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

Case No. 06-CP-07-2689

MicroClean Technology, Inc.,. . . . . .Respondent,

v.

EnviroFix, Inc., ... Petitioner.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on July 10, 2013.

QUESTIONS PRESENTED

1. Did the Court of Appeals misapprehend or fail 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?

2. Did the Court of Appeals misapprehend or fail to apply the proper standard of review in reversing the trial court's finding 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?

STATEMENT OF THE CASE

This case involves a dispute between two businesses over a Licensing Agreement and an installment contract. On October 24, 2006, MicroClean Technology, Inc. ("MicroClean") brought this action for breach of contract, claim and delivery, and quantum meruit against EnviroFix, Inc. ("EnviroFix") and requested damages of $83,813, plus late fees and interest. EnviroFix answered and asserted counterclaims against MicroClean for breach of contract, breach of the covenant of good faith and fair dealing, quantum meruit, negligent misrepresentation, fraud in the inducement and fraudulent misrepresentation.

This dispute primarily involves a License Agreement between MicroClean, as licensor, and EnviroFix, as licensee, for the use of newly developed equipment named the BioTower, which was designed to remediate mold and bacteria and eliminate odors in cars, homes, businesses, and other various enclosed spaces. (R. pp. 178–88). MicroSweep Corporation ("MicroSweep") manufactured and distributed the BioTower from its plant in Florida and headquarters in Texas. (R. p. 36, line 19 – p. 37, line 4).

MicroSweep began to distribute the BioTower system in 2004. (R. p. 39, line 21 – p. 41, line 13). In June of 2004 MicroClean began negotiations with MicroSweep to obtain a license to distribute the BioTowers. (R. p. 40, lines 13–16; Appellant's Br. 3). MicroSweep and MicroClean finally entered into a written distributorship on August 2, 2004.

Two weeks before entering into the written distributorship contract with MicroSweep, MicroClean entered into the License Agreement with EnviroFix on July 14, 2004. (R. pp. 70, line 15 – p. 71, line 51; 51–60; 178–88). As part of the License Agreement, EnviroFix purchased four BioTowers and a marketing system from MicroClean. (R. pp. 151–60). The six-year contract granted EnviroFix the non-exclusive right to use the trade name "MicroSweep" in its business utilizing the BioTowers in the Raleigh-Durham-Chapel Hill area of North Carolina, with the exclusive right of distributorship in Wake County, North Carolina for one year. (R. pp. 151–52, § 1).

Under the License Agreement, EnviroFix paid to MicroClean a $25,000 territory fee and became responsible for monthly license fee payments of $1,000 for the first 12 months, increasing to $1,250 per month for the remaining five years of the six-year term. (R. pp. 152–53, § 3). EnviroFix had the option to purchase additional BioTowers at $7,500 per unit or $7,000 for the addition of more than one unit. (R. pp. 152–53, § 3). In May 2005, the parties executed a separate installment contract, whereby EnviroFix acquired two additional BioTowers at a cost of $7,000, with additional monthly licensing fees of $373 for 36 months. (R. pp. 47, lines 3–22; pp. 159–60).

The License Agreement required EnviroFix to pay a $15,000 security deposit to be "returned at the end of the six year term, provided Licensee has been in full

compliance with all the terms hereof." (R. p.153, § 4). The terms of the License Agreement gave EnviroFix the right to terminate the contract without cause upon "60 days advance written notice . . . ." (R. p. 152, § 2). The License Agreement obligated MicroClean to provide maintenance and repair for the BioTowers during the six-year contract period. (R. pp. 152–53, § 3). During any period of maintenance and repair where EnviroFix lost the use of a BioTower, the contract obligated MicroClean to cease collection of the monthly license fee and to provide a replacement unit to EnviroFix until return of the repaired unit. (R. pp. 152–53, § 3).

From the beginning of the relationship, EnviroFix experienced myriad problems with the BioTowers. In November 2004, EnviroFix reported to MicroClean a failure of the digital timer on one of the units. (R. p. 165). By October 2005, the timers on all six of EnviroFix's units had failed. (R. p. 168). The timers kept track of the time each unit was in use for safety and quality control purposes, which was critical to EnviroFix's business. (R. p.105, lines 1–2; p. 109, lines 2–6). The counters on at least one of the units also stopped working, preventing EnviroFix from keeping track of how long a unit had run at a job site. (R. p. 113, lines 1–19). Further, the switches of several units, which functioned with the timer to allow the BioTower to automatically shut off, failed and required replacement.

EnviroFix also experienced problems with warping of the caps of all of its BioTowers, which was a big concern for EnviroFix from a consumer confidence perspective. (R. p. 92, line 20 – p. 93. line 8; p. 113, lines 20–25). Additionally, the fans in several of the BioTowers failed, requiring one BioTower to be shipped to MicroSweep for repairs. (R. p. 110, lines 12–16; p. 111, lines 10–14). EnviroFix also experienced

problems with the failure of the mechanical timer on one of the BioTowers, which caused the unit to completely fail, requiring repair. (R. p. 110, lines 1–11).

On December 4, 2005, EnviroFix sent written correspondence to MicroClean expressing its dissatisfaction with MicroClean's responses—and in some instances, its failure to respond—to the mechanical problems and equipment failures EnviroFix experienced with its BioTowers. (R. p. 176). Through the letter, EnviroFix evidenced its desire to terminate the License Agreement, stating that due to MicroClean's failure to remedy the maintenance and repair issues, that the "spirit of the agreement has been violated and is dead." (R. p. 176). Having previously demanded repair of its BioTowers to no avail (R. p. 174), EnviroFix further 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 dated December 20, 2005, EnviroFix stated: "In EnviroFix's opinion the agreement with MicroClean is void." (R. p. 177). MicroClean's receipt of these letters is undisputed. (R. p. 58, lines 8–11; p. 60, lines 6–8; p. 61, line 20 – p. 62, line 18).

Pursuant to the terms of the License Agreement, upon termination prior to the contract's expiration, MicroClean had the right to regain possession of the BioTowers. (R. pp. 154–55, § 10). After the termination, MicroClean expressed its desire to pick up the BioTowers and made plans to do so; however, MicroClean failed to show up to pick up the BioTowers. (R. p. 79, line 18 – p. 80, line 24; p. 119, line 23 – p. 120, line 11). After MicroClean failed to show up on the appointed date and time, it made no further attempts to regain possession of the BioTowers. (R. p. 119, line 23 – p. 120, line 11). EnviroFix never represented to MicroClean that it would resist MicroClean's efforts to

regain possession of the BioTowers. (R. p. 120, lines 5–8; p. 137, lines 2–4). Rather, EnviroFix only sought the refund of $13,377 in monthly license fees, representing the period of time that one or more of the machines were in disrepair and in need of maintenance. (R. p. 139, line 24 – p. 140, line 15; p. 176).

EnviroFix calculated its damages for MicroClean's breach of its maintenance and repair obligations under the License Agreement at $13,377, which it calculated based on the amount EnviroFix paid to MicroClean in monthly license fees during the time the BioTowers were in disrepair and in need of maintenance. (R. p. 119, lines 1–7; p. 139, line 24 – p. 140, line 15; p. 176).

On May 22, 2013, the Court of Appeals 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 of Appeals made two separate rulings with respect to findings made by the trial court. First, the Court of Appeals 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 of Appeals 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. It is these two issues that are presently before the Court.

ARGUMENT

1. THE COURT OF APPEALS 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.

A. The record contains evidence reasonably supporting the trial court's findings.

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. 6, ¶ 9). MicroClean argued 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 4, 2005 letter from EnviroFix terminated the License Agreement.

The Court of Appeals misapprehended or failed to apply the proper standard of review in reversing the findings of the trial court. The Court of Appeals 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. See id.

The Court of Appeals 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 of Appeals further cited as a basis for this ruling that EnviroFix failed to pay monthly fees for December of 2005 and January 2006. Despite recognizing the applicable standard of review, the Court of Appeals reversed the trial court in the face of evidence reasonably supporting the trial court's findings.

As stated above, the Court of Appeals 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 of Appeals explains that it interpreted the evidence presented to the trial court and even relied on evidence contrary to Respondent's position. This was improper.

2. THE COURT OF APPEALS MISAPPREHENDED OR FAILED TO APPLY THE PROPER STANDARD OF REVIEW IN REVERSING THE TRIAL COURT'S FINDING 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.

A. The Court of Appeals improperly weighed the evidence regarding whether the $15,000.00 security deposit was intended to serve as liquidated damages.

The Court of Appeals 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. "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).

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 of Appeals 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) (emphasis added).

However, 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. See id. 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.

Again, the Court of Appeals 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.

B. The Court of Appeals improperly remanded the matter to the Master on the issue of compensation to MicroClean for EnviroFix's alleged failure to relinquish the equipment.

The Court of Appeals 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." (Ct. App. Op. No. 5135, May 22, 2013, p. 10). 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. 4, ¶¶ 18, 19). The record contains evidence that although MicroClean expressed its desire to pick up the BioTowers and made plans to do so, MicroClean failed to show up to pick up the BioTowers. (R. p. 79, line 18 – p. 80, line 24; p. 119, line 23 – p. 120, line 11). MicroClean made no further attempts to regain possession of the BioTowers. (R. p. 119, line 23 – p. 120, line 11).

On appeal, MicroClean argued that because it did not regain possession of the BioTowers, it is entitled to damages and that the trial court wrongfully denied MicroClean a right of recovery on its claim and delivery cause of action. (Appellant's Br. 23, 24, 27). 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 security deposit paid by EnviroFix as liquidated damages. (R. p. 9, ¶ 16). Although MicroClean argues that the trial court denied it recovery on its claim and delivery action, MicroClean actually *prevailed* on its claim and delivery cause of action, and the trial court awarded damages equal to the $15,000 security deposit paid by EnviroFix, as liquidated damages. (R. p. 9, ¶¶ 16, 17).

In remanding the matter back to the trial court to determine the amount of damages to which MicroClean is entitled based on EnviroFix's alleged failure to

relinquish the equipment, the Court of Appeals 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), SCRCP.

"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 asserted 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 reasons stated, EnviroFix respectfully requests that the Court grant this Petition for a Writ of Certiorari.

Respectfully submitted,

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Attorneys for Petitioner

August 9, 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.,. . . . . .Respondent,

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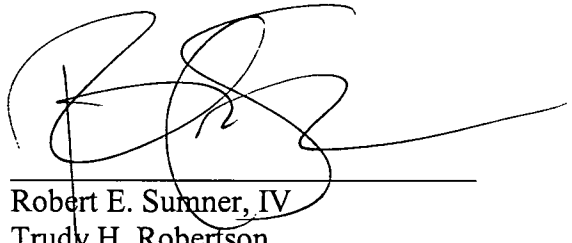
PROOF OF SERVICE

I certify that I have on this date served the Petition for Writ of Certiorari on MicroClean Technology, Inc. by depositing a copy of same in the United States Mail, postage prepaid, addressed to its attorney of record Terry A. Finger, Finger & Fraser, P.A., P.O. Box 24005, Hilton Head, South Carolina 29925.



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August 9, 2013

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BEAUFORT COUNTY
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Marvin H. Dukes, III, Master-in-Equity

Case No. 06-CP-07-2689

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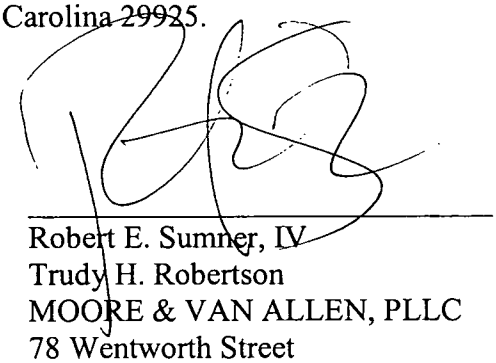

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August 9, 2013

VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

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

Dear Ms. Kitchings:

With regard to the above-referenced action, please find two copies of a Petition for Writ of Certiorari, together with a Proof of Service and Appendix which has been filed with the South Carolina Supreme Court and served on the Appellant. If you would please file one copy and return a file stamped copy to our courier for return to me.

Should you have any questions, please do not hesitate to contact me.

Sincerely,

Moore & Van Allen, PLLC

Robert E. Sumner, IV

RES/hm
Enclosure

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

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August 9, 2013

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VIA HAND DELIVERY

The Honorable Daniel E. Shearouse
Clerk of Court
The South Carolina Supreme Court
1231 Gervais Street
Columbia, SC 29201

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

Dear Mr. Shearouse:

With regard to the above-referenced action, enclosed for filing please find the original and seven (7) copies of a Petition for Writ of Certiorari and Proof of Service, together with three (3) copies of the Appendix (one unbound for the court). Please file the original and return a file stamped copy of the Petition and Appendix to our courier for return to me. Also enclosed is a filing fee check in the amount of $100.00.

By copy of this letter, we are serving Appellant's attorney and the Clerk of the Court Appeals with a copy of the Petition.

Thank you for your assistance with this matter. If you have any questions or concerns, please do not hesitate to contact me.

Very truly yours,

Moore & Van Allen PLLC

Robert E. Sumner, IV

RES/hm
Enclosures
cc (w/encl.): Terry A. Finger, Esquire
The Honorable Jenny Abbott Kitchings, Clerk of Court of Appeals