

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

68654

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, III, Master-in-Equity

Case No. 06-CP-07-2689

MicroClean Technology, Inc., Appellant,

v.

EnviroFix, Inc., Respondent.

PETITION FOR REHEARING

Robert E. Sumner, IV
Trudy H. Robertson
MOORE & VAN ALLEN, PLLC
78 Wentworth Street
Charleston, SC 29401
(843) 579-7000
Attorneys for Respondent

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JUN 06 2013

SC Court of Appeals

Other Counsel of Record:

Terry A. Finger, Esquire
Finger & Fraser, P.A.
P.O. Box 24005
Hilton Head Island, SC 29925-4004
(843) 681-7000
Attorneys for Appellant

Now Comes Respondent, EnviroFix, Inc., by and through counsel, pursuant to SCACR 221(a) and hereby files this Petition for Rehearing as to the Opinion by the Court of Appeals (the “Court”) filed on May 22, 2013.

STATEMENT OF THE CASE

On May 22, 2013, the Court filed Opinion No. 5135 (the “Opinion”), which affirmed in part, reversed in part and remanded the case to the trial court for final determination of the following issues:

(1) the merit of any of the alternative defenses that EnviroFix asserted at trial, (2) the damages, if any, to which MicroClean is entitled for breach of the License Agreement, (3) which party is in possession of the BioTowers, and (4) any damages to which MicroClean is entitled on its claim and delivery action.

(Ct. App. Op. p. 14).

In arriving at these conclusions, the Court made two separate rulings with respect to findings made by the trial court. First, the Court weighed the evidence presented at trial and concluded that the letters sent by EnviroFix to MicroClean were insufficient to convey a sixty-day notice of termination under the License Agreement. Second, the Court weighed the evidence presented at trial and concluded that the parties did not agree that the \$15,000.00 security deposit would serve as liquidated damages in the event that the BioTowers were not returned by EnviroFix.

Respondent now moves this Court for a rehearing on the Court’s two rulings above based on the Court’s misapprehension and misapplication of the standard of review regarding a master or special referee’s findings.

REHEARING STANDARD

The scope of review for deciding a Petition for Rehearing is limited to whether the Court “overlooked or misapprehended” a point in reaching its decision. Rule 221 of the South Carolina Appellate Court Rules states, “A petition for rehearing shall be in accordance with Rule 240, and shall state with particularity the *points supposed to have been overlooked or misapprehended by the court.*” Rule 221, SCACR (2011) (emphasis added). In order to prevail on a petition for rehearing, appellants must demonstrate that the Court overlooked or misapprehended their argument. Jean H. Toal, et al., Appellate Practice in South Carolina 293 (Second ed. 2002) (citing Kennedy v. South Carolina Retirement Sys., S.C. Sup. Ct. Order dated July 23, 2001). “The appellate court will not entertain petitions for rehearing on a motion or petition unless the action of the court on the motion or petition has the effect of dismissing or finally deciding a party’s appeal.” Id. (citing Rule 221(c), SCACR and Rule 224(i) SCACR).

ARGUMENT

The Court misapprehended or failed to apply the proper standard of review in reversing the findings of the trial court. The Court referenced the proper standard of review in the Opinion:

When reviewing an action at law, referred to a master or special referee for final judgment with direct appeal to the supreme court or the court of appeals, the appellate court’s jurisdiction is limited to correcting errors of law, and the appellate court will not disturb the master or special referee’s findings of fact as long as they are reasonably supported by the evidence.

(Ct. App. Op., p. 9) (citing Allen v. Pinnacle Healthcare Sys., LLC, 394 S.C. 268, 272, 715 S.E.2d 362, 364 (Ct. App. 2011)).

In determining whether there is evidentiary support for the master's findings under this standard, the appellate court should construe evidence presented to the master so as to support his decision wherever reasonably possible. May v. Hopkinson, 289 S.C. 549, 554–55, 347 S.E.2d 508, 511 (Ct. App. 1986). In so doing, the appellate court should consider only evidence favorable to the prevailing party, while eliminating from its consideration all evidence contrary thereto or in conflict therewith, and look at such evidence in the light most favorable to the prevailing party. Id.

Despite recognizing the applicable standard of review, the Court reversed the trial court in the face of evidence reasonably supporting the trial court's findings.

I. The Court misapprehended or failed to apply the proper standard of review in reversing the trial court's finding that the letters sent by EnviroFix to MicroClean were sufficient to convey a sixty-day notice of termination of the License Agreement.

The evidence in the record supports the trial court's finding that EnviroFix properly terminated the License Agreement. The trial court found that EnviroFix terminated the License Agreement with MicroClean in a letter sent to MicroClean on December 4, 2005. (R. p. 4, ¶ 17). MicroClean argues that the letter was ambiguous as to whether EnviroFix intended to terminate the License Agreement; however, EnviroFix stated that due to MicroClean's failure to remedy the maintenance and repair issues noted by EnviroFix, the "spirit of the agreement has been violated and is dead." (R. p. 176). In the same letter, EnviroFix advised MicroClean that it would not make any future monthly payments under the License Agreement as long as the BioTowers were in disrepair. (R. p. 176). In a subsequent letter later that month, EnviroFix reiterated its position by

stating, “In EnviroFix’s opinion, the agreement with MicroClean is void.” (R. p. 177). Thus, the trial court had ample evidence in the record to support its finding that the December 2005 letters from EnviroFix terminated the License Agreement.

The Court stated in the Opinion, “We *interpret* the other letter, in which Stoner asserted the agreement was “void” and expressed a willingness to enter into a new agreement only if MicroClean refunded EnviroFix’s security deposit as well as certain overpayments, as an intent to restore the pre-agreement status quo rather than to terminate the License Agreement in the manner specified in the agreement itself.” (Ct. App. Op., pp. 10-11)(emphasis added). The Court further cited as a basis for this ruling that EnviroFix failed to pay monthly fees for December of 2005 and January 2006.

As stated above, the Court should have construed all of the evidence in the light most favorable to Respondent and, for purposes of review, disregarded any evidence in conflict with Respondent’s position. By its own language, the Court explains that it interpreted the evidence presented to the trial court and even relied on evidence contrary to Respondent’s position. This was improper.

II. The Court misapprehended or failed to apply the proper standard of review in reversing the trial court ruling that the parties agreed that the \$15,000.00 security deposit would serve as liquidated damages in the event that the BioTowers were not returned by EnviroFix.

First, the Court improperly weighed the evidence and concluded that the parties did not agree that the \$15,000.00 security deposit was intended to serve as liquidated damages. Finding that the BioTowers were still in EnviroFix’s possession (R. p. 9, ¶ 20) and that the return of the collateral in this case was “akin to the return of a perishable

item with no marketable resale value” and, thus, impractical (R. p. 8, ¶ 15), the trial court awarded MicroClean retention of the \$15,000.00 security deposit paid by EnviroFix as liquidated damages. (R. p. 9, ¶ 16). In reversing the trial court’s finding on this point, the Court stated, “Here, other provisions in the License Agreement suggest the parties did not recognize the amount of the security deposit to be a sum that cannot be changed by proof.” (Ct. App. Op., p. 13). Again, the Court interpreted the evidence on the existence of an agreement between the parties on liquidated damages—which is a finding of fact—de novo and improperly considered evidence that conflicts with Respondent’s position.

“Liquidated damages are an agreed-upon sum of money to be paid or a deposit to be forfeited in the event of a breach of contract.” 11 S.C. JUR. *Damages* § 65 (2011) (citing C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 146 (1935)). “Parties to a contract may stipulate as to the amount of liquidated damages owed in the event of nonperformance.” Foreign Academic & Cultural Exch. Svcs., Inc. v. Tripon, 394 S.C. 197, 715 S.E.2d 331, 334 (2011) (quoting Lewis v. Premium Inv. Corp., 351 S.C. 167, 172, 568 S.E.2d 361, 363 (2002)); Benya v. Gamble, 282 S.C. 624, 630, 321 S.E.2d 57, 61 (Ct. App. 1984). Here, the License Agreement supports the trial court’s characterization of the \$15,000 security deposit as liquidated damages payable in the event of a breach:

The License Agreement states:

Section 4. Proprietary Products Security Deposit. Licensee shall deposit with Licensor the amount of \$15,000 as a security deposit on the four Proprietary Products. This deposit shall be . . . returned at the end of the six year term, provided Licensee has been in full compliance with all of the terms hereof.

(R. p. 153, § 4). The plain language of the contract allowed Appellant to retain the security deposit in the event Respondent failed to comply with the terms of the contract. Finding that the parties agreed that the security deposit served as a liquidated damages provision, the trial court properly found that the \$15,000.00 liquidated damages provision represented the value of the BioTowers and properly limited damages to that amount in light of Respondent's retention of the BioTowers.

Second, the Court improperly remanded the matter to the Master to determine the amount of compensation, if any, to which MicroClean is entitled because of EnviroFix's alleged failure to relinquish the equipment. The trial court found from the evidence presented, as a finding of fact, that MicroClean made no efforts to pick up the six (6) BioTowers and that the parties offered no evidence that EnviroFix interfered with any efforts on the part of MicroClean to pick up the six (6) BioTowers. (R. p. 6, ¶¶ 18, 19). The Court improperly weighed the evidence and concluded, contrary to the trial court's factual findings, that EnviroFix detained or withheld the BioTowers as is required for an assessment of punitive damages by the finder of fact as set forth in Rule 49(c), SCRPC.

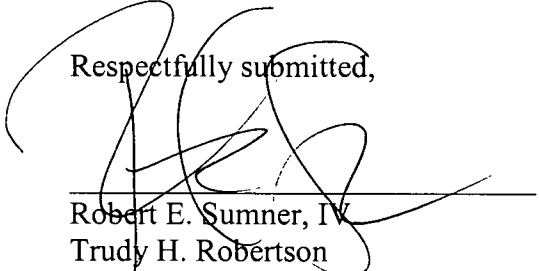
“It is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the circuit court to be preserved.” North Am. Rescue Prods., Inc. v. Richardson, No. 4909, 2011 WL 5546221 (S.C. Ct. App. Nov. 9, 2011) (citing Holy Loch Distribs., Inc. v. Hitchcock, 340 S.C. 20, 24, 531 S.E.2d 282, 284 (2000); Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000)). “Moreover, our courts have adhered to the rule that when an issue has not been ruled upon by the circuit court or raised in a post-trial motion, such issue may not be considered on appeal.” Id. (citing SSI Med. Servs., Inc. v. Cox, 301 S.C. 493, 499, 392

S.E.2d 789, 793 (1990) (finding an issue never ruled on by the circuit court or raised in an appropriate post-trial motion is not preserved for review)). Given that MicroClean improperly asserts its claim for punitive damages for the first time in its appeal and that Rule 49(c), SCRCP, does not apply based on the Master's findings of fact set forth above, MicroClean is not entitled to an award of punitive damages on its claim and delivery action.

CONCLUSION

For the aforementioned reasons, Respondent requests that the Court order a rehearing in order to apply the appropriate standard of review, change its rulings to reflect the application of the correct standard of review, and affirm the trial court's order on the issues addressed herein.

Respectfully submitted,



Robert E. Sumner, IV
Trudy H. Robertson
MOORE & VAN ALLEN, P.L.L.C.
78 Wentworth Street
Charleston, SC 29401
(843) 579-7000

Attorneys for Respondent

June 6, 2013

THE STATE OF SOUTH CAROLINA
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APPEAL FROM BEAUFORT COUNTY
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Marvin H. Dukes, III, Master-in-Equity

Case No. 06-CP-07-2689

MicroClean Technology, Inc., Appellant,

v.

EnviroFix, Inc., Respondent.

PROOF OF SERVICE

I certify that I have served Respondent EnviroFix, Inc.'s Petition for Rehearing, by depositing a copy of same in the United States Mail, postage prepaid, addressed to:

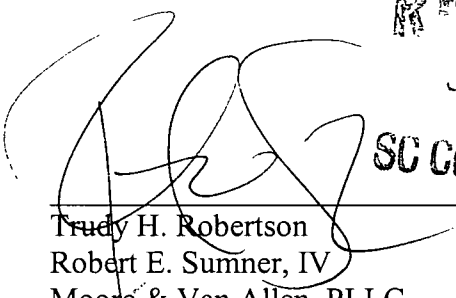
Terry A. Finger, Esquire
Finger & Fraser, PA
P.O. Box 24005
Hilton Head Island, SC 29925-4005

Attorney for the Appellant

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SC Court of Appeals



Trudy H. Robertson
Robert E. Sumner, IV
Moore & Van Allen, PLLC
78 Wentworth Street
Charleston, SC 29401
(843) 579-7000
Attorneys for Respondent
EnviroFix, Inc.

June 6, 2013

Moore & Van Allen

June 6, 2013

Robert E. Sumner, IV
Attorney at Law

T 843 579 7018
F 843 579 8743
robertsumner@mvalaw.com

VIA HAND DELIVERY

The Honorable Tonya Gee
Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

Moore & Van Allen PLLC

78 Wentworth St.
Charleston, SC 29401-1428

Mailing Address:
Post Office Box 22828
Charleston, SC 29413-2828

Re: MicroClean Technology, Inc. v. EnviroFix, Inc.
Civil Action No. 06-CP-07-2689
File No. 021032-1
Tracking No. 2011193786

Dear Ms. Gee:

Enclosed for filing, please find an original and seven (7) copies of Respondent Envirofix, Inc.'s Petition for Rehearing and a Proof of Service in the above-referenced matter. I am enclosing our firm's check in the amount of \$25.00 for the requisite filing fee.

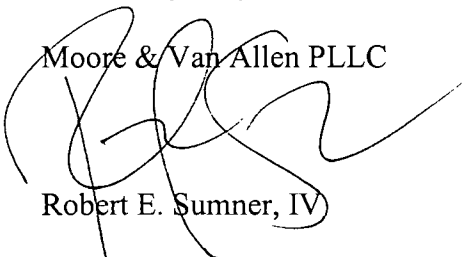
Please file the original documents and return the date-stamped copy of each to the courier for return to me.

By copy of this letter, I am hereby serving counsel with copies of these documents.

Thank you for your assistance in this matter. If there are any questions as to any of the above, please call me.

Yours very truly,

Moore & Van Allen PLLC


Robert E. Sumner, IV

RES/hm
Enclosures: as stated

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SC Court of Appeals

cc: Terry A. Finger, Esquire (w/encl.)

Charlotte, NC
Research Triangle Park, NC
Charleston, SC