

**THE STATE OF SOUTH CAROLINA**  
**In the Supreme Court**  
**Appellate Case No. 2021-000233**

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**Apr 12 2021**

**S.C. SUPREME COURT**

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Appeal from Sumter County

R. Ferrell Cothran, Jr., Circuit Court Judge

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Unpublished Opinion No. 2021-UP-009 (S.C. Ct. App. Jan. 13, 2021)

(Court of Appeals Case No. 2017-000998)

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

v.

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

\_\_\_\_\_  
**REPLY OF PETITIONER**  
\_\_\_\_\_

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Pursuant to Rule 242, SCACR, Petitioners Paul Branco and Branco Investments, Inc., d/b/a Great American Cookie Co., (hereafter “Branco” or “Petitioners”) file this brief Reply in response to Respondents’ Return to Petition for a Writ of Certiorari.

Because there exist special and important reasons for this Court to issue the writ – namely, the Court of Appeals’ disregard of the “any evidence” standard in reversing the trial court’s entry of judgment – the Court should grant the Petition and issue a Writ of Certiorari to review the Court of Appeals’ decision in this case; order briefing and permit oral argument; and, finally, reverse the Court of Appeals’ decision and reinstate the judgment for all the reasons contained in the Petition or for any other reason contained in the record.

### **Argument in Reply**

A writ of certiorari is, first and foremost, a matter “of sound judicial discretion.” Respondents assert that there exist no “special and important” reasons for the Court to issue the writ as required under Rule 242, SCACR. Respectfully, nothing could be further from the truth. A jury’s verdict – or the trial judge’s entry of judgment – reflect the fact-finder’s determination of “what the facts are” and applies the law to such facts. Only the fact-finder can evaluate the credibility of the witnesses and, applying the law, enter a verdict or decision that “speaks the truth.”

Here, the record reflects that the trial court considered a body of evidence over a 2-day trial that included executed asset purchase contracts and commercial lease agreements; proposals; voluminous written correspondence; and, perhaps most importantly, testimony of the parties and a key witness. With evidence (including the pleadings of both parties) acknowledging the existence of an executed asset purchase agreement between Branco and BrookTenn – and, most importantly, evidence reflecting that Respondent was on notice of the contract and interfered with same in an attempt to either extract a non-existent “lease assignment fee” from a departing tenant or secure funds for amorphous “capital investments” – the Court of Appeals incorrectly substituted

its view of the evidence for that of the trial court, electing to focus on a single provision contained in the asset purchase agreement, instead of the existence of the agreement itself. “In an action at law, on appeal of a case tried without a jury, the findings of fact will not be disturbed on appeal unless found to be without evidentiary support.” Townes Associates, Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976).

Respondents engage in verbal gymnastics in an effort to distance themselves from the clear and unambiguous admissions contained in their pleadings, wherein they admit the existence of the contract. The pleadings of the parties are excerpted below:

**FOR A SECOND CAUSE OF ACTION  
(Tortious Interference with a Contract)**

16. The Plaintiff reiterates the foregoing allegations as if fully set forth herein.
17. Plaintiff and Brooktenn, LLC entered into a contract for the purchase of certain assets and inventory.
18. Defendant’s had knowledge of the contract between Plaintiff and Brooktenn, LLC.

In its answer, Respondent Sumter Mall admitted Plaintiff entered into a contract with Brooktenn, LLC, as alleged in Paragraph 17 of the Complaint:

**SECOND CAUSE OF ACTION  
(Tortious Interference with a Contract)**

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16. Defendant realleges, by reference, paragraphs 1 through 15 as if set forth fully.
  17. Upon information and belief, Plaintiff or an affiliated entity, entered into a contract with Brooktenn, LLC, which was to include Plaintiff’s purported leasehold interest at Sumter Mall. The contract speaks for itself.
  18. It is admitted that Paul Branco informed representatives of Sumter Mall that he or a related entity had entered into an agreement with Brooktenn, LLC.

The answer filed by Hull-Storey contained identical admissions:

**SECOND CAUSE OF ACTION**  
**(Tortious Interference with a Contract)**

16. Defendant realleges, by reference, paragraphs 1 through 15 as if set forth fully.
17. Upon information and belief, Plaintiff or an affiliated entity, entered into a contract with Brooktenn, LLC, which was to include Plaintiff's purported leasehold interest at Sumter Mall. The contract speaks for itself.
18. It is admitted that Paul Branco informed representatives of Sumter Mall that he or a related entity had entered into an agreement with Brooktenn, LLC.

Respondents now argue that their answers are not admissions and rather “*state only that the purported contingent Proposal for Purchase “speaks for itself” and “merely acknowledge that Branco and Brooktenn entered into an agreement . . . without acknowledging said agreement to be valid.”* See Return at p. 6. Respectfully, Respondents mischaracterize the plain language of their answers, which admit that Branco entered into a contract with BrookTenn, LLC. Parties are generally bound by their pleadings and are precluded from advancing arguments or submitting evidence contrary to those assertions.

“[T]he general rule [is] that the parties to an action are judicially concluded and bound by such unless withdrawn, altered or stricken by amendment or otherwise. The allegations, statements or admissions contained in a pleading are conclusive as against the pleader. It follows that a party cannot subsequently take a position contradictory of, or inconsistent with, his pleadings and the facts which are admitted by the pleadings are to be taken as true against the pleader for the purpose of the action. Evidence contradicting such pleadings is inadmissible.” *Johnson v. Alexander*, 775 S.E.2d 697, 700 (S.C. 2015) (citing *Elrod v. All*, 243 S.C. 425, 436, 134 S.E.2d 410, 416 (1964)).

To argue after the fact that their answers “merely acknowledge” that the agreement exists, but then deny the existence of same, is to contort the English language beyond repair. “[The Court]

must also interpret language used in its natural and ordinary sense, except with technical language or where the context requires another meaning.” *Blakeley v. Rabon*, 266 S.C. 68, 72 (S.C. 1976). In *Collins Entertainment v. Coats*, 355 S.C. 125, 584 S.E.2d 120 (Ct. App. 2003), the trial court found that the defendant, American Bingo, interfered with Collins Entertainment’s contract and the evidence before the trial court was that the defendant admitted in its answer the existence of a contract at issue in the case.<sup>1</sup> Rejecting the defendant’s attempts to perform an “end-run” around its admission, the Court of Appeals found sufficient evidence to support a claim for intentional interference with contractual relations, even if the contracts between Collins Entertainment and the Coats entities contained certain inconsistencies as it related to the exact names of the entities thereto.

Furthermore, simply because a contract contains a contingency that was unmet before the expiration of the term of the contract does not invalidate the contract or foreclose interference with same; if that were the case, then options contracts or agreements that include performance of certain events in the future, would essentially be rendered void *ab initio*. Accordingly, the trial court correctly found that the preponderance of the evidence demonstrated the existence of a contract sufficient to support a claim for tortious interference with contractual relations. See *Boddie-Noell Properties v. 42 Magnolia Partnership*, 352 S.C. 437, 443 (S.C. 2002) (“[W]hen a contract contains a provision or option giving the right of cancellation and the contract is canceled in pursuance of the right given, such cancellation does not extinguish liabilities that have already accrued under the contract , and this is so regardless of whether the liability is that of the party who exercised the option to cancel the agreement or is the liability of the party against whom the cancellation is made.”) See also *Fort Hill Federal Savings & Loan Ass'n v. South Carolina*

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<sup>1</sup> The answer at issue in *Coats* contained the following admission: “*This Defendant admits purchasing the businesses known as Ponderosa Bingo and Shipwatch Bingo from Coats Rental Agreement and Wayne Coats individually.*”

*Farm Bureau Insurance*, 281 S.C. 532 (S.C. Ct. App. 1984) (simply because check for premium payment bounced does not render the contract void as to loss payee under the contract); See also *Marlboro Cotton Mills v. Moore*, 115 S.C. 99 (S.C. 1920) (existence and terms of contract which provided for the future delivery of cotton was not a mere speculation and directed verdict was improper where circumstances surrounding the making of the contract was properly for the fact-finder).

Evidence of the existence of valid contract is further demonstrated by Hull-Storey's admission, in its briefing before the Court of Appeals, acknowledging that Hull-Storey's demand for a lump sum payment was the result of its legitimate – but mistaken – view of a contractual right to a lease assignment payment, based upon its “perception” that the asset purchase agreement was an “end run” to attempt to avoid having to pay a lease assignment payment. Br. of App. at p. 17. Of course, this admitted conduct by Hull Storey supports the trial court's finding of a valid contract between BrookTenn and Branco. *See Shatto v. McLeod Reg'l Med. Ctr.*, 753 S.E.2d 416, 417-18 (S.C. 2013) (After reviewing evidence of staffing and employment contracts involving a nurse injured while working at McLeod, the Supreme Court reversed the Court of Appeals and affirmed the Commission, finding that “the evidence, although not one-sided, preponderates in favor of an employment relationship.”)

***A. The Cases Cited by Respondents are Unpersuasive and Inapposite***

Respondents devote significant time to their argument that there was a “condition precedent” in the asset purchase contract which was never satisfied and, accordingly, there was no enforceable contract with which to interfere. See Return at pp. 9-13. This argument is without merit, as Respondents are asserting a position that does not belong to them (as they were essentially strangers to the asset purchase contract). This conclusion is supported by the cases cited by Respondents – specifically, *Worley v. Yarborough Ford* and *McGill v. Moore*. Neither of these

cases involve allegations of a third party interfering with a contract during the term of the contract; rather, those cases involved a contract dispute between the actual signatories to the contract (which is not the case here). Similarly, the case of *Alexander's Land Co. LLC v. MMK Corp.* is unpersuasive, given that it involved a buyer seeking specific performance of a contract for the purchase of real property (and its failure to satisfy a condition precedent related to same) - no claim for interference with contractual relations was before the court.<sup>2</sup> Finally, the case of *Dutch Fork Dev. Group v. SEL Properties* is likewise not relevant to the case at bar. *Dutch Fork* held that the managing agent of an LLC which was a party to a contract cannot, absent evidence of exceeding his managerial authority, be held individually liable in tort for interference with such contract.

### **CONCLUSION**

There is at least “some evidence” which reasonably supports the trial court’s findings of a valid contract. Simply because the asset purchase contract contained a contingency does not render the contract void and the conduct of the Respondents in attempting to negotiate with Petitioners, and others, is further evidence of the contract’s validity. Coupled with the Respondents’ admissions in their pleadings— and their acknowledgment that their demands for payment were based upon their “perception” that the asset purchase agreement was an “end run” to attempt to avoid having to pay a lease assignment fee - the record is not devoid of evidence and *certiorari* is necessary to correct the error below. *See, e.g., Curcio v. Caterpillar, Inc.*, 355 S.C. 316, 585 S.E.2d 272 (2003) (“the trial judge is concerned with the existence of evidence, not the weight of the evidence or the credibility of the witnesses”).

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<sup>2</sup> Similarly, Respondents’ citation to the unpublished 4<sup>th</sup> Circuit case of *BCD LLC v. BMW Mfg. Co.* is likewise misplaced, as the BMW case involved an “agreement to agree” which, by its very terms, was an agreement to enter into negotiations to reach an agreement (and was, in fact, subsequently expressly terminated by the parties in a later agreement).

Accordingly, Petitioners, incorporating all arguments contained in its Petition, respectfully request that this Court grant the Petition and issue a Writ of Certiorari; order briefing and permit oral argument; and reverse the Court of Appeals' decision and reinstate the judgment for all the reasons contained in the record.

SIMMONS LAW FIRM LLC

A handwritten signature in blue ink, appearing to read 'JS Simmons', is positioned above a horizontal line.

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