

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM HORRY COUNTY  
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

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Case No. 2019-CP-26-03905

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Resort Restaurants of Myrtle  
Beach, Inc. d/b/a Rossi's,

Appellant,

**RECEIVED**

JAN 31 2020

**SC Court of Appeals**

v.

Galleria Shopping Center,  
LLC,

Respondent.

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INITIAL BRIEF OF APPELLANT

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Robert B. Strickland, IV  
412 North Poplar Drive  
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(843) 238-5618  
Attorney for Appellant

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## STATEMENT OF ISSUES ON APPEAL

1. DID THE MAGISTRATE COURT PROPERLY DISMISS THE ACTION IN THE MAGISTRATE COURT PURSUANT SCRCP 41(a)?
2. DID THE MAGISTRATE COURT PROPERLY DISMISS THE ACTION IN THE MAGISTRATE COURT PURSUANT TO SCRMC 11(b)?
3. THE BOND TO STAY JURY SHOULD BE RETURNED TO APPELLANT ONCE RESPONDENT DISMISSED ITS CASE.
4. DID THE MAGISTRATE COURT ABUSE ITS DISCRETION BY RETURNING THE BOND TO STAY JURY TRIAL TO APPELLANT?
5. DID THE MAGISTRATE COURT ABUSE ITS DISCRETION BY GRANTING RESPONDENT'S MOTION FOLLOWING THE DISMISSALL AND AWARING THE BOND TO THE RESPONDENT?
6. DID THE CIRCUIT COURT BY DENYING APPELLANT'S APPEAL TO THE CIRCUIT COURT?

## STATEMENT OF THE CASE

On March 21, 2017 Respondent, Galleria Shopping Center, LLC brought the underlying action by filing its Application for Ejectment. The Appellant, Resort Restaurants of Myrtle Beach, Inc. d/b/a Rossi's filed its Answer and Jury Trial Request on April 6, 2017. The Bond Hearing in this matter was held on July 31, 2017 at this Hearing the Bond to Stay Jury Trial was set at \$34, 840.82, however this amount improperly included alleged attorney fees and costs. (Bond To Stay Jury Trial p1) Subsequently, Appellant filed its Notice of Motion and Motion to Reconsider on August 7, 2017. (Motion to Reconsider) The Magistrate Court held a hearing on Appellant's Motion on August 28, 2017 and issued its Order reducing the amount of the Bond to Stay Jury Trial on September 4<sup>th</sup>, 2017, this Order reduced the Bond amount to \$16,451.50. (Order) After numerous continuances the underlying eviction was set for trial on May 8, 2018. (See Pleadings/Motions/Orders)

On May 7, 2018, the day before trial, Respondent's attorney informed the trial court, via facsimile, that Respondent was dismissing its case and that a trial would no longer be necessary (See Letter from Connell). Accordingly, Respondent failed to appear at the appointed time set for the trial of this matter. Appellant's trial counsel appeared and, following the dismissal of the Respondent's action, requested that the trial court return the remaining Bond. The trial court agreed and issued its Order to Return Bond on May 16, 2018 directing Respondent to return \$18, 389.32 to Appellant. Respondent then filed a Motion for Relief on September 24<sup>th</sup>, 2018. The trial court granted Respondent's Motion. Appellant then filed a Motion to Return Bond Funds on October 10<sup>th</sup>, 2018. A hearing on that Motion was held on June 10<sup>th</sup>, 2019 after which the trial court denied Appellants Motion.

On June 18, 2019, Appellant filed its Notice of Civil Appeal of Horry County Magistrate Civil Case # 2017CV261070942. Appellants appeal from the Magistrate Court was held on September 11, 2019. The Appeal from Magistrate Court was denied by the Circuit Court. This Appeal followed, on October 9th, 2019, Appellant served the Notice of Appeal on Respondent.

#### STANDARD OF REVIEW

This Court set forth the Standard of Review for appeals from the magistrate court in *A&I, Inc. v. Gore*, 366 S.C. 233, 621 S.E.2d 383 (2005). On appeal from the magistrate court, the circuit court may make its own findings of fact. S.C. Code Ann. §18-7-170 (1985). Where the circuit court has affirmed the magistrate court decision, this court looks to whether the circuit court order is “controlled by an error of law or is unsupported by the facts.” *Parks v. Characters Night Club*, 345 S.C. 484, 490, 548 S.E. 2d 605, 608 (Ct.App.2001). “The Court of Appeals will presume that an affirmance by a Circuit Court of a magistrate’s judgment was upon the merits where the testimony is sufficient to sustain the magistrate’s judgment and there are no facts that show the affirmance was influenced by an error of law.” *Id.* However, “the circuit court is restricted regarding which issues it may entertain in determining whether a judgment should be affirmed or reversed...The circuit court, acting as an appellate court in a case heard by the magistrate, cannot consider questions that have not been presented to the magistrate.” *Indigo Associates v. Ryan Inv. Co.* 314 S.C. 519, 523, 431 S.E 2d 271, 273 (1993).

## ARGUMENTS

### I. THE PROCEEDINGS IN THE MAGISTRATE COURT WERE PROPERLY DISMISSED PURSUANT TO SCRPC 41(a) AND SCRMC 11(b).

The Respondent's underlying action for eviction was scheduled for trial on May 8, 2018 in the Conway Magistrate Court. On the afternoon prior to the trial, counsel for respondent forwarded a letter to the trial court stating that "Pursuant to my telephone call this morning, Galleria Shopping Center, LLC will be withdrawing its complaint and tomorrow's, May 8, 2018 civil jury trial with Judge Livingston is no longer necessary. (Connell Letter p1). Appellant's trial counsel was copied on this communication via email. This letter to the trial court dismissed the action without a decision being made by the trier of fact on the merits of the case. The following day, Appellant's trial counsel appeared at the appointed time and place for trial while Respondent's counsel failed to appear. Counsel for Appellant met with Judge Livingston in chambers and requested that she return the remaining Bond to Stay Jury Trial based on the Respondent's dismissal rendering the bond moot. Judge Livingston agreed with Appellant's counsel and issued an order directing to Respondent to return the remaining bond of \$18, 389.32 to Appellant. (Order to Return Bond p1).

South Carolina Rule of Civil Procedure 41(a)(1) specifically provides that "an action may be dismissed by the plaintiff without order of the court. (S.C. R. Civ. Pro. 41(a)(1). The notice of dismissal is effective upon its filing and no action is required by the court. Further, South Carolina Rules of Magistrates Court Rule 11(b) states that "if the plaintiff does not appear at trial...the court may enter an order dismissing the action. (S.C. R. Mag. Ct. 11(b). The South

Carolina Supreme Court stated in *Allen v. Atlanta & Charlotte Air Line Ry. Co.* that it “is fundamental that a voluntary dismissal or nonsuit brings about the same situation or result as if no suit had been brought.” *Allen v. Atlanta & Charlotte Air Line Ry. Co.*, 216 S.C. 188, 192, 57 S.E. 2d 249, 250 (1950). The Court of Appeals of South Carolina held in *South Carolina Dept. of Social Services v. Pritcher* that the dismissal of an action upon request of the Plaintiff is within the discretion of the court. *South Carolina Dept. of Social Services v. Pritcher*, 329 S.C. 242, 248, 495 S.E.2d 242, 245 (1997).

In the current matter, the Respondent voluntarily dismissed its initial eviction action the day before it was set to go to trial. Under well settled South Carolina law, this dismissal returns the parties to a position as if the action was never filed. Moreover, the statute that controls the issues of pre-trial bonds during the pendency of an ejectment proceeding does not contemplate the bond continuing after the matter has ended.

## II. THE CIRCUIT COURT ERRED BY AFFIRMING THE RULING OF THE MAGISTRATE AND RETURNING THE BOND TO RESPONDENT

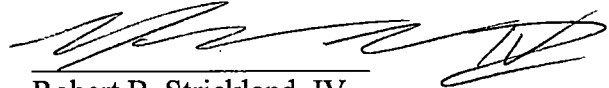
The Court of Appeals held in *Indigo* that the circuit court cannot consider questions that have not been presented to the magistrate and that parties to an appeal from magistrate court are restricted to the theory on which the case was tried in the magistrate court. *Indigo* at 523, 274. At the hearing in the circuit court on September 11, 2019, Counsel for Respondent made repeated references to alleged amounts of back rent owed to the Respondent. (Transcript of Record). The circuit court improperly considered this information from Respondents counsel. Accordingly, the circuit court erred by affirming the magistrate court based upon information that was never submitted to a jury or ruled upon by the magistrate court.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the circuit court.

January 30, 2020

Respectfully submitted,



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Resort Restaurants of Myrtle Beach, Inc  
d/b/a Rossi's.....Appellant  
vs.  
Galleria Shopping Center, LLC.....Respondent

PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellant and Designation of Matter to be Included in the Record on Appeal on Galleria Shopping Center, LLC by depositing a copy of it in the United States Mail, postage prepaid, on January 30, 2020 addressed to its attorney of record, John F. Connell, Jr., Post Office Box 336, Myrtle Beach, South Carolina 29578.

Dated: January 30, 2020



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January 30, 2020

The Honorable Jenny Abbott Kitchings  
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RE: Resort Restaurants of Myrtle Beach, Inc. d/b/a Rossi's, Appellant, v. Galleria Shopping Center, LLC, Respondent, Case No. 2019-CP-26-03905  
Appellate Case No. 2019-001744

Dear Ms. Kitchings:

Enclosed for filing is the Appellants Initial Brief in the above case. Also enclosed are the following:

- (1) Proof of service of the Initial Brief on the Respondent.
- (2) Designation of Matter to be Included in the Record on Appeal

Sincerely,



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