THE STATE OF SOUTH CAROLINA
In the 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 RESPONDENTS PAUL BRANCO AND BRANCO INVESTMENTS, INC., D/B/A GREAT AMERICAN COOKIE CO.

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INTRODUCTION

This case is about Appellants, corporate landlords, that leveraged their superior bargaining power to engage in unlawful conduct with the specific intent and purpose of extorting funds from their lessees, Respondents. When that failed, Appellants engaged in a concerted effort to tortiously interfere with contractual relations between Respondents and a third-party who was to take over Respondents' lease and assets. The trial court, in an order to which no challenges were properly preserved on appeal, correctly found that this behavior amounted to tortious interference and properly awarded damages to the lessee. Appellants now ask this Court to reverse the trial court based on numerous unpreserved issues.

COUNTER-STATEMENT OF ISSUES ON APPEAL[1]

I. Did Appellants fail to preserve any issues on appeal where Appellants' counsel made a motion for a "directed verdict" during the bench trial but failed to renew that motion at the close of the case?

II. Did the trial court correctly rule that Appellant Hull Storey was liable for tortious interference with contract when there was substantial evidence in the record of the existence of a valid and enforceable contract?

III. Did the trial court err by ruling Appellant Hull Storey's actions relating to that contract were unjustified where there was evidence of numerous actions on the part of Appellant Hull Storey taken for improper purpose and with actions constituting improper methods?

IV. Did the trial court correctly award damages in an amount supported by competent evidence based on the trial court's credibility determination and review of the evidence?

V. Did the trial court correctly award damages to a corporation and its principal officer who both had capacity to enter a contract?

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[1] As set forth throughout Respondents' brief, Respondents contend that none of Appellants' issues are preserved. Nonetheless, a Counter-Statement of the Issues on Appeal is included so that the Court may focus on the appropriate issues and standards of review.

COUNTER-STATEMENT OF THE CASE

I. Factual History [2]

Respondents Paul Branco and Branco Investments, Inc., d/b/a Great American Cookie Co. (hereinafter collectively "Respondents" or "Branco"), owned and operated two Great American Cookie Company (hereinafter "GAC") franchises, one in the Sumter Mall and the other in the Magnolia Mall in Florence. (R. p. 21). Branco entered into a lease agreement (hereinafter "lease") with Sumter Mall, LLC, a South Carolina LLC under the control and direction of Appellant Hull Storey Retail Group, LLC (hereinafter collectively "Appellants" or "Hull Storey"), giving Branco a lease on Unit 55 in the Sumter Mall. (R. p. 21). The lease term was from December 30, 2002, to April 30, 2013. (R. p. 22).

Sometime in 2013, Respondent Branco Investments, Inc., the owner of the equipment and assets utilized in the Sumter Mall and Magnolia Mall GAC franchises, through Respondent Paul Branco, negotiated an asset sale agreement (hereinafter "Asset Purchase Agreement") with Brooktenn, LLC (hereinafter "Brooktenn"), a limited liability company owned by Stewart Applebaum (hereinafter "Applebaum"). (R. p. 359). Brooktenn owns and operates several GAC franchises in neighboring and other southeastern states. (R. p. 227, lines 12-14).

Pursuant to the Asset Purchase Agreement with Branco, Brooktenn submitted a lease application to Appellant Hull Storey, and Hull Storey approved Brooktenn's lease to operate a GAC franchise in the Sumter Mall. (R. p. 359). The approved lease agreement between Hull Storey and Brooktenn was not signed. (R. p. 359)

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[2] The trial court ably and accurately stated the factual background of this case in its Findings of Facts and Conclusions of Law. (R. pp. 1-4). Thus, Respondents will use the trial court's factual findings as relevant to the issues on this appeal to briefly summarize the background of this case.

When Appellants became aware of Branco's deal with Brooktenn, Respondent made a demand of $70,000 for a "lease assignment fee." (R. p. 155, lines 4-5, 13-20; p. 157, lines 14-18). Appellants knew and understood that Brooktenn was not taking an assignment of Branco's lease, but representatives from Appellants – specifically Hull Storey – nevertheless cited an assignment provision in the lease as a basis for the demand. (R. p. 155, lines 4-5, 13-20; p. 157, lines 14-18). Hull Storey eventually reduced its demand from $70,000 to $20,000. (R. p. 155, lines 4-5, 13-20; p. 157, lines 14-18).

Both Branco and Brooktenn were told by Hull Storey representatives that Brooktenn would not be allowed to operate in the Sumter Mall unless the $20,000.00 was paid. (R. p. 129, line 23-p. 131, line 12, p. 157, lines 4-9, p. 160, lines 5-23; pp. 360-362; pp. 378-379). When both Branco and Brooktenn objected and pointed out that there was not a lease assignment, the representatives then told Branco that the $20,000 was instead based on an effort to recoup capital investments made in the Sumter Mall. (R. p. 129, line 23-p. 131, line 12, p. 157, lines 4-9, p. 160, lines 5-23; pp. 360-362; pp. 378-379).

Once it became clear Branco would not pay the $20,000, Hull Storey turned to Brooktenn for the money. (R. p. 129, line 23-p. 131, line 12, p. 157, lines 4-9, p. 160, lines 5-23; pp. 360-362; pp. 378-379). Hull Storey representatives subsequently contacted Applebaum and suggested Applebaum should break his Asset Purchase Agreement with Branco. (R. p. 129, line 23-p. 131, line 12, p. 157, lines 4-9, p. 160, lines 5-23; pp. 360-362; pp. 378-379). They even suggested to Applebaum that Brooktenn would come out $50,000 "better" if it backed out of its deal with Branco. (R. p. 129, line 23-p. 131, line 12, p. 157, lines 4-9, p. 160, lines 5-23; pp. 360-362; pp. 378-379). Due to Appellants' conduct, Brooktenn withdrew from the agreement with Branco and abandoned

its effort to operate a franchise in Sumter. (R. p. 129, line 23-p. 131, line 12, p. 157, lines 4-9, p. 160, lines 5-23; pp. 360-362; pp. 378-379).

Due to the interference by Appellants – notably Hull Storey – with the Asset Purchase Agreement between Branco and Brooktenn, Branco lost $70,000. (R. p. 359; p. 197, lines 6-16, p. 227, lines 15-25). Branco was ultimately able to sell some of the equipment for $5,000, and after his relationship with Appellants terminated, he owed $1,375 in rent. (R. p. 7).

II. Procedural History

Branco filed a complaint against Appellants on March 5, 2015. (R. pp. 17-26). Appellants answered on April 14, 2015, admitting that the Asset Purchase Agreement was a valid contract. (R. p. 30; 37).

After approximately two years of discovery and motions practice, this matter proceeded to a bench trial before Judge Cothran. During the bench trial, Appellants made a motion for a "directed verdict" but failed to renew that motion at the close of the case. (R. pp. 235-238). At the conclusion of the trial, the trial court circulated a proposed order among counsel. Without waiting for the order to be reviewed, edited, signed, or entered, Appellants filed a Motion to Alter or Amend. (R. pp. 46-53). Two days later, the trial court filed its order, which took Appellants' objections into consideration as it made certain changes to the order. (R. pp. 10-15). The order ruled in Appellants' favor on many issues but ruled in favor of Branco on the claim of tortious interference with contractual relations and awarded Branco $63,625 in damages. (R. pp. 10-15).

Appellants did not renew their Motion to Alter or Amend or make a new Motion to Alter or Amend after the order was filed. Instead, Appellants filed a Notice of Appeal. Against the objections of Branco, Appellants 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 allegedly pending Motion to Alter or Amend. On August 28, 2017, this Court granted the motion.

Judge Cothran held a hearing on February 9, 2018, and filed an Amended Order of Judgement on March 2, 2018. (R. pp. 290-318; pp. 1-9). The Amended Order reached the same conclusions as the original order. (R. pp. 1-9).

STANDARD OF REVIEW

On appeal from a bench trial, "the trial judge's findings of fact will not be disturbed . . . if there is ***any evidence*** to reasonably support his findings. *Meredith v. Mt. Pleasant Boat Bldg. Co.*, 286 S.C. 115, 116, 333 S.E.2d 565, 565 (1985) (emphasis added) (citing *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976)). *See also Maddux Supply Co. v. Safhi, Inc.*, 316 S.C. 404, 406, 450 S.E.2d 101, 102 (Ct. App. 1994) (holding that the trial court's findings of fact will not be disturbed unless those findings are "wholly unsupported by the evidence or controlled by an erroneous conception or application of the law") Thus, the "appellate court standard of review extends only to the correction of errors of law." *Hunt v. Forestry Com'm*, 358 S.C. 564, 569, 595 S.E.2d 846, 849 (Ct. App. 2004) (quoting *Okatie River, L.L.C. v. Southeastern Site Prep, L.L.C.*, 353 S.C. 327, 334, 577 S.E.2d 468, 479 (2003)).

Moreover, an appellate court will not disregard the fact that the trial court is in a better position to determine the credibility of witnesses. *Cherry v. Thomasson*, 276 S.C. 524, 525, 280 S.E.2d 541, 541 (1981). It is not for the appellate court to weigh the evidence. *Kiriakides v. Atlas Food Sys. & Servs., Inc.*, 343 S.C. 587, 594, 541 S.E.2d 257, 261 (2001).

ARGUMENT

There are two reasons this Court should affirm the trial court's judgment.

First, none of the issues raised by Appellants are preserved.

Second, each of the issues raised by Appellants are substantively without merit for the following reasons: (1) Branco entered a valid contract with Brooktenn; (2) Appellants – specifically Hull Storey – interfered with that contract for an improper purpose and with actions constituting improper methods; (3) the trial court's award of damages was supported by ample evidence; and (4) the parties at issue had the requisite capacity and the trial court properly entered judgment.

This Court should affirm.

I. The issues raised in Appellants' appeal are unpreserved and the Court should dismiss the entire appeal on this ground alone.

As a threshold matter, each of Appellants' four issues are unpreserved for appeal.

"'Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide [the appellate courts] with a platform for meaningful appellate review.'" *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) (citations omitted); *see also Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (holding that it is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.). In cases tried without a jury, an appellant waives the right to question on appeal the trial court's denial of a Rule 41, SCRCP, motion when the appellant presents evidence after the initial denial of the motion and fails to renew the motion at the close of the case. *See Wallace v. Milliken & Co.*, 300 S.C. 553, 559, 389 S.E.2d 448, 451 (Ct. App. 1990). The Supreme Court of South Carolina has further explained that "the issue must be sufficiently clear to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the judge." *Herron*, 395 S.C. at 466, 719 S.E.2d at 642.

At the close of Respondents' case, Appellants' counsel – who is not the counsel it has for its current appeal – did make a motion for a "directed verdict," which is inapplicable to a matter

tried without a jury.[3] (R. pp. 235-238). Assuming that this constituted a valid motion for non-suit under Rule 41, SCRCP, after the trial court denied the motion as to the tortious interference claim, Appellants' counsel called an additional witness for its case-in-chief - a leasing representative for Hull Storey. (R. p. 244). Appellants' counsel never made a further motion, nor did counsel make any effort to renew the "directed verdict" motion. (R. pp. 280-288). Thus, Appellants plainly presented evidence after the initial denial, failed to renew the motion at the close of the case, and thus have waived the right for this Court to review any and all arguments raised in the appeal at bar. *See Wallace,* 300 S.C. at 559, 389 S.E.2d at 451.

In addition to Appellants' blanket failure to preserve any issues at bar for appeal by way of its failure to renew its "directed verdict" motion, each of Appellants' arguments are unpreserved for additional reasons.[4]

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[3] This Court has explained the distinction as follows:

> We note initially that while [appellant's] motion at the close of the evidence was couched as a "directed verdict" motion, governed by Rule 50, SCRCP, this was a non-jury action. As Rule 50 by its nature is applicable to jury trials, the proper motion for [appellant] to have made was a motion for involuntary non-suit under Rule 41, SCRCP. "After the plaintiff in an action tried by the court without a jury has completed the presentation of his evidence, the defendant, . . . may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief." Rule 41(b), SCRCP . . . Therefore, [appellant's] appeal is from the master's factual findings as a judge in a non-jury action at law. . . . Thus, this court must affirm if there is any evidence to support the master's findings.

Waterpointe I Prop. Owner's Ass'n, Inc. v. Paragon, Inc., 342 S.C. 454, 458–59, 536 S.E.2d 878, 880–81 (Ct. App. 2000).

[4] It appears Appellants' former counsel attempted to lodge some of the arguments raised in this appeal in a purported Motion to Amend. (R. pp. 46-53). However, Appellants cannot use Rule 52(b), SCRCP, to present to the Court an issue the party could have raised prior to judgment but did not, and the issue preservation rules plainly required Appellants to raise the issue at the close of the case. *See Wilder Corp*, 330 S.C. at 76, 497 S.E.2d at 733, *Wallace,* 300 S.C. at 559, 389 S.E.2d at 451. Moreover, Rule 52(b) by its express terms does not permit the parties to make new legal arguments, such as Appellants' Statute of Frauds argument or their legal capacity

Appellants' first argument is that there was a contingency in the contract that "could be satisfied only by Brooktenn obtaining a written, executed lease agreement for the Sumter Mall property." (App. Br. at 13). This argument that the Statute of Frauds prohibits enforcement of the contract at issue is simply not an argument that was ever raised prior to judgment and thus this issue is not preserved.

Appellants' second argument is that it had a legitimate purpose and business interest in requesting payment from Brooktenn or Branco. (App. Br. at 24). However, the transcript is bereft of any preserved argument before the judge that a legitimate purpose and business interest existed. While Appellants cite to some portions of testimony in their Brief, there was no actual argument on this point presented to the trial court before judgment. In fact, it does not appear that the words or phrases "legitimate," "purpose," "business interest," and "justified" were ever spoken by Appellants' counsel during trial or closing arguments, and the word "justification" was mentioned once in reciting the elements of tortious inference but never revisited. (R. p. 236, line 18-p. 238, line 7). Appellants simply did not do enough to preserve this issue as it was never raised to the trial judge during the trial. *See Wilder Corp*, 330 S.C. at 76, 497 S.E.2d at 733.

Appellants' third argument, that the amount of damages was without evidentiary support, was not addressed by then-counsel for Appellants during the "directed verdict" argument. In fact, other than a few questions and a fleeting mention in closing, there was virtually no discussion that the damages may have been without evidentiary support, and that limited discussion in not enough from which the trial court could glean "the precise nature of the alleged error," leaving the argument unpreserved. *See Herron*, 395 S.C. at 466, 719 S.E.2d at 642.

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argument. *See* Rule 52(b), SCRCP. In any event, as has been thoroughly briefed by Respondents in their opposition to the previously filed Motion to Remand in this case, Appellants' purported Motion to Amend was a nullity.

Appellants' fourth and final argument that the trial court supposedly awarded damages to the wrong party was not raised in any capacity during the trial, before judgment, or in the post-trial motion in the case. (R. pp. 70-289; pp. 46-53). It is further worth noting that this allegedly problematic judgment was entered nearly a year and a half ago. (R. p. 387). Yet Appellants' Brief offers the first instance of this argument, and thus the trial court has had no opportunity to rule on this issue or provide this Court with any platform for meaningful review. *See Herron*, 395 S.C. at 465, 719 S.E.2d at 642.

For these additional reasons, Appellants' first, second, third, and fourth arguments are further precluded from appellate review. Appellants plainly ask this Court to disregard this State's issue preservation rules; however, Appellants' counsel are experienced appellate lawyers who are well-acquainted with issue preservation law. This Court and the Supreme Court of South Carolina frequently and stringently apply issue preservation rules in cases every day, even those involving important constitutional issues and substantial civil verdicts. *See State v. Stone*, 376 S.C. 32, 36, 655 S.E.2d 487, 488–89 (2007) (finding a victim impact evidence issue unpreserved in a capital case); *see also State ex rel. Wilson v. Ortho-McNeil-Janssen Pharm., Inc.*, 414 S.C. 33, 777 S.E.2d 176 (2015) (finding countless issues unpreserved in a civil case involving a $327,073,700 award of civil penalties). That is so, of course, because "the validity of a doctrine does not depend on whose ox it gores." *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 525 (1953).

Nonetheless, if this Court were to overlook Appellants' failure with regard to preservation, it should nonetheless affirm the trial court's order.

II. There is a cornucopia of evidence in the record to support the trial court's ruling that a valid contract existed between Branco and Brooktenn.

There is ample evidence in the record to support the trial court's finding that Branco entered into a contract with Brooktenn. Specifically, the trial court correctly ruled that Branco had a valid

contract with Brooktenn for the sale of its assets, namely the Asset Purchase Agreement. (R. p. 359). Appellants' arguments to the contrary are without merit.

Under South Carolina law, "an agreement between two or more persons upon sufficient consideration to either do or not do a particular act is a contract." *McPeters v. Yeargin Const. Co.*, 290 S.C. 327, 331, 350 S.E.2d 208, 210–11 (Ct. App. 1986) "Mutual promises . . . .constitute a good consideration." *Baugh v. Columbia Heart Clinic, P.A.*, 402 S.C. 1, 19, 738 S.E.2d 480, 490 (Ct. App. 2013) (quoting *Evatt v. Campbell*, 234 S.C. 1, 8, 106 S.E.2d 447, 451 (1959)). *See also Edens v. Laurel Hill, Inc.*, 271 S.C. 360, 247 S.E.2d 434 (1978) (holding that in order for a contract to be binding, "there must be a mutual manifestation of assent" between the parties as to the terms of the contract").

A. The record shows that any supposed contingency in the contract was satisfied.

Even if Appellants are correct that the Asset Purchase Agreement can be read as having any contingency, there is abundant evidence that any such contingency was satisfied. In the written memorialization of the agreement,[5] which was drafted by two non-lawyers, Brooktenn agreed to

[5] In a footnote, Appellants argue that the Asset Purchase Agreement contained a second contingency, namely a second agreement regarding the purchase of certain assets relating to Branco's location in Florence. (*See* App. Br. at 12 n.9). This argument is unavailing. First, for the reasons discussed herein, this argument was unpreserved and the Asset Purchase Agreement was a valid contract between Branco and Brooktenn regarding the sale of Branco's assets in Sumter. Second, Applebaum squarely testified that the agreement relating to the Sumter location was "not at all" contingent, and "independent" of what occurred regarding the Florence location. (R. p. 178, lines 4-12). Third, even if this were two provisions of a single contract, the provision relating to the Florence location is separate and discrete from the provision relating to the Sumter location. (R. p. 359). Thus, on the plain face of the agreement, and as supported by the testimony in the case, to the extent the provision relating to Florence is problematic, it is severable. "A severable contract is one in its nature and purpose susceptible of division and apportionment, having two or more parts . . . . The entirety or severability of a contract depends primarily upon the intent of the parties rather than upon the divisibility of the subject, although the latter aids in determining the intention." *Columbia Architectural Group, Inc. v. Barker*, 274 S.C. 639, 641, 266 S.E.2d 428, 429 (1980) (quoting *Packard & Field v. Byrd*, 73 S.C. 1, 6, 51 S.E. 678, 679 (1905)). If the

purchase Branco's equipment in Sumter. (R. p. 359). This document also noted that Brooktenn would "get[]" a satisfactory lease from Hull Storey. (R. p. 359). In spite of Appellants' argument that this never occurred, the trial court properly found that "Hull Storey approved Brooktenn's lease application . . . ." (R. p. 2). Applebaum, in testimony the trial court found credible and upon which it heavily relied, explained as follows:

> A: . . . We already had approval of the lease. They already told us that we had a lease.
> . . .
>
> Q: But you were approved for the lease, and then after the approval came the claim for the 20,000-dollars?
>
> A: That's correct.
>
> Q: All right. At no time during your conversations with the defendant about your lease application did they mention to you a lease assignment fee?
>
> A: Never.

(R. p. 155, lines 4-5, 13-20; pp. 54-69). Applebaum further explained that as far as he was concerned, there was never a discussion about taking an assignment of Branco's lease because of the lease that he had with Hull Storey:

> Q: Did they tell you at that time it was about a lease assignment, that you were taking Paul's lease?
>
> A: First of all, they knew I wasn't taking Paul's lease because I had a new lease. We already had discussed it and that was in place.

(R. p. 157, lines 14-18). It is logical that the Court found this testimony credible, as Applebaum was the only witness to testify who had no pecuniary interest – personally or through his company – in the outcome of this trial. This testimony was further bolstered by texts to Branco directly

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record in the case supports any proposition, it is that the Florence agreement was a separate agreement and Appellants' tortious interference caused the breach of a second contract.

which explained the lease had been approved. (R. pp. 360-362). As additional evidence that there was a contract at issue in this case, in its Answer to the tortious interference allegation in Plaintiff's Complaint that a valid contract existed, Appellants each responded, "[u]pon information and belief, [Branco] . . . entered into a contract with Brooktenn . . . ." (R. p. 30; 37).[6]

As noted by the trial court, it was only after Hull Storey approved the lease – and thus satisfied any applicable conditions in the Asset Purchase Agreement – that it wrongly demanded funds from Brooktenn to which it was not entitled and effectively killed Branco's contract with Applebaum. (R. pp. 2-3; pp. 54-69).

Appellants spend much of their argument in what amounts to a misdirection: Appellants claim that because there was no signed lease in the record, the Statute of Frauds precludes enforcement of the contract at issue. In addition to this argument being unpreserved as discussed above, it also misunderstands the nature of the contract at issue here. The Asset Purchase Agreement simply does not run afoul of the Statute of Frauds.[7] Branco is not seeking damages for the breach of a lease between Brooktenn and Hull Storey, nor is Branco seeking damages for a tortious interference of a lease agreement between Brooktenn and Hull Storey. Branco is seeking damages for a tortious interference with the Asset Purchase Agreement between Branco and Brooktenn, which

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[6] Respondents would argue that the admission in Appellants' Answers provide an additional sustaining ground to affirm the trial court's decision as the admissions alone would be enough evidence for the trial court to determine a contract between Branco and Brooktenn existed.

[7] As noted previously, Appellants did not properly preserve their Statute of Frauds argument. In any event, their argument speaks only to the lease and not the Asset Purchase Agreement. There is no allegation that the Asset Purchase Agreement itself fails under the Statute of Frauds. Assuming, *arguendo*, that the Statute of Frauds applies to the Asset Purchase Agreement, it was plainly a signed writing sufficient to indicate a contract for sale as it amounted to a written memorialization of the parties' agreement. *See* S.C. Code Ann. § 36-2-201(1). (R. pp. 360-362). Additionally, even under the Statute of Frauds the trial court was free to look to the understanding of the parties to the agreement. *See* S.C. Code Ann. § 36-2-201(1) ("A writing is not insufficient because it omits or incorrectly states a term agreed upon . . . .").

for the reasons discussed herein, and as stated in the trial court's well-supported finding, constituted a valid contract.

Appellants would appear to take the position that this Court should weigh the evidence to determine, in the first instance, the efficacy of the approved lease between Hull Storey and Brooktenn as it relates to the Asset Purchase Agreement. Even if this Court were inclined to engage in such a task, there would still be some evidence in the record to support a valid lease between Hull Storey and Brooktenn. While there may be no fully executed lease in the record, and while such leases are generally subject to the Statute of Frauds, the inquiry does not end there.

This Court has recognized that the doctrine of estoppel can bar the defense of Statute of Frauds in a case at law. "[T]he party asserting the estoppel must show that he has suffered a definite, substantial, detrimental change of position in reliance on the contract, and that no remedy except enforcement of the bargain is adequate to restore his former position." *Atl. Wholesale Co. v. Solondz*, 283 S.C. 36, 41, 320 S.E.2d 720, 723 (Ct. App. 1984) (quoting *Collins Music Co. v. Cook*, 281 S.C. 580, 583, 316 S.E.2d 418, 420 (Ct. App. 1984)). There is evidence in the record that the lease would be valid under the estoppel exception to the Statute of Frauds. For example, there is at least some evidence that Brooktenn took the time it could have devoted to other business interest to negotiate its lease with Hull Storey. Of course, had this issue been raised or litigated at the trial court level, the exact extent of Brooktenn's reliance could have been explored.

Moreover, to the extent Appellants' make the seemingly strained argument that the absence of a written lease somehow invalidated the Asset Purchase Agreement under the Statute of Frauds, as discussed earlier in a pleading signed by their then-attorney Appellants specifically admitted that the Asset Purchase Agreement was a valid contract. (R. p. 30; 37). "In South Carolina, a pleading admitting a[n] . . . agreement that is within the statute of frauds may constitute a sufficient

writing within the statute so as to enable the court to enforce the contract; however, the pleading must be sufficiently definite and certain and it must be signed by the party to be charged or by his agent or attorney on his behalf. *Robert Harmon & Bore, Inc. v. Jenkins*, 282 S.C. 189, 193, 318 S.E.2d 371, 373–74 (Ct. App. 1984) (internal citations omitted); *see also Smith v. Traxler*, 224 S.C. 290, 295, 78 S.E.2d 630, 632 (1953) (acknowledging that "certain admissions made in appellant's answer" could destroy a Statute of Frauds defense, but that argument would be best addressed at the trial of the case).

Appellants' Statute of Frauds arguments, even if preserved, mischaracterize the contract at issue and do not create a reason to reverse the trial court's ruling.

B. Regardless of any supposed contingent language, the record is clear that Branco and Brooktenn manifested mutual assent and formed a contract.

To the extent the Court were to accept Appellants' argument that there was some unmet future condition relating to the Asset Purchase Agreement, there is still sufficient evidence to find that the Asset Purchase Agreement was a valid contract.

In *McPeters v. Yeargin Const. Co.*, 290 S.C. 327, 330, 350 S.E.2d 208, 210 (Ct. App. 1986), the construction company appellant met with employees, including respondent, to discuss ways to increase productivity. At the trial of the case, witnesses testified that the following general agreement was reached: if the employees, including respondent, agreed to finish the job on time so as to allow the appellant employer to receive a profit, then the appellant employer would agree to pay those employees a bonus of six months pay. *Id.* at 327, 350 S.E.2d at 210. Various officials from the appellant employer testified that the company "did not have a specific bonus policy and the payment of any bonuses was strictly discretionary with the company and subject to the final approval of its chairman." *Id.* At trial, the jury returned a verdict in favor of the respondent employee, and appellant employer appealed. *Id.*

In affirming the verdict and finding evidence of a valid contract, this Court held that there was valid consideration by way of the appellant employer's promise and the respondent employee's undertaking a responsibility to work harder. *McPeters*, 290 S.C. at 331, 350 S.E.2d at 211. Alternatively, the Court noted that there was evidence to reject appellant's contention that the bonuses were some discretionary future act that never occurred. *Id.*

Like the situation in *McPeters*, Branco promised to sell his equipment while Brooktenn agreed to undertake the responsibility of securing a lease (in addition to agreeing to pay $70,000 for the equipment). Further, there was also evidence here by way of Hull Storey's lease approval for the trial court to reject Appellants' contention that the subsequent lease procurement was some unsatisfied discretionary future act. Like the situation in *McPeters*, there was instead evidence that the acquisition of a lease went to the performance of an act required by the contract, and did not strike a blow to the contract's formation. There is certainly evidence that Branco and Brooktenn exchanged, at a minimum, mutual promises. *See Baugh,* 402 S.C. at 19, 738 S.E.2d at 490 (explaining that mutual promises constitute good consideration). *See also Champion v. Whaley*, 280 S.C. 116, 122, 311 S.E.2d 404, 408 (Ct. App. 1984) ("The fact that no duty of performance can arise until the happening of a condition does not make the existence of the contract depend upon its happening . . . .").

Applebaum himself explained as follows when referring to the written memorialization of his agreement with Branco, which was drafted by two non-attorneys:

Q: Okay. Yes, sir. And eventually you and Mr. Branco reached an agreement?

A: Yes.

Q: And you all memorialized that to writing; is that correct?

A: I'm sorry?

Q: You memorialized that to writing?

A: That's true.

. . .

Q: Is that the deal that you and Mr. Branco had about asset purchases?

A: Yes, sir.

Q: You were going to buy the assets from the Florence location that he had and the Sumter location that he had, correct?

A: Correct.

Q: All right. Exactly what were you buying pursuant to that agreement that you're holding in your hand there?

A: We're buying the equipment. We're buying, you know, the store basically, all the assets that were inside the store.

(R. p. 150, lines 1-8, p. 150, line 19-p. 151, line 6; p. 91, line 2-p. 92, line 9; p. 359; pp. 54-69). Certainly, Branco and Brooktenn manifested a mutual intent to be bound by the Asset Purchase Agreement, as evidenced by the testimony in the case and the fact that Brooktenn did everything in its power to fulfill its promise to secure a lease with Hull Storey. (R. p. 150, lines 1-8, p. 150, line 19-p. 151, line 6; p. 91, line 2-p. 92, line 9; p. 359; pp. 54-69).

For these reasons, the trial court did not err in ruling that Branco and Brooktenn had a valid contract.

III. The trial court relied on the abundant evidence of Appellants' gross misconduct in the case to properly hold that Appellants – specifically Hull Storey – acted with improper purpose and/or improper methods.

Appellants' assertion that the actions of Hull Storey were justified belies the record in the case.

A party is liable for tortious interference with contract when, among other elements, its actions are "for an improper purpose" or when its actions are by "improper methods." *Love v.*

Gamble, 316 S.C. 203, 214, 448 S.E.2d 876, 882 (Ct. App. 1994). The *Love* Court explained the contours of these improper purposes and improper methods as follows:

> Methods of interference considered improper are those means that are illegal or independently tortious, such as violations of statutes, regulations, or recognized common-law rules. Improper methods may include 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.
>
> Methods also may be improper because they violate an established standard of a trade or profession, or involve unethical conduct. Sharp dealing, overreaching, or unfair competition may also constitute improper methods.

Love, 316 S.C. at 215, 448 S.E.2d at 883 (quoting *Duggin v. Adams*, 360 S.E.2d 832, 836-37 (Va. 1987)). In *Webb v. Elrod*, 308 S.C. 445, 448, 418 S.E.2d 559, 561 (Ct. App. 1992), the Court specifically held that interference would be unjustified and serve no legitimate purpose if the purpose of an entity's "contacts was to procure the breach" of a contract.

Here, the evidence of improper purpose and improper methods is overwhelming. As explained by the trial court in its factual findings, and as supported by the record, in an effort to interfere with the Asset Purchase Agreement (1) Appellants – specifically Hull Storey – demanded funds that were only applicable if Branco was assigning the lease, which did not occur here and which Appellants knew was not occurring; (2) Appellants refused to allow Brooktenn to operate at their premises unless they were paid off; (3) Appellants unilaterally changed their justification for demanding the money when the payment was challenged; and (4) Appellants contacted Brooktenn directly and encouraged Brooktenn to break its contract with Branco by stating that Brooktenn would be better off if it backed out of the deal with Branco and paid Appellants directly. (R. pp. 2-3; p. 129, line 23-p. 131, line 12, p. 157, lines 4-9, p. 160, lines 5-23; pp. 360-362; pp. 378-379).

Further, Applebaum testified that Appellants' method of behavior was far from an appropriate, routine business dealing:

A: . . . I said I don't do business this way. I wouldn't stab somebody in the back.

Q: The suggestion was of the 70,000-dollars that you were supposed to give to Paul, don't give it to Paul, give us 20, and you come out 50,000-dollars to the better?

A: That's correct.

Q: And they knew of your deal obviously with Mr. Branco at that time?

A: They did.

(R. p. 160, line 16-p. 161, line 1; pp. 2-3) (making the factual finding that "Applebaum testified he has been in business for years and dealt with many malls and landlords but had never encountered this sort of behavior"). The tactics employed by Appellants, as supported by the evidence, offer numerous badges of improper purpose and improper methods: bribery; misrepresentation; duress; undue influence; sharp dealing; overreaching; unethical conduct; and violation of an established standard of a trade or profession. After weighing this evidence and credibility of the witnesses, the trial court agreed and properly ruled in Branco's favor. (R. p. 4).

The gravamen of Appellants' argument is that Hull Storey had some legitimate purpose for interfering with Branco's contract because Appellants were seeking to make money off their property. Appellants cite to federal cases for the generic proposition that legitimate business purposes are protected. (App. Br. at 16-19). Assuming these cases accurately state the proper rules under South Carolina law, as stated above the record correctly shows there was no legitimate business interest in Appellants' behavior. Under Appellants' definition of a legitimate business interest, there could be no such tort as tortious interference because in virtually each of these cases the culpable party acts to further its own self-interest. The problem is that the self-interested behavior outlined herein amounted to substantial self-dealing, unethical behavior, and protection of Appellants' interests above, and at the expense of, all else.

The trial court did review Appellants' purported motives and stated that "[t]his interference was not justified in any way and there was no ***credible*** evidence of justification offered by defendants at trial or in the pleadings." (R. p. 4) (emphasis added). Even if the Appellants are successful in scraping together some evidence of proper motive, and even if this issue was not precluded from review, it would still not eradicate the plentiful evidence "to reasonably support [the trial court's] findings. *Meredith,* 286 S.C. at 116, 333 S.E.2d at 565.

The Court should affirm the trial court on this issue.

IV. The trial court correctly entered a damage award of $63,625 as it represented the actual loss suffered by Branco as a result of Appellants' tortious behavior.

The trial court reasonably determined the damages suffered by Branco in this case.

When calculating damages for breach of contract, damages should place a nonbreaching party in the position he would have enjoyed had the contract been performed. *Madren v. Bradford,* 378 S.C. 187, 195, 661 S.E.2d 390, 395 (Ct. App. 2008) (citing *Collins Entm't, Inc. v. White*, 363 S.C. 546, 559, 611 S.E.2d 262, 268–69 (Ct. App. 2005)). A party need not prove damages with mathematical certainty so long as the evidence allows a court to reasonably determine an appropriate amount. *Id.* When dealing with damages ascertained by a trial court in a bench trial, this Court has held that it should "defer to the trial court's decision" and that "questions regarding credibility and weight of evidence are exclusively for the trial judge." *Id.* (citing *Sheek v. Crimestoppers Alarm Systems*, 297 S.C. 375, 377, 377 S.E.2d 132, 133 (Ct. App. 1989)).

In *Madren*, the trial court held that a putative purchaser breached a contract with his seller. *Madren*, 378 S.C. at 190–91, 661 S.E.2d at 392. The sole evidence noted by the Court on the issue of damages was the testimony of the respondent seller. *Id.* at 195–96, 661 S.E.2d at 395. Specifically, respondent seller testified that although he had spent $82,000 on a large tract of land, the property at issue had since been subdivided and he estimated that $25,000 of the initial purchase

price could be attributed to the property at issue. *Id.* He further testified that his best "estimate" of his time and labor in the home was $40,000, and that the contract price was $120,000 (although no appraisal had been completed). *Id.*

The Court affirmed the trial court's damage award of $55,000, which was calculated "by subtracting the [respondent's] original purchase price for the House ($25,000) and the [respondent's] estimated cost of labor and materials ($40,000) from the Contract's purchase price of the House ($120,000)." *Id.* at 96, 661 S.E.2d at 395. In affirming the award, the Court specifically "defer[red] to the trial court's decision to believe [respondent's] testimony regarding financial figures and use those figures in calculating damages." *Id.*

Here, like in *Madren*, although the parties did not have an appraisal they had contractually agreed on a price of $70,000 for the equipment at issue. (R. p. 359). As additional evidence, Branco testified that his equipment's value was $70,000, and specifically noted that there was unique equipment in the Sumter location that supported that value. (R. p. 197, lines 6-16). Further, Applebaum, a business owner aware of the nature of Branco's business, agreed to pay $70,000 for the equipment. (R. p. 227, lines 15-25).

Like the trial court in *Madren*, the trial court here found Branco's testimony on the issue of value and financial figures credible, particularly as it was supported by the price listed in the Asset Purchase Agreement to which a third-party fellow business owner had agreed. (R. p. 7). The trial court thus used $70,000 as the baseline value. (R. p. 7). From that number, like the court in in *Madren*, the trial court here subtracted the value already received, namely the value received from the sale of some of the equipment ($5,000) and unpaid rent owed to Appellants ($1,375.00), for a total damage award of $63,625. (R. p. 7).

Appellant thus incorrectly assert that the trial court entered its damage award without a "sufficient evidentiary basis." (App. Br. at 20). What Appellants actually offer in support can be liberally described as some competing evidence. However, as is the standard for reviewing these cases, the trial court only needed ***any evidence*** support its findings. *Meredith,* 286 S.C. at 116, 333 S.E.2d at 565.

If there is any distinguishing characteristic from *Madren* to the case at bar, it would be that the evidence of damages is even stronger in this case. Moreover, as Branco would have received $70,000 had Appellants not tortiously interfered with the contract, the trial court's award placed Branco squarely in the position it would have been in had the contract been performed. *See Madren,* 378 S.C. at 195, 661 S.E.2d at 395.

The trial court's damage award was well-founded.

V. The issue of capacity and form of judgment was never raised below, but regardless the trial court correctly entered judgment in this case.

To the extent Appellants attack the trial court's imposition of judgment, the trial court's judgment should be affirmed.

As noted previously, the issue of capacity and the form of the judgment was not raised before the trial court in any form, and on that basis alone the Court should affirm the trial court's entry of judgment. An examination of Appellants' allegations counsels the same result.

Appellants' claim that Branco Investments, Inc. somehow lacked requisite capacity is meritless. The sole evidentiary basis for this assertion is an out-of-record citation[8] to the Secretary of State's website. Yet there is a dearth of information in the record as to why the Secretary of State's

[8] Branco would note that in addition to being unpreserved, Appellants cite to numerous documents not included in the Designation of Matter, and Appellants have never requested the Court take judicial notice of these documents and other sources.

website might have shown this information, what that notation actually meant in this case, and what processes were employed in arriving at that designation.[9] It is plain that (1) Branco Investments, Inc., through Paul Branco, conducted business with Brooktenn and (2) Branco Investments, Inc. had full corporate status when virtually all legal proceedings relevant to this matter occurred and certainly during trial. This Court has rejected such hyper-technical corporate identity arguments in the service of process context:

> A suit at law is not a children's game, but a serious effort on the part of adult human beings to administer justice; and the purpose of process is to bring parties into court. If it names them in such terms that every intelligent person understands who is meant, as is the case here, it has fulfilled its purpose; and courts should not put themselves in the position of failing to recognize what is apparent to everyone else.

McCall v. IKON, 363 S.C. 646, 652–53, 611 S.E.2d 315, 318 (Ct. App. 2005) (quoting *Griffin v. Capital Cash*, 310 S.C. 288, 292, 423 S.E.2d 143, 146 (Ct. App. 1992)); *see also Long v. Carolina Baking Co.*, 193 S.C. 225, 239, 8 S.E.2d 326, 332 (1939) ("If a corporation has acquired a name by usage, an adjudication against it by the name so acquired is valid and binding."). Regardless of its status, that Branco Investments, Inc. was selling off equipment (a maneuver thwarted by Appellants) is evidence that it was, at minimum, liquidating business assets. This is an expressly permitted activity even for dissolved corporations. *See* S.C. Code Ann. § 33-14-210(d).

If the Court were to set aside the preservation issues in this case, the only substantive argument remaining for Appellants would simply result in the remedy have having the trial court

[9] For example, the Secretary of State must mail written notice to the effected corporation before dissolution, among a myriad of other technical requirements. *See* S.C. Code Ann. § 33-14-210(a). It is certainly within the realm of possibility, if not likelihood, that the Secretary of State's office may have failed to perform one of the many technical requirements set forth in the statute.

engage in the needless and ministerial task of adding another party to the judgment.[10] For these reasons, the Court should affirm.

CONCLUSION

Based on the foregoing reasons, this Court should affirm the judgment of the trial court.

Respectfully submitted,

October 26, 2018

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[10] It is worth noting that were the Court decide to add a party to the judgment, it would not change Appellants' obligation to pay post-judgment interest. "Post-judgment interest is in the nature of a penalty. . . . If, after appeal, a further *determination by the trial court* is necessary in order to *fix the amount of an award*, the award will not draw interest until the determination is made." *Babb v. Rothrock*, 310 S.C. 350, 354, 426 S.E.2d 789, 792 (1993). In *Vance v. Jacobs*, 294 S.C. 377, 379, 364 S.E.2d 755, 756 (Ct. App. 1988), the plaintiff obtained a jury verdict, and the trial judge entered a JNOV. The appellate court reversed the JNOV, and "remanded for entry of judgment on the verdict." *Id.* The appellate court ruled that interest ran from the date of the original judgment. *Id.*; *see also Edens v. S. Carolina Farm Bureau Mut. Ins. Co.*, 288 S.C. 435, 436, 343 S.E.2d 49, 50 (Ct. App. 1986). Thus, the direction to add a party or replace a party would require no further "determination" from the trial court, and certainly would not be necessary to fix the amount.