THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

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

Opinion No. 6005 (S.C. Ct. App. filed July 26, 2023)

SOUTH CAROLINA CVS PHARMACY, LLC, Respondent,

vs.

KPP HILTON HEAD, LLC, Petitioner.

# PETITION FOR A WRIT OF CERTIORARI

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## INDEX

Petitioner, KPP HILTON HEAD, LLC ("Landlord") files this Petition for Writ of Certiorari pursuant to Rule 242, SCACR, seeking review and reversal of the Court of Appeals' final decision in South Carolina CVS Pharmacy, LLC v. KPP Hilton Head, LLC, Opinion No. 6005, --- S.C. --, 890 S.E.2d 824 (Ct. App. July 26, 2023), which is in conflict with prior decisions of the South Carolina Supreme Court and a prior decision by the South Carolina Court of Appeals.

## INTRODUCTION

This dispute involves a 20-year (April 1999 to January 2020) lease (the "Lease") of the CVS store on Pope Avenue on Hilton Head Island (the "Hilton Head Store") by SOUTH CAROLINA CVS PHARMACY, LLC ("Tenant") from Landlord. The issue is whether Tenant's last minute attempt to exercise the first 5-year renewal option contained in the Lease was timely. It was not: Landlord did not receive timely notice of Tenant's exercise of the option to renew the Lease during the life of the option, but the Court of Appeals nevertheless found that delivery of the tear-off ticket for a Registered Mail, Return Receipt Requested letter (but not the letter itself) to Landlord's Post Office Box on a non-business day (Saturday) satisfied the signed receipt requirements of the Lease.

## CERTIFICATION

Counsel hereby certifies that Landlord timely filed a Petition for Rehearing with the Court of Appeals on August 9, 2023, and the Court of Appeals denied the Petition by Order dated August 18, 2023.

## QUESTIONS PRESENTED

**Question 1**: Is the Court of Appeals' decision in conflict with longstanding Supreme Court and Court of Appeals precedent that "[b]ecause of its unilateral nature, an option to renew a lease is strictly construed against the party claiming the option" as set forth in A. C. Tuxbury Lumber

Co. v. Byrd, 131 S. C. 32, 127 S. E. 267, 269 (1925); Pope v. Goethe, 175 S.C. 394, 399, 179 S.E. 319 (1935); S. Silica Min. & Mfg. Co. v. Hoefer, 215 S.C. 480, 498, 56 S.E.2d 321, 328 (1949) and as quoted in 33 Flavor Stores of Virginia, Inc. v. Hoffman's Candies, Inc., 296 S.C. 37, 370 S.E.2d 293, 295 (Ct. App. 1988)?

**Question 2**: Is the Court of Appeals' finding that delivery of Tenant's Registered Mail, Return Receipt Requested Renewal Notice (as called for by the Lease) to the Post Office in which Landlord maintained its Post Office Box and the tear-off ticket (but not the Renewal Notice letter itself) was placed in Landlord's Post Office Box that Saturday morning outside of Landlords' customary business hours notifying Landlord that a Registered Mail letter could be obtained at the Post Office counter when it was open that Saturday morning consistent with South Carolina's required strict construction of lease renewal options?

## STATEMENT OF THE CASE

The following material facts are, in fact, undisputed.

(a) The Lease requires written notice to Landlord by Tenant of the exercise of Tenant's renewal option (the "Renewal Notice"). *See Lease, Renewal Options Part II, Art. 3, "Tenant may extend the Term of this Lease … by giving Landlord notice of each such election not later than the Required Advance Notice of Exercise of Renewal Options (as defined in Section 13 of Part I)" (R. 34-35); Lease, Notices Part II, Art. 27, "[E]ach such notice or demand shall be in writing …*"[.] (R. 47.)

(b) The Lease implicitly provides that all notices, including the Renewal Notice at issue, ***be signed for*** by the notified party, not merely received.[1] Specifically, the Lease expressly

[1] Landlord has numerous obligations and Tenant has numerous rights to require things from Landlord pursuant to the Lease by making demand or giving notice. *See, e.g.*, Lease Part II Article 9(d) (Repairs & maintenance) (R. 39), Article 15(a) (Assignment & Subletting) (R. 43), Article 16

provides that notice "shall not be effective ***for any purpose*** unless the same shall be given or served as follows: by mailing the same to the other party by registered or certified mail, ***return receipt requested***, or by overnight courier ***provided a receipt is required*** . . .." (Emphasis added) *Lease Part II, Article 27* (R. 47).

(c) The required Renewal Notice was to be received (and, therefore, signed for) by Landlord "***no later than***" Sunday, November 3, 2019. *See Compl. ¶ 17* (R. 22); *Motion for Temporary Restraining Order ¶ 17;* (R. 132); *King Aff. ¶¶ 8, 10, and 14*; (R. 148-150).

(d) The Lease unambiguously provides that "[***t]he date of receipt of the notice*** . . . shall be deemed the date of service thereof (unless the notice or demand is not received or accepted in the ordinary course of business, in which case the date of mailing shall be deemed the date of service thereof)." *See Lease Part II, Article 27* (R. 47).[2]

(e) Tenant signed its Renewal Notice letter on Tuesday, October 29, 2019, posted it to Landlord via Registered Mail, Return Receipt Requested the next day (Wednesday, October 30, 2019), and its Registered Mail, Return Receipt Requested Renewal Notice reached the Hilton Head Post Office on Saturday, November 2, 2019, at 9:45 am. *See Motion for Temporary Restraining*

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(Alterations) (R. 43), Article 33(c (Maintaining Parking and Exterior Areas) (R. 49), Article 36 (Tenant Audit Rights) (R. 53), Article §47 (Landlord's Indemnity) (R. 58), and Article 24 provides a required Notice of Default (R. 46). All required notices and demands regarding these matters, as well of the exercise of option to renew, are subject to the Notice provision requirements of Article 27 (R. 47).

[2] The exception contained in Article 27 of the Lease "(unless the notice or demand is not received or accepted in the ordinary course of business, in which case the date of mailing shall be deemed the date of service thereof)" was not the basis of the Court of Appeals Opinion; rather, and as explained below, the Court of Appeals Opinion found that because "Notice of [Tenant's] intent to renew the lease arrived at its final destination and was available for pick up the day before the deadline," the Renewal Notice was timely. Opinion at *3. There was no finding or allegation that Landlord did not receive or accept the Notice; the issue was when it was received, and the Opinion found delivery to Landlord's Post Office—not to Landlord's Post Office Box—was sufficient.

*Order ¶¶14-17 (R. 132); January 23, 2020, Affidavit of Peter J. Perry ("Perry Aff.") ¶¶12-15* (R. 78-79) *and Exhibits C and D thereto* (R. 120-23).[3]

(f) The Renewal Notice itself was not placed in Landlord's Post Office Box on November 2, 2019. Rather, and at most,[4] the tear-off Return Receipt ticket notifying Landlord that a Registered letter from Tenant could be received at the Post Office window was placed in Landlord's Post Office Box that day.[5] As such and contrary to the Court of Appeals Opinion, the Renewal Notice itself had not "arrived at its final destination," it had not been placed in Landlord's Post Office Box or been picked up by Landlord at the Post Office window.

(g) Consistent with the practice of those in the commercial real estate industry,[6] in the normal course of their business, Landlord and its property manager retrieve their mail from their

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[3] The Opinion refuses to allow Tenant's own delay in the face of its knowledge of the time it would take for a Renewal Notice to get to Landlord be used against it. As the record shows, Tenant had renewed another low country lease managed by Landlord's management company and learned that it took 11 days for its renewal notice to be received, yet it waited until the Tuesday before the Renewal deadline for the Hilton Head Store to execute the Renewal Notice and then waited until late the next day (Wednesday, October 30) to post the letter, allowing just 2 business days for its Renewal Notice to be received timely. (R. 149, ¶10 in *King Aff.*; *see also* R. 148-49, *King Aff.* ¶¶ 8 and 13.) Inasmuch as even the "flexible approach" mandated by the EEOC cases relied upon by the Court of Appeals Opinion requires an equitable analysis, as explained below and in Note 10, Landlord contends not considering Tenant's own seeming disregard for the ensuing renewal deadline is misguided.

[4] There was no finding that the Return Receipt ticket was placed in Landlord's Post Office box that morning; the parties have merely assumed it was.

[5] *See* Note 1. Knowing that a Registered letter could be obtained would not allow Landlord to know it was a Renewal Notice, particularly as Tenant had never responded to the October 9, 2019, email from Landlord's property manager asking whether Tenant did wish to renew, to which Tenant responded that it was "still waiting on direction," and then never further responded. *See King Aff.* ¶ *8* (R. 148).

[6] *See* Order at p. 3. "[Tenant's] own expert was of the opinion 'that the ordinary course of business in the commercial real estate industry is that property owners/managers (or their designated agents), including those acting on behalf of landlords, check their mail, including post office boxes, on all non-holiday business days (**generally, Monday through Friday').**" (Emphasis added) (R. 6).

Post Office Box during the customary (Monday – Friday) work week, not on weekends or holidays. *King Aff.* ¶*12* (R. 149).

(h) Landlord did not go the Post Office on Saturday morning, November 2, 2019, and did not learn that a Registered Letter of some sort from Tenant was available for pick-up at the Post Office window after 9:45 am and before it closed at noon. *See King Aff.* ¶¶ *11-12* (R. 149).

(i) The Master-in-Equity found that "[t]here is no evidence (or allegation) that [Landlord] ignored any Return Receipt ticket that may have been in its Post Office Box after [Tenant's] Renewal arrived at the Hilton Head Post Office on Saturday, November 2, 2019." *Order* ¶ *10* (R. 6-7).

(j) As the Master-in-Equity also found and is not disputed, Tenant's "renewal letter arrived in the Post Office on Saturday, which is not a business day. The next business day, which was Monday, was [itself] beyond the renewal period." *Order Denying Notion to Reconsider* (R. 1).

(k) Landlord signed for the Renewal Letter at the Hilton Head Post Office on Wednesday, November 6, 2019, and the Post Office recorded it "Delivered" that day.[7] *See King Aff.* ¶*11* (R. 149), *and Exhibit D to Perry Affidavit, the United States Postal Service Tracking History* (R. 122-23).

(l) Landlord thereafter notified Tenant it had rejected the Renewal Notice for the Hilton Head Store as being untimely. *See Compl.* ¶*25* (R. 23) and *Exhibits F and G thereto* (R. 124-26 and R. 127-29)*; Motion for Preliminary Restraining Order* ¶*21* (R. 133.)

[7] The receipt on Wednesday rather than Monday is irrelevant for, as the Master-in-Equity correctly found, Monday "was [itself] beyond the renewal period."

(m) Based upon these undisputed facts, the Master-in-Equity found that Tenant "did not timely exercise the right to renew the Lease as its required notice was not given in accordance with the provisions of the Lease." *See Order at p. 7* (R. 10). No "Return Receipt" to Tenant's Registered Mail Renewal Notice had been signed for by the Landlord by the close of the Renewal Notice deadline.

**The Court of Appeals Opinion**

On July 26, 2023, the Court of Appeals entered its Opinion reversing the Beaufort County Master-in-Equity's decision and finding that "Notice of [Tenant's] intent to renew the lease arrived at its final destination and was available for pick up the day before the deadline," which the Court found sufficient receipt of notice. *Opinion at *3*.[8]

The Court of Appeals relied upon Fourth Circuit Court of Appeals EEOC Title VII cases that, for purposes of starting the 90 limitations period in Title VII EEOC matters, actual receipt of notice to a party of his/her right to sue was not required, that delivery of that notice was ***sometimes*** sufficient.[9] *See Opinion at *2, and cases cited therein*.

The Order denying the Petition for Rehearing provides no further guidance on the matter.

[8] Inasmuch as it was at most the Return Receipt ticket and not the Renewal Notice itself that had been placed into Landlord's Post Office Box and had not been picked up by Landlord at the Post Office window, Landlord submits that the only evidence is that the Renewal Notice itself in fact had ***not*** "arrived at its final destination."

[9] The Opinion disregards the fact that the EEOC cases only stand for the proposition that delivery of notice rather than actual receipt is ***sometimes*** sufficient, not always sufficient. They stand for the proposition that there ***may*** be equitable reasons to so provide, that equitable tolling may extend the deadline for commencing an EEOC Title VII lawsuit, and the examples recited in the cases reflect that equitable reasons are the exception, not the rule.

## ARGUMENTS

### I. THE COURT OF APPEALS DECISION IS IN CONFLICT WITH LONG-STANDING SOUTH CAROLINA SUPREME COURT PRECEDENT REQUIRING STRICT CONSTRUCTION OF OPTIONS TO RENEW A LEASE AGAINST THE PARTY SEEKING TO EXERCISE THE OPTION.

Landlord submits the Court of Appeals erred in construing and applying long-standing South Carolina Supreme Court precedent and that its error will lead to significant future confusion regarding what strict construction regarding lease renewal options requires.

The Court of Appeals relied upon and then misconstrued EEOC cases. Unlike the split of authority regarding whether actual receipt is required to start the limitations period in an EEOC Title VII matter acknowledged by the Fourth Circuit Court of Appeals in Harvey v. City of New Bern Police Dep't, 812 F. 2d 652, 653-54 (4th Cir., 1987), a split which Harvey then resolved in favor of a "flexible rule … [requiring] a thorough examination of the facts to determine if reasonable grounds exist for an equitable tolling of the filing period,"[10] long-term and consistently applied South Carolina precedent expressly provides that "[b]ecause of its unilateral nature, an option to renew a lease **is strictly construed against the party claiming the option**." 33 Flavor Stores of Virginia, Inc. v. Hoffman's Candies, Inc., 296 S.C. at 40, 370 S.E.2d at 295 (emphasis added), citing Southern Silica Mining and Manufacturing Company v. Hoefer, 215 S.C. 480, 496, 56 S.E. 2d 321, 328 (1949).[11]

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[10]As the Court explained in Harvey at 653-54, "The circuits differ as to when the filing period should begin to run. The Seventh Circuit … adopted an 'actual receipt' rule…. The Seventh Circuit refused to read any theory of constructive receipt into Title VII ….The Fifth and Eleventh Circuits have rejected the actual receipt rule in favor of a flexible rule which requires a case-by-case examination to determine if an equitable tolling of the filing period is appropriate….Congressional desire for expedition and the requirements of justice can best be served by the flexible rule …[and] courts should conduct a thorough examination of the facts to determine if reasonable grounds exist for an equitable tolling of the filing period."

[11] Notably, courts finding that delivery of the EEOC notice is constructive receipt are construing the right to sue against the party holding that option. The "flexible approach" allows

The 33 Flavor Stores court is quite adamant:

> Where, as in this case, notice of the exercise of the option is required in a certain manner, time is of the essence and **exact compliance will be required.** Pope v. Goethe, 175 S.C. 394, 179 S.E. 319 (1935). Where a lessee has a right to renew upon giving notice to the lessor at or before a specified time, in the absence of a waiver, the giving of notice is a condition precedent which must be complied with within the stipulated time; and, absent special circumstances warranting relief from a court of equity, **the right of renewal is lost if notice is not given in accordance with the provisions of the lease.** Id. 179 S.E. at 321. (Emphasis added).

33 Flavors Stores of Virginia, Inc., 296 S.C. at 40, 370 S.E.2d at 295.

"Exact compliance" does not allow for the failure of the actual Renewal Notice to reach the Landlord and simply be "available for pick-up"; notice in Landlord's Post Office Box at 9:45 am on a Saturday that a Registered letter of some sort would be available at the window between 9:45 and noon that same day, if Landlord happened to go to its Post Office Box on a non-business day weekend, is not "exact compliance" or strictly construing the option provisions against the option holder.

Disregarding the Lease requirement that Notice be signed for[12] is not "exact compliance."

The Opinion essentially neuters 33 Flavor Stores and the Supreme Court precedent it relied upon and will undoubtedly provide many South Carolina litigants with precedent to justify asking

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the party otherwise precluded to provide equitable reasons for not having timely acted. That party must still then carry the burden to establish why the 90-day period should not be measured by when the EEOC notice is delivered and not actually received.

[12] As set forth above, the Lease implicitly provides that all notices, including the Renewal Notice at issue, ***be signed for*** by the notified party, not merely received. Specifically, the Lease expressly provides that notice "shall not be effective ***for any purpose*** unless the same shall be given or served as follows: by mailing the same to the other party by registered or certified mail, ***return receipt requested***, or by overnight courier ***provided a receipt is required*** . . ." (Emphasis added) *Lease Part II, Article 27* (R. 47).

the court in their case to disregard the requirement of strict construction of lease options against the option holder.

## II. THE COURT OF APPEALS ERRED IN FINDING THAT PLACEMENT IN LANDLORD'S POST OFFICE BOX OF ONLY THE TEAR-OFF TICKET FOR THE REGISTERED MAIL, RETURN RECEIPT REQUESTED LETTER BY WHICH TENANT MADE ITS RENEWAL NOTICE ON A SATURDAY OUTSIDE OF LANDLORD'S (AND THE INDUSTRY'S) CUSTOMARY BUSINESS HOURS SATISFIED THE LEASE REQUIREMENT FOR ACTUAL SIGNED RECEIPT WITHIN THE OPTION RENEWAL PERIOD.

The Opinion conflates the fact that the Registered letter Tenant sent was "available for pick up" with its actual delivery to Landlord, disregards the signed receipt required by the Lease, and seemingly obligated Landlord, a party to commercial lease transaction, to pick up its mail more often than is the custom of the industry, which Tenant's own expert indicated was limited to weekdays.

The Opinion totally abrogates the meaning and purpose of a Registered Mail, Return Receipt Requested letter required under the Lease; the Court of Appeals gave absolutely no meaning to the Return Receipt requirement.

The Opinion will provide precedent for litigants who wish to avoid Registered Mail, Return Receipt or Certified Mail notice requirements in other contracts where there is no equitable basis for doing so.

The Opinion's reference to and reliance upon the Restatement is similarly misplaced: the Restatement is ***not*** restating the law of lease renewal options in South Carolina or elsewhere; does not in any way refute the strict construction against the lease option holder South Carolina law mandates; does not say or intimate that a Registered Mail, Return Receipt letter does not actually require a signed Return Receipt despite its express terms; and it does not purport to abrogate

specific language contained in agreements, and particularly agreement language regarding options to lease which is to be strictly construed against the option holder.

The Opinion will provide South Carolina litigants with precedent that the express language in leases need not be given their unambiguous meaning.[13]

To the extent the "flexible approach" and "equitable estoppel" principals discussed in Harvey v. City of New Bern Police Dep't, *supra*, may impact the analysis, here there is no allegation that Landlord did anything to interfere with Tenant's ability to timely exercise its option or in any way lead Tenant to believe it did not have to meet the renewal deadline; here, there is no extraneous event – weather, mail failure, death-in-the-family, etc. – which caused Tenant's Renewal Notice to be delayed. Indeed, the only evidence is that Landlord's property manager sent an email to Tenant on October 9, 2019, some 65 days before the renewal deadline, asking whether Tenant wished to renew, *Order at p. 2* (R. 5), and Tenant not only dawdled, but once it decided to renew, it did not even post the renewal letter for a full day after finally deciding. *Order at p. 3* (R. 6). It is Tenant, not Landlord, who failed to timely act. No equitable estoppel is available.

Finally, the Opinion also disregards paragraph 21 of Tenant's Complaint, which admits that "a notice received on a Saturday is 'not received or accepted in the ordinary course of business,' as contemplated by Part II, Paragraph 27 of the Lease." Compl. ¶ 21 (R. 22-23).

## CONCLUSION

FOR THE FOREGOING REASONS, Landlord respectfully prays that the Court grant this Petition and issue a Writ of Certiorari to hear this matter, correct the Court of Appeal's decision

[13] The Court of Appeals Opinion comments regarding the fact that the Lease provides that "notice shall be 'given or served' and … when notice is not 'received or served'" adds nothing to the necessary analysis, as the disjunctives do not identify inconsistent circumstances justifying the disregard for the clearly articulated requirement for a written receipt whether given, served, received, or served.

that is inconsistent with long-standing Supreme Court precedent and grant such other relief as is just and proper.

Respectfully submitted,

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