AMENDED MOTION AND PETITION TO REINSTATE 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.

AMENDED MOTION AND PETITION TO REINSTATE APPEAL

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APPELLANTS' AMENDED 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 April 4, 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:

PROCEDURAL HISTORY

1.

The record will show that Respondent **MARGARET H. DURHAM LIVING TRUST** filed for a writ of ejectment against Appellant **BLACKSTONE AND CHASE, LLC**, on or around October 16, 2017, before the Gantt Summary Court unbeknownst to Plaintiffs (Case No. 2017CV2311003419). On or around October 23, 2017, the Gantt Summary Court issued a Rule to Show Cause or a Rule to Vacate, and for the writ of ejectment to occur on or around December 12, 2017 (Case No. 2017CV2311003419). Appellants never received notice of Respondent **MARGARET H. DURHAM LIVING TRUST**'s filing for a writ of ejectment until independently discovering a writ of ejectment had been filed against Appellants on or around December 8, 2017 (Case No. 2017CV2311003419). Appellants filed a Notice of Motion for Preliminary Injunction, a Motion for Preliminary Injunction and Writ of Supersedeas, and a Memorandum in Support of Appellants' Motion for Preliminary Injunction on or around December 8, 2017, before the Gantt Summary Court (Case No. 2017CV2311003419). The Gantt

Summary Court held a hearing for Appellants' Motion for Preliminary Injunction and Writ of Supersedeas on or around January 29, 2018 (Case No. 2017CV2311003419). The Gantt Summary Court ruled that Respondent **MARGARET H. DURHAM LIVING TRUST**'s removal of the tenant by changing the locks and dispossession of the Plaintiffs' personal property on the premises before ever filing for a writ of ejectment was unlawful (Case No. 2017CV2311003419). Moreover, the Gantt Summary Court acknowledged the issue of Appellants not receiving proper notice of the writ of ejectment and stated that the amount of dispute exceeded the Gantt Summary Court's jurisdiction over the matter (Case No. 2017CV2311003419). *See* Exhibit A.

2.

Before the Greenville County Circuit Court, Appellants also filed for a Notice of Intent to Appeal on or around December 11, 2017, and an Amended Notice of Intent to Appeal on or around January 11, 2018 (Case No. 2017-CP-23-07820). The Gantt Summary Court filed the Magistrate's Appeal Return on January 10, 2018, and again on February 5, 2018 (Case No. 2017-CP-23-07820). Exhibit A. Respondent **MARGARET H. DURHAM LIVING TRUST** filed a Response to Amended Appeal on February 7, 2018 (Case No. 2017-CP-23-07820). Appellants filed a Response to the Respondent's Response to Amended Appeal on February 8, 2018 (Case No. 2017-CP-23-07820). Respondent **MARGARET H. DURHAM LIVING TRUST** filed an Affidavit for Respondent **JAMES W. DURHAM** on February 8, 2018 (Case No. 2017-CP-23-07820). The Affidavit included an admission to the Defendant **MARGARET H. DURHAM LIVING TRUST** repeatedly reentering the premises in non-emergency situations and locking out the Plaintiffs from the premises on or around July 28, 2017, before ever filing for a writ of ejectment on or around October 16, 2017, along with a locksmith receipt made out to Respondent **HELEN W. SHOCKLEY** (Case No. 2017-CP-23-07820). *See* Exhibit B. Contemporaneously with Appellants' Notice of Intent to Appeal, Appellants filed a Complaint for Declaratory Relief on December 12, 2017, before the Greenville County Circuit Court (Case No. 2017-CP-23-07857). Respondents filed a Motion to Dismiss Respondents' Complaint for Declaratory Relief on December 28, 2017 (Case No. 2017-CP-23-07857). Appellants' filed Appellants' Response to Respondents' Motion to Dismiss on January 10, 2018 (Case No. 2017-CP-23-07857). Because the Gantt Summary Court declined to rule on Appellants' Motion for Preliminary Injunction,

Appellants filed a Motion for Preliminary Injunction and a Memorandum in Support of Appellants' Motion for Preliminary Injunction on February 2, 2018, which is still pending (Case No. 2017-CP-23-07857). Respondents filed Respondents' Memorandum in Support of their Motion to Dismiss on February 7, 2018 (Case No. 2017-CP-23-07857). Appellants filed Appellants' Response to Respondents' Memorandum in Support of Respondents' Motion to Dismiss on February 8, 2017 (Case No. 2017-CP-23-07857). The Greenville County Circuit Court heard Respondents' Motion to Dismiss Appellants' Complaint for Declaratory Relief on February 8, 2018 (Case No. 2017-CP-23-07857). Exhibit C. On February 28, 2018, the Greenville County Circuit Court ruled on Respondents' Motion to Dismiss to allow Appellants to file an amended complaint (Case No. 2017-CP-23-07857). The Greenville County Circuit Court's order was a consolidation of these three cases into one (Case No. 2017-CP-23-07857) as well as to operate as a dismissal of the writ of ejectment before the Gantt Summary Court for lack of jurisdiction (Case No. 2017CV2311003419). *See* Exhibit A.

3.

Appellants filed Appellants' Amended Complaint on March 16, 2018, of which was the first formal lawsuit filed against Respondents pursuant to the Greenville County Circuit Court's order on February 28, 2018. Respondents filed Respondents' Motion to Dismiss of Appellants' Amended Complaint on March 30, 2018. Appellants filed Appellants' Response to the Respondents' Motion to Dismiss and Memorandum in Support thereof on April 10, 2018. Appellants' Response to Respondents' Motion to Dismiss and Memorandum in Support thereof requested the Greenville County Circuit Court's permission to amend the complaint, cure any noted defects or deficiencies, and rectify any issues raised by Respondents on March 30, 2018. Respondents filed Respondents' Memorandum in Support of their Motion to Dismiss on April 17, 2018. Appellants filed Appellants' Response to Respondents' Memorandum in Support of their Motion to Dismiss on April 20, 2018. The Greenville County Circuit Court for the Respondents' Motion to Dismiss Appellants' Amended Complaint was heard on April 21, 2018. Exhibit C. Appellants' filed Appellants' Second Amended Complaint on May 8, 2018. Respondents filed an Answer and Counterclaim on May 31, 2018. Appellants filed Appellants' Motion to Dismiss and Motion to Strike Respondents' Answer and Counterclaim on June 29, 2018. On page 3 of Appellants' Motion to Dismiss and Motion to Strike Respondents' Answer

and Counterclaim, Appellants argued that Appellants "hereby move to dismiss and strike any claims for breach of contract or breach of contract accompanied by fraudulent acts concerning the lease agreement as asserted in Defendants' Counterclaim, pursuant to Rules 12(b)(6), 12(e), and 12(f) of the South Carolina Rules of Civil Procedure." Exhibit B. Respondents filed Respondents' Response to Appellants' Motion to Strike and Motion to Dismiss Respondents' Answer and Counterclaim filed on August 23, 2018. On page 3 in Respondents' Response to Appellants' Motion to Strike and Motion to Dismiss Respondents' Answer and Counterclaim, Respondents claimed:

> A valid contract was formed between Landlord and Kerr when he signed the Lease on behalf of Blackstone and Chase, LLC. Blackstone and Chase, LLC 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. Exhibit B.

Appellants filed Appellants' Memorandum in Support of Appellants' Motion to Dismiss and Motion to Strike Respondents' Answer and Counterclaim on August 24, 2018. On page 12 of Appellants' Memorandum in Support of Appellants' Motion to Dismiss and Motion to Strike Respondents' Answer and Counterclaim, Appellants moved to strike Respondents' counterclaims for breach of contract and breach of contract accompanied by fraudulent acts. *See* Exhibit B.

4.

The Greenville County Circuit Court heard Appellants' Motion to Dismiss and Motion to Strike Defendants' Answer and Counterclaim on August 29, 2018. Exhibit C. In an order entered on October 3, 2018, the Greenville County Circuit 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 distrain 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. 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 Plaintiffs' personal property and

security deposit. *See* Exhibits A, B, C. On October 5, 2018, Appellants filed Appellants Notice and Motion for Reconsideration to Alter or Amend a Judgment. Appellants specifically referenced errors for both motion for partial summary judgment Plaintiffs requested a motion to strike and a motion for partial summary judgment for Defendants' counterclaims related to the existence of lease agreement in Defendants' causes of action for breach of contract and breach of contract accompanied by fraudulent acts. *See* Exhibit B. On October 15, 2018, Respondents filed Respondents' Response to Appellants' Motion for Reconsideration to Alter or Amend a Judgment arguing that a commercial landlord, or lessor, may circumvent the judicial process to evict a tenant, or lessee, from the premises based on contractual language within the lease agreement. *See* Exhibit B. On October 29, 2018, and October 30, 2018, the Greenville County Circuit Court denied Appellants' Motion Appellants' Motion for Reconsideration to Alter or Amend a Judgment. Appellants filed a Notice of Appeal before this Court on November 2, 2018. This Court requested memoranda from the parties on January 23, 2019. Respondents filed a memorandum before this Court on January 30, 2019. Appellants filed a memorandum before this Court on February 4, 2019, which is hereby incorporated herein into this Motion and Petition to Reinstate Appeal Appellants and the arguments presented by Appellants therein ("Memorandum"). This Court denied Appellants' appeal in an order entered on April 4, 2019. Exhibit A.

FACTS

5.

The record will show that, on or around April 8, 2017, and July 28, 2017, Appellants were denied access to the premises pursuant to a commercial lease between Appellant **BRADLEY W. KERR** and Respondent **MARGARET H. DURHAM LIVING TRUST** for the first floor of 17 W. North Street, Greenville, South Carolina ("Premises"). The commercial lease was executed prior to the formation of Appellant **BLACKSTONE AND CHASE, LLC**, and Appellants **TENSLEY E. THOMAS** and **MARK T. THOMAS** never saw the lease until after Respondents evicted Appellants from the Premises. On or around July 28, 2017, Respondent **HELEN W. SHOCKLEY**, acting as an agent of the **MARGERET H. DURHAM LIVING TRUST**, signed the receipt to change the locks to the premises thereby forcibly dissezing the premises from the Appellants in a hostile landlord-tenant dispute. Respondent **MARGARET H. DURHAM LIVING TRUST** belatedly filed for a writ of ejectment

before the Gantt Summary Court on or around October 16, 2017. To date, Respondent **MARGARET H. DURHAM LIVING TRUST** has not filed for a writ of distraint to seize Appellants' personal property located on the Premises. To date, Appellants have not had access to Appellants' personal property or trade fixtures, including Appellants' business records relevant to this litigation, located on the Premises since on or around July 28, 2017. Appellants cannot fully participate in discovery or file taxes accurately without Appellants' business records.

6.

Appellants have not had access to the Premises since on or around July 28, 2017, when Respondents, whether acting individually or through that Respondent's agent, locked out Appellants from the Premises and distrained Appellants' personal property on the Premises in violation of South Carolina law. Being that Respondent **MARGARET H. DURHAM LIVING TRUST** is a fictitious legal entity, Respondents **JAMES W. DURHAM** and **HELEN W. SHOCKLEY** were primarily responsible for corresponding with Appellants during the scope of their employment for any of the abovenamed Respondents. However, Respondents **MARGARET H. DURHAM, JAMES W. DURHAM, HELEN W. SHOCKLEY,** and **TAMALA D. CRANE** were all involved in the demise of the hostile landlord-tenant relationship between Appellants and Respondents in a mismanaged family affair to act egregiously in disregard of Appellants' rights to the Premises and personal property therein.

7.

The specific provision of the lease agreement in dispute allegedly permits Respondents to circumvent the judicial process for evicting Appellants from the Premises:

> 20.2 Lessor's Remedies. In addition to its other remedies, Lessor, upon an Event of Default by Lessee, will have the immediate right, after any applicable grace period expressed herein, to terminate and cancel this Lease or to reenter and remove all persons and properties from the Premises and dispose of such property as it deems fit, or both. *If Lessor reenters the Premises, either with or without legal process, it may either terminate this Lease or from time to time without terminating this Lease, make such alterations and repairs as may be necessary or appropriate to relet the Premises, and relet the Premises upon such terms and conditions as Lessor deems advisable without any responsibility on Lessor whatsoever to account to Lessee for any surplus rents collected.* No retaking of possession of the Premises by Lessor will be deemed as an election to terminate this Lease unless a written notice of such intention is given by Lessor to Lessee at the time of reentry, but, notwithstanding any such reentry or reletting without termination, Lessor may at any time thereafter elect to terminate for such previous Event of Default. In the event of an election of termination by Lessor, whether before or after reentry, Lessor may

> recover from Lessee damages, including the costs of recovering the Premises, and Lessee will remain liable to Lessor for the total rental (which may at Lessor's election be accelerated to be due and payable in full as of the date of the Event of Default) as would have been payable by Lessee hereunder for the remainder of the Term less the rentals actually received from any reletting. If any rent owing under this Lease is collected by or through an attorney or if the Lessor retains the services of an attorney for the pursuit or enforcement of any matter encompassed within or implied by the terms of this Lease, then and in any such events Lessee agrees to pay Lessor's reasonable attorneys' fees to the extent not prohibited by applicable law. Exhibit A (emphasis added).

8.

The record will show that Respondents attempted to circumvent the statutory requirement to eject a tenant from the premises through the judicial process by magic language in a contract in a proposed order adopted by the lower court:

> *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). Exhibits A, B.

The record will show that, on February 7, 2018, Respondents filed an affidavit from Respondent **JAMES W. DURHAM** and a locksmith receipt signed by Respondent **HELEN W. SHOCKLEY** and dated on July 28, 2017, in Respondents' Response to Amended Appeal from Appellants' appeal from

Gantt Summary Court. The record will show that Respondents, whether acting individually or as agents of another Respondent, forcibly evicted Appellants from the premises on or around July 28, 2017. However, Respondents never applied for a writ of ejectment until on or around October 16, 2017, after-the-fact. The record will show that Appellants never abandoned the premises, were forcibly dispossessed from the Premises, and were unlawfully dispossessed of Appellants' personal property located therein. Exhibits B, C.

RECITATION OF THE LAW

9.

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

10.

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. In this case, two standards of appeal exist: (1) the granting of partial summary judgment as to a cause of action or allegations; and, (2) the denial of a motion to strike allegations or a cause of action in a complaint, or counterclaim. 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 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). When the lower court denies a motion to strike a cause of action in a counterclaim, or essential element(s) within that cause of action, 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. *See Arnold v. State*, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992); *Weil v. Weil*, 299 S.C. 84, 89, 382 S.E.2d 471, 473-74 (Ct. App. 1989). Subsequent appellate review is limited to the evidence presented in the case during litigation. *See Arnold*, 309 S.C. at 172.

11.

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 analysis for reviewability focuses "on the effect of the order, not the label given to the motion or to the order granting it." *Thornton*, 391 S.C. at 303.

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.* 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. 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).

When a court denies a plaintiff's motion to strike a cause of action, or allegations therein to essential elements, or a motion for partial summary judgment, based on an erroneous application of the law and consideration of undisputed facts, then the denial may operate in effect based on the lower court's language to dismiss and strike essential elements of plaintiff's causes of action, or plaintiff's

causes 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), SCRCP (motion to dismiss), *with* Rule 12(f), SCRCP (motion to strike). 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). Despite the labeling of the order ruling on a motion for partial summary judgment or a motion to strike, and given the facts and circumstances of the case, if the order in effect strikes out a portion of Appellants' complaint by removing a material issue from the case, preventing the parties litigating the issue on the merits, prejudicing Appellants from being able to correct the errors in subsequent litigation or appeal, then the order is reviewable because Appellants' substantial rights are affected. *Thornton*, 391 S.C. at 304.

12.

When the lower court denies a motion to strike a cause of action in a counterclaim, the issue must be preserved in a motion to strike a counterclaim 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 12(f), SCRCP; S.C. Code Ann. § 14-3-330(2); *see Grooms v. Med. Soc'y of S.C.*, 298 S.C. 399, 401-04, 380 S.E.2d 855, 857-58 (Ct. App. 1989); *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). The failure to preserve the issue operates as a waiver of that issue. *See Noisette v. Ismail*, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991). A motion to strike allegations in a pleading is permissible under Rule 12(f) of the South Carolina Rules of Civil Procedure:

> Upon motion pointing out the defects complained of, and made by a party before responding to a pleading or, if no responsive pleading is required within 30 days after the service of the pleading upon him or upon the court's own initiative, at any time the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter.

A motion to strike operates to challenge a theory of recovery alleged in a complaint, or counterclaim. *See Hackworth v. Greywood at Hammett, LLC*, 385 S.C. 110, 114, 682 S.E.2d 871, 874 (Ct. App. 2009); *Grooms*, 298 S.C. at 401-04. A cause of action "accrues the moment the defendant breaches a duty owed to the plaintiff." *Grooms*, 298 S.C. at 402. By contrast, a defense or counterclaim with no substantial relation to the dispute between the parties is irrelevant because the allegations or denials have no

connection to or effect upon the cause of action. *See Aetna Cas. & Sur. Co. v. Golightly*, 289 S.C. 408, 410, 338 S.E.2d 153, 154 (1985); *Olympic Radio & Television, Inc. v. Baker*, 230 S.C. 383, 386-87, 95 S.E.2d 636, 637-38 (1956). If Respondents fail to state allegations to support a viable cause of action that would entitle Respondents to recover on any theory of the case, then Respondents' cause of action should be dismissed. *See Hackworth*, 385 S.C. at 114-15. In a motion to strike, the standard is "whether a party should be allowed to plead a defense or other matter . . . ." *Alladin Plastics, Inc. v. Wintenna, Inc.*, 301 S.C. 90, 93, 390 S.E.2d 370, 372 (Ct. App. 1990). A motion to strike a sham allegation or pleading "presents a question of fact to be determined by the court upon evidence." *Ins. Co. of N. Am. v. Hyatt*, 290 S.C. 159, 163, 348 S.E.2d 532, 535 (Ct. App. 1986). A motion to strike should be granted when "the pleading is manifestly false and made in bad faith." *Id.*

The standard for reviewing an order denying a motion to strike is abuse of discretion as to whether the lower court issued an order that "was controlled by an error of law or where the order is based on factual conclusions that are without evidentiary support." *BB&T v. Taylor*, 369 S.C. 548, 551, 633 S.E.2d 501, 503 (2006). Abuse of discretion for denying a motion to strike does not occur when "either real cause for doubt [to a question in dispute], or it is clear that the ends of justice may well be promoted by a trial on the merits." *Mayes v. Paxton*, 313 S.C. 109, 115, 437 S.E.2d 66, 69-70 (1993). If the motion to strike merely pertains to raising a doubtful question, or that justice may best be promoted by a trial on the merits, then fair, judicial discretion does not warrant granting a motion to strike accordingly. *See id.* Alternatively, if the facts are clear and undisputed as to whether the challenged defenses or cause(s) of action are insufficient, or further developing the issues in a trial on the merits is unnecessary to find the challenged defenses or cause(s) of action insufficient as a matter of law, then fair, judicial discretion warrants granting a motion to strike accordingly. *See id.* An abuse of discretion occurs when the lower court does not account for the latter. *See id.* When the lower court's ruling is controlled by the erroneous application of the law or factual conclusions without evidentiary support, then an abuse of discretion arises. *Steinke v. S.C. Dep't of Labor, Licensing, & Regulation*, 336 S.C. 373, 398, 520 S.E.2d 142, 155 (1999). When questions of law are concerned related to a motion to strike, the appellate court may decide the question of law as a matter of law without deference to the lower court. *See Skywaves I Corp.*, 423 S.C. at 456-59.

13.

When the lower court makes impermissible findings of fact or conclusions of law denying

a motion to strike, such a ruling is prejudicial to the moving party for a motion to strike. *See Skywaves I Corp.*, 423 S.C. at 456-59. The moving party regarding the lower court's denial of a motion to strike bears the burden to show clear prejudicial error to the moving party. *See Rimer v. State Farm Mut. Auto. Ins. Co.*, 248 S.C. 18, 26, 148 S.E.2d 742, 746 (1966). The record must show error and that the complaining party was prejudiced by that error. *Watts v. Bell Oil Co.*, 266 S.C. 61, 63, 221 S.E.2d 529, 530-31 (1976). By admitting incompetent evidence that has some probative value on a material issue of fact within the case, the evidence is presumptively prejudicial unless the issue of fact is undisputed. *Id.* Additionally, loss of earnings related to a theory of recovery pled in a cause of action, or permissible recovery of attorney's fees by contract or statute for a party to assert and protect that party's rights related to an element of damage, such factors may be attributable to a clear showing of prejudice to the moving party for a motion to strike from the lower court's denial of the motion to strike. *See Rimer*, 248 S.C. at 26-27. Essentially, if damages would accrue from the denial of the motion to strike, and those damages relate to an element of damages in the causes of action pled by the moving party, then such damages that incur to the moving party warrant a clear showing of prejudice. *See id.* Therefore, if the pecuniary loss or damages is related to an element of damages for any causes of action, then the pecuniary loss complained of resulting from the denial of a motion to strike warrants a clear showing of prejudice. *See Daniels v. Coleman*, 253 S.C. 218, 225-28, 169 S.E.2d 593, 596-98 (1969).

Additionally, prejudice may also occur when a party may not maintain that party's action or defense on the merits when "presentation of the merits will be subserved since the admissions, if not dispositive, involve key factual elements of Plaintiffs' causes of action." *Baughman v. AT&T*, 306 S.C. 101, 110, 410 S.E.2d 537, 542 (1991). When the allegations in a pleading are indefinite or uncertain, and the precise charge or defense is unapparent, prejudice flows from the party to answer and affirm such allegations. *Ellen v. King*, 227 S.C. 481, 488, 88 S.E.2d 598, 602 (1955). When responding to the allegations in a complaint, Respondents must adhere to Rule 8(b) of the South Carolina Rules of Civil Procedure. Rule 8(b), SCRCP. Under Rule 8(d) of the South Carolina Rules of Civil Procedure, "[a]llegations made in a complaint that are not denied in the answer are deemed admitted." *Motors Ins. Corp. v. State by & ex rel. Dep't of Highways & Pub. Transp.*, 313 S.C. 279, 281, 437 S.E.2d 555, 556-57 (Ct. App. 1993). A party is bound by

that party's pleadings when alleged in an Answer or Counterclaim. *Postal v. Mann*, 308 S.C. 385, 387, 418 S.E.2d 322, 323 (Ct. App. 1992). Ultimately, Respondents must deny Appellants' allegations unequivocally. Respondents may not palter in Respondents' responsive pleading when Appellants charged Respondents with an act under Appellants' Complaint. *Conley v. Summersett & Co.*, 149 S.C. 513, 527, 147 S.E. 635, 640 (1929). When pleading denials in an answer, inconsistent denials may deem the answer "frivolous when it is clearly insufficient on its face, and does not controvert the material points of the complaint, and is presumably interposed for mere purposes of delay." *Guar. Tr. Co. v. Kibler*, 105 S.C. 513, 519, 90 S.E. 159, 160 (1916). Essentially, prejudice may also occur when a party must defend the merits of an invalid claim. *See Patton v. Miller*, 420 S.C. 471, 489-93, 804 S.E.2d 252, 261-63 (2017).

By contrast, Rule 11 of the South Carolina Civil Procedures requires that:

> The written or electronic signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay . . . If a pleading, motion or other paper is not signed or does not comply with this Rule, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this Rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee. Rule 11, SCRCP.

The application of Rule 11 of the South Carolina Rules of Civil Procedure requires that a party's position must have supporting grounds to the best of that party's knowledge, information, and belief. To order default or dismissal, and in a manner that is reasonable as not to foreclose a decision based on the merits of the case, the Court must "determine that there is some element of bad faith, willfulness, or gross indifference to the rights of other litigants." *Karppi v. Greenville Terrazzo Co.*, 327 S.C. 538, 542-43, 489 S.E.2d 679, 682 (Ct. App. 1997).

ARGUMENT

14.

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 April 4, 2019, erroneously

dismisses Appellants' appeal because the lower court erred: (1) denying Appellants' motion to strike Respondents' causes of action for a breach of contract and a breach of contract accompanied by fraudulent acts, specifically the validity of Section 20.2 in the lease agreement as a valid provision in the contract; and, (2) granting partial summary judgment in favor of Respondents regarding the lease agreement being a valid contract that essentially operated to strike out essential elements of Appellants causes of action in effect. The dispositive issue before the Court is a simple legal question: Whether a landlord, whether residential or commercial, must engage in the judicial process before evicting a tenant from the premises. The answer is yes. A landlord locking out a tenant from the premises against the tenant's will, and with the tenant's personal property located therein, without due process of the landlord providing notice and engaging in the judicial process to evict a tenant is a violation of Appellants' rights as a matter of law. S.C. Code Ann. §§ 15-67-410 to -610; S.C. Code Ann. §§ 15-69-10 to -20; S.C. Code Ann. §§ 27-37-10 to -160; *see Saine v. Hertzog*, 106 S.C. 501, 506, 91 S.E. 859, 860 (1917); *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); *cf. Parker v. Sheeal*, 349 S.C. 226, 230-31, 562 S.E.2d 620, 623 (2002); *Freeman v. Freeman*, 323 S.C. 95, 99, 473 S.E.2d 467, 470 (Ct. App. 1996); *De Laine v. Alderman*, 31 S.C. 267, 275-76, 9 S.E. 950, 953 (1889). Therefore, a landlord, or lessor, in 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 lower court's ruling on validating the lease agreement and granting a landlord, or lessor, the power to circumvent the statutory requirements requiring a landlord to engage the judicial process before evicting a tenant, or lessee, is a clear error of law and abuse of discretion that has no legal basis in South Carolina common law, the South Carolina Code governing landlord-tenant relationships, the South Carolina Constitution, or the Federal Constitution. Appellants' substantive rights are prejudiced by the due process violation from Appellants' deprivation of property, or an interest in that property: (1) divesting Appellants of Appellants' property interest in the possession of the Premises and Appellants' personal property located therein; and, (2) divesting Appellants of property, or a property interest, when creating a windfall to Respondents exercising multiple landlord remedies of dispossession of the Premises, distraint of Appellants' personal property located therein, including business records required for litigation, and acceleration of the terms and conditions of the lease agreement. Moreover, the lower

court's ruling is inapposite to South Carolina law and Federal law. Therefore, the lower court, as a state actor, violated Appellants' constitutional rights. *See* 42 U.S.C. § 1983; U.S. Const. amend. 1, XIV; S.C. Const. art. I, § 2; *see* S.C. Code Ann. §§ 27-37-10 to -160; S.C. Code Ann. §§ 27-39-10 to -360; *Gentry v. Recreation, Inc.*, 192 S.C. 429, 435, 7 S.E.2d 63, 65 (1940). Hence, proceeding with litigation subjects Appellants to waive Appellants' constitutional rights prohibiting the deprivation of property, or an interest in that property, without due process. *See Noisette*, 304 S.C. at 58.

15.

In a cause of action for breach of contract, a party must establish "the existence and terms of the contract, defendant's breach of one or more of the contractual terms, and damages resulting from the breach." *Taylor v. Cummins Atl.*, 852 F. Supp. 1279, 1286 (D.S.C. 1994). With a breach of contract, "the defendant is liable for whatever damages follow as a natural consequence and a proximate result of such breach." *Fuller v. E. Fire & Cas. Ins. Co.*, 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962). More importantly, this cause of action depends upon the existence of a contract. *Taylor*, 852 F. Supp. at 1286. The cause of action for breach of contract accompanied by fraudulent actions comprise of the following elements: "(1) a breach of contract; (2) fraudulent intent relating to the breaching of the contract and not merely to its making; and (3) a fraudulent act accompanying the breach." *Harper v. Ethridge*, 290 S.C. 112, 119, 348 S.E.2d 374, 378 (Ct. App. 1986). The common elements of fraud and deceit are not required in this cause of action. *Id.* Under this cause of action, a "fraudulent act is any act characterized by dishonesty in fact, unfair dealing, or the unlawful appropriation of another's property by design." *Id.* However, essential to this cause of action, Defendants must prove the existence of the lease as a 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). By contrast, an illegal contract, or a provision thereunder, 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 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*, 192 S.C. at 435. 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 (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). 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 Rorrer 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. *Rorrer*, 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.

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. The first step in the legal analysis concerning Section 20.2 of the lease agreement, as a matter of law, is whether the lease agreement must respond to any liability the landlord, or lessor, may legally incur that accrues at the moment liability attaches to form a basis for that cause of action. *See Massey v. War Emergency Co-operative Ass'n*, 209 S.C. 292, 297, 39 S.E.2d 907, 911 (1946). The statutes governing landlord-tenant relationships warrant both an original and direct liability from the

landlord, or lessor, to a damaged member of the public the statute(s) were designed to protect. *See id.* If the lease agreement does not comply with statutory principles of ejectment, then Appellants have a right to challenge the validity of such a contract as damaged members of the public the statutes were designed to protect by requiring all landlords to resort to the judicial process before evicting a tenant, or lessee, from the premises. Therefore, landlords, or lessors, have a statutory duty to engage in the judicial process before evicting a tenant, or lessee, from the premises rather than engage in a self-help eviction that no private contract may usurp:

> [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).

Respondents admitted to breaching this duty, which is central to several of Appellants' causes of action as previously discussed in Appellants' Memorandum. Respondents liability on this issue is clear and undisputed. The lower court's erroneous application of the law is not based on supporting law nor the admissible facts in this case when denying Appellants' partial motion for summary judgment and motion to strike these counterclaims with the allegations therein purporting Section 20.2 of the lease agreement as enforceable.

16.

In Appellants' Memorandum, Appellants presented arguments against the lower court's characterization of granting of partial summary judgment as to the validity of the lease agreement provision 20.2 in favor of Respondents and striking essential elements of Appellants' causes of action. This Court denied further appellate review based on the principal that "[t]he denial of summary judgment does not establish the law of the case, and the issues raised in the motion may be raised again later in the proceedings by a motion to reconsider the summary judgment motion or by a motion for a directed verdict." *Ballenger v. Bowen*, 313 S.C. 476, 477, 443 S.E.2d 379, 380 (1994). This Court also denied further appellate review because "[a]n interlocutory denial of summary judgment is not a final order and is subject to change by the trial court." *Baber v. Greenville Cty.*, 327 S.C. 31, 40, 488 S.E.2d 314, 319 (1997). The analysis is not the denial of summary judgment to Appellants, but the lower court's order and the effect of such an order ruled in favor of Respondents by essentially striking key, essential elements of Appellants' causes of action rendering the decision as reviewable. S.C. Code Ann. § 14-3-

330; *Thornton*, 391 S.C. at 303-04.

The lower court's intentions were clearly manifested in plain and unambiguous language affecting the case including, but not limited to, the following: granting a partial motion for summary judgment in favor of Respondents deciding issues of merit to key elements of causes of action; striking key elements of Appellants' causes of action as previously discussed in Appellants' memorandum; and, affecting the substantial rights of Appellants that operates in a manner that subsequent litigation or appellate review would not cure despite the possibility of a different ruling by a different judge in subsequent litigation or post-trial appellate review. In *Ballenger*, the rule of law determined that "the denial of summary judgment does not finally determine anything about the merits of the case and does not have the effect of striking any defense since that defense may be raised again later in the proceedings." 313 S.C. at 477. In *Baber*, the rule of law determined that "the trial judge retained jurisdiction to rule, after the presentation of the evidence, on the same issue previously the subject of a pre-trial summary judgment motion." 327 S.C. at 40. Whether a judge in the lower court may reserve the right to rule differently than a previous judge concerning a partial motion for summary judgment, the lower court's ruling in this case does not dissipate the effect of violating Appellants' constitutional rights in the interim or the prejudicial consequences that flow therefrom until another judge may decide the law differently during litigation. Appellants provided numerous examples of prejudicial issues flowing from the lower court's decision and corresponding analysis previously in Appellants' Memorandum.

Moreover, a violation of Appellants' constitutional rights has no temporal limitation with respect to one judge ruling in one manner and a subsequent judge ruling in a different manner during litigation in the rotation system of trial judges in the South Carolina Circuit Courts. Meaning, the violation of constitutional rights occurs exactly when the violation occurs. *See United States v. Jacobsen*, 466 U.S. 109, 113, 104 S. Ct. 1652, 1656, 80 L. Ed. 2d 85 (1984). Therefore, if a subsequent judge rules differently from the previous judge on the issues presented upon appeal, then the subsequent judge's ruling does not cure the constitutional violation and the prejudicial effect flowing therefrom that already occurred from the previous judge's ruling. The Court's analysis on whether the issue is reviewable is properly characterized in the following legal question: Whether the constitutional violation of a ruling by one judge toward Appellants in an interlocutory order, including the prejudice to Appellants' substantial rights that flows therefrom, is cured by the discretion of a subsequent judge's ruling who may disregard deference to the previous judge's ruling in subsequent litigation or appellate review.

Based on Appellants' analysis previously in Appellants' Memorandum and herein, the answer is no. The time lapse from one judge ruling on an essential issue related to the merits of the litigation to another judge possibly ruling differently does not abate Appellants' loss of constitutional rights, protect substantial rights of Appellants, prevent the established law as erroneously applied in the case, or cure any potential waivers of such rights for subsequent appellate review in the interim. The Court's legal support deals with the possibility that a subsequent judge in the South Carolina Circuit Court system of rotating judges may rule differently, not that a subsequent judge must rule differently when the erroneous application of the law has already occurred. No crystal ball exists to foreshadow a subsequent judge will cure such defects from a previous ruling by a previous judge. Suggestion of the possibility for a subsequent judge to rule differently is no guarantee that erroneously established law concluding the essential merits of litigation having the effect of a final order, or a previous ruling that substantially affected Appellants rights, will not permeate throughout subsequent litigation leaving Appellants no means to cure such defects in a subsequent appeal. *See Mayer*, 313 S.C. at 114 ("The trial judge's findings of fact are conclusive unless there is no evidence that reasonably supports them."); *Snell v. Parlette*, 273 S.C. 317, 322, 256 S.E.2d 410, 412 (1979). Reviewability, therefore, does not deal with suggestions of probability for a subsequent judge's discretion to disregard a previous ruling, but the effect of a ruling, the prejudice that flows therefrom, and Appellants' ability to cure such defects in a subsequent appeal. If the effect of a ruling and prejudice that flows therefrom cannot be cured in a subsequent appeal from one judge to another in subsequent litigation, then the previous ruling should be reviewable. This Court's jurisdiction was designed to prevent such defects from permeating in subsequent litigation and prejudicing Appellants' rights further when subsequent appellate review will not cure such defects. In this framework, Appellants seek the Court's reconsideration of the Court's analysis regarding the effect of the lower court's ruling of a partial motion for summary judgment in favor of Respondents as written pertaining to the erroneous application of law to validate Section 20.2 of the lease agreement.

17.

The lower court relied 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 lower court may not rely upon this case as dispositive on the issue as to whether provisions of a lease agreement exclusively control commercial leases. Moreover, the lower 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 a 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 distrain 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. S.C. Code Ann. § 36-9-102(65) (promissory notes); 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).

In this case, no application of Article 9 of the South Carolina Uniform Commercial Code exists as Respondents never entered into a promissory note with Appellants, funded the upfit for Appellants' barber shop on the Premises, or financially invested in Appellants' barber shop as a secured lender. Aside from this single case, Respondents cannot provide any other legal supporting basis that permits a landlord, or lessor, to circumvent the statutory requirements to evict a tenant, or lessor, without resorting to the judicial process beforehand based on admissible evidence and admissions of facts presented by Respondents before the lower court. Because, no such remedy for landlords, or lessors, by way of contractual drafting in lease agreements in commercial leases exists under South Carolina law outside the application of Article 9 of the South Carolina Uniform Commercial Code.

18.

Therefore, Respondents have no legal basis in South Carolina law, whether common law or by statute, supporting Section 20.2 of the lease agreement for Respondents to evict Appellants from the Premises without resorting to the judicial process for evicting tenants from the premises. Respondent **JAMES W. DURHAM** admitted to seeing Appellant **MARK T. THOMAS** on the Premises working on or around July 27, 2017. Respondents admitted to locking out Appellants and evicting Appellants from the Premises on or around July 28, 2017. Respondents admitted to dispossessing Appellants from the Premises and Appellants' personal property located therein on or around July 28, 2017, and

subsequently thereafter. Defendants admitted to allowing Plaintiffs' employees to retrieve personal items when appearing for work on the premises, which occurred on the very same day Defendants locked out Plaintiffs from the premises on or around July 28, 2017. Respondents admitted to receiving a demand letter for repossession of the Premises from Appellants on or around August 4, 2017. Respondents admitted to receiving a demand letter for repossession of Appellants' personal property on the Premises from Appellants on or around September 27, 2017. Respondents admitted to applying for a writ of ejectment before Gantt Summary Court on or around October 16, 2017, after evicting Appellants from the Premises. Respondents admitted to never applying for a writ of distraint before any court in South Carolina. Exhibits A, B, C.

As a matter of law, the facts are clear and undisputed that, by resorting to Section 20.2 of the lease agreement, Respondents failed to comply with South Carolina law in violation of Appellants' rights thereunder and unlawfully: (1) evicted Appellants from the Premises; and, (2) distrained Appellants' personal property located therein. The lower court based its validation of the lease agreement and Section 20.2 on inapposite law that violated Appellants' constitutional rights to property, or interests in that property, whether real or personal property. Section 20.2 of the lease agreement is invalid and against public policy. No law under South Carolina permits private parties of a contract to circumvent the judicial process for evicting tenants from the premises. In turn, Section 20.2 of the lease agreement invalidates the lease agreement as a valid contract and the lease agreement, as a contract, may not exist. Without the existence of the lease agreement as a contract, these causes of action must fail for pleading insufficient facts warranting these theories of recovery as to essential elements and allegations of these causes of action. Therefore, Respondents' causes of action for breach of contract and breach of contract accompanied by fraudulent acts must be stricken pertaining to Appellants' motion to dismiss and motion to strike allegations essential to these causes of actions. Because, allegations of the lease agreement as a valid agreement pertaining to Section 20.2 of the lease agreement is factually insufficient to support these causes of action in Respondents' counterclaims as a matter of law without any doubt nor would further development of this issue disputing Section 20.2 of the lease agreement warrant a trial on the merits.

19.

The lower court abused discretion when denying Appellants' motion to strike these causes of action and this decision must be reversed because validating Section 20.2 of the lease agreement is an

erroneous application of the law as a matter of law to which this Court is not required to show any deference to the lower court on rulings as a question of law. The application of erroneous law and establishing such erroneous law in the case, until another judge decides not to follow a previous judge's decision, does not wash the taint of the erroneous law applied and prejudices Appellants in various aspects in the interim including, but not limited to, the following:

(1) discovery in litigation and the waiver of Appellants' rights in discovery that cannot be rectified during litigation, post-trial, or in a subsequent appeal;
(2) the ability to file taxes accurately without Appellants' business records within the exclusive dominion, control, and possession of Respondents;
(3) the adulterated salon products that have expired beyond their shelf-life located on the Premises within the exclusive dominion, control, and possession of Respondents that cannot be rectified during litigation, post-trial, or in a subsequent appeal;
(4) dispossession of Appellants' personal property located on the Premises within the exclusive dominion, control, and possession of Respondents that cannot be rectified during litigation, post-trial, or in a subsequent appeal;
(5) spoliation of Appellants' evidence located on the Premises within the exclusive dominion, control, and possession of Respondents that cannot be rectified during litigation, post-trial, or in a subsequent appeal;
(6) the inability to earn income from relocating the barber shop to another location and mitigate damages of loss of earnings for Respondent **BLACKSTONE AND CHASE, LLC**, because the Premises has been within the exclusive dominion, control, and possession of Respondents that cannot be rectified during litigation, post-trial, or in a subsequent appeal;
(7) the pecuniary loss of attorney's fees to assert and protect Appellants' rights in this landlord-tenant dispute that is an element of damages in causes of action pled in Appellants' Complaint; and,
(8) the waiver of Appellants' constitutional rights from deprivation of property, or a property interest, from the lower court's ruling dispossessing Appellants of the Premises, Appellants' personal property located therein, within the exclusive dominion, control, and possession of Respondents that cannot be rectified during litigation (from one judge's ruling until another judge rules differently), post-trial, or in a subsequent appeal.

The application of Rule 11 of the South Carolina Rules of Civil Procedure requires that Respondents exercise due diligence when attesting that Section 20.2 of the lease agreement is a valid provision and enforceable under South Carolina law to the best of Respondents' knowledge, information, belief, and supporting grounds for Respondents' position. Because Section 20.2 of the lease agreement is untenable and unenforceable under South Carolina law as previously discussed, purporting the lease validity to enforce this provision is grounds to be stricken. Rule 11, SCRCP. Appellants have repeatedly belabored the position that Section 20.2 of the lease agreement is unenforceable under South

Carolina law in pleadings, motions, discussion with opposing counsel, oral arguments, and Appellants' Memorandum. That Appellants are prejudiced from the lower court's denial of Appellants' motion to strike undoubtedly occurs, especially when the lower court's order went beyond the scope of the motions before the court to establish erroneous law in violation of South Carolina law, operate to dismiss or strike essential elements of Appellants' causes of action, and violate Appellants' constitutional rights in manner that subsequent appellate review will not cure nor protect Appellants' substantial rights. The lower court thereby forces Appellants to waive such rights until another subsequent judge may possibly rule differently, whenever that may occur. Appellants' substantive rights are not subject to a game of chance depending on what a future judge assigned to the case may decide when a previous ruling has already prejudiced Appellants accordingly in the interim.

The lower court's order dispossessed Appellants' rights from the unlawful dispossession of the Premises from Respondents' self-help eviction contrary to South Carolina law for evicting tenants; and, dispossessed Appellants' rights to Appellants' personal property, including business records required for discovery in litigation, located on the Premises giving all rights to said property to Respondents contrary to South Carolina law for distraining personal property. The lower court's order operated to violate Appellants' constitutional rights of due process before suffering the deprivation of property, or an interest in that property. Appellants cannot earn income from the barber shop when dispossessed of the Premises and Appellants' personal property located therein unlawfully. Appellants have incurred legal fees to assert and protect Appellants' rights that are permissible to recover by statute. The damages flowing therefrom are pled in the element of damages for Appellants' relevant cause(s) of action. Respondents have admitted to key facts of Appellants' key factual elements of Appellants' causes of action that do not warrant maintaining Respondents' causes of action or defenses in Respondents' counterclaim and Answer. Appellants face prejudice having to answer or affirm such allegations when such causes of action cannot be maintained by Section 20.2 of the lease agreement as an unenforceable provision. Hence, Appellants face prejudice from having to defend the merits of an invalid claim accordingly. Furthermore, the lower court's order forces Appellants to waive rights in discovery by compelling 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. Validating Section 20.2 of the lease agreement by the lower court's order, when the provision is clearly disputed, in effect admits incompetent evidence with

probative value on the material issue of fact in the case for Appellants' causes of action that is presumptively prejudicial when said provision is unenforceable and contrary to South Carolina law.

CONCLUSION

These grounds for appeal have resulted in unnecessary litigation over the clear application of the law in South Carolina. The lower court definitively ruled on the merits of litigation for Appellants regarding the validity of Section 20.2 of the lease agreement and established the law in this case erroneously, which has, in effect, divested Appellants of Appellants' substantive rights without means to cure such defects 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 decision by a future judge in subsequent litigation or a new trial will not cure violating Appellants' substantive rights or prejudice incurred by Appellants in the interim. Proceeding with litigation and trial may constitute a waiver of Appellants' substantial rights in Appellants' causes of action for a violation under South Carolina law and Federal law. Therefore, the finality of the order involves the merits of litigation 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 18 day of April, 2019.

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ATTORNEY FOR APPELLANTS

South Carolina
Date: April 18, 2019

PROOF OF SERVICE OF AMENDED MOTION AND PETITION TO REINSTATE 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.

PROOF OF SERVICE

I certify that I have served the Amended Motion and Petition to Reinstate Appeal on

Respondents **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**, by depositing a copy of it in the United States Mail, postage prepaid, on April 17, 2019, addressed to the attorney of record, to the following address(es):

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 18 day of April, 2019.

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ATTORNEY FOR APPELLANTS

DICKSON DAVIS LAW FIRM

MOTION AND PETITION TO REINSTATE COVER LETTER

April 18, 2019

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

VIA FEDEX 775010033467

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 know, I represent Appellants Blackstone and Chase, LLC, et al. in this matter. Included is the Motion and Petition to Reinstate Appellants' appeal related to the South Carolina Appellate Court Order issued on April 4, 2019, dismissing the appeal on the basis that a motion for partial summary judgment is not immediately appealable. Included is the following; Appellants' Amended Motion and Petition for Reinstatement with attendant proof of service. Exhibits remain the same as previously filed.

Respectfully submitted this 18 day of April, 2019

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

cc: Robert K. Merting, Joshua Hudson

/ddd

RECEIVED
APR 19 2019
SC Court of Appeals

FAX COVER SHEET

TO	Shelby
COMPANY	S.C. Appellate Clerk of Court
FAX NUMBER	18037341839
FROM	Deborah Davis
DATE	2019-04-18 20:59:03 GMT
RE	Case No. 2017-CP-23-07837

COVER MESSAGE

Shelby,

Please see the amended petition to reinstate appellants' appeal in case no. 2017-CP-23-07837 via Fedex Tracking No. 775010033467.

Best Regards,

Deborah D. Davis, Esq.
Attorney at Law

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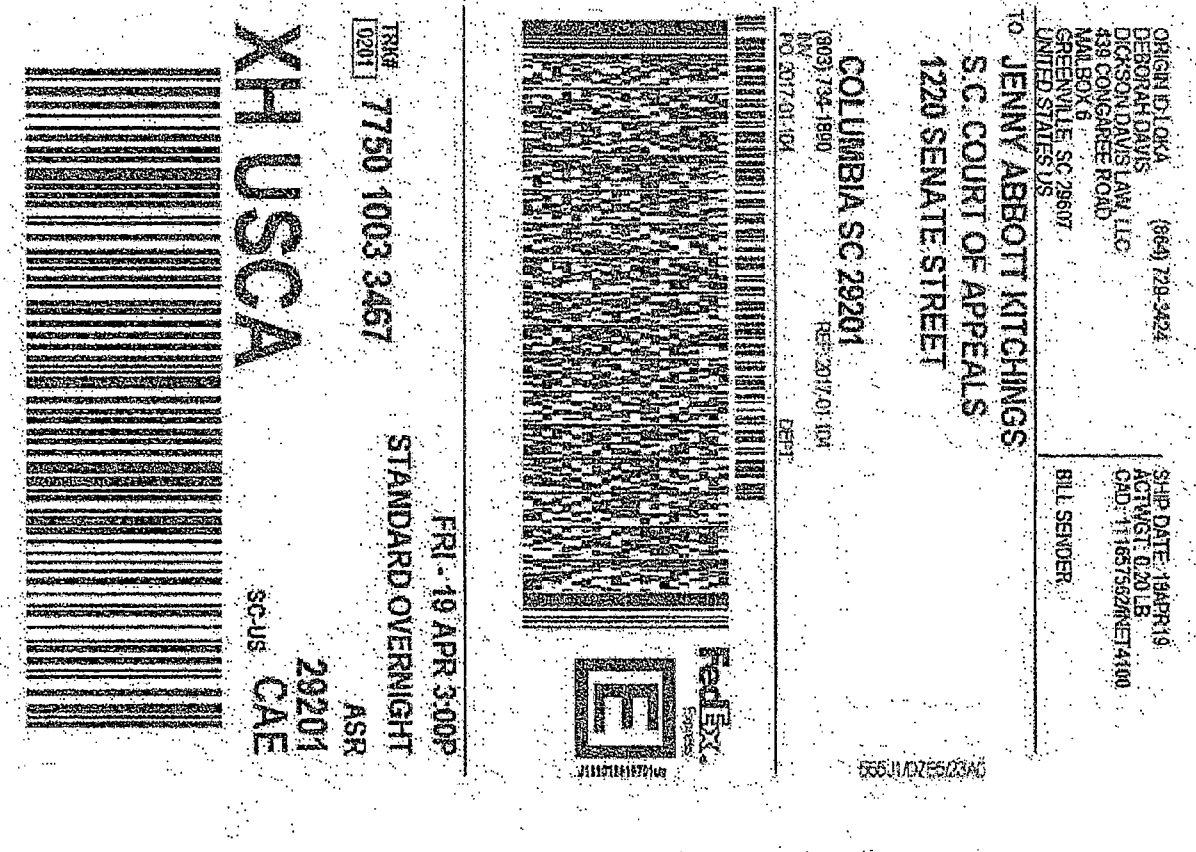

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