THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Charles B. Simmons, Jr., Master in Equity

Case No. 2013-CP-23-03075

Appellate Case No. 2014-000086

Sherman Financial Group, LLC.....Appellant,

vs.

FM FRI Greenville, LLC.....Respondent.

RETURN TO RESPONDENT'S MOTION TO DISMISS APPEAL

Through successive, *pre-trial* rulings, the lower court has wrongly ordered Sherman Financial Group, LLC, Appellant/Tenant, to pay rent under the South Carolina Ejectment Statute, S.C. Code Ann. § 27-37-10 (2007), *et seq.* (the "Ejectment Statute"), or else to suffer civil contempt. The first of such rulings, issued by Judge Robin B. Stilwell (entered July 31, 2013 and August 23, 2013), declares simply that Appellant/Tenant must pay pre-trial damages, but these initial rulings specify no consequence for failure or inability to so pay. Presumably, Judge Stilwell was cognizant

of the plain language of Section 27-37-155(B)(5) of the Ejectment Statute, which requires eviction in the face of a tenant's failure to pay rent during the pendency of an action for recovery of leased realty.

Ignoring statutory language, FM FRI Greenville, LLC, Respondent/Landlord, filed an Emergency Motion for Contempt and Sanctions on September 4, 2013. Judge Charles B. Simmons, Jr. heard Respondent/Landlord's Emergency Motion and ruled that Judge Stilwell's initial orders establish the law of this case. Judge Simmons then declared that Appellant/Tenant must pay pre-trial, monetary damages to Respondent/Landlord or be held in contempt.

The aggregated rulings of Judges Stilwell and Simmons are contrary to law and deprive Appellant/Tenant of its due process rights under the United States and South Carolina Constitutions. The lower court has not afforded a hearing to resolve ultimate legal and countless factual disputes, yet it has awarded monetary damages and declared such award to be beyond challenge. Further, Judge Simmons would impose the ultimate civil consequence, contempt, without first affording Appellant/Tenant its day in court. The appealed orders are final in that they declare (albeit erroneously) that Appellant/Tenant owes Respondent/Landlord some $152,137.76, and that such debt is the irreversible law of this case. Further, these rulings constitute a final and appealable contempt decree. Further still, even if they were not final, the aggregated rulings of Judges Stilwell and Simmons are founded on a patent absence of due process, thereby affecting a substantial right. Accordingly, appellate jurisdiction is proper under Section 14-3-330 of the South Carolina Code of Laws, and Respondent/Landlord's Motion to

Dismiss should be denied. Appellant/Tenant submits an accompanying Memorandum in support of its position.

Respectfully submitted,

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Attorneys for Appellant

February 19, 2014

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APPELLANT'S MEMORANDUM OF LAW IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS APPEAL

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February 19, 2014

I. INTRODUCTION/STATEMENT OF ISSUES:

Through successive, *pre-trial* rulings, the lower court has wrongly ordered Sherman Financial Group, LLC, Appellant/Tenant, to pay over $150,000.00 in alleged rental damages to the Respondent/Landlord on authority of the South Carolina Ejectment Statute, S.C. Code Ann. § 27-37-10 (2007), *et seq.* (the "Ejectment Statute"), or else to suffer civil contempt. Furthermore, the lower court has declared Appellant/Tenant's payment obligation to be the law of this case. These rulings constitute a de facto, pre-trial judgment against Appellant/Tenant and have been issued without a hearing to resolve the ultimate legal and factual disputes. The appealed orders are final in that they declare (albeit erroneously) that Appellant/Tenant owes a liquidated debt of $152,137.76 to Respondent/Landlord and that such debt is the irreversible law of this case. Further, the lower court rulings constitute a final and appealable contempt decree. Further still, even if they were not final, the aggregated rulings of the lower court are grounded in an extreme absence of due process, thereby affecting a substantial right. Accordingly, appellate jurisdiction is proper under Section 14-3-330 of the South Carolina Code of Laws, and Respondent/Landlord's Motion to Dismiss should be denied.

II. FACTUAL BACKGROUND:

At the outset, Appellant/Tenant informs the Court that very little discovery has taken place in the subject action—written discovery is incomplete, no depositions have been taken, and no witnesses have testified before the lower court. As a result, ultimate factual disputes persist. The following relevant details, however, are supported by recent, third-party subpoena responses, or are a matter of record documentation.

In May 2003, Appellant/Tenant and Respondent/Landlord's predecessor-in-interest entered into a commercial lease (the "Lease"), which provided for a 10-year tenancy. The Lease incorporates a "Work Letter," attached hereto as **Exhibit A** (the "Work Letter"). Such Work Letter calls for Respondent/Landlord to reimburse Appellant/Tenant's up-fitting costs at a rate of $20.00 per square foot of leased premises. Based upon the final premises area, Respondent/Landlord's obligation of reimbursement (the "Unpaid Allowance") totaled in excess of $1.2 Million. The amount of the Unpaid Allowance owed to Appellant/Tenant has been acknowledged by Respondent/Landlord in the context of mortgage-loan documentation. In particular, the Loan Agreement signed by Respondent/Landlord's principal, Michael McCloskey, memorializes and quantifies the debt owed to Appellant/Tenant. Relevant excerpts of such Loan Agreement are attached hereto as **Exhibit B**.

Based on such loan documents (which were not available to the lower court at the time the appealed rulings were issued), the following additional facts are revealed:

(1) Respondent/Landlord, at the insistence of its mortgage lender, deposited $1,272,400.00 in a cash reserve account to cover the Unpaid Allowance (*See* Schedule IV of **Exhibit B**);

(2) Respondent/Landlord sought to deprive Appellant/Tenant of the Unpaid Allowance on the hope that Appellant/Tenant would simply overlook the debt (*See* **Exhibit C**); and

(3) Respondent/Landlord eventually converted the Unpaid Allowance cash reserve to its use—as purchase-money to acquire the building in which the premises are situated (*See* **Exhibit D**).

In sum, Respondent/Landlord has consistently acknowledged Appellant/Tenant's entitlement to the Unpaid Allowance, and Respondent/Landlord has absconded with cash set aside to cover this obligation in hopes that Appellant/Tenant would "overlook" the debt owed.

Appellant/Tenant did not overlook this sizeable sum, and with approximately six months remaining on the Lease, Appellant/Tenant sent a demand letter to Respondent/Landlord (*See* **Exhibit E**). Appellant/Tenant's demand for payment was met with a letter from Respondent/Landlord's Florida attorney conjuring a non-existent default allegation and threatening self-help eviction and seizure of Appellant/Tenant's property (*See* **Exhibit F**).

III. PROCEDURAL POSTURE:

Confronting unlicensed counsel's threats, Appellant/Tenant moved for a temporary restraining order and sought permission to pay rent into court as a means of preserving contested possessory rights to the premises. Appellant/Tenant has consistently argued to both Respondent/Landlord and the lower court that there is no self-help eviction privilege in South Carolina, asserting instead that the due process requirements of the Ejectment Statute must be followed. Eventually, on July 16, 2013 (forty-six days after Appellant/Tenant filed suit seeking the Unpaid Allowance), Respondent/Landlord proffered a Rule to Show Cause as required under the Ejectment Statute. *See* S.C. Code Ann. § 27-37-10 (2007). Such Rule has never been issued or served. Yet, at the hearing on Appellant/Tenant's Motion to Deposit Funds into Court, the lower court ordered payment of the June and July rent according to Section 27-37-155 of the Ejectment Statute. (*See* Order of Judge Stilwell dated July 31, 2013, **Exhibit G**). Questioning how

the lower court might recourse to the Ejectment Statute without adherence to statutory notice requirements, Appellant/Tenant moved for reconsideration. Judge Stilwell denied Appellant/Tenant's Motion for Reconsideration, but reassured the parties that the Order awarding pre-trial rent was not a merits-based decision and was without prejudice. (*See* Order of Judge Stilwell dated August 23, 2013, **Exhibit H**).

On September 4, 2013, Respondent/Landlord filed an Emergency Motion for Contempt on the basis of Appellant/Tenant's refusal to pay rent. The matter was referred to Judge Simmons by Order dated September 16, 2013. Upon hearing the Respondent/Landlord's Emergency Motion, Judge Simmons declared that the prior Orders of Judge Stilwell—which explicitly declare themselves to be non-prejudicial and not merits-based—establish the law of the case. Judge Simmons consequently ordered Appellant/Tenant to pay pre-trial damages in excess of $300,000.00 at peril of contempt. (*See* Orders of Judge Simmons dated November 13, 2013 and December 23, 2013, **Exhibit I**). Appellant/Tenant has appealed Judge Simmons' Orders, and inherently the non-final Orders of Judge Stilwell, which were founded on *pendente lite* provisions of the Ejectment Statute.

IV. ARGUMENT:

A. The Lower Court's Erroneous Ruling that Non-Final, Prior Orders Constitute Law of the Case is Appealable.

The lower court has declared that a pre-trial, damages award establishes the law of this case. Such an erroneous ruling is immediately appealable because it deprives Appellant/Tenant of the right to a trial on the merits. E.g., Lester v. Dawson, 327 S.C. 263, 491 S.E.2d 240 (1997); C&S Real Estate Services. Inc., v. Massengale, 290 S.C. 299, 350 S.E.2d 191 (1986); Creed v. Stokes, 285 S.C. 542, 331 S.E.2d 351 (1985); First

Union Nat'l Bank of S.C. v. Soden, 333 S.C. 554, 511 S.E.2d 372 (Ct. App. 1998); Preferred Sav. Bank, Inc. v. Elkholy, 303 S.C. 495, 399 S.E.2d 195 (Ct. App. 1990). The foregoing line of cases establishes that an order depriving a party of a mode of trial to which it is entitled is immediately appealable. In the present case, the lower court's orders would preclude not only the mode of trial, but any trial at all—including presentation of witnesses and determinations by a finder of fact—as to more than $300,000.00 of contested contract damages. The rulings of Judge Simmons, based on blind obedience to a prior decree, must be appealed; otherwise, Appellant/Tenant would be deemed to forego any contest of these damages—which is the ultimate matter in dispute!

In amplification of the foregoing, Appellant/Tenant is compelled to expound on the lower court's law-of-the-case ruling. The law-of-the-case doctrine allows that "an appealable order from which no appeal is taken becomes the law of the case in all subsequent proceedings involving the same parties and the same subject matter." Prof'l Bankers Corp. v. Floyd, 285 S.C. 607, 613, 331 S.E.2d 362, 365 (Ct. App. 1985). The doctrine applies to both findings of fact and principles of law. See, e.g., Lucas v. Rawl Family Ltd. P'ship, 359 S.C. 505, 598 S.E.2d 712 (2004); McCullough v. Urquhart, 248 S.C. 348, 149 S.E.2d 909 (1966). Moreover, the law-of-the-case doctrine applies regardless of any patent error in the unappealed ruling. McCall v. State Farm Mut. Auto. Ins. Co., 359 S.C. 372, 597 S.E.2d 181 (Ct. App. 2004). Given the grave and imposing consequences of the doctrine, it is not surprising that appellate courts have confined its effect to matters *actually determined* in a ruling that was *in fact appealable*. E.g., Prof'l Bankers Corp., 285 S.C. at 613, 331 S.E.2d at 365.

In the present action, Appellant/Tenant has consistently pointed out that the lower court's rent-payment decree is founded on the Ejectment Statute. The pretrial rent-payment remedy of the Ejectment Statute is not intended as a means to a final and appealable damages decree upon which contempt might stand. Indeed, Judge Stillwell cites to Section 27-37-155 of the Ejectment Statute which provides as follows:

> If the court orders that the tenant pay all rent due and accruing as of and during the pendency of the action as provided by Section 27-37-150 and this section, the order may require the payments to be made (a) directly to the commercial landlord or to the clerk of court, to be held until final disposition of the case, or (b) through the magistrate's office.... ***If the tenant fails to make a payment*** as provided in Section 27-37-150 and this section, ***the tenant's failure to comply entitles the landlord to execution of the judgment for possession*** and, upon application of the landlord, the magistrate shall issue a warrant of ejectment and the landlord must be placed in full possession of the premises by the sheriff, deputy, or constable.

S.C. Code Ann. § 27-37-155(B)(5)(2007) (emphasis added).[1] In its Motion for Reconsideration submitted to Judge Stilwell, Appellant-Tenant urged that "the Court's Order should be amended to declare that the consequence of a failure to pay rent is dispossession from the Premises (not contempt)...."[2] (See Appellant/Tenant's Motion to Reconsider dated Aug. 9, 2013, pg. 3). In response, Judge Stilwell advised that Appellant/Tenant:

> has convoluted and confused the meaning of the Court's previous Order. This Court has made no rulings with respect to the merits of the case and leaves open for a trial

[1] Notably, the Ejectment Statute abrogates from common law and must be strictly construed. Wallace v. Wannamaker, 231 S.C. 158, 97 S.E.2d 502 (1957).

[2] Appellant/Tenant's concern over contempt arose from Respondent/Landlord's communicated intent to move for such relief.

> on the merits all justiciable issues raised in the parties' pleadings. The Court's Order is without prejudice to any party with respect to allocations of an unpaid allowance or a breach under the contract.

(*See* Order of Judge Stilwell dated August 23, 2013, **Exhibit H**). Having thus received equal parts admonishment and reassurance, Appellant-Tenant contented itself with the prospects of either payment or eviction. In summary, Judge Stilwell's Orders declare no consequence; they beg further action, and are, therefore, not final-appealable rulings. Judge Stilwell's rulings are explicitly non-prejudicial and cannot be the basis for establishing the law of this case. The Respondent/Landlord's Motion to Dismiss Appeal should be denied so that trial on the merits can proceed.

B. The Lower Court Rulings are Final and Appealable Because They Declare Appellant/Tenant's Failure to Pay Pre-Trial Damages is Contemptuous Conduct.

The orders issued by Judge Simmons declare that Appellant/Tenant's failure to pay pre-trial damages is contemptuous conduct; therefore, Judge Simmons' rulings are immediately appealable. E.g., Tucker v. Honda of S.C. Mfg., Inc., 354 S.C. 574, 582 S.E.2d 405 (2003); Ex parte Whetstone, 289 S.C. 580, 347 S.E.2d 881 (1986); Ex parte Cannon, 385, S.C. 643, 685 S.E.2d 814 (Ct. App. 2009). The foregoing cases adopt the nearly universal position that contempt citations are final and immediately appealable. The non-prejudicial/non-merits rulings of Judge Stilwell, by themselves, do not constitute final judgments as contemplated by Section 14-3-330(1) of the South Carolina Code of Laws. After all, Judge Stilwell's rulings merely provided for interim statutory relief. By contrast, Judge Simmons' subsequent rulings ascribing contempt to Appellant/Tenant's refused payment are final and are thus immediately appealable.

C. Even if not Final, the Rulings of the Lower Court are Grounded in an Absence of Due Process, and Are Therefore Appealable as Affecting a Substantial Right.

Respondent/Landlord's Motion to Dismiss should further be denied on the basis that the appealed orders affect a substantial right and prevent Appellant/Tenant from achieving a judgment from which appeal might be taken. S.C. Code Ann. § 14-3-330(2) (1976), See also Graham Law Firm, P.A. v. Makawi, 396 S.C. 290, 721 S.E.2d 430 (2012); Ex parte S.C. Farm Bureau Mut. Ins. Co., 314 S.C. 487, 431 S.E.2d 252 (1993). In Graham, appellant argued that the lower court's refusal to allow a factual inquiry deprived it of due process and would likely have the effect of defeating appellant's underlying claims. Graham, 396 S.C. at 300, 721 S.E.2d at 436. The same is true in the present case. Here, the lower court has ruled that Appellant/Tenant is obligated to pay some $315,000.00 to Respondent/Landlord. Moreover, Judge Simmons has proclaimed this pre-trial payment obligation to be law of the case. Judge Simmons' rulings constitute a de facto judgment which cannot be undone without the present appeal, and worse, such judgment was rendered without due process. Appellant/Tenant was given no opportunity to present its case before a trier-of-fact; Appellant/Tenant was given no opportunity to conduct meaningful discovery; and Appellant/Tenant was given no opportunity to depose Respondent/Landlord's witnesses.

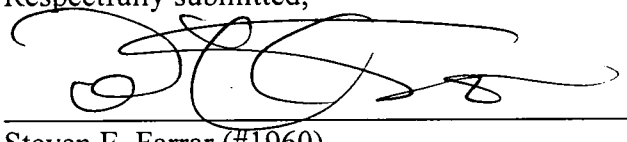
The lower court's failure to afford due process is even more patent upon review of statutory provisions relied upon by Judge Stilwell. The plain language of the Ejectment Statute allows that a landlord may pursue eviction on grounds of an alleged rental default. S.C. Code Ann. § 27-37-10(A)(2007). Unequivocally, an action for ejectment is commenced by issuance and service of a written Rule to Show Cause. S.C. Code Ann. § 27-37-20(2007). Section 27-37-40 requires that a warrant of ejectment shall issue in the

instance of a non-appearing tenant; however, recognizing that landlords do not have a monopoly on the truthful default allegations, Section 27-37-60 mandates that a tenant appearing in contest of ejectment shall be entitled to a trial on the merits over the opposing claims just "as in any other civil case." Depriving Sherman of its right to due process, the lower court's ruling disregards the prerequisite Rule to Show Cause—which is not perfunctory, but is instead a hallmark to the tenant that an ejectment action has been properly engaged. Though proffered to the lower court by Respondent/Landlord, no Rule to Show Cause was ever issued or served in this matter. Judge Stilwell's payment decree cites to—and fundamentally depends upon—Section 27-37-155 of the Ejectment Statute as grounds for commanding Appellant/Tenant's pre-trial payment. Without the issuance of a Rule to Show Cause, however, Sherman cannot have been prepared to make arguments in contest of such payment. Because Appellant/Tenant has been deprived of due process in a manner that would preclude judgment, the lower court rulings are immediately appealable.

V. CONCLUSION:

For the reasons above, Respondent-Landlord's Motion to Dismiss must be denied.

Respectfully submitted,



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PROOF OF SERVICE

I certify that I have served the Return to Respondent's Motion to Dismiss Appeal with Appellant's Memorandum of Law in Opposition to Respondent's Motion to Dismiss Appeal on FM FRI Greenville, Inc., by depositing a copy of it in the United States Mail, postage prepaid, on February 19, 2014, addressed to its attorney of record, Cynthia Buck Brown, Post Office Box 908, Greenville, South Carolina 29602.

February 19, 2014

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SMITH MOORE LEATHERWOOD

February 19, 2014

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: *Sherman Financial Group, LLC v. FM FRI Greenville, LLC*
Court of Appeals Case No. 2014-000086

Dear Ms. Kitchings:

Enclosed for filing in the above-referenced matter please find an original and seven (7) copies of Return to Respondent's Motion to Dismiss Appeal, Appellant's Memorandum of Law in Opposition to Respondent's Motion to Dismiss Appeal, and Exhibits A-I, paginated per Rule 240(c), SCACR. In addition, please find an original and one copy of a Proof of Service. Please file same and return the clocked copy to me by way of the enclosed, self-addressed, stamped envelope. Should anything further be necessary from me in order to accomplish the filing of these documents, please do not hesitate to contact me at your convenience.

Yours very truly,

Jason D. Maertens
Smith Moore Leatherwood LLP

JDM/sps
Enclosures
cc: Ms. Cynthia Buck Brown (w/ enclosures)
Mr. Calvin T. Vick, Jr. (w/ enclosures)
Mr. R. Patrick Smith (w/ enclosures)

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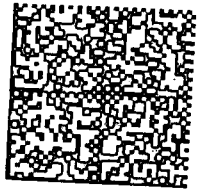

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