**THE STATE OF SOUTH CAROLINA**
**IN THE SUPREME COURT**

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

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**OPINION NUMBER 5309**
**FILED APRIL 1, 2105**
**WITHDRAWN, SUBSTITUTED, AND REFILED JUNE 3, 2015**

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Bluffton Towne Center, LLC,

Respondent,

v.

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

PETITIONER

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**PETITION FOR WRIT OF CERTIORARI**

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## INDEX

## CERTIFICATE OF COUNSEL

Counsel for the Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on June 3, 2015.

## QUESTIONS PRESENTED

1. Did the Court of Appeals improperly affirm the trial court's interpretation of the general term "damages" as contained the lease agreement between the parties to be sufficient to specifically include damages of "future rent," as set forth in Simon v. Kirkpatrick, 141 S.C. 251, 139 S.E.2d 614 (1927) and its progeny?

2. Did the Court of Appeals improperly affirm the trial court by determining the master's finding that the Petitioner abandoned the leased premises was reasonably supported by the evidence?

3. Did the Court of Appeals improperly affirm the trial court by ruling that a tenant may unilaterally terminate a lease agreement by abandoning leased premises, without consideration to the consequences of the remedy elected by the landlord?

4. Did the Court of Appeal improperly affirm the trial court by ruling the master's consideration of extrinsic evidence was harmless error?

## STATEMENT OF THE CASE

This matter arises from a commercial landlord-tenant dispute. In January 2009, Petitioner, Beth Ann Gilleland-Prince d/b/a The Law Office of Beth Ann Gilleland, LLC (hereinafter also referred to as "Petitioner," "Tenant," or "Prince"), 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 "Petitioner," "Landlord," or "BTC"), for a term of three (3) years, beginning January 1, 2009 and ending December 31, 2011. R., p. 81.

The lease, 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 ten 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, dated 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.

Four days later, on April 1, 2010, Respondent's attorney sent another email, informing Prince that Respondent did not have an extra key to the premises, and requested that Prince to provide any keys in her possession to the rental broker, which

Prince did that same day. R., pp. 90-93. Respondent made no further contact with Prince for the next twenty-three (23) months.

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.

The Petitioner filed a Petition for Rehearing and Suggestion for Rehearing *En Banc*, which was denied by the Court of Appeals on June 3, 2015. The Court of Appeals filed a substituted order, withdrawing the original one, also on June 3, 2015. This Petition for Writ of Certiorari follows.

## ARGUMENT

1. **Did the Court of Appeals improperly affirm the trial court's interpretation of the general term "damages" as contained in the lease agreement between the parties to be sufficient to specifically include damages of "future rent," as set forth in Simon v. Kirkpatrick, 141 S.C. 251, 139 S.E.2d 614 (1927) and its progeny?**

In Simon v. Kirkpatrick, 141 S.C. 251, 139 S.E.2d 614 (1927), this Court considered the issue of whether a tenant is required to pay "future rent" in the absence of an express provision in the lease agreement. The Simon Court determined in circumstances where the landlord precluded the tenant from using the premises, thereby effectively terminating the lease, the tenant was required to pay only the rental obligations incurred up to the date of termination, but would not be required to pay any future rental obligations. In considering this question, the Court 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 the Court of Appeals 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.")(emphasis added); 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 Court of Appeals conceded, "the term "damages" ***was not specifically defined in the lease.***" App. p. 283. Yet, 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." App. p. 283. (emphasis added). Inexplicably, of the "four corners" and the "lease as a whole," the Court of Appeals referred only to the default provision which allowed for "costs, damages, and expenses." This is the exact sentence of the lease about which the Court of Appeals had just stated did not provide a specific definition of the term "damages." It seems a circular logic to look to the phrase, "costs, damages, and expenses" in order to define the term "damages." Even more circular is to claim the same sentence in which damages is ***not defined***, does in fact supply a definition of damages.

Based on the Black's Law definition of "express," there can be no question that the lease in question did not "expressly" provide for the tenant to be obligated to pay future rent in the event of termination of the lease agreement. The convoluted effort of the Court of Appeals employed to define "damages" further underscores the absence of an express provision providing for a tenant's obligation to pay future rent in the event of lease termination.

Petitioner would submit that the much more common interpretation of this default provision in the subject lease is that the Landlord's repossession due to tenant's default

does not prejudice his rights to any damages to which he may be entitled to *under the law*, such as back rent and repairs for physical damages to the premises. "Damages" can mean such an overwhelmingly large number of things, but in no case can the use of the term, without something more, entitle the Respondent to types or forms of damages it is not otherwise entitled to. The body of law on this principle has repeatedly ruled that in order to be entitled to "future rent" as a damage, in the event of lease termination, the landlord must *specifically* provide for same. Id. At best, "damages" is a general term, and is simply insufficient to *specifically* refer to "future rent." Therefore, the ruling of the trial court should be reversed.

As illustrated by the foregoing, the rule of law set forth in Simon v. Kirkpatrick, *supra*, is that a lease provision must 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. The Court of Appeals erred in its ruling in the instant case that the general term "damages" is sufficient to specifically include "future rental obligations," as required by Simon. Therefore, this Court should grant this Petition, permit the parties to submit briefs and reverse the Court of Appeals.

**2. Did the Court of Appeals improperly affirm the trial court by determining the master's finding that the Petitioner abandoned the leased premises was reasonably supported by the evidence?**

The Court of Appeals 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). In the instant case the record does not support the factual findings of either the trial court or the Court Appeals. The Court of Appeals appeared to overlook or misapprehend a number of key points in its analysis of the master's factual findings.

First, in affirming the trial court's factual conclusion that the Petitioner abandoned the premises, the Court of Appeals pointed to two events which took place nearly two months apart. Specifically, the panel stated in its 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." (emphasis added) App. p. 278. The Record does not support such a version of the facts. 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) Petitioner was in the process of vacating the premises during the month of February 2010. (2) Respondent sent a ten-day notice to pay or quit the premises on February 26, 2010. (3) Petitioner did not pay, and thereafter completely relinquished possession of the premises, as requested in the notice. (4) Respondent contacted Tenant six weeks later, asking for her set of keys to be returned. (5) Respondent complied. Inexplicably, the panel opined that Petitioner'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 Respondent's notice to pay or quit the premises, ***which was delivered six weeks prior to the return of the keys.***

Such an interpretation of the facts may be construed as taking the position that *Petitioner abandoned the premises in early February 2010 by vacating, despite the fact the Petitioner was actively seeking a replacement tenant and retained the keys to the premises. Respondent sent a notice to Petitioner 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. Petitioner did not pay as requested in the notice to pay or quit. Approximately six (6) weeks later, in the first few days of April, 2010, Petitioner returned the keys to the Respondent, which either completed the abandonment of the premises, or constituted a second abandonment.* The resultant absurdity of this position is wholly inconsistent with the applicable case law and pertinent facts. Therefore, this Court should grant this Petition, permit the parties to submit briefs and reverse the Court of Appeals.

Presumably in support of its ruling that the master's finding was reasonably supported by the evidence, the Court of Appeals offered an additional confounding argument. Despite the fact the Petitioner never made a claim of constructive eviction, the Court of Appeals inexplicably applied a constructive eviction analysis to the facts in the case at bar. The Court never explains the rationale for such an analysis, but Petitioner speculates the Court intended to imply that if the Petitioner was not (constructively) "evicted," Petitioner necessarily abandoned the property. 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).

Even if this Court were to determine that a constructive eviction analysis were not misplaced, Thomas v. Hancock is distinguishable, nonetheless, in that the basis for the tenant's claim in Thomas v. Hancock was that the landlord had made a verbal demand for her to move out, which she did and then subsequently sued the landlord for damages for unlawful ouster. The landlord did not seek damages for the balance of the lease term. 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 case at bar is distinguishable in that the complainant is the landlord suing for the balance of a lease term, whereas in Thomas v. Hancock, the complainant was the tenant suing for damages on a theory of constructive eviction.

Based upon the foregoing, the Court of Appeals improperly affirmed the trial court's finding that the Petitioner abandoned the leased property. Therefore, Petitioner respectfully requests this Court grant the Petition for Writ of Certiorari, permit briefing, and reverse the Court of Appeals.

**3. Did the Court of Appeals improperly affirm the trial court by ruling that a tenant may unilaterally terminate a lease agreement by abandoning leased premises, without consideration to the remedy elected by the landlord?**

The Court of Appeals affirmed the master's determination that the subject lease had been terminated by abandonment. App. p. 277. Yet, the Court later stated in the opinion that the lease was terminated by Respondent re-entering and re-letting of the

premises. App. p. 282. However, the Court did not specify if Respondent's re-entering and re-letting was done for the account of the Petitioner or its own account, which is a crucial distinction, because one effectively terminates the lease; the other does not. More specifically, when a landlord decides to re-enter and re-let 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). It appears the Court of Appeals overlooked or misapprehended several crucial points in its analysis of this issue, which are outlined in detail below.

First, the panel misapprehended the Petitioner's argument in her brief. In its opinion, the Court of Appeals stated, "According to Tenant, Watson's ten-day notice to pay or quit the premises was the equivalent of an eviction." App. p. 277. The actual argument heading in Petitioner'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). Petitioner'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...." App. p. 208.

It may seem a fine point, but one with a significant distinction. Petitioner argued the lease was terminated ***by an action taken by the Respondent, BTC,*** not abandonment by Petitioner. The Court of Appeals improperly affirmed the master's ruling that the lease had been terminated by abandonment, because of the simple fact that 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.*** (emphasis added).

What this means is that even if this Court were to determine Petitioner had, in fact, abandoned the premises, such act alone simply cannot dictate whether the lease is terminated. The crucial factor is the response from the landlord, 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) Simon v Kirkpatrick, at 616.

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. The Court of Appeals overlooked the

uncanny similarity between the notice in Simon and that sent by Respondent in the instant case, which unequivocally precluded Petitioner from any and all rights under the lease. App. p. 86(A). In fact, Respondent admitted at trial it 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 Petitioner queried Paul Watson from BTC:

> 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.

The Court of Appeals took the position that the ten (10) day notice to pay or quit premises had no effect on the relationship between the parties because, as discussed hereinabove, it believed the Petitioner had already "abandoned" the premises. Petitioner asserts, however, even if Petitioner had, in fact, abandoned the premises prior to receipt of the ten (10) day notice to pay or quit the premises, this sequence of events cannot 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 considered whether (1) the tenant had abandoned the subject leased property; (2) was in the process of abandoning the property; or (3) if action taken by the landlord in electing its remedy to re-enter and re-let 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 appeared 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. (emphasis added). Id. at 815, 14-15.

The Court in Southpark further discussed the factual scenario where although there had been 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 the tenant it would have no further authority or rights to the leased premises. The Court found this notification 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 re-letting for its own account, thereby relieving the tenant of any further rental obligation. Id. at 819, 21-22.

There are no cases in South Carolina where the facts are identical; however, Simon, *supra,* comes so close as to be nearly identical. Yet, it appears the Court of Appeals overlooked or misapprehended the facts in Simon, by improperly distinguishing it on the basis that the tenant in Simon never actually took possession of the premises. In its opinion the Court 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. App. p. 280.

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, thereby terminating the lease. 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.

The landlord's election of remedy is crucial when considering whether or not the leasehold has been terminated and by what means. The Court of Appeals appeared to overlook or misapprehend that after Petitioner defaulted, Respondent chose its own remedy, when other remedies, which may have been more advantageous were equally available. If the landlord had desired to seek to recover the balance of the lease term, the Simon court discussed various other options available which may have availed him that opportunity. 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 the instant case, it should likewise be assumed that Respondent chose to terminate the lease as its personal interest dictated, and when it did so, it precluded Petitioner from exercising any right to use and occupancy. Nevertheless, the Court of

Appeals effectively absolved Respondent of responsibility for its own actions, and instead took the untenable position that Respondent was powerless to protect itself, subject to the whims of an opportunistic tenant, as evidenced by this excerpt from the Opinion:

> 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) App. p. 281.

Please note, the Court of Appeals 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. ***Kirkpatrick, the Tenant, is the party to which the Simon Court referred as being unfairly held to liability against which he could not have protected himself.*** Moreover, the above quote was preceded by a discussion in which the Simon Court 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.

By pointing out how "unfair" the Court of Appeals believed it was to allow the Tenant to "terminate rent payments at her own leisure," the Court hinted at what may be its true motivation for what can only be described as a conscious decision to ignore case precedent, and rescue the Respondent, as if it had wound up in a stick predicament through no fault of its own. Yet, as demonstrated by the rulings in Simon, *supra*, and its

progeny, the Respondent had a variety of remedies available to it, but for reasons unknown, it chose a remedy inconsistent with the relief it later attempted to recover.

Moreover, the most opportune time for the Respondent to adequately protect itself from loss of future rents was before the parties executed the lease agreement. However, Respondent failed to include language which would have expressly required the tenant to remain obligated for future rental payments in the event of termination of the lease agreement following tenant's default. Petitioner should not be penalized for signing an agreement which may have been more advantageous to her position. "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). 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. Petitioner respectfully asserts that the Court of Appeals failed to enforce the terms of the contract as it was written, despite what it may have perceived as the Respondent's failure to adequately protect itself.

Based upon the foregoing, the Petitioner respectfully requests this Court grant the Petition for Writ of Certiorari, permit the parties to submit briefs, and reverse the Court of Appeals.

**4. Did the Court of Appeal err by ruling the trial court's consideration of extrinsic evidence was harmless error?**

The panel found the master's consideration of extrinsic evidence despite his finding that the lease was unambiguous, was harmless error. App. p. 283. The panel

appears to have overlooked the fact that the extrinsic evidence the master considered and referenced in the order was all in the form of communications which took place between the parties approximately a year or more after the lease was executed. (As set forth in the Statement of the Case, above, the lease was executed in January 2009, and the 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 it 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, the Court of Appeals improperly ruled that the trial court's consideration of extrinsic evidence was harmless error because the extrinsic evidence at issue was not contemporaneous with or prior to the execution of the lease, and in fact were actually contained in a series of emails between the parties approximately a year after the execution of the lease agreement. Therefore, the Court of Appeals improperly affirmed the trial court's consideration of extrinsic evidence as harmless error. Petitioner respectfully requests this Court to grant the Petition for Writ of Certiorari, permit the parties to submit briefs, and reverse the Court of Appeals.

## CONCLUSION

For the foregoing reasons, this Court should grant this Petition for Writ of Certiorari, permit the parties to submit briefs, and reverse the Court of Appeals in favor of Petitioner.

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July 12, 2015
Hilton Head Island, SC

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED
JUL 16 2015
S.C. Supreme Court

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

**OPINION NUMBER 5309**
**HEARD NOVEMBER 4, 2014—FILED APRIL 1, 2015**
**WITHDRAWN, SUBSTITUTED, AND REFILED JUNE 3, 2015**

Bluffton Towne Center, LLC,

Respondent,

v.

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

Petitioner.

**PROOF OF SERVICE**

I certify that I have served the Petitioner's Petition for Writ of Certiorari on the Respondent, Bluffton Towne Center, LLC, by depositing a copy of it in the U.S. Mail, postage prepaid, on July 13, 2015, addressed to its attorney of record, Russell P. Patterson, PO Box 8047, Hilton Head, SC 29938.

July 13, 2015

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