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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

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

Court of Appeals No.: 2013-000305

Bluffton Towne Center, LLC,

Respondent,

v.

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

Appellant.

APPELLANT'S PETITION FOR HEARING AND SUGGESTION FOR REHEARING *EN BANC*

Appellant, Beth Ann Gilleland-Prince d/b/a The Law Office of Beth Ann Gilleland, LLC, hereby petitions this Court for rehearing and suggests rehearing *en banc,* pursuant to Rules 201, 221 and 240, SCACR, of its Order filed April 1, 2015 Opinion No. 5309, which affirmed as modified the trial court's ruling in the above-referenced matter. Further, as more fully discussed below, Appellant suggests rehearing *en banc* because consideration by the full court is necessary to secure or maintain uniformity of its decisions, inasmuch as it appears the Appellate panel overlooked or misapprehended a

number of matters of fact and law, and as a result misapplied the applicable precedent and mischaracterized relevant facts. As grounds for her petition for rehearing and suggestion for rehearing *en banc* Appellant contends the panel's decision overlooks or misapprehends the following:

1. The panel overlooked the opinion of Wallace v. Day, 390 S.C. 69, 700 S.E.2d 446 (Ct. App. 2010) (per curiam) in determining Appellant failed to preserve for appeal the issue that the trial court erred by failing to recognize the lease at issue was ambiguous.
2. The panel overlooked the significance of the "express" language requirement in order to allow a landlord to collect future rent after termination of a lease agreement, as set forth in Simon v. Kirkpatrick, 141 S.C. 251, 139 S.E.2d 614 (1927).
3. The panel misapprehended the Appellant's argument in her brief, overlooking the fact Appellant argued the lease at issue had been terminated by the landlord's February 26, 2010 notice to pay or quit the premises. The panel overlooked the specific language in Appellant's brief, and instead conducted an analysis of whether or not the Appellant had been constructively evicted.
4. The panel overlooked the significance of the landlord electing a remedy after a tenant defaults and how such election affects the rights and responsibilities of the parties.
5. The panel overlooked the difference between a landlord reentering and reletting for its own account, which operates to terminate a lease agreement, as opposed to the landlord reentering and reletting for the account of the tenant, which does not operated to terminate the lease agreement, as set forth in Simon v. Kirkpatrick, 141 S.C. 251, 139 S.E.2d 614 (1927) and Surety Realty Corp.v. Asmer, 249 S.C. 114, 153 S.E.2d 125 (1967).
6. The panel overlooked or misapprehended the factual sequence of events leading up to the termination of the lease, the effect of which mischaracterized actions taken by both parties, resulting in a ruling which is inconsistent with the applicable precedent.
7. The panel overlooked or misapprehended the timing of the extrinsic evidence admitted at trial, which is inconsistent with the panel's finding that such admission was harmless error.

Appellant incorporates by reference the Record filed in this appeal and both of Appellant's final briefs, including the issues and arguments raised therein. For purposes of this petition, the pertinent facts in this matter are as follows:

FACTS

On or about January 2009, the Appellant, Beth Ann Gilleland-Prince d/b/a The Law Office of Beth Ann Gilleland, LLC (hereinafter also referred to as "Tenant," "Prince" or "Appellant"), entered into a commercial lease agreement for the purposes of operating a law office, with the Respondent, Bluffton Towne Center, LLC (hereinafter referred to as "Landlord," or "BTC"), for a term of three (3) years, beginning January 1, 2009 and ending December 31, 2011. R., p. 81.

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

> Subject to any governing provisions of law to the contrary, if Tenant fails to cure any financial obligation within 10 days...after written notice of such default is provided by Landlord to Tenant, Landlord may take possession of the Premises without further notice (to the extent permitted by law), and without prejudicing Landlord's right to damages....Tenant shall pay all costs, damages, and expenses (including reasonable attorney fees and expenses) suffered by Landlord by reason of Tenant's defaults. R., p. 81, lines 31-35.

On or about December 18, 2009, Prince notified Respondent, by and through its owner, Mr. Paul Watson, that she needed to close her practice in order to accept an appointment as a magistrate and would eventually vacate the space because she would no longer be legally permitted to operate her law practice. At that time she was unsure exactly how long it would take to accomplish the task. R., p. 85, lines 9-19.

Still in the process of closing the office, Prince defaulted in the rent for the month of February 2010, after which Prince received a "10 Day Notice to Pay or Quit" (hereinafter referred to also as "Notice") from the Respondent dated February 26, 2010. R., p. 86. In the Notice, Respondent stated, "You are hereby notified that you have ten

(10) days to pay to the undersigned office rent now due from you in the amount of $1,875.00 as set forth below, or your right to possession of the above referenced premises will cease and you must quit the same." R., p. 86.

It was undisputed at trial that Prince did not pay the amount requested in the Notice, and did, in fact, relinquish possession of the premises, as requested in the Notice. In fact, Paul Watson, representative of the Plaintiff, testified at trial that when he did not receive the past due rent within the 10 days as requested, he believed the Defendant vacated the premises as demanded. R., p. 44, lines 19-21.

Nonetheless, several weeks later after Prince vacated the premises, as requested in the Notice, she received an email from the Respondent's attorney, on March 28, 2010, which contained several propositions, as if the Notice sent directly from Respondent had not existed. R., p. 88. In fact, the propositions contradicted the demands in the February 26, 2010 Notice. In the March 28 email, Plaintiff's attorney now proposed that Prince pay the back rent for February and March 2010, and that she voluntarily vacate the space and then continue to make rent payments until the space is re-let, and if that were unacceptable, the Respondent intended to file an eviction action and suit for ***back rent.*** Emphasis added. R., p. 88. Somewhat puzzled by this correspondence, Prince responded via email to Respondent's attorney on the same date, and informed him, "I have been out of the unit for nearly two months, as Mr. Watson requested." R., p. 89.

The next communication between the parties was via email 4 days later, on April 1, 2010, in which Respondent's attorney informed Prince the Respondent did not have an extra key to the premises, and requested Prince to provide any keys in her possession to the rental broker, which Prince did that same day. R., pp. 90-93. There were no further

communications between the parties for nearly 2 years. Then, on or about March 9, 2012, Respondent's attorney sent Prince correspondence demanding $34,850.00, which Respondent believed it was owed pursuant to the lease agreement. R., p. 140. Prince did not agree that the lease and the circumstances of the lease termination legally entitled the Respondent to any rent past February 2010. As a result, Respondent filed this action on or about April 18, 2012.

The matter was tried before the Honorable Marvin H. Dukes, III, Master-in-Equity for Beaufort County on October 26, 2012. On December 26, 2012, the Court issued its Order Granting Judgment to the Plaintiff for the entire amount requested, plus attorney's fees and costs in the amount of $3,843.55, for a total judgment of $39,627.55. Thereafter, Prince filed a Notice of Appeal. The Appellate panel heard oral argument in this matter on November 4, 2014, and its Order was filed April 1, 2015, Opinion No. 5309, affirming the master's order as modified. This petition for rehearing and suggestion for rehearing *en banc* followed.

ARGUMENT

It appears the panel overlooked the opinion of Wallace v. Day, 390 S.C. 69, 700 S.E.2d 446 (Ct. App. 2010) (per curiam) when it determined Appellant failed to preserve for appeal the issue that the trial court erred in failing to recognize the lease at issue was ambiguous, and therefore, should have been construed against the drafter.

This panel determined that because "Tenant never argued to the master that the terms of the contract were ambiguous," she therefore failed to preserve the issue for review, citing Knight v. Waggoner, 359 S.C. 492, 496, 597 S.E.2d 894, 896 (Ct. App.

2004); Wilson v. Builders Transp.,Inc., 330 S.C. 287, 294, 498 S.E.2d 674, 678 (Ct. App. 1998). However, this Court ruled differently in Wallace v. Day, 390 S.C. 69, 75, 700 S.E.2d 446, 449 (Ct. App. 2010) (per curiam). This Court rejected an identical argument raised by one of the parties in Wallace where,"[t]he Wallaces contend[ed] that neither party argued before the trial court or this Court that any contractual provisions were ambiguous, and, therefore, issue preservation rules prohibit this Court from recognizing any ambiguities in the contract." Id. at 450, 75. This Court found such argument to be meritless, and ruled, "[b]ecause the Wallaces dispute Day's interpretation of the contract's default provision, this Court is called upon to decide whether the provisions in question are reasonably susceptible to more than one interpretation and thus ambiguous." Id. at 450, 76. *See* S.C. Dep't of Natural Res. v. Town of McClellanville, 345 S.C. 617, 623, 550 S.E.2d 299, 302 (2001) ("A contract is ambiguous when the terms of the contract are reasonably susceptible of more than one interpretation.").

Therefore, it appears the panel overlooked this Court's previous ruling in Wallace, where, as in the instant case, even if both parties argue against ambiguity, yet offer differing interpretations, "the issue of a contract's interpretation necessarily subsumes the primary question of whether the contract's language is clear or ambiguous....Therefore, we not only have the authority but also the responsibility to recognize an ambiguity in a contract." Wallace, 390 S.C. at 75, 700 S.E.2d at 449.

Appellant does not concede the contract is ambiguous, and maintains the general term "damages" unambiguously ***does not*** expressly specify, "future rent." Nonetheless, "[a] contract is 'ambiguous' when it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire

integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business." Rosen v. University of South Carolina, 398 S.C. 703, 708, 731 S.E.2d 298, 301 (Ct. App. 2011). In the instant case, both parties offered opposing interpretations of the terms of the contract, specifically regarding the meaning of the term, "damages." Thus, it appears the terms of the agreement may be capable of more than one meaning when viewed under such circumstances as espoused in Rosen.

Therefore, Appellant respectfully requests the panel to reconsider its decision in this instant matter in light of its ruling in Wallace. Appellant then urges the panel to find that any ambiguity in the lease at issue should have been resolved against the Respondent, the drafter of the lease. "Were we to entertain the idea of an ambiguity, such ambiguity would have to be construed against the Bank which drafted the agreement." Duncan v. Little, 384 S.C. 420, 426, 82 S.E.2d 788, 791 (2009), (citing, *Williams v. Teran, Inc.*, 266 S.C. 55, 60, 221 S.E.2d 526, 529 (1976) (noting the rule of contract interpretation that an ambiguous contract will be construed against the drafting party); *Chassereau v. Global Sun Pools, Inc.*, 373 S.C. 168, 175, 644 S.E.2d 718, 722 (2007) ("[A] court will construe any doubts and ambiguities in an agreement against the drafter of the agreement.")).

It would appear the panel also overlooked the significance of the requirement that a lease must contain "express" language in order to reserve landlord's right to future rent in the case of termination following default by the tenant, as set forth in Simon v. Kirkpatrick, 141 S.C. 251, 139 S.E.2d 614 (1927). The Court in Simon stated as follows:

> The rule as we understand it, is that the termination of a lease does not absolve the lessee from obligations incurred up to the date of termination, but it does absolve him from future obligations, unless the lease shall provide that, notwithstanding the termination for cause by the lessor, the lessee shall not be relieved of such future obligations. Id. at 618. (*citing* 36 C. J. 335).

The issue appeared to be a case of first impression in South Carolina, and the Simon Court proceeded to explain by citing a string of cases from multiple jurisdictions.

> Upon termination of a lease for conditions broken, the lessor is entitled to rent which had previously become due, but not, in the absence of an ***express*** agreement, entitled to recover rent subsequently become due. (emphasis added) Galbraith v. Wood, 124 Minn. 210, 144 N.W. 945, 50 L.R.A. (N.S.) 1034, Ann. Cas. 1915B, 609. The retaking of the premises by the lessor releases the lessee from subsequently accruing rents, unless the lease ***expressly*** provides otherwise.(emphasis added) Burke v. Norton, 42 Cal. App. 705, 184 P. 45; 1 Taylor, Land. & T. (8th Ed.) Sections 377, 378; 2 Wood, Land. & T, (2d Ed.) Section 477. Resumption of possession by the lessor of the thing leased...puts an end to the lessee's liability for future installments of rent, unless otherwise ***plainly*** provided. (emphasis added) Lamson Co. v. Bowland (C.C.A.) 114 F. 639.

In subsequent cases decided in South Carolina, cited in this Court's opinion in the case at bar, each instance where the Court found the terms of the lease exempted the case from the general rule that termination of the lease absolves the tenant from future rental obligations, the lease at issue contained language which spoke specifically to rental obligations, not merely a reservation by the landlord for general "damages." *See* U.S. Rubber v. White Tire Co., Inc., 231 S.C. 84, 97 S.E.2d 403 (1956) (lease term provided specifically, "The purpose of this agreement being to protect the Lessor against any loss of rental during the term of this lease."); Blumberg v. Nealco, 307 S.C. 537, 416 S.E.2d 211 (Ct. App. 1992) (*cert. granted August 31, 1992, reversed and remanded on other grounds)* ("lessor shall have the right, at its sole option...to terminate this lease...but the exercise or non- exercise of such right of termination shall not prejudice any other rights

which the lessor may have against the lessee hereunder and ***shall not operate to relieve the lessee of its obligation to pay rental*** or of its obligations under any other covenants and agreements herein contained.") (emphasis added); Richman v. Joray Corp., 183 F.2d 667 (4th Cir. 1950) (lease contained clause referring specifically to application of security deposit to future rental obligations, as well as an acceleration clause in the case of default by tenant, thereby taking the lease "out of the general rule, that the termination of a lease absolves the lessee from future obligations thereof....").

Although it does not appear the South Carolina courts have considered the definition of "express," it is defined in Black's Law Dictionary (9th ed. 2009) as, "Made known distinctly and explicitly, and not left to inference or implication. Declared in terms; set forth in words. Manifested by direct and appropriate language, as distinguished from that which is inferred from conduct. The word is usually contrasted with 'implied.'" State v. Denny, 118 Ind. 449, 21 N. E. 274, 4 L R. A.65. In the opinion in the case at bar, the panel conceded, "the term "damages" was not specifically defined in the lease," but then the panel determined after the master looked to "the four corners of the subject lease" and when "[r]eading the lease as a whole, ...the parties clearly and unambiguously intended that, upon default, Tenant would be liable to BTC for the rents due during the full term as damages." However, of the "four corners" and the "lease as a whole," the panel refers only to the default provision which allows for "costs, damages, and expenses," which the panel had already stated a few sentences prior that "damages" was not specifically defined. It seems a circular logic to look to the phrase, "costs, damages, and expenses" in order to define the term "damages."

As illustrated by the foregoing, it would appear the panel overlooked the necessity of a lease provision to be express and specific when referring to a tenant's obligation to pay future rental installments in the event of termination of the lease agreement. Simon, *supra.* Even if the panel were to determine no specificity requirement exists, it nonetheless appears to have overlooked the circular logic which led to its ruling on the definition of "damages." Therefore, Appellant respectfully requests the panel to reconsider and amend its ruling to find the general term "damages" is not sufficient to specifically include "future rental obligations," as required by Simon.

The panel affirmed the master's determination that the subject lease had been terminated by abandonment. Yet, despite the fact the panel affirmed the master's ruling that it was Tenant's abandonment of the premises that terminated the lease, the panel later stated in the opinion that the lease was terminated by BTC reentering and reletting, The panel did not specify if BTC's reentering and reletting was done for the account of the tenant or the landlord's own account, which is a crucial distinction, because one effectively terminates the lease, and the other does not. More specifically, if the landlord has decided re-enter and relet for the account of the tenant, the leasehold is ***not*** terminated. *See* Surety Realty Corp.v. Asmer, 249 S.C. 114, 153 S.E.2d 125 (1967). Moreover, the panel unequivocally stated in the opinion the lease was terminated, although parts of its analysis seemed to imply the lease was not terminated and that the landlord had reentered and relet for the account of the tenant. These remedies are mutually exclusive, and therefore, it appears the panel overlooked or misapprehended several crucial points in its analysis of this issue, which are outlined in detail below.

First, the panel misapprehended the Appellant's argument in her brief. In its opinion, the panel states, "According to Tenant, Watson's ten-day notice to pay or quit the premises was the equivalent of an eviction." The argument heading in Appellant's brief read as follows, "THE TRIAL COURT ERRED BY FINDING THAT THE LEASE IN THE INSTANT CASE WAS TERMINATED BY ABANDONMENT." (Capitalization in original). Appellant's argument was best summarized by the following excerpt from her brief:

> There can be no factual dispute as to whether or not this Notice sent to Prince on February 26, 2010 terminated the lease agreement. By its very terms it terminated the agreement, and this intent was confirmed by Watson's testimony at trial...." (R. __).

It may seem a fine point, but one with a significant distinction. Tenant argued that the lease was terminated by an action taken by BTC, not abandonment by Tenant, and that the master erred in ruling the lease had been terminated by abandonment, because abandonment cannot operate to terminate a lease agreement. Especially instructive on this issue is the Restatement (Second) of Prop.: Landlord's Right and Remedies § 12.1 (1977):

> The tenant does not end his obligation to pay rent by abandoning the leased property, unless the landlord accepts what is in effect the tenant's offer to surrender the leased property, ***thereby terminating the lease.***
>
> Prior to any action being taken by the landlord that amounts to an acceptance of the tenant's offer to surrender the leased property, and prior to any reletting of the premises for the benefit of the tenant's account, the tenant may retake possession of the leased property and cancel his abandonment.

Tenant does not concede that the act of vacating the premises manifests any intent to permanently abandon possession, particularly when the Tenant had in fact demonstrated a desire to assist in finding a replacement tenant. (R. p. __). However, such

act alone simply cannot dictate whether the lease is terminated without considering the response from BTC, as it is the landlord that elects the remedy for the default. The Court in Simon offered the following analysis of the various remedies available to the landlord, and the consequences of each:

> Had Simon notified Kirkpatrick that he was holding or taking possession of the premises for the account of Kirkpatrick, it is my opinion that he would clearly have been entitled to the amount of the verdict, as, I think, the facts warranted it. The relationship of landlord and tenant would not then have been terminated and loss resulting to Simon by reason of Kirkpatrick's breach of the contract within the 13 months could properly have been charged up to Kirkpatrick as the defaulting tenant.
>
> But Simon elects to rely upon the authority given in the lease and e*victs Kirkpatrick* and precludes him 'from any further right or benefit thereunder.' *The only reasonable deduction is that this act terminated the relationship of landlord and tenant between them.* And is (in?) (sic) such a circumstance, the authorities available seem clear that the rent, or liability on the contract ceases. (emphasis in original) Id. at 616.
>
> The rule, as we understand it, it that termination of a lease does not absolve the lessee from obligations incurred up to the date of termination, but it does absolve him from future obligations, unless the lease shall provide that, notwithstanding the termination for cause by the lessor, the lessee shall not be relieved of such future obligations. 36 C.J. 335. The lease in the case at bar does not carry a provision to the effect mentioned. Id.

Specifically, the notice provided by Simon to Kirkpatrick stated that due to failure to pay rent, Kirkpatrick, "as per terms of the lease (you) are thereby precluded from any further right to benefit thereunder." Id. at 617. The Court in Simon determined this notice undoubtedly terminated the landlord/tenant relationship, and thus, extinguished any obligation by the tenant for future rent. Id. It appears the panel overlooked the uncanny similarity between the notice in Simon and that sent by BTC in the instant case.

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

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

In light of the foregoing analysis set forth in Simon, it appears the panel overlooked or misapprehended the importance of the landlord's decisions and election of remedies. The landlord's election of remedy is crucial when considering whether or not the leasehold has been terminated and by what means. The panel appeared to overlook or misapprehend that after Tenant defaulted, BTC chose its own remedy, when other remedies, which may have been more advantageous to BTC were equally available. Moreover, the panel also appeared to overlook the fact that the time for BTC to adequately protect itself from loss of future rents was before the parties executed the lease agreement. "The court's duty is to enforce the contract made by the parties regardless of its wisdom or folly, apparent unreasonableness, or failure to guard their rights carefully." Blakely v. Rabon, 266 S.C. 68, 73, 221 S.E.2d 767, 769 (1976)(citing Kable v. Simmons, 217 S.C. 161, 60 S.E.2d 79 (1950). In fact, the panel clearly overlooked or misapprehended BTC's own responsibility to protect itself. The panel opined,

> The Court in Simon found it would be unfair to hold the ***lessor*** "to a liability against which he could not have protected himself" when the lessor withdrew any consideration for the lessee's promise to pay rent and was enjoying the premises for his own benefit. Id. at 260-61, 139 S.E. at 617-18. The same cannot be said for the instant case. In fact, we believe it would be unfair to allow Tenant to simply abandon the leased premises and terminate rent payments at her own leisure...without any consequence for such actions. (Emphasis added).

The panel either overlooked or misapprehended the actual content and context of the above quote from Simon. The actual quote is, "Is it fair, then, to ***[the lessee,] Kirkpatrick,*** to hold him to a liability against which he could not have protected himself...." (emphasis added) Id. Moreover, the Simon Court preceded that comment with a discussion in which it declared, "It must be assumed that Simon exercised his option to terminate the lease as his personal interest dictated. If he restored his own right to the use and occupancy of the lot....Kirkpatrick could not have had the same right at the same time...." Id. In the instant case, it should likewise be assumed that BTC chose to terminate the lease as its personal interest dictated, and when it did so, it precluded Tenant from exercising any right to use and occupancy. Nevertheless, the panel appeared to overlook BTC's responsibility for its own actions, and instead appeared to take a position which implied BTC was powerless to protect itself, subject to the whims of an opportunistic Tenant. As the Court in Blakely observed, the Court's responsibility is to enforce the terms of the contract, despite any failure of a party to adequately protect itself. Blakely, at 73, 796.

Second, in its analysis of the factual scenario which took place between the parties in the instant case, it appears the panel overlooked or misapprehended a number of key points as well. The panel applied the standard of review for reviewing a master's judgment in an action at law, as stated in Silver v. Aabstract Pools & Spas, Inc., 376 S.C.

585, 590, 658 S.E.2d 539, 541-2 (Ct. App. 2008). "[T]he appellate court will not disturb the master's findings of fact unless the findings are found to be without evidence reasonably supporting them." Id. at 590, 542. The "reviewing court is free to decide questions of law with no particular deference to the [master]." Id. (quoting Hunt v. S.C. Forestry Comm'n, 358 S.C. 564, 569, 595 S.E.2d 846, 848-49 (Ct. App. 2004) (internal quotation marks omitted).

The panel applied a constructive eviction analysis as authority to support its position Tenant was not evicted from the premises, and cited Thomas v. Hancock, 271 S.C. 273, 153 S.E.2d 125 (1967). Thomas v. Hancock is distinguishable in that it was a tenant suing her former landlord for unlawful ouster, or constructive eviction. The basis for the tenant's claim was that the landlord had made a verbal demand for her to move out, which she subsequently did. The Court found no constructive eviction took place, "the theory being that to constitute constructive eviction there must be some substantial interference which is injurious to the tenant's beneficial use and enjoyment of the premises." Id. at 276, 606. The Appellant in the case at bar never claimed constructive eviction, and this analysis is misplaced.

In reaching its factual conclusion that the master's ruling that Tenant abandoned the premises is reasonably supported by evidence in the record, the panel pointed to two events which took place nearly two months apart. Specifically, the panel stated in the opinion, "Because Tenant returned her keys and admitted to voluntarily vacating the lease premises prior to the February 26, 2010 notice to pay or quit the premises, the record simply does not support her argument that BTC evicted her and terminated the lease via the notice." The Record does not support such a version of the facts in the

instant case. The panel overlooked or misapprehended the sequence of events, resulting in what can only be described as a mischaracterization of the facts. The undisputed facts in proper sequence are as follows: (1) Tenant was in the process of vacating the premises during the month of February 2010. (2) BTC sent a ten-day notice to pay or quit the premises on February 26, 2010. (3) Tenant did not pay, and thereafter completely relinquished possession of the premises, as requested in the notice. (4) BTC contacted Tenant six weeks later, asking for her set of keys to be returned. (5) Tenant complied. Inexplicably, the panel opined that Tenant's actions of, "voluntarily vacating the leased premises prior to the February 26, 2010 notice to pay or quit the premises" and "return[ing] her keys" supported the master's ruling, as if these actions taken together (despite the number of weeks in between) somehow neutralized BTC's notice to pay or quit the premises. Moreover, the panel overlooked that such an interpretation of the facts may be construed as taking the position that *Tenant terminated the lease in early February 2010 by vacating (which the panel equated with abandonment) the premises. BTC sent a notice on February 26, 2010 to pay or quit the premises, which the panel determined had no effect on the lease agreement or the relationship between the parties. Then in the first few days of April, 2010, Tenant terminated the lease agreement again by returning the keys to BTC.* The panel overlooked or misapprehended how such a position is wholly inconsistent with the applicable case law and pertinent facts.

Third, as illustrated above, it appears the panel overlooked or misapprehended that even if the Tenant had abandoned the premises prior to receipt of the ten-day notice to pay or quit the premises, this sequence of events does not nullify the ramifications of landlord electing to deliver the notice. There are no cases on point in South Carolina

addressing the issue of the significance of a similar sequence of events as those in the instant case. However, an interesting case was decided in the Fifth Circuit in 2013. In Southpark Comm. Hosp., LLC v. Southpark Acquisition Co., LLC, et al, 126 So.3d 805, 2013-59 (La. App. 3 Cir. 10/30/13). In Southpark, the Court was considering whether or not the tenant had abandoned the property, was in the process of abandoning the property, or if action taken by the landlord in electing its remedy to re-enter and relet for its own account terminated the lease along with any and all of the tenant's rental obligations. In restating the well established law in the state of Louisiana, which appears to closely mirror that set forth in Simon, the Court set forth the landlord's available remedies as follows:

> In the event that a lessee breaches a lease, the lessor may pursue one of two options:
>
> He may sue to *cancel* the lease and to recover accrued rentals due, or he may sue to *enforce* the lease and to recover both accrued rentals and future accelerated rentals (if the lease contains an acceleration clause). These remedies are mutually exclusive. If the lessor elects to *cancel* the lease, the lease is terminated and the lessor is entitled to return into possession, but he forfeits the right to all future rentals. On the other hand, if the lessor elects to *enforce* the lease, he may obtain a money judgment against the lessee based on the terms of the lease agreement, but the lease remains in effect and the lessee retains the right of occupancy for the remainder of the term of the lease. Id. at 815, 14-15.

The Court in Southpark then went on to discuss the factual scenario where although there was some question as to abandonment by the tenant, the question was resolved by the fact the landlord sent a written notice to the tenant informing them it would have no further authority or rights to the leased premises. The Court found that action by the landlord finally and completely terminated the lease agreement, and by disallowing the tenant any rights to the property, it was re-entering and reletting for its

own account, thereby relieving the tenant of any further rental obligation. Id. at 819, 21-22.

Despite the fact there are no cases in South Carolina where the facts are identical, Simon, *supra,* comes so close as to be nearly identical. However, it appears the panel overlooked or misapprehended the facts in Simon, by distinguishing it on the basis that the tenant in Simon never actually took possession of the premises. In its opinion the panel stated:

> More importantly, unlike the Tenant in this case, the lessee in *Simon* never actually took possession of the premises prior to the lessor sending a notice terminating his rights under the lease. The court in *Simon* was notably concerned with precluding the lessee from enjoying any rights and benefits under the lease, while also holding him responsible for the future obligations under it. In the instant case, however, Tenant occupied the leased premises for several years and renewed the subject lease prior to defaulting on rent payment and breaching the lease. Further, Tenant voluntarily abandoned the premises prior to Watson's notice to pay or quit, the effect of which was not to preclude her from entering the premises or exercising any rights or benefits under the lease.

This position by the Court overlooks a large portion of the Simon decision, as well as several key facts in the case at bar. The Simon Court contemplates the significance, or lack thereof, of the fact the tenant never actually took possession of the premises throughout the opinion. The Simon Court recognized that the trial judge improperly characterized the parties' relationship as landlord and tenant because the tenant never actually took possession of the premises. However, the Simon Court deemed the possession by tenant, "has absolutely nothing to do with the main issue, whether the notice terminated the relation of the parties." Id. at 617. The Simon Court expanded on this idea as follows:

> We can perceive no difference between a case of termination of a lease following by eviction of the tenant, where that is possible by reason of his possession, and that of termination of a lease by the lessor by reason of the fact the lessee has never been in possession. In either case, the lessor will have done all that he could do to terminate the lease. If a demand to *get out* is a termination when the lessee is in possession, a demand to *stay out* would be equally effective when he is not possession. (emphasis in original) Id. at 618 (*citing* Gardiner v. Butler, 245 U.S. 603, 38 S. Ct. 214, 62 L. Ed. 505 (1918)).

As demonstrated by this analysis set forth in Simon, occupancy is not a requirement to preclude a tenant from the premises. The Simon Court made emphatically clear the result of the case would not have changed if the tenant had, in fact, taken possession. Therefore, distinguishing the instant case on the basis of occupancy does not comport with the analysis used in Simon. It appears this Court overlooked or misapprehended the controlling law and imroperly imposed an occupancy requirement in order for the landlord to effectively preclude a tenant from the premises.

The panel overlooked or misapprehended that the notice sent by BTC unequivocally precluded Tenant from any and all rights under the lease, just as the notice did in Simon. BTC undoubtedly intended for all of Tenant's rights under the lease to be extinguished if she failed to pay as demanded in the ten-day notice to pay or quit premises. Consider the following excerpt from the Trial Transcript, wherein Tenant queries Paul Watson from BTC as to what rights he intended her to have after he sent the ten-day notice to pay or quit:

Q. What rights did I have under the lease? Was I able to use the space?
A. Well not after you defaulted.
Q. As a matter of fact you told me if you don't pay you need to get out or I am going to file an eviction action and make you get out, right?

A. Right.

Q. ***So I am just trying to be clear here. You told me I had to go and I couldn't come back and you wanted the keys. You can't use the space but I want you to pay for it, right?***

A. Yes.

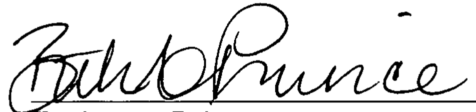
(emphasis added). R., p. 63, line 20 – p. 64, line 9.

Based upon the foregoing, it appears the panel overlooked or misapprehended a number of issues as a matter of fact and as a matter of law. Therefore, Tenant respectfully requests the panel to amend its decision consistent with the Appellant's Final Brief and the arguments set forth herein, and rule that BTC's ten-day notice to pay or quit the premises effectively terminated the lease agreement.

The panel found the master's consideration of extrinsic evidence despite his finding that the lease was unambiguous, was harmless error. The panel appears to have overlooked the fact that the evidence the master considered and referenced in the opinion was all in the form of communications which took place between the parties over a year after the lease was executed. (As set forth in the Facts, above, the lease was executed in January 2009, and the extrinsic evidence was a series of emails referred to spanned approximately December 2009 to April 2010). "The parol evidence rule prevents the introduction of extrinsic evidence of agreements or understandings contemporaneous with or prior to execution of a written instrument." McGill v. Moore, 381 S.C. 179, 188, 672 S.E.2d 571, 576 (2009) (citing In re Estate of Holden, 343 S.C. 267, 275, 539 S.E2d 703, 708 (2000)). The extrinsic evidence the master considered was not contemporaneous with or prior to execution of the lease, and the consideration of them in connection with interpreting the terms of the lease was error as a matter of law.

"Interpretation of a contract is governed by the objective manifestation of the parties' assent at the time the contract was made, rather than the subjective, after-the-fact meaning one party assigns to it." Laser Supply and Services, Inc. v. Orchard Park Associates, 382 S.C. 326, 334 S.E.2d 139, 144 (Ct. App. 2009). Therefore, it would appear the panel overlooked the fact the extrinsic evidence at issue were not contemporaneous or prior to the execution of the lease. Appellant respectfully requests the panel to amend its ruling and find the trial court's erred as a matter of law, and that such error was not harmless.

For the foregoing reasons, and for any other reason supported by the Appellant's briefs and the Record in this matter, Appellant respectfully requests that the Court grant a rehearing of the panel's decision and reverse the panel decision consistent with the arguments set forth herein.



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Pro Se Apellant

April 14, 2015
Bluffton, SC

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

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

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Case No.: 2012-CP-07-1530
Court of Appeals No.: 2013-000305

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APR 15 2015
SC Court of Appeals

Bluffton Towne Center, LLC,

Respondent,

v.

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

Appellant.

PROOF OF SERVICE

I certify that I have served the Appellant's Petition for Rehearing and Suggestion for Rehearing *En Banc* on the Respondent, Bluffton Towne Center, LLC, by depositing a copy of it in the U.S. Mail, postage prepaid, on April 14, 2015, addressed to its attorney of record, Russell P. Patterson, PO Box 8047, Hilton Head, SC 29938.

April 14, 2015

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RECEIVED
APR 15 2015
SC Court of Appeals

April 14, 2015

UPS
Via ~~Federal Express~~ Overnight Service
The Honorable Jenny Abbott Kitchings
Clerk of SC Court of Appeals
1220 Senate Street
(formerly 1015 Sumter Street)
Columbia, SC 29201

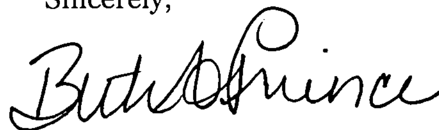
Re: **Petition for Rehearing and Suggestion for Rehearing *En Banc***
Bluffton Towne Center, LLC v. Beth Ann Gilleland-Prince
d/b/a The Law Office of Beth Ann Gilleland, LLC
Appellate Case No.: 2013-000305

Dear Ms. Kitchings:

Enclosed please find the original and six (6) copies of the Appellant's Petition for Rehearing and Suggestion for Rehearing *En Banc* and Proof of Service, along with the appropriate filing fee.

With kind personal regards, I am

Sincerely,



Beth Ann Prince

BAP
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