THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas
R. Ferrell Cothran, Circuit Court Judge

Appellate Case No. 2017-000998
Civil Action No. 2015-CP-43-596

Paul Branco and Branco Investments,
Inc., d/b/a Great American Cookie Co., ... Respondents,

v.

Hull Storey Retail Group, LLC, and
Sumter Mall, LLC .... Appellants.

FINAL BRIEF OF APPELLANTS

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INTRODUCTION

This appeal raises a simple question of law: can one be liable for tortious interference with contract when there is no valid contract with which to interfere? Plaintiffs Paul Branco and Branco Investments, Inc. allege Sumter Mall, LLC and Hull Storey Retail Group, LLC tortiously interfered with Branco Investments' contract with a third party for the sale of certain equipment and assets. The supposed contract, however, was only a proposed purchase agreement that was expressly made contingent on the satisfaction of certain conditions. Those contingencies were never satisfied, and thus there was no valid contract with which Sumter Mall and Hull Storey could interfere. Accordingly, they cannot, as a matter of law, be liable for tortious interference with contract.

Alternatively, even assuming, *arguendo*, that the proposed purchase agreement was a valid and enforceable contract, Sumter Mall's and Hull Storey's allegedly wrongful conduct—namely, attempting to negotiate lease terms to increase the revenue they generated from a property they owned and managed—was a justifiable assertion of their right, and thus cannot constitute a tortious interference with contract.

Furthermore, the damages amount awarded by the trial court was not supported by competent evidence but, rather, was based solely on Paul Branco's admittedly unsupported, wholly subjective, and speculative conjectures about what the assets at issue were worth to him. Indeed, *any* award of damages was improper because the party who purported to enter the supposed "contract"—Branco Investments, Inc.—was, at the time of the transaction and at the time it filed this lawsuit, in forfeiture of its corporate status and thus lacking the legal ability to enter the transaction or bring suit. Finally, even assuming there was a contract, interference, and a compensable injury (all of which are assumptions that, as explained below, are contrary to law and/or the facts of this case), the trial court erred by awarding damages to Paul Branco, who was not a party to the purportedly breached "contract" on which the trial court's award of damages was based.

STATEMENT OF THE ISSUES ON APPEAL

1. Did the trial court err by ruling Hull Storey was liable for tortious interference with contract when plaintiffs Paul Branco and Branco Investments, Inc. failed to demonstrate the existence of a valid and enforceable contract and thus failed to satisfy their burden of establishing an essential element of the claim?

2. Even assuming, *arguendo*, that a valid contract existed, did the trial court err by ruling Hull Storey's actions relating to that contract were unjustified?

3. Did the trial court err by awarding damages in an amount unsupported by any competent evidence but, rather, based solely on Plaintiffs' unsupported, subjective, and speculative assertions?

4. Did the trial court err by awarding damages arising from a purported contract that was entered by a then-dissolved corporation that lacked the capacity to transact, or by awarding damages to Paul Branco individually, when he was not a party to the purported contract?

STATEMENT OF THE CASE

Plaintiffs Paul Branco and Branco Investments, Inc. filed this lawsuit on March 5, 2015, asserting causes of action for (i) Breach of Contract with Fraudulent Intent, (ii) Tortious Interference with a Contract, (iii) Fraud, and (iv) Constructive Fraud. *See* Compl. (R. 17–26). Sumter Mall, LLC filed its Answer on April 14, 2015, denying the allegations of wrongdoing, asserting two counterclaims, and asserting eight affirmative defenses, including the Statute of Frauds. *See* Answer of Sumter Mall (R. 27–33). Hull Storey Retail Group, LLC likewise filed its Answer on April 14, 2015, denying the allegations of wrongdoing and asserting ten affirmative defenses, including the Statute of Frauds. *See* Answer of Hull Storey (R. 34–38).

Hull Storey filed a Motion for Judgment on the Pleadings on September 27, 2016. See Mot. for J. (R. 39–45). Judge Cooper conducted a hearing on the motion on November 28, 2016, and, on December 15, 2016, denied the motion. *See* Tr. of Nov. 28, 2016 hearing (R. 54–69); Order Denying Mot. for J. (R. 16). Plaintiffs' claims were tried in a bench trial before Judge Cothran on

February 28, 2017. *See* Trial Tr. at 1–220 (R. 70–288). At the conclusion of the bench trial, Judge Cothran took the matter under advisement.

A few weeks later, the trial court emailed to the parties' counsel a draft of the order the court intended to file. In response, on March 21, 2017, Hull Storey filed a Motion to Amend. *See* Mot. to Amend (R. 46–53). Two days later, the trial court filed its order, which was substantively identical to the draft it had previously circulated. *See* Order of J. (R. 10–15). The Order ruled in Plaintiffs' favor on the claim for tortious interference with a contract, ruled in Defendants' favor on the other causes of action, and ruled in Plaintiffs' favor on Hull Storey's counterclaims. *See id.* at 4–5 (R. 13–14). Notably, the trial court awarded judgment for Paul Branco individually. *See* Order of J. at 1, 3, and 5 (R. 10, 12, and 14) (awarding judgment and $63,625 in damages to "the plaintiff," which the Order defined as "Paul Branco");[1] *see also* Circuit Court docket entry (R. 387) (noting judgment was awarded for "Branco, Paul").

The trial court did not schedule a hearing on the Motion to Amend, nor did it express any indication of whether and when it might set a hearing or rule on the motion. Accordingly, out of an abundance of caution Hull Storey timely filed its Notice of Appeal on April 21, 2017. Hull Storey subsequently moved this Court to remand the case, without prejudice to refile the appeal, to allow the trial court to consider and rule upon the pending post-trial motion. On August 28, 2017, this Court granted the motion.

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[1] The trial court arrived at this damages amount by taking $70,000 (the revenue Branco allegedly lost as a result of the disruption of the supposed contract with Brooktenn) and reducing it by $5,000 (which Branco recouped by selling to another entity some of the equipment that Brooktenn proposed to buy) and reducing the remaining amount by $1,375 for the 15 days post-lease expiration during which Hull Storey and Sumter Mall allowed Branco to remain in the store without paying rent. *See* Order of J. at pp. 3 and 5 (R. 12 and 14).

Judge Cothran held a hearing on the post-trial motion on February 9, 2018, and filed an Amended Order of Judgement on March 2, 2018. *See* Hearing Tr. at 1–29 (R. 290–318); Amend. Order of J. (R. 1–9). The Amended Order reached the same outcome as the trial court's earlier Order of Judgment, but included a slightly lengthier analysis of the claim for tortious interference with contract. As with the earlier Order, the trial court awarded judgment and damages to Paul Branco individually. *See* Amend. Order of J. at 1, 4, and 7 (R. 1, 4, and 7) (awarding judgment and damages to "the plaintiff," which the Order defined as "Paul Branco"); *see also id.* at 7 (R. 7) (stating that as a result of Hull Storey's supposed interference, "*Branco* lost the opportunity to sell his assets) (emphasis added). Hull Storey timely filed its Notice of Appeal.

<u>STATEMENT OF THE FACTS</u>

Sumter Mall, LLC owns the Sumter Mall, a retail shopping mall in Sumter, South Carolina. *See* Complaint at ¶ 3 (R. 21). Hull Storey Retail Group, LLC manages the mall on behalf of Sumter Mall, LLC. *See id.* at ¶¶ 2 and 4 (R. 3); Trial Tr. at 9:8–15 (R. 78). Both Sumter Mall and Hull Storey are Georgia Limited Liability Companies authorized to conduct business in South Carolina. *See* Answer at ¶¶ 2–3 (R. 28). This appeal arises from the lease of a storefront in the Sumter Mall.

I. The Brancos' 2002 lease, and their efforts in 2012–13 to renew or transfer the lease.

On or about December 30, 2002, Paul Branco and Anne Branco entered into a lease with Sumter Mall, LLC to operate a Great American Cookie ("GAC") franchise store and a Pretzel Time store in Unit 55 of the Sumter Mall. *See* Trial Tr. at 10:25 to 11:1–8 and 12:23–25 (R. 79–81); Pl.'s Trial Ex. 1 at p.1 (R. 321). The lease term was for ten years. *See* Trial Tr. 12:10–14 and 14:16–21 (R. 81 and 83); Pl.'s Trial Ex. 1 at p.1 (R. 321). Initially, the lease was to expire on April 30, 2013. *See* Trial Tr. 15:3–5 (R. 84). On April 30, 2013, Appellants extended

the Brancos' lease term to May 15, 2013. *See* Trial Tr. 189:14–23 (R. 258); Pl.'s Trial Ex. 8 (R. 366). The Brancos operated the GAC store in Unit 55 of the Sumter Mall from December 30, 2002 until May 15, 2013. *See* Amend. Order at 1 (R. 1). The Brancos also operated a second GAC store at the Magnolia Mall in Florence, South Carolina. *See* Trial Tr. 8:22–24 (R. 87).

In September of 2012, as the end of the Brancos' lease term drew near, Paul Branco engaged in discussions with Hull Storey's leasing representative, Lewis White,[2] regarding the potential renewal or extension of the lease of Unit 55 in the Sumter Mall. *See* Trial Tr. at 118:10–20, 119:23–25, 120:1–15, 121:12–17, 177:11–13, and 177:18–20 (R. 187–90 and 246); Pl.'s Trial Ex. 2 at pp. 1–2 (R. 347–48). Branco and White's preliminary discussions envisioned Branco's daughter taking over the lease of Unit 55 to operate a GAC store in the Sumter Mall. *See* Trial Tr. at 16:12–16 (R. 85); *id.* at 120:20–21 (R. 189). White indicated Hull Storey would be agreeable to this idea so long as Branco signed as a guarantor of his daughter's proposed lease. *Id.* at 20:1–15 (R. 89); Pl.'s Trial Ex. 3 at p. 1 (R. 357); Amend. Order of J. at 1–2 (R. 1–2). Although Hull Storey's proposal provided Branco's daughter with an opportunity to continue the family business by assuming occupancy and operating a GAC store in Unit 55 of the Sumter Mall, Branco rejected the idea because it was "critical" to him that he not act as a guarantor for his daughter. *See* Trial Tr. at 20:10–11 (R. 89); Amend. Order of J. at 2 (R. 2).

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[2] White is a leasing representative for Hull Storey and had been so employed for approximately five-and-a-half years at the time of trial of this matter. *See* Trial Tr. at 175:14–19 (R. 244). White's responsibilities, as a leasing representative for Hull Storey, included leasing available spaces in shopping centers and malls and negotiating terms of leases, renewals, and assignments with tenants. *Id.* at 176:14–24 (R. 245). In September of 2012, White's duties included marketing available space within the Sumter Mall. *Id.* at 177: 2–5 (R. 246).

Branco continued in conversation and negotiations with White regarding a lease renewal. *See* Trial Tr. at 178:10–13 (R. 247). In September of 2012, White forwarded Branco a proposal for a five-year lease. *Id.* at 178:17–24 (R 247). Negotiations were still ongoing in November of 2012, *see id.* at 179:8–24 (R. 248); Pl.'s Trial Ex. 2 at p. 2 (R. 348), and discussions about a lease renewal continued into 2013. *See* Trial Tr. at 180:9–20 (R. 249) (noting that on January 31, 2013, White and Branco were still negotiating a lease renewal of Unit 55 of the Sumter Mall, and that on that date, White provided Branco a lease renewal spreadsheet for GAC); *see also* Pl.'s Trial Ex. 2 at p. 9 (R. 355).

By early 2013, White was also contemplating marketing Unit 55 to other potential tenants. *See* Trial Tr. at 180:25 and 181:1–3 (R. 249–50). And although White and Branco appeared to be close to reaching an agreement on terms that Hull Storey's real estate committee had authorized, White testified the parties did not have a "legal document or lease amendment memorializing the terms." *Id.* at 180:1–3 (R. 249).

II. Branco Investments, LLC's negotiation and execution of a contingent Proposal for Purchase with Brooktenn, LLC.

Meanwhile, unbeknownst to White and Hull Storey, in January 2013, Mr. Branco—on behalf of Branco Investments, LLC, which owned the equipment and other assets in the GAC stores in the Sumter and Florence malls—was engaged in discussions with Brooktenn, LLC ("Brooktenn"), a Georgia Limited Liability Company owned by Stewart Applebaum, about a possible transaction wherein Brooktenn would purchase Branco Investment's assets located in the Florence and Sumter GAC stores. *Id.* at 20:24–21:16 (R. 89–90); *see also id.* at 180:14–20, 182:4–6, and 183:15–24 (R. 249, 251, and 252) (noting that as of January 31, 2013, Hull Storey was still negotiating with Branco and planning on him renewing the lease, and that

Branco had not yet informed Hull Storey he was negotiating with a third party to take over the store).

Although Branco was simultaneously negotiating a lease renewal with Hull Storey and a possible sale to Applebaum, neither Branco nor Applebaum disclosed to Hull Storey that Brooktenn intended to operate the store in the Sumter Mall. *See id.* at 105:7–11, 180:14–20, 182:4–6, and 183:15–24 (R. 174, 249, 251, and 252). Indeed, Branco deliberately refrained from informing White until sometime late in the first quarter of 2013 that Branco was in discussions with another operator about possibly taking over the space. *Id.* at 105:7–11 and 183:14–24 (R. 174 and 252). At that time, Branco informed White that the new operator would be another Great American Cookie franchise operator named Stewart Applebaum. *Id.* at 184:10–13 (R. 253). White testified that based on the limited information Branco gave him, and based on Branco's strategy of simultaneously negotiating a lease renewal and a potential sale of the franchise, Hull Storey's understanding was that the potential new GAC operator would come in via a lease assignment in the future. *Id.* at 186:20–187:6 (R. 255–56).

On March 1, 2013, Branco Investments and Brooktenn entered into a conditional agreement—titled a "Proposal for Purchase"—whereby Brooktenn would purchase the equipment and other assets owned by Branco Investments and located in the GAC stores in the Sumter and Florence malls. *See* Trial Tr. at 20:24–25, 21:1–2, 21:21–25, 22:1–5, 22:22–25, and 23:1-8 (R. 89–92); Pl.'s Trial Ex. 4 (R. 359). The proposed agreement was expressly conditioned upon Brooktenn obtaining a satisfactory lease from Hull Storey for the Sumter Mall within 90 days after the proposed agreement was signed. *See* Pl.'s Trial Ex. 4 (R. 359)

("This proposal is contingent upon Buyers getting a satisfactory lease from Hull Storey Gibson within 90 days of signed proposal.");[3] *see also* Trial Tr. at 27:1–8 (R. 96).

The proposed purchase agreement indicates Branco and Applebaum understood and expected that Branco Investments and Brooktenn would be required to pay Hull Storey a transfer fee in order to transfer the operations of the GAC stores to Brooktenn and to allow Brooktenn to occupy the Sumter Mall. *See* Pl.'s Trial Ex. 4 (R. 359) (listing a line item for a "Mall Transfer Fee.....to be split 50/50 with seller (not to exceed $2,500 for Seller)"); Trial Tr. at 24–25 and 92–95 (R. 93–94 and 161–64).[4]

III. Hull Storey's understanding of and response to the Proposal for Purchase.

As noted above, based on the limited information Branco disclosed to White about the potential sale to Brooktenn, and based on the fact that Branco continued negotiating a lease renewal even *after* disclosing that information to White, Hull Storey determined the proposed transaction between Branco Investments and Brooktenn contemplating Brooktenn's occupancy and operation of the GAC store in the Sumter Mall would be an assignment of Branco's lease of that space. *See* Trial Tr. at 185:3–187:6 and 190:13–25 (R. 254–56 and 259); *see also id.* at 104:20–106:19 (R. 173–75) (Applebaum admitting that months prior to Hull Storey's awareness of Applebaum's involvement, while Mr. Branco was negotiating his lease renewal with Hull Storey, Mr. Branco had shared with Applebaum the lease renewal proposal he planned to send Hull Storey and asked Applebaum to review and provide feedback on it).

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[3] The Proposal is also expressly conditioned on Brooktenn obtaining a lease from the lessor of the Florence Mall within 90 days. *See* Pl.'s Trial Ex. 4 (R. 359) ("This proposal is contingent upon Buyers getting a satisfactory lease from PREIT within 90 days of signed proposal."). Applebaum admitted Brooktenn never obtained or sought to obtain lease approval in Florence. *See* Trial Tr. at 96:5–7, 96:23–25, 99:5–7 (R. 165 and 167).

[4] The Proposal for Purchase likewise contemplates a transfer fee to be paid to the franchisor. *See* Pl.'s Trial Ex. 4 (R. 359) ("GFG Transfer Fee....to be paid for by Seller").

Shortly after learning of the proposed transaction, White sought more information from Branco about it. *See id.* at 185:3–186:19 (R. 254–55); Pl.'s Trial Ex. 7 (R. 365) (March 25, 2013 email from White asking Branco for information regarding the proposed store transfer to Brooktenn). In response, Branco informed White that the Proposal for Purchase offered to sell the Sumter Mall store to Brooktenn for $70,000.00, of which $45,000 was for Branco's interest in the leasehold, and the $25,000.00 balance was for Branco Investment's equipment and inventory. *See* Trial Tr. at 198:4–9 (R. 267).[5] Not surprisingly then, Hull Storey believed the proposed transaction amounted to Branco selling the leasehold interest to Brooktenn. *See id.* at 192:2–11 (R. 261). Accordingly, Hull Storey informed both Branco and Applebaum that it viewed the proposed arrangement between Branco Investments and Brooktenn as a lease assignment requiring either Branco or Brooktenn to make a payment to Hull Storey pursuant to section 16.2 of the lease. *Id.* at 86:24–87:7, 87:25–88:9, and 192:2–8 (R. 155–57 and 261).

In keeping with this view, on April 30, 2013, White emailed Branco and Applebaum extending Branco's lease until May 15, 2015 and attaching a draft assignment and assumption of the subject lease. *Id.* at 46:6–13, 51:2–9, and 189:10–23 (R. 115, 120, and 258); Pl.'s Trial Ex. 8 at p.1 (R. 366). Neither Branco, Applebaum or Brooktenn executed the draft lease assignment agreement provided by White.[6] *See* Trial Tr. at 190:16–17 (R. 259). Furthermore,

[5] The Proposal for Purchase proposed a $100,000 purchase price for both stores, allocating $70,000 to the sale of the Sumter Mall store and its equipment and inventory, and allocation $30,000 to the sale of the Florence Mall store and its equipment and inventory. *See* Pl.'s Trial Ex. 4 (R. 359). At trial, Branco effectively conceded this allocation was an arbitrary way of dividing up the total amount without any real rhyme or reason. *See* Trial Tr. at 127:16–25 and 166:3–10 (R. 196 and 235).

[6] A review of the record confirms that this draft "Assignment, Assumption, Amendment and Ratification of Lease Agreement," which was admitted into evidence in the trial of this matter as Plaintiff's Exhibit 8, is the only written document drafted between Sumter Mall, LLC and Brooktenn, and no other written document purporting to be a lease between Hull Storey or Sumter Mall, LLC and Brooktenn has been proffered at any time.

Brooktenn never executed a lease with Sumter Mall and/or Hull Storey. *See* Amend. Order of J. at 2 (R. 2) (noting that a "lease agreement between Hull Storey and Brooktenn was never executed").

The draft assignment and assumption that White sent to Branco and Applebaum was not as demanding as Hull Storey could have been under the terms of Branco's existing lease. Specifically, section 16.2 of the Brancos' lease that was then in force states that the *entirety* of any lease assignment fees received by the Brancos is payable to Landlord. See Pl.'s Trial Ex. 1 at § 16.1 (R. 330). Here, the Proposal for Purchase contemplated a transaction for $70,000.00, of which Branco told White $45,000 was for the leasehold interest. *See* Trial Tr. at 198:4–9 (R. 267). White, however, proposed an assignment and assumption that permitted Brooktenn to assume occupancy of Unit 55 and operate a GAC store upon payment of only $20,000.00. *See* Trial Tr. at 45:6–14, 48:17–22, and 191:6–19 (R. 114, 117 and 260); Pl.'s Trial Ex. 8 at p.2 (R. 367). Several days before sending this draft assignment and assumption, White told Branco that Hull Storey's real estate committee had approved this proposal, and, consistent with the document he subsequently sent, "Stewart's deal has been approved ***if*** *we can determine a way to come up with 20,000.*" *See* Trial Tr. at 195:1–25 (R. 264) (emphasis added); Pl.'s Trial Ex. 5 at 2 (R. 361).

Both Branco and Brooktenn rejected Hull Storey's and Sumter Mall's proposal requiring payment of $20,000.00 for Brooktenn to assume occupancy of Unit 55 and operate a GAC store there. *See* Compl. at ¶ 10 (R. 22); Trial Tr. at 87:25 and 88:1–11 (R. 156–57); Pl.'s Trial Ex. 12 (R. 378). Neither Branco nor Brooktenn made any sort of counteroffer regarding the issue of Brooktenn taking over Branco's space, *see* Trial Tr. at 192:15–23 (R. 261), and Brooktenn never entered *any* lease agreement with Sumter Mall and/or Hull Storey as required by the Proposal for

Purchase, *id.* at 190:5–7, 191:22–24, and 193:2–6 (R. 260 and 262); Amend. Order of J. at 2 (R. 2) (noting a "lease agreement between Hull Storey and Brooktenn was never executed").[7] Applebaum testified that at some point following his and Branco's refusal to sign the draft assignment and assumption,[8] White told him orally that Branco Investments would be hard pressed to remove the equipment in Unit 55 and thus, if the proposed asset sale never materialized, Applebaum could simply obtain a lease from Hull Storey—including the $20,000 up-front payment—and could likely take occupancy of Unit 55 with some equipment already in place. *See* Trial Tr. at 91:1–23 (R. 160). Applebaum—whose failure to obtain a lease with Hull Storey had already torpedoed his proposed agreement with Branco Investments—interpreted this suggestion as White's encouragement to scuttle the proposed deal.

Branco's lease of the Sumter Mall space expired and Hull Storey took the space back. *See* Trial Tr. at 56:19–21, 69:6–8, 164:9–11, and 192:19–20 (R. 125, 138, 233, and 261). Sumter Mall and Hull Storey moved forward by entering into an agreement with the Pizitz Group for the lease of the referenced space. *Id.* at 193:2–6 (R. 262).

STANDARD OF REVIEW

On appeal from a bench trial, "a reviewing court is free to decide questions of law with no particular deference to the trial court." *Hunt v. Forestry Comm'n*, 358 S.C. 564, 569, 595 S.E.2d 846, 848–49 (Ct. App. 2004) (citations omitted); *see also Okatie River, LLC v. Se. Site Prep, LLC*, 353 S.C. 327, 334. 588 S.E.2d 327, 334 (2003) ("In an action at law, tried without a jury, the appellate court standard of review extends only to the correction of errors of law.") (citations

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[7] Similarly, Brooktenn never secured (or even attempted to secure) a lease of the GAC store at the Florence Mall as required by the Proposal for Purchase to become effective. *See id.* at 96:23–25, 97:4–8, and 99:5–10 (R. 165–66 and 168); Pl.'s Trial Ex. 4 (R. 359).

[8] Applebaum's recollection of the chronology of the events was quite hazy, but he agreed the telephone conversation in question occurred "sometime in that time frame." Tr. 91:1–4 (R. 160).

omitted). The trial court's findings of fact should not be disturbed unless they were "without evidentiary support." *Hunt*, 358 S.C. at 569, 595 S.E.2d at 848.

ARGUMENT

I. Hull Storey cannot be liable for tortious interference with contract because there was no enforceable contract with which to interfere.

It is axiomatic that there can be no tortious interference with contract unless there is a viable contract with which to interfere. The cause of action is expressly predicated on the existence of a "valid, enforceable" contract:

> The elements of a cause of action for tortious interference with contract are: (1) *existence of a valid contract*; (2) the wrongdoer's knowledge thereof; (3) his intentional procurement of its breach; (4) the absence of justification; and (5) resulting damages.

Dutch Fork Dev. Group II, LLC v. SEL Properties, LLC, 406 S.C. 596, 604, 753 S.E.2d 840, 844 (2012) (emphasis added); *see also Jackson v. Bi-Lo Stores, Inc.*, 313 S.C. 272, 277, 437 S.E.2d 168, 171 (Ct. App. 1993) ("The right to recover for the unlawful interference with the performance of a contract presupposes the existence of a *valid, enforceable* contract.") (emphasis added).

In the instant lawsuit, Hull Storey cannot have interfered with a contract between Branco Investments, Inc. and Brooktenn because there was no valid, enforceable contract with which to interfere. The proposed agreement between Branco Investments, Inc. and Brooktenn contained a contingency making the agreement dependent on Brooktenn obtaining a lease for the Sumter Mall location from Hull Storey within 90 days.[9] *See* Pl.'s Trial Ex. 4 ("Proposal for Purchase") (R. 359)

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[9] In addition, the proposed agreement contained another contingency, namely that Brooktenn also obtain lease approval for the *Florence* mall within 90 days. *See* Pl.'s Trial Ex. 4 ("Proposal for Purchase") (R. 359) ("This proposal is contingent upon Buyers getting a satisfactory lease from PREIT within 90 days of signed proposal."). Brooktenn's failure to obtain lease approval in Florence (or even to *begin* the process of seeking lease approval in Florence, *see* Trial Tr. at 96:5–7, 96:23–25, 99:5–7 (R. 165 and 168), is yet another reason there is no valid, enforceable contract between Branco Investments, Inc. and Brooktenn.

("This proposal is contingent upon Buyers getting a satisfactory lease from Hull Storey Gibson within 90 days of signed proposal.").

There is no evidence this contingency was ever satisfied. Brooktenn *applied* for a lease for the Sumter Mall location, but the record before the trial court is entirely devoid of any document indicating Hull Storey ever entered a lease agreement with Brooktenn.[10] Because lease agreements, as a matter of law, must be in writing, the contingency in the proposed agreement between Branco Investments, Inc. and Brooktenn could be satisfied *only* by Brooktenn obtaining a written, executed lease agreement for the Sumter Mall property. *See* S.C. Code Ann. § 27-35-20 ("Any agreement for the use or occupation of real estate for more than one year shall be void unless in writing."); *id.* § 32-3-10 ("No action shall be brought whereby . . . To charge any person upon any contract or sale of lands . . . or any interest in or concerning them . . . Unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith."); *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d

[10] At trial, Applebaum, the owner of Brooktenn, asserted Hull Storey had approved his lease application, *see* Trial Tr. at 86:3–16 (R. 155), but neither he nor Mr. Branco nor any other witness presented any document in support of that assertion or showing Brooktenn entered a lease with Hull Storey. Mr. Branco relied heavily on a text message he received from Hull Storey's leasing representative, Lewis White, which stated "Stewart[']s deal has been approved *if* we can come up with a way to get 20k." Pl.'s Trial Ex. 5 at p. 2 (text message dated April 22, 2013) (R. 361) (emphasis added). Branco and the trial court seized on that statement as evidence the lease had been approved. *See, e.g.*, Trial Tr. at 45:8–16, 54:11–16, 170:15–25, 172:2–7 (R. 114, 123, 239, and 241); *see also* Order of J. at 2 (R. 11) ("Branco was even told by Hull Storey that Brooktenn's lease application ' . . . **has been** approved if we can determine a way to come up with 20k.'") (emphasis in Order); Amend. Order of J. at 3 (R. 3) (same); *id* at. 2 (R. 2) ("Communications between Branco and Lewis White, a representative of Hull Storey, indicated that Hull Storey approved Brooktenn's lease application to operate a GAC franchise in Sumter Mall."). That conclusion, however, is contrary to White's plain and express meaning when he said the lease would be approved "***if***" Brooktenn paid $20,000. Brooktenn refused to do so. *See* Pl.'s Trial Ex. 12 (R. 378) (email from Applebaum to White stating "We strongly oppose the imposition of the $20,000" and "will not pay said cost"). Accordingly, the lease was never approved, much less executed. *See* Amend. Order of J. at 2 (R. 2) ("This lease agreement between Hull Storey and Brooktenn was never executed.").

891, 894 (1989) (holding a supposed oral modification to a retail property lease agreement was void because "[a]ny contract for an interest in land or any agreement that is not to be performed within one year must be in writing and signed by the party against whom it is seeking to be enforced" and the "[f]ailure to put such a contract in writing renders it void"); *see also In re Camelot Casino Cruises, Inc.*, 330 B.R. 263 (Bankr. M.D. Fla. 2005) (applying South Carolina law) (holding proposed commercial lease agreement void because it was not signed by both parties and there was no "meeting of the minds" between them as to all terms and conditions).

When this rule is applied to the present appeal, it is clear that Brooktenn never satisfied the proposed agreement's contingency of "getting a satisfactory lease" for the Sumter Mall. The only written document exchanged between Sumter Mall, LLC, and Brooktenn was a draft "ASSIGNMENT, ASSUMPTION, AMENDMENT AND RATIFICATION OF LEASE AGREEMENT" (the "Draft Assignment") emailed to both Branco and Applebaum on April 30, 2013.[11] The Draft Assignment includes a requirement that the tenant parties pay the $20,000 assignment fee to Sumter Mall, LLC, and a requirement that Branco waive any claim against Sumter Mall and its agents. *See* Pl.'s Trial Ex. 8 at ¶¶ 4 and 7 (R. 368–69). No other written document purporting to be a Brooktenn lease for the Sumter Mall has been proffered, and none exists. The Draft Assignment was never signed, nor did the parties reach a meeting of the minds with respect to a lease between Brooktenn and Sumter Mall, LLC. In this context, any valid lease agreement of a storefront at Sumter Mall to Brooktenn for the ten year term requested would have to be in writing and signed by the parties. That did not occur, and in the absence of an enforceable lease between Hull Storey and Brooktenn, the contingency in the proposed agreement between

[11] The Draft Assignment was and attached to the Complaint as Exhibit C and was also presented as an exhibit at the bench trial. *See* Pl.'s Trial Ex. 8 (R. 366–72).

Branco Investments, Inc. and Brooktenn was not satisfied, and thus there was no valid and enforceable contract with which Hull Storey could interfere. *See Dutch Fork Dev. Group II, LLC*, 406 S.C. at 604, 753 S.E.2d at 844 (noting a claim for tortious interference with contract is predicated on the existence of a valid, enforceable contract); *Jackson*, 313 S.C. at 277, 437 S.E.2d at 171 (same); *see also BCD LLC v. BMW Mfg. Co., LLC*, 360 Fed. Appx. 428, 434 (4th Cir. 2010) (applying South Carolina law) (holding there was no tortious interference with contract where the contract at issue contained requirements and contingencies that had not been satisfied, because "[t]here can be no contract so long as, in the contemplation of the parties thereto, something remains to be done to establish contract relations").[12]

Although Hull Storey repeatedly explained to the trial court that the contingencies in the Proposal for Purchase had not been satisfied and thus there was no contract with which to interfere, and although the trial court expressly noted in its Findings of Fact that the sole lease document exchanged between Hull Storey and Brooktenn was never agreed-upon and "was never executed," *see* Amend. Order of J. at 2 (R. 2), the trial court's Conclusions of Law nevertheless inexplicably assert in a single, summary sentence that "The court finds persuasive the evidence showing Branco Investments had a valid contract with Brooktenn for the asset sale, *id.* at 5 (R. 5). This conclusion was unsupported by the facts and is contrary to law.

[12] The South Carolina Court of Appeals has recently affirmed a trial court's dismissal of claims for breach of contract and tortious interference where the "contract" at issue was an oral agreement that violated the Statute of Frauds. Because the Court's opinion was not published, and because unpublished opinions lack precedential authority, *see* Rule 268(d)(2), SCACR, Appellants mention this recent ruling without citation merely to illustrate the continued vitality of the rule set out in the case law and statutes cited above involving a proposed contract dependent on a contingency that was never satisfied.

Courts of other jurisdictions considering retail lease agreements have likewise held that where an agreement is contingent on a condition that is not satisfied, there can be no tortious interference with contract because there was never an enforceable contract with which to interfere. *See First Union Mgmt. Corp., Inc. v. Kmart Corp.*, 1994 WL 385645 (Minn. Ct. App. 1994).

In sum, in the absence of a written, executed lease agreement between Hull Storey and Brooktenn (and there was none), and/or in the absence of evidence that Brooktenn obtained a lease agreement from the landlord of the Florence Mall (and there is none), there is no valid, enforceable contract between Branco Investments and Brooktenn. Without a contract with which to interfere, Hull Storey, as a matter of law, cannot be liable for tortious interference with contract.

II. Hull Storey cannot be liable for tortious interference with contract because the conduct supposedly constituting "interference" was justified.

Even assuming there was a valid, enforceable contract between Branco Investments, Inc. and Brooktenn (which there was not), Hull Storey cannot be liable for tortiously interfering with that contract because Hull Storey's actions were justified. Accordingly, for the reasons explained below, the trial court erred in ruling that Hull Storey's supposed interference "was not justified in anyway and there was no credible evidence of justification offered by defendants at trial or in the pleadings." *See* Amend. Order of J. at 5 (R. 5).

As noted above, one of the elements of tortious interference with contract is the "absence of justification" for the conduct that supposedly interfered with the contract. *Dutch Fork Dev. Group II, LLC*, 406 S.C. at 604, 753 S.E.2d at 844. Stated differently, a party's conduct that interferes with a contract "*is* justified . . . when acting in the advancement of its legitimate business interests or legal rights." *BCD LLC v. BMW Mfg. Co., LLC*, 360 Fed. Appx. 428, 435 4th Cir. 2010) (citing *Webb v. Elrod*, 308 S.C. 445, 418 S.E.2d 559 (1992)) (emphasis added).

The question of justification turns on whether Hull Storey's conduct had an "improper purpose," *i.e.*, "malice or spite," or was carried out through "improper means," *i.e.*, "violence, threats or intimidation, bribery, unfounded litigation, fraud, misrepresentation or deceit, defamation, duress, undue influence, misuse of inside or confidential information or breach of a fiduciary relationship." *Id.* at 435 (citing *Waldrep Bros. Beauty Supply, Inc. v. Wynn Beauty Supply*

Co., 992 F.2d 59, 62 (4th Cir. 1993)) (applying South Carolina law). Conversely, "[a] party *is* justified, however, when acting in the advancement of its legitimate business interests or legal rights." *Id.* (emphasis added); *see also BCD LLC v. BMW Mfg. Co., LLC*, 2008 WL 304878, at *21 (D.S.C. Jan. 31, 2008) ("If some legitimate purpose or right exists, liability cannot be imposed even if the defendant exercises that right for a malicious reason.") (citation omitted). If "some legitimate purpose or right exists, the improper purpose must predominate in order to create liability." *BCD LLC*, 360 Fed. Appx. at 435 (citing *Crandall Corp. v. Navistar Int'l Transp. Corp.*, 302 S.C. 265, 395 S.E.2d 179, 180 (1990)).

Here, Hull Storey had a legitimate purpose and business interest in requesting a lump sum payment from Mr. Branco and/or Brooktenn, namely (1) what Hull Storey viewed—even if mistakenly—as a contractual right to a lease assignment payment,[13] (2) a desire to recoup investments it had made in the common areas of the mall, or (3) a desire to generate revenue by leasing its real estate, including by the imposition of a lump-sum up-front charge in addition to a monthly lease payment. *See, e.g.*, Trial Tr. 187:4–5 (R. 256) (Mr. White stating the landlord is "not into having tenants sell his place over improvements"); *id.* at 192:6–7 (R. 261) ("You don't want the, you know, tenant to sell off our leasehold"); *id.* at 197:5–198:4 (R. 266) (Mr. White stating that based on the limited facts available to Hull Storey at the time, Hull Storey believed the proposed transaction to be a lease assignment and thus subject to the lease's assignment fee provision); *see also id.* at 65:23–66:9 (R. 134–35) (Mr. Branco noting that Hull Storey's stated

[13] As noted in the Statement of the Facts, *supra*, the facts surrounding the development of the proposed agreement between Branco Investments, Inc. and Brooktenn give rise, at minimum, to a perception that the proposed agreement was an "end run" attempting to avoid having to pay a lease assignment payment to the landlord.

basis for requesting the $20,000 payment was to recoup capital improvements such as new carpet it had installed in the common areas of the mall).

Sumter Mall is in the business of leasing its mall property for income and profit, and there was ample testimony about leasing of the Sumter Mall. The only asset of Sumter Mall is land and leasable space at the mall, and obtaining payment from tenants for the right to occupy the Sumter Mall—whether it be up-front payment or monthly rent or percentage rent or reimbursement for common area maintenance expenses or any other type of lawful payment—is the business of Sumter Mall and the justification for its actions. Indeed, the legitimacy of a landlord like Hull Storey charging an up-front "transfer" fee is demonstrated by the fact that the proposed agreement between Branco Investments, Inc. and Brooktenn expressly contemplated such a fee and agreed to split such fees 50/50 between them up to $2,500 each, with any excess amount to be paid by Brooktenn. *See* Pl.'s Trial Ex. 4 (R. 359).

Sumter Mall, LLC's right not to lease space to Brooktenn or to condition that lease on any lawful condition must be superior to Branco's request to extend the lease or Applebaum's request for a new lease. It is the essence of private property ownership. And the good faith assertion of one's own right cannot constitute tortious interference with another's contract, even if the assertion of that right causes one of the contracting parties to renege on the agreement:

> One who, by asserting in good faith a legally protected interest of his own or threatening in good faith to protect the interest by appropriate means, intentionally causes a third person not to perform an existing contract or enter into a prospective contractual relation with another does not interfere improperly with the other's relation if the actor believes that his interest may otherwise be impaired or destroyed by the performance of the contract or transaction.

Restatement (Second) of Torts § 773; see also *Gailliard v. Fleet Mortgage Corp.*, 880 F. Supp. 1085, 1089 (D.S.C. 1995) ("“A party who in good faith exercises a legal right ‘affords no basis for

an action by the second party for intentional interference with a contract' despite the fact it may cause a third party not to perform a contract.") (citing *Webb v. Elrod*, 308 S.C. 445, 418 S.E. 2d 559, 581 (S.C. App. 1992)).

Hull Storey's decision to exercise its legal right to charge a tenant or prospective tenant an up-front payment of $20,000 in addition to ongoing monthly lease payments was justifiable business conduct and cannot support liability for wrongful interference with contract. *See Webb*, 308 S.C. at 448, 418 S.E.2d at 561 (holding the "exercise in good faith of a legal right" affords no basis for an action "for intentional interference with contract even though the consequence of the exercise of the legal right by the first party is to cause a third party not to perform another contract with the second party"). The 2002 lease between the Brancos and Sumter Mall was set to expire on April 30, 2013. Sumter Mall had no obligation to lease space to Brooktenn or to approve Brooktenn as a tenant, and the fact that Hull Storey sought to profit by leasing the space to a new tenant is the legitimate exercise of a justified business interest in generating profit.

Though South Carolina's courts have not previously considered this issue in the context of commercial retail real estate, at least one other jurisdiction's appellate court has done so and concluded a party had a legitimate business interest in generating rent revenue and thus the assertion of that right—even if it disrupted an agreement between two other parties—did not constitute tortious interference with contract. In *Union Mgmt. Corp., Inc. v. Kmart Corp.*, 1994 WL 385645 (Minn. Ct. App. 1994), a shopping center landlord entered an agreement with an Arby's franchisee allowing the franchisee to construct and operate an Arby's in the shopping center's parking lot. The landlord's agreement with the Arby's franchisee, however, was contingent on Kmart—the center's anchor tenant—giving "unconditional consent" to the construction of the Arby's in the shopping center's parking lot. *Union Mgmt. Corp.* at *1. Kmart

refused to consent unless the landlord gave Kmart 50% of the "ground rents" income received from the Arby's franchisee. *Id.* Kmart's position was based on a corporate policy that sought to generate revenue in return for parking lot developments that could disrupt visibility, traffic flow, drainage, etc. *Id.* Because Kmart withheld its unconditional consent, the deal between the landlord and the Arby's franchisee fell through. *Id.* The landlord sued Kmart for tortious interference with contract. The court ruled Kmart was not liable, in part because Kmart had a legitimate business interest in trying to extract rent concessions from the landlord. *Id.* at *2–4.[14]

Here too, Hull Storey had a legitimate purpose and business interest in requesting a lump payment from Mr. Branco and/or Brooktenn, and the assertion of Hull Storey's right to generate rental income from its property cannot, as a matter of law, render Hull Storey liable for tortious interference with contract.

III. The amount of damages awarded by the trial court was not supported by sufficient evidence but was instead based solely on speculation and conjecture.

Even if Hull Storey could be liable for tortiously interfering with the "contract" between Brooktenn and Branco Investments (and as explained above, it cannot), the trial court erred by awarding an amount of damages without any sufficient evidentiary basis. At trial, Mr. Branco alleged the assets owned by Branco Investments in the Sumter mall that Brooktenn proposed to buy were worth $70,000 or more, but he provided no appraisal, costs of comparable equipment, or testimony or evidence of this valuation other than his own, unsupported opinion, and the fact that Brooktenn was willing to pay it.

> Q: So you had agreed that the 70,000 was something that came out of your head?

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[14] The court also ruled Kmart could not be liable for tortious interference with contract because the contingency in the agreement between the landlord and Arby's franchisee contained a contingency that had not been satisfied, and thus there was no contract with which to interfere. *See generally* Part I, *supra*.

A: It's the value I put on equipment in Sumter, yes.

Q: Based on what?

A: My personal value.

* * *

A: I valued it that, yes, 70,000.

Q: Has anyone else independently valued it that?

A: Stewart Applebaum, he agreed to the purchase.

Q: Didn't Mr. Applebaum say he didn't care what the breakdown was because it was the two deals going together that mattered?

A: Well, that might be partly true . . . .

Trial Tr. at 128:1–22 (R. 197); *see also id.* at 126:22–23 (R. 195) ("The value of the equipment *to me* was 70,000 dollars.") (emphasis added); *id.* at 165:12–166:10 (R. 234–35) (Mr. Branco admitting he had no idea how much he'd paid for the equipment originally and admitting he had not created any estimate or undertaken any discernable process to reach his $70,000 estimate).

During the bench trial, Hull Storey's trial counsel challenged this valuation, noting there was no support for it other than Mr. Branco's *ipse dixit*, and that the contract with Brooktenn contemplated the sale of two locations' equipment, and the price allocation of $70,000 to one and $30,000 to the other was a purely arbitrary way of dividing the total $100,000 sales price. *See* Trial Tr. at 102:1–103:20 (R. 171–72).

When determining the amount of damages to award, the evidence "should be such that a court or jury can reasonably determine an appropriate amount." *Yadkin Brick Co., Inc. v. Materials Recovery Co.*, 339 S.C. 640, 646, 529 S.E.2d 764, 767 (Ct. App. 2000) (citation omitted). "'Neither the existence, causation nor amount of damages can be left to [the judge or jury's] conjecture, guess or speculation,'" and "bald allegations are insufficient" to accurately establish a damages amount. *Id.* (citations omitted) (alteration in original). Where the sole "evidence" of damages is a party's self-serving estimate or approximation, any resulting calculation of damages based on

those guesses is "pure speculation." *Collins. Enter., Inc. v. White*, 363 S.C. 546, 560, 611 S.E.2d 262, 269 (Ct. App. 2005).

In the trial of the instant lawsuit, Branco and Branco Investments failed to bear this evidentiary burden. Accordingly, the trial court's calculation and award of damages was based on the plaintiff's subjective beliefs, speculation, and conjecture. This was error and requires, at minimum, the Judgement to be reversed and remanded for a proper calculation of damages supported by reasonable evidence and testimony.

IV. The trial court erred by awarding damages to the wrong party and based on supposed injuries that occurred at a time when the allegedly injured party did not have the legal capacity to enter into the underlying transaction.

Even assuming there was a contract to interfere with, and even assuming Hull Storey's conduct was not the justifiable pursuit of profit, the trial court nevertheless erred by awarding a judgment to Mr. Branco individually rather than to Branco Investments, Inc. The Proposal for Purchase was between Brooktenn and *Branco Investments, Inc.* (not Paul Branco himself). *See* Pl.'s Trial Ex. 4 (R. 359); *see also* Trial Tr. at 21:23–22:6 (R. 90–91); *see id.* at 22:25–23:1 (R. 91–92) (describing the Proposal for Purchase as "the agreement between Brooktenn, LLC, and Branco Investments"); *id.* at 23:22–24 (R. 92) (same); *id.* at 64:2–5 (R. 133) ("Q: Plaintiff's Exhibit Number 4 is the deal between you and Brooktenn. That document is the deal between Brooktenn, LLC, and Branco Investments, Inc., correct? A: That is correct.").

Further, the assets and equipment that Brooktenn proposed to buy were owned by Branco Investments, not by Mr. Branco individually. *See id.* at 64:7–11 (R. 133) ("Q: The equipment at the mall that you took out of there in the middle of May, all that equipment was ordered by Branco Investments Company, Inc., correct? A: Correct."); *id.* at 65:2–5 (R. 134) ("Q: Just to be clear,

your deal with Mr. Applebaum for 100,000-dollars is Branco Investments selling assets to Brooktenn, LLC? A: That is correct.").

Accordingly, the party allegedly injured by Hull Storey's conduct was Branco Investments, Inc., not Mr. Branco individually. The trial court, however, awarded judgment and damages to Mr. Branco. *See* Order of J. at 1, 3, and 5 (R 10, 12, and 14) (awarding judgment and damages to "the plaintiff," which the Order defined as "Paul Branco"); Amend. Order of J. at 1, 4, and 7 (R. 1, 4, and 7) (same); *see also* Court docket entry (R. 387) (listing award of judgment "For: Branco, Paul").

In addition, the party who was allegedly injured—*i.e.*, Branco Investments—was in forfeiture of its corporate status from March 7, 2012 to July 1, 2015, a period that encompasses all of the acts and communications giving rise to the allegations of this lawsuit. *See* S.C. Sec. of State "Business Name Search," *available at* https://businessfilings.sc.gov/BusinessFiling/Entity/Search (search for Branco Investments).[15] Accordingly, the "contract" at issue was entered by an entity that lacked legal capacity to enter the transaction, and this lawsuit was filed by a party without the legal ability to carry on any business, both of which are contrary to the South Carolina Code. *See* S.C. Code Ann. § 33-14-210(d) ("A corporation dissolved administratively continues its corporate existence *but may not carry on any business* except that necessary to wind up and liquidate its business and affairs . . . .") (emphasis added).[16]

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[15] By the time of trial and the Order of Judgment, Branco Investments had sought and received reinstatement of its corporate status.

[16] Branco Investments was administratively dissolved as a result of its forfeiture. *See* S.C. Sec. of State, Business Filings FAQs, *available at* http://www.sos.sc.gov/Business_Filings_FAQs (stating when a business is in forfeiture, "the Secretary of State's Office has administratively dissolved the entity").

Accordingly, the trial court erred by awarding damages arising from a supposed contract entered by an entity without capacity to do so, and, even if damages were appropriate (and as explained above, they were not) the trial court erred by awarding them to the wrong party.

CONCLUSION

For the foregoing reasons, Appellants respectfully request this Court reverse the trial court's Amended Order of Judgment.

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November 7, 2018
Greenville, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas
R. Ferrell Cothran, Circuit Court Judge

RECEIVED
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SC Court of Appeals

Appellate Case No. 2017-000998
Civil Action No. 2015-CP-43-596

Paul Branco and Branco Investments, Inc., d/b/a Great American Cookie Co., ... Respondents,

v.

Hull Storey Retail Group, LLC, and Sumter Mall, LLC .... Appellants.

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that the Final Brief of Appellant and the Final Reply Brief of Appellants comply with Rule 211(b), SCACR.

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