THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

The Honorable Mikell R. Scarborough, Master in Equity

Opinion No. 5270 (S.C.Ct.App. Filed September 10, 2014)

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56 Leinbach Investors, LLC,..... Respondent,

v.

Magnolia Paradigm, Inc.,.....Petitioner.

AMENDED PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Pursuant to Rule 242 SCACR, Magnolia Paradigm, Inc. petitions this Court to issue a Writ of Certiorari to the Court of Appeals to review its decision in the within matter, 56 Leinbach Investors, LLC, v Magnolia Paradigm, Inc. Op. No. 5270 (S.C.Ct.App. Filed September 10, 2014) (Shearouse Adv. Sh. No. 36 at 35) (2014 WL 4437465); 411 S.C. 466, 769 S.E.2d 242.

CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that a petition for rehearing in the within matter was made and finally ruled on by the Court of Appeals on March 19, 2015 denying the petition.

Novel Question Presented

Under South Carolina Law, can a commercial landlord under a long term lease with Tenant No.1 unilaterally carve out a portion of the leasehold property and lease it to Tenant No.2, and at the same time demand undiminished rents from Tenant No. 1? Can a landlord profit from such "double leasing"? Prior to the decision of the Court of Appeals in this case, no reported South Carolina decision appears to have addressed this novel question.

Petitioner contends that the Court of Appeals reached the wrong conclusion to the question. The Court of Appeals held that, yes, a landlord may effectively eject a tenant from a portion of the leasehold property, and that, unless the tenant can prove actual damages, the tenant may not abate the rent payments.

The Court of Appeals as much as acknowledged the existence of a novel question in this case: "The basic law of damages in our jurisprudence requires proof of damages, and we can find no case law that suggests double-leasing, particularly in a commercial transaction, gives rise to damages, *per se*." (769 SE2d at 249). However, as will be suggested in this petition, the question before the court was not one of damages. Rather, the question is one of remedies. Petitioner seeks the equitable remedy of rent abatement because of Respondent landlord's actual ejectment of Petitioner from a portion of the leased property.

The decisions of the Court of Appeals and of the Trial Court squarely conflict with the fundamental proposition that a lease is tantamount to the conveyance of the leasehold property to the tenant for the term of the lease; that the essence of commercial property is the right to derive profits therefrom; and that the tenant's rights of possession, and to the profits derived from possession, are inviolate rights.

STATEMENT OF THE CASE

This controversy arises because of the "double leasing" by Respondent 56 Leinbach Investors, LLC ("Landlord") of a 1.21 acre parcel of land in the City of Charleston. (The "Leased Property").

In June, 2003, Landlord signed a long term lease agreement for the Leased Property with Magnolia Paradigm, Inc. ("Magnolia"), for employee parking for Magnolia's nearby retail automobile dealerships. (R. p 189.) Then in 2006, without notice to Magnolia, Landlord leased a portion of the same Property, a 4900 square foot corner (See R.p. 228) of the 1.21 acres, to a third party for use as a cell phone

tower site. This "double lease" occurred with seventeen years remaining on the term of Magnolia's lease. Under Landlord's double leasing scheme, Landlord seeks to receive rents from both Magnolia and from the cell tower for the same parcel of land: $1,800 per month from Magnolia, plus $996.00 per month from the cell tower company. Landlord's action ejected, or "ousted" Magnolia from a portion of the Leased Property; and it enables Landlord to collect an additional 59.9% in rents over and above rents paid by Magnolia.

After Magnolia discovered the cell tower trespassed upon its leasehold estate, and after notice to Landlord, Magnolia began abating the rent in the same amount as the cell tower lease payments to Landlord, in accordance with lease Section 6.03. (R.p. 194.) Landlord then sued Magnolia for breach, for not paying the full amount of the lease payments, and alleging unjust enrichment. Magnolia's answer and counterclaim asserted that Landlord had breached the lease by double renting the property, and by usurping Magnolia's fundamental property rights as a tenant to exclusive possession, and alleged unjust enrichment. Magnolia claimed the rental stream, or credit for that rent stream, from the cell tower company in accordance with basic landlord tenant law and pursuant to the terms of the lease.

After full hearing, the Master in Equity for Charleston County issued his order finding both parties had breached the lease: Landlord by double leasing the property and Magnolia by excessive abatement. The Master's remedy reformed the lease on the basis of mutual mistake, and held that Magnolia should abate the rent in an amount proportionate to the ratio that the physical area leased to the cell tower company bears to the total leasehold property.

The Court of Appeals issued its opinion, reported at 411 S.C.466, 769 S.E.2d 242 (September 10, 2014), affirming the Master that both parties had breached the lease; but reversing the Master's ruling that there had been a mutual mistake. The Court also reversed the Master's reformation remedy . The Court further reversed the Master's finding that Magnolia was entitled to abate the rent, finding that "Magnolia's normal use of the property was not interfered with." (769 SE2d at 249.) The Court of Appeals decided the abatement question on the principle that Magnolia's proof of damages was speculative. The Court further rejected Magnolia's argument that Landlord will be unjustly enriched by its double leasing scheme. The case was remanded to the Master for entry of nominal damages in favor of Magnolia, because of Landlord's breach.

Magnolia filed its Petition for Rehearing on September 24, 2014. The Court of Appeals denied the Petition by order filed March 19, 2015.

ARGUMENT

The decision of the Court of Appeals overlooks a broad perspective of the case. Landlord undisputedly leased the entire parcel to Magnolia. Without question, Landlord breached its covenant of quiet enjoyment, as well as an express covenant that the Leased Property would be subject to no conflicting leases, by leasing to the cell tower company a portion of the same Leased Property it had leased to Magnolia, thereby ejecting Magnolia from that portion of the property. The very essence of a lease of real property is its conveyance of an interest in land. Landlord took away from Magnolia the very essence of the thing assured to Magnolia. Landlord's breach deprived Magnolia of the full use of the Leased Property and its profits, and

diminished Magnolia's opportunity to use the entirety of the Property for the seventeen years remaining on the term of the lease.

Grounds for the Petition:

I. The Court of Appeals erred in affirming the Master's finding that the actions of Landlord did not substantially interfere with the normal use of the demised premises, and thereby denying Magnolia the right to partially abate the rent in accordance with the lease; and in accordance with equitable principles.

II. The Court of Appeals erred in finding that Magnolia suffered no actual damages.

III. The Court of Appeals erred in finding that Landlord was not unjustly enriched as a result of its "double leasing" the Leased Property.

IV. The Court of Appeals erred in finding that Magnolia breached the lease by failing to pay the agreed upon rent and that Landlord was entitled to payment of those funds.

V. The Court of Appeals erred in not ruling on the issue of the rights of the tenant over the landlord to the income or profits from the property in question when the Landlord knew the consequences of its actions.

VI. The Court of Appeals erred in not granting Magnolia attorney's fees as the successful party.

Discussion:

I. The Court of Appeals erred in affirming the Master's finding that the actions of Landlord did not substantially interfere with the normal use of the demised premises, and thereby denying Magnolia the right to partially abate the rent in accordance with the lease; and in accordance with equitable principles.

The General Rule. The broad governing principle of this case rests on "the general rule that the eviction of the tenant by the landlord from a part of the premises relieves the tenant from liability for future rents, and the fact that the tenant remains in the possession and enjoyment of the balance of the premises does not require an apportionment of the rent..." *(49 Am.Jur.2nd Landlord and Tenant Section 599 (2015).*

In *Fifth Ave. Bldg. Co. vs. Kernochan*, 221 N.Y. 370, 372, 117 N.E. 579 (1917), Justice Cardozo wrote that that an eviction suspends the obligation of payment of rent because it "involves a failure of the consideration for which rent is paid", and that an actual eviction by the landlord, though partial only, "suspends the entire rent because the landlord is not permitted to apportion his own wrong." The same principle was recognized by Justice Holmes in the Massachusetts case of *Smith vs. McEnany*, 170 Mass. 26, 48 N.E. 781 (Mass. 1897). Both decisions have been cited with approval in modern decisions. See *Barash vs. Pa. Terminal Real Estate Corp.*, 26 N.Y.2d 77, 256 N.E.2d 707 (N.Y. 1970) (Citing *Fifth Ave. Bldg. Co.* as "the leading case", [256. N.E. at 710.]); *Goldberg vs. Cosmopolitan Bank, etc.*, 33 Ill. App.2d 83, 178 N.E.2d 647 (Ill. 1961.)

In this case, the Court of Appeals and the Master relied exclusively on lease Section 6.03, the Landlord's covenant to use best efforts "to not interfere with Tenant's operations", that further provides: "If the landlord creates a condition that substantially interferes with the normal use of the demised premises or appurtenant parking or service areas as allowed herein, the rent and other charges due hereunder shall be abated during the times such interference persists..." But as will be shown, that emphasis was misplaced. Section 6.03 is not the only remedy.

The courts below measured the case purely on the Section 6.03 lease language of "substantial interference", notwithstanding Petitioner's arguments that it had been ejected from the portion of the leased property upon which the cell phone tower has been constructed. Even though he agreed there had been an ejectment, the Master held, nevertheless, that Landlord's usurpation did not amount to a "substantial interference." The Court of Appeals affirmed. That holding must be examined here, however, in light of the general principle cited above, that partial eviction of the Tenant by the Landlord relieves the Tenant from liability for future rents, and in consideration of other, more controlling, provisions of the lease agreement.

To the extent the general rule would make exception for a *de minimis* infringement, the facts in this case belie a *de minimis* interpretation. In the first place, the area misappropriated by Landlord is a square lot measuring 70 feet on each side, or 4900 square feet. (See plat at R.p. 228). The 4900 square foot lot comprises almost 10% of the entire leased property. (1 acre=43,560 square feet, times 1.21 acres equals 52,707 square feet of total leased property. 4900 of square feet divided by 53,707 equals 9.29%).

Secondly, the misappropriated lot is of adequate size to accommodate a cell phone tower, surrounded by a chain link fence. (See photographs at R.pp. 229-236). As of the date of trial, the misappropriated lot generated income to the Landlord of $11,952.00 per year. (See Cell Tower Lease at R.p. 217). The cell tower rent escalates at 3% per year, so that current rent exceeds $1,090 per month.

Thirdly, the nature of interference by Landlord in this case, under the general principle from *Am. Jur.* cited above, should relieve Magnolia from liability for rents altogether, because Landlord has partially evicted Magnolia from the Leased Property. (Although total rent abatement is not the relief sought, here.)

The plat at R.p.261 depicts Magnolia's layout of its parking spaces. The 4900 square foot lot for the cell tower occupies the southeastern corner, unused for the time being by Magnolia. It is obvious that no "use" of that vacant space, by a stranger or by Landlord, would interfere with Magnolia's then normal use of the property; that is, use for parking in the platted spaces. But the lease demise to Magnolia was of all of the Property, for the full term of the lease, not only the portion then used by Magnolia for parking; this included all rights and opportunities for future use. At the time of Landlord's breach there were seventeen years remaining on the twenty year lease.

The Lease Terms. The Master and the Court of Appeals measured the rights of Magnolia to abate the rent only by the language of Section 6.03, and its standard of "substantially interferes with the normal use". However, Section 6.03 is not the exclusive lease provision determinative of Magnolia's rights and remedies; 6.03 deals with "Landlord Interference".

On the other hand, Section 9.02 of the lease (R.p. 200) provides that "If Landlord shall fail to perform any of its obligations as required by the lease, and if Landlord shall fail to cure such failure within the applicable grace period, then Tenant shall have its rights and remedies at law or in equity." (Emphasis added).

Furthermore, Article XII (R.p. 205) contains Landlord's Covenants, including this: "...the demised premises shall hereafter be subject to no leases, easements, covenants, restrictions or the like which in any manner would prevent or interfere with Tenant, and (Landlord shall) defend the demised premises against the claim of all persons claiming by, through, or under Landlord." (Emphasis added). This was an affirmative covenant by Landlord not to do, exactly what it did do.

Article XII further provides that "Tenant shall, during the demised term, have lawful, quiet and peaceful possession and occupation of the demised premises and shall enjoy all the rights herein granted without any let, hindrance, ejection, molestation, or interference by any person."

Article XII, containing Landlord's covenants, and Section 9.02's provisions for rights and remedies, are not qualified or modified by any standard of "substantial interference with normal use". Rather, the covenants of Article XII comprise landlord's promise to "no leases" in any manner which would prevent or interfere with tenant; and further promises the "lawful, quiet and peaceful possession and occupation of the demised premises...without any let, hindrance, ejection, molestation or interference by any person." (R.p. 205). Section 9.02 assures Magnolia of its rights and remedies at law or in equity. It is more than implied that all rights and remedies are assured to Magnolia by that section of the lease.

Therefore, Landlord has committed a material breach for which the general rule would permit full abatement of the rent. (See the citations to Justices Cardozo and Holmes, above.) Even reviewed from a "substantial interference" standard, such a breach is and should be substantial interference, as a matter of law. But even without a "substantial interference" standard, equity provides for abatement of rent in a case of partial eviction, and this Court should declare that principle to be the law of South Carolina in this case.

Therefore, for the breach of the covenants of Article XII, Magnolia seeks, and is entitled to, the equitable remedy of abatement.

"Damages", or Equitable Relief? The Court of Appeals referred to the standard or measure of Magnolia's relief to be one of "damages": "Although we conclude that Leinbach breached the lease, Magnolia's proof as to damages was only speculative and does not support an award of actual damages." 769 S.E.2d at 248.

However, the issue here is not one of "damages". Landlord/Tenant law would be turned on its head if a landlord could unilaterally lease out an unused portion of a long-term leasehold, and then claim that because the Tenant cannot prove present damages, Tenant would be entitled to no compensatory relief; and that Tenant must nevertheless continue to pay unabated rent.

"Abatement" is not a damages standard. It is an equitable remedy, and is readily calculable in a case for partial ejectment by comparing what was taken with what was bargained for. *Restatement (Second) of Property, Landlord & Tenant, Section 11.1 (1977).* Even though Magnolia does not agree with its adequacy, the Master in Equity at least formulated an equitable abatement of rent based upon the

loss of use by Magnolia of the relative square footage of land that is occupied by the cell tower, and that had been misappropriated by Landlord. Now, the Court of Appeals has eviscerated that relief, by remanding the case for only "nominal" damages.

The standard of nominal damages is one more applicable to a tort case than to a contract case. 11 *SC Juris Damages Section* 15. Magnolia's right and opportunity to use 10% of its leased property has been misappropriated and usurped by Landlord. Magnolia has been partially ejected from the Leased Property. Magnolia does not seek "damages", as such. It seeks the remedy of equitable adjustment to its rental obligation, because of Landlord's wrongful ejectment, by abatement of the rents.

Certiorari should be granted as to this issue.

II. The Court of Appeals erred in finding that Magnolia suffered no actual damages.

Introduction: The Court of Appeals held: "Additionally, although we conclude Leinbach breached the lease, Magnolia's proof as to damages was only speculative and does not support an award of actual damages". (769 SE2d at 248.)

Argument:

As argued in the first ground for this petition, Magnolia did not claim actual damages, as found by the Court of Appeals, but asserted that it was entitled to the rent payments from the cell tower as a result of its position as a tenant.

The Court of Appeals, in the finding quoted above, did not address Magnolia's argument that, as tenant, the rights in the subject property, and to its

profits, belong to Magnolia for the entire 20 year term of the lease, and that Magnolia was partially ejected by Landlord.

"The right to use the leased premises during the term specified in the lease was transferred from the landlord to the tenant. Thus the landlord and tenant have separate estates in the demised premises during the term of the lease, the tenant's being a possessory interest, while the landlord has reversionary interest in the land. In other words during the existence of the lease, the tenant is the absolute owner of the demised premises for all practical purposes for the term granted, with the landlord's right being confined to the reversionary interest." 9 *Am Jur 2nd Landlord/Tenant* § 889, 52 CJS Landlord and Tenant §337. (Emphasis added).

Property law regards a lease as equivalent to a sale of the premises for the term of the lease, making the tenant both owner and occupier during the lease. The right to use leased premises during the term specified in the lease is transferred from the landlord to the tenant. During the existence of the lease, the tenant is the absolute owner of the leased property for all practical purposes for the term granted, the landlord's rights being confined to a reversionary interest. In the absence of an express or necessarily implied covenant to the contrary, a tenant may put the leased premises to whatever lawful purpose it desires that is consistent with the design and construction of the property[4] and that is not injurious to the reversion." 9 *Am Jur 2nd Landlord/Tenant* § 384.

(The Master-in-Equity reached the same conclusion at para 28. Page 9 (Tr pp 011): "A lease is tantamount to a conveyance of real property for the period of time of the lease. Subject to the terms of the lease the Tenant is entitled to the use and benefits of the property.")

Here, Landlord has unlawfully ejected the Tenant and is putting the Leased Property to profitable use for only the Landlord's benefit. Having leased the entire parcel to Magnolia for use as parking, Landlord has carved out a section of Magnolia's leasehold and has leased it to a third-party for the "parking" of a cell tower. How could this not be a substantial and material breach, measured by the additional compensation received by Landlord for "parking" the cell tower?

The rents from the cell tower in this case properly belong to Magnolia:

The law provides that one wrongfully dispossessed of property is entitled to the rents and profits derived from the property during the dispossession. *Segars v*

Segars 279 S.C. 564,570, 310 S.E.2nd 156,159 (Ct. App. 1983) citing Martin *and Walter v. Evans,* 20 S.C. Eq. 171, 1 Strobhart's Equity 350 (1847).

"A right to land essentially implies a right to the profits accruing from it."-"For what," says Lord Coke, "is the land, but the profits thereof."-Co. Litt. 46; *Lyford's* case, 11 Co. 46. *Martin v Evans*, 20S.C. Eq. 350, 355 (1847)

Additionally the Court of Appeals failed to consider or address Magnolia's argument that Landlord, having changed the nature of the use of the area in question, the value of the area in question should be determined by its present use, as a cell tower, and not by its use as an automobile parking area as originally contemplated. The value of the area as a cell tower would be the income stream derived from the cell tower rent. *Restatement, Property, Landlord and Tenant* § 11.1 *Abatement comment e* (1977).

III The Court of Appeals erred in finding that Landlord was not unjustly enriched as a result of its "double leasing" the property in question.

Unjust Enrichment

Introduction: The Court of Appeals stated in its opinion: "Magnolia claims Landlord is being unjustly enriched by Optima's monthly rent payment. However, Magnolia failed to demonstrate it is entitled to that money. While Magnolia may have had the opportunity to sublease the wooded area to a tenant, any sublease was subject to Landlord's approval and did not exist as a matter of right. In fact, the record demonstrates Hiers' consent to a sublease for the tower construction would have been questionable at best. Hiers testified the Optima lease was incredibly beneficial to him because it could offset the failure of the Charleston Montessori School to timely pay its rent. Additionally, the construction of the cell tower was a matter of public

concern and debate because of its proximity to the school. Therefore, the record suggests Landlord's agreement to the tower, in the face of public controversy, was because of the benefit *Landlord* would receive from the Optima lease and was not given simply as a matter of course. Accordingly, Magnolia was not entitled to the lease payments, and it is not unjust or inequitable for Landlord to retain them. "

Statement of Issue

The reasoning of the Court of Appeals fails to take into consideration Magnolia rights as a tenant, as a matter of law, as discussed in the previous arguments of this petition.

Discussion:

The statement "Magnolia failed to demonstrate it is entitled to that money" is contrary to Magnolia's rights as a tenant.

"The right to use the leased premises during the term specified in the lease was transferred from the landlord to the tenant. ... During the existence of the lease, the tenant is the absolute owner of the demised premises for all practical purposes for the term granted, with the landlord's right being confined to the reversionary interest." 9 Am Jur 2nd Landlord/Tenant § 889, 52 CJS Landlord and Tenant §337.

Thus Magnolia is entitled to the rental proceeds from the cell tower lease as a result of its position as the tenant. Further, Landlord has not shown that it is entitled to the money from the cell tower lease.

Magnolia is also entitled to the money as it was wrongfully dispossessed:

The law provides that one wrongfully dispossessed of property is entitled to the rents and profits derived from the property during the dispossession. *Segars v Segars* 279 S.C. 564,570, 310 S.E.2nd 156,159 (Ct. App. 1983) citing *Martin and Walter v. Evans,* 20 S.C. Eq. 171, 1 Strobhart's Equity 350 (1847).

"A right to land essentially implies a right to the profits accruing from it."- "For what," says Lord Coke, "is the land, but the profits thereof."-Co. Litt. 46; *Lyford's* case, 11 Co. 46. *Martin v Evans*, 20S.C. Eq. 350, 355 (1847)

The Master found, and the Court of Appeals affirmed, that Landlord had breached the lease by double leasing the property, and therefore Magnolia was wrongfully dispossessed.

The Court of Appeals stated: "While Magnolia may have had the opportunity to sublease the wooded area to a tenant, any sublease was subject to Landlord's approval and did not exist as a matter of right. In fact, the record demonstrates Heirs' consent to a sublease for the tower construction would have been questionable at best." This statement is belied by the fact that Landlord approved the construction of the tower under the unilateral mistaken belief that it was not part of the property leased to Magnolia. Having approved use of the property for cell tower for its own profit, any suggestion that Landlord would have denied that use if requested by Magnolia is clear evidence that such a denial by Landlord would have been arbitrary and capricious, contrary to the letter of the lease, and a violation of the implied covenant of good faith and fair dealing. Therefore the issue whether Magnolia would have received permission should be moot; the construction of the cell tower has been completed, and Landlord should be estopped to now argue that approval would not have been given.

The Court of Appeals further stated: "Therefore, the record suggests Landlord's agreement to the tower, in the face of public controversy, was because of the benefit *Landlord* would receive from the Optima lease and was not given simply as a matter of course." (769 S.E.2d at 250).

The fact that Landlord's motives to lease the property to cover payments on its adjacent property may have been well intentioned is not relevant to the issue of Landlord's unjust enrichment. What is relevant is that Landlord now collects double rent from a single piece of property, to which Magnolia was demised a complete leasehold interest. Landlord is therefore benefitting at Magnolia's expense. Although the Court of Appeals stated "we do not condone the 'double leasing' of property", the decision of the Court permits exactly that.

The Court of Appeals also found that Landlord actually knew of Magnolia's interest in the property when it was negotiating the cell tower lease:

"Hiers testified he was not heavily involved in the placement of the cell tower. 'I told [Optima's representative] my plate was full at the time. And if he wanted to pursue this opportunity, he was going to need to contact the city, Mr. Baker, and everyone else, and he was responsible for getting this done if, in fact, that's what he wanted to do. This testimony indicates Hiers believed Baker had some interest in the property or there would be no need to contact him regarding the tower's construction." (769 S.E.2d at 247.) (Emphasis added.)

Therefore, as observed by the Court of Appeals, Landlord acted intentionally, or at least knowingly. This was no accident or mere mistake. It has long been the common law that:

"No one should be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own inequity, or to acquire property by his own crime. *Riggs v. Palmer*, 22 N .E. 188, --- (1889)

And, in South Carolina specifically, this common law principle was applied in the case of *Ex Parte Dibble*, 310 S.E.2d 440, 442 (S.C. App. 1983) that "Courts have the inherent power to do all things reasonably necessary to insure that just results are reached
to the fullest extent possible."

Because the Landlord knew that the cell tower lease called for Magnolia's permission, because of its prior lease, and there is no evidence that such permission

was ever sought (much less granted), how could it possibly be just and fair for the Landlord to profit from its own wrong for the next 17 years?

IV The Court of Appeals erred in finding that Magnolia had breached the lease by failing to pay the agreed upon rent and that landlord was entitled to payment of those funds.

In its lease with Magnolia, Landlord bargained for a set rental from the property, 1.21 acres, for twenty years, for payments of $1,800.00 per month, with increases as provided in the lease. Through the date of the trial in October 2011 Landlord was due from the property and in accordance with its lease with Magnolia, the sum of $193,352.65 (Tr pp 246). Magnolia paid Landlord from the inception of the lease in June 2003, through October 1, 2011, the date of the trial, the sum of $153,561.00. Having rented a portion of the property to Optima Towers for $996.00 per month with increases, Landlord also received from Optima from the inception of the tower lease until October 1, 2011, $54,116.65. The total received by Landlord from Magnolia and Optima was $207,477.65. (Tr pp259) This exceeded the total rent to which Landlord was entitled in the lease agreement with Magnolia.

Since Landlord breached the lease and was only contractually entitled to receive rental payments of $193,352.65 and it received $207,477.65, it has not been damaged. If anything, it was overpaid $14,125.00.

V. The Court of Appeals erred in not ruling on the issue of the rights of the tenant over the landlord to the income or profits from the property in question.

The Court of Appeals did not address the rights of Landlord as a defaulting party. The Court only stated Magnolia had no right to abate and it should pay the full amount of the rent to Landlord. This left open the question of who was entitled to the rent from the cell tower.

As between Landlord and Magnolia, who should be entitled to the rent payments from Optima Towers? As a matter of law Magnolia, should be entitled to the rent derived from its leasehold due to its legal status as tenant.

"The right to use the leased premises during the term specified in the lease is transferred from the landlord to the tenant. Thus, a landlord and tenant have separate estates in the demised premises during the term of the lease, the tenant's being a possessory interest while the landlord has a reversionary interest in the land. In other words, during the existence of the lease, the tenant is the absolute owner of the demised premises for all practical purposes for the term granted, (emphasis mine) with the landlord's rights being confined to the reversionary interest." *49 Am. Jur. 2d Landlord and Tenant* § 889, 52 *C.J.S. Landlord & Tenant* § 337

A right to land essentially implies a right to the profits accruing from it."- "For what," says Lord Coke, "is the land, but the profits thereof."-Co. Litt. 46; *Lyford's* case, 11 Co. 46. *Martin v Evans*, 20S.C. Eq. 350, 355 (1847)

Further as a wrongfully dispossessed tenant,

"The law provides that one wrongfully disposed of property is entitled to the rents and profits derived from the property during the dispossession." *Segars v Segars* 279 S.C. 564, 570; 310 S.E.2d 156,159 (Ct. App 1983) citing *Martin and Walter v Evans* 20 S.C. Eq. 171, 1 Strobhart's Equity 350 (1847).

VI This Court should grant Magnolia attorney's fees as the successful party.

The Lower Court and the Court of Appeals both committed error of law by not finding and concluding that the Tenant in this case was the "prevailing party," as that term is commonly defined, based upon the Master of Equity's Order abating rent of $300 a month; and this error should be corrected by remanding this case to the lower court for a finding as to proper attorney's fees to be awarded in

favor of the Tenant pursuant to the clear terms of the parties commercial lease agreement. Section 14.11 of the Lease provides as follows:

"Attorney Fees. If Landlord or Tenant brings an action at law or equity against the other to enforce the provisions of this Lease or as a result of the alleged default under this Lease, the prevailing party in such action shall be entitled to recover reasonable attorney's fees from the other."

In light of the undisputed fact that the Master In Equity squarely found that the Defendant – Magnolia- was authorized to reduce its rent to the Plaintiff in an amount of $300 per month for the entire period of time for which the rent is received by Landlord, from Optima Towers until the termination of Magnolia's lease (R.p. 014), Magnolia was clearly the prevailing party, as a matter of law.

In short, it was error for the Master to find an abatement of rent of hundreds of dollars for many months but not also find that Section 14.11 of the Lease, as written by the parties themselves, be applied to this case.

Although Magnolia sought to receive a greater abatement than $300 per month, it has long been settled that a party "is not required to prevail on all of its claims to be a prevailing party but must only 'have received at least some relief on the merits' that 'materially altered the legal relationship between the parties' resulting in a direct benefit to the party claiming prevailing party status." See *Pure Fishing, Inc. v. Normark Corp.*, C.A. No. 10-cv-2140-CMC (D.S.C., Columbia Division, Filed January 21, 2014); See also *Shum v. Intel Corp.*, 629 F.3d 1360, 1367-68 (Fed. Cir. 2010). Magnolia contends that it was entitled to a total abatement of rent due to the

actual ouster by the Landlord. But even if that is wrong, it is equally clear that the Magnolia has prevailed in part, with the $300 a month abatement.

Accordingly, as part of the relief rightfully due under the lease, Magnolia is entitled as a matter of law to a remand of this case for a determination of "reasonable attorney fees" under Section 14.11 of the Lease.

Summary and Conclusions:

This Court should grant the Petition for Writ of Certiorari in this case to enable the parties to more fully brief and to argue the novel question posed. As observed by the Court of Appeals, there is no case law on the question of double leasing, and the remedies available to a tenant whose leasehold interest has been usurped by the landlord's double leasing. Respectfully, the resolution of the question under a standard of "damages" does not afford equitable relief.

The case law of South Carolina should not permit the partial ejectment of a tenant, without equitable remedy.

Respectfully submitted,

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