

MEMORANDUM ON INTERLOCUTORY APPEAL

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2017-CP-23-07837

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

Appellants,

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,

Respondents.

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APPELLANTS' MEMORANDUM ON INTERLOCUTORY APPEAL

RECITATION OF THE LAW

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 for partial summary judgment or a motion to strike under Rules 12(c) and 12(f) respectively 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.

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. A motion for partial summary judgment on the pleadings is similarly treated as a motion for summary judgment under the South Carolina Rules of Civil Procedure:

If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56. Rule 12(c), SCRCF.

An interlocutory order on a motion for partial summary judgment serves to “to expedite the disposition of cases not requiring the services of a fact finder.” *Watson v. Underwood*, 407 S.C. 443, 453, 756 S.E.2d 155, 160 (Ct. App. 2014). A partial motion for summary judgment “is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law . . . [and] the evidence and all reasonable inferences drawn from it must be viewed in the light most favorable to the nonmoving party.” *Id.* at 453. By contrast, when resisting a motion for summary judgment, the nonmoving party must come forward with specific facts showing genuine issues that require a trial on the issue. If the moving party carries the initial burden that the nonmoving party’s case lacks evidentiary support, the nonmoving party may not resort to allegations or denials in the pleadings. *Skywaves I Corp. v. Branch Banking & Tr. Co.*, 423 S.C. 432, 453, 814 S.E.2d 643, 654 (Ct. App. 2018).

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 for partial summary judgment 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. In *Mid-State Distribs.*, the appeal was based on the lower court's denial of a motion to dismiss based on lack of personal jurisdiction. 310 S.C. at 332-36. An appeal based on a 12(b)(2) motion to dismiss for lack of personal jurisdiction is inapposite to a 12(c) motion for partial summary judgment on the pleadings. A 12(b)(2) motion to dismiss for lack of personal jurisdiction, generally speaking, can be raised before, during, and after trial rendering the interlocutory order denying a 12(b)(2) motion as not final in that context because further factual development in discovery and at trial would ascertain whether personal jurisdiction exists as an open question of fact by the lower court. See *Mid-State Distribs.*, 310 S.C. at 332-36; compare Rule 12(b)(2), SCRCP (motion to dismiss for lack of personal jurisdiction), with Rule 12(c), SCRCP (motion for partial summary judgment on the pleadings). In a motion for partial summary judgment on the pleadings, if the judgment applies the law foreclosing questions of fact for further determination, then the finality of the judgment ruling on the motion for partial summary judgment affects the disposition of the causes of action and defenses and the parties' ability to move forward in litigation to determine the parties' rights. See *Mid-State Distribs.*, 310 S.C. at 332-36.

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). When the lower court denies a partial motion for summary judgment and decides the merits of the case foreclosing part of or a whole cause of action or defense, the lower court establishes the law in the case as a binding adjudication—not as a mere expression or statement in dicta. See *Weil v. Weil*, 299 S.C. 84, 89, 382 S.E.2d 471, 473-74 (Ct. App. 1989). An issue regarding the denial of a motion for partial summary judgment must be preserved in the motion for partial summary judgment and a motion for reconsideration to amend or alter the previous order that applied to both issues ruled upon and issues not ruled upon. Rule 56(e), SCRCP; see *Watson*, 407 S.C. at 456. Furthermore, denial of a motion for partial summary judgment is not reviewable even after the conclusion of the underlying litigation. *Weil*, 299 S.C. at 89.

In *Ex Parte Capital U-Drive-It, Inc.*, the appeal was based on an order issued by the lower court to unseal the court records. 369 S.C. at 7-8. No further action was required under these circumstances because, once the “court file is unsealed and the information released, no appellate remedy is likely to repair any damage done by an improper disclosure.” *Id.* at 8. Compelling a party that disputes the disclosure of sealed court records to forgo an appeal until the conclusion of the underlying litigation would be self-defeating without any meaningful way of recapturing that information if the lower court's ruling was erroneous. *Siedle v. Putnam*

Invs., 147 F.3d 7, 9 (1st Cir. 1998). Therefore, the appeal involved the merits of litigation is reviewable when no appellate remedy after the conclusion of the underlying litigation would ameliorate the error. *See Ex Parte Capital U-Drive-It, Inc.*, 369 S.C. at 8.

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. 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. In *Hagood*, the lower court denied an interlocutory appeal on an order granting a motion disqualifying the appellant’s attorney in a civil case. 362 S.C. at 196-99. The South Carolina determined that depriving the right to a party’s preferred attorney was a substantial right that was immediately appealable or that party would waive that right in a subsequent appeal. *Id.* at 196-99. Furthermore, if a constitutional right is asserted by an appellant in an appeal of an interlocutory order, and appellants will not be afforded appellate review to correct the alleged errors following final judgment at the conclusion of the underlying litigation, then the interlocutory order may affect the Appellant’s substantial, constitutional right under the circumstances that operates as a waiver of that constitutional right potentially. *See Stone v. Thompson*, 418 S.C. 599, 605-06, 795 S.E.2d 49, 52-53 (Ct. App. 2016); *Grosshuesch v. Cramer*, 377 S.C. 12, 24, 659 S.E.2d 112, 118 (2008). In *Grosshuesch*, the lower court granted an order of contempt for appellant failing to respond in discovery and appellant appealed asserting a constitutional right under the Fifth Amendment of the U.S. Constitution and the corollary rights under Article I, Section 12, of the South Carolina Constitution. 377 S.C. at 24. The South Carolina Supreme Court reversed the order compelling appellant to respond in discovery to preserve appellant’s constitutional rights from waiver of the same that would not be reviewable in a subsequent appeal. *See id.* at 22-28.

The finality of the judgment, order, or decree operates, in effect, to dispose of a cause of action in part of

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.* at 41-42. The two-issue rule applies to a decision that is based on more than on 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.*, 423 S.C. at 451-52. Moreover, historically, the South Carolina Supreme Court ruled that the court will consider interlocutory orders that may not be directly appealable if an appealable issue is before the court and a ruling on appeal will avoid unnecessary litigation when the lower court decides the merits of the case and establishes the law of the case. *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). Nevertheless, an appellant must properly preserve an issue for appeal on an interlocutory order that was "both raised to and ruled upon by the trial court." *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). Because a denial for partial summary judgment 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 Weil*, 299 S.C. at 89.

ARGUMENT

Appellants made a motion for partial summary judgment on the issue of forcible entry and detainer, wrongful dispossession, claim and delivery, and conversion. Regarding a partial motion for summary judgment on the validity of the lease agreement, Appellants argued that the status of the lease agreement as a valid contract is moot when Respondents unlawfully dispossessed Appellants of the premises and Appellants' personal property located therein. Appellants maintained the positions that: (1) the lease agreement is an ultra vires contract and Appellant never ratified the lease agreement; (2) Respondents engaged in forcible entry and detainer reentering and repossessing the premises without resorting to the judicial process beforehand; and, (3) Respondents dispossessed Appellants' personal property and trade fixtures on premises the Appellants' personal property on the premises remains the personal property of Appellants. For the first position, Appellants disputed the validity of the lease as a genuine fact in Appellants' motion to dismiss and motion to strike Respondents' causes of action for breach of contract and breach of contract accompanied by fraudulent acts as well as Respondents defense for default. For the second and third positions, these facts, both as alleged and supported

by admissible evidence, form the essential elements for Appellants' causes of action for forcible entry and detainer, wrongful dispossession, claim and delivery, and conversion.

This commercial landlord-tenant dispute is a bona-fide gordian knot because the prohibition against self-help evictions of tenants from the premises is designed to prevent many of the issues Appellants, as the tenants or lessees, face in this case. Appellants have not had access to the commercially-leased premises or Appellants' personal property, including Appellants' business records, on the premises since Respondents locked out Appellants from the premises on or around July 28, 2017, without resorting to the judicial process for evicting a tenant from the premises or distraining Appellants' personal property located therein. These facts are undisputed as alleged in the pleadings and supported by affidavits and admissible evidence presented by both parties. Respondents provided the lower court with an affidavit and a locksmith receipt showing that the landlord changed the locks to the premises to prevent Appellants from re-entry to the premises on the very same day the locks were changed. Respondents denied Appellants access to the premises and access to Appellants' personal property, including Appellants' business records, necessary for litigation and discovery. Spoliation of evidence has already occurred. Respondents have unfettered access to Appellants' personal property for purposes of litigation. Assessing damages, hiring an expert witness to determine total damages, and amending the complaint accordingly is unavailable when Respondents maintain exclusive control, dominion, and possession of the premises and Appellants' personal property located therein since before the inception of litigation.

The primary issue, simply put, is whether magic words in a commercial lease agreement permits the landlord-lessor to circumvent the judicial process for evicting tenants and distraining tenants' property on the premises. The law is clear: The answer is no. Despite symbolic accolades and general references to disputed facts, pending discovery, and future trial in the lower court's order issued on October 3, 2018, the lower court ruled decisively and determined the subject matter of the following, dispositive issues: (1) whether the lease agreement between Appellant(s) and Respondent(s) was valid as executed or ratified by Appellant(s) subsequently thereafter when taking possession of the premises; (2) whether a landlord may circumvent the judicial process in a commercial lease agreement when evicting a tenant from the premises without resorting to the judicial process and engaging in a self-help eviction by forcible entry and detainer; and, (3) whether a landlord may circumvent the judicial process in a commercial lease by distraining a tenant's personal property without resorting to the judicial process and dispossessing the tenant of tenant's property on the premises. However, issue one regarding the validity of the lease agreement is really subsumed into issues two and three

for whether a landlord may circumvent the judicial process when evicting a tenant from the premises and distraining the tenant's personal property located therein regardless of the contractual language in a lease agreement. As to the fourth issue in an unsettled area of law, of which the lower court never ruled upon, the issue is whether a landlord electing all landlord remedies of re-entry and repossession of the premises, distraint of tenant's personal property for rent in arrears, and acceleration of the rent under the terms and conditions of the lease agreement is constitutional under the Fourteenth Amendment Due Process Clause of the U.S. Constitution and corollary rights under the South Carolina Constitution.

On issue one, the lower court decided the parties' rights and ruled affirmatively that the lease agreement was a valid, enforceable agreement when a promoter signed a lease prior to the tenant, as a business, came into existence, and later ratified the lease agreement:

The Court finds a valid contract was formed between Landlord and Kerr when he signed the Lease on behalf of Blackstone and Chase, LLC, and the company ratified the Lease when its member, Kerr, knowing the terms of the Lease, took possession of the premises and made payment upon the Lease for Blackstone and Chase, LLC. A single member of an LLC may bind the company, and an operating agreement is ineffective against a party who gave value in good faith. S.C. Code Ann. §33-44-301(c). The other Plaintiffs received the benefit of the Lease, made payments upon the Lease, and recognized the Landlord as such thereby ratifying the contract. Order, *Blackstone and Chase, LLC et al. v. Margaret H. Durham Living Trust et al.*, No. 2017-CP-23-07837 (Judge G. Thomas Cooper, Jr., October 3, 2018).

The lower court based the decision on the merits as to the validity of the lease, which decided substantial matters that foreclosed whole or part of Appellants' causes of action for forcible entry and detainer, wrongful dispossession, claim and delivery, and conversion without leaving open questions of fact for later determination. In effect, the lower court determined that the lease agreement was valid and enforceable in toto. The lease agreement pertains to various issues, but key points of the lease involve the landlord reentry and repossession of the premises without legal process, the landlord distraining the tenant's personal property (apart from trade fixtures) without legal process, and acceleration of the rent under the terms and conditions of the lease agreement.

Relying upon an unpublished opinion with no precedential value and inapposite to this case in a cause of action for a default on a promissory note governed the law of secured transactions under Article 9 of the South Carolina Uniform Commercial Code, the lower court decided the parties' rights and ruled affirmatively on issues two and three for Respondents dispossessing Appellants of the premises and Appellants' personal property located therein:

To the extent the Court is to rule on the pleadings before it, Landlord was contractually authorized to evict the Plaintiffs without resort to the judicial process and to distrain or seize the property within the premises to cover damages incurred by Landlord. Section 20.2 of the Lease between Landlord and Plaintiffs authorizes the Landlord to “reenter and remove all persons and properties from the Premises and dispose of such property as it deems fit.” Such remedy may be resorted to “with or without legal process.” *Id.* In commercial leases, the provisions of the contract control. See *KBR Development v. Yansy Realty, Inc.* 2005 WL 7083858, No. 2005-UP-217, 2. (S.C. Court of Appeals) (“The lease provided KBR with the self-help option of repossessing the property if lease payments were overdue by fifteen days. Therefore, KBR acted within their legal rights.”). Improvements made to the real estate by Plaintiffs become the property of Landlord under Section 9.4 of the Lease. *Id.* (“All Lessee Alterations, including, but not limited to, all walls, railings, carpeting, floor and wall coverings and other permanent real estate fixtures (excluding, however, Lessee’s moveable trade fixtures and equipment) made by, for, or at the direction of Lessee, will when made, become the property of Lessor and will remain upon the Premises at the expiration or earlier termination of this Lease.”) Trade fixtures installed by Plaintiffs become the property of Landlord if not removed by the termination of the Lease. *Id.* (“Any trade fixtures or equipment not removed by Lessee at the expiration or earlier termination of this Lease will, at the Lessor’s option, become the property of the Lessor or Lessor will be entitled to remove and dispose of such property.”) Consequently, Landlord was within its contractual rights to take the actions complained of by Plaintiffs . . . The written Lease between Blackstone and Chase, LLC and The Margaret H. Durham Living Trust is valid and enforceable. Order, *Blackstone and Chase, LLC et al. v. Margaret H. Durham Living Trust et al.*, No. 2017- CP-23-07837 (Judge G. Thomas Cooper, Jr., October 3, 2018) (emphasis added).

The lower court did not leave open facts as to the lease agreement being valid thereby ruling and establishing the law in this case that the landlord had a legal, contractual right to dispossess Appellants from the premises and Appellants’ personal property located therein without resorting to the judicial process. Because preliminary discovery has just begun, the lower court’s ruling also shapes discovery between the parties that prejudices Appellants when unduly burdening Appellants to recreate Appellants’ business records with unnecessary subpoenas, waiving Appellants’ rights under discovery with Respondents having unfettered access to Appellants’ personal property, obtaining Appellants’ key business records for potential witnesses to call upon for trial, inspecting total damages to Appellants’ personal property on the premises, and so forth. Respondents are in sole possession of key business records necessary to litigation. As in *Ex Parte Capital U-Drive-It, Inc.*, the interlocutory order, in effect, compels Appellants to full, unlimited disclosure in discovery without the ability to preserve any rights, privileges, or objections regarding the business records and personal property within the exclusive possession, dominion, and control of Respondents.

The lower court’s ruling involves the merits of litigation that foreclose part of or a whole of Appellants’

causes of action. Therefore, the lower court establishes the law in the case as a binding adjudication that divests Appellants' rights in Appellants' causes of action, whether in part or in full, including, but not limited to, the following: forcible entry and detainer; wrongful eviction; claim and delivery; conversion; unjust enrichment; and, preliminary or permanent injunction. As a matter of public policy, the law is clear that no landlord may bypass the judicial process when evicting a tenant from the premises or distraining the tenant's personal property by engaging in forcible entry and detainer and a self-help eviction. Moreover, the interlocutory order also violates Appellants' constitutional rights under the Fourteenth Amendment of the U.S. Constitution and corollary rights in South Carolina. First, when ruling that Respondents could dispossess Appellants of the premises without resorting to the judicial process, the lower court, in effect, divested Appellants on a substantial matter and foreclosed the essential element of dispossession of real property in a landlord-tenant relationship from the causes of action for forcible entry and detainer and wrongful dispossession without leaving open questions of fact. The same conduct of forcible entry and detainer also equates to a wrongful eviction because the unlawful dispossession of the leased premises by force that originates in trespass includes the wrongful dispossession of the leased premises. *Compare* S.C. Code Ann. § 15-67-420 (forcible entry and detainer), *with* S.C. Code Ann. § 27-37-140 (wrongful dispossession).

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:

While landlord-tenant relationships are frequently governed by contract, landlords have certain statutory duties, as do tenants. These duties protect the public interest in that they create a framework that governs landlord-tenant relationships regardless of the private arrangements parties have made between themselves. *Burbach v. Inv'rs Mgmt. Corp. Int'l*, 326 S.C. 492, 496-97, 484 S.E.2d 119, 121-22 (Ct. 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 (distraining personal property of tenants).

A cause of action for forcible entry and detainer occurs when one uses a strong hand to disseize another

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from the land with the intent to permanently deprive that person's use of the land. *See Parker v. Shecut*, 349 S.C. 226, 230-31, 562 S.E.2d 620, 623 (2002). South Carolina law is well settled that the landlord engaging in a self-help eviction is patently against public policy: "The law does not allow a man to take another by the collar and say, leave. He is bound to use the means which the law has given him." *Sharp v. Kinsman*, 18 S.C. 108, 112-14 (1882); *State v. Bates*, 87 S.C. 527, 530-31, 70 S.E. 170, 171 (1911); *Bradshaw v. Ashley*, 180 U.S. 59, 64, 21 S. Ct. 297, 299 (1901); *Rush v. Aiken Mfg. Co.*, 58 S.C. 145, 150, 36 S.E. 497, 499 (1900); *see also* S.C. Code Ann. §§ 15-67-410 to -610 (prohibiting forcible entry and detainer of land or tenements); S.C. Code Ann. §§ 15-69-10 to -20 (allowing for recovery of personal property wrongfully dispossessed); S.C. Code Ann. § 27-5-110 (prohibiting trespass onto land with a strong hand); S.C. Code Ann. § 27-37-140 (permitting tenants recovery from wrongful eviction). As a matter of law, no landlord may use a strong hand to enter or re-enter onto the premises to evict a tenant or disseize the tenant's personal property on the premises for rent in arrears. S.C. Code Ann. §§ 15-67-410 to -470; S.C. Code Ann. §§ 15-69-10 to -210; S.C. Code Ann. §§ 22-3-1310; S.C. Code Ann. § 27-5-110; S.C. Code Ann. §§ 27-37-10 to -160; S.C. Code Ann. §§ 27-39-10 to -360. A forcible entry, or a strong hand, is any "unlawful entry upon the [actual] possession of another." *Bates*, 87 S.C. at 530. The landlord's intent to evict the tenant with a strong hand must not be a mere trespass, but an intent to permanently deprive the tenant's use of the premises, in full or in part. *See Skalowski v. Joe Fisher, Inc.*, 152 S.C. 108, 126, 149 S.E. 340, 347 (1929) (Watts, J., dissenting).

South Carolina law allows the tenant to recover for damages from the landlord engaging in a wrongful dispossession of the Premises. S.C. Code Ann. § 27-37-140. Wrongful dispossession is when a defendant deprives the plaintiff possession of the land by way of a wrongful intrusion and entry into that land, originating from trespass. *See Bradshaw*, 180 U.S. at 64. South Carolina law defines "an actual eviction [as] an actual expulsion or physical ouster of the tenant from a material part of the premises." *Thomas v. Hancock*, 271 S.C. 273, 275, 246 S.E.2d 604, 605 (1978). The factual circumstances surrounding an "ouster must be of an unequivocal nature, and so distinctly hostile to the rights of the other [tenants] that the intention to disseize is clear and unmistakable." *See Freeman v. Freeman*, 323 S.C. 95, 99, 473 S.E.2d 467, 470 (Ct. App. 1996). South Carolina law has determined that the act of changing the locks to prevent access to the premises manifests a clear and unmistakable intention to disseize another from the land. *Parker*, 349 S.C. at 230-31. Hence, an eviction is the tenant's involuntary relinquishment and surrender of one's possession of land. *See Bluffton Towne Ctr., LLC v. Gilleland-Prince*, 412 S.C. 554, 563, 772 S.E.2d 882, 887 (Ct. App. 2015). An eviction is

any act that directly deprives the tenant's possession of the leased premises or impairs the tenant's quiet use and enjoyment of the premises. *Id.*

Second, when ruling that Respondents could dispossess Appellants of Appellants' personal property on the premises without resorting to the judicial process, and determining that Appellants' personal property on the premises is not the property of Appellants, the lower court, in effect, divested Appellants on a substantial matter and foreclosed the essential element of dispossession of personal property from the causes of action for claim and delivery and conversion without leaving open questions of fact. Respondents unlawfully detained and distrained the Appellants' personal property located on the premises pursuant to South Carolina law under a cause of action for claim and delivery. S.C. Code Ann. §§ 15-69-10 to -210. Regardless of the lease agreement, Respondents have no legal basis for personally withholding Appellants' personal property due to nonpayment of rent. S.C. Code Ann. §§ 27-39-10 to -360 (distraining personal property of tenants). The law of distress is now governed by statutory principles that require the landlord to properly apply before the magistrate judge for a pre-distress hearing before the Landlord may distrain the Tenant's personal property on the Premises for rent in arrears. S.C. Code Ann. §§ 27-39-210 to -360. No landlord has the authority to enter the Premises forcibly to take the Tenant's personal property by breaking, or changing, the locks to make distress for rent in arrears. *See Jones v. Parker*, 81 S.C. 214, 221, 62 S.E. 261, 264 (1908); *cf. Parker*, 349 S.C. at 230-31. Regardless of whether the tenant surrendered the premises voluntarily or involuntarily, the landlord may not seize the tenant's personal property on the premises by means of self-help. S.C. Code Ann. § 27-39-270 (prohibiting landlords from engaging in self-help to remove the tenant's personal property from the premises).

An action for claim and delivery is an action at equity. *See Burnett v. Boukedes*, 240 S.C. 144, 155-56, 125 S.E.2d 10, 16 (1962); S.C. Code Ann. §§ 22-3-1310; S.C. Code Ann. §§ 15-69-10 to -210; *see also* S.C.R.C.P. 49(c). South Carolina law provides that Plaintiff may recover personal property in a claim and delivery cause of action:

The plaintiff, in an action to recover the possession of personal property, may, at the time of issuing the summons, or at any time before answer, claim the immediate delivery of such property, as provided in this chapter. S.C. Code Ann. § 15-69-10.

The cause of action for claim and delivery is a statutory blend of replevin and trover. *Reynolds v. Philips*, 72 S.C. 32, 34, 51 S.E. 523, 524 (1905). Replevin is when a plaintiff requested to recover specific chattel and damages from the unlawful detention of that chattel. *Id.* Trover is when a plaintiff asserts an action for damages

resulting from the unlawful conversion of personal property. *Id.* The tort of conversion under South Carolina common law “is the unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of the condition or the exclusion of the owner's rights.” *Crane v. Citicorp Nat'l Servs.*, 313 S.C. 70, 73, 437 S.E.2d 50, 52 (1993) (emphasis added). The statutory cause of action subsumes the traditional torts of trespass to chattel and conversion for replevin and trover respectively. *Reynolds*, 72 S.C. at 34. If Plaintiff requested the return of chattel and recover possession of the same, then the action tracks replevin. *Id.* If Plaintiff claimed the value of the property and damages therefrom, then the action tracks trover. *Id.*; see also *McLean v. Godwin Props., Inc.*, 292 S.C. 518, 521, 357 S.E.2d 473, 475 (Ct. App. 1987) (“[D]amages were the same for claim and delivery and conversion.”). Proof of title or right to possession to the personal property is essential to maintain a claim and delivery cause of action related to conversion. *MicroClean Tech., Inc. v. EnviroFix, Inc.*, 404 S.C. 207, 220, 744 S.E.2d 210, 218 (Ct. App. 2013). Similarly, the dispossession of Appellants’ personal property on the premises supports an unjust enrichment cause of action in equity that entitles Appellants to recover under the theory of restitution. *JASDIP Props. SC, LLC v. Estate of Richardson*, 395 S.C. 633, 640, 720 S.E.2d 485, 488 (Ct. App. 2011). Unjust enrichment occurs when the defendant has been unjustly enriched at the plaintiff’s expense. *Id.* In the absence of a contract, Plaintiff must prove that: (1) plaintiff conferred a non-gratuitous benefit upon the defendant; (2) the defendant realized a value from the benefit bestowed upon by the plaintiff; and (3) inequity results from the defendant retaining the benefit without compensating the plaintiff for the value of that benefit. *Id.*

These grounds for the dispossession of Appellants’ personal property on the premises also support Appellants’ cause of action for a preliminary or permanent injunction. For the lower court to issue a preliminary injunction as a drastic remedy, a plaintiff must show: “(1) it would suffer irreparable harm if the injunction is not granted; (2) it will likely succeed on the merits of the litigation; and (3) there is an inadequate remedy at law.” *Scratch Golf Co. v. Dunes W. Residential Golf Properties, Inc.*, 361 S.C. 117, 121, 603 S.E.2d 905, 908 (2004); *Poynter Invs. v. Century Builders of Piedmont*, 387 S.C. 583, 587, 694 S.E.2d 15, 17 (2010). Irreparable harm refers to the loss of one’s legal rights under the circumstances. See *Levine v. Spartanburg Reg'l Servs. Dist., Inc.*, 367 S.C. 458, 464, 626 S.E.2d 38, 41 (Ct. App. 2005). For whether a plaintiff will likely succeed on the merits of the pending litigation, a plaintiff only needs to present a question regarding the existence of a legal right based on prima facie showing on the merits of the underlying case regardless of the case’s outcome. *Id.* at 465-66. An inadequate remedy at law simply refers to money damages as inadequate to restore the parties to the

status quo before the pending litigation, and the Court's intervention is necessary to preserve the existing status before litigation. *Id.* at 466-67. Here, Appellants have already suffered irreparable harm without being able to reclaim Appellants' personal property on the premises for purposes of litigation, discovery, assessing damages, accurately filing tax returns, and so forth. As previously discussed, Respondents have no legal basis for unlawfully distraining Appellants' personal property on the premises when Respondents failed to resort to the judicial process. Therefore, Appellants will likely succeed on the merits of the litigation. Without reclaiming Appellants' personal property on the premises, Appellants will be unduly prejudiced moving forward in litigation, waive Appellants' rights in the matter, and the finality of the lower court's order prevents raising this issue in a subsequent appeal with no adequate remedy at law.

No applicable statutory construction or case precedent allow for an exception in commercial leases that a landlord may circumvent the judicial process when evicting tenants or distraining tenants' personal property. This point of law renders the validity of the lease agreement as a valid contract moot because contract provisions contrary to South Carolina law are unenforceable. 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"). Whether the tenancy had terminated, or the tenant was a holdover tenant, is irrelevant because:

"[T]he [landlord] did not have the right to use [a strong hand] in making a re-entry until a reasonable time had expired, or due diligence had been used to ascertain if the [tenant] asserted a right to the premises after the expiration of the tenancy, and if [the tenant] asserted such a right, that *the [landlord] could only eject [the tenant] by process of law.*" *Rush*, 58 S.C. at 150 (emphasis added).

Third, and more importantly, the interlocutory order violates Appellants' constitutional rights under the Fourteenth Amendment Due Process Clause of the U.S. Constitution and corollary rights in South Carolina. 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). Both the U.S. 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). Just as the right to the preference of an attorney is a substantial right as in *Hagood*, so is Appellants’ constitutional rights under the Due Process Clause a substantial right at issue. Furthermore, as in *Grosshuesch*, asserting a constitutional right under the Fourteenth Amendment of the U.S. Constitution and the corollary rights under the South Carolina Constitution, is necessary to prevent unnecessarily compelling Appellants in discovery as well as preserve Appellants’ constitutional rights from waiver of the same that would not be reviewable in a subsequent appeal.

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 435-37. 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. of S.C. v. Kiriakides*, 290 S.C. 220, 221-27, 226, 349 S.E.2d 344, 345-49 (S.C. App. 1986). 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 v. UA Commc'ns*, 312 S.C. 271, 276, 440 S.E.2d 364, 366-67 (1994).

From the very beginning, Appellants have touted that the law does not support Respondents proposition that the provisions of the lease agreement in commercial leases supersedes contrary statutes governing landlord-tenant law in South Carolina that require landlords to resort to the judicial process. Failure to resort 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 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.

CONCLUSION

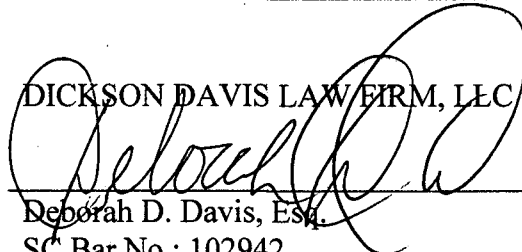
These grounds for appeal have resulted in unnecessary litigation over the clear application of the law in South Carolina. Appellants' appeal on the lower court's denial of Appellants' partial motion for summary judgment on this key, dispositive issue based on undisputed facts is not presented to litigate this case in a piecemeal fashion. The lower court definitively ruled on the merits of litigation and established the law in this case erroneously, which has, in effect, divested Appellants of key causes of action in this case and the ability to present the issues in a subsequent appeal. Hence, the lower court's determination become 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—not a mere expression or dicta. Therefore, the finality of the order involves the merits and substantially affects the rights of Appellants. A new trial will not cure Appellants' rights. Proceeding with litigation and trial may constitute a waiver of substantial rights in discovery and Due Process rights under the circumstances. An appeal after the conclusion of the underlying litigation will not cure Appellants' rights because “the cat is out of the bag” for discovery purposes thus compelling Appellants to waive any rights to Appellants' personal property, including Appellants' business records, for litigation and discovery. Appellants' substantial, constitutional rights under Due Process may be waived without properly preserving the issue upon an immediate review of an interlocutory order. Additionally, denials of interlocutory orders for partial motion for summary judgment are not reviewable post-trial. Because of the interlocutory order erroneously applying the law, the error, if left unchallenged upon an immediate appeal, becomes the law in this case that is not reviewable post-trial on appeal.

Appellants raised and preserved arguments against all grounds for the lower court's denial of Appellants' partial motion for summary judgment in Appellant's Motion for Reconsideration to Alter or Amend the Judgment filed before the lower court on October 5, 2018, to satisfy the two-issue rule. The law is clear that the judicial process is necessary to evict a tenant from the premises and distraint the tenant's property located therein regardless of whether the tenant is a residential or commercial tenant. Neither of which Respondents complied with South Carolina law in this case. This point of law is an appealable issue, and appellate review on these dispositive issues would prevent unnecessary litigation moving forward on a very straightforward application of landlord-tenant law in South Carolina.

Respectfully submitted this

4 day of February, 2019

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ATTORNEY FOR APPELLANTS

South Carolina

Date: February 4, 2019

PROOF OF SERVICE

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2017-CP-23-07837

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

Appellants,

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,

Respondents.

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ATTORNEY FOR APPELLANTS

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SC Court of Appeals

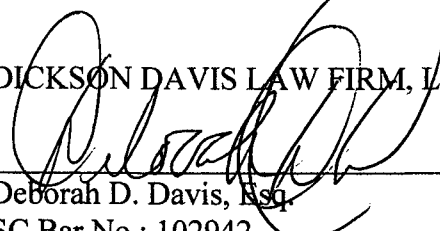
PROOF OF SERVICE

I certify that I have served the Appellants' Memorandum on Interlocutory Appeal on Respondents **MARGARET H. DURHAM LIVING TRUST ET AL.** by depositing a copy of it in the United States Mail, postage prepaid, on February 4, 2019, addressed to the attorneys of record, to the following addresses:

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

Respectfully submitted this 4 day of February, 2019.

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DICKSON DAVIS LAW FIRM

NOTICE OF APPEAL COVER LETTER

February 4, 2019

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

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SC Court of Appeals

VIA CERTIFIED MAIL

Re : *Blackstone and Chase, LLC et al. v. Margaret H. Durham Living Trust et al.*
Case No. : 2017-CP-23-07837
File Id. : 2017-01-104

Dear Clerk of Court:

As you are aware, I represent Appellants Blackstone and Chase, LLC et al. in this matter. Included is the Appellants' Memorandum on Interlocutory Appeal, with the same served upon opposing counsel.

Please let me know if you have any questions or require anything further.

Respectfully submitted this

4

day of

February

2019

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

cc: Robert K. Merting, Joshua Hudson,

/ddd

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