THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Marvin H. Dukes III
Beaufort County Master-In-Equity

Case No.: 2006-CP-07-2689

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

vs.

EnviroFix, Inc. .....Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE CASE

This case involves a dispute over a licensing contract and installment contract involving BioTower machines, a system that eliminates odors and purifies the air in cars, homes, and other locales. (R. 178-88.) The BioTowers are manufactured by MicroSweep, a corporation headquartered in Texas. Respondent MicroClean Technology, Inc. ("MicroClean"), a South Carolina corporation, is a licensor of the BioTower. In 2004 and 2005, MicroClean entered into two separate nonexclusive License Agreements to supply Appellant EnviroFix, Inc. ("EnviroFix"), a North Carolina corporation, with six BioTowers for use in EnviroFix's cleaning business. (R. 151-60.)

The License Agreement signed by MicroClean and EnviroFix contained a fixed term of six years. (R. 152 § 3.) However, EnviroFix had the right to terminate the agreement upon "60 days advance written notice." (R. 152 § 2.) The agreement also contained a choice-of-law clause that provides that it shall be governed by and construed and enforced in accordance with South Carolina law. (R. 156 § 12(e).)

Section 3 of the License Agreement set forth the territory and license fees EnviroFix owed to MicroClean:

> The Territory fee shall be $25,000, which shall be paid to [MicroClean] contemporaneously with the execution of this Agreement by [EnviroFix]. Thereafter, for a term of six years, [EnviroFix] shall pay to [MicroClean] a Monthly License Fee of $1,000 per month, due on the first day of each month for the first 12 months and $1250 on the first of each month for the balance of the six-year term hereof. . . . It is further agreed that at such time as [EnviroFix] requires additional BioTowers from [MicroClean], beyond the initial four, [EnviroFix] will pay to [MicroClean] an additional License Fee of $7,500 for each such BioTower, or $7,000 each if [EnviroFix] requires more than one additional tower at any given time. In addition, it is agreed that for each additional BioTower that [EnviroFix]

> requires from [MicroClean], [EnviroFix] will pay an additional Monthly License Fee of $250, starting as each such BioTower is delivered. It is agreed, however, that the License Fee for the BioTowers shall be due on each machine for no more than six years after delivery, and once the License fees have been made for six years; ownership of such BioTower will be deemed transferred to [EnviroFix] herein, with no further payment being due for such machine.

(R. 152 § 3.)

Under the License Agreement, EnviroFix was to pay monthly installment fees of $1,000 per month to MicroClean throughout the first year of the contract. (R. 49, 152 § 3.) Thereafter, the monthly installment fees increased to $1,250 during the balance of the six-year term. (R. 49, 152 § 3.) Under the second installment agreement, EnviroFix was to pay an additional monthly fee of $373 for 36 months. (R. 37, 160.)

In addition, the License Agreement required EnviroFix, as licensee, to deposit the sum of $15,000 as a security deposit on the MicroSweep products. (R. 153 § 4.) The security deposit was to be refunded to EnviroFix at the expiration of the contract, provided that EnviroFix complied with the contract terms. (R. 48.) EnviroFix paid the security deposit called for in the contract. (R. 48, 100, 102, 161.)

Upon the expiration or termination of the contract, MicroClean was to "take possession of all Proprietary Products provided to [EnviroFix] by [MicroClean] pursuant to this Agreement and licensed to [EnviroFix] for less than six years." (R. 155 § 10.) EnviroFix was obligated to "fully cooperate with [MicroClean] in the delivery of all such Proprietary Products used by [EnviroFix], which delivery shall be at the expense of [MicroClean]." (R. 155 § 10.) MicroClean had the right to pick up the items "without having to resort to legal process of any kind." (R. 155 § 10.)

Under the License Agreement, MicroClean had a duty to maintain and repair EnviroFix's equipment. (R. 152 § 3.) MicroClean promptly referred all problems EnviroFix reported to MicroSweep so that MicroSweep could determine the cause of the problem and come up with a repair. (R. 51-56, 59, 77, 129-30, 133-36; Supp. R. 1-2.) MicroClean returned the equipment to EnviroFix as soon as repairs were completed. (R. 51-56, 59, 77, 129-30, 133-36; Supp. R. 1-2.)

By letter dated December 4, 2005, David Stoner ("Stoner"), the principal of EnviroFix, notified MicroClean that EnviroFix was dissatisfied with MicroClean's performance of its repair obligations under the License Agreement. (R. 57, 176.) The letter asserts, in pertinent part:

> You have never inspected or tested the machines to assure their proper and safe working order. You have failed to perform any periodic maintenance on machines. Basically, you have not made one repair or performed any maintenance on any machine at any time, until the recent repairs made by the manufacturer [MicroSweep] on one machine.
>
> This letter references only a few of the things you have not done as provided for by the terms our [sic] agreement. Some may argue that these breaches of contract may be viewed as having already terminated our agreement. I do not know. I do know that due to your actions, or the lack thereof, that the spirit of the agreement has been violated and is dead.
>
> Please be advised that I am not going to pay my monthly fees this month nor will I pay any future monthly fees until my machines are repaired.

(R. 176.)

Stoner sent a second letter to MicroClean dated December 20, 2005, which stated, in relevant part:

> EnviroFix acknowledges that MicroClean believes that EnviroFix is making more of MicroClean's performance breaches than MicroClean thinks

> necessary, but that is where we find ourselves. In EnviroFix's opinion the agreement with MicroClean is void. The big question now facing MicroClean and Enviro Fix is how do we deal with this reality.
>
> EnviroFix would view entering a new agreement with MicroClean preferable to an expensive knock down, dragged out fight.

(R. 177.)

EnviroFix paid all of the monies due under the License Agreement and the related installment agreement from the inception of the contract through November 2005. (R. 99.) However, beginning in December 2005, EnviroFix failed to pay the required monthly installment fees under the contracts. (R. 58.) EnviroFix has not paid any monies to MicroClean since November 2005. (R. 58, 99, 117-18, 131-32.)

By letter dated January 24, 2006, MicroClean acknowledged EnviroFix's correspondence of December 4 and December 20, 2005. (Suppl. R. 3.) In that letter, MicroClean stated that on February 1, 2006 it would like to pick up the BioTowers that EnviroFix had leased. (Suppl. R. 3.)

EnviroFix, however, refused to allow MicroClean to obtain possession of the six leased BioTowers. (R. 63, 80, 120, 136-37.) In this regard, Stoner, on behalf of EnviroFix, informed MicroClean that he would return the BioTowers to MicroClean only if MicroClean refunded all the money EnviroFix had paid under the License Agreement. (R. 137.) In his trial testimony, Stoner also indicated that if MicroClean had appeared on his premises in February 2006, he was prepared to resist MicroClean's efforts to regain possession of the collateral. (R. 120, 137.)

Because EnviroFix would not allow MicroClean to peaceably regain possession of the six leased BioTowers, MicroClean considered the License Agreement and the related installment agreement as remaining in force through the remainder of the six-year contract term. (R. 63.) In other words, MicroClean treated the contracts as though they were never terminated.

As of the date of trial on February 24, 2011, EnviroFix continued to do business utilizing the BioTower devices. (R. 68, 94-96.) At that time, EnviroFix had a total of 19 BioTowers and still utilized on a daily basis the original 6 BioTowers it acquired from MicroClean in 2004 and 2005. (R. 68, 124, 138.) The 13 additional BioTowers were acquired by EnviroFix directly from MicroSweep and/or were manufactured by EnviroFix. (R. 127.)

At trial, MicroClean calculated that a balance of $84,063 in license fees remained due and owing by EnviroFix under the License Agreement and the installment agreement. (R. 65, 141-49.) At that time, the interest owed totaled $45,491.37. (R. 65, 141-49.) An additional $4,700 was due based on the $100 per month late penalty payment under the contract. (R. 64-65, 141-49.)

A bench trial on the matter was held before a Master-in-Equity on February 24, 2011. (R. 3.) The Master entered an Order on April 12, 2011. (R. 3-10.) In that Order, the Master denied MicroClean's causes of action for breach of contract, claim and delivery, and quantum meruit but granted damages to MicroClean in the amount of $2,500 for EnviroFix's failure to make monthly license payments for December 2005 and January 2006, and in the amount of $11,190 for EnviroFix's failure to make a total of 30 monthly payments due under

an installment agreement. (R. 8, 10.) The Master further ruled that MicroClean was entitled to retain in full EnviroFix's security deposit of $15,000. (R. 9-10.)

The Master then granted EnviroFix's cause of action for breach of contract in the amount of $13,377. (R. 10.) In so doing, the Master found that MicroClean had breached its maintenance and repair obligations under the parties' contract. (R. 9-10.) The Master denied Envirofix's remaining claims for breach of the covenant of good faith and fair dealing, quantum meruit, negligent misrepresentation, fraud in the inducement, and fraudulent misrepresentation. (R. 9.)

By way of a setoff for the above-referenced claims, the Master concluded that MicroClean was entitled to receive total damages from EnviroFix in the amount of $313. (R. 10.) On September 19, 2011, MicroClean served its Notice of Appeal on Envirofix.

On appeal, the Court of Appeals affirmed in part, reversed in part, and remanded the case back to the trial court. (Ct. App. Op. No. 5135 ["Ct. App. Op."] 2.) First, the Court of Appeals reversed the Master's finding that EnviroFix's letters of December 4 and 20, 2005 were sufficient to provide 60 days' written notice of termination to MicroClean. (Ct. App. Op. 9-11.) The Appeals Court then remanded the matter to the Master to determine whether MicroClean is ultimately entitled to prevail on its breach-of-contract action and the amount, if any, of its damages. (Ct. App. Op. 11.)

Second, in regard to MicroClean's claim and delivery cause of action, the Court of Appeals remanded the matter to the Master to determine whether repossession of the BioTowers by MicroClean is an appropriate remedy and the amount of compensation, if any, to which MicroClean is entitled as a result of EnviroFix's refusal to return the equipment to

MicroClean. (Ct. App. Op. 11.) The Court of Appeals further determined that in the event MicroClean is entitled to a return of the BioTowers, it may be entitled to punitive damages. (Ct. App. Op. 12.)

On or about August 9, 2013, EnviroFix filed its Petition for Writ of Certiorari to this Court. For the reasons set out in detail below, EnviroFix's Petition is not well taken and should be denied.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT ENVIROFIX'S LETTERS TO MICROCLEAN WERE INSUFFICIENT TO PROVIDE 60 DAYS' NOTICE OF TERMINATION OF THE LICENSE AGREEMENT.

A. The Court Of Appeals Did Not Apply An Inappropriate Standard Of Review.

The License Agreement executed by the parties contained a term of six years. (R. 152 § 3.) That six-year term, however, was subject to EnviroFix's right to terminate the agreement upon "60 days advance written notice." (R. 152 § 2.) As the Court of Appeals correctly determined, EnviroFix's letters dated December 4 and 20, 2005 were insufficient to provide MicroClean with the 60 days' written notice of termination required by the License Agreement to enable EnviroFix to terminate the contract prior to the expiration of the six-year term. In its Petition, EnviroFix incorrectly contends that the Court of Appeals misapprehended or failed to apply the proper standard of review in reaching this decision.

As the Court of Appeals recognized, in reviewing an action at law referred to a master or special referee, an appellate court will not disturb the master's or special referee's findings of fact that are reasonably supported by the evidence. *See Allen v. Pinnacle Healthcare Sys., LLC*, 394 S.C. 268, 272, 715 S.E.2d 362, 364 (Ct. App. 2011). The court may, however, correct any errors of law. *Lowcountry Open Land Trust v. State*, 347 S.C. 96, 101, 552 S.E.2d 778, 781 (Ct. App. 2001). In addition, the court may correct findings of fact that are not reasonably supported by the evidence. *Gurganious v. City of Beaufort*, 317 S.C. 481, 485, 454 S.E.2d 912, 914 (Ct. App. 1995).

The Master found that the language of the License Agreement executed by the parties is clear and unambiguous. (R. 7.) A contract is unambiguous where its terms are not reasonably susceptible of more than one meaning when viewed objectively by a reasonably intelligent person. *Hawkins v. Greenwood Dev. Corp.*, 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997). The meaning of unambiguous contract language presents a question of law. *S.C. Dep't of Natural Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 303 (2001).

Because the notice requirement contained in the License Agreement is clear and unambiguous, the Court of Appeals had the power and discretion to correct the Master's incorrect legal interpretation of that clause. *See Lowcountry Open Land Trust*, 347 S.C. at 101, 552 S.E.2d at 781. EnviroFix's contention that the Court of Appeals applied an incorrect standard of review is clearly erroneous and must be rejected.

Under South Carolina contracts law, "notice of termination must be given in accordance with the terms of the contract." *Edisto Is. Hist. Soc'y, Inc. v. Gregory*, 354 S.C.

198, 202, 580 S.E.2d 141, 143 (2003). Under the clear and unambiguous terms of the License Agreement, EnviroFix lacked any right to terminate the contract before the end of the six-year contract term without providing 60 days' advance written notice to MicroClean. (R. 152 " 2-3.)

By their express terms, EnviroFix's letters dated December 4 and 20, 2005 do not purport to provide MicroClean with 60 days' advance notice of termination. Instead, in the December 4, 2005 letter, Stoner, the principal of EnviroFix, cryptically states that he did "not know" whether the License Agreement was terminated by MicroClean's alleged breach of its repair obligations. (R. 176.) The letter also threatened that EnviroFix would withhold all monthly fees due under the License Agreement "until [its] machines are repaired." (R. 176.) According to Stoner, MicroClean's "[r]emittance of the referenced fees and maintenance to repair [EnviroFix's] machines will enable [EnviroFix] to consider forgiving [MicroClean's] breech [sic] of our agreement." (R. 176.) This language clearly reflects a belief by Stoner and EnviroFix that the License Agreement was ongoing and would not be terminated in the next 60 days. *See Schwartz v. Rent A Wreck Am. Inc.*, 468 F. App'x 238, 249 (4th Cir. 2012) (where contract contained provision permitting franchisee to operate car rental business at specific location and parties' conduct was consistent with this provision, parties intended to preserve franchisee's right to use franchise name indefinitely).

Similarly, the December 20, 2005 letter is devoid of language providing MicroClean with notice that the License Agreement would come to a premature end after 60 days. Instead, the letter recites that "[i]n EnviroFix's opinion the agreement with MicroClean is

void. *The big question now facing MicroClean and EnviroFix is how do we deal with this reality.*" (R. 177 (emphasis added).)

EnviroFix's letters of December 4 and 20, 2005 do not contain any unqualified language informing MicroClean that EnviroFix intended to terminate the License Agreement in the next 60 days. *See Monongahela Power Co. v. Local No. 2332, Int'l Bhd. of Elec. Workers*, 566 F.2d 1196, 1200 (4th Cir. 1976) (term "unqualified" means "'completely,' 'absolutely' and 'entirely'"). As a result, the letters do not provide MicroClean with the 60 days' notice of termination required in the License Agreement to trigger EnviroFix's right to terminate said contract prior to the expiration of the six-year term. *See Edisto Is. Hist. Soc'y*, 354 S.C. at 202, 580 S.E.2d at 143.

South Carolina case law has clearly established that where a party fails to provide the contractually required advance notice of termination to the other party, the party attempting to terminate has no right to end the contractual relationship. *See Furst & Thomas v. Davis*, 150 S.C. 1, 147 S.E. 654, 655 (1929) (seller had no right to terminate contract without notice to buyer, and seller's attempt to do so amounted to breach of contract); *see also Litchfield Co. of S.C. v. Kiriakides*, 290 S.C. 220, 225 n.2, 349 S.E.2d 344, 347 n.2 (Ct. App. 1986) ("[A] demand for immediate possession of premises is not sufficient notice of termination of the lease[.]"). The party's invalid attempt to terminate the contract without notice itself constitutes a breach of contract. *Furst & Thomas*, 150 S.C. 1, 147 S.E. at 655.

In the present case, it is clear that the express terms of EnviroFix's letters dated December 4 and 20, 2005 failed to provide MicroClean with the required 60 days' advance written notice of termination. Because EnviroFix failed to provide notice of termination that

conformed with the requirements of the License Agreement, it must be concluded that EnviroFix's alleged attempt to terminate the contract was ineffective and amounts to a breach of the parties' contract. *See Edisto Is. Hist. Soc'y*, 354 S.C. at 202, 580 S.E.2d at 143. The Master's finding to the contrary amounts to an error of law that was properly corrected by the Court of Appeals. *See Lowcountry Open Land Trust*, 347 S.C. at 101, 552 S.E.2d at 781.

Moreover, in incorrectly determining that EnviroFix gave proper notice of termination, the Master failed to recognize and account for the ambiguity in the language of EnviroFix's letters. Contract language is ambiguous when its terms "are reasonably susceptible of more than one interpretation." *S.C. Dep't of Natural Res.*, 345 S.C. at 623, 550 S.E.2d at 302. Here, EnviroFix's letters of December 4 and 20, 2005 are ambiguous in that they contain conflicting terms. On the one hand, the December 4, 2005 letter states that EnviroFix did not know whether the License Agreement was terminated due to MicroClean's alleged failure to repair the machines. In addition, that letter recognizes the continuing effectiveness of the License Agreement by stating that EnviroFix would not pay any monthly fees *until the machines were repaired*, and that EnviroFix was willing to forgive MicroClean's alleged breach in the event certain conditions were satisfied. (R. 176.) On the other hand, that letter also expresses the opinion that the "spirit" of the License Agreement was violated and is dead. (R. 176.)

The December 20, 2005 letter likewise contains inherently conflicting terms. First, the letter sets forth EnviroFix's opinion that the License Agreement was void. (R. 177.) However, the letter goes on to recognize the continuing effectiveness of the License

Agreement by reciting the need for the parties to come up with a solution that adequately addresses EnviroFix's concern for MicroClean's alleged breach. (R. 177.)

It is well established that "[i]t is a question of law for the court whether the language of a contract is ambiguous." *S.C. Dep't of Natural Res.*, 345 S.C. at 623, 550 S.E.2d at 302-03. In construing the language of the letters as a whole and finding that EnviroFix acknowledged the continued effectiveness of the License Agreement, the Court of Appeals properly corrected the Master's legal error in failing to recognize the existence of the ambiguous contract language. *See Lowcountry Open Land Trust*, 347 S.C. at 101, 552 S.E.2d at 781.

Further, the Master's finding that EnviroFix's December 4 and 20, 2005 letters provided 60 days' notice of termination to MicroClean is not reasonably supported by the evidence. *See Gurganious*, 317 S.C. at 485, 454 S.E.2d at 914. EnviroFix's letters reflect the belief that the License Agreement would continue in effect indefinitely. *See Schwartz*, 468 F. App'x at 249. Where the meaning of contractual language is in doubt, the interpretation of the language, as manifested by the parties' conduct, is determinative. *Kitchens v. Lee*, 221 S.C. 59, 66, 69 S.E.2d 67, 69 (1952). Further, the court must construe any ambiguity in the language against the drafter, which in this case is EnviroFix. *Mathis v. Brown & Brown of S.C., Inc.*, 389 S.C. 299, 309, 698 S.E.2d 773, 778 (2010). These fundamental principles of contract interpretation demand the conclusion that EnviroFix's letters failed to provide the 60 days' notice of termination required by the License Agreement and, therefore, the contract remained in effect.

Because the Master's finding on the notice issue was not reasonably supported by the evidence, the Master's opinion was properly corrected by the Court of Appeals. *See Gurganious*, 317 S.C. at 485, 454 S.E.2d at 914. EnviroFix's arguments to the contrary are not well-taken and should be rejected.

II. THE COURT OF APPEALS DID NOT MISAPPREHEND OR FAIL TO APPLY THE PROPER STANDARD OF REVIEW IN REGARD TO MICROCLEAN'S CAUSE OF ACTION FOR CLAIM AND DELIVERY.

A. The Security Deposit Is Not A Proper Measure Of MicroClean's Damages.

In his Order, the Master expressly denied MicroClean's cause of action for claim and delivery under sections 15-6-10 et seq. of the South Carolina Code. (R. 8.) According to EnviroFix, however, MicroClean actually prevailed on this cause of action, but the Master limited its damages to the retention of the $15,000 security deposit paid by EnviroFix. EnviroFix incorrectly contends that the License Agreement contemplates MicroClean's retention of the security deposit as a permissible form of liquidated damages. EnviroFix's argument is distorted, as it overlooks the crucial fact that a claim and delivery action is statutory and is thereby governed by the South Carolina Code and the accompanying Rules of Civil Procedure. These statutory precepts cannot be simply thrown aside by a contractual provision that does not even purport to represent a liquidated damages clause.

The remedy to be recovered by a plaintiff who prevails on a claim and delivery cause of action is set by statute:

> In an action to recover the possession of personal property judgment for the plaintiff may be for possession or for the value thereof in case a delivery cannot be had and for damages, both punitive and actual, for the detention.

S.C. Code Ann. § 15-69-210. Rule 49 of the South Carolina Rules of Civil Procedure further provides that if the property has not been delivered to the plaintiff, "the jury shall assess the value of the property if the verdict be in favor of the plaintiff," and, in so doing, the jury may assess actual and punitive damages the plaintiff sustained "by reason of the detention or taking and withholding of such property." Rule 49(c), SCRCP.

The statutory damages recoverable by the plaintiff in a claim and delivery action are equivalent to those recoverable for a conversion claim. *McClean v. Godwin Props., Inc.*, 292 S.C. 518, 521, 357 S.E.2d 473, 475 (Ct. App. 1987). Under South Carolina law, a plaintiff who prevails on a conversion claim is entitled to recover damages in the amount of the value of the property converted, with interest thereon, from the date of the conversion to the date of trial. *King v. Allstate Ins. Co.*, 272 S.C. 259, 261, 251 S.E.2d 194, 195 (1979); *Green v. Waidner*, 284 S.C. 35, 37-38, 324 S.E.2d 331, 333 (Ct. App. 1984).

Similarly, a successful plaintiff in a claim and delivery action is entitled to a judgment "for possession of a chattel which he sought to recover, or, if return of the property is impossible, to a money judgment for its value." *Brunswick Corp. v. Long*, 392 F.2d 337, 343 (4th Cir.), *cert. denied*, 391 U.S. 966 (1968). Thus, a money judgment on a claim and delivery cause of action must be based on the fair market value of the property. S.C. Code Ann. § 15-69-210; Rule 49, SCRCP. No other measure of damages is authorized.

"When a statute creates a substantive right and provides a remedy for infringement of that right, the plaintiff is limited to that statutory remedy." *Dockins v. Ingles Mkts., Inc.*, 306

S.C. 496, 498, 413 S.E.2d 18, 19 (1992). Accordingly, a contractual liquidated damages provision cannot override the express statutory requirements and remedies pertaining to a South Carolina claim and delivery action.

The Master's calculation of damages here was determined by the provision in the License Agreement calling for EnviroFix to pay a security deposit of $15,000 for use of the BioTower machines. (R. 9.) However, MicroClean's retention of this sum as the measure of damages for EnviroFix's wrongful retention of the machines does not accord with the valuation measure required by statute. Contrary to the requirements of section 15-69-210 and Rule 49, no assessment was made of the actual market value of the property retained by EnviroFix.

In addition, no evidence was submitted to the Master to show that EnviroFix's $15,000 security deposit was a reflection of the actual market value of the BioTower machines the company retained. Rather, the terms of the License Agreement indicate that the deposit was intended to provide some measure of security to MicroClean against EnviroFix's use and possession of the equipment. (R. 153 § 4.) The amount of the security deposit is to provide an offset against the damages MicroClean is entitled to recover from EnviroFix pursuant to section 15-69-210 and Rule 49. *See Porter-Constructors v. Dixon Motor Serv. Co.*, 171 S.C. 396, 172 S.E. 419, 422 (1934) (plaintiffs who prevailed in breach-of-contract action had the right to offset their damages with "whatever sum they had in hand to the credit of defendant"); *Hendricks v. Hicks*, 374 S.C. 616, 618, 649 S.E.2d 151, 151 (Ct. App. 2007) (contract gave nonbreaching party right to offset any loss or damage incurred due to

breaching party's breach of warranty from any sum nonbreaching party still owed under the contract).

In this regard, the evidence before the Master showed that as of January 1, 2004, the manufacturer's suggested retail price of each BioTower was $6,395. (R. 186.) Multiplying this figure by six, the total fair market value as of July 2004 of the six BioTowers EnviroFix obtained from MicroClean was $38,370. To determine the fair market value of the BioTowers at the time of conversion by EnviroFix, depreciation must be subtracted from the retail price of the equipment. Depreciation is calculated as the difference between the fair market value of the property at the time of the taking less its present value. *Gen. Motors Acceptance Corp. v. Henson*, 243 S.C. 276, 279, 133 S.E.2d 798, 799-800 (1963); *see also Michalowski v. Ey*, 8 A.D.2d 854, 854, 190 N.Y.S.2d 535, 536 (App. Div.), *aff'd*, 7 N.Y.2d 71, 195 N.Y.S.2d 633, 163 N.E.2d 863 (1959).

If depreciation is taken at a flat monthly rate over the six-year contract term, the monthly rate of depreciation is $532.92. Applying this rate of depreciation to the BioTowers, the fair market value of the collateral as of February 2006, when EnviroFix refused to permit MicroClean to regain possession, was $27,711.60 (i.e., original market value of $38,370 - depreciation of $10,658.40 = $27,711.60). Pursuant to the License Agreement, the $15,000 security deposit EnviroFix paid to MicroClean is to be offset against this amount. (Def.'s Ex. 9, License Agrmt. § 4.) Thus, the proper measure of EnviroFix's damages on its Claim and Delivery action is $12,711.60 (i.e., fair market value of collateral of $27,711.60 - $15,000 security deposit paid = $12,711.60 damages).

As the above analysis makes clear, the Master abused its discretion in limiting the statutory damages payable on MicroClean's claim and delivery action to the amount of EnviroFix's $15,000 security deposit. The Master's Order fails to conform with the requirements of section 15-69-210 and Rule 49. The Court of Appeals correctly reversed the Master's erroneous calculation of damages, and EnviroFix's arguments to the contrary should be rejected.

B. The Court Of Appeals Correctly Remanded The Issue Of Compensation To The Trial Court.

Pursuant to Rule 49(c), "[a]ctual and punitive damages are available in a claim and delivery action." *McClean*, 292 S.C. at 521, 357 S.E.2d at 475. Under this precept, the Court of Appeals found that if MicroClean is entitled to the return of the BioTowers, it may also be entitled to actual and punitive damages on its claim and delivery cause of action. (Ct. App. Op. 12.) In opposition, EnviroFix incorrectly contends that MicroClean cannot recover punitive damages because it did not raise the issue before the Master.

The imposition of damages on MicroClean's claim and delivery cause of action is a matter of statute and Rule 49. If the Master had applied the law correctly and referenced Rule 49, as he ought to have done, he would have expressly considered whether punitive damages could appropriately be levied against EnviroFix. Because the punitive damages issue under Rule 49 was implicitly before the Master, it was properly considered by the Court of Appeals. *See Elam v. Elam*, 275 S.C. 132, 135, 268 S.E.2d 109, 110 (1980). Hence,

contrary to EnviroFix's claims, the question as to whether MicroClean is entitled to punitive damages is an appropriate subject for remand.

CONCLUSION

For the foregoing reasons, this Court should deny EnviroFix's Petition for Writ of Certiorari.

Respectfully submitted,

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APPEAL FROM BEAUFORT COUNTY
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PROOF OF SERVICE

I certify that I have served a copy of the Respondent's Response to Petition for Writ of Certiorari, by depositing a copy of it in the United States Mail, postage prepaid, on October 8, 2013, addressed to Petitioner's attorneys of record, Robert E. Sumner, IV, Esquire and Trudy H. Robertson, Esquire, Moore & VanAllen, PLLC, 78 Wentworth Street, Charleston, SC 29401.

October 8, 2013

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October 8, 2013

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

Re: MicroClean Technology, Inc. vs. Envirofix, Inc.
Civil Action No.: 06-CP-07-2689
Tracking No.: 2011193786
Our File No.: 2836-001

Dear Mr. Kitchings:

Enclosed please find two copies of Respondent's Return to Petition for Writ of Certiorari and Proof of Service in the above captioned matter. Please file the originals and return file stamped copies to me in the envelope provided for your convenience.

Thank you for your assistance in this regard.

Very truly yours,

FINGER & FRASER, P.A.

Terry A. Finger

TAF/cc
Enclosures
cc: Robert E. Sumner, IV, Esquire
Mr. Ansley Cohen

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