THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

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

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COURT OF APPEALS CASE NO.: 2015-001462
OPINION NUMBER 5309
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WITHDRAWN, SUBSTITUTED, AND REFILED JUNE 3, 2015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 Anne Gilleland, LLC,

Petitioner.

RESPONDENT'S RETURN TO PETITION FOR WRIT OF CERTIORARI

Russell P. Patterson
SC Bar # 4375
Russell P. Patterson, P.A.
P.O. Drawer 8047
Hilton Head Island, SC 29938
(843) 341-9300
russell@russellpattersonlaw.com
Attorney for Respondent

Other Counsel of Record:

Beth Ann Prince, Esquire
Bauer & Metro, P.C.
38A New Orleans Road
P.O. Box 7965
Hilton Head Island, SC 29938
(843) 842-5297
Pro Se Petitioner

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

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

3. Did the Court of Appeals properly affirm the trial court by ruling the remedy elected by the Landlord allowed for the recovery of future rents?

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

COUNTERSTATEMENT OF THE CASE

This is a straightforward, commercial landlord – tenant dispute. The Petitioner, Beth Ann Gilleland-Prince ("Tenant"), originally leased an office for her law practice in a building owned by the Respondent, Bluffton Towne Center, LLC ("Landlord"). (R. pp. 31 – 32). On January 1, 2009, Tenant signed a new, three (3) year lease agreement for a different office space in the same building ("Lease" R. pp. 20 – 23). After approximately a year in the new space, on December 18, 2009 the Tenant notified the Landlord that she was leaving the private practice of law and becoming a full-time magistrate court judge and was closing her practice. She advised the Landlord that she would stay through January, and possibly February, and acknowledged that the Lease would not expire for some time. (R. p. 86). The Landlord immediately responded by seeking confirmation that the Tenant would honor her obligations under the Lease for the entire term. (R. p. 86). The Tenant moved out in February, failing to pay the February rent. As required under the Lease, on February 26, 2010 the Landlord sent a 10-day notice of default and right to cure letter. ("Right to Cure" – R. pp. 86A – 87). On March 28, 2010, the Tenant responded that she had vacated the unit in early February and did not have any money to pay the back rent. (R. p. 88). The Tenant returned the keys to the Landlord on April 1, 2010. (R. pp. 91 – 92).

The Landlord thereafter properly mitigated its damages by seeking alternate tenants during the remaining term of the Lease, receiving a net rental amount of $6,691. (R. pp. 93 – 117; 119 – 140; p. 150). No eviction action was ever filed by Landlord. After the end of the term of the Lease, Landlord filed suit for damages (R. pp. 14 – 24).

The trial court found the Tenant breached the lease and awarded damages of $34,850 for the rent for the unexpired term, less the rents received of $6,691. (R. pp. 4 – 11). The Tenant

did not testify at trial. There was no evidence submitted by either party as to who drafted the Lease.

As found by the trial court and the Court of Appeals, the Lease specifically reserved the right of the Landlord to obtain damages for future rent in the event the Tenant breached the Lease (R. p. 4 – 11, §§ 15 and 17).

ARGUMENT NO. 1

1. Did the Court of Appeals properly 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 the instant case, the Court of Appeals properly interpreted and applied *Simon v. Kirkpatrick*, 141 S.C. 251, 139 S.E.2d 614 (1927) to the Lease and allowed for the recovery of unpaid rent for the full term of the Lease. *Simon* held that under certain circumstances, the termination of a lease by the landlord may release the tenant from future obligations, unless the lease provides that notwithstanding the termination, the tenant is responsible for future obligations. If such language is present, the tenant is still obligated for future rents. *Simon* did not require any special or unique language to meet this obligation, just an expression of the intent of the parties as to the issue of future damages.

> The rule, as we understand it, is that the termination of the 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**. (emphasis added)

Id. at 618.

The Tenant is asserting that *Simon* requires some **special** type of language, or **express** provision as to future obligations. No such requirement is stated in *Simon*, nor is any such requirement found in any case applying *Simon* in our State.

In *Camden Inv. Co. v. Gibson*, 204 S.C. 513, 30 S.E.2d 305 (1944), the Court allowed recovery of future rents after a tenant vacated, with no discussion as to any special language or reservation of rights. In *Richmond v. Joray*, 183 F.2d 667 (4th Cir. 1950), the Court specifically applied the *Simon* rule, allowing for recovery of future rents, finding sections 7 and 19 of the lease properly reserved the right to future rents. These provisions simply provided that the landlord may relet the property and that the tenant would be responsible for any remaining deficiency.

In *United States Rubber Company v. White Tire Company*, 231 S.C. 84, 97 S.E.2d 403 (1956), following the tenant's abandonment and default in payment of rent, the landlord was entitled to recover rent for the remaining term. The Court in *U.S. Rubber* held that the relationship of landlord and tenant had come to an end under *Simon*, but allowed for the recovery of future rent under a breach of contract theory, citing no special language or reservation of rights in the subject lease.

In *Blumberg v. Nealco*, 307 S.C. 537, 416 S.E.2d 211 (1992) the Court found the following lease provision sufficiently reserved the landlord's rights to future rents under *Simon* at p. 539:

> but the exercise or non-exercise by lessor 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 rent or of its obligations under any other covenants and covenants and agreements herein contained.

Id. at 539.

Finally, *In re Builders Transport, Inc.*, 471 F.3d 1178 (11th Cir.), applying South Carolina law, found the following language was sufficient to come within the stated exception under *Simon:* The landlord "may enter upon and take possession of such Leased Property in order to protect it from deterioration and continue to demand . . . the monthly rental of the other charges provided" (Id. at 1188).

From a careful review of these cases following *Simon*, there is no unique or specific language required in a lease to evidence the intent of the parties that the tenant is liable for future rent if it defaults or abandons the leased premises. As both the trial court and Court of Appeals found, the language in the subject Lease sufficiently stated the intention of the parties that the Tenant would be responsible for future rent payments if she abandoned the property or the Lease was terminated. The default provision reads as follows:

> **DEFAULTS**. Tenant shall be in default of this Lease if Tenant fails to fulfill any lease obligation or term by which Tenant is bound. Subject to any governing provisions of law to the contrary, if Tenant fails to cure any financial obligation within 10 days (or any other obligation within 30 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 rights to damages**. In the alternative, Landlord may elect to cure any default and the cost of such action shall be added to Tenant's financial obligations under this Lease. **Tenant shall pay all costs, damages and expenses (including reasonable attorney fees and expenses) suffered by Landlord by reason of Tenant's defaults**. All sums of money or charges required to be paid by Tenant under this Lease shall be additional rent, whether or not such sums or charges are designated as "additional rent. (emphasis added) (R. pp 20-21)

The Lease specifically provides that if Tenant fails to meet its obligations under the Lease, the Landlord can retake possession of the property, without prejudicing any of its rights to damages. It further provides that the Tenant shall pay all costs, damages and expenses as a result of their default.

The only monetary obligation of the Tenant under the Lease was the payment of rent. Clearly, the rental obligations are included in the term "damages". There simply is no other

interpretation that gives meaning to all of the provisions of the Lease. *Brady v.* Brady, 222 S.C. 242, 246-247, 72 S.E.2d 193, 195 (1952) (language used should be given a reasonable meaning); *Reyhani v. Stone Creek Cove Condominiums II Horizontal Property* Regime, 329 S.C. 207, 212, 494 S.E.2d 465 (Ct.App. 1997) (agreement should be interpreted to give effect to all provisions). There is no need to make reference to *Black's Law Dictionary*, or any other case or treatise on this point. The Court is obligated to enforce the agreement of the parties. *Low Country Open Land Trust v. Charleston Southern*, 376 S.C. 399, 656 S.E.2d 775 (2008).

Much like President Clinton notoriously sought to create an ambiguity as to the definition of the term "is," the Tenant in this case is seeking to create a question as to what the term "damages" in a lease means. No such question exists under this Lease.

ARGUMENT NO. 2

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

The Tenant in this case is asking this Court to review the decision of the Court of Appeals and the trial court as to the existence of evidence reasonably supporting the conclusion that the Tenant abandoned the premises. Under Rule 242(b) SCACR, such an issue is clearly not a matter deserving further review by this Court. In addition, the determination of whether the Tenant abandoned the property, or was evicted, has absolutely no impact on the final result that the Tenant is responsible for rent after she vacated. Under *Simon* and its progeny, the rule discussed above allowing recovery of future rents, with the appropriate language in the lease, has been applied uniformly in situations where the tenant abandoned the leased premises or was evicted. *Richmond v. Joray*, 183 F.2d 666 (4th Cir. 1950) (landlord recovered possession by agreement with tenant); *U.S. Rubber Co. v. White Tire Co.,* 231 S.C. 84, 97 S.E.2d 403 (1956)

(lease terminated by the Landlord's re-entry and reletting following tenant's abandonment of the property and default in payment of rent); *Surety Realty Corporation v. Asmer,* 249 S.C. 114, 153 S.E.2d 125 (1967) (recovery allowed for future rents even though tenant vacated property and turned over keys).

Thus, the only relevant issue is whether the subject Lease contained language indicating it was the intent of the parties to allow the Landlord to recover future rents. As discussed above, this Lease certainly met that requirement.

Assuming, *arguendo,* this Court deems it relevant as to whether the Tenant abandoned the property or the Landlord evicted the Tenant, there is ample evidence supporting the trial court's and the Court of Appeals' finding of an abandonment.

On December 18, 2009, the Tenant wrote the Landlord advising she had taken a job as a full-time judge and was closing her law office. (R. p. 86). She stated that she would stay through the end of January, and possible some in February. (R. p. 86). In response to the required ten (10) day notice of default provided by the Landlord on February 27, 2010 (R. p. 86(A) – 87), the Tenant stated she had vacated the property at the beginning of February and had been out of the unit for nearly two (2) months. The Tenant's March 28, 2010 e-mail reads as follows:

> I vacated the unit at the beginning of February, and the only items that I am aware of that are still in the unit are furniture that was there when I moved in.
>
> I am happy to assist in getting the place rerented, however, I am simply unable to pay the back rent, or else I would pay it. Filing an ejectment action is simply unnecessary. I have been out of the unit for nearly two months, as Mr. Watson requested. (R. p. 88, P. Ex. 5)

Thereafter, on April 1, 2010, the Tenant returned the keys to the Landlord. (R. pp. 90, 91, and 92). The Landlord never filed an eviction.

Abandonment has been defined by our Courts as the voluntary surrender of possession by the Tenant to the Landlord. *Thomas v. Hancock,* 271 S.C. 273, 246 S.E.2d 604, 606 (1978). Section 27-35-150 of the South Carolina Code of Laws (1976) states that "[a]bsence from the property for fifteen days after default in the payment of rents shall be construed as abandonment." It is undisputed the Tenant did not pay the February rent. Pursuant to Tenant's own e-mail, she admitted she had been out of the property for nearly two months (i.e., since approximately January 28, 2010) (R. p. 88). It is difficult to imagine a more clear and definitive factual scenario of an abandonment under both *Thomas* and § 27-35-150.

In summary, this is not an appropriate issue for further review under Rule 242 SCACR. The Tenant is still liable for future rents if she abandoned the property or was evicted. Finally, the evidence strongly supports a finding of abandonment.

ARGUMENT NO. 3

3. Did the Court of Appeals properly affirm the trial court by ruling the remedy elected by the Landlord allowed for the recovery of future rents?

Tenant asserts that both the trial court and the Court of Appeals misapplied *Simon* and *U.S. Rubber* since the Landlord terminated the Lease by the February 26, 2010 Right to Cure letter, and is thus barred from seeking future rents. Tenant argues that once the Lease was terminated, she no longer had any responsibility for future rents. Such a position misapplies *Simon* and *U.S. Rubber* and ignores the provisions of the Lease and the undisputed facts.

As discussed above, the Court of Appeals decision is entirely consistent with *Simon* and *U.S. Rubber.* The Lease in this case, unlike the lease in *Simon*, did contain an express provisions reserving the right of the Landlord to recover future rents. In addition, the Right to Cure Letter (R. pp. 86A – 87), consistent with the terms of the Lease, expressly informed the Tenant she was

still obligated for all future rents ("you will still be obligated and responsible for . . . legal fees, expenses, and rents that continue to accrue under the terms of the lease because of non-payment"). Again, there was no such reservation of rights found in *Simon.*

The opinion of the Court of Appeals is also consistent with *U.S. Rubber,* finding that *U.S. Rubber* is "more reflective of the modern rule for damages recoverable upon the breach of a lease." (R. 281). This transition by our Court, and other jurisdictions, of viewing a lease as merely a property interest toward a contractual analysis, is explained by the Supreme Court of Colorado in *Schneiker v. Gordon*, 732 P.2d 603, 608 (1987), as follows:

> In recognition of the increasing importance of covenants found in modern leases, as well as the policy of discouraging economic and physical waste, Courts in recent times are beginning to look to principles of contract law in analyzing the rights and obligations of a landlord and a tenant upon abandonment of premises by a tenant. *United States Rubber Co. v. White Tire Co.,* 231 S.C. 84, 97 S.E.2d 403 (1956) (cites omitted). In the jurisdictions in which these cases were decided, acceptance of surrender acts to terminate the privity of the estate between the parties but the privity of contract between them is held to be unaffected. *See: e.g. United States Rubber Co.,* 97 S.E.2d at 149 (cites omitted). Therefore, while a landlord can no longer maintain an action for rent due after termination of the lease in these jurisdictions, he can maintain an action for contract damages caused by the tenant's breach of the lease. *United States Rubber Co.,* 97 S.E.2d at 409 (cites omitted).

This remedy for contract damages of future rent, specifically reserved in the instant Lease, was thus properly recognized by the Court of Appeals, consistent with *Simon* and *U.S. Rubber*. While the landlord-tenant relationship ended between the parties, it did not extinguish the contractual remedies available under the Lease for damages suffered by the Landlord. The Landlord's actions were entirely consistent with said remedy.

In addition to the fact that the Lease expressly reserved the right for future damages, at all times, the Landlord always maintained the Tenant was responsible for the remaining term of the Lease. See: December 18, 2009 e-mail – "I am not willing to forgive the balance of the Lease." (R. p. 86); February 26, 2010 Right to Cure – "you will still be obligated and responsible for the

payment of monies set forth below, together with any additional costs, legal fees, expenses and rents that continue to accrue under the terms of the Lease because of nonpayment." (R. p. 86A); March 9, 2012 letter to Tenant prior to suit being filed – includes detailed summary of rents due for the remaining unexpired term. (R. pp. 141 – 142).

The Court of Appeals correctly applied South Carolina law and the end result is fair and reasonable. The Tenant is obligated to fulfill her obligations under the Lease and pay the rent for the unexpired term, after reducing the amounts the Landlord was able to recover through other rentals.

ARGUMENT NO. 4

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

The admissibility of evidence as to the construction of a contract should not be reviewed by this Court under Rule 242(b) SCACR. If it is to be considered, the opinion of the Court of Appeals should be upheld. The Tenant has misread or misconstrued the Court of Appeals' opinion as it relates to its ruling on the admission of extrinsic evidence surrounding the interpretation of the Lease. The panel held that because the Lease was unambiguous, the e-mails exchanged between the parties as to how they construed the Lease were violative of the parole evidence rule and should not have been admitted. The panel stated that the reference in paragraphs 18(a) – (c) and 19 in the trial court's Order to this evidence were basically alternate grounds for the lower court's interpretation of the Lease, not necessary for the decision, and the admission of same was thus harmless. (R. p. 285). An error is harmless if it could not have reasonably affected the results of the trial. *Way v. State*, 410 S.C. 377, 764 S.E.2d 701 (2014). Such a conclusion is sound and consistent with South Carolina law. Even if the references to the e-mails were excluded, the result would be the same for the reasons discussed above.

CONCLUSION

The issues raised by the Tenant in this routine breach of a commercial lease case do not merit the consideration of further review by this Court under Rule 242(b) SCACR. The Tenant signed a three-year lease and vacated after a little more than a year, simply deciding to become a full-time Magistrate. The Court should enforce the Lease as agreed to by the parties and require the Tenant to pay the damages resulting from her voluntary act of vacating the property. The literal maze of legal requirements and trap doors the Tenant asserts are applicable would render enforcement of leases virtually impossible if adopted by our State.

Respectfully submitted,

RUSSELL P. PATTERSON, P.A.

Russell P. Patterson
P.O. Box 8047
Hilton Head Island, SC 29938
(843) 341-9300
russell@russellpattersonlaw.com
Attorney for Respondents

August 12, 2015

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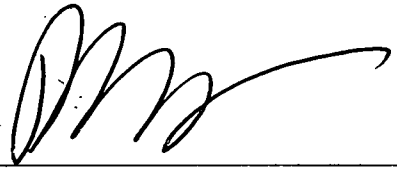
PROOF OF SERVICE

I certify that I have served Respondent's Return to Petition for Writ of Certiorari on the Petitioner, Beth Ann Gilleland-Prince, by depositing a copy of same in the U.S. Mail, postage prepaid, on August 12, 2015, address to said *Pro Se* Petitioner, as follows:

Beth Anne Prince
Bauer & Metro, P.C.
P.O. Box 7965
Hilton Head Island, SC 29938



Russell P. Patterson
SC Bar # 4375
Russell P. Patterson, P.A.
P.O. Drawer 8047
Hilton Head Island, SC 29938
(843) 341-9300
russell@russellpattersonlaw.com
Attorney for Respondent