THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

The Honorable Marvin H. Dukes, III
Beaufort County
Trial Court Case No. 2018-CP-07-01622

APPELLATE CASE NO. 2020-000862

J & W Corporation of Greenwood,

Appellant,

vs.

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

Respondents.

BRIEF OF APPELLANT

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s/Thomas C. Taylor
Thomas C. Taylor, Esq.
South Carolina Bar No.: 5499
LAW OFFICE OF THOMAS C. TAYLOR, LLC
22 Bow Circle, Suite A
Post Office Box 5550
Hilton Head Island, SC 29938
T: 843-785-5050
F: 843-785-5030
tom@thomastaylorlaw.com

ATTORNEY FOR APPELLANT
J & W CORPORATION OF GREENWOOD

Hilton Head Island, South Carolina
June 21, 2020

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STATEMENT OF THE CASE

This appeal arises from the failure and refusal of the Landlord Defendants to provide the Plaintiff Tenant with a legal, permitted commercial office space as required under the terms of a 99-year Lease Agreement executed in 1993 and a Release and Confidential Settlement Agreement signed in December of 2004. In 2008, the Plaintiff Tenant, the J & W Corporation of Greenwood, stopped paying certain "common area" charges to the Landlord, and then when the Landlord Defendants' bank foreclosed upon the Landlord in 2010, and named J & W as an additional defendant, J & W initiated a crossclaim that has eventually led to the current Amended Complaint for Damages, For Temporary and Permanent Injunctive Relief, and for a Declaratory Judgment.

William P. "Wick" Scurry is the owner of the Plaintiff J & W Corporation of Greenwood ("J & W"), and he and his father purchased the Broad Creek Marina on Hilton Head in 1981 or 1982. (R.p. 403, lines 19-22.) The Scurrys built up the marina with expanded docks and a boat dealership and then sold it to Frank Ferrari for $2,600,000. Mr. Ferrari was unable to profitably run the marina, and his mortgagee, the South Carolina National Bank, took it back and requested that Wick Scurry return and manage the property. (R.p. 404, lines 6-7 and p. 405, lines 6-25.) Mr. Scurry agreed to manage the marina for SCNB in exchange for the bank's execution and recordation of a First Right of Refusal to Mr. Scurry and J & W on any future sale of the marina, which was executed and filed. (R.p. 404, lines 18-23.)

In or around 1993, Richard Freedman entered into negotiations with SCNB and reached an agreement to purchase the Broad Creek Marina property for $1.3 million. However, Mr. Scurry then exercised his Right of First Refusal to purchase the property for the $1.3 million price. (R.p. 405, lines 11-14.) Richard Freedman then approached Mr. Scurry and after further negotiations, Mr. Scurry and Mr. Freedman reached a deal where Mr. Scurry would waive his Right of First

Refusal and allow Freedman to purchase the marina, in exchange for Freedman giving J & W a 99-year Lease Agreement at $1 a year for certain areas of Broad Creek Marina, 300 feet of dock space, and an office from which J & W would operate its businesses. (R.p. 406, lines 1-15.) In essence, Mr. Freedman was able to purchase the marina that had sold a few years earlier for 2.6 million, at the price of 1.3 million, and Mr. Scurry's business gained a 99-year lease in exchange for the $1.3 million dollar discount Mr. Freedman achieved.

The original Lease Agreement (Defendants' Exhibit 1, R.p. 1190) was signed on September 23, 1993, and issues arose between the parties regarding insurance and shared charges quickly. (R.p. 407, lines 13-18.) The parties to the Lease Agreement, the J & W Corporation of Greenwood and Hilton Head Island Marina, L.P., then reached a Confidential Settlement Agreement and Release on December 13, 2004. Defendants' Exhibit 2. (R.p. 1208.)

At the time the Release and Confidential Settlement Agreement ("RCSA") was signed, J & W was operating its businesses on Hilton Head (a ferry service to Daufuskie Island and barge to Daufuskie Island) at the Broad Creek Marina from the "Marina Office" building located on the mainland, adjacent to the barge creek landing area. However shortly after the signing of the RCSA, when Broad Creek Marina of Hilton Head, LLC (the successor in interest to Hilton Head Island Marina, L.P. ("BCM") decided to build a restaurant in the Marina Office, J & W's office was moved to a houseboat provided by BCM at the dock. The houseboat then sank and J & W lost all of its equipment and office furnishings. (R.p. 419, lines 4-8.)

BCM then directed J & W's administrative personnel into a boat shed on the mainland portion of the marina, that was not permitted for commercial office occupancy nor for any human occupancy. (R.p. 419, lines 12-19.) It was unacceptable to J & W and Mr. Scurry demanded to be

moved into one of the three options that had been agreed to in the RCSA. Roger Freedman (who had taken his brother's place) and his General Manager Nate Jones assured J & W that the boat shed office was temporary, but when it went on for four years, Mr. Scurry stopped paying the monthly "common area" charges set forth in the RCSA in order to encourage BCM to move J & W into an appropriate, safe and legally permitted, commercial office. (R.p. 423, lines 3-7.) When that succession of monthly common area payments failed to move BCM to embrace the requirements of the RCSA, this litigation followed in 2010 when the Landlord's foreclosing bank named J & W as a co-defendant in a foreclosure action.

Since the litigation began in 2010 as 2010-CP-07-5068, there have been Motions for Temporary Restraining Orders filed and Injunctions issued against BCM for actions threatened and taken that would and did damage J & W's business. In 2015, a new suit was filed and was assigned civil action number 2015-CP-07-1704, and was consolidated with 2010-CP-07-5068. That consolidated action was taken off the roster pursuant to S.C.R.C.P. 40(j), and reinstated in 2018 and assigned this case number.

The case was called for trial before the Hon. Marvin Dukes, Master in Equity of Beaufort County on May 15, 2019 and concluded on May 16 ,2019. Judge Dukes issued his Interim Order Relating to Relocation of Plaintiff's Office Space on May 29, 2019. (R.p. 8.) The Defendants filed a Motion To Implement and Enforce The Masters Interim Order on September 26, 2019 and the Plaintiff filed a Motion to Allow Additional Discovery on November 8, 2019 in reply. (R.p. 202.) The Master entered his Order on Floating Office in response to both on November 25, 2019. (R.p. 17.)

The Master then issued his Order and Judgment on January 9, 2020 awarding the Defendants a judgment of $112,428.40. (R.p. 19,) and the Plaintiff filed its Motion to Alter or Amend Judgment on January 17, 2020. (R.p. 211.) On May 4, 2020, the Master denied the Motion to Alter or Amend. (R.p. 46.) This appeal followed.[1]

STANDARD OF REVIEW

The appropriate standard of review for this case is as an action in equity tried by a judge and thus this appellate court may find facts in accordance with its own view of the preponderance of the evidence. The gravamen of the Plaintiff's Amended Complaint for Damages, for Temporary and Permanent Injunctive Relief, and for a Declaratory Judgment, was for a declaration compelling the Defendants to provide the Plaintiff with the commercial office space agreed to in December 2004 in the Release and Confidential Settlement Agreement, and allow an equitable set off of the Annual Shared Liabilities amounts that the Plaintiff ceased paying in 2008 in order to force the Defendants to provide the office space agreed to in 2004. Whether it is viewed as a prayer for an injunction stopping the Defendants from continuing to relegate the Plaintiff's business operations to an illegal, un-permitted converted boat shed, or as a request for specific performance of a contract, the Plaintiff's complaint sounded in equity and was tried in equity by the Master.

"Declaratory judgment actions are neither legal nor equitable and therefore, the standard of review depends on the nature of the underlying issues." Judy v. Martin, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009). "To determine whether an action is legal or equitable, this [c]ourt must look to the action's main purpose as reflected by the nature of the pleadings, evidence, and character of the relief sought." Lollis v. Dutton, 421 S.C. 467, 468, 807 S.E.3d 723, 728 (Ct. App. 2017)

[1] Currently pending before the Master are cross-motions for attorneys fees, and Plaintiff's Petition for a Writ of Supersedeas.

(quoting Fesmire v. Digh, 385 S.C. 296, 303, 683 S.E2d 803, 807 (Ct. App. 2009)). "The character of the action is generally ascertained from the body of the complaint, but when necessary, resort may also be had to the prayer for relief and any other facts and circumstances which throw light upon the main purpose of the action." Sloan v. Greenville Cty., 380 S.C. 528, 534, 670 S.E.2d 663, 666-67 (Ct. App. 2009). "If the character of the action appears with sufficient clearness in the body of the complaint, it must control, unaffected by the prayer for relief or the intention or characterization of the pleader." Bramlett v. Young, 229 S.C. 519, 531, 93 S.E.2d 873, 879 (1956) (quoting Speizman v. Guill, 202 S.C. 498, 514-15, 25 S.E.2d 731, 739 (1943)). "While the prayer constitutes no part of the plaintiff's cause of action, 'it is an element that may properly be considered in determining the legal or equitable character of an action, and when the complaint states facts which would support either a legal or an equitable action, the relief demanded will ordinarily determine its character'," Id. (citation omitted) (quoting 1 C.J.S. *Actions* § 54 at 1155).

"The power of the court to grant an injunction is in equity." Strategic Res. Co. v. BCS Life Ins. *Co.*, 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006). An injunction is a drastic and "extraordinary equitable remedy courts may use in their discretion in order to prevent irreparable harm to a party" when no adequate remedy exists a law. Hampton v. Haley, 403 S.C. 395, 409, 743 S.E.2d 258, 265 (2013). "In an action at equity, tried by a judge alone, an appellate court may find facts in accordance with its own view of the preponderance of the evidence." Inlet Harbour v. S.C. Dep't of Parks, Recreation & Tourism, 377 S.C. 86, 91, 659 S.E.2d 151, 154 (2008). "However, we are not required to disregard the findings of the trial judge who saw and heard the witnesses and was in a better position to judge their credibility." Straight v. Goss, 383 S.C. 180, 192, 678 S.E.2d 443, 449 (Ct. App. 2009). "Moreover, the appellant is not relieved of his burden

of convincing the appellate court the trial judge committed error in his findings." Pinckney v. Warren, 344 S.C. 382, 387-88, 544 S.E.2d 620, 623 (2001).

ARGUMENT

1. **The Master erred in failing to specifically enter a Declaratory Judgment in favor of the Plaintiff on it's Second Cause of Action (For a Declaratory Judgment regarding the office space and dock lease) in that the preponderance of the evidence proved the Defendants had, for at least ten (10) years, refused to provide the Plaintiff with a properly permitted, commercially reasonable office despite repeated demands and that Plaintiff was entitled to such office space.**

The evidence presented at trial proved that Broad Creek Marina repeatedly refused to relocate J & W into a properly permitted, legal, safe office space, despite the covenant made in the Release and Confidential Settlement Agreement executed on December 13, 2004, that it would provide J & W with "new office space." It was not until trial that the Defendants agreed to honor the RCSA.

The RCSA provides, in pertinent part:

> J&W shall continue to occupy its existing space in its current location at the Marina Office until such time as new office space is available for its use and occupation ("New Office Space"). The New Office Space shall be in substitution for the office space previously located in the floating store as identified in the Lease. J&W agrees that they waive any entitlement, if any, to the insurance proceeds the HHIM received from the casualty loss to the floating store. The Parties agree the HHIM may provide one of the following alternatives as substitute office space for J&W:
>
> i. HHIM will seek approval from the necessary regulatory authorities for the replacement of the floating store. A copy of the Plan is attached as Exhibit D. Any replacement of the floating store must be of a design and construction acceptable to HHIM. J&W agrees to accept 300 usable square feet in full substitution for office space located in the southwestern end of the store. The 300 usable square feet as shown on Exhibit "D" shall have a separate entrance and shall be an enclosed space with appropriate ventilation and windows and shall be provided with the same utility services as the remainder of the New Floating Store. Said utilities shall be separately metered and shall be the sole responsibility of J&W. J&W can seek approval if landlord's application is denied subject

to the landlord's review and approval of the design and construction and such approval shall not be unreasonably withheld.

ii. Dockmaster's House: If and only if the floating store is not replaced due to denial of any permits required for its replacement, or for any reason at all, HHIM agrees to provide J&W with 300 usable square feet of office space in the Dockmaster's House. A copy of the plan for the Dockmaster's House is attached as Exhibit E and incorporated herein by reference.

iii. Hub of Activity. If and only if HHIM is unable to provide space to J&W in a new floating store or in the Dockmaster's House, then J&W will continue to occupy its existing space in the Marina Office. If HHIM decides at some time in the future to relocate the Marina Offices, the space provided to J&W for its office and business needs shall be relocated to a mutually agreeable location of a size, kind and quality at least comparable to the existing space, and such replacement space shall be located in the center of the commercial and retail activity at the Marina. RCSA, p. 2. (Defendants' Exhibit 2, R.p. 1208.)

Trent Shaw from OCRM testified that as of the date of trial, May 15, 2019, there were no active permits issued to BCM that would allow the placement of a floating office in any location other than the inside portion of the finger dock located closest to the marsh, where all parties agreed, a floating office would be on mud for at least half a day, every day. (R.p. 364, lines 4-17.) Mr. Shaw also confirm that in order to place a floating office elsewhere at BCM, Mr. Freedman would have to file a request to amend the existing permit, which had not been done as of May 15, 2019. (R.p. 364, lines 11-17.)

Mr. Scurry testified that after the RCSA was entered, BCM moved J & W's office operations into a houseboat on the docks, which "sunk," causing J & W to lose all of its computers and office equipment. (R.p. 419, lines 4-8.) According to Mr. Scurry, that's when BCM moved J & W into a boat shed that had been constructed when Mr. Scurry and his father owned the marina, "to house a rich guy's boat." (R.p. 420, lines 12-13.) Mr. Scurry told Mr. Freedman at the time that the shed was an "illegal building" and asked him to move J & W into another office building as they had agreed to do in the RCSA. (R.p. 422, lines 8-25 and p. 423, lines 1-7.) J & W never

agreed to accept the boat shed as an office, and shortly thereafter, ceased paying its common area charges in order to try to force BCM to live up to the terms of the RCSA. (R.p. 423, lines 3-7.)

In July 2010, the Defendants were formally notified in two separate letters that the converted boat shed was an illegal building, not permitted by the town to operate a commercial business from. Those letters were ignored. (R.p. 687, lines 3-7 and p. 690, line 12 through p. 693, line 8.) (Plaintiff's Exhibits 14 and 15, R.p. 1175 and p. 1178.)

Winters in the shed office for the J & W staff were "treacherous." (R.p. 427, lines 1-10.) There was no heat nor insulation. Mr. Scurry was surprised by a copperhead snake in his office once, along with marsh rats, roaches, and spiders. (R.p. 428, lines 4-25.) There was never another "floating office" nor any other office made ready and offered to J & W from 2008 until the time of trial. (R.p. 429, lines 5-9.)

Chris Yates, the Town of Hilton Head Island Building Official, confirmed under oath that the converted boat shed had never been properly permitted as a useable commercial office. (R.p. 554, lines 5-18.) Mr. Yates confirmed that the converted shed had "egress and life safety issues" (R.p. 555, lines 19-23.) and that the boat shed was being "illegally occupied as a commercial building" as of May 3, 2019. (R.p. 560, lines 8-14.) (Plaintiff's Exhibit 12, R.p. 1137.) Mr. Yates testified that Mr. Freedman did not disagree with the Town's assessment of the illegality of the shed being used as an office. (R.p. 584, lines 13-21.) The Town ordered the Defendants to cease use of the boat shed as a commercial office within 60 days. (R.p 560, lines 8-25.) See also Plaintiff's Exhibit 11, photos of the boat shed office. (R.p. 1117.)

Mr. Freedman's testimony concerning the relegation of J & W into the boat shed was conflicting and fuzzy. "My recollections are really hazy." (R.p. 613, lines 4-11.) Nate Jones,

BCM's General Manager, recalled telling J & W in late 2009 that the boat shed "would be suitable for their office." (R.p. 615, lines 11-19.) When asked if J & W accepted the converted shed as appropriate office space, Mr. Jones replied: "I don't remember a huge dumpster fire blowing up...." (R.p. 618, lines 5-10.) He apparently reasoned "I would say I knew of the space requirement that needed to be filled—fulfilled. And it was communicated to me that space would satisfy." (R.p. 619, lines 12-15.)

When asked for specific details of the placement of J & W into the boat shed office, Mr. Freedman admitted that the unpermitted boat shed was not an office space contemplated under the RCSA (R.p. 711, line 21 through p. 715, line 3.), admitted that the placement of J & W into the shed was supposed to be "temporary" (R.p. 714, lines 13-15.), admitted that as an experienced developer he knew the building had to be permitted to be legal (R.p. 689, lines 5-23.), and admitted that between the time he placed J & W in the boat shed and the trial (a period of over 10 years), that neither he nor BCM ever had an alternative floating office available for J & W (R.p. 711, line 21 through p. 712, line 2.). Despite those admissions, Mr. Freedman testified that in his opinion, the provision of the unpermitted, illegal boat shed for J & W's commercial use as on office for over 10 years, was "generous." (R.p. 795, lines 7-14.)

Nate Jones also testified that the placement of J & W into the unpermitted, illegal boat shed in or around 2009, was supposed to be a "temporary solution" to the office situation. (R.p. 905, lines 20-24.) And he admitted that the Defendants had never, as of trial, presented any specific concepts for future placement of J & W's office. (R.p. 906, lines 15-20.)

The testimony at trial from the parties and the Town of Hilton Head Island officials shows clearly and convincingly that Mr. Freedman, on behalf of BCM - being an experienced developer

- knew that the relegating of J & W into the boat shed was wrongful, illegal, and not in conformance with the Lease Agreement and the RCSA. As to why Mr. Freedman and BCM refused to live up to the RCSA and put J & W into a properly permitted office building, Mr. Freedman indicated that BCM had probably saved at least $75,000 over the years by not building the Dockmaster's Building that was called for in the RCSA and that had been properly permitted to BCM at the time of trial. (R.p. 804, lines 3-11.)

The Master erred in failing to enter an Order that clearly grants the Plaintiff the declaratory relief sought in Paragraph 22 of the Amended Complaint filed March 28, 2016 (R.p. 48), in that the Master's Interim Order Relating to Relocation of Plaintiff's Office Space entered May 29, 2019 (R.p. 8), does not acknowledge that the Plaintiff had to seek the court's assistance through the declaratory judgment action to convince the Defendants to finally agree to provide the Plaintiff the office space promised under the RCSA in December 2004. Such an Order is important because of the Attorneys Fee provision of the original Lease Agreement, which provides at paragraph 36, that the "non-prevailing party" in an action to enforce any covenant of the Lease, shall pay all costs, including reasonable attorney's fees. Lease, p. 13. (R.p. 1190.)

2. The Master erred in entering an Order directing the Plaintiff to accept as its new office space under the RCSA, a "floating office" in the form of an "Aqua Lodge" houseboat when the use of such a floating office is specifically prohibited under these facts by South Carolina statutory law. The Master further erred by ordering the Plaintiff to accept the Aqua Lodge as its office, even though the Defendants acknowledge it fails to meet the Master's Interim Order of May 29, 2019.

The Master, by his Interim Order of May 29, 2019, in seemingly granting the Plaintiff's prayer for a declaratory judgment that the Defendants failed and refused to earlier provide the new office space required under the RCSA, directed the Defendants "as soon as reasonably possible" to "take all reasonable steps to permit and acquire a new floating office with at least 300 square

feet of commercially useable space and at least a 20-year anticipated service life." Once the floating office has been "properly permitted, installed, and a Certificate of Occupancy issued, J & W shall at its expense, vacate the temporary office and move to the new floating office." (Interim Order, p.3, R.p. 8.)

The South Carolina Department of Health and Environmental Control has adopted and published binding Regulations regarding the placement of "floating offices" on the coastal waters of our state.

Reg. 30-1, Statement of Policy, notes that the Department "seeks to guide the wise preservation and utilization of coastal resources." It further defines what a "nonwater-dependent" structure is in South Carolina: "A facility which cannot demonstrate that dependence on, use of, or access to coastal waters is essential to the functioning of its primary activity."

DHEC has further adopted and published strict guidelines concerning the permitting of such "floating offices" as follows:

Regulation 30-12
Special Project Standard for Tidelands
And Coastal Waters

M. Nonwater-Dependent Structures:

(1) Nonwater-dependent structures, as defined in Section R.30-1(D), have been built in the past on pilings, moored or in other ways situated over coastal water and/or tideland critical areas. These structures are a serious threat to the values set forth in Section 48-39-20-E.

(2) Nonwater-dependent structures, including buildings, houses, or offices that float shall be prohibited from being constructed, moored, or otherwise placed in or over tidelands and coastal water critical areas unless there is no significant environmental impact, an overriding public need can be demonstrated, and no feasible alternatives exist.

> (3) The Department shall at its discretion determine on a case-by-case basis whether or not a floating structure is a boat and thus exempt from the Act or in fact is a nonwater-dependent structure. This shall be based upon the primary function of the floating structure. The mere fact that a structure is registered as a vessel or capable of being propelled does not mean it is exempt from the Department regulations.

The Appellant contends a plain reading of the applicable Regulations concerning floating offices shows that the "Aqua Lodge" houseboat proffered by the Respondents and embraced by the Master, cannot be properly permitted and used as a floating office in the coastal waters of the Broad Creek Marina.

Mr. Scurry has testified without contradiction, that the work performed in J & W's illegal and unpermitted boat shed office on the mainland from 2009 until trial in 2019, consisted of his employees answering the phones, monitoring their website, taking reservations by phone, and selling tickets for the ferry through an office window. (R.p. 424, lines 8-13.) "Nonwater dependent" floating offices are prohibited under Reg. 30-12 unless there is no significant environmental impact, an overriding public need can be demonstrated, and no feasible alternatives exist. No one would seriously contend that the above-described administrative work as was performed in J & W's "office" on the mainland for the last 10 years, requires dependence on, use of, or access to, coastal waters as essential to the functioning of its primary activity. Thus, the administrative office is by definition, a "nonwater-dependent" structure. As such, unless there is no significant environmental impact, and an overriding public need can be demonstrated, and no feasible alternatives exist, it cannot be properly permitted by DHEC/OCRM.

It is further doubtful that anyone would seriously contend that an overriding public need exists for placing J & W's administrative personnel in a floating office, and importantly, there are feasible alternatives set forth right in the RCSA:

> If and only if HHIM is unable to provide space to J & W in a new floating store or in the Dockmaster's House, then J & W will continue to occupy its existing space in the Marina Office. [J & W was pushed out of the Marina Office years ago (R.p. 417, line 24 through p. 418, line 5.)] If HHIM decides at some time in the future to relocate the Marina Office, the space provided to J & W for its office and business needs shall be relocated to a mutually agreeable location of a size, kind and quality at least comparable to the existing space, and such replacement space shall be located in the center of the commercial and retail activity at the Marina. (Defendant's Exhibit 2, p. 2, R.p. 1208.)

Setting aside the issue of the impossibility of proper DHEC/OCRM permitting, the vessel that was proposed to and accepted by the Master in his Order of November 25, 2019, admittedly fails to meet the standards set by Master in his Interim Order of May 29, 2019 requiring at least "a 20-year anticipated service life." (Interim Order, p. 3, R.p. 8.)

The Master erred in not requiring an alternative floating office/houseboat when the Defendants responded to the Plaintiff's Motion for Relief and to Allow Discovery on November 18, 2019, by submitting a statement ("THIS STATEMENT IS NOT A WARRANTY OR GUARANTEE") from Dirk Wiley, President of Catamaran Cruisers, Inc., in which Mr. Wiley offers:

> It is not possible to provide multi-year guarantees of performance due to the variables that are inherent in weather conditions and whether the vessel is maintained appropriately. However, when properly maintained, Aqua Lodges can remain in service for twenty (20) years or longer. However, as noted above, this statement is **not** [emphasis added by Mr. Wiley] a warranty or a guarantee. I am not aware of any manufacturer of such structures that guarantees the performance of their vessels for twenty (20) years. With proper care and precaution, our Aqua Lodge vessels are designed for a long service life, as indicated by the testimonials featured on our website. Exhibit 2 to Defendants' Motion To Implement. (R.p. 138.)

The Master required in the May 29, 2019 Interim Order, that the to-be-provided floating office have "at least a 20-year anticipated service life." Mr. Wiley's statement makes clear that in his opinion as President of the manufacturing company, that the houseboat might remain in service for 20 years, but that he would never guarantee that and his company will not even begin to stand

behind such a representation. If this Court finds that a "floating office" for administrative paperwork and telephone answering is permittable in South Carolina, then it should order that the floating office to-be-provided come with the Master-required 20-year anticipated service life. Otherwise, the Plaintiff will be damaged in that J & W will undoubtedly be replacing the office many times over the course of the remaining years of the 99-year lease.

3. The Master erred in failing to award the Plaintiff at least nominal damages for the breach of contract proven by a preponderance of the evidence.

The Master's final Order dated January 9, 2020 (R.p. 19), states that the Plaintiff failed to meet its burden of proof on the claim for breach of contract relating to the office space. (Order at p. 9, R.p. 27) The basis of the holding seems to be that the Landlord was allowed under the original Lease Agreement to place the Tenant in any structure, and leave the repair, permitting or total reconstruction (of, for example, a boat shed), to the Plaintiff. "To the extent that the office space (or other portion of the Lease Property) requires additional maintenance, repair, improvements, compliance efforts, or replacement, the Lease was written in such a manner to place such obligations upon Tenant, not Landlord." (Order, p. 10, R.p. 28.) The Master concluded "Although the Court could consider an award of nominal damages, Tenant has failed to prove a breach of contract by a preponderance of the evidence, as Tenant was provided with office space throughout the term. Also, in light of the provisions of the Lease that place obligations upon Tenant for the condition of the office space, the Court is unable to conclude that the circumstances establish a breach of contract by Landlord. (Order, p. 11, R.p. 29.)

The Masters Order erred in ignoring the preponderance of the evidence presented at trial (see discussion above in Argument 1) that the Landlord failed to ever provide a properly permitted, appropriate commercial office for J & W. Even Mr. Freedman, the owner of the Defendant

Landlord, acknowledged at trial that the Defendants had an obligation to initially place the Plaintiff in an acceptable office, and that the converted boat shed was only meant to be "temporary." (R.p. 686, lines 7-19.)

Further, the Master's Order on this point ignores the written requirements of the RCSA quoted above, which provided three options to the Landlord: either a new floating office, placement in the Dockmaster's House (that the Landlord chose not to construct because of costs (R.p. 804, lines 3-11), or an office in "a mutually agreeable location of a size, kind and quality at least comparable to the existing space (then the Marina Office), and such replacement space shall be located in the center of the commercial and retail activity at the Marina."

The Master's denial of the Plaintiff's breach of contract claim overlooks the requirements of the RCSA, the trial testimony, and the preponderance of the evidence. But it also contradicts his holdings at page 19 of the Order where he states "[I]t is undisputed that the parties were unable to place the Tenant in office space of the quality that was anticipated under the contracts and agreements" and declined the Defendants' request for pre-judgement interest on the alleged "back payments" owed "in the face of the obvious deficiency in the office space." (Order, p. 19, R.p. 37.)

Although the Plaintiff suffered through ten years of using the "temporary" converted boat shed as an office while working hard to remain profitable, that fact alone does not mean the Landlord did not materially breach the lease by its failure and refusal to provide a new office until its acknowledgment at trial that the converted boat shed was illegal and un-permitted. Even if the evidence did not prove lost profits, the Plaintiff is entitled to a finding of breach of contract by the Defendants, and an award of at least nominal damages. *See* Stevens v. Allen, 342 S.C. 47, 53 n.5, 536 S.E.2d 663, 665 n.5 (2000). ("We have previously recognized that every violation of a legal

right imports damages and authorizes the maintenance of an action and the recovery of at least nominal damages, regardless of whether any actual damage has been sustained.")

4. The Master erred in failing to apply an equitable set off to any damages proved by the Defendant, based upon the Defendants' egregious and unwarranted failure to provide the Plaintiff with an office required under the RCSA for more than 10 years.

Mr. Scurry testified that he ceased making the "Annual Shared Liabilities" charges (Exhibit F to the RCSA) (Defendant's Exhibit 2, R.p. 1208 and p. 1242) as a result of the Defendants' refusal to place J & W into a properly permitted and legal commercial office as required under the RCSA.

Mr. Scurry testified that the Defendants' general manager came to him around 2008 and told him that Broad Creek Marina "wanted to make a restaurant" out of J & W's current office (R.p. 418, line 22 through p. 419, line 9), and that they wanted J & W to move into a houseboat temporarily. "And I agreed to do that temporarily, and the houseboat sunk. We lost all our computers and everything. We were never reimbursed by anyone for anything. It sunk and we were without an office again." (R.p. 419, lines 4-8.)

As is set forth in detail above, all parties agree that J & W was then placed in the illegal, unpermitted, converted boat shed "temporarily" for the next ten (10) years. "We had no choice, honestly. [W]e had nowhere to work." (R.p. 419, lines 21-24.) Mr. Scurry told Mr. Freedman at the time that the boat shed office "was illegal" (R.p. 422, line 11) and asked him to place J & W into another, more appropriate building. (R.p. 422, line 8 through p. 423, line 15.)

"I mean, I was really referring back to what we had agreed to do. Right. So—basically none of that ever happened, which is exactly why in '08 or '09, we just quit paying fees because

he would not do what he said he was going to do. He just refused to do it." (R.p. 422, line 24 through p. 423, line 7.)

> Q. Wick, did you ever agree with Mr. Freedman that the provision of the shed building was a final office space for J & W under the settlement agreement provisions?
>
> A. Absolutely not.
>
> Q. Is that why you ceased making payments?
>
> A. Absolutely.

(R.p. 424, line 23 through p. 425, line 4.)

In these circumstances, the Plaintiff is equitably entitled to a substantial set-off of the claimed "unreimbursed expenses" computed under Exhibit F to the RCSA, which allegedly totaled $56,371.27, because of the Defendants' breach of the agreement to provide J & W with a legal, permitted office space. The Master erred in failing to provide such a set off. This Court is empowered under the law of the State of South Carolina to craft an equitable remedy for the admitted breach of contract. The legal maxim "Equity will not suffer a wrong without a remedy" is established law in South Carolina, and equity fashions a remedy for a wrong when justice demands it. *See* Verenes v. Alvanos, 387 S.C. 11 (2010). The equitable rules a Court employs are not "cast iron rules," rather the rules exist to do fairness and are flexible so that relief is granted, when denying such relief would cause one party to suffer a gross wrong at the hands of another. Hooper v. Ebenezer Senior Services & Rehabilitation Ctr., 386 S.C. 108 (2009). This Court should reduce the amount of damages to be awarded BCM for the common area charges ("unreimbursed expenses") not paid, by an amount sufficient to equitably "set off" the damages suffered by J & W over the 10 years its staff worked out of a boat shed. *See also* Brown v. Lowe, 182 S.C. 9, 188 S.E.

182 (1936) ("Right to offset mutual demands is founded upon equitable principles, and tendency of courts is to liberalize rather than restrict such right.") *See also* W.M. Kirkland, Inc. v. Providence Washington Ins. Co., 264 S.C. 573, 216 S.E.2d 518 (1975) (Setoff belongs to the inherent power of court in exercise of its equitable jurisdiction ordinarily.)

5. The Master erred in awarding the Defendants recovery for "dock damages" and pre-judgement interest thereon because the Defendants failed to prove, by a preponderance of the evidence, that the damage to the Broad Creek Marina docks leased by J & W, was caused either by the "Tenant's occupancy or use" of the docks.

The Master's Order of January 9, 2020, awarded the Defendants $44,398.00 plus $8,79288 in pre-judgment interest, upon the Defendants' claims that the Plaintiff was required to reimburse the Defendants for the repairs performed on the Plaintiff's leasehold docks following Hurricane Matthew in 2016. (Order, p. 18, R.p. 19 and p. 36.) As the basis for the award, the Master cites Paragraphs 3(c), 6, 18, 26 and 30 of the original Lease Agreement. (Defendants' Exhibit 1, R.p. 1190.) (Order, p. 18, R.p. 19 and 36.)

Paragraph 3(c) states that the Tenant shall pay as "Additional Rent" any charges due Landlord by Tenant, "including but not limited to, damage to the Property...." Paragraph 6 provides that "As it becomes necessary to repair or replace the dock which is a portion of the Lease Property, Landlord shall complete said repairs or replacement and Tenant shall pay to Landlord all costs **attributed to its use** [emphasis added], said costs to be paid as they are incurred by Landlord." Paragraph 18 provides, in pertinent part, **"Subject to the provisions of paragraph 6, entitled "Dock Repair"** [emphasis added], Tenant shall, at Tenant's expense, make all repairs necessary to maintain the Lease Property in good working condition and repair, neat and clean, and generally in a manner consistent with the operation of a first class marina." Paragraph 26 provides that Tenant shall give notice to Landlord of any damage to the Lease Property caused by

fire or other casualty, and then Tenant "shall apply for all necessary permits and approvals and shall repair, restore, rebuild, or replace the damaged Lease Property to the extent that it shall deem necessary or desirable in connection with the requirements of its busines." Paragraph 30 states that the Tenant shall indemnify and save Landlord harmless from any and all claims, damages, costs and expenses, including reasonable attorneys' fees **arising from the occupancy or use by Tenant of the Property.** [Emphasis added.]

While the cited paragraphs are conflicting and somewhat ambiguous, one theme transcends: The Tenant/Plaintiff is to repair, or reimburse the Landlord for repairs, damage caused by the Tenant or attributed to its use of the docks. The damages sought to be recovered were admittedly caused by Hurricane Matthew's winds and storm surge. But the Defendants assert that the Plaintiff's vessels that were moored to the docks somehow caused the damage. As is shown below, the evidence was lacking on that claim.

The testimony produced at trial failed to establish by a preponderance of the evidence that the Plaintiff was in any way negligent, and/or the testimony and exhibits failed to establish by a preponderance of the evidence, that the damage that occurred to the docks during Hurricane Matthew was caused by anything other than the hurricane-- an Act of God. Further, there was no evidence presented at trial that the dock damage suffered during Hurricane Matthew was in any way caused by the Plaintiff's "use" of the docks, as addressed in paragraph 6 of the original Lease Agreement.

Mr. Scurry testified that he did not believe that the damage to the BCM docks during Hurricane Matthew was caused by J & W's boats being tied up to the docks during the storm. (R.p. 529, lines 12-19.) Mr. Scurry further testified that he personally saw that there were a number of

other boats that remained tied to the BCM docks during Hurricane Matthew, and that there was dock damage throughout the marina—both in areas where boats had been tied and areas that were empty docks. (R.p. 530, line 12 through p. 532, line 7.)

BCM's own agent and General Manager Nate Jones, admitted under oath that J & W was never instructed to move its boats in the face of the storm, but that he simply asked J & W's then General Manager Joe Pelletier if the boats were going to be moved: "I asked Joe if he was going to remove the boats, and that answer was no." (R.p. 916, lines 11-15.) But of far more import than the fact that J & W had not obligation to move its boats from its leasehold, is that fact that Mr. Jones also admitted he had no knowledge of what actually caused the dock damage: "It was a combination. I don't know that we can properly allot what [was] wave action, wind action and boat action," and acknowledged that there was an additional $10,000 in damages to other areas of BCM's docks during Hurricane Matthew that could not have been allegedly impacted by J & W's boats being tied to the docks. (R.p. 942, lines 22-25 and p. 944, line 14 through p. 945, line 7.)

There was no presentation of expert testimony by any party as to the cause of the dock damage, and Mr. Jones acknowledged that it is impossible to determine with any specificity, whether storm winds, rains, water swells, waves, or other windblown debris, caused the dock damage. Thus, there was an insufficiency of evidence on this point to hold J & W responsible in any way for the alleged damages to the docks during Hurricane Matthew.

Equitably speaking, this Court should also take into consideration on this point, that BCM had property insurance on the docks as per the requirements of the original Lease Agreement and the RCSA, but chose a $40,000 deductible, of which Mr. Jones was unaware. With dock damages exceeding $54,000 in total to BCM's docks, they failed to call upon their insurance, which would

have saved them at least $14,000 on these dock damage claims. (R.p. 947, lines 5-14.) To that issue, this Court should consider the contractual changes in insurance coverage agreed to by the parties in 2004 when the RCSA was executed and the responsibility for property insurance coverage on the docks of Broad Creek Marina was accepted by the Landlord BCM, with the agreement that J & W would thereafter pay a pro-rata share of the annual property insurance coverage to be procured by BCM. J & W is to pay 7.5 percent of the cost of the property insurance on the "docks, wharves and piers" and thus should equitably should pay no more than 7.5 percent of any damages caused by BCM's decisions on what size of deductible it wanted to take and expose itself and J & W to paying. At most, the damages that should be attributable to J & W as a result of the alleged damages to the docks under its lease by Hurricane Matthew, should be 7.5 percent of the $40,000 deductible that BCM chose, or $3,000.

6. **The Master erred by not entering a Declaratory Judgment holding that the parties clearly amended and supplemented the terms of the original Lease Agreement when they entered into the RCSA, which provides that the Plaintiff would have no further responsibility for insuring nor responding in damages to destruction or loss of its leasehold interest on the docks because the Plaintiff became contractually obligated under the RCSA to pay its mutually agreed upon pro rata portion of the property insurance to be provided by the Landlord over all of the docks at Broad Creek Marina.**

Under the RCSA, the Landlord assumed all responsibility for insuring the docks at Broad Creek Marina and released the Plaintiff from any future obligation to insure same and/or respond in monetary damages to any future damage to the docks. Specifically, the Plaintiff prays this Court answer the question presented by consent at trial, and by the Plaintiff's Motion to Alter or Amend: What was the clear intention of the parties under the RCSA regarding future property insurance payments on the docks at Broad Creek Marina and was the Plaintiff released from any obligations under the original Lease Agreement to repair its leasehold interests by the RCSA? (Transcript of hearing on Motion To Alter Or Amend, R.p. 1056 and pp. 1073 and 1074.)

This is the most important issue that the Court can address for the benefit of the parties and for the benefit of the judicial system avoiding future, needless continuing controversy between the parties. A judicial declaration as to the parties' intentions concerning insurance coverage in the RCSA is imperative.

J & W's President, Wick Scurry, testified that he and Roger Freedman have distinctly different interpretations as to what the RCSA requires concerning insurance on the docks and which entity is to procure it, maintain it and pay for it. (R.p. 432, line 17 through p. 434, line 11.) The Court even noted during trial that the parties "agree on all but, perhaps, the insurance issues." (R.p. 414, lines 22-24.) Mr. Scurry further testified that to his understanding, the RCSA requires BCM to insure the docks, and J & W to contribute to that insurance annually. (R.p. 433, line 13 through p. 434, line 8.) Mr. Scurry testified that he tried to insure his leasehold interest in the BCM docks, but that his insurance agent told him the docks could not be "double insured." (R.p. 524, line 18 through p. 525, line 24.) Ed Barteet, both J & W's and BCM's insurance agent, affirmed that statement. (R.p. 601, line 25 through p. 602, line 12.)

Mr. Freedman's testimony as to his interpretation of the insurance requirements post-RCSA is unhelpful. His testimony there continued to be "hazy": he said he had "no recollection" about any RCSA insurance changes, that he didn't remember about any insurance issues being discussed, and that he really didn't have much memory about the entire negotiations and agreement on the RCSA (R.p. 629, line 4 through p. 631, line 2). However, of course, the RCSA specifically sets up a new "Annual Shared Liabilities" formula for "determining amounts due and payable by the Parties for common area charges" beginning in January 2005, and those Common Area Charges are broken down specifically in Exhibit F to the RCSA. Exhibit F states that J & W is to

pay 7.5 percent of the "Insurance: General Liability, Docks, Wharves and Piers." (Defendants' Exhibit 2, p. 1208 and 1242.)

The only clear and reasonable interpretation of the insurance requirements between the parties effective January 2005 under the mutually-agreed upon RCSA, is that BCM is to procure, maintain and pay for the General Liability and property insurance on the docks, wharves and piers, and that J & W is to reimburse BCM for 7.5 percent of the costs of that insurance upon presentation of proof of payment having been made by BCM. The only reasonable interpretation to be made of the RCSA is that J & W was released from any and all obligations (if any) contained in the original Lease Agreement requiring J & W to purchase and maintain insurance of any type on the docks at BCM, and instead, all insurance would be provided by BCM with a certain amount reimbursed by J & W based upon the 7.5 percent agreement. There is no other possible interpretation of the RCSA that would explain why J & W would have agreed to pay the 7.5 percent of BCM's insurance costs on an annual basis going forward, unless J & W was being released from any claims from BCM that J & W had to maintain a second layer of insurance on the leasehold docks (which Mr. Scurry testified, he could not get).

Plaintiff J & W thus requests this Court cure the Master's error and enter its declaration of interpretation of the RCSA as follows:

1. That BCM is to provide general liability and property insurance coverage over all docks, wharves and piers at Broad Creek Marina with a deductible as BCM sees fit to procure. J & W is to reimburse BCM within 30 days of presentment to J & W of documentation showing the purchase price and coverage of the insurance, 7.5 percent of the cost of the insurance paid by BCM. The

documentation must be sufficient to easily determine the nature and scope of the insurance and the relationship of the policy to the docks, wharves and piers alone. If a claim is made to which the deductible applies, J & W shall pay a maximum of 7.5 percent of the deductible incurred by BCM.

2. That BCM is to provide general liability and property insurance coverage over the parking lots and the new floating office to be provided to J & W with a deductible as BCM sees fit to procure. J & W is to reimburse BCM within 30 days of presentment to J & W of documentation showing the purchase price and coverage of the insurance, 32 percent of the cost of the insurance paid by BCM. The documentation must be sufficient to easily determine the nature and scope of the insurance and the relationship of the policy to the parking lots and floating office alone. If a claim is made to which the deductible applies, J & W shall pay a maximum of 32 percent of the deductible incurred by BCM.

7. The Master erred as a matter of law in quashing the trial subpoena issued to the Defendants' bookkeeper Robbin Rachels on May 8, 2019, and erred as a matter of law in awarding the $56,371.27 portion of the Final Order for "Unreimbursed Lease Charges" because same was not supported by the evidence.

Of the $112,428.40 awarded to the Defendants by the Master on their counterclaims, $56,371.27 represented alleged "Unreimbursed Lease Charges." (Order dated January 9, 2020, pp. 3 and 26, R.p. 21 and 31.) Of that $56,371.27, at least $10,566.47 was composed of alleged "unreimbursed insurance charges" which were not proven by a preponderance of the evidence and which the Plaintiffs were not able to appropriately cross examine the Defendants' bookkeeper about at trial, because she did not produce the subpoenaed documents required to back up the charges.

The original Lease Agreement provides at Paragraph 3 (b)(iii) that the Plaintiff shall pay as Additional Rent, "any and all amounts expended by Landlord for liability, property and casualty insurance pursuant to paragraph 17, entitled 'Liability Insurance' or to be allocated pursuant to paragraph 5, entitled 'Licensing Fees and Other Costs'." Paragraph 17 provides, in pertinent part to this issue: "Tenant agrees to pay, upon demand, as Additional Rent, any and all premiums of insurance carried by the Landlord on the Property resulting from Tenant's use or occupancy." Paragraph 5 provides, in pertinent part to this issue:

> Licensing Fees and Other Costs. Tenant shall pay taxes, license fees, insurance, utilities, and all other costs of ownership and possession for the Lease Property. To the extent such items are not separately assessed, charged, or metered, as the case may be, the parties will allocate and prorate them in an equitable manner. If one party pays any such item with respect to a portion of the Property for which it or they are not responsible, the other party shall reimburse the paying party on or before the later of the date upon which payment is due or ten (10) days after demand for reimbursement, *subject to the right of either party to contest the amount of any such tax, assessment, fee or charge.* (Emphasis added.)

As is discussed at length above in Argument 6, the Plaintiff contends that the ambiguities in the differing paragraphs of the original Lease Agreement concerning the insurance reimbursement were a major part of the disputes that led to the signing of the Release and Confidential Settlement Agreement (RCSA) on December 13, 2004, which contains a specific written formula for how insurance on the docks and piers under the leasehold at Broad Creek Marina would be paid in the future. Thereunder, the Plaintiff was to annually reimburse the Defendants for 7.5 percent of the "Docks and Piers" "Real Property" insurance purchased by the Defendants for the docks and piers at Broad Creek Marina (as opposed to the other real property the Defendants were to insure such as the Storage Shed, Dry Stack Building, and Floating Store or Dock Masters Office). Of course, the RCSA specifically provides that "Except as set forth, amended or modified herein, all terms and conditions of the Lease remain in full force and effect."

RCSA, p. 4, R.p. 1211. Thus, the Plaintiff's right to contest the amount of any claimed reimbursable charge continued.

On December 12, 2018, the Plaintiff issued a S.C.R.C.P. 30(b)(5) and (6) Notice of Deposition and Request for Production to the Defendant Broad Creek Marina of Hilton Head, LLC. The Notice listed as a topic of inquiry:

> 52. If BCM contends that J & W has failed to pay all or a portion of the "Common Area Charges" addressed in the Release and Confidential Settlement Agreement, a specific delineation of each charge that J & W has supposedly failed to pay, the composition of the charge, identification of the documents that support the charge, the date and means of notice that BCM used to notify J & W of the particular charge, and the amount of money and means of payment that BCM has paid as its share of the particular charge(s).

In addition, the 30(b)(5) list of documents to be produced included:

> 5. Copies of all insurance policies and DEC sheet procured by or on behalf of BCM between January 1, 2010 and the date of this deposition, to cover any of the real property or docks at Broad Creek Marina, along with copies of BCM's paperwork that shows the actual amount of money BCM paid for the insurance policies produced, along with paperwork showing any rebates or refund of premiums received by BCM for any reason.

The 30(b)(5) and (6) deposition was taken on January 11, 2019, and certain portions were introduced at trial. Pertinent as to this point was the testimony of Robbin Rachels, the Bookkeeper for the Defendants, who testified on January 11, 2019 that in order for her to appropriately respond to questions about the "insurance billing that has been given to us," she would have to undertake a further analysis. "That is something we would have to do. That is something we are in the—we are in the progress of working on." (See mistakenly unnumbered Record page between marked pages 640 and 641 (trial transcript page 342), lines 2 through 7.) When pushed further by the undersigned as to whether she could get that information and produce it for the Plaintiff if her counsel instructed or asked her to, Ms. Rachels replied "Yes. It will take some time." Id. at lines 6-7.

When the supporting paperwork had not been produced by early May 2019, with a trial date looming of May 15, 2019, the Plaintiff issued a trial subpoena to Ms. Rachels on May 8, 2019, requiring her to produce at trial:

> h. Originals (or complete copies) of all insurance policies, premium invoices, and DEC sheets, procured by or on behalf of Broad Creek Marina (or whatever named entity was doing business as the "owner" of Broad Creek Marina at the time) for what you call "General Liability" insurance and "Docks & Piers" Insurance on those invoices tendered by both Broad Creek Marina Operations, LLC and Broad Creek Marina to the J & W Corporation of Greenwood under that what you call "Expense Reimb. Account" between January 1, 2009 and the date of trial. IN ADDITION, originals (or true and correct copies) of all documents referring to, relating to, or otherwise evidencing the actual amount of money that Broad Creek Marina paid for each policy of insurance (to include cancelled checks or bank statements), along with any paperwork showing any rebates or refund of premiums received by Broad Creek Marina on any of the aforementioned policies. See Trial Subpoena, Plaintiff's Exhibit 17. (R.p. 1184.)

Defendants' counsel filed a Motion to Quash Subpoena on May 10, 2019 alleging, among other things, that the subpoena imposed an "undue burden" on the Defendants and their employees. (R.p. 112.)

Defendants called Ms. Rachels at trial on May 16, 2019 and solicited from her the identification of Defendants' Exhibits 25 and 26 (R.p. 1267 and p. 1290), which purportedly were summaries of the monthly invoices sent to J & W for the "unreimbursed lease charges" totaling $56,371.27. (R.p. 830, Lines 3-14.) Further, Defendants' counsel solicited the identification of Defendants' Exhibit 31 from Ms. Rachels, inquiring "Have you undertaken to assemble the copies of the policies and the payments and all of those things and provided those to me?" to which she replied "Yes, sir." (R.p. 844, lines 16-19.)

When queried on cross as to how she formulated the amount of "docks and piers" property insurance reimbursement that she billed to J & W (since the Defendants' property insurance

covered much more than just the docks and piers), Ms. Rachels testified that "The agent's office had to provide me with a spreadsheet breaking down docks and piers versus buildings versus, you know, all the commercial property. I don't see that here. I apologize for that oversight, but I think I can provide that for you." (R.p. 873, lines 7-13.) Plaintiff's counsel specifically directed her attention to Broad Creek Marina's invoice numbered 8606853, dated October 30, 2013, a part of Defendants' Exhibit 27 and Bates numbered 000340, and asked how she computed the $1,745.70 bill rendered to J & W for "reimbursement Docks and Piers," to which Ms. Rachels replied "I had to get a breakdown from the agent office. They provided me with a spreadsheet listing the different entities that totaled this. One of the items was docks; and, as I said, it's not here. I apologize. And I can go back through my records and find that." (R.p. 874, lines 9-16.)

Plaintiff's counsel then directed Ms. Rachel's attention to the Trial Subpoena she had been issued (discussed above)(Plaintiff's Exhibit 17, R.p. 1184), and she acknowledged it was served upon the week prior. The follow colloquy then ensued:

Q. Once you received it, did you review it and see what it asks for you to bring?

A. Yes, sir.

Q. And if you will look at—

A. I've already apologized for that being left out of the—out of this exhibit. Errors happen.

Q. I don't know what that means. I mean—

A. Well, you're about to say this list has all the stuff that you're supposed to bring.

Q. Yes, ma'am.

A. That spreadsheet, if that's what you're wanting to see, I said its left out; and I can get it for you.

Q. Well, what I'm wanting to see and what you were commanded to bring with you today to back up your testimony was all documentation from which we could discern whether these numbers are accurate or not.

(R.p. 878, lines 3-16.)

Plaintiff's counsel then moved the admission of Exhibit 17, the Trial Subpoena, and Defendants' Counsel moved to have his Motion to Quash heard, and argued that it was burdensome "because it asked for, not just the spreadsheet she had used." Plaintiff's counsel reminded the Court that Ms. Rachels had testified four months earlier on January 11, 2019 at the 30(b)(5) and (6) deposition when asked why she did not then and there produce the insurance back up documentation described in the Notice, that "That is something we would have to do." (See mistakenly unnumbered Record page between pages 640 and 641, lines 2-3.)

Judge Dukes thereupon erroneously granted the Motion to Quash, and noted that he was "listening to the cross-examination as to backup and that sort of thing, and I'll consider it all." (R.p. 881, lines 5-9.)

Following that ruling by the Court, Plaintiff's counsel asked Ms. Rachels:

> Q. In addition to the spreadsheets, did you bring with you any of the actual policies of insurance that were requested in the subpoena?
>
> A. No, sir.
>
> Q. So is it correct to say that, as to the page that i just pulled out, Number 340, the bill of $1,745.70 to J & W, you can't tell me right now or show me any documentation that show that's actually related to docks and piers coverage, can you?
>
> A. No, sir. Not with me.

(R.p. 882, lines 13-22)

The Master's error in quashing the subpoena, and his inclusion of the "docks and piers" reimbursement bills in the $56,371.27, amounts to an abuse of discretion that damaged the Plaintiff, in that the Defendants included a total of $6,438.46 in "reimbursable docks and piers" insurance in the $56,371.27 prayer adopted by the Court. See Defendants' Exhibit 27, Bates

numbered 0339, 0340, 0441, 0443, and 0455 (R. pages 1423,1424,1524,1526 and 1538). In addition, the Appellant contends the invoice dated April 29, 2011 (R.p. 1360) claiming a total reimbursable expense of $2,054.63 (without any breakdown of General Liability versus property "docks and piers") and the invoice dated September 1, 2011 (R.p. 1371) claiming a total reimbursable expense of $2073.38 (without any breakdown of General Liability versus property "docks and piers") should have been excluded from the damage calculation because there is nothing to allow the Plaintiff to confirm the calculation, despite repeated attempts pre-trial and at trial, to solicit the documentation. There is no other way the Plaintiff could have exercised its right to contest the amount of the claimed reimbursable. At a minimum, the damage award of $56,371.27 was excessive by at least $10,566.47 in "reimbursable insurance charges" that have no documentation. *See* Whisenant v. James Island Corp., 277 S.C. 10, 281 S.E.2d 794 (1981). (In order for damages to be recoverable, evidence should be such as to enable a court or jury to determine amount thereof with reasonable certainty or accuracy....)

In addition to the unsupported "insurance reimbursables," Ms. Rachels admitted at trial that she had overbilled the Plaintiff by $1,532.95 in her total $56,371.27 number adopted by the Master. This number is a multiple of the $13.34 monthly overcharge for "lot maintenance" that was billed 115 times between November 11, 2009 and May 1, 2019, as is presented in Defendant's Exhibits 25 and 26. This mistake was brought to Ms. Rachel's attention at the 30(b)(6) deposition on January 11, 2019, when she acknowledged that the monthly charge based upon the $1,437.44 annual J & W liability as set forth in the RCSA should have been $119.79, as opposed to the $133.12 number that she saw had been billed prior when she took the job. "I just continued billing them what was being billed when I started." (R.p. 641, lines 7-8.)

When asked at trial why she had not corrected the error in her computations prior to submitting the Defendants' Trial Exhibits 25 and 26 containing the wrong numbers, Ms. Rachels testified that "we're waiting on this action, I guess, to see what happens from this trial." (R.p. 863, lines 6-7.) She then elaborated:

> A. I have not gone back and changed the amount billed each month. We have continued to bill the incorrect amount.
>
> Q. And you knew it for the last four months.
>
> A. Yes.
>
> Q. And does—each and every one of the exhibits that has been marked and entered into evidence in which you've taken a seat in that witness chair today, is inaccurate and is, in fact, an overbill, correct?
>
> A. Yes.

(R.p. 864, lines 9-20.)

The Master not only erred in overlooking Ms. Rachel's admitted error in calculations (and not reducing the prayed for $56,371.27 by at least the admitted overbill of $1,532.95), but he further erred and abused his discretion by denying the Plaintiff's Motion to Exclude the previously admitted Defendant's Exhibits 25 and 26, which contained the admittedly erroneous calculations by Ms. Rachels. (R. pages 951, line 24 through p. 954, line 3.)

CONCLUSION

For the reasons set forth above, this Court should reverse the decisions of the Master and enter the following Orders:

a. A Declaratory Judgment in favor of the Plaintiff on its Second Cause of Action that the Defendants must provide the Plaintiff a new office space as set forth in the Release and Confidential Settlement Agreement;

b. An Order providing that the new office space to be provided by the Defendants must be either in the Dockmasters House as described in the RCSA or in a mutually agreeable location of a size, kind and quality comparable to the Marina Office where the Plaintiff was at the time of execution of the RCSA;

c. If this Court finds that a "floating office" falls within the regulatory framework of this State, an Order that the floating office to be provided must have at least a 20-year anticipated service life;

d. An Order awarding the Plaintiff at least nominal damages for the Defendants' breach of contract in failing to provide a proper office for over 10 years;

e. An Order providing an appropriate equitable setoff to any damage award granted the Defendants;

f. An Order denying the Defendants recovery for the "dock damages" of Hurricane Matthew due to a failure of proof that the Plaintiff's vessels proximately or directly causing the complained of damage or that the damage was a result of the Plaintiff's use of the docks;

g. A Declaratory Judgment that the parties amended and supplemented the insurance requirements of the original Lease Agreement by the execution of the RCSA in 2004, thereby requiring the Landlord Defendants to maintain all insurance coverage on the Broad Creek Marina property, and requiring the Plaintiff to contribute as per the schedule of payments set forth in the RCSA; and,

h. An Order reversing the Master's exclusion of the trial court subpoena to Ms. Rachels and an Order reducing or eliminating the $56,371.27 portion of the Master's judgment for "reimbursable" costs as being unfounded and unproven.

Respectfully Submitted,

s/Thomas C. Taylor
Thomas C. Taylor, Esq.
South Carolina Bar No.: 5499
LAW OFFICE OF THOMAS C. TAYLOR, LLC
22 Bow Circle, Suite A
Post Office Box 5550
Hilton Head Island, SC 29938
T: 843-785-5050
F: 843-785-5030
tom@thomastaylorlaw.com

ATTORNEY FOR APPELLANT
J & W CORPORATION OF GREENWOOD

Hilton Head Island, South Carolina
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