THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY

Court of Common Pleas

Marvin H. Dukes, III, Master-in Equity and Special Circuit Court Judge

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Case No. 2012-CP-07-1530

Bluffton Towne Center, LLC,

Respondent,

v.

Beth Ann Gilleland-Prince
d/b/a The Law Office of Beth
Ann Gilleland, LLC,

Appellant.

INITIAL BRIEF OF THE APPELLANT

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STATEMENT OF THE CASE

AND STATEMENT OF FACTS

On or about January 2009, the Defendant/Appellant, Beth Ann Gilleland-Prince d/b/a The Law Office of Beth Ann Gilleland, LLC (hereinafter referred to as "Tenant," "Prince" or "Appellant"), entered into a commercial lease agreement with the Plaintiff/Respondent, Bluffton Towne Center, LLC (hereinafter referred to as "Landlord," or "Respondent"), for a term of three (3) years, beginning January 1, 2009 and ending December 31, 2011.[1] Plaintiff's Tr. Ex. 1. Prince had been operating the Law Office of Beth Ann Gilleland, LLC at Towne Center since 2005.[2]

The lease between the parties, drafted entirely by the Respondent, was approximately 3 ½ pages long. The Default provision of the lease reads in pertinent part as follows:

> Subject to any governing provisions of law to the contrary, if Tenant fails to cure any financial obligation within 10 days...after written notice of such default is provided by Landlord to Tenant, Landlord may take possession of the Premises without further notice (to the extent permitted by law), and without prejudicing Landlord's right to damages....Tenant shall pay all costs, damages, and expenses (including reasonable attorney fees and expenses) suffered by Landlord by reason of Tenant's defaults. Plaintiff's Tr. Ex. 1.

On or about November of 2009, Prince, rather unexpectedly, accepted an appointment as a full-time magistrate court judge in Beaufort County, which would prohibit her from practicing law. Therefore, at that time, Prince would no longer be

[1] Another tenant to the lease agreement was Miguel Picco, who vacated the premises shortly after entering into the lease. It appears the whereabouts of this individual are unknown, which presumably accounts for the fact such individual was not a named defendant in the above captioned action.

[2] For clarification purposes, Prince's maiden name is "Gilleland." She continued the use of her maiden name for professional purposes from 2006 until 2009, and transitioned by using a hyphenated version of her maiden and married names. Currently, she rarely uses the hyphenated version of "Gilleland-Prince," and is generally known in the community as, "Beth Ann Prince."

permitted to use the premises for the purpose specifically provided for in the lease. Plaintiff's Tr. Ex. 1.

On or about December 18, 2009, Prince notified Respondent, by and through its owner, Mr. Paul Watson, that she would eventually have to vacate the space because she would no longer be legally permitted to operate her law practice and was, therefore, beginning the process of closing her practice. At that time she was unsure exactly how long it would take to accomplish the task, and notified Respondent she expected it likely would be no later than February 2010. Plaintiff's Tr. Ex. 2. The Respondent replied to her email on the same date of December 18, 2009, stating, "I would assume you will honor your obligation under the lease." Plaintiff's Tr. Ex. 2.

There was no further communication between the parties for more than 60 days, during which time Prince continued to occupy the space and pay rent. Prince then defaulted in the rent for the month of February 2010, after which Prince received a "10 Day Notice to Pay or Quit" (hereinafter referred to also as "Notice") from the Respondent dated February 26, 2010. Plaintiff's Tr. Ex. 3. In the Notice, Respondent stated, "You are hereby notified that you have ten (10) days to pay to the undersigned office rent now due from you in the amount of $1,875.00 as set forth below, or your right to possession of the above referenced premises will cease and you must quit the same." Plaintiff's Tr. Ex. 3. The Notice further contained the following language:

> In the event you do not satisfy all the requirements of this ten (10) day notice by paying the amount set forth below and do either voluntarily or by court leave the premises, you will still be obligated and responsible for payment of monies set forth below, together with any additional costs, legal fees, expenses and rents that continue to accrue under the terms of the lease because of non-payment." Plaintiff's Tr. Ex. 3.

It was undisputed at trial that Prince did not pay the amount requested in the Notice, and did, in fact, relinquish possession of the premises, as requested in the Notice. Tr. Transcript, p. 19. In fact, Paul Watson, representative of the Plaintiff, testified at trial that when he did not receive the past due rent within the 10 days as requested, he believed the Defendant vacated the premises as demanded. Tr. Transcript, p. 19.

Nonetheless, several weeks later after Prince vacated the premises, as requested in the Notice, she received an email from the Respondent's attorney, on March 28, 2010, which contained several propositions, as if the Notice sent directly from Respondent had not existed. Plaintiff's Tr. Ex. 4. In fact, the propositions contradicted the demands in the February 26, 2010 Notice. In the March 28 email, Plaintiff's attorney now proposed that Prince pay the back rent for February and March 2010, and that she voluntarily vacate the space and then continue to make rent payments until the space is re-let, and if that were unacceptable, the Respondent intended to file an eviction action and suit for ***back rent***. Emphasis added. Plaintiff's Tr. Ex. 4. Somewhat puzzled by this correspondence, Prince responded via email to Respondent's attorney on the same date, and informed him, "I have been out of the unit for nearly two months, as Mr. Watson requested." Plaintiff's Tr. Ex. 5.

The next communication between the parties was via email 4 days later, on April 1, 2010, in which Respondent's attorney informed Prince the Respondent did not have an extra key to the premises, and requested Prince to provide any keys in her possession to the rental broker, which Prince did that same day. Plaintiff's Tr. Ex.'s 6-9. Prince was again somewhat puzzled by the request inasmuch as Respondent had never requested the keys be returned, and in fact, had obviously been inside the premises since Prince's

departure, as indicated by inquiries of items remaining in the premises contained in the Respondent's March 28, 2010 email, to which Prince informed Respondent that all items remaining were actually property of the landlord. Plaintiff's Tr. Ex.'s 4-5.

After the arrangements for Prince's original keys to be picked up by the landlord's rental broker on April 1, 2010, there was no communication between the parties for nearly 2 years. On or about March 9, 2012, Respondent's attorney sent Prince correspondence demanding $34,850.00, which Respondent believed it was owed pursuant to the lease agreement. Plaintiff's Tr. Ex. 14. Prince did not agree that the lease and the circumstances of the lease termination legally entitled the Respondent to any rent past February 2010. As a result, Respondent filed this action on or about April 18, 2012. The matter was tried before the Honorable Marvin H. Dukes, III, Master-in-Equity for Beaufort County on October 26, 2012. The parties were each given an opportunity to submit post-trial briefs following the trial, and on December 26, 2012, the Court issued its Order Granting Judgment to the Plaintiff for the entire amount requested, plus attorney's fees and costs in the amount of $3,843.55, for a total judgment of $39,627.55. Thereafter, Prince filed a Notice of Appeal.

ARUGMENT

I. THE TRIAL COURT ERRED IN DETERMINING THE HOLDINGS SET FORTH IN SIMON V. KIRKPATRICK, 141 S.C. 251, 139 S.E. 614 (1927) WERE NO LONGER "VALID LAW."

Prince's main argument at trial was that the lease's default provision was insufficient to entitle the Respondent to future rent in the event of termination of the lease agreement prior to the lease expiration. Tr. Transcript, pp. 44-52. In support of this argument, she presented the Court with a copy of Simon v. Kirkpatrick, 141 S.C. 251, 139 S.E. 614 (1927). The facts of Simon are very similar to those of the case at bar. In both instances, upon the tenant's breach of lease by failure to pay rent, the landlord specifically chose to notify the tenant it was terminating the lease, and that the tenant would no longer have any rights thereunder. In Simon, the lower court granted a new trial following a jury verdict for the landlord (Simon). In its order granting the new trial, which was affirmed by the South Carolina Supreme Court, the lower court in Simon stated the following:

> Had Simon notified Kirkpatrick that he was holding or taking possession of the premises for the account of Kirkpatrick, it is my opinion that he would clearly have been entitled to the amount of the verdict, as, I think, the facts warranted it. The relationship of landlord and tenant would not then have been terminated and loss resulting to Simon by reason of Kirkpatrick's breach of the contract within the 13 months could properly have been charged up to Kirkpatrick as the defaulting tenant.
>
> But Simon elects to rely upon the authority given in the lease and *evicts Kirkpatrick* and precludes him 'from any further right or benefit thereunder.' *The only reasonable deduction is that this act terminated the relationship of landlord and tenant between them.* And is (in?) (sic) such a circumstance, the authorities available seem clear that the rent, or liability on the contract ceases. Emphasis in original. Id. at 616.

Specifically, the notice provided by Simon to Kirkpatrick stated that due to failure to pay rent, Kirkpatrick, "as per terms of the lease (you) are thereby precluded from any

further right to benefit thereunder." Id. at 617. The Court in Simon determined this notice undoubtedly terminated the landlord/tenant relationship, and thus, extinguished any obligation by the tenant for future rent.[3]

> The rule, as we understand it, it that termination of a lease does not absolve the lessee from obligations incurred up to the date of termination, but it does absolve him from future obligations, unless the lease shall provide that, notwithstanding the termination for cause by the lessor, the lessee shall not be relieved of such future obligations. 36 C.J. 335. The lease in the case at bar does not carry a provision to the effect mentioned. Id.

However, the Court in Simon discussed the various other options which had been available to the landlord, in which he may have been able to recover damages for the balance of the lease term. For example, had the landlord not opted to affirmatively terminate the lease he may have done the following:

> He might have awaited the expiration of the term, and, upon a showing of reasonable efforts to minimize his damage, sued for the damage actually sustained, the agreed upon rental less rental which he had in the meantime received or with proper effort should have received. Id. at 617.[4]

The Respondent in the instant case, likewise, could just as easily have declined to terminate the lease via the February 26, 2010 Notice to Pay or Quit, and simply re-entered the premises and attempted to re-let for the account of Prince. However, that is not what the Respondent chose to do. Further, testimony at trial made clear it was in fact the Respondent's intention that all of Prince's rights under

[3] Despite the fact the Simon Court determined the relationship between the parties had been mischaracterized as "landlord/tenant" due to the fact the tenant in Simon never actually took possession of the leased premises, the Court nonetheless offered that the, "error in the particulars...has absolutely nothing to do with the main issue, whether the notice terminated the relation of the parties." Id. at 617.
[4] It is this alternate measure of damages, as espoused in Simon v. Kirkpatrick that the trial court in the instant case, on the one hand promulgates as the "modern rule," while at the same time, rejecting the main holding as "invalid."

the lease be extinguished, as is proven by the following excerpt from the Trial Transcript, wherein Prince queries the Respondent as to what rights she had under the lease if she failed to pay the February rent within 10 days as demanded in the Notice:

> Q. What rights did I have under the lease? Was I able to use the space?
>
> A. Well not after you defaulted.
>
> Q. As a matter of fact you told me if you don't pay you need to get out or I am going to file an eviction action and make you get out, right?
>
> A. Right.
>
> Q. So I am just trying to be clear here. You told me I had to go and I couldn't come back and you wanted the keys. You can't use the space but I want you to pay for it, right?
>
> A. Yes.
>
> Tr. Transcript, p. 38.

The trial court in the instant case found and concluded that Simon is no longer "valid law," despite the fact that Simon has never been overruled, and actually has been repeatedly cited for its holdings, *See* United States Rubber Co. v. White Tire Company, 231 S.C. 84, 97 S.E.2d 403 (1956), Camden Inv. Co. v. Gibson, 204 S.C. 513, 30 S.E.2d 305 (1944), Blumberg v. Nealco, 307 S.C. 537, 416 S.E.2d 211 (Ct. App. 1992) (*cert. granted August 31, 1992, overruled on other grounds).* Order, pp.4-6. Moreover, the trial court found and concluded that Simon does not state the "modern law of damages for breach of a lease in South Carolina today." Order, p. 4. The trial court then proclaimed the "modern rule" to be set forth in United States Rubber Co. v. White Tire Company, 231 S.C. 84, 97 S.E.2d 403 (1956). The

Appellant cannot fathom to what the trial court attributed the "invalidity" of Simon or for what reason it deemed the following language contained in U.S. Rubber, to be the "modern rule."

> The measure of such damages is the amount that she would have received as rent for the remainder of the term, had there been no default, less such amount as she may receive from the new tenant, for it was her duty to minimize her damages. Burkhalter v. Townsend, 139 S.C. 324, 138 S.E. 34 (Ct. App. 1927).

It must be noted that not only is Burkhalter factually distinguishable from the case at bar, and from Simon v. Kirkpatrick, but most interestingly, it was decided several months ***prior to*** Simon v. Kirkpatrick, and in fact is nearly verbatim to the language adopted by Justice Blease in the Simon opinion as the measure of damages available to the landlord had he not opted to terminate the lease.

There is simply no legal foundation upon which the trial court arbitrarily declared the portion of Simon argued by the Appellant as applicable to the case at bar, to be "no longer valid law," and yet at the same time offer another portion of Simon to be the "modern rule" regarding breach of lease damages.[5] The trial court appeared to deem U.S. Rubber Co. v. White Tire Co., 231 S.C. 84, 97 S.E.2d 403 (1956) (referred to in the trial court's order as "White Tire") as the seminal case in the entire body of case law regarding the measure of damages for breach of lease. However, there is no support for this position. U.S. Rubber, again, is factually distinguishable from the case at bar in that the landlord did not terminate the lease by eviction (or threat thereof), and preclude the tenant from any rights under the lease from a certain day forward. The landlord/tenant relationship in U.S. Rubber

[5] The trial court does not at any time acknowledge in its order that Simon contains the very language it considers to be the "modern rule," which the trial court appears to attribute to originating in U.S. Rubber.

was terminated by the landlord re-letting after the tenant's abandonment of the premises, following the tenant's insolvency and appointment of a receiver. Id. Further, the dispute in U.S. Rubber was over the return of a security deposit and/or how such deposit may be applied. The Court in U.S. Rubber properly looked to the lease to determine what rights the parties had under the circumstances. In paragraph 14, the lease specifically spoke to the issue of a receiver being appointed for the tenant, and allowed the landlord to terminate the lease or continue if satisfactory security was given to secure the terms of the lease "and the payments therein provided." Id. at 88. The Court determined it must construe the lease as a whole to ascertain, "the intention of the parties with regard to the deposit required under Paragraph 18..." and decided that, "Viewing that paragraph in relation to the others, especially Paragraphs 14 and 15, it seems clear that the deposit was intended to protect the lessor against any loss resulting from the lessee's default, whether such loss should be in respect of rent or maintenance...." Id. at 95-96. Again, the facts of U.S. Rubber are obviously distinguishable from the case at bar, and the holding thereof is wholly consistent with Appellant's argument in favor of reversal of the trial court's ruling in the instant case.

Based upon the ruling in U.S. Rubber, and the underlying factual basis thereof, the trial court had no basis upon which to find a "modern rule" within the holding of U.S. Rubber Co. v. White Tire Co. which would in any way abrogate or invalidate Simon v. Kirkpatrick, *supra*. Additionally, the trial court fails to consider in each of the citations offered for further support of its ruling, that the cases are each factually distinguishable from the case at bar. Moreover, the direct quotes are often

taken out of context, when a more comprehensive reading of the opinion actually supports the Appellant's position that the holding in Simon has been consistently recognized by our Courts. For example, the trial court cites Richman v. Joray Corp., 183 F.2d 667 (4th Cir. 1950), and sets forth a quote that "the measure of damages is the difference between the rent fixed in the lease and the rental value of the premises for the entire term at the time of the breach, together with such special damages as may result from the breach." Id. at 671. However, the trial court overlooks several key points in Richman. First, the case is factually distinguishable from the case at bar on many levels, namely, the landlord never terminated the lease by eviction, rather, the parties entered into a settlement agreement following the surrender of the premises by the tenant. Second, the lease between Richman and Joray Corp. contained very specific language regarding application of rental payments should the landlord need to re-let the premises due to tenant's default, and that the "balance (if any) to be paid over to the tenant who shall remain liable for any deficiency...." Id. at 668. Third, the Court noted the general rule, "as laid down in Simon v. Kirkpatrick, 141 S.C. 251, 262, 139 S.E. 614...the termination of a lease does not absolve the lessee from obligations incurred up to the date of termination, but ***it does absolve him from future obligations, unless the lease otherwise provides.***" Emphasis added. Id. at 669-670. The Court then opined as follows:

> In the first place it is noteworthy that the lease is taken from the general rule, that the termination of a lease absolves the lessee from future obligations thereof, by the explicit provision in Section 7 of the lease...and by the provisions of Section 19 that in case of eviction and re-entry, the landlord may re-let the premises at the risk of the tenant and retain the deposit as security until the time fixed for the expiration

of the term. Id. at 670.[6]

Finally, Simon v. Kirkpatrick, *supra,* was most recently cited in Blumberg v. Nealco, 307 S.C. 537, 416 S.E.2d 211 (Ct. App. 1992) (*cert. granted August 31, 1992, reversed and remanded on other grounds).* Although, Blumberg is cited in the trial court's order in the case at bar as support for its ruling in favor of the Respondent, the case actually provides much stronger support for the Appellant's position, by affirming the lower Court's ruling as follows:

> The judge dismissed Blumberg's claim for future payments without prejudice. Ordinarily, the termination of a lease will terminate a lessor's right to future payments. United States Rubber Co. v. White Tire Co., 231 S.C. 84, 97 S.E. 2d 403 (1956). However, if the lease agreement provides for payment of future rents, termination will not release the lessee of such future obligations. Simon v. Kirkpatrick, 141 S.C. 251, 139 S.E. 614 (1927).
>
> The lease provides as follows:
>
> Section 20.01. Termination. In the event lessee shall fail to pay any monthly installment of rental promptly as the same shall become due....lessor shall have the right, at its sole option...to terminate this lease...but the exercise or non- exercise of such right of termination shall not prejudice any other rights which the lessor may have against the lessee hereunder and *shall not operate to relieve the lessee of its obligation to pay* ***rental*** or of its obligations under any other covenants and agreements herein contained. Emphasis added.

Based upon the foregoing, the Blumberg court affirmed the trial court inasmuch as it was not error to dismiss the claim for future rent *without* prejudice due

[6] It is noteworthy that although the trial court offers Richman v. Joray Corp. as support that U.S. Rubber contains the "modern rule," Richman v. Joray Corp. was actually decided several years prior.

to the fact the lease specifically provided for future rents, and thus, it may be appropriate for the claim to be filed at a later date.[7]

The long-standing doctrine of *stare decisis* necessarily required the Court to follow the body of case law which begins with the holdings in Simon v. Kirkpatrick, 141 S.C. 251, 139 S.E.2d 614 (1927). "The doctrine of stare decisis says that where a principle of law has become settled by a series of court decisions, it should be followed in similar cases." Langley v. Boyter, 284 S.C. 162, 180, 325 S.E.2d 550, 560 (Ct.App.1984), *quashed on other grounds,* 286 S.C. 85, 332 S.E.2d 100 (1985). The trial court's failure to follow the precedent set by Simon v. Kirkpatrick and its progeny constitutes error, and therefore, the trial court's ruling in favor of the Respondent should be reversed.

II. THE TRIAL COURT ERRED BY FINDING THAT THE LEASE IN THE INSTANT CASE WAS TERMINATED BY ABANDONMENT.

Along with the terms of the lease itself, whether or not a landlord is entitled to "future rent" after a tenant vacates depends largely upon the facts upon which the tenant vacated, and whether or not such results in the termination of the lease agreement. If the landlord terminates the lease by eviction, "the estate is at an end; the lessee is liable for the stipulated rent, as damages, up to the date of the termination; after that, his obligation, as well as his rights under the lease, have been annihilated." Simon v. Kirkpatrick, 141 S.C. 251, 139 S.E.2d, 614, 618 (1927). However, a different result may arise if the premises were abandoned by the tenant, such as the case in U.S. Rubber Co. v. White Tire Co., 231 S.C. 84, 97 S.E. 2d 403 (1956). In U.S. Rubber the tenant had abandoned

[7] The reason for the dismissal was not completely clear; however, it would be fair speculation that the lease term in question had not yet expired.

the property and the lease subsequently was terminated due to the lessor's re-entry and re-letting of the property.

When a tenant abandons the leased premises and the landlord re-enters and re-lets, the Courts look to the lease terms and the facts and circumstances of the case in order to determine whether or not the landlord is re-letting for the account of the tenant or for his own account, which shall determine if the lease is actually terminated and/or if the tenant is further obligated for rent subsequent to the re-entry. *See* Surety Realty Corp. v. Asmer, 249 S.C. 114, 153 S.E.2d 125 (1967); Camden Inv. Co. v. Gibson, 204 S.C. 513, 30 S.E.2d 305 (1944). The factual scenario of abandonment by a tenant is distinctly different from termination by the landlord by eviction. Eviction clearly terminates the lease agreement, and failing lease provisions obligating the tenant to future rents in the event of eviction, the general rule is that any obligations for future rent are also terminated.

Inexplicably, in its order, the trial court ignores the singlemost significant piece of correspondence between the parties, which is the landlord's "10 Day Notice to Pay or Quit," dated February 28, 2010. Plaintiff's Tr. Ex. 3. There can be no factual dispute as to whether or not this Notice sent to Prince on February 26, 2010 terminated the lease agreement. By its very terms it terminated the agreement, and this intent was confirmed by Watson's testimony at trial, as already reproduced hereinabove. Further, a plain reading of the subject lease quickly reveals the absence of any specific provision

obligating a tenant to "future rent" in the event of termination due to tenant's default or otherwise.[8]

Therefore, based upon the foregoing, the trial court finding that the lease between the parties was terminated by abandonment is without support of any competent evidence, and therefore, constitutes error as a matter of law. As such, the trial court's ruling in favor of the Respondent should be reversed.

III. THE TRIAL COURT ERRED BY FINDING THE TERM "DAMAGES" AS CONTAINED IN THE LEASE, NECESSARILY AND UNAMBIGUOUSLY ALSO ENTITLED THE LANDLORD TO "FUTURE RENTS."

On page 6 of the trial court's order, the ruled as follows:

> 15. This Court find and concludes that even if the rule announced in 1927 by the Court in Simon is still applicable today, the Plaintiff is entitled to the full damages it claims because it specifically reserved the right for all damages under the subject Lease.
>
> 16. On page 1 of the Lease, in the last section, captioned **"DEFAULTS",** there is the following language:
>
> **DEFAULTS**--***Subject to any governing provision of law to the contrary, if tenant fails to cure any financial obligation within 10 days (or any other obligation within 30 days) after written notice of such default is provided by Landlord to Tenant, Landlord may take possession of the Premises without further notice (to the extent permitted by law), **and without prejudicing Landlord's rights to damages**.***Tenant shall pay all costs, **damages,** and expenses (including reasonable attorneys fees and expenses) **suffered by Landlord by reason of Tenant's defaults."** (Emphasis added in original).
>
> 17. ***A more clear, unambiguous intention to reserve all rights against the Defendant for rents due during the full term is more difficult to imagine.*** Not only did the Plaintiff specifically reserve its rights to damages (i.e., recovery of future rents in the event of termination) but the lease provided a specific damage formula by providing the Defendant must pay all costs, damages and expenses as a result of default....No other

[8] Respondent argued vigorously at trial, and the trial court agreed, that reference to the term "damages" was tantamount to referring to "future rent." Tr. Transcript, *supra*. Order, *supra*.

construction would provide full meaning to all of the terms of the Lease. Emphasis added.

Appellant is astounded by such a bold statement that "a more clear, unambiguous intention to reserve all rights against the Defendant for rents due during the full term is more difficult to imagine." In fact, the language contained in that very paragraph of the trial court's order is more specific than that contained in the lease. The use of the parenthetical "(i.e., recovery of future rents in the event of termination)" should not have been necessary to illustrate the point if it in fact were so obviously unambiguous. Further, it would have been so very simple to insert that exact language in the lease, thus rendering this discussion unnecessary. Moreover, nearly every lease referred to in each and every citation within the trial court's order, with the exception of the lease in Simon, contained language specifically referring to future rental obligations. If the term "damages" alone were sufficient, certainly Richman v. Joray Corp., *supra*, and Blumberg v. Nealco, *supra*, both would have been decided differently.

Appellant would submit that the much more common interpretation of this default provision in the subject lease is that the Landlord's repossession due to tenant's default does not prejudice his rights to any damages to which he may be entitled to *under the law*, such as back rent and damages to the premises. "Damages" can mean such an overwhelmingly large number of things, but in no case can the use of the term, without something more, entitle the Respondent to types or forms of damages it is not otherwise entitled to. The body of law on this principle has repeatedly ruled that in order to be entitled to "future rent" as a

damage, in the event of lease termination, the landlord must *specifically* provide for same. Id. At best, "damages" is a general term, and is simply insufficient to *specifically* refer to "future rent." Therefore, the ruling of the trial court should be reversed.

IV. THE TRIAL COURT ERRED IN CONSIDERING EXTRINSIC EVIDENCE INTRODUCED BY THE RESPONDENT REGARDING INTENT OF THE PARTIES, WHEN THE COURT FOUND THE LEASE TO BE UNAMBIGUOUS.

The parol evidence rule prohibits the introduction of extrinsic evidence to explain the written instrument, when the contract's language is clear and unambiguous. Davis v. KB Home of South Carolina, Inc., 394 S.C. 116, 713 S.E.2d 799 (Ct. App. 2011), McGill v. Moore, 381 S.C. 179, 672 S.E.2d 571 (2009), Gilliland v. Elmwood Props., 301 S.C. 295, 391 S.E.2d 577 (1990). Yet, despite the fact the trial court clearly found the lease between the parties to be unambiguous, it nonetheless, in paragraphs 18 (a), (b), (c) and 19, on page 7 of the Order, sets forth an analysis of the correspondence and behaviors of the parties which the Court claims, "Thus, it is clear both the Defendant and the Plaintiff construed the Lease as an obligation of the Defendant for all future rents."

Not only does the Appellant vehemently disagree that any conduct or correspondence between the parties subsequent to the execution of the lease have the ability to impose lease terms which do not exist, but if the Court found the lease itself to unambiguous on its face, it was an error of law to consider this extrinsic evidence in its analysis, and therefore, the trial court's decision should be reversed.

V. IF THE TRIAL COURT WERE GOING TO CONSIDER EXTRINSIC EVIDENCE, IT ABUSED ITS DISCRETION BY REFUSING TO ALLOW THE DEFENDANT TO INTRODUCE ANY EVIDENCE SHOWING

INTENT OF THE PLAINTIFF OR QUESTION THE PLAINTIFF REGARDING INTENT.

During trial, the Appellant attempted several times to elicit testimony regarding intent of the Plaintiff as to particular terms of the lease, largely due to the fact the Plaintiff was the sole drafter of the lease. However, the Court sustained the Respondent's objections to even allow the Appellant to ask Mr. Watson during cross examination if the default provision of the lease specifically contained language referring to "future rent," to wit:

> Q. Okay, I am going to ask you now if you would go back to Plaintiff's Exhibit 1 for me. That's the lease agreement and I am going to refer you specifically to the first page down at Defaults and I am going to read you a portion here. "Landlord may take possession of the premises without further notice to the extent permitted by law without prejudicing Landlord's right to damages. In the alternative, Landlord may elect to cure any default and the cost of such action shall be added to Tenant's financial obligations under this lease." Anywhere in that default provision and not necessarily just the portion I read, but I am highlighting the area of where it would speak to that, does it say that if you terminate the lease I am still required and obligated to pay rent.
>
> MR. PATTERSON: I think I would object, that's asking for a legal conclusion. The lease says what it says and that's what Your Honor is here to do is to interpret what the lease says.
>
> COURT: I think that -- is there a claim that it's ambiguous or something?
>
> MS. PRINCE: The law is very clear that you don't have any more obligation as the future lease is due -- that the tenant will remain obligated for rent even in the event the lease is terminated. The Landlord is not entitled to collect any future rent after the lease is terminated.
>
> COURT: Your question though goes to the language in the lease itself.
>
> MS. PRINCE: Right, but I think that we need to go to the intention of the parties. He is the one that drafted the lease presumably when he presented it to me.
>
> COURT: Well that's why I was asking about ambiguity because if the document is not ambiguous and the parties --

MS. PRINCE: I think that he can --- I am not asking him to interpret it. I am asking him, does it say he is entitled to future rent -- does it say you are entitled to future rents?

COURT: You are asking him to read it to the extent that you want him to find certain passages and read them? I will certainly allow you to do that but as to the interpretation of it --

MS. PRINCE: I am not asking him for interpretation. I am asking him just strictly, is there a provision in here that says -- has that contained language to the effect of Landlord is entitled to collect future rents in the event the lease is terminated.

MR. PATTERSON: Your Honor, she just read the language that says, "without prejudicing Landlord's right to damages" --

MS. PRINCE: Damages and future rent are not the same thing.

MR. PATTERSON: Okay, well that's a legal argument. It is not a question for this witness.

COURT: I think there is no argument that this is an ambiguous document so I think it's probably my job at some point to look through the lease itself and see what it means, but as far as the witness's opinion what this means I will sustain the objection.

MS. PRINCE: Just so I can be clear for the record the basis that you are sustaining the objection is because you believe I am asking for an opinion rather than a factual statement of whether the lease contains language that says future rent or not?

COURT: I don't mind if you pick out the portion and say, can you read the first sentence such and such, but if you get to, what does that mean, then you have crossed the line. I think if you say, can you tell me where in this lease it says such and such I think that's fine.

MS. PRINCE: Judge I think that's exactly what my question was. Can you tell me does it say this?

COURT: I think that's probably argument for you to make at the end that nowhere in this lease does it say that or whatever but I think anything beyond that may -- again I think the lease says what it says and it speaks for itself or it doesn't speak for itself so I believe it's proper for argument so --

MS. PRINCE: Okay, then.

Trial Transcript, pp. 21-24.

Slightly later during cross examination of Mr. Watson, the Appellant began to question him about Plaintiff's Trial Exhibits 11 and 13, which are lease agreements for the premises formerly occupied by Prince. These agreements are nearly identical to each other in form, and appear to be the Respondent's new "form" lease agreement. However, they are substantially different from the agreement entered into by the parties in the case at bar, and had increased from approximately 4 pages to 20. As a result, the Appellant wanted to question Mr. Watson, as the purported drafter of the agreement, about the default provisions they contained, which very specifically speak to "future rents." *See* Plaintiff's Tr. Ex.'s 11 and 13, p. 14, "Defaults", sect. 27.2 ("If Landlord elects to terminate this Lease...and/or Tenants right of possession, then everything contained in this Lease to be done...shall cease, without prejudice...to Landlord's right to recover from Tenant ***all rent*** and sums due hereunder through the Lease Expiration date.") Emphasis added. The Respondent objected on the grounds of relevance, and despite the Appellant's explanation of relevance regarding intent due to the fact that although she was not claiming the lease was ambiguous, she anticipated the issue of ambiguity would soon be raised. The Court, *sua sponte*, sustained the objection on the grounds of inadmissibility as a subsequent remedial measure pursuant to SCRE Rule 407. Tr. Transcript, pp. 31-34.

Appellant would submit that SCRE Rule 407, prohibiting admissibility of subsequent remedial measures, is wholly inapplicable in a contract case, and even if it were to apply, such evidence may still be admitted for purposes of "feasibility of precautionary measures, if controverted, or impeachment." Certainly, the exception of impeachment should have allowed the introduction of the evidence, if the evidence could

in fact even be considered a subsequent remedial measure, which Appellant, again, submits, it is not.

If the trial court considered extrinsic evidence in reaching its decision, which it appeared it did, despite its finding that the lease was unambiguous, it abused its discretion in refusing to allow the Defendant to introduce any evidence regarding intent of the parties. As such, the trial court erred as a matter of law and the judgment against the Appellant should be reversed.

VI. THE TRIAL COURT ERRED BY FAILING TO RECOGNIZE THAT THE LEASE TERMS WERE AMBIGUOUS, AND SUCH AMBIGUITY SHOULD HAVE BEEN CONSTRUED AGAINST THE DRAFTER, WHICH WAS THE RESPONDENT.

"A contract is 'ambiguous' when it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business." Rosen v. University of South Carolina, 398 S.C. 703, 708, 731 S.E.2d 298, 301 (Ct. App. 2011). Further, even if the both parties are arguing against ambiguity, yet are offering differing arguments, "the issue of a contract's interpretation necessarily subsumes the primary question of whether the contract's language is clear or ambiguous....Therefore, we not only have the authority but also the responsibility to recognize an ambiguity in a contract." Wallace v. Day, 390 S.C. 69, 75, 700 S.E.2d 446, 449 (Ct. App. 2010). In the instant case, both parties offered opposing interpretations of the terms of the contract, specifically regarding the meaning of the term, "damages." Although the Appellant does not concede the contract is ambiguous, and maintains that the term damages

unambiguously ***does not*** include "future rent," inasmuch as the court appeared to consider extrinsic evidence to determine the intention of the parties, it would appear the trial court, in fact, did find ambiguity. As a result, the ambiguity should have been resolved against the Respondent, the drafter of the lease. "Were we to entertain the idea of an ambiguity, such ambiguity would have to be construed against the Bank which drafted the agreement." Duncan v. Little, 384 S.C. 420, 426, 82 S.E.2d 788, 791 (2009), (citing, *Williams v. Teran, Inc.*, 266 S.C. 55, 60, 221 S.E.2d 526, 529 (1976) (noting the rule of contract interpretation that an ambiguous contract will be construed against the drafting party); *Chassereau v. Global Sun Pools, Inc.*, 373 S.C. 168, 175, 644 S.E.2d 718, 722 (2007) ("[A] court will construe any doubts and ambiguities in an agreement against the drafter of the agreement.")).

Based upon the foregoing, even if this Court were to find an ambiguity does exist, such ambiguity should have been resolved against the Respondent, and therefore, the ruling of the trial court should be reversed.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the trial court.

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Bluffton, SC
June 10, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Marvin H. Dukes, III, Master-in Equity and Special Circuit Court Judge

Case No. 2012-CP-07-1530

Bluffton Towne Center, LLC,

Respondent,

v.

Beth Ann Gilleland-Prince
d/b/a The Law Office of Beth
Ann Gilleland, LLC,

Appellant.

DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

1. Trial Court's Order of December 26, 2012;
2. Plaintiff's Complaint;
3. Defendant's Answer;
4. Entire Transcript of Proceedings pp.1-55;
5. Plaintiff's Trial Exhibits 1-15;
6. Plaintiff's Post-Trial Memorandum;
7. Defendant's Post Trial Memorandum.

I certify that this designation contains no matter which is irrelevant to this appeal.

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PROOF OF SERVICE

I certify that I have served the Appellant's Initial Brief and Designation of Matters to Be Included in the Record on Appeal on the Respondent, Bluffton Towne Center, LLC, by depositing a copy of it in the United States Mail, postage prepaid, on June 10, 2013, addressed to its attorney of record, Russell P. Patterson, Post Office Box 8047, Hilton Head, South Carolina 29938.

June 10, 2013

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