THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master in Equity

Case No.: 2008-CP-10-3590

---

56 Leinbach Investors, LLC...Appellant/Respondent,

vs.

Magnolia Paradigm, Inc...Respondent/Appellant.

INITIAL APPELLANT'S BRIEF OF RESPONDENT/APPELLANT

William S. Barr
Barr, Unger and McIntosh
11 Broad Street (29401)
P.O. Box 1037
Charleston, SC 29402
Telephone: 843-577-5083
Facsimile: 843-723-9039
wsb@barrungermcintosh.com
Attorney for Respondent/Appellant

RECEIVED
MAR 13 2013
SC Court of Appeals

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS .... i, ii

TABLE OF AUTHORITIES .... iii, iv, v

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 2

STANDARD OF REVIEW 5

ARGUMENT I. THE MASTER ERRED IN JUDICIALLY CONSTRUING THE LEASE
THE LEASE IS NOT AMBIGUOUS 7

ARGUMENT II THE MASTER ERRED IN REFORMING THE LEASE BETWEEN THE PARTIES
A. THERE WAS NO MUTUAL MISTAKE 11
B. THERE IS NO EVIDENCE OF ABANDONMENT 13
C. REFORMATION OF THE LEASE BETWEEN THE PARTIES WAS IN ERROR 14

ARGUMENT III. THE TRIAL COURT ERRED IN FINDING THAT MAGNOLIA HAD BREACHED THE PAYMENT TERMS OF THE LEASE 16

ARGUMENT IV: THE MASTER'S REMEDY WAS IN ERROR
A. THE MASTER ERRED INFINDING THAT LEINBACH WAS ENTITLED TO RELIEF UNDER ITS CAUSE OF ACTION FOR UNJUST ENRICHMENT. 19
B. THE MASTER ERRED IN DENYING MAGNOLIA RELIEF UNDER ITS CAUSE OF ACTION FOR UNJUST ENRICHMENT 23
C. THE MASTER ERRED NOT ALLOWING MAGNOLIA FULL ABATEMENT OF THE RENT BEING RECEIVED FROM OPTIMA TOWERS 25

TABLE OF CONTENTS

PAGE

D. THE TRIAL COURT ERRED IN ITS CALCULATION OF THE ARREARS IN RENTAL PAYMENTS OWED BY MAGNOLIA TO LEINBACH 26

ARGUMENT THE MASTER ERRED IN NOT AWARDING MAGNOLIA ATTORNEYS FEES 29

CONCLUSION... 31

TABLE OF AUTHORITIES

PAGE

CASES:

Belin v Stikeleather,
232 S.C. 116, (SCt. SC 1957)... 11

Bellamy v Bellamy,
292 S.C. 107, (Ct. App.1987)... 9,10,14

C.A.N. Enters., Inc. v. South Carolina Health and Human Servs. Fin. Comm'n,
296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988)............................... 5,7

Carolina Health and Human Servs. Fin. Comm'n,
296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988)............................... 5,7

Chan v. Thompson,
302 S.C. 285, 289, 395 S.E.2d 731, 734 (Ct.App.1990)..................... 5,7

George v Empire Fire and Marine Insurance Company
336 S.C. 206, 519 S.E.2d 107, Ct. App 1999................................. 14

Gowdy v. Kelley,
185 S.C. 415, 194 S.E. 156. 11

Harper v McCoy
276 S.C. 170, 172 276 S.E.2d 782,783-784 1981........................... . 23,24

Holly Hill Lumber v Grooms
16 SE2d 816 1941 13

Kennerty v. Etiwan Phosphate Co.,
21 S.C. 226 11

Kirven v. Bartell,
266 S.C. 385, 223 S.E.2d 597 (1976).. 10

Moore-Hudson Oldsmobile/GMC, Inc. v. Waterman,
298 S.C. 107 (1989) 22

TABLE OF AUTHORITIES

PAGE

CASES:

Moore v. Jeffords,
195 S.C. 512, 12 S.E.2d 737 11

Pruitt v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n,
343 S.C. 335, 339, 540 S.E.2d 843, 845 (2001) 5,7

Sauner v Public Service Authority of South Carolina.
581 S.E.2d 161 22

Sims v. Tyler,
276 S.C. 640, 281 SE2d 229, S.Ct. 1981 11

Stanley Smith & Sons v. Limestone College,
283 S.C. 430, 434, 322 S.E.2d 474, 478 (Ct.App.1984) 22

Sullivan v. Moore,
92 S.C. 305, 75 S.E. 497 11

Thomas v. Mitchell,
287 S.C. 35, 37, 336 S.E.2d 154, 155 (Ct.App.1985). 6

United Dominion Realty Trust, Inc. v. Wal-Mart Stores, Inc.,
307 S.C. 102, 105-07, 413 S.E.2d 866, 868-69 (Ct.App.1992) 5,7

Ward v. West Oil Co., Inc
379 S.C. 225, 665 S.E.2d 618 (Ct.App.2008) 5,7

STATUTES

Uniform and Declaratory Judgment Act,
S.C. Code Ann. § 15-53-30 (1976) 1

OTHER AUTHORITIES

52 *C.J.S.* Landlord & Tenant § 337	21,77
77 *C.J.S. Restitution* at 322-323	20,24
2 *S.C. Jur.* Attorney Fees § 2	29
12 S.C. Jur. Equity § 23 Restitution and unjust enrichment	22
13 *S.C. Jur. Implied Contracts* § 6, Unjust enrichment and restitution. and cases cited therein	20
76 *C.J.S. Reformation of Instruments* § 40 What Constitutes Mutual Mistake	11,14,26
49 Amjur 2d Landlord and Tenant Section 44	7
49 Amjur 2d Landlord and Tenant Section 214.......................................	13
49 *Am. Jur. 2d Landlord and Tenant* § 889..................................	21

STATEMENT OF THE CASE

The Appellant/Respondent (Herein "Leinbach:) commenced this action by the filing of a Complaint on June 24, 2008 for breach of contract arising out of a lease entered into by and between the parties dated June 1, 2003, (R.p.) Leinbach's Complaint alleges that the Respondent/Appellant (herein "Magnolia") abatement of $800.00 per month from the rental payments constitute breach of the terms of the lease. A second cause of action requests the Court to declare the parties rights under the lease, pursuant to the Uniform and Declaratory Judgment Act S.C. Code Ann. § 15-53-30 (1976). Thereafter, Leinbach filed an amended complaint attaching the lease which had been inadvertently left off of the lease in the original filing (R.p.) This matter was referred to the Master in Equity for Charleston County by Order of Reference filed on September 1, 2009. (R.p.), granting the Master full authority to decide all issues with finality, in accordance with Rule 53(e)(1) SCRCP. (R.p.)

On August 3, 2010, Leinbach filed a Motion to amend its Complaint with a proposed unsigned Second Amended Complaint attached and adding causes of action for unjust enrichment and equitable estoppel. (R.p.)

On July 18, 2008, the Magnolia filed its answer and counterclaim asserting the Leinbach had breached its lease with the Magnolia by leasing a portion of the property that had been heretofore leased to it. (R.p.) On October 18, 2010 Magnolia filed an amended answer and counterclaim to the second amended complaint to assert the additional cause of action of unjust enrichment.(R.p.)

On October 11, 2011 the case was tried by the Honorable Michel R. Scarborough, Master in Equity for Charleston County who issued a final order dated June 11, 2012 and

filed on June 15, 2012 Receipt of notice of entry of the order was received on June 29, 2012. On July 9, 2012 counsel for the Magnolia filed a motion to reconsider alter or amend. (R.p.) A form order denying Magnolia's motion was issued August 31, 2012 but filed not filed until October 8, 2012. (R.p.). Receipt of the notice of the courts order was received on October 15, 2012.

The import of the Courts order was that both parties had breached the terms of the lease, that there had been a mutual mistake that allowed the court to reform the lease , that Magnolia was entitled to abate the rent to Leinbach in a set amount and denied the recovery of attorneys fees.

Leinbach served its notice of appeal on or about November 8, 2012 . (R.p.) and Magnolia served its notice of appeal on November 12, 2012 (R.p.).

STATEMENT OF FACTS

The lease, (R.p.) which is the subject matter of this action, was entered into between the parties on June 1, 2003. The lease was prepared by counsel for Leinbach and reviewed and commented on by counsel for Magnolia. An examination of the lease will reveal that it describes the Demised Premises as Parcel H2 of TMS 349-01-00-045 containing 1.21 acres and located on Leinbach Drive in the City of Charleston. A plat entitled "Harrison Executive Park Plat of Parcel H2 owned by Charles W. Patrick, Jr. and Stephen Ziff about to be conveyed to Charles W. Patrick, Jr. (TMS 349-01-00-045) showing the demised premises was introduced into evidence as Plaintiff's Ex. 10, (R.p.). Leinbach's, manager, Clyde Hiers, testified that the parcel H-2 is the parcel leased to Magnolia.(R.p.)

The initial term of the lease was for five years with three options to renew for additional five year periods. The initial rent was $21,600.00 per years for three years and thereafter three percent increase per year. In all it is a twenty year lease. Magnolia is in first renewal and has exercised its option for the third renewal that commences in June 2013. Exhibit 8 (R.p.) is a rental summary as of the date of the trial showing rent paid through October 1, 2011. Total rent paid was $153,561.00, total rent due under the lease was $193,352.65. The difference is the amount that Magnolia deducted from its rent payment as a result of the Tower lease described below. Additionally Magnolia was responsible for and paid the taxes on the subject property.

On or about February 23, 2006, after leasing the demised premises to Magnolia, Leinbach entered into a lease with Optima Towers, LLC. (R.p.) Attached to that lease is a site sketch of the proposed lease area with Optima Towers which was executed by Clyde Hiers, the managing member of the Leinbach. It should be noted in comparing Exhibit "10" (R.p.) with the site sketch that TMS Parcel 349-01-80-105 is, in fact, Parcel H2 heretofore leased to the Magnolia. Mr. Hiers in his testimony admitted that the sketch is a portion of parcel H-2. (R.p.). See also Plaintiff's Exhibit 4 (R.p.) which shows the Cell Tower parcel more clearly.

It is undisputed that the Lease to Optima Towers is a portion of the property already leased to Magnolia.

The Optima lease was for an initial term of five years with four five year options after that. The initial rental was for $9,600 per month with increase after the first year of 3.5 % per anum. Exhibit 9 is a rent summary of rents paid by Optima from the inception

the tower lease through September 21, 2011 just before the trial. Total Rent paid was $54, 116.65. (R.p.)

Based on the forgoing two exhibits, from the inception of the tower lease to the date of the trial Leinbach received total rent of $207,477.65 from Optima and Magnolia combined. Exhibit 15 shows these receipts. (R.p.). Leinbach was only due from rents from the property $193, 352.65 over the same period. Therefore, from Exhibit 15, Leinbach was overpaid $14,125.00 through the date of the trial and continues to be overpaid to date. (R.p.)

Magnolia/ learned that Leinbach had leased a portion of the premises during negotiations for the purchase of the subject property in late 2007. In accordance with the terms of the lease, on December 18, 2007, Magnolia notified Leinbach's counsel of the terms of the lease that had been breach by Leinbach's lease to Optima Towers and to cure Leinbach's breach within 30 days of the letter or Magnolia would commence abating the rent until the Leinbach cured its breach (R.p.), On January 31 the rent for February was sent to Leinbach's lawyer, Donald H. Howe, abating $800.00 from the rent. (R.p.)

As a result of the forgoing abatement of the rent Leinbach commenced the underlying action leading to this appeal

The Court in its order following the trial, after multiple findings of fact and conclusions, determined that there had been a mutual mistake of fact and since neither party sought rescission, that reformation was the appropriate remedy. Neither party had pled or submitted evidence of mutual mistake or sought reformation of the lease. The only evidence of mistake was the unilateral mistake of Leinbach (Transcript, P61, Line 16-18)(R.p.). The reformation of the lease consisted of reducing the size of the demised

premises to the area that the tenant (Magnolia) was occupying. Based on the foregoing reformation of the lease the Court then fashioned a remedy that recalculated the lease payment due to its reducing the size of the demised premises and allowed Magnolia to abate the rent since the inception of the tower lease.

The crux of this case is the question , as between Magnolia, the tenant and Leinbach, the landlord, who is entitled to the rent from the Tower lease.

STANDARD OF REVIEW

This action was brought by both parties contending that each had breached the terms of the lease. Lease provisions are construed under rules of contract interpretation. See *United Dominion Realty Trust, Inc. v. Wal-Mart Stores, Inc.*, 307 S.C. 102, 105-07, 413 S.E.2d 866, 868-69 (Ct.App.1992) (applying the rules of contract construction to interpret the lease of a shopping center). One cardinal rule of contract interpretation is to ascertain and give effect to the intention of the parties. *Chan v. Thompson*, 302 S.C. 285, 289, 395 S.E.2d 731, 734 (Ct.App.1990). To determine the intention of the parties, the court "must first look at the language of the contract." *C.A.N. Enters., Inc. v. South Carolina Health and Human Servs. Fin. Comm'n*, 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988). The construction of a clear and unambiguous contract presents a question of law for the court. *Ward v. West Oil Co., Inc.*, 379 S.C. 225, 665 S.E.2d 618 (Ct.App.2008); see *also Pruitt v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n*, 343 S.C. 335, 339, 540 S.E.2d 843, 845 (2001).

Although the action was brought as a case at law the Trial Courts remedy was equitable, that is, it reformed the lease based upon the mutual mistake of the parties and granted Leinbach judgment on its cause of action for unjust enrichment.

In an appeal of an equitable action tried before a master authorized to enter final judgment, this Court must review the entire record and make its own findings of fact according to its view of the preponderance of the evidence." *Thomas v. Mitchell,* 287 S.C. 35, 37, 336 S.E.2d 154, 155 (Ct.App.1985). "This requirement does not, however, command us to ignore the findings of the trial judge who heard the witnesses." *Id.* at 38, 336 S.E.2d at 155

ARGUMENT I

THE MASTER ERRED IN JUDICIALLY CONSTRUING THE LEASE

LAW

> "Lease provisions are construed under rules of contract interpretation. See *United Dominion Realty Trust, Inc. v. Wal-Mart Stores, Inc.*, 307 S.C. 102, 105-07, 413 S.E.2d 866, 868-69 (Ct.App.1992) (applying the rules of contract construction to interpret the lease of a shopping center). One cardinal rule of contract interpretation is to ascertain and give effect to the intention of the parties. *Chan v. Thompson*, 302 S.C. 285, 289, 395 S.E.2d 731, 734 (Ct.App.1990). To determine the intention of the parties, the court "must first look at the language of the contract." *C.A.N. Enters., Inc.* v. *South Carolina Health and Human Servs. Fin. Comm'n*, 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988). The construction of a clear and unambiguous contract presents a question of law for the court. *Ward v. West Oil Co., Inc.*, 379 S.C. 225, 665 S.E.2d 618 (Ct.App.2008); see also *Pruitt v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n*, 343 S.C. 335, 339, 540 S.E.2d 843, 845 (2001).
>
> "Before judicial construction of a lease is appropriate to determine the intent of the parties to the lease, there must be an ambiguity in the lease; and in the absence of an ambiguity in the terms of the lease, no judicial construction is required or permitted. *(49 Amjur 2d Landlord and Tenant Section 44).* The question of whether a lease is ambiguous or clear is a question of law for the Court to determine, not a question of fact."

THE LEASE IS NOT AMBIGOUS

The heart of the issue between the parties was the extent of the demised premises. Leinbach took the position that the Demised Premises was limited to the area that Magnolia was using for its parking. The lease clearly limits the demised premises use to parking for its employees and those of Baker Motor Company. (Lease Section 1.02 Parking, Section 1.02 (repeated) Use of Space and Article VI, USE, Section 6.01 Use.(R. p.) The language used in each of those sections refers to the Demised Premises and not to the parking area. The only reference in the lease to "parking area" is in the first section 1.02 of the lease :

> Section 1.02 . Parking. Throughout the Demised Term Tenant and its employees shall have the exclusive right to use any parking areas within the Demised Premises"

The next section also labeled Section 1.02 and entitled" Use of Space" states that the demised premises shall be used by Tenant as parking for employees.

At the time of the creation of the lease there was nothing but an unimproved lot. There was no designated "parking area". Since the second Section 1.02 and also Section 6.01 allow the Tenant to use the entire demised Premises for parking the only impact of the first Section 1.02 is that use is exclusive and not by way of limitation of the extent of the demised premises.

In its order the Master failed to rule that the lease was ambiguous or not although he was requested to do so in Magnolia's Motion to Alter or amend (R.p.). The Master did, however find at page 4 paragraph 12 of the order :

"Based on the Court's review of the lease itself and hearing the testimony of the Plaintiff and Defendant's witnesses and, in particular, Mr. Carnevale, who was Plaintiff's real estate agent at the time, the Court finds that Section 1.01 of the lease entitled "demised premises" describes the demised premises as the entire 1.21 acre parcel shown on the plat at Plat Book DB, Page 47" (R.p.). (Plaintiff's Exhibiy 10 R.p.)

Magnolia asserts that this finding is consistent with Magnolia's assertion that the lease was unambiguous and not subject to parole or extrinsic evidence that would modify it's terms.

Over Defendant's objection, the Plaintiff was allowed introduce sketches and plans of the parking area that were not a part of the lease (R.p. Tr pp 20 ln 24 – pp 22 ln 18) and to testify that he thought the demised premises was limited to the parking area

(R.p.) as an explanation as to why he had made a mistake. These plans were submitted to Plaintiff in accordance with the lease that required his approval of the improvements. (Lease page 4, Article V Section 5.01) (R.p.)

The Court found in its order at page 6 paragraph 18 "Magnolia argues it is entitled to the quiet enjoyment of the entire parcel, On page 17 of the lease, however, the enjoyment of quiet title and peaceful possession is limited to "all rights herein granted" and those rights, as noted above, are <u>limited of the use of the parking in the designated area.</u>" (emphasis mine). <u>There is no designated area for parking</u> in the four corners of the lease. This can only be gleaned by the court taking notice of the plans for the improvements which were not part of the lease. The Court at page 9 Paragraph 28 also found in pertinent part that "A lease is tantamount to a conveyance of real property for the period of time of the lease."

> "In absence of ambiguity in description of realty conveyed by deed, grantor's intent was to be determined from within four corners of deed and he was deemed to have intended to convey land which was accurately and well-described within the deed." *Bellamy v Bellamy*, 292 S.C. 107,111, 355 SE2d 1,3 (Ct. App. 1987)

The court further made reference to the "parking area" in paragraph 16 of the order at page 5. Referring to Article XII, TITLE TO PREMISES, "The Demised Premises shall hereafter be subject to no leases ... which in any manner interfere with Tenant." Notably, it does <u>not</u> say the demised Premises is not subject to any lease. It only <u>forbids leases that interfere with the use of the parking area</u>." (emphasis mine) The problem is there is no parking area within the demised Premises. This goes to the issue of the unambiguous description of the Demised Premises. The court found that the Demised Premises consists of the entire 1.21 acre parcel, order page 4 paragraph 12. There is no parking area within the Demised Premises. Parking is only a use. This

Section of the lease is an affirmative warranty of title by the landlord, Leinbach, and an affirmative covenant that the property will thereafter not be subject to anything that in any manner would prevent or interfere with Tenant. If the erection of a cell tower on the demised premises does not prevent or interfere in any manner with Tenant, then nothing can.

The court should have excluded and not considered any evidence that tended to reduce the size of the demised premises as being in violation of the parole evidence rule.

> "Since the description in the deed of the land conveyed exactly matches the realty conveyed with no discrepancy as to the location of the boundaries, and no question as to the accuracy of the survey as shown within the deed's description, there is no ambiguity within the deed, either patent or latent, of the location of the property described in the deed; and we so hold. *Bellamy v Bellamy*, 292 S.C. 107, 355 S.E.2d 1, Court of Appeals of South Carolina , 1987."
>
> "It is fundamental law in this state that if a deed description is unambiguous, extrinsic evidence cannot add to, subtract from, vary or explain its terms, in the absence of fraud, accident or mistake in its procurement. *Kirven v. Bartell,* 266 S.C. 385, 223 S.E.2d 597 (1976) *Bellamy v Bellamy*, 292 S.C. 107, 355 S.E.2d 1, Court of Appeals of South Carolina , 1987".

In its remedy the court reformed the lease and reduced the sized of the "Demised Premises" to the area encompassing Magnolia's parking lot.

Based on the forgoing the court should find that the lease is unambiguous and not subject to judicial construction and reference to material outside of the lease was not admissible.

ARGUMENT II

THE MASTER ERRED IN REFORMING THE LEASE BETWEEN THE PARTIES

Neither party pled nor submitted evidence in support of the Masters ruling that their lease should be reformed. In its order the Master found that Magnolia had abandoned a portion of the demised premises which led to a mutual mistake of the extent of the demised premises.

A. THERE WAS NO MUTUAL MISTAKE

LAW

"On this issue the burden was upon him to show by clear and convincing evidence that there was not only a mistake but that it was reciprocal and common to both parties. *Gowdy v. Kelley,* 185 S.C. 415, 194 S.E. 156; *Moore v. Jeffords,* 195 S.C. 512, 12 S.E.2d 737. 'Before a court of equity will reform a solemn instrument, it must be shown by evidence which is the most clear and convincing, not simply it was a mistake on the part of one of the parties, but that it was a mutual mistake; that both parties intended a certain thing; and that by mistake in the drafting of the paper did not get what both parties intended.' *Sullivan v. Moore,* 92 S.C. 305, 75 S.E. 497. Where only one of the parties is under such mistake, 'equity will refuse its aid, except under very strong and extraordinary circumstances, showing imbecility or something which would make it a great wrong to enforce the agreement, and this must be made to appear by competent testimony of the clearest kind.' *Kennerty v. Etiwan Phosphate Co.*, 21 S.C. 226." *Belin v Stikeleather,* 232 S.C. 116,122;101 SE2d 185,188, (1957) *Sims v. Tyler*, 276 S.C. 640, 281 SE2d 229, S.Ct. 1981

A mistake by one party coupled with ignorance thereof by the other party does not constitute a mutual mistake within these rules. 76 *C.J.S. Reformation of Instruments* § 40 What Constitutes Mutual Mistake.

In the trial courts order the court found at paragraph 21 at page 7,

> "21. Plaintiff's leasing of a portion of the demised premises already leased to defendant constitutes a violation of Article 12 of the lease. While I find that the Plaintiff breached its lease with the defendant, I further find that Defendant's failure to utilize the area in question amounted to an abandonment of that part of he demised premises which resulted in a mutual mistake of fact – both parties were unaware that the wooded area was contained within the demised premises at the time that either lease

> <u>was entered into.</u> I further find that this abandonment occurred prior to Plaintiff's breach of the express terms of the lease by again renting a part of the demised premises" (Emphasis mine)

The statement that, "both parties were unaware that the wooded area was contained within the demised premises at the time that either lease was entered into", is contrary to the evidence. Magnolia's witness, Bill Cochran, testified that Magnolia was leasing the entire 1.21 acre parcel. (Tr.p. 100-109)(R.p.) Robert (Corky) Carnavale, Leinbach's realtor at the time the lease was entered into, testified that Magnolia was leasing the entire 1.21 acre parcel (Tr.p. 91-99) . The only testimony in regard to a mistake as to the extent of the demised premises was by Clyde Hiers, Leinbach's manager. (Tr.p. 49-50) R. p.) In fact Mr. Hiers testified that the lease describes the demised premises as the entire 1.21 acre tract (Tr. P 46-47). The court found at page 4 paragraph 12 of the order that the demised Premises as the "entire 1.21 acre parcel. There is no evidence that the parties were unaware the wooded area was contained within the demised premises at the time the lease was entered into. To the contrary both parties representative testified that the wooded area was a part of the demised premises and the court so found.

At best this was a unilateral mistake on the part of Leinbach. This is confirmed by the conclusion: At page 8 paragraph 26 " The tower lease was entered into by the Plaintiff under the mistaken belief that it had not leased the property to the Defendant. This was done without any assistance from the Defendant" (R.p.) There is no evidence in the record that would suggest that at the time the lease was entered into that either party was mistaken as to the extent of the demised premises. The unilateral mistake took place three years later.

B. THERE IS NO EVIDENCE OF ABANDONMENT

LAW

> An "abandonment" of leased premises occurs when a tenant leaves the premises vacant with the avowed intention not to be bound by the lease. Under the common-law definition of "abandonment," a lease may be abandoned when a tenant voluntarily relinquishes or vacates the leased premises with the intention to terminate the contractual rights to possession and control of the premises. For a lessee's actions to amount to an abandonment, two elements must be proven: (1) that the lessee vacated the premises, and (2) that the lessee had a clear intent not to be bound by the lease.
> 49 *Am. Jur. 2d Landlord and Tenant* § 214, Abandonment and re-entry; delivery and acceptance of keys—What constitutes abandonment.
>
> Black's Law Dictionary, Third Edition, page 5, defines "abandonment" to be: "The relinquishment of a right. It implies some act of relinquishment done by the owner without regard to any future possession by himself, or by any other person, but with an intention to abandon." *Holly Hill Lumber Co. , Inc. V Grooms*, 198 SC 118, 16 SE2d 816, 821 (1941)

Leinbach did not plead nor argue at the trial of the case that that Magnolia had abandoned a portion of the lease premises. The mere fact that the area in question was not being utilized does not rise to the level of abandonment. The parking lot plan clearly shows that the area in question was landscaped as part of the approval with the city of Charleston approval. (R.p. Plaintiff's Exhibit 6).

The statement , "I further find that this abandonment occurred prior to Plaintiff's breach of the express terms of the lease by again renting a part of the demised premises", is also not supported by the testimony for the same reasons stated above that there is no evidence of abandonment of any portion of the demised premises. The only evidence submitted in relation to the use of the demised premises was from Magnolia's representative Mr. Cochran. He chose not to improve that area because of the cost

involved. (Tr. p. 106-107) (R.p.) This decision was made at the inception of the lease between Leinbach and Magnolia and not after the erection of the tower.

Mr. Hiers testified that he made the mistake at the time he was approached by Optima Towers in 2006. (R.p.) (Tr.p. 49 ln 12 – p50 ln 16) Mr. Cochran and Mr. Carnavale testified that at the inception of the lease in 2003 between these parties it was intended that the entire 1.21 acre parcel be leased. Nothing happened between 2003 and 2006 that would constitute evidence of abandonment as defined above.

The court should thus reverse the Master on this issue and issue its ruling that the courts finding that Magnolia had abandoned a portion the leased premises was in error.

C. REFORMATION OF THE LEASE BETWEEN THE PARTIES WAS IN ERROR

LAW

"Description of land conveyed in deed can be reformed, and boundaries of realty redrawn, only where there is latent or patent ambiguity in description of land conveyed or where there is showing of fraud, coercion, or mutual mistake." "In absence of ambiguity in description of realty conveyed by deed, grantor's intent was to be determined from within four corners of deed and he was deemed to have intended to convey land which was accurately and well-described within the deed." *Bellamy v Bellamy*, 292 S.C. 107, (Ct. App.1987)

"Before a court will reform an instrument, the complaining party must show a mutual mistake by clear and convincing evidence, i.e., that both parties intended a certain thing and did not get what they intended by a mistake in drafting. A contract may be reformed on the ground of mutual mistake when the mistake consists of the omission or insertion of some material element affecting the subject matter or when the terms and stipulations of the contract are inconsistent with those of the parole agreement that preceded it.
George v Empire Fire and Marine Insurance Company 336 S.C. 206, 519 S.E.2d 107, (Ct. App 1999)

A mistake by one party coupled with ignorance thereof by the other party does not constitute a mutual mistake within these rules. 76 *C.J.S. Reformation of Instruments* § 40 What Constitutes Mutual Mistake.

Since there is no evidence of mutual mistake or abandonment the court has no power to reform the lease between the parties. Based on the forgoing The Court should reverse the Master on this issue.

ARGUMENT III

THE MASTER ERRED IN FINDING THAT THE MAGNOLIA HAD BREACHED THE PAYMENT TERMS OF THE LEASE WITH THE LEINBACH.

In its Order, at paragraph 22, the court found that Magnolia had breached the lease, "Plaintiff contends that Defendant breached the lease by reducing its lease payments by the amount of the lease payments received by Plaintiff from Optima Towers. I agree. Article 6.03 of the lease clearly allows for abatement of the rent. The leasing of a portion of the property to another, including fencing off the entire area, completely prevents Defendant's access to that area; however I specifically find that the Plaintiff's action does not interfere with the Defendant's normal use of the area of the demised premises. It does however effectively eject Defendant from future use of this part of the original demised premises." (emphasis mine). (R.p.) The court then went on to state at paragraph 23 of the Order (R.p.) , "While the defendant did effect a remedy allowed by the lease , I find that the self –help remedy the Defendant has utilized is excessive and constitutes a breach of the payment terms of the lease."

Thereafter in the Conclusion of Law at Paragraph 24, (R.p.) the Court concluded "I conclude that Section 6.03 of the lease provides Defendant's remedy for Plaintiff's interference with Defendant's use of the demised premises. This Section 6.03 permits the tenant (Magnolia) to abate rent due to the landlord during the time that such interference persists." (R.p.)

Section 6.03 of the lease provides: "Section 6.03. Landlord's Interference. Landlord shall use its best efforts to not interfere with Tenant's operations. If Landlord creates a condition that substantially interferes with the normal use of the Demised

Premises or appurtenant parking or service area as allowed herein, the Rent and other charges due hereunder shall be abated during the time such interference persists, ..."(R.p.)

In essence the Court has concluded and found that Magnolia has the right to abate the rent but because the leasing of a portion of the demised premises to another does not interfere with the Defendant's normal use of the area of the demised premises its abatement is excessive, and constitutes a breach of the payment terms of the lease.

The forgoing paragraphs from the order are inconsistent, the statement "I specifically find that the Plaintiff's action does not interfere with the Defendant's normal use of the area of the demised premises." is completely inconsistent with the next sentence " It does however effectively eject Defendant from future use of this part of the original demised premises and the sentence "The leasing of a portion of the property to another, including fencing off the entire area, completely prevents Defendant's access to that area" If the interference ejects the Defendant and prevents the Defendant's access to the area, it has to interfere. Plain language interpretation demands it.

By exercising a right provided by the lease the defendant cannot be in breach of the lease as stated and concluded above. If the abatement is excessive, if anything, it goes to the issue of damages. It should be noted that Section 6.03 of the lease quoted above allows the total abatement of the rent and other charges. In this case Magnolia reduced its rent payment by $800.00, the amount of the lease payments that Leinbach was receiving from Optima Towers not the full amount of its rent payments of $1,854.00 per month.

In interpreting an unambiguous contract the court should give it its ordinary and plain meaning . A remedy allowed by the lease should not create a default by Defendant.

The Court should reverse the Masters finding Magnolia breached the lease.

ARGUMENT IV. THE MASTER'S REMEDY WAS IN ERROR

A. THE MASTER ERRED IN FINDING THAT THE LEINBACH WAS ENTITLED TO RELIEF UNDER ITS CAUSE OF ACTION FOR UNJUST ENRICHMENT

The Court in its order fashioned an equitable remedy that allowed both parties to benefit from the payments from the Tower lease. This was all based on the unpled theories of abandonment, mutual mistake and reformation. The issues of mutual mistake, abandonment and reformation have been previously argued and should control this issue, that is, if this Court determines that there was no abandonment and mutual mistake then reformation was not appropriate and the lease should be enforced as written which includes allowing Magnolia to abate the rent in an amount equal to the Tower lease payments. Without waiving the forgoing Magnolia assets that it was error to grant Leinbach relief for unjust enrichment and further error to deny Magnolia relief for unjust enrichment or grant it full abatement of the rent from Optima Towers.

In its order the Master found, concluded and ordered that Leinbach's claim for unjust enrichment should be granted. In reaching that conclusion the Master concluded: at paragraph 28 page 9, "Plaintiff's claim for unjust enrichment against the Defendant is granted. Plaintiff asserts that "Defendant has been unjustly enriched because they are not paying the full amount of the rent bargained for under the lease." (R.p.) The fact that Magnolia is not paying the full amount of the rent bargained for under the lease does not impact Leinbach because it is receiving the full amount of the rent it bargained for under the lease.

LAW

"Unjust enrichment" is an equitable doctrine, akin to restitution, which permits the recovery of that amount the Defendant has been unjustly enriched at the

expense of the Plaintiff.1 While the two terms are often mentioned in one breath, actually only restitution is a form of remedy, whereas unjust enrichment provides the general theoretical framework for all damages awarded in the context of implied and constructive contracts. 13 *S.C. Jur. Implied Contracts* § 6, Unjust enrichment and restitution. and cases cited therein.

"It is not necessary, in order to create an obligation to make restitution, that the party unjustly enriched should have been guilty of any tortious or fraudulent act; the question is: Did he, to the detriment of someone else, obtain something of value to which he was not entitled? In such cases the simple, but comprehensive, question is whether the circumstances are such that equitably defendant should restore to plaintiff what he has received." 77 C.J.S. Restitution at 322-323. *Harper v McCoy at 784.*

In the case of *Harper v McCoy* 276 S.C. 170, 172 276 S.E.2d 782,783-784

1981, the Court stated

"A cause of action for restitution is a type of the broader cause of action for money had and received, and generally the object to be attained in proceedings for restitution is the prevention of unjust enrichment of the defendant and the securing for plaintiff of that to which he is justly and in good conscience entitled. A person who has been unjustly enriched at the expense of another is required to make restitution to the other, and if one obtains the property or the proceeds of property of another, without a right to do so, restitution in a proper case can be compelled.... at *id* 784

In this matter the question is, has Magnolia obtained the property or the proceeds of property of another (Leinbach), without a right to do so? The underlying question then is whether the property interest, the Tower lease, is the property of Leinbach, the landlord, or property of Magnolia, the tenant. If the property interest is the Tenant's, Magnolia, then it has not obtained the property or the proceeds of property of another, Leinbach, and Leinbach cannot recover.

"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

Leinbach leased the subject property to Magnolia for 20 years inclusive of all options. Magnolia is in its 10th year. Based on the forgoing statement of law Magnolia owns the property interest for twenty years. At the time the lease was negotiated the rent was calculated at capitalization rate of 8 to 10% per anum based on Leinbach's estimate of value at the time of $300,000.00. (R.p.) Tr.p. 52 ln 6-19. Based on that it anticipated, through the date of the trial, to receive a total of $193.352. 65. Exhibit 8 (R.p.) from the rent generated from the property. However, with the inclusion of the cell tower lease payment, $54,116.65, he received a total of $207,477.65 over the same period. In essence $14, 125.00 more than he bargained for in 2003, in other words Leinbach has not been damaged by the abatement. If Leinbach has not been damaged by Magnolia's abatement then Magnolia's abatement can't be at Leinbach's expense and Leinbach should not have recovered on its cause of action for unjust enrichment.

Additionally, Leinbach mistakenly created the production of the rent produced by the cell tower. It did so under the mistaken belief that the property was not leased to Magnolia. (Tr.p. 50 ln 16 – 25; p. 61 ln 16-18; p 64 ln 14-15) Had it realized that the property was already leased to Magnolia it would not have entered into the lease with Optima. (Tr.p. 49 ln 12-25 p. 50 ln 4) It cannot, thus, be argued that Leinbach bestowed a benefit upon Magnolia that it would be inequitable for Magnolia to retain.

The court made additional findings which are pertinent to this Argument, it ordered at paragraph 35, Page 11, (R.p.) "while I find that the Leinbach received a total of $207,677.65 through the month of October 2011, <u>it received this amount through its</u>

own efforts and not at the unjust expense of the Magnolia. (emphasis mine) I find that the Leinbach received enrichment over the contract amount but I find that the amount was not unjust." (emphasis mine) This finding is not support by the evidence. The fact that Leinbach sought and leased property already leased to Magnolia through its own efforts is a characterization of Leinbach's breach of the lease for which it should not be rewarded. Leinbach should not have been making any effort to lease property already leased to Magnolia. Magnolia asserts that if Leinbach was enriched, it would have to be unjust given the fact that it had bargained for a specific amount of rent from the Magnolia for the full term of the lease and would receive greater than it bargained for and it would be unjust for the Leinbach to receive greater than the rent it initially bargained for.

The finding "not at the unjust expense of the Magnolia" fails to consider that Leinbach exploited a valuable property right of the Magnolia and therefore it has to be at Magnolia's expense and it is unjust to allow it to happen.

Leinbach further argued and the court found that the money it received is not at the "expense of the tenant". This is clearly erroneous. Any use of the demised property by the landlord contrary to the Lease with the Magnolia which yields Leinbach additional remuneration is "at the expense of the tenant." Restitution is not damages but a remedy to prevent unjust enrichment. *Sauner v Public Service Authority of South Carolina. 581 S.E.2d 161* Restitution is a remedy designed to prevent unjust enrichment. *" Stanley Smith & Sons v. Limestone College, 283 S.C. 430, 434, 322 S.E.2d 474, 478 (Ct.App.1984) Moore-Hudson Oldsmobile/GMC, Inc. v. Waterman, 298 S.C. 107 (1989) 12 S.C. Jur. Equity § 23 . Restitution and unjust enrichment*

The court made the further finding at page 7, paragraph 22 that reflects that Magnolia was ejected from the area in question. Ejecting Magnolia from a portion of the demised premises is at the Magnolia's expense. The demised premises is Magnolia's property. Leinbach's gain was Magnolia's loss and therefore at Magnolia's expense. Leinbach exploited Magnolia's valuable property to its gain. Magnolia's action was to recover its property right that was exploited and was allowed in the lease by abatement.

Based on the forgoing authority it cannot be said that Magnolia has been unjustly enriched and that Leinbach is justly and in good conscience entitled to the use of the Tower lease rents during the term of Magnolia's lease.

B. THE MASTER ERRED IN DENYING MAGNOLIA RELIEF UNDER ITS CAUSE OF ACTION FOR UNJUST ENRICHMENT

The thrust of Magnolias claim against Leinbach has not been a claim for damages, as argued by Leinbach, limited to the square footage lost as a result of the erection of the Tower but a claim for restitution to prevent Leinbach's unjust enrichment. A claim to prevent Leinbach from capitalizing on its unilateral mistake.

Magnolia asserted that it was entitled to abatement under the lease or to recover from Leinbach under its cause of action for unjust enrichment. In order to recover under this cause of action for unjust enrichment it would have to show that Leinbach had obtained the property or the proceeds or property of Magnolia without a right to do so and that it would be inequitable for it to retain it.. The case of *Harper v McCoy* cited above is more in keeping with Magnolia's claim than Leinbach's.

> A person who has been unjustly enriched at the expense of another is required to make restitution to the other, and if one obtains the property or the proceeds of property of another, without a right to do so, restitution in a proper case can be compelled.... *Harper at* 784. (emphasis mine)

The court found Leinbach had been enriched, at page 11 paragraph 35, "While I find that the Plaintiff (Leinbach) received a total of $207,677.65 through the month of October 2011, it received this amount through its own efforts and not at the unjust expense of the Defendant. I find that the Plaintiff received enrichment over the contract amount but I find that the amount was not unjust." (emphasis mine) This finding satisfies the requirement that one has to be enriched. The next requirement would be whether that enrichment was at the expense of Magnolia.

As previously argued and found by the Master a lease is tantamount to a conveyance of real property for the period of time of the lease. (order page 9 paragraph 28 (R.p.). As argued above the demised premises is the property of the tenant for the lease term. By leasing a portion of the property already leased to Magnolia the court found that it had breached the lease, (order page 7 paragraph 21). Since the property right is the property right of the tenant and not the landlord then Leinbach took a valuable property right that he should equitable have to return to Magnolia,

> "Did he, to the detriment of someone else, obtain something of value to which he was not entitled? In such cases the simple, but comprehensive, question is whether the circumstances are such that equitably defendant should restore to plaintiff what he has received." 77 *C.J.S. Restitution* at 322-323. *Harper v McCoy at 784.*

The court further stated that "it was at the expense of Magnolia but it was not unjust" and further "the enrichment to Leinbach was not unjust". Whether the enrichment and at the expense of Magnolia was just or unjust is not an element of the cause of action. As stated above from *Harper v McCoy* , "Did he, to the detriment of someone else, obtain something of value to which he was not entitled?" Clearly the answer is yes and as result Magnolia should recover on its claim for unjust enrichment.

C. THE MASTER ERRED NOT ALLOWING MAGNOLIA FULL ABATEMENT OF THE RENT BEING RECEIVED FROM OPTIMA TOWERS

In its remedy the court found that Magnolia was entitled to abate the rent but in an amount that was calculated based on the loss of use of the tower area of the demised premises. This is an incorrect calculation of the amount of the abatement. The language at Section 6.03 of the lease provides in pertinent part "the Rent and other charges due hereunder shall be abated during the time such interference persists". The lease thus allows a total abatement of the rent not merely a partial abatement.

The Master stated in his conclusion that "it would inequitable for the Magnolia to get the full benefit of the amount of the rental payments from Optima after having sat on their rights to stop the Tower's construction" (order page. 9 paragraph 28) is not supported by the evidence and contrary to the ruling of the court that Leinbach's cause of action for equitable estoppel does not lie (order page 8 paragraph 25.) (R.p.)

The Master further made a finding at page 7 and 8 " To allow Defendant (Magnolia) to benefit from its failure to object to use of its demised premises and then to wait and claim that Plaintiff has been unjustly enriched from its own efforts smacks this court as both a breach of the parties agreement and inequitable conduct."

There's no support in the record that there was any inequitable conduct on the part of the Magnolia. Leinbach's conduct was active, it leased the property to another when it knew or should have known that the property was leased to Magnolia. Magnolia's conduct was passive and based upon ignorance of the fact that Leinbach would have the audacity to lease property to two different people. Leinbach now seeks

forgiveness for its unilateral mistake and a ruling that would allow it to profit from therefrom. If there was any inequitable conduct it was the conduct of Leinbach.

Magnolia may have passively acquiesced in the construction off the tower but it did not waive any of its rights to demand strict compliance with the terms of the lease upon learning of the Leinbach's breach. "A mistake by one party coupled with ignorance thereof by the other party does not constitute a mutual mistake within these rules. 76 *C.J.S. Reformation of Instruments* § 40 What Constitutes Mutual Mistake.

Inasmuch as the lease was not ambiguous and subject to judicial construction the provision for abatement should be enforced as written, however only for the amount of the Tower lease not the full amount as allowed in the lease.

D. THE MASTER ERRED IN HIS CALCULATION OF THE ARREARS IN RENTAL PAYMENTS OWED BY MAGNOLIA TO LEINBACH

In the event that the court rules that the lower court was correct in its assessment Magnolia would request that the court correct a mathematical error in the lower courts order.

In the section of the Court's order entitled "The Remedy" the Court found at page 12 paragraph 36, that the Defendant owed Plaintiff $39,791.65. This was based on Plaintiff's Exhibit 8 that compared the rents owed under the lease to the actual rent paid. (R.p.). ($193,352.65-$153,561.00=$39,791.65)

Previously in the order at page 11 paragraph 33 the court found that as a result of the erection of the cell tower the Defendant was deprived of approximately 0.2 of and acre or one sixth (1/6) of the area it contracted to lease. As a result of that calculation he found that the Defendant was entitled to an abatement of the rent in a fixed amount of

$300.00 per month (1/6 X $1,800) "from the time the cell tower began to pay on its rental term." (order pp 11 Tr.p.), "with that figure to be adjusted over the life of the lease assuming the defendant continued to exercise its options to renew."

The forgoing fixed dollar amount of $39,791.65, however is based upon the original lease and does not reflect the abatement of $300.00 per month, as adjusted, from the inception of the cell tower lease. The court found that a period of 66 months, from April 1, 2006 through October 1, 2011 (the month of the trial) had elapsed from the inception of the cell tower lease.

Attached to this argument is a table calculating the alleged arrears. Column 1 is the actual rent paid by Magnolia over the period in question. Column 2 is the rent that was is actually due in accordance with the lease with 3 % increases. Column 3 is the amount due with the court awarded offset of 1/6. Based on the forgoing table alleged arrears should thus be $17,466.21 instead of $39,791.65.

In Magnolia's motion to alter or amend it requested the court to correct this mathematical error.

Magnolia would thus request the court to reverse the lower court on this calculation.

RENTAL PAYMENT SUMMARY
6/1/2003 - 10/1/2011
FROM MAGNOLIA PARADIGM
to
56 LEINBACH

	Rent from Magnolia	Due From Property	Due with offset	Balance (1.)
6/1/2003-6/1/2004	$ 21,600.00	$ 21,600.00	$ 21,600.00	$ -
6/1/2004-6/1/2005	$ 21,600.00	$ 21,600.00	$ 21,600.00	$ -
6/1/2005-6/1/2006	$ 21,600.00	$ 21,600.00	$ 21,600.00	$ -
6/1/2006-6/1/2007	$ 22,248.00	$ 22,248.00	$ 18,648.00	$ (3,600.00)
6/1/2007-6/1/2008	$ 19,048.00	$ 22,915.44	$ 19,096.20	$ 48.20
6/1/2008-6/1/2009	$ 13,622.00	$ 23,602.90	$ 19,669.09	$ 6,047.09
6/1/2009-6/1/2010	$ 14,004.00	$ 24,310.99	$ 20,259.16	$ 6,255.16
6/1/2010-6/1/2011	$ 14,004.00	$ 25,040.32	$ 20,866.93	$ 6,862.93
6/1/2011-10/1/2011	$ 5,835.00	$ 10,435.00	$ 8,695.83	$ 2,860.83
Totals	$ 153,561.00	$ 193,352.65	$ 172,035.21	$ 18,474.21

1. Balance = Due from Offset - Rent Paid by Magnolia

ARGUMENT V

THE MASTER ERRED IN NOT AWARDING MAGNOLIA ATTORNEY'S FEES

In the courts order, Remedy, page 12, paragraph 37, Attorney's Fees, the court found that neither party was entitled to an award of attorney fees. Assuming this court agrees with Magnolia's position, Magnolia requests the Court to reverse the Master regarding awarding attorney fees to Magnolia.

> "As a general rule, attorney fees are not recoverable unless authorized by contract or statute." 2 *S.C. Jur.* Attorney Fees § and cases cited therin.

The lease at page 21 Section 14.11. Attorney's Fees, provides for the prevailing party to recover reasonable attorney's fees. At the trial of the case, Magnolia presented evidence of attorney's fees and an affidavit in support of Magnolia's attorney's fees. Leinbach did not submit any evidence which would support its intent to seek attorney's fees and therefore should be considered to have abandoned its claim for attorney's fees.

In its counterclaim Magnolia sought abatement of rent which is what the Court found was appropriate. Although the Court found that the amount of abatement was somewhat less than what the Defendant sought, it still was a beneficial and prevailing result as it defeated at least a portion of the Plaintiff's claim for a breach of contract.

The Court found that the Plaintiff breached its lease by leasing it to another (order page 7 paragraph 21). The Court also found that the Defendant breached the lease payment terms by excessive abatement. As previously argued, this finding should be in error. Abatement is allowed by the lease and the only issue was the amount of the abatement which only goes to the issue of damages, not to the issue of the breach of the lease. Since the lease was breached by the Leinbach and not by the Magnolia this court

should award reasonable attorney's fees to Magnolia consistent with Magnolia's affidavit in support of attorney's fees.

CONCLUSION

In order to tap the equitable remedies of the court the court found that there had been a mutual mistake of fact warranting reformation of the parties agreement. In doing so he re-wrote the lease between the parties. This was clearly erroneous as argued.

This was an action at law. The court's role was to interprets the contract and determine if there was any ambiguity that allowed the admissibility of parole or extrinsic evidence. The court never ruled that the lease was ambiguous or not. Magnolia asserts that the lease was not ambiguous and the court should not have considered matters outside the four corners of the lease.

What occurred here was Leinbach made a unilateral mistake. After the fact he looked to the lease to see whether or not there were any provisions in the lease that would justify what he had done and seized on interpretations of certain sections to try to accomplish that. To a degree he was successful, however, the court agreed that Magnolia had a right to abate the rent and then fashioned a remedy that split the baby.

This should be considered error on the part of the Master. There was no mutual mistake warranting reformation of the lease. With the court overruling the Master on that point then this court should determine that the lease unambiguously describes the demised premises as the entire 1.21 acre parcel and that Leinbach had no right to lease a portion of the property already leased to Magnolia.

The remedy is provided for in the lease that is abatement. Since Leinbach bargained for the rent provided for in its lease with Magnolia it should receive that amount only from Magnolia and Optima Towers. Thus the abatement is an amount equal

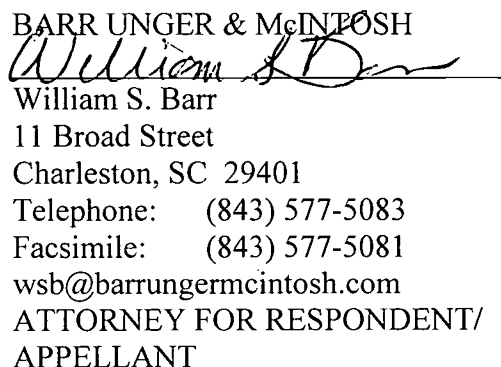
to the amount of the Optima Tower payments makes Leinbach whole and provides Magnolia with the benefit it is entitled to under its lease. The fact that Magnolia received a benefit from the cell tower lease should be of no consequence since Leinbach receives the benefit of its bargain, a 20 year lease with three per cent increases per annum .

Leinbach sued for breach of contract. He was not damaged by Magnolia abating the rent in an amount equal to the payment it was receiving from Optima Towers. His breach of contract action thus fails.

He also sued for unjust enrichment. There is no unjust enrichment to Magnolia because that has to be at the expense of Leinbach. Although Magnolia is receiving a benefit from the Optima Tower lease payment it is not at the expense of Leinbach. Leinbach would have to suffer some ascertainable loss for it to be at its expense. Having suffered no loss it is not at his expense.

The court should reverse the decision of the Master and enter judgment for Magnolia allowing it full abatement of the rent received by Leinbach since the inception of the tower lease as well as reasonable attorney's fees.

Respectfully submitted,



BARR UNGER & McINTOSH
William S. Barr
11 Broad Street
Charleston, SC 29401
Telephone: (843) 577-5083
Facsimile: (843) 577-5081
wsb@barrungermcintosh.com
ATTORNEY FOR RESPONDENT/
APPELLANT

Charleston, South Carolina
March 11, 2013

RECEIVED
MAR 1 3 2013
SC Court of Appeals