

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Master-In-Equity

The Honorable Marvin H. Dukes, III, Master-In-Equity
Beaufort County

Appellate Case No. 2020-000862
Trial Court Case No. 2018-CP-07-1622

J & W Corporation of Greenwood,

Appellant,

v.

Broad Creek Marina of Hilton Head, LLC;
Broad Creek Marina Operations, LLC;
Broad Creek Marina Properties, LLC;
Broad Creek Marina Development, LLC,

Respondents,

INITIAL BRIEF OF RESPONDENTS

Ellis R. Lesemann
Michelle A. Matthews
Lesemann & Associates LLC
418 King Street, Suite 301
Charleston, South Carolina 29403
(843) 724-5155
Attorneys for Respondents

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STATEMENT OF ISSUES ON APPEAL

- I. SHOULD THIS COURT REVERSE THE MASTER'S RULINGS ON TENANT'S CLAIM FOR DECLARATORY JUDGMENT AND LANDLORD'S COUNTERCLAIM FOR SPECIFIC PERFORMANCE RELATING TO THE COMMERCIAL OFFICE SPACE WHERE THE RULINGS ARE SUPPORTED BY EVIDENCE IN THE RECORD, INCLUDING ADMISSIONS BY TENANT, AND WERE DECIDED BY THE FINDER OF FACT WHO HAS OVERSEEN THE PROCEEDINGS FOR SEVERAL YEARS, ASSESSED AND GAVE WEIGHT TO THE EVIDENCE, AND IS UNIQUELY SITUATED TO DISCERN THE CREDIBILITY OF THE WITNESSES?
- II. SHOULD THE COURT REVERSE THE MASTER'S RULINGS BASED ON ARGUMENTS THAT TENANT DID NOT PRESENT AT TRIAL, INCLUDING TENANT'S UNPRESERVED, SUBJECTIVE, AND UNRIPE ARGUMENT THAT IT IS IMPOSSIBLE FOR THE AQUA LODGE FLOATING OFFICE (WHICH IS AN OPERABLE REGISTERED VESSEL) TO BE APPROVED AND PERMITTED BY DHEC/OCRM?
- III. IS THERE ANY EVIDENCE TO SUPPORT THE MASTER'S DETERMINATION THAT TENANT FAILED TO PROVE A BREACH OF CONTRACT AND THEREFORE WAS NOT ENTITLED TO NOMINAL DAMAGES?
- IV. IS THERE ANY EVIDENCE TO SUPPORT THE MASTER'S REFUSAL TO APPLY A SETOFF OR RECOUPMENT WHEN THE ONLY REQUEST FOR SETOFF OR RECOUPMENT WAS AN ARGUMENT OF COUNSEL UNSUPPORTED BY EVIDENCE OR TESTIMONY AND WHERE THE MASTER'S RULING THAT TENANT BREACHED THE LEASE HAS NOT BEEN RAISED ON APPEAL?
- V. IS THERE ANY EVIDENCE TO SUPPORT THE MASTER'S DETERMINATION THAT LANDLORD IS ENTITLED TO AN AWARD OF PREJUDGMENT INTEREST FOR THE DOCK REPAIR COSTS BASED ON THE EVIDENCE IN THE RECORD?
- VI. IS THE MASTER'S INTERPRETATION OF THE LEASE AND SETTLEMENT AGREEMENT SUPPORTED BY ANY EVIDENCE WHEN TENANT'S PROPOSED INTERPRETATION IS CONTRADICTED BY THE ACTUAL LANGUAGE OF THE LEASE AND SETTLEMENT AGREEMENT?
- VII. DID THE MASTER ABUSE HIS DISCRETION IN A MANNER REQUIRING A NEW TRIAL BY GRANTING A MOTION TO QUASH A TRIAL SUBPOENA AFTER THE PARTIES HAD YEARS TO CONDUCT DISCOVERY AND DID CONDUCT SUBSTANTIAL DISCOVERY, AND NO MOTIONS TO COMPEL WERE PENDING?
- VIII. IS THERE ANY EVIDENCE TO SUPPORT THE MASTER'S DAMAGES AWARD FOR UNREIMBURSED LEASE CHARGES WHEN TENANT ACKNOWLEDGED ITS OBLIGATION TO PAY THE CHARGES AT TRIAL?

STATEMENT OF THE CASE

This dispute relates to a long-term commercial Lease Agreement (the “Lease”). The Lease was first executed on September 23, 1993, for a term of ninety-nine (99) years relating to a portion of the Broad Creek Marina on Hilton Head Island, South Carolina (the “Lease Property”). (Defs. Ex. 1.) Appellant J&W Corporation of Greenwood is the Tenant (“Tenant”). Respondent Broad Creek Marina Properties, LLC is the Landlord (“Landlord”), as the successor-in-title to Hilton Head Island Marina, L.P. (“HHIM”) Respondent Broad Creek Marina Operations, LLC (“BCMO”) currently acts as the property manager/operating entity for the Broad Creek Marina (the “Marina”).

Landlord and Tenant agreed to the Lease after Tenant assigned its contract to purchase the Marina over to HHIM. (Order and Judgment, p. 2.) The Lease Property, as defined in Exhibits A and A-1 to the Lease, includes the following: (1) 300 linear feet of commercial dock space; (2) barge docking, loading, and unloading facilities; (3) 300 square feet of commercial office space (which at the time was a portion of a houseboat that was moored to the docks); (4) an embarkation and debarkation area; (5) a parking area; and (6) certain access areas. In exchange for the right to occupy and use the Lease Property during the 99-year term, Tenant agreed to pay “Rent,” “Additional Rent” and “Additional Charges” to Landlord as defined under the Lease and also agreed to comply with all terms of the Lease. (Order and Judgment, p. 2; Defs. Ex. 1.)

Relevant Terms of the Lease

This being a lease dispute, the written terms of the Lease are paramount, and particularly so when the lease term is ninety-nine (99) years. Under the terms of the Lease, it was agreed that Tenant would have sole responsibility for all maintenance and repair of the Lease Property during the entire Term, including the office space. In Paragraph 18 of the Lease, entitled “Maintenance and Repair,” Landlord and Tenant agreed as follows:

Maintenance and Repair. Subject to the provisions of paragraph 6, entitled “Dock Repair,” **Tenant shall, at Tenant’s expense, make all repairs necessary to maintain the Lease Property in good working condition and repair, neat and clean, and generally in a manner consistent with the operation of a first class marina.** If Tenant refuses or neglects to commence the necessary repairs and maintenance within a reasonable time, not to exceed fifteen (15) days, after demand by Landlord, Landlord may make such repairs without liability to Tenant for any loss or damage that may accrue to Tenant’s stock, business or fixtures by reason thereof (except if caused by Landlord or Landlord’s agent’s negligence), and if Landlord makes such repairs, Tenant shall pay to Landlord, on demand as Additional Rent, the cost thereof. Tenant’s failure to pay shall constitute a default under this Lease. **Landlord shall maintain and repair the Property except the Lease Property in good working condition and repair, neat and clean, and generally in a manner consistent with the operation of a first class marina.** If Landlord fails to maintain and repair the Property, except the Lease Property, as contemplated herein, Tenant may make such repairs without liability to Landlord for any loss or damage to the Property, except damage attributable to Tenant’s or Tenant’s agents’ negligence, and Landlord shall pay to Tenant, upon Tenant’s demand, the cost of such repair.

(Def. Ex. 1, Paragraph 18.) (emphasis added.) Similarly, Tenant, not Landlord, bears the contractual duty for keeping the Lease Property in compliance with all laws, ordinances, regulations, and requirements (for the entire Term):

Regulations and Sanitation. Tenant shall keep the Lease Property in compliance with all laws, ordinances, regulations and requirements of any legally constituted public authority, including all environmental rules and regulations. If Tenant fails to comply with any such laws, ordinances, regulations and requirements, or any aspect thereof, including notice requirements, such failure shall constitute a default by Tenant under this Lease. Landlord, may, without being liable for trespass, immediately re-enter the Lease Property and take whatever steps Landlord deems necessary to protect Landlord’s interest. **Tenant shall keep clean all areas in the Lease Property and surrounding areas.** Cleaning includes removing any trash or refuse deposited upon the Property attributable by Tenant, Tenant’s invitees, employees, customers or anyone else. In the event of non-compliance by Tenant, Landlord shall have the right to have said areas cleaned, trash and refuse removed and charge the expense to Tenant as Additional Rent which shall be due and payable upon demand, non-payment of which shall constitute a default under this Lease.

(Def. Ex. 1, Paragraph 19.) (emphasis added.) The Lease also stipulates that Tenant is also responsible for obtaining “any and all permits required from local, state and federal governmental

agencies, and/or otherwise, which may be required to run its business.” (Defs. Ex. 1, Paragraph 11.) In this instance, the “local” agency for purposes of permitting is the Town of Hilton Head, as the Marina is located within the Town of Hilton Head.

Separate from its responsibilities, Tenant also had the freedom to alter or improve the Lease Property. The Base Rent is only One Dollar (\$1.00) per year, so it is sensible that the financial responsibility for UPFITS or improvements would be upon the Tenant. Specifically, Tenant has “right to make alterations, additions, improvements, or rewiring in or to the Lease Property subject to prior written consent of Landlord, which consent shall not be unreasonably withheld.” (Defs. Ex. 1, Paragraph 20.) This would include any alterations or improvements that Tenant might want to make to the office space, as applicable, during the 99-year Term.

As noted above, a significant component of the Lease Property consisted of 300 linear feet of dock space within the Marina. With constant exposure to the elements, it was contemplated by the parties to the Lease that repairs to the docks would be needed. To address this, the Lease clarifies, in several different paragraphs, that Tenant bears the obligation to pay for repairs needed to the leased dock space used by Tenant:

Dock Repair. As it becomes necessary to repair or replace the dock which is a portion of the Lease Property, Landlord shall complete said repairs or replacement and **Tenant shall pay Landlord all costs attributed to its use,** said costs to be paid as they are incurred by Landlord.

(Defs. Ex. 1, Paragraph 6.) (emphasis added).) Additionally, Paragraph 26 of the Lease speaks specifically to damage arising due to “casualty,” such as fire or a hurricane:

Damages to or Destruction of Property. Tenant shall give immediate written notice to Landlord of any damage to the Lease Property caused by fire or other casualty. **Subject to the provisions of paragraph 7, entitled “Cooperation and Good Faith,” Tenant shall apply for all necessary permits and approvals and shall repair, restore, rebuild, or replace the damaged Lease Property to the extent that it shall deem necessary or desirable in connection with the requirements of its business.** Any and all insurance proceeds from insurance

policies carried by Landlord (or in Landlord's name) resulting from damage to the Lease Property, shall be held in trust and dispersed for repairs, restoration, rebuilding, or replacement undertaken by Tenant pursuant to this paragraph unless Landlord and Tenant otherwise agree. **If the insurance proceeds are insufficient to pay the damage, then Tenant shall pay for the difference.**

(Def. Ex. 1, Paragraph 26 (emphasis added).)

Paragraph 30, entitled "Indemnity and Liability," also place the burden upon Tenant to reimburse Landlord for any claims, damages, costs and expenses arising from the "occupancy or use" by Tenant of the Property as a whole, which includes the Lease Property:

Indemnity and Liability. Tenant shall indemnify and save Landlord harmless from any and all claims, damages, costs and expenses, including reasonable attorneys' fees arising from the occupancy or use by Tenant of the Property.

Landlord shall not be liable, and Tenant waives all claims for damage to person or property sustained by Tenant, its employees or agents, resulting from the condition of the Property or as may result from any accident in or about the Property or which may be the result directly or indirectly from any act or neglect to the Property of which the lease is a part. Landlord shall not be responsible or liable at any time for any loss or damage to Tenant's merchandise, equipment, fixtures or other personal property of Tenant or Tenant's business. Landlord shall not be responsible or liable to Tenant or those claiming by, through or under Tenant for any loss or damage to either the person or property of Tenant that may be occasioned by or through the acts or omissions of persons occupying adjacent, connecting or adjoining Property. Landlord shall not be responsible or liable for any defect, latent or otherwise, in any building constituting the Property or any of the equipment, machinery, utilities, appliances or apparatus therein, nor shall it be responsible or liable for any injury, loss or damage to any person or to any property of Tenant or other person caused or resulting from bursting, breakage, or by or from leakage, ice, running, backing up, seepage, or the overflow of water or sewage in any part of the Property or from any injury or damage caused by or resulting from acts of God or the elements or for any injury or damage caused by or resulting from any defect or negligence in the occupancy, building, machinery, apparatus or equipment by any person or by or from the acts or negligence or any occupant of the Property.

Since it was initially entered in 1993, the Lease has not been amended other than with respect to certain provisions that were clarified or further addressed in a settlement agreement that Landlord and Tenant entered in 2004 (the "Settlement Agreement"). Over the years, Tenant has successfully operated its business from the Lease Property and has seen substantial revenue growth during the

relevant timeframe. (Order and Judgment, pp. 2, 9.)

Current Issues in Dispute

Although several items are in dispute, the primary issues addressed at trial relate to: (1) Tenant's nonpayment of Additional Rent and Additional Charges under the Lease; (2) Tenant's failure to reimburse Landlord for repairs to the Lease Property, and specifically the dock area; and (3) the office space.

Tenant asserted a cause of action for breach of contract against Landlord seeking monetary damage relating to the office space, but presented no evidence of alleged damages at trial. (Order and Judgment, p. 3.) Landlord presented a counterclaim for breach of contract against Tenant seeking monetary damages relating to the amounts due under the Lease, both in terms of unpaid Additional Rent and Additional Charges as well as unpaid reimbursement for dock repairs relating to the Lease Property following Hurricane Matthew. Landlord's claims were supported by the Lease, documentary evidence of the underlying charges, copies of invoices, and corroborating testimony from witnesses. (Def. Exs. 1, 25, 26, 27, 52, 53, 54, and 55; Trial Tr. pp. 527-556.)¹

At trial, Tenant asserted that its failure to pay the charges due under the Lease was a result of Tenant's dissatisfaction with the office space provided after the prior floating office (that Tenant was obligated to maintain) became unusable. The Master-in-Equity (the "Master") found that the Lease did not include any provision that would allow Tenant to exercise self-help and withhold amounts due to Landlord, as Tenant's obligations to pay the charges to Landlord are phrased in mandatory language. (Order and Judgment, p. 4, citing Defs. Ex. 1, Paragraph 3(b). During the

¹ At trial, Landlord provided itemized calculations of prejudgment interest for each unpaid charge. (Defs. Ex. 52.) In making these calculations, Landlord used the statutory prejudgment interest rate of eight and three fourths percent (8.75%). (Trial Tr. pp. 527-556.)

time frame that Tenant refused to make payments, Tenant has had ongoing use of the barge facilities, dock space, parking, access areas, and office space during this time frame and has been able to conduct its operations. (Order and Judgment, p. 4, citing Defs. Ex. 1.) In making these rulings, the Master clearly considered the full record. The Master acknowledged that the office space was “substandard,” but found that Tenant was able to use the office space, did continuously use the office space, and operated its business successfully. The Master also noted that, under the Lease, maintenance, upkeep, and compliance were responsibilities assigned to Tenant.

The second category of damages sought by Landlord relates to the cost of repairs to the dock space that is part of the Lease Property following Hurricane Matthew.² During the storm, Tenant’s vessels had remained moored to the docks at the Broad Creek Marina, although Landlord had asked Tenant to move the vessels.³ (Trial Tr. pp. 617-18.) When Landlord’s operations manager, Nate Jones, returned to the Marina to assess the damage caused by Hurricane Matthew, he confirmed that the portions of the dock where Tenant’s vessels had been moored were significantly damaged. Mr. Jones also testified that Hurricane Matthew caused very little damage to the Marina other than to the Lease Property where Tenant’s vessels were moored. (Trial Tr. p. 642.) At trial, Landlord provided evidence confirming the amounts paid for the repair and referred to the sections of the Lease that indicated Tenant’s responsibility for the costs. (Defs. Exs. 18 and 19; Trial Tr. pp. 548-552; Defs. Ex. 1, Paragraph 6.)

The Master found that these repair costs were attributed to Tenant’s “use,” as no other party was using or was allowed to use this section of the docks at the time. (Order and Judgment, p. 5.)

² Hurricane Matthew made landfall in South Carolina on October 8, 2016.

³ The Lease permits Landlord to make and impose reasonable rules and regulations upon Tenant. (Defs. Ex. 1, Paragraph 24.)

In the Order and Judgment, the Master ruled that the subject section of the docks remains “attributed to Tenant’s use” until such time as the Lease is amended, expires or otherwise terminates. (*Id.*) In supporting of his finding, the Master determined that “[t]he evidence presented at trial confirmed that Tenant’s vessels were physically moored to the Lease Property during the storm.” (*Id.*)

As noted by the Master in the Order and Judgment, Tenant acknowledged its financial responsibility for the dock repairs, but then refused to pay for them. In a letter sent by Tenant to its insurance carrier, North American Specialty Insurance Company, relating to this specific incident, Tenant admitted that “[u]nder the terms of both [the Lease and the Settlement Agreement], J&W is responsible for repairs to its leasehold property in the event of damage.” (Defs. Ex. 16.) Additionally, at trial, Tenant acknowledged that the Lease obligated Tenant to pay for the dock repairs. (Trial Tr. pp. 189-190) (“The cost of the repairs, in my understanding, was for the landlord to make and bill me.”) The Master, on the basis of this evidence, found that Tenant did not appear to genuinely dispute its obligation to pay for the dock repairs. (Order and Judgment, pp. 6-7.)

The Office Space and the Floating Office

Following the ratification of the Settlement Agreement, various efforts were made to place Tenant in a replacement to the floating office. Landlord presented evidence at trial that a permit was obtained to place a floating office in the location that the parties had mutually chosen in the Settlement Agreement. (Defs. Ex. 12.) However, through no fault of either party, the Master concluded that the intended location for the floating office became infeasible due to the accretion of the marsh bank. As noted by the Master, “[f]or a number of reasons, the parties were unable to

agree upon a replacement location for the floating office prior to the trial.” (Order and Judgment, p. 9.)

Tenant presented evidence that the office space that it was utilizing prior to trial was not permitted by the Town of Hilton Head Island for that purpose, although it had been openly used for that purpose for a number of years. (Order and Judgment, p. 9.) However, the permitting status of the office space was always known to Tenant, as it was Tenant who initially built it (without obtaining a permit). (Trial Tr. pp. 119 - 121). Also, according to the terms of the Lease, the Master ruled that this “would be an issue for Tenant to address.” (*Id.*, citing Defs. Ex. 1, Paragraph 19 (“[s]ubject to the provisions of paragraph 7, entitled ‘Cooperation and Good Faith,’ Tenant shall procure any and all permits required from local, state and federal governmental agencies, and/or otherwise, which may be required to run its business.”))

As was established at trial, that the original office space provided under the Lease was in the form of a portion of a “floating office” moored to the docks, which was also the intended manner of resolution of the prior dispute relating to office space that was memorialized in the Settlement Agreement. To the extent that the office space (or other portion of the Lease Property) requires additional maintenance, repair, improvements, compliance efforts, or replacement, the Lease was written in such a manner to place such obligations upon Tenant, not Landlord. There was no provision obligating Landlord to provide a guarantee, or even a forecast, of the service life of the floating office, and maintenance was placed on Tenant’s shoulders, by agreement.

Although there has been a delay in Tenant’s return to a floating office, the Master found that Tenant had not proven a claim for monetary damages arising from its occupancy of the converted shed. (Order and Judgment, p. 11.) Tenant had asserted a claim for lost profits, but never presented any amount of alleged lost profits during trial. Based on the record, the Master

found that Tenant has not provided an evidentiary basis for any lost profits claim that the Court could consider. Also, although the Master recognized that he had the ability to consider an award of nominal damages, he found that “Tenant has still failed to prove a breach of contract by a preponderance of the evidence, as Tenant was provided with office space throughout the term,” which precluded any such award. (Order and Judgment, p. 11.) The Master also ruled that, “in light of the provisions of the Lease that place obligations upon Tenant for the condition of the office space, the Court is unable to conclude that the circumstances establish a breach of contract by Landlord.” (Order and Judgment, p. 11).

The Claims and Counterclaims Presented

In its Amended Complaint,⁴ Tenant had asserted nine causes of action: (1) breach of contract; (2) declaratory judgment relating to the office space and dock space; (3) trespass; (4) private nuisance; (5) negligence; (6) temporary and permanent injunctive relief; (7) sanctions for alleged violation of existing temporary injunction; (8) declaratory judgment regarding a competing ferry service at Broad Creek Marina; and (9) permanent injunctive relief regarding the operation of a competing ferry service at Broad Creek Marina. (Am. Compl.)

Landlord asserted counterclaims against Tenant for: (1) breach of contract; (2) specific performance to require Tenant to accept replacement office space and otherwise comply with the Lease; and (3) negligence. Landlord’s counterclaim for breach of contract, which is a legal claim, sought monetary damages for: (a) unpaid amounts of Additional Rent, Additional Charges due under the Lease, and other miscellaneous charges due from Tenant; and (b) unpaid amounts

⁴ The Master granted summary judgment to Landlord on Tenant’s causes of action for trespass, private nuisance, negligence, as well as on all claims that Tenant attempted to assert against Roger Freedman personally. (Order Granting in Part and Denying in Part Defendants’ Motion for Summary Judgment.)

incurred by Landlord for repairs to the Lease Property following Hurricane Matthew, which costs are attributable to Tenant; and (c) prejudgment interest on the past due amounts at the statutory rate of eight and three fourths percent (8.75%). (Ans. and Countercls.)

The trial of the case began on May 15, 2019 and concluded on May 16, 2019. (Trial Tr., pp. 1 – 656.) During the trial, the Master heard testimony from eight (8) witnesses. Both sides presented exhibits that were entered into the record.

On May 29, 2019, the Master entered the Interim Order relating to the relocation of Tenant's office space (the "Interim Order"), so that the issue would be resolved expeditiously. The Interim Order addressed Tenant's claim for declaratory judgment and Landlord's counterclaim for specific performance relating to the commercial office space. (Interim Order, pp. 1-6; Order and Judgment, p. 8.) In resolving Tenant's claim for declaratory judgment relating to the office space, the Master determined that a floating office would be provided as a replacement to the existing office location. As provided in the Lease, the Master ruled that all future costs and expenses of maintenance, repair, upkeep, environmental and regulatory compliance, sanitation, utilities, trash service, taxes, insurance and future replacement of the floating office, shall be the sole responsibility of Tenant, who will cause the floating office to be separately metered for applicable utilities within 30 (thirty) days of taking occupancy of the floating office. (Interim Order, pp. 3-4, citing Defs. Ex. 1.)

As Landlord proceeded with the implementation of the Interim Order, it was confirmed that Tenant intended to refuse the Floating Office that Landlord was proposing to purchase. Therefore, on September 26, 2019, Respondents filed a Motion to Implement and Enforce the Master's Interim Order. On November 25, 2019, the Master entered the Order on Floating Office in which he granted Respondents' Motion to Implement and Enforce the Interim Order and denied

Tenant’s Motion to Allow Additional Discovery. The Master agreed with Respondents “that the fiberglass pontoon hulled floating office is in compliance with the Order of this Court and may be obtained and utilized as the floating office.” (Order on Floating Office, p. 1.)

On January 9, 2020, the Master issued the Order and Judgment (the “Order and Judgment”) in favor of Landlord in the amount of \$112,428.40, which included the following components:

CATEGORY	AMOUNT	PREJUDGMENT INTEREST	TOTAL
Unreimbursed Lease Charges	\$56,371.27	--	\$56,371.27
Dock Damage Repair Costs	\$44,398.00	\$8,792.88	\$53,190.88
Unreimbursed Miscellaneous Charges	\$2,866.25	--	\$2,866.25
TOTAL	\$103,635.52	\$8,792.88	\$112,428.40

The Master granted judgment in favor of Respondents as to Tenant’s claims for breach of contract, declaratory judgment, and preliminary injunction, as well as on Landlord’s claims for breach of contract and specific performance.

The Master found that Landlord had proven its breach of contract counterclaim by a preponderance of the evidence. (Order and Judgment, p. 14.) The Master found that there are at least four sections of the Lease that establish Tenant’s responsibility to repair the dock or to reimburse Landlord for any amounts incurred in making such repairs. (Order and Judgment, p. 17.) Based on the record, the Master found that Landlord had shown that Landlord has incurred damages for the repair and replacement of the dock for which it is entitled to reimbursement from Tenant based on the terms of the Lease. (Order and Judgment, p. 17.) With regard to Landlord’s claim for prejudgment interest on the repair cost, the Master determined that the amounts paid for

the dock repair are a liquidated sum certain and awarded prejudgment interest to Landlord in the amount of \$8,792.88, for the loss of use of the dock repair funds based on the calculation entered into evidence. (Order and Judgment, p. 19.)

The Master also entered judgment in favor of Landlord as to Landlord’s counterclaim for specific performance. (Order and Judgment, pp. 20-22.) Landlord sought an order compelling Tenant: (1) to comply with the obligation under the Lease to name Landlord as an additional insured on Tenant’s insurance policies and to cause the coverage on the policies to be upwardly adjusted yearly to reflect inflation rates; (2) to pay the charges due under the Lease within thirty (30) days of Tenant’s receipt of invoices issued by Landlord; and (3) to comply with other aspects of the Lease relating to Tenant’s use of portions of the property that are not part of the Lease Property and to dispose of Tenant’s garbage and debris. (Order and Judgment, pp. 20-23.)

On January 17, 2020, Tenant filed a Motion to Alter or Amend the January 9, 2020 Order and Judgment. After hearing arguments from the parties and briefing, the Master issued the Order Denying Motion to Amend dated May 4, 2020. Tenant filed a Notice of Appeal on June 2, 2020. For ease of reference, a table reflecting the outcomes of the various claims, counterclaims, and post-trial motions in the proceedings is below:

TENANT’S CLAIMS	PREVAILING PARTY		DISPOSITION
	LANDLORD	TENANT	
Breach of Contract	✓		Trial (Order and Judgment)
Dec. Judg. (Office/Dock Space)	✓		Trial (Interim Order)
Trespass	✓		Summary Judgment
Private Nuisance	✓		Summary Judgment

TENANT'S CLAIMS	PREVAILING PARTY		DISPOSITION
	<i>LANDLORD</i>	<i>TENANT</i>	
Negligence	✓		Summary Judgment
Temporary Injunctive Relief		✓	Order Granting Injunctive Relief (from 2012)
Permanent Injunctive Relief	✓		Withdrawn by Tenant
Sanctions	✓		Trial (Order and Judgment)
Dec. Judg. (Ferry Service)	✓		Trial (Order and Judgment)
Permanent Injunctive Relief (Ferry Service)	✓		Trial (Order and Judgment)
LANDLORD'S COUNTERCLAIMS	PREVAILING PARTY		DISPOSITION
	<i>LANDLORD</i>	<i>TENANT</i>	
Breach of Contract	✓		Trial (Order and Judgment)
Specific Performance	✓		Trial (Interim Order; Order and Judgment)
Negligence ⁵		✓	Trial (Order and Judgment)
POST-TRIAL RELIEF	PREVAILING PARTY		DISPOSITION
	<i>LANDLORD</i>	<i>TENANT</i>	
Plaintiff's Motion to Alter or Amend Interim Order	✓		Order Denying Plaintiff's Motion to Alter or Amend Interim Order
Plaintiff's Motion to Allow Additional Discovery	✓		Order on Floating Office

⁵ Although the Master found in favor on Tenant on Landlord's claim for negligence, the damages sought under that claim (for the repairs to the dock) were awarded to Landlord under the breach of contract claim, which made the negligence claim duplicative with regard to what damages could be quantified at trial.

TENANT'S CLAIMS	PREVAILING PARTY		DISPOSITION
	LANDLORD	TENANT	
Defendants' Motion to Enforce Interim Order	✓		Order on Floating Office
Plaintiff's Motion to Alter or Amend the Order and Judgment	✓		Order Denying Motion to Amend

(Interim Order; Order and Judgment; Order Denying Plaintiff's Motion to Alter or Amend Interim Order; Order Granting Defendants' Motion to Enforce Interim Order.)

STANDARD OF REVIEW ON APPEAL

This case presents both legal and equitable claims. "When legal and equitable actions are maintained in one suit, each retains its own identity as legal or equitable for purposes of the applicable standard of review on appeal." *Consignment Sales, LLC v. Tucker Oil Co.*, 391 S.C. 266, 270, 705 S.E.2d 73, 75–76 (Ct. App. 2010). Tenant has incorrectly attempted to cast the entire proceedings below as being equitable. The claims and counterclaims are predominantly legal in nature.

In an action at law tried without a jury, the judge's finding of fact will not be disturbed unless there is no evidence to support the court's finding. *South Carolina Farm Bureau Mut. In. Co. v. Kennedy*, 398 S.C. 604, 610, 730 S.E.2d 862, 864 (2012). The trial court's findings of fact will be upheld on appeal when they are reasonably supported by the evidence unless: (1) the findings of fact are wholly unsupported by the evidence; or (2) it clearly appears the findings were influenced or controlled by an error of law. *See Butler Contracting, Inc. v. Court Street, LLC*, 369 S.C. 121, 127-28, 631 S.E.2d 252, 255-56 (2006). The trial court's findings in such a case are equivalent to a jury's findings in a law action." *Id.* On direct appeal from a final judgment of a Master, the scope of review is the same as that for review of a case heard by a circuit court without

a jury. *Tiger, Inc. v. Fisher Agro, Inc.*, 301 S.C. 229, 237, 391 S.E.2d 538, 543 (1989). In reviewing a case under the “any evidence” standard, an appellate court will uphold the lower court’s factual findings if there is any evidence of probative value to support the findings. *See, e.g., Simpson v. Moore*, 367 S.C. 587, 627 S.E.2d 701 (2006).

In an equitable action tried without a jury, the appellate court can correct errors of law and may find facts in accordance with its own view of the preponderance of the evidence. *Blackmon v. Weaver*, 366 S.C. 245, 248–49, 621 S.E.2d 42, 43–44 (Ct. App. 2005); *see also Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 564, 658 S.E.2d 80, 90 (2008) (holding that the appellate court reviews questions of law de novo). Ordinarily, an appellate court reviews cases in equity by finding facts in accordance with its own view of the preponderance of the evidence. *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). However, an appellate court still affords a degree of deference to the trial court because it was in the best position to judge the witnesses’ credibility. *Matter of Estate of Kay*, 423 S.C. 476, 480, 816 S.E.2d 542, 544–45 (2018).

ARGUMENT

This matter was thoroughly litigated by the parties and carefully considered by the Master over the course of several years of proceedings. In resolving the issues presented, the Master entered a series of detailed orders, each of which upon the evidence in the record. Through this appeal, Tenant is seeking reconsideration of issues that the Master has carefully heard and considered, when there is evidence to support each of the Master’s rulings. As a result, the appeal is without legitimate basis and should be refused.

One item that largely undermines Tenant’s appeal is that Tenant does not appeal the Master’s finding in favor of Landlord on Landlord’s breach of contract counterclaim. Under the

two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become law of the case. *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010). The unappealed ruling as to Tenant's breach of contract is law of the case. The two-issue rule should preclude Tenant's argument regarding equitable setoff or recoupment, as should the absence of any specific amount of a wholesale setoff or recoupment ever being presented in evidence below.

It is a fundamental rule of law that an appellate court will affirm a ruling by a lower court if the offended party does not challenge that ruling. *See Biales v. Young*, 315 S.C. 166, 432 S.E.2d 482 (1993). Failure to challenge the ruling is an abandonment of the issue and precludes consideration on appeal. *Id.* In this regard, Tenant's breaches of contract have become law of the case. *See Anderson v. Short*, 323 S.C. 522, 476 S.E.2d 475 (1996) (stating where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become law of the case). Tenant does not appeal all of the grounds on which the Master's Order and Judgment was based, either as to the claim for monetary damages or the claim for specific performance. Specifically, Tenant does not appeal the Master's finding that Tenant breached the Lease. Because the Master made an alternate finding of liability that Tenant does not appeal, the two-issue rule bars this Court from considering Tenant's other arguments that are affected thereby. *See Anderson v. S.C. Dep't of Highways & Pub. Transp.*, 322 S.C. 417, 472 S.E.2d 253 (1996).

Tenant does appeal the Master's finding that Tenant failed to prove Tenant's claim for breach of contract by a preponderance of the evidence. (Order and Judgment, pp. 9-11.) However, an action for breach of contract is an action at law, not equity. *Consignment Sales, LLC v. Tucker Oil Co.*, 391 S.C. 266, 270-71, 705 S.E.2d 73, 76 (Ct. App. 2010). Under the applicable standard

of review, the trial court's findings of fact should not be disturbed on appeal if there is "any evidence" to support the findings. As shown in the Order and Judgment, on its face, there is evidence supporting each of the Master's findings.

The Master granted judgment in favor of Landlord as to Landlord's second cause of action for specific performance relating to Tenant's obligations under the Lease, which has also not been appealed. In the Order and Judgment, Tenant was ordered to: (a) pay Additional Rent and Additional Charges; (b) name Landlord as an additional named insured on Tenant's insurance policies and to increase the amounts of insurance coverage in accordance with annual inflation; (c) refrain from further usage of areas that are not part of the Lease Property; and (d) separately meter Tenant's utilities. (Order and Judgment, p. 23.) However, the Master also granted Landlord's claim for specific performance as it relates to the floating office, as this was part of Landlord's counterclaim. (Am. Answer and Counterclaims, Paragraphs 95-97.) Although an action for specific performance is an action in equity, Tenant appeals the Master's interpretation of the Lease and the Settlement Agreement. *See Ingram v. Kasey's Assoc.*, 340 S.C. 98, 531 S.E.2d 287 (2000). An action to construe a contract is an action at law. *See Duncan v. Little*, 384 S.C. 420, 682 S.E.2d 788 (2009). As set forth below, the Master's factual findings are reasonably supported by the evidence and should not be disturbed upon appeal. Each of the Master's Orders that have been challenged should be affirmed.

I. THERE IS EVIDENCE TO SUPPORT THE MASTER'S RULINGS ON THE CLAIMS FOR DECLARATORY JUDGMENT AND SPECIFIC PERFORMANCE.

A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue. *See Bundy v. Shirley*, 412 S.C. 292, 772 S.E.2d 163 (2015). An issue essentially one at law will not be transformed into one in equity simply because declaratory

relief is sought. *Felts v. Richland Cnty.*, 303 S.C. 354, 400 S.E.2d 781 (1991). The underlying nature of Tenant's claim for declaratory judgment is essentially a claim for breach of contract, which is an action at law.

Tenant's arguments on appeal confirm that the underlying nature of the declaratory judgment claim is an action in law. First, Tenant asserts that the Master erred by failing to enter a declaratory judgment in favor of Tenant on the alleged basis that Landlord refused to provide Tenant with a properly permitted office space as required under the Lease and Settlement Agreement. Second, Tenant asks this Court to determine that Tenant is the prevailing party as to Tenant's claim for declaratory judgment to allow Tenant to recover attorneys' fees and costs under the Lease. (Defs. Ex. 1, Paragraph 36.)

At trial, both Landlord and Tenant presented evidence and witness testimony relating to the issue of permitting of the office space. Landlord presented evidence at trial that a permit was obtained to place a floating office in the location that the parties had mutually agreed upon in the Settlement Agreement but, due to accretion of the marsh bank, the intended location of the floating office was no longer feasible. (Order and Judgment, p. 9.) Tenant presented evidence to show that the permit would expire on February 8, 2020. (Trial Tr., p. 87, line 6; Defs. Ex. 12.) As a result, the Interim Order was issued to provide immediate resolution and guidance relating to the future location of Tenant's office space. (Interim Order, p. 2.) The Master resolved both Tenant and Landlord's claims for declaratory judgment through the Interim Order.⁶ There is evidence, and pleadings and orders, indicating that Tenant had obstructed and refused to accept the floating

⁶ As indicated in the Order and Judgment, Tenant withdrew a portion of its second cause of action for declaratory judgment relating to dock space, leaving only the portion of the claim that related to commercial office space, which was addressed in the Interim Order. (Order and Judgment, p. 8.)

office. As a result, it is appropriate that the issue was resolved in Landlord's favor. Tenant's refusal was improper.

Based on the evidence in the record, the Master found that Tenant had been provided an office space throughout the term. (Order and Judgment, p. 11.) The Lease states that Tenant "shall procure any and all permits required from local, state and federal governmental agencies, and/or otherwise, which may be required to run its business." (Defs. Ex. 1, Paragraph 19; Order and Judgment pp. 9-10.) Also, the Lease places the obligations for permitting and compliance efforts on Tenant, not Landlord. (Order and Judgment, p. 10.) In an action at law referred to a Master for final judgment, appellate courts will correct errors of law, but must affirm the Master's factual findings if they are supported by "any evidence."

This Court should deny Tenant's request for a declaration that Tenant is the prevailing party as to Tenant's claim for declaratory judgment. The Master, having assessed the evidence and considered the weight and credibility of the witnesses, already ruled on these issues in a manner that is supported by evidence. Following the issuance of the Interim Order, Respondents filed a Motion to Enforce the Interim Order due to Tenant's refusal to accept the solution provided by Landlord. This is further evidence that Landlord "prevailed" on this issue. Tenant attempted to impose demands relating to the floating office that exceeded the provisions of the Lease and Settlement Agreement and the Master's Interim Order thereby adding more delay, burden and expense. The Court should affirm the Master's Order and Judgment.

II. THERE IS EVIDENCE TO SUPPORT THE MASTER'S RULING ACCEPTING THE AQUA LODGE AS TENANT'S OFFICE SPACE.

Tenant improperly requests that this Court alter the rights and obligations as stated in the Lease and the Settlement Agreement, which is the same strategy that was unsuccessfully deployed in the proceedings below. Tenant seeks to require Landlord to go above and beyond the

requirements set forth in the Settlement Agreement and Lease, neither of which require a guaranteed 20-year minimum service life for the floating office. Tenant also seeks to impose an ongoing requirement that Landlord provide Tenant with new floating offices as needed for the remainder of the 99-year Lease, even though Tenant is plainly responsible for all maintenance and repair. No such obligation is contemplated in the Lease or the Settlement Agreement.

Furthermore, the Court should decline Tenant's request for review and predetermination relating to the Regulations of the South Carolina Department of Health and Environmental Control, Regulations 30-1 and 30-12. *See* S.C. DHEC/OCRM Regs. 30-1; S.C. DHEC/OCRM Regs. 30-12(M). Tenant failed to preserve this issue on appeal, which is not appropriate or ripe for review in any event. The issue of the applicability of Reg. 30-12(M) to Aqua Lodge Floating Office was not raised to the Master with sufficient specificity. Nonetheless, the record demonstrates that OCRM already approved and permitted the placement of a 28' x 55' floating office in the existing location. (Trial Tr. p. 64, lines 5-6; p. 80, lines 12-17; p. 83, lines 14-19.) Tenant's subjective suggestion that it will be "impossible" to gain permit approval of something that was previously approved does not present an issue for this Court to review. The Aqua Lodge itself is an operable vessel to be lodged in the Marina. This Court should not prejudge the permitting process.

a. The Proposed Floating Office Meets the Applicable Specifications Under the Lease and Settlement Agreement

The original commercial space under the Lease was a houseboat referred to as a "floating store." When describing the Lease Property, the Lease refers to "the southwestern most 300 square feet of the floating store[.]" The provision of "commercial space" has been a part of the Lease since its inception, and the provision of a "floating office" (as opposed to an office on high land) has always been acceptable. Recognizing that a floating office was in keeping with the requirements of the Lease and the Settlement Agreement, as that was what the parties had agreed

upon, the Master issued an Interim Order determining that a floating office would be provided as a replacement to the existing office location. As indicated in the Interim Order, Landlord was ordered to immediately, and at its sole expense, take all reasonable and necessary steps to permit and obtain a temporary portable rental office to be placed in a location that is mutually agreeable to the parties and to pay the expenses necessary to make utilities available in the temporary space. (Interim Order, pp. 2-3.)

After receiving the Interim Order, Landlord applied countless hours and considerable resources to the provision of a temporary office and a floating office that complies with the relevant specifications. Landlord sought an order from the Master affirming that a customized 12' x 32' Aqua Lodge vessel ("Aqua Lodge") manufactured by Catamaran Cruisers satisfies all relevant requirements of the Lease and Settlement Agreement, as well as the Master's Interim Order. (Mot. to Implement and Enforce Interim Order.) The Aqua Lodge is of sufficient size. It has a 5' x 11.5' deck, which is usable for the sale of tickets and interactions with customers, and a 25' x 11.5' cabin, which is usable as private offices. (Interim Order, p. 3.) The President of Catamaran Cruisers, Dirk Wiley, confirmed that the Aqua Lodge is a durable and suitable solution for the commercial office space requirements. (Mot. to Implement and Enforce Interim Order, Ex. B.)

It is important to note that the Settlement Agreement states that "any replacement of the floating store must be of a design and construction acceptable to [Landlord]," not Tenant. (Defs. Ex. 2, Paragraph 1(a)(i).) Under the Lease and Settlement Agreement, there is **no** requirement that the floating office: (1) consist of a building affixed to a floating dock; (2) be constructed of steel instead of fiberglass; (3) have a pitched roof; or (4) have a 20-year guarantee or warranty. These were items that Tenant sought to impose as requirements, even though they are not in the Lease or Settlement Agreement. Under the Lease, the existing floating store was accepted on an "as-is"

basis. Subsequently, the only specific requirements stated within the Settlement Agreement were that the floating store would need to include 300 usable square feet of space and “have a separate entrance and shall be an enclosed space with appropriate ventilation and windows and shall be provided with the same utility services as the remainder of the New Floating Store.” (Defs. Ex. 2, Paragraph 1(a)(i).) The Aqua Lodge meets each of these specifications but has been rejected by Tenant, who attempted to impose specifications that would create an unduly burdensome and unjustifiable expense upon Landlord.

Tenant argues that the Master erred in determining that the Aqua Lodge is sufficient. The Interim Order indicated that Landlord must provide a floating office “with at least a 20-year anticipated service life.” (Interim Order p. 3.) This requirement does not mandate a 20-year “guarantee” or even a 20-year “warranty.” However, as confirmed by the President of Catamaran Cruisers, when properly maintained, the Aqua Lodge should remain in service for twenty (20) years or longer. (Defs. Motion to Enforce Interim Order.) Also, Landlord should not be required to go above and beyond the agreed-upon obligations set forth in the Lease and Settlement Agreement to impose an ongoing requirement that Landlord provide Tenant with a new floating office, as needed, for the remainder of the 99-year Lease. No minimum service life is stated or required in any document. The Master properly granted Respondents’ Motion to Implement and Enforce the Master’s Interim Order. (Order on Floating Office.) No issue is presented warranting reversal of the Master’s rulings.

b. The Issue of the Applicability of Reg. 30-12(M) Has Not Been Preserved

As part of this appeal, Tenant is attempting to litigate about a permitting process that has not been completed. Specifically, Tenant contends that it is “impossible” for a floating office to be permitted, even though one has previously been permitted and Tenant admitted at trial that a

floating office would be acceptable to Tenant, provided that it was in an acceptable location. (Trial Tr., pp. 145; 250). The permitting process is one that is reserved to the legally authorized agency, which is the Office of Coastal Resource Management of the South Carolina Department of Health and Environmental Control (DHEC/OCRM). *See, generally*, S.C. (DHEC/OCRM) Reg. 30-12 (Special Project Standards for Tidelands and Coastal Waters). On this basis, it is not possible nor prudent to engage in appellate prognostication of any outcome of a permitting process that is not complete. Certainly, it is not possible for the issue to be properly before this Court, when Tenant did not present evidence of “impossibility” below. On the contrary, Tenant (under oath) indicated a willingness to accept the floating office. If the Master’s rulings ultimately turn out to involve a solution that it impossible to get permitted, this would be an issue for the parties to take back before the Master if and when that situation ever presented itself. For purposes of this appeal, however, the issue is unpreserved and unripe for review.

Tenant appeals the Master’s Interim Order on the alleged basis that the Aqua Lodge cannot be properly permitted and used as a floating office in the coastal waters of the Marina because nonwater-dependent floating offices are prohibited under Regulation 30-12(M), Special Project Standards for Tidelands and Coastal Waters. *See* S.C. (DHEC/OCRM) Reg. 30-12(M). The specific issue of the applicability and interpretation of Regulation 30-12(M) was not raised in Tenant’s post-trial motion. In order to preserve an issue for appellate review, the issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity. *See S.C. Dep’t of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301–02, 641 S.E.2d 903, 907 (2007). As confirmed by Tenant’s Motion to Alter or Amend and Memorandum, Tenant did not seek a ruling as to the Regulations but rather raised the issue of permitting with regard to the Town’s assessment of the

office space. (Pl.'s Mem. in Support of Mot. to Alter or Amend, pp. 1-5.) Tenant is also presupposing what DHEC/OCRM might later decide, which is improper.

Also, this Court may affirm the Order and Judgment based on the evidence in the record. *See* Rule 220(c), SCACR (“The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.”). Although Tenant now argues that permitting would be impossible, Tenant stated at trial that a floating office would be acceptable:

Q: And are you asking the Court to refuse to allow a floating office to be located in the marina for purposes of J&W Corporation’s office space?

A: I’m not. But I – I am asking the Court to make sure that the location of that store lives up to the obligations of the [L]ease, which is to put me in the area of activity at the marina and so on.

(Trial Tr. p. 145, lines 9 – 17.) With this in mind, the Master ordered that the floating office would be placed in the specific area that Tenant acknowledged was “something he could certainly live with.” (Trial Tr. 250.) It is inappropriate for Tenant, before the permitting process has been undertaken, to ask this Court to reverse the Master’s rulings based on subjective impossibility.

Tenant called Trent Shaw, the critical area permitting project manager for the Office of Ocean Coastal Resource Management (“OCRM”), as a witness at trial. (Trial Tr. pp. 48-101.) As of the trial, there was an active permit allowing for the placement of a floating office of approximately 28 x 55 feet at the Marina. (Trial Tr. p. 55, line 9 – p. 56, line 2; p. 80, lines 12-17; p. 83, lines 14-19.) There is no evidence to suggest that OCRM’s review of the 2005 permit application was defective. (Trial Tr. p. 100, lines 8 – 15.) The parties agreed to the specific location of the floating office at trial. (Trial Tr. p. 250, lines 22-24.)

There is probative evidence to support the Master’s findings. As a result, this Court should not disturb these findings.

III. THERE IS EVIDENCE SUPPORTING THE MASTER'S REFUSAL TO AWARD NOMINAL DAMAGES TO TENANT WHERE TENANT FAILED TO ESTABLISH A BREACH OF CONTRACT.

Tenant asserts that the Master erred in failing to award Tenant nominal damages for breach of contract against Landlord relating to the office space. The Master addressed the issue of an award of nominal damages to Tenant and concluded that Tenant failed to prove a breach of contract by a preponderance of the evidence. (Order and Judgment, p. 11.) The ruling on Tenant's failure to prove a breach, which is supported by probative evidence, precludes any award of damages, whether nominal or actual. To establish a claim for breach of contract, the burden is on the plaintiff to prove the existence of a binding contract, its breach, and damages suffered by the plaintiff as a result of such breach. *See Fuller v. Eastern Fire & Casualty Ins. Co.*, 240 S.C. 75, 124 S.E.2d 602, 610 (1962). Tenant failed to prove a breach of contract, as Tenant was provided with office space throughout the term of the Lease. (Order and Judgment, pp. 9-11.) At trial, Tenant confirmed that it had been able to conduct and administer its business activities in the office space provided by Landlord. Upon appellate review, this Court should not disturb these findings, as there is probative evidence to support them.

Tenant also failed to establish the element of damages. (Order and Judgment, p. 3.) Tenant asserted a claim for lost profit damages but did not present any amount of alleged damages at trial. (Order and Judgment, p. 3.) Proof of lost profits "may be established with reasonable certainty with the aid of expert testimony, economic and financial data, market surveys and analyses, business records of similar enterprises, and the like." *Moore v. Moore*, 360 S.C. 241, 254, 599 S.E.2d 467, 474 (Ct. App. 2004). The crucial requirement in a lost profit determination is that the alleged lost profits be "established with reasonable certainty, for recovery cannot be had for profits that are conjectural or speculative." *See S.C. Fin. Corp. of Anderson v. W. Side Fin. Co.*, 236 S.C.

109, 122, 113 S.E.2d 329, 336 (1960) Speculative damages are damages that depend upon future developments which are contingent or conjectural. *See 56 Leinbach Inv'rs, LLC v. Magnolia Paradigm, Inc.*, 411 S.C. 466, 478, 769 S.E.2d 242, 249 (Ct. App. 2014). Uncertain, contingent, or speculative damages cannot be recovered in any action. *Id.* The issue of nominal damages, as with setoff, was presented only through arguments of counsel after the trial.

Tenant did not present an amount of lost profit damages. (Order and Judgment, pp. 10-11.) Tenant merely presented the testimony of Wick Scurry relating to his belief that Tenant's business had not grown. However, that was contradicted by evidence that the business had grown. (Trial Tr. p. 159, lines 15-18.) The claim for damages is non-specific, speculative and undocumented. Based on the evidence in the record, the Master found that Tenant failed to meet its burden of proof on a claim for breach of contract relating to the office space. (Order and Judgment, p. 9.)

An award of nominal damages would also be refused on the additional ground that Tenant has not paid common area charges since 2008, and itself in breach of contract, which resulted in the unappealed ruling that the Tenant breached the lease. (Order and Judgment, p. 4; Trial Tr., p. 219, lines 16-23.) Tenant's dissatisfaction with the office space does not relieve Tenant from the mandatory payment obligations set forth in the Lease. (Order and Judgment, p. 4; Trial Tr. p. 144, lines 3-11; p. 178, lines 14-17; p. 182, lines 14-23.) In a landlord/tenant relationship where Tenant pays \$1 of Rent per year and has refused to pay the Additional Rent for over a decade, there is no basis for awarding damages to Tenant.

This Court should affirm the Master's judgment in favor of Landlord as to Tenant's breach of contract claim and refuse Tenant's request for nominal damages.

IV. THERE IS EVIDENCE TO SUPPORT THE MASTER’S DECLINING TO APPLY AN EQUITABLE SET OFF OR RECOUPMENT TO THE AMOUNTS OWED UNDER THE LEASE, AS TENANT PRESENTED THE ISSUE ONLY AS AN ARGUMENT OF COUNSEL AND WITHOUT EVIDENCE AS TO ANY AMOUNT.

On appeal, Tenant is asking for the Court to apply a setoff against the damages awarded to Landlord. At trial, counsel for Tenant argued that the unreimbursed charges should not be paid “under a theory of either recoupment or set off.” (Trial Tr. p. 28, lines 3-9; p. 520, line 21 – p. 521, line 1.) At trial, Counsel for Tenant asked the Master to consider a “setoff” of damages in the amount of \$60,000 in common area charges that have not been paid by Tenant. (Trial Tr., p. 520, line 21 – p. 521, line 1.) However, a claim for setoff or recoupment was not pled, either as a claim or as an affirmative defense by Tenant. No testimony was presented nor documentary evidence to support this argument of counsel. As a result, the Master could not award a setoff because arguments of counsel, standing alone, are not evidence. *See, e.g., Beaufort Realty Co. v. Beaufort Cty.*, 346 S.C. 298, 302, 551 S.E.2d 588, 590 (Ct. App. 2001) (“This court has repeatedly held that statements of fact appearing only in argument of counsel will not be considered”).

Any right to setoff or recoupment, if it had been pled and presented, could arise only in equity. Tenant’s breaches of the Lease, which Tenant does not challenge on appeal, preclude such equitable relief. The doctrine of unclean hands precludes a plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of litigation to the prejudice of the defendant. *See First Union Nat. Bank of S.C. v. Soden*, 333 S.C. 554, 568, 511 S.E.2d 372, 379 (Ct. App. 1998). The decision to grant equitable relief is in the discretion of the trial judge. *Id.* The fact that the Master found that Tenant breached the Lease, in numerous respects, is an additional evidentiary ground appearing in the record. This presents an additional sustaining ground.

The record presents no basis upon which to award a setoff or recoupment. First, the amount

of any setoff would have to be invented out of thin air. At trial, Tenant's counsel stated: "I acknowledge the fact that there's been no specific dollar figures put up in support of that," relating to Tenant's claim for damages. (Trial Tr. p. 520, lines 10-12.) Secondly, Tenant made full use of the Leased Premises during this entire timeframe, including three hundred linear feet (300') of dedicated dock space, thousands more linear feet of walkways, fifty (50) parking spaces, the entire barging area, utilities, amenities, and the office space. Tenant's counsel argued for a setoff of "\$60,000," when the unreimbursed Lease charges were \$56,371.21. Tenant used all of these things while refusing to pay for them. As a result, Tenant's unclean hands preclude such relief. A judgment was entered against Tenant for breach of contract. As a result, there is no basis for this Court to review or disturb the findings below.

With regard to Tenant's alleged encounter with a snake and various insects during the time in which it occupied the office space, Tenant fails to establish a basis for equitable set off due to the pest-control or extermination services that may have been necessary from time to time. (Trial Tr. p. 129, lines 2 – 10.) The Lease states that Tenant is obligated to "maintain the Lease Property in good working condition and repair, neat and clean, and generally in a manner consistent with the operation of a first class marina." (Defs. Ex. 1, Paragraph 18.)

Furthermore, as indicated in the Order and Judgment, the Master already exercised discretion to decline to allow prejudgment interest on the unreimbursed Lease charges. (Order and Judgment, p. 19.) In other words, the Master already applied a form of setoff to the award of damages to Landlord for the unreimbursed Lease charges, by declining prejudgment interest. Landlord sought unreimbursed Lease charges in the amount of \$76,719.97, which represented the amount of the unreimbursed Lease charges plus prejudgment interest for each unpaid charge at the statutory rate of eight and three fourths percent (8.75%). By denying Landlord prejudgment

interest for the unreimbursed Lease charges in the amount of \$20,336.03, the Master accomplished what Tenant is requesting this Court to reconsider.

The Court's task in reviewing a damages award is not to weigh the evidence, but to decide if any evidence exists to support the damages award. *See McNaughton v. Charleston Charter Sch. for Math & Sci., Inc.*, 411 S.C. 249, 262, 768 S.E.2d 389, 396 (2015). There is no basis within the evidentiary record for this Court to re-consider Tenant's request, as there is probative evidence in the record to support the Master's judgment in favor of Landlord in the amount of \$112,428.40. (Defs. Exs. 1, 4, 8, 18, 25, 26, 27, 28, 29, 30, 31, 52, 53, 54, and 55.)

V. THERE IS EVIDENCE TO SUPPORT AN AWARD OF PREJUDGMENT INTEREST ON THE DOCK DAMAGES IS APPROPRIATE BASED ON TENANT'S BREACH OF THE LEASE.

The Master properly determined that the duties and financial responsibilities of Tenant and Landlord are provided for in the Lease. Specifically, with regard to dock damages, the Master found that the Lease does not limit Tenant's responsible for payment of repairs to the dock to those situations in which Tenant is the proximate cause of damage to the Lease Property, as opposed to force majeure or some other cause. (Order and Judgment, p. 17.) The Court should affirm the Master's award of prejudgment interest on the dock repair costs based on the evidence in the record.

a. The Master Correctly Found that Tenant is Responsible for Dock Repair Costs Under the Relevant Provisions of the Lease

The Master's findings as to Tenant's obligations based on the language of the Lease should not be disturbed. The Master found that there are at least four different sections in the Lease that establish Tenant's obligation to repair the docks that are part of the Lease Property or to reimburse Landlord for the amounts incurred in making such repairs. (Order and Judgment, p. 17.) In this regard, there is evidence to support the ruling on this legal claim for damages. (Defs. Ex. 1,

Paragraphs 6, 18, 26, and 30.)

These provisions of the Lease relating to Tenant's responsibility for the costs of the dock repairs were not modified or amended by the Settlement Agreement. Tenant asks this Court to interpret the Settlement Agreement as a release of any and all obligations in the Lease requiring Tenant to purchase and maintain insurance and instead limiting Tenant's reimbursement to 7.5%. As the Master properly found, Tenant's request is inconsistent with the plain language of the Lease and Settlement Agreement and contrary to the principles of equity. The Master properly enforced, rather than modified, the terms of the Lease. Leases are construed in the same manner as contracts: The terms of a lease, like the terms of any contract, are construed to achieve the intent of the parties at the time the lease was entered into. The courts must construe and enforce contracts as written, in order to preserve the fundamental right of freedom of contract. In general, therefore, parties may bind themselves as they see fit by contract, unless the contract would violate the law or is contrary to public policy." *S.C. Dep't of Transp. v. M & T Enterprises of Mt. Pleasant, LLC*, 379 S.C. 645, 656–57, 667 S.E.2d 7, 13–14 (Ct. App. 2008). There is no evidence more probative than the terms of the Lease itself, which guided the Master's findings. (See, generally, Interim Order, Order on Floating Office, Order and Judgment, Order on Motion to Alter or Amend.)

As the record indicates, Tenant acknowledges that the Lease requires Tenant to pay for the dock repairs. (Trial Tr. p. 189, line 4 – p. 190, line 1.) ("The cost of the repairs, in my understanding, was for the landlord to make and bill me.") The record supports Tenant's financial responsibility for the dock repairs. (Trial Tr. p. 190, lines 8 -17; Defs. Ex. 16.) Landlord presented evidence of a letter sent by Tenant to its insurance carrier, North American Specialty Insurance Company, relating to the dock damage following Hurricane Matthew in which Tenant admitted that "[u]nder the terms of both [the Lease and the Settlement Agreement], J&W is responsible for

repairs to its leasehold property in the event of damage.” (Defs. Ex. 16.) Landlord completed the necessary repairs to the portions of the Lease Property that were damaged during Hurricane Matthew. Landlord established the amounts paid for the dock repair. (Order and Judgment, p. 5; Trial Tr., pp. 548-552; Defs. Exs. 18 and 19.)

As the Master concluded in the Order and Judgment, “if the Court were to decline to hold Tenant responsible for the payment of these repairs, the mutual agreement of the parties as set forth in the Lease would be undermined.” (Order and Judgment, p. 18.)

b. The Award of Prejudgment Interest on the Dock Repair Costs is Supported by the Record

The Master correctly determined that an award of prejudgment interest on the dock repair is appropriate because the amounts paid for the dock repair are a liquidated sum certain. (Order and Judgment, pp. 18-19.) Landlord established at trial that Landlord incurred the costs of the dock repair and presented evidence of the itemized amounts paid for the dock damage repairs. (Order and Judgment, p. 5; Defs. Exs. 18 and 19; Trial Tr. pp. 548-552.) Tenant has not reimbursed Landlord for the dock repair, despite Tenant’s acknowledgement of its financial responsibility for the dock repairs under the relevant provisions of the Lease. (Trial Tr. pp. 189-90; Defs. Ex. 16.)

Under South Carolina law, “[i]n all cases of accounts stated and in all cases wherein any sum or sums of money shall be ascertained and, being due, shall draw interest according to law, the legal interest shall be at the rate of eight and three-fourths percent per annum.” S.C. Code Ann. § 34-31-20. “Stated another way, prejudgment interest is allowed on a claim of liquidated damages; *i.e.*, the sum is certain or capable of being reduced to certainty based on a mathematical calculation previously agreed to by the parties.” *Butler Contracting, Inc. v. Court St., LLC*, 369 S.C. 121, 133, 631 S.E.2d 252, 258–59 (2006). The award of prejudgment interest on the dock repair is supported by the evidence in the record and the applicable law.

c. Tenant is Responsible for Dock Damage Repair Costs Regardless of the Proximate Cause of the Damage.

The Master analyzed the question of whether Landlord must “prove” that it was Tenant, as opposed to an act of God, that “caused” the damage to the dock which necessitated repairs. (Order and Judgment, p. 17.) Upon review of the relevant provisions of the Lease, the Master found that Tenant’s responsibility for payment of repairs to the dock is not limited to those situations where Tenant has been the proximate cause of damage to the Lease Property. (Order and Judgment, p. 17.) The Master concluded that “the various provisions of the Lease lead to a uniform conclusion: Tenant is responsible for the cost of repairs and maintenance to the docks that are the portion of the Lease Property, regardless of the legal cause of the damage.” (Order and Judgment, pp. 17-18.) The Master granted judgment in favor of Tenant as to Landlord’s counterclaim for negligence relating to the dock damage. The Master awarded damages for the dock repair costs in the amount of \$44,398.00 for the dock damage repair costs as part of Landlord’s breach of contract claim. (Order and Judgment, pp. 3, 5-6, 16-20; Defs. Exs. 18, 19.)

Based on the relationship between Landlord and Tenant under a binding Lease, the standard proof of causation for these damages does not need to be established. The Master found that, “[i]f Tenant were an unrelated third-party, as opposed to a tenant under Lease, Landlord would likely be held to such a standard of proof of causation.” (Order and Judgment, p. 17.) But Landlord and Tenant are parties to the Lease, which creates rights and obligations that would not exist in absence of the Lease. The repair costs are attributed to Tenant’s use, as no other party was using or was allowed to use this section of the dock at the time. (Order and Judgment, p. 5.) The evidence in the record demonstrates that Tenant’s operations caused damage to the dock. (Trial Tr., p. 458, lines 1-15.) Landlord instructed Tenant to move Tenant’s vessels from the dock prior to Hurricane Matthew. (Trial Tr., p. 617, line 18 – p. 618, lines 11-16.) The testimony presented

at trial established that, while Hurricane Matthew caused very little damage to the marina, the portions of the dock where Tenant's vessels had been moored were significantly damaged. (Trial Tr. p. 619, lines 10-17; p. 642, lines 13-15.) Tenant's vessels were physically moored to the Lease Property during the storm thereby causing significant damage to the portions of the dock used by Tenant. (Order and Judgment, p. 5.) Tenant is responsible for the cost of repairs and maintenance to the dock regardless of the legal cause of the damage. (Defs. Ex. 1, Paragraphs 3(c), 6, 18, 26, and 30.)

The Master correctly interpreted the language of the Lease and determined that Tenant is responsible for the costs of the dock repairs, that the evidence established the cost of the dock repair and that Landlord incurred the costs of the dock repair and that Tenant has not reimbursed Landlord for those costs. There is probative evidence in support of the Master's findings, which should not be disturbed on appeal.

VI. THERE IS EVIDENCE (AND LEGAL PRECEDENT) TO SUPPORT THE MASTER'S REFUSAL TO REWRITE THE LANGUAGE OF THE LEASE AND SETTLEMENT AGREEMENT AS THEY RELATE TO TENANT'S OBLIGATIONS.

Tenant challenges the Master's refusal to interpret the Settlement Agreement as a release of any and all obligations in the Lease requiring Tenant to purchase and maintain insurance. Tenant asks this Court to rewrite the provisions of the Lease and Settlement Agreement to add new language relating to Tenant's responsibility for the costs of dock repairs, which the Master properly refused to do.

a. The Settlement Agreement Does Not Relieve Tenant's Obligation to Reimburse Landlord for Dock Repair

The Settlement Agreement did not release Tenant from its obligation to reimburse Landlord for the repairs or replacement to the dock which is portion of the Lease Property. (Defs.

Ex. 1, Paragraph 6.) Tenant asks this Court to impose a limit on Tenant's responsibility for the cost of dock repairs to 7.5% of the cost of Landlord's property insurance based on the percentages provided in Exhibit F to the Settlement Agreement, entitled "Annual Shared Liabilities." Paragraph 1(e) of the Settlement Agreement, entitled "Common Area Charges," provides that "J&W agrees to pay all common area charges as identified in the Lease that come due and payable beginning January 2005. **The formula for determining amounts due and payable by the Parties for common are charges is attached as Exhibit F** (to the Lease)." (Defs. Ex. 2, Paragraph 1(e) (emphasis added).) The annual shared liabilities set forth in Exhibit F to the Settlement Agreement does not create or eliminate any right or obligation under the Lease. The intention of the parties under the Settlement Agreement is clear: "J&W agrees to be responsible for all costs of dock maintenance and repair for the Lease Property as contemplated in the Lease." (Defs. Ex. 2, Paragraph 1(f).)

As Tenant confirmed at trial that the word "insurance" does not appear in Paragraph 6 of the Lease, entitled "Dock Repair." (Trial Tr., p. 236, lines 5-10.) Paragraph 6 of the Lease states that "Landlord shall complete said repairs or replacement and **Tenant shall pay Landlord all costs attributed to its use.**" (Defs. Ex. 1, Paragraph 6 (emphasis added).)

Paragraphs 6, 18, 26, and 30 of the Lease were not amended or modified by the terms of the Settlement Agreement, which provides that, "[e]xcept as set forth, amended or modified herein, all terms and conditions of the Lease attached hereto and incorporated herein by reference, not specifically modified by the terms of this document"). The Settlement Agreement does not impliedly amend the remaining portions of the Lease that are not expressly amended or modified by the Settlement Agreement. (Defs. Ex. 2, Paragraph 1(h).) Tenant has not presented any issue that warrants reversal of this ruling.

b. The Settlement Agreement Does Not Relieve Tenant's Obligation to Carry Insurance

Tenant asks this Court to rewrite the provisions of the Lease relating to Tenant's obligation to purchase and maintain insurance. Tenant is obligated to carry its own insurance. (Defs. Ex. 1, Paragraph 17.) Nothing in the Settlement Agreement relieves Tenant of its obligation to pay its own insurance. The Master properly refused Tenant's suggestion that the Settlement Agreement be interpreted as a release of any and all obligations in the Lease requiring Tenant to purchase and maintain insurance. *See C.A.N. Enters., Inc. v. S.C. Health & Human Servs.*, 296 S.C. 373, 378, 373 S.E.2d 584, 587 (1988) (stating that courts are "without authority to alter a contract by construction or to make new contracts for the parties" but are "limited to the interpretation of the contract made by the parties themselves"). There is evidence to support these findings, specifically, the terms of the Lease and Settlement Agreement.

VII. THE AWARD FOR UNREIMBURSED LEASE CHARGES IS SUPPORTED BY THE EVIDENCE IN THE RECORD

a. The Master Correctly Granted Respondents' Motion to Quash the Trial Subpoena

On January 29, 2019, this matter was scheduled for a date certain trial to begin on May 15, 2019. One week before trial, Tenant's counsel served a subpoena on Robbin Rachels commanding her appearance at trial. (Pl. Ex. 17.) The subpoena to Ms. Rachels was accompanied by a five (5) page, single-spaced Exhibit A seeking to command Ms. Rachels to bring hundreds, if not thousands, of pages of documents with her to trial. In discovery, Respondents had already presented the documentation that was being requested. Tenant was apparently seeking to shift its trial preparation onto Landlord's shoulders, by requiring Landlord to bring all items it had already produced or made available. The subpoena was dated May 8, 2019, only seven (7) days prior to the start of trial. Respondents moved to quash the subpoena on the grounds that it was not served

at least ten (10) days prior to the time specified for compliance, as required by Rule 45(a)(4) of the South Carolina Rules of Civil Procedure and it imposed an undue burden on Landlord and its employees, on the eve of trial, to respond. Tenant's counsel moved for admission of Trial Subpoena. (Pl. Ex. 17.) The Master granted Defendants' Motion to Quash based on the testimony and documents presented at trial. (Trial Tr. p. 583, lines 5-9.)

The discovery rulings by the trial court will not be disturbed on appeal absent a clear showing of an abuse of discretion. *See Evening Post Pub. Co. v. Berkeley Cnty. Sch. Dist.*, 392 S.C. 76, 708 S.E.2d 745 (2011); *Bayle v. S.C. Dep't of Transp.*, 344 S.C. 115, 542 S.E.2d 736 (Ct. App. 2001). The admission of evidence is a matter left to the discretion of the trial judge and, absent a clear abuse of discretion amounting to an error of law, will not be disturbed on appeal. *See Vaught v. A.O. Hardee & Sons, Inc.*, 366 S.C. 475, 623 S.E.2d 373 (2005). To warrant reversal based on the admission or exclusion of evidence, a party must demonstrate both error and prejudice. *See Timmons v. S.C. Tricentennial Comm'n*, 254 S.C. 378, 405, 175 S.E.2d 805, 819 (1970). There is no error or prejudice to warrant reversal where the record establishes that Tenant is required to reimburse Landlord for these expenses in accordance with the provisions of the Lease and Settlement Agreement and that Tenant has failed to reimburse Landlord for the unreimbursed Lease charges.

At trial, Robbin Rachels testified as to the cumulative amount, excluding interest or attorney's fees, that is owed to Landlord for lot maintenance, utilities, and Tenant's share of Landlord's property taxes and insurance. (Trial Tr., p. 532.) Ms. Rachels testified as to the formula used to calculate Tenant's portion of property insurance for the docks and piers multiplied by 7.5%. (Trial Tr. p. 570, 577.) The appellate court is not required to disregard the master's findings, as the master is in the better position to assess witness credibility. *See, e.g., Fox v. Moultrie*, 379 S.C.

609, 666 S.E.2d 915 (2008) *see also Pinckney v. Warren*, 344 S.C. 382, 387, 544 S.E.2d 620, 623 (2001) (“[T]his broad scope of review does not require an appellate court to disregard the findings below or ignore the fact that the trial judge is in the better position to assess the credibility of the witnesses.”).

Taken as a whole, the record contains ample support for the Master’s finding that Tenant has refused to pay the vast majority of charges due under the Lease since 2008. (Order and Judgment, p. 4.) Tenant’s obligations to pay these charges to Landlord are mandatory. (Defs. Ex. 1, Paragraph 3(b); Order and Judgment, p. 4.) The Master did not abuse his discretion in granting the Motion to Quash the Trial Subpoena.

b. The Record Supports the Master’s Damages Award

Tenant argues that the award in favor of Landlord for unreimbursed Lease charges (\$56,371.27) should be reduced by \$10,566.47 or at least by \$1,532.95 for a billing error. The Master’s award of \$56,371.27 for unreimbursed Lease charges is supported by evidence of the underlying charges, copies of invoices, and corroborating testimony from witnesses. (Order and Judgment, p. 3; Defs. Exs. 25, 26, 27, 52, 53, 54 and 55; Trial Tr., pp. 527-556.) “The trial judge has considerable discretion regarding the amount of damages, both actual or punitive.” *Austin v. Specialty Transp. Servs., Inc.*, 358 S.C. 298, 310–311, 594 S.E.2d 867, 873 (Ct. App. 2004). Because of this discretion, this Court’s review on appeal is limited to the correction of errors of law. *Id.* This Court’s task in reviewing a damages award is not to weigh the evidence, but to decide if any evidence exists to support the damages award. *See, e.g., McNaughton v. Charleston Charter Sch. for Math and Science, Inc.*, 411 S.C. 249, 768 S.E.2d 389 (2015); *Santoro v. Schulthess*, 384 S.C. 250, 267, 681 S.E.2d 897, 906 (Ct. App. 2009). Such evidence exists.

The evidence in the record supports the damages award for the unreimbursed Lease

charges. Landlord presented documentation to the Master that showed that the outstanding balance on Tenant's account through the date of trial was \$56,371.27. Landlord presented an itemization of each charge, the category of the Tenant-allocated charges, as well as copies of all invoices for the Tenant-allocated charges from January 1, 2008 through May 1, 2019. (Defs.' Exs. 25, 26, 27, 28.) The record establishes that Landlord issued monthly invoices to Tenant and that Tenant refused to pay the invoices going back to 2008. (Order and Judgment, p. 4; pp. 15-16; p. 21.) Tenant confirmed that it has not paid Tenant's portion of insurance costs incurred by Landlord. (Trial Tr. p. 178, line 8 – p. 179, line 4.) Therefore, the Court should affirm the Master's damages award.

CONCLUSION

For the reasons set forth above, this Court should affirm the Master's Orders, as no basis is presented warranting reversal.

Respectfully submitted,

By: *s/Ellis R. Lesemann*
Ellis R. Lesemann (S.C. Bar No. 15315)
erl@lalawsc.com
Michelle A. Matthews (S.C. Bar No. 100685)
mam@lalawsc.com
LESEMANN & ASSOCIATES LLC
418 King Street, Suite 301
Charleston, SC 29403
(843) 724-5155

Attorneys for Respondents

January 29, 2021
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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Jan 29 2021

SC Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Master-In-Equity

The Honorable Marvin H. Dukes, III, Master-In-Equity
Beaufort County

Appellate Case No. 2020-000862
Trial Court Case No. 2018-CP-07-1622

J & W Corporation of Greenwood,

Appellant,

v.

Broad Creek Marina of Hilton Head, LLC;
Broad Creek Marina Operations, LLC;
Broad Creek Marina Properties, LLC;
Broad Creek Marina Development, LLC,

Respondents,

PROOF OF SERVICE

I certify on this date that the Respondents' Initial Brief and Respondents' Designation of Matter to be Included in the Record on Appeal were served on Appellant's counsel by depositing a copy of the same in the U.S. Mail, postage prepaid, properly addressed as follows:

Thomas C. Taylor, Esq.
Law Offices of Thomas C. Taylor, LLC
Post Office Box 5550
Hilton Head Island, South Carolina 29938

Attorney for Appellant J&W Corporation of Greenwood

Respectfully submitted,

By: *s/Ellis R. Lesemann*

Ellis R. Lesemann (S.C. Bar No. 15315)

erl@lalawsc.com

Michelle A. Matthews (S.C. Bar No. 100685)

mam@lalawsc.com

LESEMANN & ASSOCIATES LLC

418 King Street, Suite 301

Charleston, SC 29403

(843) 724-5155

Attorneys for Respondents

January 29, 2021
Charleston, South Carolina