION AND PETITION TO REINSTATE APPEAL**

**THE STATE OF SOUTH CAROLINA  
In The Court of Appeals**

**APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas**

**Letitia H. Verdin, Circuit Court Judge**

**Case No. 2018-CP-23-02230**

**ROLLIE BRIAN ROBERTS, KIMBER  
FLYNN ROBERTS,**

**Appellants,**

**v.**

**RTG FURNITURE CORPORATION, RTG  
FURNITURE CORPORATION OF GEORGIA,  
RTG FURNITURE CORPORATION OF  
TEXAS, RTG FURNITURE OF TEXAS, L.P.,  
ROOMSTOGO.COM, INC., SE INDEPENDENT  
DELIVERY SERVICES, INC.,**

**Respondents.**

**MOTION AND PETITION TO REINSTATE APPEAL**

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## APPELLANTS' MOTION AND PETITION TO REINSTATE APPEAL

Appellants hereby submit this motion and petition to reinstate appeal in response to the Court's Order entered and dated on January 30, 2019 ("Order"), dismissing Appellants' appeal pursuant to: (1) Rule 59(e) of the South Carolina Rules of Civil Procedure for the Court's reconsideration to alter or amend the Court's Order; (2) Rule 221(c) of the South Carolina Appellate Court Rules for a petition when the Court dismisses Appellants' Appeal; and, (3) Rule 260(a) of the South Carolina Appellate Court Rules for a petition to reinstate Appellants' appeal by leave of the Court upon good cause shown herein. This motion for reinstatement is divided into several sections as set forth below. Each section provides multiple grounds for reconsideration of the Court's Order to reinstate the appeal by Appellants making a show of good cause, Rule 260(a), SCACR. Collectively, pursuant to these grounds for reconsideration, Appellants seek rulings on matters that the Court did not address in its Order; Appellants seek the Court's reasons for deciding certain matters where no reasons are given; and Appellants seek for the Court to reconsider its findings and correct its errors based on the record and the law. Appellants show the following:

### FACTS

#### 1.

The record will show that, on August 29, 2018, Appellants filed a motion requesting leave of the Greenville County Circuit Court to amend Appellants' complaint and add a cause of action for a violation under the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act ("Magnuson-Moss Warranty Act") prior the parties conducting discovery in the early stages of pre-trial litigation. On August 29, 2018, Appellants filed a motion to strike Respondents' Answer. The Greenville County Circuit Court held a hearing for both Appellants' Motion to Amend or Alter Appellants' Complaint and Appellants Motion to Strike Respondents' Answer on November 29, 2018. After the hearing on November 29, 2018, the Greenville County

Circuit Court issued an order denying Appellants' Notice and Motion to Amend Appellants' Complaint and Appellants Motion to Strike Respondents' Answer: "It is hereby ordered that the Plaintiff's motion to Alter or Amend and the Plaintiff's motion to Strike are hereby denied." Order, *Roberts et al. v. R.T.G. Furniture Corporation et al.*, No. 2018-CP-23-02230 (Judge Letitia H. Verdin, December 12, 2018).

2.

The record will show that, prior to the hearing before the Court on November 29, 2018, Appellants asked Respondents' counsel for written permission to amend Appellants' Amended Complaint on August 22, 2018, before Appellants filed Appellants' Notice and Motion to Amend or Alter Appellants' Complaint on August 29, 2018. Respondents' counsel denied Appellants' request. With supporting legal grounds, Appellants previously requested the Greenville County Court's permission to amend Appellants' Complaint and add a cause of action for a violation under the Magnuson-Moss Warranty Act by making an oral motion in both hearings on August 1, 2018, and November 29, 2018; in Appellants' Response to Respondents' Memorandum of Law in Support of Motion to Compel Arbitration filed on July 27, 2018; and, in Appellants' Response to Respondents' Motion to Dismiss and Memorandum in Support of Appellants' Response filed on June 20, 2018.

3.

The record will show that, at the hearing on November 29, 2018, Respondents raised the uncertainty of a violation of the Magnuson-Moss Warranty Act as a valid cause of action without providing any legal support to the Court. Also, Respondents admitted that Respondents did not know whether Appellants' cause of action for a consumer violation of the Magnuson-Moss Warranty Act was an independent cause of action. Furthermore, Respondents argued the reasoning for being prejudiced from Appellants amending Appellants' Complaint was adding length to Appellants' Complaint with an additional cause of action to Appellants' Complaint and defending lengthy pleadings, motions, or responses. Respondents announced the intent to renew Respondents' motion to compel arbitration again.

4.

By contrast, the record will show Appellants raised legal support in Appellants' Memorandum in Support of Appellants' Motion to Strike Defendants' Answer filed on November 26, 2018, that Appellants are entitled to bring a suit for damages, as well as other legal and equitable relief, for a violation of the Magnuson-Moss Warranty Act:

Subject to subsections (a)(3) and (e), a consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under this chapter, or under a written warranty, implied warranty, or service contract, may bring suit for damages and other legal and equitable relief—  
 (A) in any court of competent jurisdiction in any State or the District of Columbia; or  
 (B) in an appropriate district court of the United States, subject to paragraph (3) of this subsection. 15 U.S.C. § 2310(d)(1).

Under the Magnuson-Moss Warranty Act, no informal dispute procedures such as arbitration may be legally binding on any party or third-person to the dispute rendering the failure to comply with the Magnuson-Moss Warranty Act on this issue grounds for proceeding with a civil lawsuit instead of arbitration. 15 U.S.C. §§ 2301 to -12; 15 U.S.C. § 2310(d)(1); 16 C.F.R. § 703.5(j); *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 32-33, 644 S.E.2d 663, 673 (2007).

5.

The record will show that, under Section 1 of Respondents' Dispute Resolution/Arbitration Agreement in Respondents' Sales Order, Respondents' arbitration clause applied to any dispute or claim arising in connection from the sale of furniture and delivery of the same from Respondents to Appellants to binding arbitration:

YOU AND RTG AGREE THAT ANY DISPUTE OR CLAIM BETWEEN YOU AND RTG OR ANY ROOMS TO GO AFFILIATE OR ANY OF THEIR PARENT COMPANIES, SUBSIDIARIES, DIVISIONS, SHAREHOLDERS, MEMBERS, DIRECTORS, OFFICERS, EMPLOYEES, REPRESENTATIVES, PREDECESSORS, SUCCESSORS, OR ASSIGNS, INCLUDING BUT NOT LIMITED TO ANY DISPUTE OR CLAIM THAT RELATES IN ANY WAY TO ANY PRODUCT OR SERVICE SOLD OR DISTRIBUTED BY RTG, TO ANY TRANSACTION WITH RTG, TO ANY WARRANTY, TO THE TERMS AND CONDITIONS OF SALE, TO THE FINANCING OF ANY

4.

PURCHASE FROM RTG, TO THE COLLECTION OR STORAGE OF PERSONAL INFORMATION, OR TO THE TERMS OF USE OR THE PRIVACY POLICY, INCLUDING DISPUTES OR CLAIMS UNDER FEDERAL OR STATE STATUTES OR TORT LAW ("DISPUTE") *MUST BE RESOLVED EXCLUSIVELY THROUGH FINAL AND BINDING ARBITRATION, AND NOT BY A COURT OR JURY*. EXCEPT THAT YOU OR RTG MAY ASSERT CLAIMS IN SMALL CLAIMS COURT IF THE CLAIMS QUALIFY FOR SMALL CLAIMS COURT AND THE MATTER PROCEEDS ONLY ON AN INDIVIDUAL (NOT A CLASS OR REPRESENTATIVE) BASIS. Exhibit A.

Appellants also provided legal support and factual examples showing how Respondents' Sales Order, on its face, violated the Magnuson-Moss Warranty Act in both hearings before the Court on August 1, 2018; and November 29, 2018; Appellants' Memorandum in Support of Appellants' Motion to Strike Respondents' Answer filed on November 26, 2018; Appellants' Response to Respondents' Memorandum of Law in Support of Motion to Compel Arbitration filed on July 27, 2018; and, Appellants' Response to Respondents' Motion to Dismiss and Memorandum in Support of Appellants' Response filed on June 20, 2018. See 15 U.S.C. § 2310(a)(3).

6.

The record will show that, pursuant to Rule 56(e) of the South Carolina Rules of Civil Procedure, Appellants filed Appellants' Motion for Reconsideration to Alter or Amend a Judgment on December 14, 2018. Exhibit B. Appellants only preserved the issue for the Greenville County Circuit Court denying Appellants' Motion to Amend or Alter Appellants' Complaint, which is the subject matter of this appeal. Appellants' Motion to Strike Respondents' Answer is not at issue in this appeal. Respondents filed Respondents' Renewed Motion to Compel Arbitration before the Greenville County Circuit Court on January 4, 2019. On January 15, 2019, the Greenville County Circuit Court denied Appellants' Motion for Reconsideration to Alter or Amend a Judgment.

Plaintiff's Motion for Reconsideration is hereby denied based upon a finding that the Order denying the plaintiffs' Motion to Alter or Amend and Motion to Strike was appropriate. The order previously issued by this Court was based upon a finding that first, the Defendant's answer was proper and additionally,

that the Motions to Amend and to Strike were procedurally untimely. Order, *Roberts et al. v. R.T.G. Furniture Corporation et al.*, No. 2018-CP-23-02230 (Judge Letitia H. Verdin, January 15, 2019).

7.

The record will show that, on January 17, 2019, Appellants filed Appellants' Notice of Intent of Appeal with the South Carolina Appellate Court. On January 25, 2019, the South Carolina Appellate Court sent correspondence to Appellants for Appellants to correct a deficiency in Appellants' Notice of Appeal thereby and file an amended notice of appeal. On January 30, 2019, the South Carolina Appellate Court issued an order:

This appeal arises out of an order of the circuit court denying the appellants' motion to strike. Because a motion to strike is not immediately appealable, this appeal is dismissed. See *Pelfrey v. Bank of Greer*, 270 S.C. 691, 695, 244 S.E.2d 315, 317 (1978) ("Ordinarily, the refusal of a motion to strike is not appealable until final judgment, unless (1) the motion to strike is in the nature of a demurrer or (2) there is an appealable issue before the court justifying the consideration of the motion to strike also in order to avoid unnecessary litigation." (citing *Tate v. Oxner*, 236 S.C. 313, 114 S.E.2d 225 (1960))). The remittitur will be sent as required by Rule 221(b) of the South Carolina Appellate Court Rules. Order, *Roberts et al. v. R.T.G. Furniture Corporation et al.*, No. 2019-000104 (2018-CP-23-02230 (Judge James E. Lockemy, January 30, 2019).

#### RECITATION OF THE LAW

8.

Under Rule 201 of the South Carolina Appellate Court Rules, Appellants may appeal an order allowable by law from a final judgment, appealable order, or appealable decision:

(a) Judgments, Orders and Decisions Subject to Appeal. Appeal may be taken, as provided by law, from any final judgment, appealable order or decision. The procedure for petitioning for a writ of certiorari to review final judgments in post-conviction relief cases is provided by Rule 243. Further, the review of decisions of the State Board of Canvassers in election cases shall be by petition for a writ of certiorari under S.C. Code Ann. §§ 7-17-250 and 7-17-270.

(b) Who May Appeal. Only a party aggrieved by an order, judgment, sentence or decision may appeal. Rule 201, SCACR.

As provided by law, appellate jurisdiction applies to an intermediate judgment, order, or decree that involves the merits of the action or an order affecting a substantial right in an action in the court of common pleas. S.C. Code Ann. § 14-3-330(1)-(2). An interlocutory order is issued by the court prior to the conclusion of the underlying litigation in a final judgment disposing of the case from the court. See *Wallace v. Interamerican Tr. Co.*, 246

S.C. 563, 568; 144 S.E.2d 813, 816 (1965).

Regardless of an interlocutory order related to a motion to amend or alter a complaint under Rule 15(a) of the South Carolina Rules of Civil Procedure, the South Carolina Appellate Court retains jurisdiction if the interlocutory order involves the merits of the action or affects a substantial right in an action by the lower court's order or decision under the facts and circumstances of the case. *Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 304, 705 S.E.2d 475, 479 (Ct. App. 2011); *Jefferson v. Gene's Used Cars, Inc.*, 295 S.C. 317, 318, 368 S.E.2d 456, 456 (1988); *Henderson v. Wyatt*, 8 S.C. 112 (1877). Specifically, South Carolina Law provides that the South Carolina Appellate Court has jurisdiction under the following circumstances:

- (1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;
- (2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action;
- (3) A final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment; and
- (4) An interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction or granting, continuing, modifying, or refusing the appointment of a receiver. S.C. Code Ann. § 14-3-330.

#### 9.

First, an interlocutory order is immediately appealable when the order involves the merits of the action that "finally determines some substantial matter forming the whole or part of some cause of action or defense." *Ex Parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 7, 630 S.E.2d 464, 467 (2006); *Thornton*, 391 S.C. at 306. The interlocutory order is appealable when no further act "must be done by the trial court prior to a determination of the parties' rights." *Ex Parte Capital U-Drive-It, Inc.*, 369 S.C. at 7. When the lower court denies a motion to amend a complaint to add a new cause of action, the issue must be preserved in a motion to amend the

complaint and a motion for reconsideration to amend or alter the previous order that applied to the issues ruled upon and issues not ruled upon before filing a subsequent appeal. Rule 56(e), SCRCP; see *Watson v. Underwood*, 407 S.C. 443, 456, 756 S.E.2d 155, 162 (Ct. App. 2014); *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 372-73, 628 S.E.2d 902, 919 (Ct. App. 2006) (requiring preservation of issues on appeal that was "both raised to and ruled upon by the trial court"); *Noisette v. Ismail*, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991). Failure to preserve the issue from an order denying a motion to amend a complaint to add a new cause of action prevents raising the issue for review in a subsequent appeal post-trial operating as a waiver of that issue. S.C. Code Ann. § 14-3-330(2); Rule 15(b), SCRCP; see *Noisette*, 304 S.C. at 58; cf. *Baldwin Constr. Co. v. Graham*, 357 S.C. 227, 230, 593 S.E.2d 146, 147-48 (2004).

If the judgment determines the applicable law without leaving open questions of fact, then the judgment operates as a final judgment. See *Mid-State Distribs. v. Century Imps.*, 310 S.C. 330, 335, 426 S.E.2d 777, 780 (1993). Therefore, an interlocutory order on a motion to amend or alter a complaint on a substantial matter that forecloses whole or part of a cause of action without leaving open questions of fact is immediately appealable because of the judgment's finality on that substantial matter. The issue is whether the lower court's order establishes and applies principles of law that finally affect the merits of the case or deprives a party the benefit of a final hearing. *Tatnall v. Gardner*, 350 S.C. 135, 138, 564 S.E.2d 377, 379 (Ct. App. 2002). In *Baldwin Constr. Co.*, the court states in dicta that a motion to amend a complaint can be made before, during, and after trial. 357 S.C. at 230. However, the court in *Baldwin Constr. Co.* fails to address the application of Rule 15(b) under the South Carolina Rules of Civil Procedure governing motions to amend a complaint post-trial banning a party from adding a cause of action to the complaint (or counterclaim) at that time:

When a party wishes to amend a pleading after final judgment from a full trial on the merits, South Carolina Rule of Civil Procedure 15(b) applies. Amendments under South Carolina Rule of Civil Procedure 15(b) are allowed not to assert new claims, but rather to conform the pleadings to the

evidence presented at trial. *Arnold v. State*, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992).

Therefore, if a court denies a motion to amend a complaint to add a cause of action to the complaint, then a plaintiff may not raise the same motion again to add that same cause of action post-trial. *Id.*; Rule 15(b), SCRPC; cf. *Link v. Sch. Dist. of Pickens Cty.*, 302 S.C. 1, 3-6, 393 S.E.2d 176, 177-79 (1990).

10.

In *Link*, the court addressed an appeal by the plaintiff on an order granting a motion for summary judgment in favor of the defendant. 302 S.C. at 2-6. The court analyzed that the appeal fell under either of Section 14-3-330(1) or Section 14-3-330(2)(c) of the South Carolina Code granting jurisdiction to this Court to hear the appeal post-trial. *Id.* However, a motion for summary judgment and a motion to amend a complaint to add a new cause of action are governed by different rules under the South Carolina Rules of Civil Procedure. Compare Rule 15(b), SCRPC (permitting amendments to the complaint to conform the complaint to the evidence post-trial), with Rule 54(b) (permitting entry of a final judgment prior to trial upon a motion for summary judgment). Rule 15(b) of the South Carolina Rules of Civil Procedure must be read in conjunction with the grounds of granting appellate jurisdiction involving the merits of the claim: "if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from." S.C. Code Ann. § 14-3-330(1); Rule 15(b), SCRPC; *Arnold*, 309 S.C. at 172.

When the lower court denies a motion to amend a complaint to add a new cause of action based on being procedurally untimely, the lower court, in effect, decides the merits of the case foreclosing part of or a whole cause of action or defense and establishes the law in the case as a binding adjudication—not as a mere expression or statement in dicta. *Arnold*, 309 S.C. at 172; see *Weil v. Weil*, 299 S.C. 84, 89, 382 S.E.2d 471, 473-74 (Ct. App. 1989). Therefore, denial of a motion to amend a complaint to add a new cause of action is not

reviewable after the conclusion of the underlying litigation. *Arnold*, 309 S.C. at 172. When a court denies a motion to amend to add a cause of action to the complaint on the basis of being procedurally untimely, the plaintiff must preserve the issue for subsequent appeal at that time or waive the right to adding that cause of action as barred under Rule 15(b) of the South Carolina Rules of Civil Procedure. The finality of the lower court denying a motion to amend a complaint to add a cause of action, hence, becomes a binding adjudication. A plaintiff will not then be allowed to amend the complaint to add that cause of action post-trial.

#### 11.

The South Carolina Rules of Civil Procedure provide that, unless the opposing counsel gives written consent, "a party may amend his pleading only by leave of court . . . and leave shall be freely given when justice so requires and does not prejudice any other party." S.C.R.P. Rule 15(a). The standard of review for an order denying a motion to amend a complaint is an abuse of discretion. *See BB&T v. Taylor*, 369 S.C. 548, 551, 633 S.E.2d 501, 503 (2006). Abuse of discretion by the judge issuing an order "was controlled by an error of law or where the order is based on factual conclusions that are without evidentiary support." *Id.* The lower court may not base its denial to amend a complaint on the merits of the amended claim(s) in lieu of the criteria outlined under Rule 15(a) of the South Carolina Rules of Civil Procedure. *Patton v. Miller*, 420 S.C. 471, 489-93, 804 S.E.2d 252, 261-63 (2017); *Forrester v. Smith & Steele Builders, Inc.*, 295 S.C. 504, 507, 369 S.E.2d 156, 158 (Ct. App. 1988) ("In the absence of a proper reason, such as bad faith, undue delay, or prejudice, a denial of leave to amend is an abuse of discretion.").

#### 12.

Under the first element of the court granting leave to amend a pleading freely as required to do justice, public policy strongly favors allowing parties to amend pleadings and encourages courts to freely grant a leave to amend pleadings. *Patton*, 420 S.C. at 489-93. Modeled after Rule 15(a) of the Federal Rules of Civil Procedure, the U.S. Supreme Court held that courts are behooved to follow the mandate outlined in Rule 15(a)

and tread lightly:

If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason -- such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. -- the leave sought should, as the rules require, be "freely given." Of course, the grant or denial of an opportunity to amend is within the discretion of the [ ] Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules. *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 230 (1962).

Furthermore, while "a circuit court's ruling on a Rule 15 motion to amend is within [that court's] discretion, a court's failure to exercise its discretion is itself an abuse of discretion." *Patton*, 420 S.C. at 489-93; see also *Duncan v. CRS Sitrine Eng'rs, Inc.*, 337 S.C. 537, 542, 524 S.E.2d 115, 117-18 (Ct. App. 1999); *Berry v. McLeod*, 328 S.C. 435, 449-50, 492 S.E.2d 794, 802 (Ct. App. 1997); *Forrester*, 295 S.C. at 506-10.

### 13.

Under the second element of the court granting leave to amend a pleading that does not prejudice the opposing party, the South Carolina Supreme Court outlined the analysis as "whether the defendants were prejudiced by the amendment, or whether there was some other substantial reason to deny it." *Patton*, 420 S.C. at 489-93. The non-moving party has the burden of establishing prejudice from the moving party's motion to amend a pleading. *Collins Entm't, Inc. v. White*, 363 S.C. 546, 562, 611 S.E.2d 262, 270 (Ct. App. 2005). Prejudice to the non-moving party in Rule 15(a) of the South Carolina Rules of Civil Procedure embodies "a lack of notice that the new issue is to be tried and a lack of opportunity to refute it . . . [whereas] amendments [ ] conform[ing] to the proof should be liberally allowed when no prejudice to the opposing party will result." *Id.* As an example of a substantial reason to deny a motion to amend a pleading, this Court held that "[p]rejudice occurs when the amendment states a new claim or defense that would require the opposing party to introduce additional or different evidence to prevail in the amended action." *Holland v. Morbark, Inc.*, 407 S.C. 227, 235,

754 S.E.2d 714, 719 (Ct. App. 2014). In *Holland*, the parties had already conducted extensive discovery, and the plaintiff never fully developed the underlying theory in advance prior to making a motion to amend the plaintiff's complaint to add a new cause of action shortly before the eve of trial. 407 S.C. at 233-37. This Court ruled that the defendants were prejudiced by the plaintiff's motion to amend the plaintiff's complaint because the motion afforded the defendants inadequate notice and time to prepare and conduct discovery, and inevitable delays would have resulted accordingly on the eve of trial. *Id.* The South Carolina Supreme Court interpreted that prejudice to the non-moving party exists when the non-moving party faces and suffers a disadvantage defending the merits, but for, the moving party including the amended claim in the original pleading or providing the defendants sufficient time to refute the plaintiff's motion to amend. *Patton*, 420 S.C. at 489-93.

14.

By contrast, the South Carolina Supreme Court clarified that prejudice to the non-moving party does not equate to "the non-moving party [being] forced to defend the merits of a valid claim." *Patton*, 420 S.C. at 489-93; *Forrester*, 295 S.C. at 506-10. In *Patton*, the lower court never did the legal analysis under Rule 15(a) of the South Carolina Rules of Civil Procedure for plaintiff's motion to amend a complaint, and the defendants never argued prejudice properly before the lower court. 420 S.C. at 489-93. Furthermore, the crux of the analysis concerning the prejudice prong under Rule 15(b) of the South Carolina Rules of Civil Procedure is whether the nonmoving party is afforded an opportunity to prepare and develop testimony for the issue that the moving party is raising formally when amending the complaint. *Soil & Material Eng'rs, Inc. v. Folly Assocs.*, 293 S.C. 498, 500-02, 361 S.E.2d 779, 781-82 (Ct. App. 1987). Timeliness of a motion to amend a complaint, even if filed late in trial, is not the standard for the court to determine whether to grant or deny a motion to amend a complaint. *Id.* Rule 15(b) of the South Carolina Rules of Civil Procedure govern the standard for granting or denying a motion to amend a complaint, which does not include a procedural element of timeliness as part of

the analysis. Rather, the court must make a finding that the motion to amend the complaint prejudices the opposing party; failure to do so amounts to an abuse of discretion when denying a motion to amend the complaint based purely on the timeliness of the motion to amend the complaint. *Id.*

In *Soil & Material Eng'rs, Inc.*, the lower court made no finding of prejudice to the nonmoving party when denying a motion to amend a complaint. 293 S.C. at 500-02. Neither did the nonmoving party make a showing of prejudice from a motion to amend a complaint. *Id.* The preliminary discovery requests from the moving party sufficiently alerted the nonmoving party that the moving party may raise an amendment to the complaint. *Id.* The nonmoving party had an opportunity to develop and introduce testimony on the issue raised in the motion to amend the complaint. *Id.* This Court ruled that the lower court abused discretion by making no finding of prejudice from the moving party's motion to amend the complaint when the nonmoving party failed to meet the burden to show prejudice from the motion to amend the complaint. *Id.* Finally, if the nonmoving party fails to raise proper objections to the moving party's motion to amend the complaint under Rule 15(b) of the South Carolina Rules of Civil Procedure, then the nonmoving party waives such objections. *Crestwood Golf Club v. Potter*, 328 S.C. 201, 218, 493 S.E.2d 826, 835-36 (1997).

#### 15.

Secondly, an interlocutory order is immediately reviewable upon appeal if the order affects substantial rights and determines the action in effect that prevents a judgment reviewable upon appeal. *Hagood v. Sommerville*, 362 S.C. 191, 195-97, 607 S.E.2d 707, 709 (2005). Immediate appeals on interlocutory orders are permitted when the substantial right cannot be vindicated after the case concludes on appeal, and the error in the interlocutory order cannot be corrected on appeal subsequent to the conclusion of the underlying litigation. *Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. 89, 93, 529 S.E.2d 11, 13 (2000). While appeals of interlocutory orders are not designed for piecemeal litigation, the issue is determining whether an error in an interlocutory

order prejudices a party to an extent that a new trial or appellate review will not cure the error upon the conclusion of the underlying litigation. *Id.* at 93-94. Furthermore, judgments are construed in its entirety to determine the lower court's intent. When the language is plain and unambiguous, then the literal meaning of the language gives effect to the ruling. *Weil*, 299 S.C. at 90-91.

The finality of the judgment, order, or decree operates, in effect, to dispose of a cause of action in part or in full, or the whole subject-matter, for all parties leaving no further questions or directions for future decisions as to the parties' rights but execution and enforcement of such a determination. *Good v. Hartford Accident & Indem. Co.*, 201 S.C. 32, 41-42, 21 S.E.2d 209, 212 (1942). The manner of the judgment, order, or decree divests some right(s) of the party. *Id.* The two-issue rule applies to a decision that is based on more than one ground whereby "the appellant appeals all grounds because the unappealed ground will become the law of the case." *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010); *Skywaves I Corp. v. Branch Banking & Tr. Co.*, 423 S.C. 432, 451-52, 814 S.E.2d 643, 653-54 (Ct. App. 2018). Moreover, appellate review is permitted when ruling on appeal will avoid unnecessary litigation, the lower court decides the merits of the case, the lower court establishes the law of the case, or any of the above. See *Skywaves I Corp.*, 423 S.C. at 459-61; see also *Watson*, 407 S.C. at 459; *Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 565, 564 S.E.2d 94, 98 (2002). Because a denial to amend a complaint to add a new cause of action is not reviewable in a subsequent appeal post-trial, the only time an appellant may challenge the interlocutory order is immediately after the lower court issues the interlocutory order or the issue(s) are not preserved and waived accordingly. See *Arnold*, 309 S.C. at 172; *Weil*, 299 S.C. at 89.

16.

By way of illustration, the South Carolina Supreme Court "repeatedly [has] held that the denial of a party's right to a particular mode of trial is immediately appealable as a substantial right." *Hagood*, 362 S.C. at

196-99. If a plaintiff has the right to a trial by jury on a particular cause of action, then the court must uphold the plaintiff's right to that mode of trial. *See Fass v. Liverpool, L. & G. Fire Ins. Co.*, 105 S.C. 364, 369-70, 89 S.E. 1040, 1042 (1916). When a court denies a motion to amend a complaint to add a new cause of action for an improper reason, the denial operates to dismiss the cause of action before a plaintiff ever has a chance to test the plaintiff's claim on the merits or a plaintiff's substantial rights under that cause of action. *See Thornton*, 391 S.C. at 304; *Pruitt v. Bowers*, 330 S.C. 483, 488-89, 499 S.E.2d 250, 253 (Ct. App. 1998); *Collins v. Sigmon*, 299 S.C. 464, 466, 385 S.E.2d 835, 836 (1989); compare Rule 12(b) (motion to dismiss), Rule 12(f), SCRPC (motion to strike), Rule 15(a) (motion to amend pleadings prior to final judgment), with Rule 15(b), SCRPC (motion to amend pleadings after final judgment). Courts must adhere to "the basic principle . . . that, in order to avoid the danger that [courts] might dispose of viable claims prematurely, courts must allow the parties to develop an adequate record." *Carlson v. Gen. Motors Corp.*, 883 F.2d 287, 293 (4th Cir. 1989).

When a court grants a motion to amend a complaint on proper grounds, the amendments shape and alter the issues to determine the parties' rights before the court and test the merits to a plaintiff's causes of action. *See Dockside Ass'n v. Detyens, Simmons & Carlisle*, 297 S.C. 91, 93-94, 374 S.E.2d 907, 909 (Ct. App. 1988). By contrast, when a court denies a motion to amend a complaint that would shape the issues of the case as well as the mode of trial, then the denial of a motion to amend affects the substantial rights of the plaintiff related to the substantive merits of the amendments to the complaint when proceeding forward with litigation. *See id.* While denying a motion to amend a complaint may not be based on the merits of the proposed amendments to the complaint, the denial of a motion to amend a complaint to add a new cause of action affects the plaintiff's substantive rights related to that cause of action by disposing of viable claims prematurely that are never fully developed on the record. *See Patton*, 420 S.C. at 489-93; *Carlson*, 883 F.2d at 293.

**ARGUMENT****17.**

Appellants raise the following exceptions to particular statements, findings, and conclusions in the Order and Appellants respectfully request that the Court reconsider the same based on the record and the evidence and arguments identified herein. The Court's Order issued on January 30, 2019, erroneously dismisses Appellants' appeal on the basis that Appellants' appeal related to an interlocutory order denying Appellants' Motion to Strike Respondents' Answer. Appellants never addressed the issue on appeal regarding the lower court's denial of Appellants' Motion to Strike Respondents' Answer in Appellants' Motion for Reconsideration to Alter or Amend the Judgment filed before the lower court on December 14, 2018. Rather, Appellants' Motion for Reconsideration to Alter or Amend the Judgment addressed the issue of the lower court denying Appellants' Motion to Amend or Alter Appellants' Complaint. This Court's Order entered into on January 30, 2019, does not address the correct issue on appeal.

**18.**

First, the lower court's order denying Appellants' motion to amend Appellants' complaint to add a cause of action for a violation under the Magnuson-Moss Warranty Act involved the merits of the action that, in effect, determined the dismissal of the cause of action before ever being litigated and foreclosed Appellants from forming the whole cause of action. *Ex Parte Capital U-Drive-It, Inc.*, 369 S.C. at 7. Initially, in the lower court's order on December 12, 2018, the lower court provided no explanation for denying Appellants' motion to amend Appellants' complaint to add a new cause of action despite a strong bias for the lower court to give leave to Appellants' request to amend Appellants' complaint. Such a ruling was a clear abuse of discretion because the lower court exercised no discretion or explanation for denying Appellants' motion to amend Appellants' complaint.

After Appellants filed a motion to reconsider to alter or amend a judgment before the lower court, the

lower court issued an order denying Appellants' motion to amend Appellants' complaint because the motion was procedurally untimely. Under the prejudice prong of Rule 15(a) of the South Carolina Rules of Civil Procedure, Respondents had the burden of showing that Respondents were prejudiced by Appellants' motion to amend Appellants' complaint. Respondents were placed on notice well in advance of multiple requests to the lower court by Appellants to amend the complaint and add a cause of action for a violation under the Magnuson-Moss Warranty Act. The parties have only just begun preliminary discovery. The parties have not taken any depositions yet to develop any testimony. The parties are well in the early stages of litigation affording Respondents plenty of time to develop testimony and prepare for defending against a cause of action for a violation under the Magnuson-Moss Warranty Act. Respondents never provided any supporting arguments or proper objections as to being prejudiced by Appellants' motion to amend Appellants' complaint. Hence, Respondents have waived Respondents' objections of any prejudice from Appellants' motion to amend Appellants' complaint. Timeliness of a motion to amend a complaint, in a conclusive statement in one sentence without more, is not a proper analysis by the lower court of the prejudice prong under Rule 15(a) of the South Carolina Rules of Civil Procedure. Failure to conduct a proper analysis of prejudice to Respondents from Appellants' motion to amend Appellants' complaint is also an abuse of discretion and misapplication of the law.

The issue is circular where Appellants face a "catch-22" situation. Ultimately, the lower court's order establishes and applies erroneous principles of law that affect the merits of the case and deprives Appellants any benefit of a final hearing or subsequent appeal post-trial. *Tamm*, 350 S.C. at 138. Because Respondents failed to show prejudice from Appellants' motion to amend Appellants' complaint, and the lower court denied Appellants' motion to amend Appellants' Complaint to add a cause of action for a violation under the Magnuson-Moss Warranty Act, Appellants cannot file another motion to amend Appellants' complaint to add the same cause of action before, during, or after trial. *Compare Thornion*, 391 S.C. at 301-05 (order granting a

motion to strike a cause of action prevents the nonmoving party from raising the cause of action again and removes a material issue from the case because the evidence submitted before a jury is limited to the pleadings), with *Arnold*, 309 S.C. at 172 (ruling that amending the complaint to add a new cause of action post-trial is barred by Rule 15(b), SCRPC). Hence, Appellants must preserve the issue in a subsequent appeal at the time the lower court denies Appellants' motion to amend Appellants' complaint to add a cause of action for a violation under the Magnuson-Moss Warranty Act because the issue is not preserved for review in a post-trial appeal. Rule 15(b), SCRPC; *Noisette*, 304 S.C. at 58; *Arnold*, 309 S.C. at 172. Therefore, the court's denial prevents "the issue from being litigated on the merits, and prevent[s] the party from seeking to correct any errors in the order during or after trial." *Thornton*, 391 S.C. at 304.

19.

Secondly, the lower court's order denying Appellants' Motion to Alter or Amend Appellants' Complaint affects Appellants' substantial rights by determining Appellants' rights under a cause of action for a violation of the Magnuson-Moss Warranty Act that is not available for subsequent appellate review post-trial under Rule 15(b) of the South Carolina Rules of Civil Procedure. *Hagood*, 362 S.C. at 195-97; *Breland*, 339 S.C. at 93. The lower court's language that Appellants' motion to amend Appellants' complaint as procedurally untimely is plain and unambiguous. *Weil*, 299 S.C. at 90-91. The finality of the lower court's order divests Appellants of the right to allege a new cause of action. As such, Appellants have had no opportunity to test the merits of this cause of action or develop the record accordingly. The finality of the lower court's order divests Appellants of the right to proceed with Appellants lawsuit because Respondents' Sales Order violates the Magnuson-Moss Warranty Act on its face compels arbitration as binding and unreviewable by a court or jury. The Court may not "enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution." *Simpson*, 373 S.C. at 33. Hence, the Magnuson-Moss Warranty Act governs regardless of whether Appellants

pled a violation of the Magnuson-Moss Warranty Act specifically in Appellants' complaint under principals of supremacy of federal law and federal preemption. *Id.*

When a motion to compel arbitration is at issue, then Appellants' mode of trial is clearly called into question regarding the waiver of the right to a jury trial. *See Fass*, 105 S.C. at 369-70. The Magnuson-Moss Warranty Act grants Appellants the right to file a civil suit under federal law because of Respondents' failure to comply with the requirements of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2310(d)(1). In that context, a ruling on denying a motion to amend a complaint to add a violation under the Magnuson-Moss Warranty Act based on being procedurally untimely touches a substantive matter and Appellants' rights under federal law. Appellants have a substantive right to file a civil suit under the Magnuson-Moss Warranty Act and request a jury trial versus proceeding with arbitration. *See Collins*, 299 S.C. at 466 ("It follows that the trial judge should generally not consider these substantive arguments at the mere amendment stage."); *Fass*, 105 S.C. at 371.

Therefore, the denial of a motion to amend a complaint for Appellants to add a violation under the Magnuson-Moss Warranty Act operates to divest Appellants' rights under the Magnuson-Moss Warranty Act to select the mode of trial and request a trial by jury instead of proceeding with arbitration when Respondents are clearly in violation of the Magnuson-Moss Warranty Act. *Good*, 201 S.C. at 41-42. Appellants are not required to proceed with arbitration before filing a lawsuit accordingly. Therefore, the lower court's order denying Appellants' motion to amend Appellants' complaint also affects Appellants' mode of trial when Appellants have requested a jury trial in this case. Respondents have attempted to compel arbitration twice in this case. Unnecessary litigation has occurred already when Respondents' are in violation of the Magnuson-Moss Warranty Act. Appellate review will avoid further unnecessary litigation on this issue.

#### CONCLUSION

These grounds for appeal have resulted in unnecessary litigation over the clear application of the law in

South Carolina and under the Magnuson-Moss Warranty Act. The lower court definitively ruled on the merits of litigation for Appellants to introduce a new cause of action and established the law in this case erroneously, which has, in effect, divested Appellants of said cause of action and the ability to present the issue in a subsequent appeal post-trial. Hence, the lower court's determination became a binding adjudication as the law established in the order would have become the established law of the case had Appellants not filed an appeal. A new trial will not cure Appellants' rights. Proceeding with litigation and trial may constitute a waiver of substantial rights in a cause of action for a violation under the Magnuson-Moss Warranty Act. Therefore, the finality of the order involves the merits and substantially affects the rights of Appellants.

WHEREFORE, for all the reasons set forth above, this motion be granted; this appeal is reinstated; upon reinstatement, the order dismissing this appeal is reversed; and, and such other and further relief as the Court deems just and proper.

Respectfully submitted this 6 day of February, 2019.

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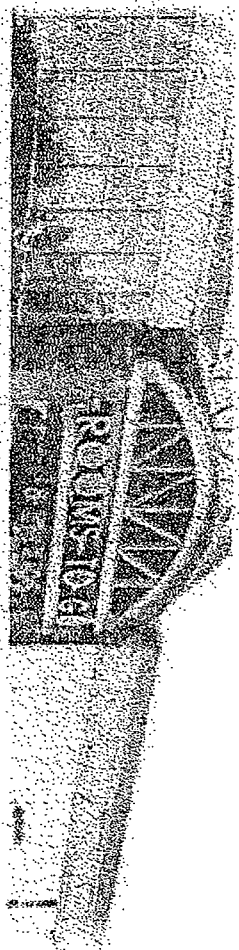
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ATTORNEY FOR APPELLANTS

South Carolina

Date: February 6, 2019

# EXHIBIT A



Store #: 1901

ROOMS TO GO - GREENVILLE  
1525 WOODRUFF RD, STE E101, GREENVILLE, SC 29607 (864) 987-0400

Order #: 12210959

Order Date: 02/02/2019  
Sales Person Name: ANTHONY LAYBEE (0295581)  
Sold To: KYLE H. SCHWARTZ | LOW SANDY IN THE BR | CARRE RIVIERE SEC 29607 | HomeTel No: (803) 580-1172 | Business Tel No: (803) 4720-3044  
Delivery/Pickup: 20190207 | See Inventory History

Revised Order #: 1  
ORD# 2017 01 32 P4 006608

Description	SKU No.	QTY	Unit Amount	Total Amount
Force Field Protection	10392 SP	1	\$1,799.99	\$1,799.99
Force Field Protection	10393 SP	1	\$49.99	\$49.99
Force Field Protection	12302 BK	1	\$50.00	\$50.00
Force Field Protection	10491 BK	1	\$290.99	\$290.99
Force Field Protection	10492 BK	1	\$16.99	\$16.99

*Handwritten:* Cash Paid by Customer  
1259 2158  
399.99

Sales Total: \$7,226.00  
 Delivery/Setup: \$2,100.00  
 Subtotal: \$9,326.00  
 Sales Tax: \$441.00  
 Total: \$9,767.00

Payment Information

ACH Payment from ACH Bank Account: 02/02/2019

Deposit History

02/02/2019  
02/02/2019  
\$201.00

Delivery/Pickup Instructions  
Customer Name: Kyle H. Schwartz | Low Sandy In The Br | Carre Riviere Sec 29607







# EXHIBIT B

ELECTRONICALLY FILED - 2019 Oct 05 9:50 AM - GREENVILLE - COMMON PLEAS - CASE#2017CP2907837

STATE OF SOUTH CAROLINA  
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS  
FOR THE THIRTEENTH JUDICIAL CIRCUIT

2017-CP-23-07837

CIVIL ACTION NO.

BLACKSTONE AND CHASE, LLC, MARK  
T. THOMAS, TENSLEY E. THOMAS,  
AND BRADLEY W. KERR,

Plaintiff(s).

v.

MARGARET H. DURHAM LIVING TRUST,  
MULTIPLEX SYSTEMS, INC., ICE RINK  
ENGINEERING AND MANUFACTURING  
COMPANY, LLC, EZ GLIDE 350, LLC,  
MARGARET H. DURHAM, JAMES W.  
DURHAM, HELEN W. SHOCKLEY, AND  
TAMALA D. CRANE,

Defendant(s).

PLAINTIFFS' NOTICE AND MOTION FOR  
RECONSIDERATION TO ALTER OR AMEND  
A JUDGMENT

TO: MARGARET H. DURHAM LIVING TRUST  
MULTIPLEX SYSTEMS, INC.  
ICE RINK ENGINEERING AND MANUFACTURING COMPANY, LLC  
EZ GLIDE 350, LLC  
MARGARET H. DURHAM  
JAMES W. DURHAM  
HELEN W. SHOCKLEY  
TAMALA D. CRANE

PLEASE TAKE NOTICE that Plaintiffs hereby submit this motion for reconsideration to alter or amend the Court's Order entered and dated on October 3, 2018 ("Order"), pursuant to rule 59(e) of the South Carolina Rules of Civil Procedure. This motion for reconsideration is divided into several sections as set forth below. Each section provides multiple grounds for reconsideration of the Court's Order. Collectively, pursuant to these grounds for reconsideration, Plaintiffs seek rulings on matters that the Court did not address in its Order; Plaintiffs seek the Court's reasons for deciding certain matters where no reasons are given; and Plaintiffs seek for the Court to reconsider its findings and correct its errors based on the record and the law. Plaintiffs show the following:

**FACTS**

On October 3, 2018, the Court issued an Order denying Plaintiffs' Motion for Partial Summary Judgment, Plaintiffs' Motion to Strike Defendants' Answer, and Plaintiffs' Motion to Dismiss Defendants' Counterclaims. Plaintiffs requested a motion for partial summary judgment on the following issues for Plaintiffs' causes of action: (1) forcible entry and detainer; (2) wrongful dispossession; (3) claim and delivery; (4) conversion; and, (5) unjust enrichment to

ELECTRONICALLY FILED - 2018 Oct 05 8:50 AM - GREENVILLE - COMMON PLEAS - CASE#2017CP2307837

Plaintiffs' personal property and security deposit. Plaintiffs requested a motion to strike and a motion for partial summary judgment on the following issues for Defendants' counterclaims: (1) the existence of lease agreement in Defendants' causes of action for breach of contract and breach of contract accompanied by fraudulent acts; (2) negligence (or gross negligence); (3) conversion; (4) private nuisance; and, (6) abuse of process. Plaintiffs requested a motion to strike and a motion for partial summary judgment on the following issues for Defendants' defenses: (1) abandonment; and, (2) default. Plaintiffs requested a motion to strike Defendants' defenses: (1) motion to dismiss; (2) abandonment, waiver, estoppel, laches, and unclean hands; (3) failure to mitigate; and, (4) inconsistent pleadings. Plaintiffs requested a motion for a more definite statement for Defendants' second, third, and sixth defenses of: (1) failure to state a claim; (2) abandonment, waiver, estoppel, laches, and unclean hands; and, (3) affirmative defenses. Defendants made an oral motion to make a more definite statement for negligence in the hearing on August 27, 2018.

The Court denied Plaintiffs' motion to dismiss Defendants' counterclaims for: (1) conversion; (2) private nuisance; and, (3) abuse of process. The Court denied Plaintiffs' motion to strike Defendants' defenses: (1) failure to state a claim; (2) default; (3) mitigation of damages; (4) abandonment, waiver, estoppel, laches, and unclean hands. The Court denied Plaintiffs' motion to strike Defendants' inconsistent pleadings. The Court denied Plaintiffs' motion for a more definite statement for Defendants' second, third, and sixth defenses of: (1) failure to state a claim; (2) abandonment, waiver, estoppel, laches, and unclean hands; and, (3) affirmative defenses. The Court granted Defendants' motion to make a more definite statement with respect to Defendants' claim for negligence.

The Court ruled that: (1) the lease agreement was a valid contract with respect to Defendants' counterclaims for breach of contract and breach of contract accompanied by fraudulent acts; (2) Plaintiffs were liable to Defendants who were occupants of the building and not parties to the lease agreement for smoke damage; (3) the landlord was contractually authorized to evict Plaintiffs from the premises and distraint Plaintiffs' personal property therein without resorting to the judicial process; (4) Plaintiffs waived the right to challenge the lease agreement; and, (5) Plaintiffs were estopped from challenging the lease agreement.

**GROUND FOR RECONSIDERATION BASED ON EXCEPTIONS TO PARTICULAR STATEMENTS, FINDINGS, AND CONCLUSIONS IN THE ORDER**

Plaintiffs raise the following exceptions to particular statements, findings, and conclusions in the Order and Plaintiffs respectfully request that the Court reconsider the same based on the record and the evidence and arguments identified herein.

**I. COMMERCIAL LEASES ARE SUBJECT TO THE JUDICIAL PROCESS BEFORE EJECTING A TENANT**

Regarding Plaintiffs' motion for partial judgment on the pleadings with respect to Plaintiffs' causes of action forcible entry and detainer, wrongful dispossession, claim and delivery, and conversion, the Order on pages 5-5 relies upon inapposite law to this case that is also an unpublished opinion with no precedential value. *KBR Dev. v. Yansy Realty*, No. 2005-UP-217, 2005 S.C. App. Unpub. LEXIS 361, at \*4 n.3 (Ct. App. Mar. 24, 2005). Specifically, "[m]emorandum opinions and unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved." Rule 268(d)(2), SCACR; see S.C. Code Ann. § 18-9-280 ("[T]he Court may file memorandum opinions in unanimous decisions when the Court determines that a full written opinion would have no precedential value . . ."). Therefore, the Court may not rely upon this case as dispositive on the issue as to whether provisions of a lease agreement exclusively control commercial leases. Such a construction of the law renders Title 27, Chapter 37, Section 10 of the South Carolina Code as superfluous with respect to commercial leases and results in an inequitable miscarriage of justice to Plaintiffs.

Moreover, the Court's reliance upon *KBR Dev.* is also inapposite because the court based its ruling upon the interaction of Article 9 with secured lenders related to the landlord-tenant dispute thereby deciding the case on other grounds outside of the statutory principles of ejectment for the landlord to repossess the premises and distraint the tenant's personal property therein. In *KBR Dev.*, the case involved both a lease agreement for the rental of the premises and a promissory note to upfit the premises subject to Article 9 of the South Carolina Uniform Commercial Code for secured transactions. The lessor was required to build the structure of the barbeque restaurant for the lessee, and the lessee was required to finance the upfitting of the new building. However, the lessee could not afford to upfit the barbeque restaurant. Subsequently, the lessor financed the upfitting of the same and the lessee signed a promissory note regarding the lessor upfitting the new restaurant building.

In *KBR Dev.*, the lessor filed an action to collect on the promissory note, which permitted a thirty-day notice before repossessing the premises and goods, fixtures, or accessions therein from the upfitting of the barbeque restaurant. The lessee was in default for approximately three months. A promissory note is "an instrument that evidences a promise to pay a monetary obligation . . ." S.C. Code Ann. § 36-9-102(65). Because the lessor was the financier of the upfitting for the barbeque restaurant by virtue of the promissory note, the lessor also had a purchase-money security interest in the goods that became fixtures or accessions during the upfitting of the barbeque restaurant. See S.C. Code Ann. § 36-9-335 (accessions); S.C. Code

Ann. § 36-9-103 (purchase-money secured interests), S.C. Code Ann. § 36-9-334 (purchase-money secured interests). Under Article 9 of the South Carolina Commercial Code, a secured party's rights after default include the agreement between the parties. S.C. Code Ann. § 36-6-901. In this case, while the outcome would have been the same due to the promissory note pursuant to Article 9 of the South Carolina Uniform Commercial Code, the analysis of the lease, which was backed by personal guarantees of the lessee(s), was folded into the analysis of the promissory note that permitted repossession on independent grounds other than the lease agreement. Therefore, the legal basis for deciding this case did not pertain to statutory principles of ejectment for the landlord to repossess the premises by virtue of the lease agreement as the exclusive means of controlling the commercial landlord-tenant relationship. The Order is based on an erroneous application of the law.

By contrast, an illegal contract is void and unenforceable if the contract: (1) violates public policy; or, (2) circumvents the statutory requirements for ejecting a tenant from the leased premises. See *Berkebile v. Outen*, 311 S.C. 50, 53 n.2, 426 S.E.2d 760, 762 (1993) (reifying that no court must "enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution"). The dispositive issue is whether a landlord for a commercial lease is required to engage in the judicial process before forcibly removing the tenant from the premises regardless of creative wordsmithing in the lease agreement stating anything to the contrary. The answer is yes. The statutory requirements to evict a tenant, whether the tenant is a residential tenant or a commercial tenant, follows the same judicial process that are essentially grounded in the constitutional rights of due process before suffering the deprivation of property, or an interest in that property. See S.C. Code Ann. §§ 27-37-10 to -160; *Gentry v. Recreation, Inc.*, 192 S.C. 429, 435, 7 S.E.2d 63, 65 (1940).

Under landlord-tenant law in South Carolina, the landlord and tenant have either statutory duties, contractual duties, or both by virtue of the dichotomous nature of leases as both a lease and a transfer of estate as a tenement of land. *Burbach v. Inv'rs Mgmt. Corp. Int'l*, 326 S.C. 492, 496-97, 484 S.E.2d 119, 121-22 (Cl. App. 1997). The statutory duties imposed on the landlord and tenant incorporate the public's expression of the public's interest that is mutually exclusive of the contractual duties imposed by a lease as a contract. See *Rowland & Sons v. Bock*, 150 S.C. 490, 493, 148 S.E. 549, 550 (1929); S.C. Code Ann. §§ 27-33-10 to -50 (applying general definitions, court jurisdiction, and general provisions); S.C. Code Ann. §§ 27-35-10 to -180 (defining the statutory meanings of creation, construction, and termination for leasehold estates); S.C. Code Ann. §§ 27-37-10 to -160 (ejecting tenants); S.C. Code Ann. §§ 27-39-10 to -360 (distraintaining personal property of tenants).

As a matter of statutory interpretation, unless the statutory provision allows for parties to agree differently, the statute controls regardless of what terms and conditions the private parties reach in agreement. See S.C. Code Ann. § 27-35-75(A) ("[u]nless otherwise agreed to"); S.C. Code Ann. § 27-35-90 ("[u]nless otherwise agreed"); see also *Rorner v. P.J. Club, Inc.*, 347 S.C. 560, 566, 556 S.E.2d 726, 729 (Ct. App. 2001) ("[P]enal statutes are strictly construed . . ."). When the statute's meaning is plain and unambiguous, then the court may not apply the canons of statutory construction to interpret the clear and definite meaning of the legislative intent. *Rorner*, 347 S.C. at 568. By contrast, when a party "seeks to recover a penalty for the failure on the part of to discharge some duty imposed by law, [that party] must bring [the party's] case clearly within the language and meaning of the statute awarding the penalty." *Id.* A writ of ejectment based on nonpayment of rent is a penal statute by which the court must evaluate the statute within context of the whole statute(s) and policy of the law. See *id.* The South Carolina Residential Landlord-Tenant Act is very analogous comparative law designed to avoid oppressive conduct by landlords and tenant-abuse. S.C. Code Ann. §§ 27-40-10 to -940. For commercial leases, Title 27, Chapters 33, 35, 37, and 39 of the South Carolina Code primarily apply.

Title 27, Chapters 33, 35, 37, and 39 of the South Carolina Code were substantially amended in 1962 with subsequent modifications thereafter over the years. Older case law in South Carolina prior to 1962 purports the landlord's ability to engage in a self-help eviction when the tenant has abandoned the property or when and the tenancy status relates to a tenancy at will: "a landlord may peaceably dispossess a tenancy at will after expiration of the term." *Colonial Oil Co. v. Am. Oil Co.*, 43 F. Supp. 718, 723 (D.S.C. 1942) (citing *Barbee v. Winnsboro Granite Corp.*, 190 S.C. 245, 251, 2 S.E.2d 737, 739 (1939)); but see *Trakas v. Mitchell*, 111 S.C. 160, 170-71, 97 S.E. 245, 248 (1918) (Hydrick, J., dissenting) (disfavoring forfeitures and strictly construing forfeiture provisions in leases in equity "when fair dealing and good conscience require it"). However, South Carolina subsequently passed legislation changing the effect of these line of cases relegating a very narrow scope for self-help in landlord-tenant disputes:

When a tenant abandons premises theretofore occupied by him the landlord may enter and take possession thereof, making distraint as herein provided of any property found thereon, including the property exempt from distress by the provisions of Section 27-39-230 and the term of a tenant abandoning premises used and occupied by him as such shall be deemed ended by such abandonment. Absence from the property for fifteen days after default in the payment of rent shall be construed as abandonment. S.C. Code Ann. § 27-35-150.

By contrast, the same does not apply when a lease governs the terms and conditions of tenancy provided that the lease does not conflict with other statutory tenancy principles. See *Burbach*, 326 S.C. at 496-97; *Berkebile*, 311 S.C. at 53 n.2.

In 1962, South Carolina enacted law that have substantially displaced these older lines of cases and require a statutory process to peaceably evict a tenant through the judicial process. S.C. Code Ann. §§ 15-67-410 to -470 (forcible entry and detainer), S.C. Code Ann. §§ 27-37-10 to -160 (ejecting tenants); S.C. Code Ann. §§ 27-39-10 to -360 (distraing personal property of tenants). Hence, South Carolina law created new governing statutory ejectment principles that take precedence over older case law ruling in the contrary:

Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worth while, — a government which retains adequate authority to secure the peace and good order of society. *Home Bldg. & Loan Asso. v. Blaisdell*, 290 U.S. 398, 435, 54 S. Ct. 231, 239 (1934).

Moreover, the South Carolina Supreme Court overruled older case law strictly construing the statutory principles of ejectment: “[A] forfeiture for a trivial or immaterial breach of a commercial lease should not be enforced.” *Kiriakides v. UA Commc'ns*, 312 S.C. 271, 276, 440 S.E.2d 364, 366-67 (1994) (overruling *Wright v. Payer*, 233 S.C. 223, 104 S.E.2d 289 (1958); *Billips v. Hawkins*, 298 S.C. 435, 381 S.E.2d 210 (Ct. App. 1989); *Beard v. Ryder/P-I-E Nationwide, Inc.*, 292 S.C. 250, 355 S.E.2d 872 (Ct. App. 1987); and *Hairston v. Carolina Wholesale Furniture Co.*, 291 S.C. 371, 353 S.E.2d 701 (Ct. App. 1987) to the extent that they are inconsistent with this holding”). The factors for determining whether a breach is a substantial, material breach are as follows:

- (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;
- (b) the extent to which the injured party can be adequately compensated [by damages] for the part of that benefit of which he will be deprived;
- (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
- (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;
- (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing. *Kiriakides*, 312 S.C. at 276 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 241 (1981)).

Thus, any breach of a commercial lease must be tempered by equitable principles to avoid a forfeiture of the lease. See *Litchfield Co. of S.C. v. Kiriakides*, 290 S.C. 220, 225-27, 226, 349

S.E.2d 344, 347-49 (S.C. App. 1986) ("[E]quity will relieve against a forfeiture of a lease incurred by the breach of a covenant to pay rent.")

As a matter of public policy, no landlord has the right to evict the tenant forcibly without legal process at that time. See *Sharp v. Kinsman*, 18 S.C. 108, 114 (1882); see also *Parker v. Shecut*, 349 S.C. 226, 230-31, 562 S.E.2d 620, 623 (2002) (exemplifying a disseisor of land). For example, under the South Carolina Landlord-Tenant Residential Act, the parties to a lease are prohibited from contracting in a manner that circumvents the statutory requirements for properly resorting to the judicial process before evicting a tenant from the premises. See S.C. Code Ann. § 27-40-330. The spirit of the South Carolina Residential Landlord-Tenant Act prohibiting landlord and tenants to contract in violation (or retaliation) of either party's rights or remedies under statutory principles of landlord-tenant law should also apply to commercial leases as the risk of oppressive landlords and tenant-abuse applies to all types of leases whether residential or commercial.

Therefore, the Order's reliance on *KBR Dev.* is misplaced and antiquated in light of modern statutes governing the ejectment process for both residential and commercial tenants alike. No dispute exists that Defendants locked Plaintiffs out so Plaintiffs, or Plaintiffs' employees, could not access the premises on or around July 28, 2017. No dispute exists that Defendants refused Plaintiffs reentry to the Premises subsequently thereafter. No dispute exists that Defendants repossessed the premises before resorting to the judicial process. No dispute exists that Defendants took possession of Plaintiffs' personal property on the premises when changing the locks to deny Plaintiffs' access to the premises. No dispute exists that Plaintiffs demanded the return of Plaintiffs' personal property from Defendants after Defendants locked out Plaintiffs from the premises. No dispute exists that Defendants refused to return Plaintiffs' personal property on the premises subsequently thereafter. **Ergo, no dispute exists that Defendants are liable to Plaintiffs for forcible entry and detainer and claim and delivery by engaging in a self-help eviction. With respect to the issue of forcible entry and detainer, wrongful dispossession, claim and delivery, and conversion, the existence of the lease agreement as a valid contract is moot because no lease, whether contractual or statutory, will absolve any landlord from circumventing the judicial process to evict a tenant.** Plaintiffs' motion for partial summary judgment on the issue of forcible entry and detainer, wrongful dispossession, claim and delivery, and conversion should be granted in Plaintiffs' favor.

**I. THE LEASE AGREEMENT IS NOT A VALID CONTRACT AND DOES NOT GOVERN THE LANDLORD-TENANT RELATIONSHIP BETWEEN PLAINTIFFS AND DEFENDANT MARGARET H. DURHAM LIVING TRUST**

Regarding Plaintiffs' motion to dismiss, motion to strike, and motion for partial summary judgment with respect to the existence of the lease agreement as a valid contract in connection with both Defendants' counterclaims for breach of contract and breach of contract accompanied by fraudulent acts and Defendants' defense of default, the Order on pages 1-3 and 5-6 apply the law erroneously. The dispositive issue was whether the lease agreement was a valid contract. For a cause of action for a breach of contract and a breach of contract accompanied by fraudulent acts, the existence of a contract is essential or these causes of action will fail as a matter of law without this element. *Taylor v. Cummins Atl.*, 852 F. Supp. 1279, 1286 (D.S.C. 1994) (breach of contract); *Crawford v. Limehouse & Sons, Inc.*, Civil Action No. 2:10-2094-CWH-BM, 2010 U.S. Dist. LEXIS 131291, at \*5-6 (D.S.C. Nov. 10, 2010) (breach of contract accompanied by fraudulent acts). Defendants may not deny facts presumptively within the Defendants' knowledge or matters of public record to put such facts in issue. *Clanton's Auto Auction Sales, Inc. v. Campbell*, 230 S.C. 65, 71, 94 S.E.2d 172, 175 (1956). Defendants' causes of action for breach of contract and breach of contract accompanied by fraudulent acts both reference to the lease agreement to support the element of an existence of a contract. ¶403-412, Defendants' Answer and Counterclaim. By contrast, a lease is not always relevant in a landlord-tenant dispute because the lease may be invalid, expired, or nonexistent. *E.g.*, *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891, 894 (1989) (expired lease and unenforceable oral contract); *Barksdale v. Hinson*, 212 S.C. 1, 3, 46 S.E.2d 170, 171 (1948) (oral lease); *Wilson v. McAbee*, 256 S.C. 211, 217, 182 S.E.2d 313, 315 (1971) (defective, written lease).

A limited liability company is a limited liability company that is organized under Title 33, Chapter 44 of the South Carolina Code. S.C. Code Ann. § 33-44-101(9). The organization of a limited liability company must meet certain substantive and procedural requirements to come into existence with the South Carolina Secretary of State. S.C. Code Ann. §§ 33-44-105 to -112 (substantive requirements); S.C. Code Ann. §§ 33-44-201 to -210 (procedural requirements). The signatory of a limited liability company must be a member, and presumably acting with appropriate authority, of an existing limited liability company to "sign and deliver any instrument transferring or affecting the company's interest in real property." S.C. Code Ann. § 33-44-301(c). Hence, whether a limited liability company exists is a matter of public record with the South Carolina Secretary of State. Therefore, the agency of members and liability of the same for limited liability companies only apply to a limited liability company organized under South Carolina law with a certificate of existence

**Issued by the South Carolina Secretary of State pursuant to the South Carolina Uniform Limited Liability Company Act of 1996, S.C. Code Ann. §§ 33-44-301 to -303.**

The general rule is that a limited liability company is not liable for promoter pre-incorporation contracts or torts. *Hansen v. Fields Co., LLC*, 409 S.C. 541, 547-48, 549-50, 763 S.E.2d 31, 34-36 (2014). A promoter of a limited liability company "is a person who acts to organize the entity by preparing it to transact business and establishing it." *Id.* at 547 n.5. **No agency relationship exists "between a promoter and a non-existent corporate entity." *Id.* at 549-50. If no agency relationship exists between the promoter and the non-existent entity, then no constructive knowledge of all the material facts received by the promoter may be imputed to the non-existent entity. See *Indep. Nat'l Bank v. Buncombe Prof'l Park, LLC*, 411 S.C. 605, 608-09, 769 S.E.2d 663, 665 (2015) (citing *Crystal Ice Co. v. First Colonial Corp.*, 273 S.C. 306, 309, 257 S.E.2d 496, 497 (1979)).** If the promoter of a limited liability company never committed a tort, then the complaining party has no recourse for the alleged wrong. See *Hansen*, 409 S.C. at 549-50. Public policy protects innocent investors from being financially harmed from tortious conduct of which they were ignorant to promote potential investment in businesses. *Id.*

Whether a limited liability company is liable for promoter pre-incorporation contracts or torts depends entirely on whether a limited liability company expressly ratifies the contract or implicitly ratifies the contract "by accepting its benefits with full knowledge of its terms." *Id.* at 547-48 (emphasis added). For the principal to ratify an unauthorized contract entered into by its agent, the principal must: (1) accept the benefits under the contract; (2) have full knowledge of the facts; and, (3) manifest an intention to adopt the contract. *Anthony v. Padmar, Inc.*, 320 S.C. 436, 452, 465 S.E.2d 745, 755 (Ct. App. 1995). Ratification may not be implied "against a principal who is ignorant of the facts." *Moore v. Hardaway Contracting Co.*, 193 S.C. 299, 305, 8 S.E.2d 511, 513 (1940). And, the principal must either ratify or reject the contract in toto (i.e., no partial acceptance or rejection of the terms and conditions of the contract). *Fuller v. E. Fire & Cas. Ins. Co.*, 240 S.C. 75, 77, 124 S.E.2d 602, 610 (1962). **Thus, merely accepting benefits under the contract is not sufficient to ratify the terms and conditions of a contract. The principal must have full knowledge of the terms and conditions of the contract.**

In *Hansen*, two promoters, Hansen and Fields, were trying to finance a deal to purchase a water bottling company in South Carolina. When Hansen discovered that Fields was trying to exclude Hansen from the deal, Hansen filed suit against Fields and the related entities to the deal. The court overturned the verdict for Hansen's contract claims because Hansen failed to prove that the other entities ratified the conduct of Fields. In *Indep. Nat. Bank*, a valid agency

existed between an agent and the limited liability company with regard to entering a mortgage with the bank that was subordinated to an earlier mortgage unbeknownst to the bank. Because a valid agency relationship existed, the limited liability company was imputed with the knowledge that the agent received when acting within the scope of authority granted by the limited liability company.

At the time of the lease agreement on or around March 15, 2016, Plaintiff BLACKSTONE AND CHASE, LLC, did not exist as a limited liability company until May 13, 2016, that was discoverable as a matter of public record, as an undisputed fact. Plaintiffs TENSLEY E. THOMAS, MARK T. THOMAS, and BRADLEY W. KERR took possession of the premises on or around March 15, 2016, which is an undisputed fact. The lease agreement is not made out to Plaintiff BRADLEY W. KERR individually. The preamble and recital named Plaintiff BLACKSTONE AND CHASE, LLC. Section 29 named Plaintiff BLACKSTONE AND CHASE, LLC, as the lessee. Exhibit B, Plaintiffs' Amended Complaint. The lease agreement is clear that the lessee was Plaintiff BLACKSTONE AND CHASE, LLC, not Plaintiff BRADLEY W. KERR in the individual capacity. And, the lease agreement is clear that Defendant MARGARET H. DURHAM LIVING TRUST entered into a lease agreement with a limited liability company that was not yet in existence.

Because Plaintiff BLACKSTONE AND CHASE, LLC, was not formed yet, no agency relationship existed between Plaintiff BRADLEY W. KERR and Plaintiff BLACKSTONE AND CHASE, LLC. Moreover, Plaintiffs TENSLEY E. THOMAS and MARK T. THOMAS cannot ratify a contract in which they are ignorant of the terms and conditions of the same. Neither of these Plaintiffs were parties to the lease agreement, and they asked repeatedly for a copy of the lease agreement from Defendants to no avail. Defendants' counsel refused to provide Plaintiffs' counsel with a copy of the lease agreement upon request during settlement negotiations. Defendants admitted to not meeting these Plaintiffs until after March 15, 2016. Therefore, the lease agreement is not a valid contract and does not govern the landlord-tenant relationship between Plaintiffs and Defendant MARGARET H. DURHAM LIVING TRUST. This conclusion does not negate whether a subsequent oral contract or a landlord-tenant relationship was formed consequently. Plaintiffs' motion for partial summary judgment on the lease agreement as an invalid contract should be granted. Plaintiffs' motion to dismiss and motion to strike Defendants' causes of action for breach of contract and breach of contract accompanied by fraudulent acts should be granted. Plaintiffs' motion to strike Defendants' defense for default should be granted.

## II. DEFENDANTS' COUNTERCLAIM FOR CONVERSION MUST FAIL AS A MATTER OF LAW

Regarding Plaintiffs' Motion to Dismiss and Strike Defendants' cause of action for conversion the Order on page 4 relies upon inapposite law to this case. See *Kutter v. Smith*, 69 U.S. (2 Wall.) 491, 497 (1865). In *Kutter*, the landlord-tenant dispute arose out of the lessee erecting a house on the land with the lessor having the right to purchase said house pursuant to the lease agreement in the state of Illinois. The case also introduced the concept of trade fixtures used for the convenience of the tenant's trade. *Kutter*, 69 U.S. at 497. By contrast, the erection of the house was deemed the fixture in question. The U.S. Supreme Court ruled that the lower court applying the law of conversion to the house—as a fixture—was a mistake of law. *Id.* ("Time is given by law for the removal of such fixtures, and any interposition, on the part of the lessor, to prevent the removal, is, in law, a conversion and an injury resulting from the act of the lessor, for which he must respond in damages."). Rather, the rule of law in *Kutter* is that if the tenant affixed a building onto the land, the building became part of the land and the property of the landowner. 69 U.S. at 497. Therefore, conversion of the house, as a fixture, was inapplicable.

State law defines fixtures, which is "a mixed question of law and fact . . . unless the facts are susceptible of but one inference." *Carson v. Living Word Outreach Ministries, Inc.*, 315 S.C. 64, 70, 431 S.E.2d 615, 618 (Ct. App. 1993). Fixtures are defined as "goods that have become so related to particular real property that an interest in them arises under real property law." S.C. Code Ann. § 36-9-102(41). In South Carolina, whether personal property retains its status as personal property (i.e., a trade fixture) or as a fixture annexed to real property depends on the following test:

A fixture is generally defined as an article which was a chattel, but by being physically annexed to the realty by one having an interest in the soil becomes a part and parcel of it. By mere affixation the chattel does not become a fixture. The test for determining whether an item remains personalty or becomes a fixture include the following criteria: (1) mode of attachment, (2) character of the structure or article, (3) the intent of the parties making the annexation, and (4) the relationship of the parties. *Carson*, 315 S.C. at 70.

Meaning, if the fixture becomes annexed to real property, and is characterized as part of the real property, then the fixture is considered part and parcel of the real property. In that instance, the fixture loses its characterization of being personal property.

Defendants' cause of action for conversion should be dismissed because the tort of conversion only applies to personal property—not real property. *Hawkins v. City of Greenville*, 358 S.C. 280, 297, 594 S.E.2d 557, 566 (Ct. App. 2004) ("[A] conversion action does not lie

when alleging the exercise of dominion or control over real property.”). In landlord-tenant disputes, the tenant’s fixtures when annexed to the premises are presumed to belong to the tenant provided that removal of the same does not materially injure the premises. *Carson*, 315 S.C. at 70. Moreover, in the lease agreement under Section 15, “[a]ny trade fixtures or equipment installed by Lessee in the Premises at Lessee’s expense will remain Lessee’s personal property and Lessee will have the right at any time during the Term of this Lease to remove such fixtures or equipment . . . [and must] restore the Premises to substantially the same condition as they were when received by Lessee, ordinary wear and tear excepted.”

Exhibit B, Plaintiffs’ Amended Complaint.

Defendants alleged conversion to the fixtures within the building with respect to Plaintiffs’ fixtures. P. 4, Defendants’ Response to Plaintiffs’ Motion to Strike and Motion to Dismiss Defendants’ Answer and Counterclaim. In Defendants’ Fourth Counterclaim, Defendants state: “Plaintiffs converted the Premises to their own use . . . [and] [a]s a direct and proximate result of Plaintiffs’ conversion of the Premises, Landlord has been significantly damaged and is entitled to recover actual damages from Plaintiffs.” ¶¶420-21, Defendants’ Answer and Counterclaim. At the hearing on August 27, 2018, Defendants alleged the fixtures were related to the infrastructure of the building. Defendants’ cause of action is logically unsound because the fixtures on the premises with respect to the infrastructure is part and parcel of real property that was preexisting before Plaintiffs took possession of the premises—not personal property. Defendants’ counterclaim denotes the premises, not personal property. Moreover, if Defendants admitted to locking out Plaintiffs from the premises without resorting to the judicial process, then Plaintiffs are clearly unable to remove Plaintiffs’ personal property therein or restore the premises in a bona fide gordian knot of an impossible, inequitable ruling tantamount to a miscarriage of justice for Plaintiffs. The Court’s denial of Plaintiffs’ motion to strike and dismiss this cause of action is based on an error of law. Plaintiffs’ motion to strike, motion to dismiss, and partial motion for summary judgment on Defendants’ cause of action for conversion should be granted.

**III. DEFENDANTS STILL MUST BEAR THE BURDEN OF PROVING ELEMENTS OF NEGLIGENCE CONCERNING SMOKE DAMAGE THAT ARE STILL IN DISPUTE**  
Regarding Plaintiffs’ Motion to Dismiss and Strike Defendants’ cause of action for negligence in the Order on page 3 asserts incorrectly that Plaintiffs are liable for smoke damages to other occupants in the building. In a negligence cause of action, plaintiff must show “(1) the defendant owes a duty of care to the plaintiff, (2) the defendant breached the duty by a negligent act or omission, (3) the defendant’s breach was the actual and proximate cause of the plaintiff’s injury, and (4) the plaintiff suffered an injury or damages.” *See Moore v. Weinberg*, 383

S.C. 583, 588-89, 681 S.E.2d 875, 878 (2009). Regardless of the status of the lease, Defendants must prove damages as an essential element, which remains disputed at this time. ¶¶122-26, Plaintiffs' Amended Complaint; ¶413-416, Defendants' Answer and Counterclaim. Also, Defendants failed to allege damages in Defendants' Answer and Counterclaim. With discovery pending, the facts are still in dispute on this issue before determining liability on the matter as stated in the Order.

The Court granted Defendants' motion to amend Defendants' Answer and Counterclaim to make a more definite statement. Plaintiffs' motion to strike and a motion for partial summary judgment on Defendants' counterclaim for negligence is still unresolved. The Court's ruling on this issue unclear.

#### IV. DEFENDANTS' COUNTERCLAIM FOR ABUSE OF PROCESS MUST FAIL

Regarding Plaintiffs' Motion to Dismiss and Strike Defendants' cause of action for abuse of process in the Order on page 4, the Court asserts Plaintiffs showing a disregard for judicial economy that does not comport with Plaintiffs' right to assert a legitimate, legal right within the judicial process. Judicial process and judicial economy are not one and the same concept. The cause of action for the tort of abuse of process "provides a remedy for one damaged by another's perversion of a legal procedure for a purpose not intended by the procedure." *Food Lion, Inc. v. United Food & Commer. Workers Int'l Union*, 351 S.C. 65, 69, 567 S.E.2d 251, 253 (Ct. App. 2002). The elements for the abuse of process tort include: (1) an ulterior purpose; and, (2) a willful act using the judicial process that is improper for regularly conducting the proceeding. *Id.* An ulterior purpose is when the judicial process is used to gain an illegitimate objective. *Id.* The element of willful act is some definite, overt act using the judicial process that is improper because the act is either unauthorized by the process or directed at an illegitimate, collateral objective in the regular use of the judicial process. *Id.* at 71. However, no ulterior purpose, however, exists when a party merely seeks to the right to access property as the subject matter of the dispute. *Davis v. Epting*, 317 S.C. 315, 319-20, 454 S.E.2d 325, 328 (Ct. App. 1994). Thus, merely asserting a legitimate, legal right within the judicial process is not grounds for abuse of process. *See id.*

From the very beginning, Plaintiffs have touted that the law does not support Defendants' proposition that the provisions of the lease govern commercial leases. Judge Duckett in the Gantt Summary Court informed Defendants that evicting Plaintiffs without resorting to the judicial process was unlawful. Statutory tenancy principles, case law, and public policy do not support a self-help eviction. A dispute over one month's rent of less than \$3,500.00 versus Plaintiffs' livelihood is extreme and is, arguably, a forfeiture. Attempting to

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repossess the premises, accelerate the lease, and distraint the tenant's personal property is also, arguably, unconstitutional creating a windfall to the landlord and violating a tenant's due process rights to due process for the deprivation of property. Both the Federal Constitution and the South Carolina Constitution extend protection to individuals from any state actor who deprives any citizen of the United States "under [the] color of any statute, ordinance, regulation, custom, or usage, of any State." 42 U.S.C. § 1983; U.S. CONST. amend. 1, XIV; S.C. CONST. art. I, § 2. The Fourth Amendment vests to the people "[t]he right . . . to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONST. amend. IV. The physical trespass of property by the government is not necessary to affect a seizure of property because unlawful seizure may occur "when there is some meaningful interference with an individual's possessory interests in that property." *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S. Ct. 1652, 1656, 80 L. Ed. 2d 85 (1984).

Forfeiture provisions, such as acceleration or liquidated damages provisions, are designed to penalize the tenant by collecting future, unearned rent and unforeseeable, speculative damages that are far more than the actual damages sustained by the landlord unless the landlord makes a good faith attempt to mitigate the landlord's damages by reletting the premises. *Gentry*, 192 S.C. at 436-37. An illegal eviction would operate as a forfeiture of all the tenant's rights under the lease, or subsequent oral contract, which is usually disfavored under South Carolina law. *Litchfield Co.*, 290 S.C. at 221. As a matter of unsettled law, whether the landlord's election of remedies related to eviction, acceleration, and distraint for rent in arrears is valid under substantive due process remains at issue when the result produces a windfall in favor of the landlord as an unreasonable seizure of the premises and the tenant's personal property and trade fixtures located therein. See *Gentry*, 192 S.C. at 436-37; *Kiriakides*, 312 S.C. at 276. Here, no misuse of the judicial process exists when Plaintiffs exercised legitimate, legal rights by statutory tenancy principles concerning allegations of forcible entry and detainer, claim and delivery, wrongful dispossession, and so forth related to Defendants locking out Plaintiffs from the premises. The facts are egregious.

While settlement negotiations were still in process (that ultimately failed), and Defendant **MARGARET H. DURHAM LIVING TRUST** knew Plaintiffs were represented by counsel, Defendant **MARGARET H. DURHAM LIVING TRUST** filed a writ of ejectment without providing notice to Plaintiffs' counsel—knowing full well that Plaintiffs lacked access to the premises and Defendants checked Plaintiffs' mail regularly. Plaintiffs discovered the writ of ejectment, literally less than 48 hours from the ejectment, and filed a preliminary injunction and a notice of intent to appeal on constitutional grounds for lack of due process for lack of notice. Plaintiffs had the right

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to appeal the writ of ejectment. Plaintiffs pursued a complaint for declaratory relief because third parties have an interest in Plaintiffs' personal property located on the premises in the exclusive dominion, control, and possession of Defendants since on or around July 28, 2017. Plaintiffs have worked with Defendants regarding any and all third parties who have a legitimate interest in Plaintiffs' personal property on the premises to release said property. Any outstanding claims are either unknown or denied as illegitimate claims to Plaintiffs' personal property on the premises. Plaintiffs heeded Judge Gravely's order to amend Plaintiffs' complaint at Defendants' first motion to dismiss hearing. Judge Stilwell found no technical deficiencies at Defendants' second motion to dismiss hearing. Both judges questioned Defendants regarding filing for a writ of ejectment after-the-fact.

Without access to Plaintiffs' business records for over a year, Plaintiffs had to reconstruct what Plaintiffs could from independent sources. At the hearing on February 28, 2018, Judge Gravely asked Defendants whether Plaintiffs could at least have access to Plaintiffs' business records. Plaintiffs attempted to work out a solution with Defendants to that effect, which did not prevail in any meaningful agreement without Defendants compromising Plaintiffs' rights and interests despite the actual or high risk of spoliation of evidence by this point—before discovery actually began. Defendants have long been aware of Plaintiffs' quandary to prepare for litigation without Plaintiffs' business records for discovery and have refused to return Plaintiffs' business records, repeatedly. Plaintiffs have merely defended Plaintiffs' legal rights under the circumstances in this litigation in a most inequitable situation.

Plaintiffs' motion to dismiss and motion to strike Defendants' cause of action for abuse of process should be granted.

WHEREFORE, Plaintiffs request that this Motion be granted and the Court amend its Order and Judgment in accordance with the above-requested relief, give leave to amend this motion as required, and such other and further relief as the Court deems just and proper.

Respectfully submitted this 5 day of October, 2018

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Deborah D. Davis, Esq.  
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Attorney for Plaintiffs

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STATE OF SOUTH CAROLINA  
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS  
FOR THE THIRTEENTH JUDICIAL CIRCUIT  
2017-CP-23-07837

COMMON PLEAS CIVIL CASE NO.

BLACKSTONE AND CHASE, LLC, MARK  
T. THOMAS, TENSLEY S. THOMAS,  
AND BRADLEY W. KERR

Plaintiff(s)

v.

MARGARET H. DURHAM LIVING TRUST,  
MULTIPLEX SYSTEMS, INC., ICE RINK  
ENGINEERING AND MANUFACTURING  
COMPANY, LLC, EZ GLIDE 350, LLC,  
MARGARET H. DURHAM, JAMES W.  
DURHAM, HELEN W. SHOCKLEY, AND  
TAMALA D. CRANE,

Defendant(s)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that I served a copy of the foregoing PLAINTIFFS' NOTICE AND MOTION FOR RECONSIDERATION TO ALTER OR AMEND A JUDGMENT in this action dated October 5, 2018, on October 5, 2018, upon the adverse party electronically to the following:

Margaret H. Durham Living Trust et al. & Margaret H. Durham, Trustee c/o Robert K. Merting 501 Furman Road, Suite W Greenville, SC 29609 Attorney for the Defendants	Margaret H. Durham Living Trust et al. & Margaret H. Durham, Trustee c/o Josh Hudson 1052 North Church Street Greenville, SC 29601 Attorney for the Defendants
---	---

I have served a copy of the foregoing by one of the following methods:

- (1) Delivering a copy personally to the adverse party.
- (2) Mailing a copy to the adverse party's last known address, by depositing the copy in the U.S. Mail in an envelope with sufficient postage affixed.
- (3) Delivering it by commercial delivery service in accordance with Rule 4(d)(9), SCRPC, or,
- (4) Other pursuant to Rule 5(b)(1), SCRPC: electronic filing.

Respectfully submitted this 5 day of October, 2018

Deborah D. Davis, Esq.  
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/s/ Deborah D. Davis, Esq.  
Deborah D. Davis, Esq.  
Attorney for Plaintiffs

RECEIVED

FEB 07 2019

SC Court of Appeals

**PROOF OF SERVICE OF MOTION AND PETITION TO REINSTATE  
APPEAL**

**THE STATE OF SOUTH CAROLINA**  
In The Court of Appeals

**APPEAL FROM GREENVILLE COUNTY**  
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

Case No. 2018-CP-23-02230

**ROLLIE BRIAN ROBERTS,**  
**KIMBER FLYNN ROBERTS,**

Appellants,

v.

**R.T.G. FURNITURE  
CORPORATION, RTG  
FURNITURE CORPORATION OF  
GEORGIA, RTG  
FURNITURE CORPORATION OF  
TEXAS, RTG  
FURNITURE OF TEXAS, L.P.,  
ROOMSTOGO.COM, INC., SE  
INDEPENDENT  
DELIVERY SERVICES, INC.**

Respondents.

**RECEIVED**

FEB 07 2019

SC Court of Appeals

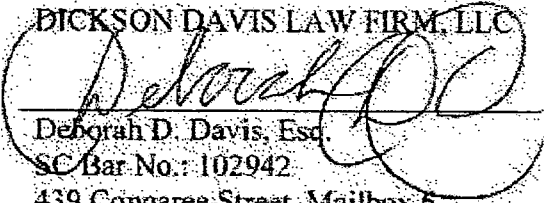
**PROOF OF SERVICE**

I certify that I have served the Motion and Petition to Reinstate Appeal on Respondents **R.T.G. FURNITURE CORPORATION ET AL.** electronically and by depositing a copy of it in the United States Mail, postage prepaid, on February 6, 2019, addressed to the attorney of record, to the following address(es):

R.T.G Furniture Corp. et al.

c/o Frank S. Stern, Esq.  
Turner Padgett Graham and Laney P.A.  
200 East Broad Street, Suite 250  
P.O. Box 1509  
Greenville, SC 29602

Respectfully submitted this 6 day of February, 2019

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ATTORNEY FOR APPELLANTS

# The South Carolina Court of Appeals

Rollie Brian Roberts and Kimber Flynn Roberts,  
Appellants,

v.

R.T.G. Furniture Corporation, RTG Furniture  
Corporation of Georgia, RTC Furniture Corporation of  
Texas, RTC Furniture Corporation of Texas, L.P.,  
Roomstogo.com, Inc., SE Independent Delivery Services,  
Inc., Respondents.

Appellate Case No. 2019-000104

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## ORDER

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This appeal arises out of an order of the circuit court denying the appellants' motion to strike. Because a motion to strike is not immediately appealable, this appeal is dismissed. See *Pelfrey v. Bank of Greer*, 270 S.C. 691, 695, 244 S.E.2d 315, 317 (1978) ("Ordinarily, the refusal of a motion to strike is not appealable until final judgment, unless (1) the motion to strike is in the nature of a demurrer or (2) there is an appealable issue before the court justifying the consideration of the motion to strike also in order to avoid unnecessary litigation." (citing *Tate v. Oxner*, 236 S.C. 313, 114 S.E.2d 225 (1960))). The remittitur will be sent as required by Rule 221(b) of the South Carolina Appellate Court Rules.

FOR THE COURT

Columbia, South Carolina

cc:  
Deborah Dickson Davis, Esquire  
Frank Sanders Stern, Esquire

**FILED**

*January 30, 2019*

**FAX COVER SHEET**

<b>TO</b>	Amelia
<b>COMPANY</b>	S.C. Appellate Clerk of Court
<b>FAX NUMBER</b>	18037341839
<b>FROM</b>	Deborah Davis
<b>DATE</b>	2019-02-07 03:52:29 GMT
<b>RE</b>	Case No. 2019-000104

**COVER MESSAGE**

Amelia,

Please see the enclosed Motion and Petition to Reinstate Appeal for Appellants in this matter. The same is being shipped to you via FedEx Tracking No. 774411220875.

Best Regards,

Deborah D. Davis, Esq.  
Attorney at Law

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**RECEIVED**

FEB 07 2019

SC Court of Appeals



DICKSON DAVIS LAW FIRM

**MOTION AND PETITION TO REINSTATE COVER LETTER**

February 6, 2019

Clerk of Court  
South Carolina Court of Appeals  
1220 Senate Street  
P.O. Box 11629  
Columbia, SC 29211

**VIA FEDEX**

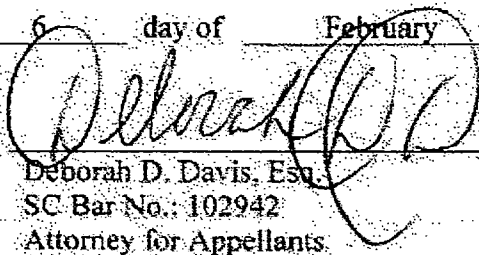
Re : *Roberts et al. v. RTG Furniture Corporation et al.*  
Case No. : 2018-CP-23-02230  
File Id. : 2017-01-122

Dear Clerk of Court:

As you know, I represent Appellants in this matter. Included is the Motion and Petition to Reinstate Appellants' appeal related to the South Carolina Appellate Court Order issued on January 30, 2019, dismissing the appeal on the basis that a motion to strike is not immediately appealable. Please note that the appeal pertains to Order issued by the Greenville Circuit Court denying Appellants' Motion to Alter or Amend Appellants' Complaint. Included is the following:

- (1) Appellants' Motion and Petition for Reinstatement with attendant proof of service;
- (2) Order from the South Carolina Court of Appeals dismissing Appellants' appeal; and,
- (3) A check for \$50.00 payment to file Appellants' Motion for Reconsideration.

Respectfully submitted this 6 day of February, 2019.

  
Deborah D. Davis, Esq.  
SC Bar No.: 102942  
Attorney for Appellants.

cc: Frank S. Stern

/ddd

**RECEIVED**

FEB 07 2019

SC Court of Appeals