

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

R. Ferrell Cothran, Circuit Court Judge

Civil Action No. 2015-CP-43-596
Court of Appeals Case No. 2017-000998
Appellate Case No. 2021-000233

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

v.

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

**RESPONDENTS' RETURN TO THE
PETITION FOR CERTIORARI**

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INTRODUCTION

This Court should deny Paul Branco and Branco Investments, Inc., d/b/a Great American Cookie Company's (collectively and hereinafter "Branco" or "Petitioner") Petition for Certiorari. None of the factors exist from Rule 242(b) SCACR to justify the issuance of the writ. There is no novel question of law, no dissenting opinion at the Court of Appeals, no constitutional issues, no conflict with the United States Supreme Court on any question of federal law, and contrary to Branco's assertion, there is no conflict with this Court's precedents. In an attempt to make this matter appear worthy of certiorari, Branco incorrectly argues that certain aspects of the Court of Appeals' unpublished opinion conflict with this Court's precedents. The argument is not accurate. Rather, as explained below, the Court of Appeals correctly applied this Court's precedents to the issues raised in Respondents' appeal, and this Court should deny Branco's Petition for Certiorari.

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

1. Is the Court of Appeals' opinion consistent with and did it correctly apply this Court's precedents in determining that, in the absence of an enforceable contract, there can be no claim for interference with contract?
2. Did the Court of Appeals correctly determine that there was no evidence that the contingencies in the Proposal for Purchase were ever satisfied, and, thus, there was no evidence that the contingent Proposal for Purchase ever became an enforceable contract with which anyone could interfere?
3. Did the Court of Appeals properly interpret and appropriately rely upon *Chitwood v. McMillan*, 189 S.C. 262, 1 S.E.2d 162 (1939)?
4. Did the Court of Appeals correctly conclude that the Statute of Frauds issue was preserved for appellate review because it had been raised to and ruled upon by the trial court?

COUNTER STATEMENT OF THE FACTS

Sumter Mall, LLC owns the Sumter Mall, which is a retail shopping mall in Sumter, South Carolina. *See* Complaint at ¶ 3 (R. 21). Hull Storey Retail Group, LLC (hereinafter "HSRG") manages the mall on behalf of Sumter Mall, LLC. *See* Trial Tr. at 9:8–15 (R. 78);

Pl.’s Trial Ex. 10 at p.1 (R. 374). Both Sumter Mall and HSRG (collectively, “Respondents”) are Georgia limited liability companies authorized to conduct business in South Carolina. *See* Answer at ¶¶ 2–3 (R. 28). The dispute underlying this appeal arises from the lease of a retail space 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 Brancos operated the GAC store in the Sumter Mall from December 30, 2002, until May 15, 2013. *Id.*; *see also* Amend. Order of J. at 2 and 4 (R. 2 and 4). The Brancos also operated a second GAC store at the Magnolia Mall in Florence, South Carolina. *See* Trial Tr. 8:22–24 (R. 87).

As the end of the Branco’s lease term drew near, Paul Branco engaged in discussions with HSRG’s leasing representative, Lewis White, regarding the potential renewal or extension of the Sumter Mall lease. *See* Trial Tr. at 118:10–20, 119:23–25, 120:1–15, 121:12–17, 175:14–19, 177:11–13, and 177:18–20 (R. 187–90, 244 and 246); Pl.’s Trial Ex. 2 at pp. 1–2 (R. 347–48). 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). Although White and Branco appeared to be close to reaching an agreement on terms that HSRG’s real estate committee could authorize, 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.

In January of 2013, Mr. Branco—without disclosing the same to White and HSRG—on behalf of Branco Investments, LLC, 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, HSRG was still negotiating with Branco and was planning on him renewing the lease, and that Branco had not yet informed HSRG he was negotiating with a third party to purchase and take over the store).

While simultaneously negotiating a lease renewal with Hull Storey and a possible sale to Applebaum, Branco and Applebaum did not disclose to HSRG their intention for Brooktenn 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 his operation in the space. *Id.* at 105:7–11 and 183:14–24 (R. 174 and 252). White testified that based on the limited information Branco eventually gave him and based on Branco’s strategy of simultaneously negotiating a lease renewal and a potential sale of the franchise, HSRG’s understanding was that any potential new GAC operator would come in via a lease assignment in the future. Trial Tr. at 186:20–187:6 (R. 255–56).

On March 1, 2013, Branco Investments and Brooktenn entered into a conditional agreement titled “Proposal for Purchase” for the purchase of Branco’s equipment and other assets located in the GAC stores in the Sumter Mall and Florence Mall. *See* Trial Tr. at 20:24–25, 21:1–4, 21:21–25, 22:1–6, 22:22–25, and 23:1–8 (R. 89–92); Pl.’s Trial Ex. 4 (R. 359). The Proposal for Purchase was *expressly conditioned* upon Brooktenn obtaining a satisfactory lease from HSRG 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.”); *see also* Trial Tr. at 27:1–8 (R. 96). The Proposal for Purchase 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 that Brooktenn never obtained or sought to obtain a lease in the Florence Mall. *See* Trial Tr. at 96:5–7, 96:23–25, 99:5–7 (R. 165 and 167).

III. HSRG’s understanding of and response to the Proposal for Purchase.

As noted above, based on the limited information Branco disclosed to White about his potential sale to Brooktenn, and based on the fact that Branco continued negotiating a lease renewal even *after* disclosing that information to White, HSRG 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 extension of Branco’s lease and an assignment of that lease of the existing premises. *See* Trial Tr. at 185:3 to 187:6 and 190:13–25 (R. 254–56 and 259); *see also id.* at 104:20–106:19 (R. 173–75) (Applebaum admitted that months prior to HSRG’s awareness of Applebaum’s involvement and while Mr. Branco was negotiating his lease renewal with HSRG, Mr. Branco had shared with Applebaum the lease renewal proposal he planned to send HSRG and asked Applebaum to review and provide feedback on it).

Shortly after learning of the proposed transaction, White sought more information about it from Branco. *See id.* at 185:3 to 186:19 (R. 254–55); Pl.’s Trial Ex. 7 (R. 365). In response, Branco informed White that in the contingent Proposal for Purchase he had offered to sell his Sumter Mall store to Brooktenn for \$70,000, of which he claimed \$45,000 was for Branco’s interest in the leasehold, and the \$25,000 balance was for Branco Investment’s equipment and inventory. *See* Trial Tr. at 198:4–9 (R. 267). 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 allocating \$30,000 to the sale of the Florence Mall store and its equipment and inventory. *See* Pl.’s Trial Ex. 4 (R. 359). Not surprisingly then, HSRG believed the proposed transaction amounted to Branco selling the leasehold interest at the Sumter Mall to Brooktenn. *See* Trial Tr. at 192:2–11 (R. 261). Accordingly, HSRG informed both Branco and Applebaum that the proposed arrangement between Branco Investments and Brooktenn amounted to a lease assignment, triggering a payment to HSRG by either Branco or Brooktenn 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).

On April 30, 2013, White emailed Branco and Applebaum a draft document to extend Branco’s lease until May 15, 2015, and attached 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, nor Brooktenn executed the draft lease extension and assignment agreement provided by White.¹ *See* Trial Tr. at 190:16–17 (R. 259). Furthermore, Brooktenn never executed a lease with Sumter Mall and/or HSRG. *See* Amend. Order of J. at 2 (R. 2) (noting that a “lease agreement between Hull Storey and Brooktenn was never executed”). Several days before sending this draft assignment and assumption, White told Branco that HSRG’s real estate committee had conditionally approved this proposal, and consistent with the document he subsequently sent noted, “Stewart’s deal has been approved *if we can determine a*

¹ 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 HSRG or Sumter Mall, LLC and Brooktenn has been proffered at any time.

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 HSRG’s and Sumter Mall’s proposal including the required payment of \$20,000.00 for Brooktenn to assume the lease and operate a GAC store at Sumter Mall. 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). Brooktenn never entered *any* lease agreement with Sumter Mall and/or HSRG as required by the contingent Proposal for Purchase. See Trial Tr. 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”). Similarly, Brooktenn never secured (or even attempted to secure) a lease of the GAC store at the Florence Mall as required by the contingent 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).

COUNTER-STATEMENT OF THE CASE

Branco commenced this action on March 5, 2015, by filing a complaint against Respondents alleging causes of action for Breach of Contract with Fraudulent Intent, Tortious Interference with a Contract and Fraud and Constructive Fraud. See Complaint (R. p. 21–23 at ¶¶ 12–26). Respondents each filed an Answer. See Answers (R. 27 and 34). Branco’s Petition for Certiorari incorrectly asserts that Respondents’ Answer “admit[ed] that the asset purchase agreement at issue was a valid contract.” See Pet. for Cert. at 4 (citing R. p. 30 at ¶¶ 17–18; p. 37 at ¶¶ 17–18). In reality, Respondents’ Answers state that only the purported contingent Proposal for Purchase “speaks for itself” and merely acknowledge that Branco and Brooktenn entered into an agreement for Brooktenn to purchase Branco’s leasehold interest at the Sumter Mall without acknowledging said agreement to be valid. See Answers (R. p. 30 at ¶¶ 17–18; p. 37 at ¶¶ 17–18).

On February 28, 2017, the case proceeded to trial before the Honorable R. Ferrell Cothran, Jr. in the Sumter County Court of Common Pleas. *See* Trial Tr. at 1–219 (R. 70–288). Subsequent to the trial, the trial court issued an order of judgment ruling in Respondents favor as to counts one and three of the Complaint (Breach of Contract with Fraudulent Intent and Fraud and Constructive Fraud) and in Branco’s favor as to count two of the Complaint (Tortious Interference with a Contract). *See* Order of Judgment at 4, 5 (R. 13–14). Respondents filed a Motion to Amend Judgment, *see* Mot. to Amend 1–8 (R. 46–53), and, after holding a hearing on the Motion, the court issued an amended order of judgment on March 2, 2018 that again ruled for Respondents on counts one and three and ruled for Branco on count two. *See* Amend. Order of J. at 4, 5 (R. 4–5). Respondents appealed.

STANDARD OF REVIEW

This Court reviews Petitions for Certiorari under the standard in Rule 242, SCACR. A Petition “will be granted only where there are special and important reasons” such as the five enumerated in the rule, *e.g.*, a novel question of law, a dissenting opinion at the Court of Appeals, where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court, a substantial constitutional issue, or a conflict with the United States Supreme Court on any question of federal law. *See* Rule 242(b), SCACR. At the certiorari petition stage, the question before this Court is not whether the lower court erred but whether there is a “special and important reason” to grant the petition. *See* Rule 242, SCACR; *see also* Jean H. Toal et al., *Appellate Practice in South Carolina*, 12 (2d ed. 2002) (“The Court of Appeals is an error-correction court, whereas the Supreme Court is a law-giving court.”).

ARGUMENT

I. The Court of Appeals’ opinion is consistent with and correctly applied this Court’s precedents in determining that, in the absence of an enforceable contract, there can be no tortious interference with contract.

It is axiomatic that there can be no tortious interference with a contract unless there is a viable contract with which to interfere. Tortious interference 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. (emphasis added)

Dutch Fork Dev. Group II, LLC v. SEL Properties, LLC, 406 S.C. 596, 604, 753 S.E.2d 840, 844 (2012) (citing *Camp v. Springs Mortgage Corp.*, 310 S.C. 514, 517, 426 S.E.2d 304, 305 (1993)); *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 this instance, the Court of Appeals correctly articulated the elements of a claim for tortious interference noting, “[t]he 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.” *Branco v. Hull Storey Retail Group*; 2021 S.C. App. Unpub. LEXIS 9, [*10]; 2021 WL 118536 (Ct. App. 2021). This language is consistent with the language found in this Court’s existing body of case law on the topic. In fact, the Court of Appeals in *Branco* relied expressly upon the exact language found in this Court’s opinions in *Dutch Fork Dev. Grp. II, LLC* and in *Camp*. *See id.* In view of the aforementioned authority, the Court of Appeals’

opinion clearly applied this Court's precedents correctly in determining that, in the absence of an enforceable contract, there can be no claim for tortious interference with a contract.

II. The Court of Appeals correctly determined that there was no evidence that the contingent Proposal for Purchase's contingency was ever satisfied, and thus, no evidence that the contingent Proposal for Purchase ever became an enforceable contract.

In the instant lawsuit, Respondents cannot have interfered with a contract between Branco Investments, Inc., and Brooktenn because there was no valid, enforceable contract with which to interfere. The contingent Proposal for Purchase between Branco Investments, Inc., and Brooktenn contained a condition precedent—namely that the agreement's validity and enforceability was dependent on Brooktenn obtaining a lease for the Sumter Mall location from Hull Storey 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 Hull Storey Gibson within 90 days of signed proposal.")²

A condition precedent is an act which must occur before performance by the other party is due. *Alexander's Land Co., L.L.C. v. M&M&K Corp.*, 390 S.C. 582,596, 703 S.E.2d 207 (2010) (internal citations omitted). If a contract contains a condition precedent, that condition must either occur or it must be excused before a party's duty to perform arises. *Id.* (internal citations omitted). Even an otherwise valid contract is unenforceable in the absence of the satisfaction of conditions precedent to performance. *See Worley v. Yarborough Ford*, 317 S.C. 206, 210, 452 S.E.2d 622 (1994) ("A condition precedent

² 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 undisputed 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.

entails something that is essential to a right of action. In contract law, the term connotes any fact other than the lapse of time, which, unless excused, must exist or occur before a duty of immediate performance arises.”) (internal citations omitted).³ Brooktenn purportedly *applied* for a lease for a Sumter Mall location, but the record before the trial court is entirely bereft of any document indicating Hull Storey ever entered a lease agreement with Brooktenn and thus satisfied the Proposal for Purchase’s contingency.⁴

Because there is no evidence the lease contingency was ever satisfied, Brooktenn and Branco were not and have never been subject to a duty to perform under the terms of their purported contingent Proposal for Purchase as would be required for that agreement to ripen into a valid and enforceable contract according to this Court in *Alexander’s Land Co., L.L.C.*

³ See also *Gecy v. S.C. Bank & Trust*, 422 S.C. 509, 522, 812 S.E.2d 750 (Ct. App. 2018) (“A condition precedent is an act which must occur before performance by the other party is due. If a contract contains a condition precedent, that condition must either occur or it must be excused before a party’s duty to perform arises.”); *McGill v. Moore*, 381 S.C. 179, 672 S.E.2d 571 (2009) (emphasizing the high importance of satisfying contingencies to render a contract enforceable, noting that where “a condition has not been met and has not been excused,” a party to a contract cannot “circumvent the contract’s condition precedent by arguing substantial compliance”).

⁴ 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 HSRG. 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.’”); 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.”). But approval of a lease application and execution and entry into a lease are not the same, and the conclusion of the Trial Court and Petitioner are 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.”).

v. M&M&K Corp. 390 S.C. 582, 596, 703 S.E.2d 207 (2010). Accordingly, the agreement between Brooktenn and Branco Investments was and remains unenforceable. Branco and Branco Investments could never be capable of establishing the existence of an enforceable contract, which is a required element of a claim for tortious interference with a contract.

The proposed lease extension was for approximately two years, and because a lease agreement for duration longer than one year, as a matter of law, must be in writing, the contingency in the Proposal for Purchase agreement between Branco Investments, Inc., and Brooktenn could be satisfied *only* by Brooktenn obtaining a written, signed lease agreement for the Sumter Mall property (and the Florence 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 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 and 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).

It is clear that Brooktenn never satisfied the contingency in the Proposal for Purchase of “getting a satisfactory lease” for the Sumter Mall. Even assuming *arguendo* that Brooktenn

and Mr. White informally agreed *orally* to the terms of a lease, the contingency of “getting a satisfactory lease” is still not satisfied unless and until a *written* lease is signed by the parties. 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. *See* Pl.’s Trial Ex. 8 (R. 366–72). It was never signed by anyone.

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 HSRG and Brooktenn, the contingency in the proposed agreement between Branco Investments, Inc., and Brooktenn was not satisfied, and thus there was no valid and enforceable contract with which HSRG 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 v. Bi-Lo Stores, Inc.*, 313 S.C. 272, 277, 437 S.E.2d 168, 171 (Ct. App. 1993); *see also BCD LLC v. BMW Mfg. Co., LLC*, 360 Fed. Appx. 428, 434 (4th Cir. 2010) (applying South Carolina law and 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”). The courts in South Carolina are not alone among the states in holding that where an agreement is contingent on a condition that is unsatisfied, there can be no tortious interference with contract because there was never

an enforceable contract with which to interfere. *See First Union Mgmt. CO1 p., Inc. v. Kmart Corp.*, 1994 WL 385645 (Minn. Ct. App. 1994).

III. The Court of Appeals properly interpreted and appropriately relied upon *Chitwood v. McMillan*, 189 S.C. 262, 1 S.E.2d 162 (1939).

As previously noted, tortious interference with a contract is, in part, expressly predicated on the existence of a valid, enforceable contract. *Dutch Fork Dev. Group II, LLC v. SEL Properties, LLC*, 406 S.C. 596, 604, 753 S.E.2d 840, 844 (2012); *Camp v. Springs Mortgage Corp.*, 310 S.C. 514, 517, 426 S.E.2d 304, 305 (1993). This Court's older holding in *Chitwood v. McMillan*, 189 S.C. 262, 265, 1 S.E.2d 162 (1939) is consistent with those holdings, and the Court of Appeals did not err by citing to and relying on *Chitwood's* holding.

Branco maintains that the Court of Appeals' reliance on *Chitwood* is "misplaced." *See* Pet. for Cert. at 10. Branco argues that *Chitwood* is inapplicable in this matter because (1) "Hull-Storey's sole involvement in the asset purchase transaction could have only occurred if Branco elected to try to assign or sublet the lease," and (2) in *Chitwood*, "Mr. Bowe was forbidden, pursuant to the terms of his contract with SCDOT, from entering into any subcontract without first obtaining written consent from SCDOT (which he failed to do). Here, the expiring Lease Agreement contains no such prohibition against Branco entering into a contract to sell certain assets of his business." *See* Pet. for Cert. at 10–11.

Branco's arguments, made in an apparent attempt to distinguish this matter from the *Chitwood* case, are wholly without merit. For example, Branco's contention that "Hull-Storey's sole involvement in the asset purchase transaction could have only occurred if Branco elected to try to assign or sublet the lease," *see* Pet. for Cert. at 11, ignores the express language of the Proposal for Purchase. As previously noted, the Proposal for Purchase explicitly states that "[t]his proposal is contingent upon buyers getting a satisfactory lease from Hull Storey Gibson within 90

days of the signed proposal.” Pl.’s Trial Ex. 4 (R. 359). HSRG would necessarily be involved as the counterparty in a “satisfactory lease from Hull Storey.” In view of this unambiguous language, Branco’s suggestion that only an attempted lease assignment by Branco would trigger HSRG’s involvement in the purported asset purchase agreement is baseless. Branco’s assertion wholly ignores HSRG’s ability (and more importantly, its right as the landowner and counterparty in any lease) to control whether or not Brooktenn could in fact obtain a “satisfactory lease.” By definition as the landowner, HSRG’s involvement and agreement is an intrinsic and necessary component of the process of satisfying the conditions of and fulfilling the terms of the contingencies in the Proposal for Purchase between Brooktenn and Branco.

Branco’s second argument to distinguish *Chitwood* fares no better. Specifically, Branco asserts that *Chitwood* is inapplicable in this matter because in *Chitwood*, Bowe’s contract with the SCDOT prohibited any sort of subcontracting of the work without the consent of the SCDOT, while Branco’s lease agreement with Respondent did not prohibit Branco from selling its assets to a third party. *See* Pet. for Cert. at 10–11. This is a distinction without a difference. Branco’s assertion that his lease does not prohibit such a sale of Branco’s assets demonstrates his failure to either recognize or acknowledge the significance of the express contingency in the Proposal for Purchase (the acquisition of a “satisfactory lease”) that must be satisfied in order to render the agreement between Brooktenn and Branco valid and enforceable. *See* Pet. for Cert. at 10–11; Pl.’s Trial Ex. 4 (R. 359). Simply put, the absence of any language in the Branco-HSRG lease regarding Branco’s ability to sell its own assets is irrelevant to and has no bearing upon the determination of whether or not the agreement between Branco and Brooktenn is valid and enforceable.⁵

⁵In fact, after terminating the Proposal for Purchase (with its \$70,000 price for Sumter Mall), Branco sold its assets to a different party for \$5,000 establishing the difference of \$65,000 as the value of the leasehold estate to which it had no contractual right.

The *Chitwood* Court instructs that there must be evidence of the satisfaction of the contingencies in a contract being satisfied in order for the contract to be valid and enforceable. *Chitwood v. McMillan* 189 S.C. 262,265, 1 S.E.2d 162 (1939). Branco misses the relevance of this proposition, and, instead, fixates on the fact that *Chitwood* involved a different type of contract and a different contingency than the one in the instant proceeding:

Accordingly, the Court of Appeals' reliance upon *Chitwood* is wholly inapposite, as *Chitwood* involved an underlying contract that contained express terms forbidding subcontracts without prior approval. Here, there was no subcontract, nor did the mall's lease contain any prohibition against the sale of the assets of a privately-held business.

Pet. for Cert. at 11. Branco seemingly argues that that the distinct nature of the contracts and contingencies in the present case and *Chitwood* renders the *Chitwood* opinion inapplicable to the current case. However, *Chitwood's* holding (and its applicability here) is not dependent on the specific *nature* of the underlying contingency. Instead, the *Chitwood* Court's analysis focused on the more fundamental point that when (as here) a contract is contingent on something else, and when (as here) there was no evidence of the contingency being satisfied, then (as here) there is no enforceable contract that can be breached or interfered with. Similarly, when the Court of Appeals noted that "Respondents failed to demonstrate the existence of a valid and enforceable contract that is necessary for a tortious interference with contract claim," the Court of Appeals demonstrated that it, like the *Chitwood* Court, focused on whether or not there was evidence supporting the satisfaction of a contingency to the efficacy of the contract of which tortious interference was claimed. *Branco v. Hull Storey Retail Group*, 2021 S.C. App. Unpub. LEXIS 9 at *6, 2021 WL 118536 (2021). An examination of the *Chitwood* court's opinion and this Court's aforementioned body of authority relating to contingent contracts validates the interpretation of and reliance upon the *Chitwood* Court by the Court of Appeals in this matter. The *Chitwood* case

provides a solid underpinning for the Court of Appeals’ opinion in this matter, and the Court of Appeals appropriately interpreted and applied the *Chitwood* case.

IV. The issues considered by the Court of Appeals were unquestionably preserved for appellate review.

A. Respondent properly raised the statute of frauds issue at the trial court level, and the trial court ruled upon and rejected Respondent’s statute of frauds argument by incorrectly determining that (1) Brooktenn had a lease with Respondent and (2) Brooktenn and Branco had a valid contract.

Branco levels an all-encompassing but incorrect assertion that, “as to the Statute of Frauds” argument, Respondent “raised this argument for the first time in its post-trial motion for reconsideration.” *See* Pet. for Cert. at 12. As explained more fully below, Branco’s argument is incorrect. Respondents timely raised the Statute of Frauds issue multiple times before, during, and after trial.

For example, Sumter Mall, LLC raised the Statute of Frauds issue in its Answer and Counterclaim. (R. 27.) Likewise, HSRG also raised the Statute of Frauds issue in its Answer and Counterclaim. (R. 34.) Indeed, the Statute of Frauds component of this dispute is the very first issue identified in and memorialized by Respondents’ Answers. (R. 27 and R. 34.)

Further, Branco’s and Brooktenn’s related failure to obtain any executed document or lease memorializing any purported Lease between Brooktenn and Respondents was raised and confirmed on numerous occasions during pre-trial proceedings and during trial, including the following instances:

- (1) Multiple times during the hearing on the Motion for Summary Judgment. *See* Tr. at 5:14–25 (R. 58) (trial counsel for Respondents noting the Brooktenn-Branco agreement required the acquisition of a Lease and the failure to obtain a signed Lease); *id.* at 9:14–17 (R. 62) (trial counsel for Petitioners acknowledging that the proposed assignment of Lease was not signed by the parties); *id.* at 14:17–23 (R. 62) (trial counsel for Petitioners confirming that neither Petitioner nor Brooktenn signed a lease document);
- (2) Multiple times during the trial. *See* Trial Tr. at 141:19–23 (R. 210) (Paul Branco’s testimony that Applebaum never signed a lease or lease assignment with

Respondents); *id.* at 190:2–16, 191:20–24, 191:20–25, and 192:19–20 (R. 259, 260 and 261) (Lewis White’s testimony establishes that Applebaum and Branco did not sign off on any lease or any assignment of a Lease); and

- (3) In exhibits introduced at trial. *See, e.g.*, Pl.’s Trial Ex. 12 (R. 378) (email from Applebaum to Lewis White wherein Applebaum indicates that Applebaum will not enter into the proposed the lease assignment agreement requiring a “\$20,000.00” assignment cost).

Not only was the issue raised to the trial court, it was ruled upon by the trial court. *See* Order of Judgment at 2 (R.11) and Amend. Order of J. at 2 (R. 2). In its Amended Order of Judgment, the Trial Court acknowledged and confirmed that Defendants raised the Statute of Frauds issue by amending its initial Order of Judgment to note that “[t]his Lease Agreement between Hull Storey and Brooktenn was never executed.” *Id.* The Statute of Frauds requires a lease for more than one year to be in writing and to be signed by the parties, and prior to and during trial Respondents repeatedly raised the Petitioner’s shortcomings on these Statute of Frauds issues relative to any purported lease between Respondents and Brooktenn with the result that the lease contingency was unsatisfied, and the Proposal for Purchase between Brooktenn and Branco was unenforceable. *Pye v. Estate of Fox*, 369 S.C. 555, 564, 633 S.E.2d 505 (2006).

Given these factors, the Petitioners incorrectly assert that “[t]he Court of Appeals addressed an issue that the trial court did not address – namely, that because there was no written lease agreement entered into between BrookTenn and Hull-Storey, allegedly in violation of the Statute of Frauds, the underlying asset purchase agreement was a nullity.” *See* Pet. for Cert. at 10–11. The reality is that, as required by the body of South Carolina law on the preservation of issues, Respondents repeatedly raised the issues of the Statute of Frauds prior to and during trial, and the trial court ruled upon and rejected the Statute of Frauds issue by incorrectly declaring that “Hull Storey approved Brooktenn’s lease application” and that Brooktenn and Branco had a valid agreement. Respondents raised the Statute of Frauds issues at the trial court level, and the trial

judge ruled on them by determining that HSRG and Brooktenn had an unexecuted lease. The issue was properly preserved for appeal.

B. The Respondent further preserved the statute of frauds issue for appeal by filing a Motion to Amend Judgment.

Even if the trial court had not ruled on the Statute of Frauds issue (which it did), Respondents' timely Motion to Amend preserved the issue for appeal. In *City of Rock Hill v. Suchenski*, 374 S.C. 12,16, 646 S.E.2d 879 (2007), this Court instructs that even if an issue is not initially ruled upon by the trial court, motions to alter or amend the judgment preserve issues for "further review by the Court of Appeals or the Supreme Court in cases where the circuit court fails to address an issue raised by a party." The Court in *Pye v. Estate of Fox*, 369 S.C. 555, 565, 633 S.E.2d 505 (2006) likewise explains that there is a corollary to the general rule that "an issue must be raised to and ruled upon by the circuit court to be preserved," namely that when an issue is "raised but not ruled on" and is subsequently raised again in a motion to alter or amend a judgment, that issue is preserved. *See also Elam v. S.C. DOT*, 361 S.C. 9, 602 S.E.2d 772 (2004) ("A party may wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party must file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.").

In this case, Respondents' timely Motion to Amend preserved for appeal the Statute of Frauds issues initially raised in their respective Answers. *See* Ans. (R. 27, 34); Respondents' Mot. to Amend at 1–3 (R. 46–48) (specifically quoting the Statute of Frauds and noting that, to satisfy the contingency in the Proposal for Purchase, "the Brooktenn lease would have to be a written expression of agreement and signed by both Brooktenn and Sumter Mall, LLC," and that "no such written document . . . has been proffered"); *see also* Amend. Order of J. at 2–3 (R. 2–3) (ruling on

the issue). In view of the referenced body of authority, the Statute of Frauds issue was preserved for appeal.

CONCLUSION

This Court should deny the Petition for Certiorari. The Court of Appeals' opinion is consistent with existing law, and the Petition does meet any of the conditions upon which certiorari is to be granted by this Court.

Respectfully submitted,

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