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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
DEBRA R. MCCASLIN, CIRCUIT COURT JUDGE

Appellate Case No. 2021-000460

Quality Fresca I, LLC, ...Appellant,

v.

Kenneth R. Davenport, II, Personal Representative of the
Estate of Kenneth R. Davenport, ...Respondent.

FINAL BRIEF OF APPELLANT

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ATTORNEYS FOR APPELLANT

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II. To the extent equitable principles should have been considered at all, tenant's assumption of commercial space for a restaurant in downtown Charleston the early months of the 2020 pandemic weighed in favor of construing equity in favor of tenant.

III. The circuit court erred in finding and concluding that the magistrate did not have jurisdiction to grant an appeal bond for the appeal to the circuit court. In addition, landlord did not appeal the magistrate's order setting the appeal bond, so this issue was not preserved for review by the circuit court, was moot and should not have been addressed by the circuit court.

STATEMENT OF THE CASE

This is an appeal by Quality Fresca I, LLC (hereafter "Tenant") from a magistrate's court ruling ejecting Appellant Tenant from commercial retail property in downtown Charleston. The matter was appealed to the circuit court, which affirmed. Tenant appeals both orders.

The lease applicable to the parties to this action (the "original lease") was executed on September 25, 2013 between landlord and Tenant's predecessor in interest, Ochlocknee Ventures, LLC. (R. pp. 44-69). The lease was amended by an Assignment, Assumption and Amendment of Lease executed October 16, 2018. (R. pp. 70-80). Lastly, a subsequent Assignment, Assumption and Amendment to Lease Agreement was executed as of May 8, 2020, to include the current Tenant, Appellant Quality Fresca I, LLC (R. pp. 147-150) (already designated herein as "tenant"). The May 8, 2020 Assignment, Assumption and Amendment is referred to here as the "COVID-19 Amendment."

Tenant notified landlord in writing on September 3, 2020 that Tenant was exercising its option to renew. (R. pp. 170-171). The email enclosed a letter dated September 3, 2020 from tenant, formally exercising its option to renew the lease for the first five-year period. (R pp. 172). This was before the lease had expired on September 30, 2020. (R. p. 255, line 14 – p. 256, line 10). Tenant paid rent for October, the first month of the renewed lease, on September 28, 2020, which tenant (or its agent) accepted. (R. p. 278, line 18 – p. 283, line 23). The magistrate's court was not made aware that tenant had paid for the first month of the rent for the renewed lease when it issued its order. (R. p. 337, lines 10-21). Additionally, rent for November, 2020 was also paid, but that was paid during the pendency of the ejectment proceeding before the Magistrate' court.

(R. p. 337, line 25 – p. 338, line 18; p. 342, lines 6-17). It was also learned at the bond hearing that Tenant's payments were made to the management company, not directly to landlord. *Id.*

Two days later, on October 1, 2020, Landlord instituted a proceeding entitled "Rule to Vacate or Show Cause (Eviction) alleging "the terms of your tenancy or occupancy have ended" and "[y]ou have violated the terms of conditions of your lease. . ." (R. pp. 37-94).

Landlord argued that tenant should be evicted because of a series of emails exchanged between landlord and tenant during the Summer of 2020, when virtually all businesses in the country were trying to determine if they were going to survive the COVID-19 quarantine. One of the emails exchanged included a statement by an agent of tenant that [based on what it knew then] it would "unfortunately" be unable to renew the lease prior to expiration. (R. pp. 425-426). However, during those email discussions, landlord also said no decision had been made as to renewal. (R. pp. 437-438).

The Magistrate granted landlord's motion to evict tenant. (R. pp. 3-12). Tenant appealed to the circuit court, and the Magistrate issued an order for an appeal bond which required tenant to pay full compensation to landlord during the appeal to the circuit court. (R. pp. 13-14). The circuit court affirmed the Magistrate's order (R. pp. 15-32). Appeal to this Court was timely filed. This Court granted tenant's petition for writ of supersedeas to continue the terms of the Magistrate's appeal bond in effect "until a final ruling by this court." (R. p. 36).

FACTS RELEVANT TO ALL ISSUES

At the time of the COVID-19 Amendment, the country was in the early days of the COVID-19 pandemic, and restaurants in South Carolina were operating at a severely reduced level, if at all, pursuant to Section 1 of Executive Order 2020-05008 issued by Governor Henry McMaster

and effective Monday, May 11, 2020. That Executive Order permitted "limited indoor, on-premises customer dining" for restaurants in the state and "incorporating guidelines established by the South Carolina Restaurant and Lodging Association, in additional to undertaking and implementing all reasonable steps to comply with any applicable sanitation guidelines promulgated by the CDC, DHEC, or any other state or federal public official." (McMaster Executive Order 2020-05-08, not included in ROA).

The COVID-19 Amendment (to which Landlord consented) was executed the same date as Governor McMaster's executive order 2020-05-08. (R. pp. 146-151). The COVID-19 Amendment included, *inter alia*, assignment to the present Tenant and amendments to the October 2018 lease to include *deferral of rent* contingent upon payment in advance of certain monthly rent and all CAM for April and May 2020. (R. pp. 146-151).

Thus, the COVID-19 Amendment to lease was executed in the midst of the pandemic, making those circumstances relevant to the intent of the parties at the time the document was executed on May 8, 2020. Tenant's restaurant was still shut down at the time the COVID-19 amendment was executed.[1] (R. p. 288, lines 9-24).

The COVID-19 Amendment included the following provision:

> Landlord acknowledges and agrees that . . . Assignee shall be entitled to exercise any of Assignor's options or rights afforded to Assignor, as tenant under the Lease, pursuant to the terms and conditions provided therein, including, but not limited to, tenant's option to extend the term of the Lease for two (2) additional five (5) year periods as set forth in Section B.2 of the Lease.

(R. p. 148, Section 3).

[1] The record reflects that the restaurant reopened "the first week of June. . . temporarily for . . . Thursday, Friday and Saturdays, and then slowly expanded days of the week until the college students returned." (R. p. 289, lines 2-6).

Thus, when the parties executed the COVID-19 Amendment, everyone knew that restaurants were closed and any date for reopening was speculative at best. Nonetheless, Landlord expressly renewed the existing option for two (2) five-year extensions of the lease with full knowledge that operating restaurants was an assumed risk.

Tenant notified Landlord in writing on September 3, 2020 that Tenant was exercising its option to renew. (R. p.170). The email enclosed a letter dated September 3, 2020 from tenant, formally exercising its option to renew the lease for the first five-year period. (R. pp. 171-172). This was well before the lease had expired on September 30, 2020. (R. p. 255, line 14 – p. 256, line 10). In response, Landlord's attorney wrote a letter via email to Tenant on September 4, 2020 attempting to claim a default by tenant. (R pp. 430-431). The subject line of the letter was "[d]efault of and waiver of option under that certain . . . lease dated September 25, 2013. . ."

The letter also pointed out for the first time, that the security deposit from the COVID-19 Amendment had not been paid, which prompted tenant to send it. *See* discussion, *infra.*

Landlord's lawyer attempted to characterize emails that had been exchanged during the summer of 2020 as "notice" that tenant "would be vacating. . ." which is a misstatement of the content of the emails.[2] According to Landlord, an agent of Appellant/tenant contacted the Landlord during the summer of 2020 to "solidify the lease that was coming up with – coming up for renewal with options." (R. p. 250, lines 1-6). This is not a case of Tenant or Landlord asking for advance notice of renewal. To the contrary, Landlord testified that no notice of the option to

[2] The emails were admitted into evidence by stipulation as to "authenticity [and] foundation." (R. p. 240, line 13 – p. 241, line 5; p. 246). They are listed as without an exhibit number in the Magistrate's Return Vol. 1, p. 4. (R. p. 100).

renew was required, and under the lease "[Tenant] could wait till the very last day of the lease to exercise the option." (R. p. 272, lines 17-21.)

The summer 2020 emails included a July 27, 2020 email with Tenant's agent saying, 'let us know if you find another tenant.'[3] (R. p. 256, lines 13-18; p. 274, lines 2-16; R. p. 161). Landlord's agent testified on direct that they "made a few phone calls" and found "a new tenant. . ." because they "had the impression" tenant was not going to exercise its option to renew. (R. p. 252, lines 17-20; p. 257, line 14).

Only on cross did Landlord admit the "new tenant" was vacuous, in that there was no actual lease to this "new tenant," no copy of any such lease or agreement was offered into evidence, the terms of any such agreement supposedly existed "for a period of time," and the new tenant was not obligated to do anything while the current tenant remains in the space. (R. p. 263, lines 11 – p. 264, line 2; Tr. p. 267, lines 6 – 15). Landlord did not produce a signed lease and offered no testimony that it had sustained any damages as a result of making "a few phone calls."[4]

The representative for landlord admitted that on July 27, 2020, it had agreed to notify tenant if it found a new tenant. (R. p. 274, lines 2 – 16). However, no such notice was ever given to tenant. (R. p. 266, lines 15-22; p. 274, lines 2-6; lines 14-16; p. 276, lines 13-19). On August 25, 2020, Tenant made clear in an email to Landlord that Tenant was still considering exercising the

[3] The emails, which were admitted by stipulation, are identified on the Magistrate's Return as Item 7 of exhibits, but with no exhibit number. (R. p. 100). The documents included in the Magistrate's Return Vol. 2 at pp. 14-25, attached here as Defendant's Exhibit. (R. pp. 160-171).

[4] In fact, the only speculative "damages" which landlord testified would have occurred was if the shadowy "new tenant" leaves, not if the current Tenant stays. (R. p. 273, lines 17-25). The testimony (via an extremely leading question) was merely that Landlord was "concerned that . . . the estate is going to have to incur expenses with respect to the broker that it engaged and with respect to the new tenant and that opportunity being lost." (R. p. 273, lines 20-25). There was no testimony that any action of the existing Tenant had caused any damages at all to Landlord.

option. (R. p. 166). At that time, Landlord for the first time raised other issues that suggested Landlord did not want Tenant to renew the lease. *Id.* at page 21.

Landlord wanted tenant to leave. Landlord attempted on August 25, 2020 to characterize Tenant's July 27, 2020 email as "Quality Fresca has elected to not exercise their option regarding the lease extension. . .". (R. p. 165). Tenant immediately disputed that, and responded within a day to clarify that no such notice had yet been given and Tenant was still considering the option of exercising the option. (R. p. 166). Only then did Landlord decide to find fault with Tenant's occupancy of the premises. *Id.* p. 21.

It is impossible to find detrimental reliance when Tenant made clear it was still considering exercising the option long after the "unfortunately it does" email of August 6, 2020. (R. p. 163). Tenant made clear that nothing in the emails should be construed as notice of tenant's intent to vacate. Landlord demonstrated absolutely no detrimental reliance on the summer 2020 emails, and if it so relied, it did so despite the August 25, 2020 email that expressly said the option was still being considered. *Id.* Any claimed detrimental reliance was unreasonable in light of the express statement on August 25, 2020 that the option was still being considered.

The original 2013 lease included several specific terms relevant to the issues before the Courts, none of which was raised by landlord, nor addressed by the magistrate's court or the circuit court.

A. Section B.1 provided that the lease ended on the 30th day of September 2020.

B. Section B.2 permitted two (2) additional five (5) year tensions with no date specified for tenant's election to extend the Lease.[5]

C. Section 21.b requires "written notice" to Tenant of any default under the lease, which written notice shall "specify[] any such event of default" and advising of the right to cure within 20 days in the written notice of default.

The pleadings in this matter alleged, erroneously, that "Tenant never made the $30,496.00 Security Deposit required by Paragraph 4.c of the Assignment, Assumption and Amendment of Lease dated May 8, 2020." Landlord made this allegation even though the option to extend the lease for another five years was made September 3, 2020, before the expiration of the lease. (R. p. 255, line 14 – p. 256, line 10). This false statement was also made despite Tenant's tendering of the Security Deposit and future advance rental on September 29, 2020, which was both before the end of the lease and before this action was filed. The full amount was tendered a second time, as discussed herein.

Testimony established that tenant tendered the full Security Deposit before the expiration of the lease on September 29, 2020. "The – balance owed on the security deposit was not paid until September 29, 2020." (R. p. 278, lines 8 – 19; p. 279, lines 12-16). Evidence further reflected that at no time had Landlord requested payment of the security deposit after the COVID-19 Amendment was executed. The issue arose only after Tenant exercised its option, via counsel's September 4, 2020 letter, which was an attempt by landlord to terminate the lease after the option had already been exercised. (R. p. 279, lines 11 – 25).

[5] The landlord Kenneth Davenport testified "there's no defined period that says they have to exercise that option within a certain period of time. So they could wait till the very last day of the lease to exercise that option." (R. p. 272, lines 17-21).

Landlord instructed the property manager not to accept the security deposit when it was paid on September 29, 2020 (before this lawsuit had been filed). Landlord's agent testified that the payment, if accepted, would have brought Appellant tenant's financial obligations current. (R. p. 280, line 5 -25; p. 282, line 2 – 6). Landlord testified that tenant paid $41,995.99 on September 29, 2020, but Landlord rejected the payment on October 1, 2020.[6] Appellant\tenant then made as second payment on October 12 "in the same amount and that was rejected on October 14. As "instructed to by the owner of the property." (R. p. 280, lines 1 – 21). The reason the Landlord gave for rejected both payments sent by Appellant/tenant is that "Moe's was not exercising their option and the money was not to be collected." (Tr. p. 280, line 16 – p. 281, line 1). This was clearly false, and Landlord lied to his agent because the option had been exercised on September 3, 2020.

These funds were rejected *despite* the option having already been exercised and this action already having been filed. (R. p. 283, lines 3-11); Clearly, Landlord did not want Tenant to exercise its option to renew, and is attempting to use the summer 2020 correspondence as a reason to terminate the lease even though the option was exercised and the full payment tendered *before* the lease expired. In seeking supersedeas from this Court, tenant included an affidavit from the Account Manager who maintains the accounts payable for tenant, which details all funds due in connection with the execution of the COVID-19 Amendment were paid to and accepted by

[6] The record is silent as to whether Landlord deposited the check and issued a refund, or simply returned the checks sent September 29, 2020 and October 13, 2020. Since it was Landlord's burden to establish that the funds were not paid, it was critical to know whether Landlord initially accepted the funds before rejecting them. Since Landlord failed to introduced evidence as to the manner in which it received and rejected Tenant's payments, the trial courts should have applied the inference that evidence in control of a party that is not introduced by that party supports an inference that the evidence, if produced, would be detrimental to the party who secretes the evidence. Sanders, Trial Handbook for South Carolina Lawyers (SC Bar 2019), Section 41.1, p. 1590. *See also Johnson v. Windham*, 224 S.C. 502, 80 S.E.2d 234 (1954).

Landlord. The affidavit also verified that tenant was current on all financial obligations to landlord, including monthly rental payment made and accepted after the appeal to this Court. (R. pp. 445-448).[7]

RELIEF REQUESTED BEFORE MAGISTRATE

After Tenant exercised its option to renew the lease, and after it had tendered all funds due including deposit, tax, insurance and advance rent, on October 1, 2020, Landlord instituted a proceeding entitled "Rule to Vacate or Show Cause (Eviction) alleging "the terms of your tenancy or occupancy have ended" and "[y]ou have violated the terms of conditions of your lease. . ." (R. p. 38). The lease would have expired the day before, but Tenant had already exercised the option to renew and tendered all funds due including rent in advance. Landlord instituted this action not because Tenant did not exercise its option and tender all funds due, but because tenant did exercise its option and pay the sums due. Clearly, Landlord wants Tenant out, not the other way around.

The alleged violation of the lease was described in the Application for Ejectment as "on August 6, 2020, Tenant informed Landlord that it would not be financially able to pay full rent and would not exercise its option to extend the lease beyond expiration of the current term, which ended on September 30, 2020." That is completely false. The last communication between the two was an agreement for Landlord to notify Tenant if a new tenant was located. (R. p. 435). Even if a new tenant really existed, Landlord never told Tenant about it. Tenant exercised its option.

[7] This affidavit will be included in the record on appeal even though it was not before the trial court, because (1) the affidavit is of record in this appeal by virtue of its inclusion in the Petition for Writ of Supersedeas; (2) having it available in the Record on Appeal will assist the Court in understanding the finances that neither the magistrate's court nor the circuit court understood; and (3) for the convenience of the Court.

No provision of the lease allowed email communications to be relied upon the parties to the COVID-19 2019 Amendment. To the contrary, the original lease and all subsequent documents required written notice. Instead, Landlord attempted to terminate the lease by letter to tenant dated September 4, 2020 from its counsel, before the lease had expired, after the option had been exercised and after the security deposit and all funds due on renewal of option were paid. By twice rejecting landlord's payment in September and October, landlord breached the lease.

Throughout trial, Landlord's lawyer attempted to persuade a witness to testify that Tenant had the financial ability to exercise its option and was merely posturing to get a better deal on the renewal. (R. p. 290, line 17-p. 291, line 17). No witness had any knowledge of that, and there is no evidence as to whether or not tenant's financials in the summer of 2020 were or were not sufficient to exercise its option. Tenant only had to decide whether it would exercise its option prior to September 30, 2020, which it did. Where the money came from was never explored, nor was it relevant.

ARGUMENT

I. THE MAGISTRATE AND THE CIRCUIT COURT ERRED IN DECIDING THE MATTER SOLELY ON THE BASIS OF EQUITABLE PRINCIPLES OF LAW, OVERLOOKING THE LEGAL ISSUES PRESENTED WHICH DEFINED THE RIGHTS OF THE PARTIES. BOTH LOWER COURTS GRANTED RELIEF TO LANDLORD SOLELY ON THE BASIS OF EQUITABLE DOCTRINES, DESPITE THE LEGAL RIGHTS SPELLED OUT BY THE CONTRACT DOCUMENTS.

An action for ejectment is an action at law. *Rogers v. Nation*, 284 S.C. 330, 326 S.E.2d 182 (Ct.App. 1985). When both legal and equitable claims are joined in a single action, each retains its own separate identify as legal or equitable. *Future Group II v. NationsBank*, 324 S.C. 89, 478 S.E.2d 45 (1996).

Respondent/landlord argued only equitable issues at trial and both the magistrate's court and the circuit court addressed the issues presented under equitable principles. That was error.

As a general rule, the construction of a contract is a matter of law for the court, unless the contract is ambiguous, in which case the intention of the parties is a question of fact for the jury. *Soil Remediation Co. v. Nu-Way Environmental Inc.*, 325 S.C. 231, 482 S.E.2d 554 (1997). In *Rogers, supra*., the Court of Appeals determined that the presence of legal questions as a predicate to application of equitable principles did not convert the action from one at law to one in equity. *Rogers, supra* 284 S.C. at 332-33.

Accordingly, in an ejectment proceeding, the court is obligated to look to the documents which form the contract between the parties to determine the parties' rights under the contract. Only then can equitable issues be addressed. A question of breach of contract is a matter at law. *Moore v. Crowley & Associates*, 254 S.C. 170, 174 S.E.2d 240 (1977); *Jacobs v. Service Merchandise Co. Inc.*, 297 S.C. 123, 375 S.E.2d 1 (Ct.App. 1985).

In its Petition for Ejectment, Landlord included all the relevant contract documents. However, the grounds stated for ejectment stated "[A]n email shows that on August 6, 2020, tenant informed Landlord that it would not be financially able to pay all rent and would not exercise its option to extend the Lease beyond expiration of the current term, which ended on September 30, 2020. In reliance thereon, Landlord accordingly entered into an agreement to relet the Leased Premises." (Emphasis added) (R. p. 38). The petition also falsely stated that Tenant had never paid the "security deposit" required by the COVID-19 Amendment. *Id.*

In her detailed order of ejectment, the Magistrate discussed the lease documents but then stated "[t]he facts at issue relating to these terms are not in dispute." (R. p. 6). In one sense, that

is true, because it is undisputed that Tenant exercised its option to renew the lease for an additional five-year term prior to expiration of the COVID-19 Amendment.

Tenant argued that it had fully complied with the terms of the lease by exercising its option to renew the lease for the first of two five-year periods prior to the expiration of the lease and elicited testimony on cross examination that tenant had timely exercised its option to renew the lease. (R. p. 259, line 16 – p. 260, line 25; p. 272, line 3 – p. 273, line 4. It also demonstrated, through cross-examination, that Landlord's claim that it had secured a new tenant was false, and Landlord could not produce a written agreement with a new tenant. (R. p. 263, line 11 – p. 264, line 2; p. 266, lines 15 – p. 267, line 15).[8] Landlord's sole evidence for having incurred damages for its detrimental reliance on the summer emails was the lost opportunity with the never-identified new tenant and landlord's concern that might cost money at some point in the future. (Tr. p. 273, line 18 – p. 274, line 1).

Landlord's counsel argued solely that the emails exchanged by the parties during the summer had caused Landlord to assume Tenant was not going to renew the option to renew the lease before the expiration on September 30, 2020, and Landlord detrimentally relied on the emails to undertake steps to locate a new tenant prior to expiration of the lease, so Tenant should have to leave the premises. (R. p. 243, line 1 – p. 246, line 3; p. 289, line 16 – p. 291, line 17). Landlord's witnesses focused solely on the emails and their assumption that they would have to find a new tenant. (Trial Tr. p. 17-26, p. 274, line 2 – p. 276, line 5). Landlord's witness did verify that

[8] Landlord acknowledged having agreed to let Tenant know if Landlord secured a new tenant prior to the expiration of the lease, but also agreed that Landlord had never notified Tenant that a new tenant had been located. (R. p. 274, lines 3-25; p. 276, lines 12-19). Landlord completely failed to show any damages or even changed circumstances as a result of its alleged detrimental reliance.

Landlord had received the funds due under the COVID-19 Amendment prior to the expiration of the existing lease. (R. p. 278, lines 1-19).[9]

Landlord's property manager testified that Tenant had paid funds due at the time of the renewal of the lease but that Landlord had instructed to reject the payment. (R. p. 280, line 5 – p. 282, line 6).

No witness for Landlord testified that the "term of tenancy. . . ha[d] ended" or that "terms . . . of the lease had been violated." Those were the sole grounds set forth in the Petition for Ejectment (R. pp. 38-94). Landlord did not provide any evidence of violation of the terms of the lease or that the lease had ended. What it tried to do, and unfortunately did, was to convince the trial courts that Landlord it was entitled to rely on emails sent during the Summer of 2020 to throw Tenant out even though Tenant had fully complied with the terms of the lease.

The testimony, taken as a whole, paints a clear picture of Landlord not wanting Tenant to renew the lease and doing everything in its power to prevent Tenant from doing so. That explains why, although the petition for ejectment alleged "the term of tenancy or occupancy has ended; or . . the terms. . . of the lease have been violated . . ." but the alleged violation was the summer 2020 emails. Neither was true. And Landlord made no attempt to prove that either was true.

Instead, Landlord's sole presentation of evidence was the Summer 2020 emails buttressed by a "concern" that Landlord might have to spend some money in the future to retain a broker and new tenant.

[9] It appears that the funds due from Tenant to Landlord under the COVID-19 Amendment were not immediately paid. It is also true that Landlord never notified Tenant of this alleged omission until after Tenant had exercised its option to renew the lease for another 5-year period, at which time Tenant immediately forwarded the funds due. (Tr. p. 274, lines 8-19; p. 279, line 10 –p. 282, line 6; p. 283, line 3-p. 284 line 1).

By reciting that the terms of the lease were not at issue, the Magistrate bought Landlord's argument that the language of the lease did not matter, and that Landlord was entitled to rely on the Summer 2020 emails and equitable relief of ejectment despite the lease having been fully complied with. (R. pp. 4-12).

This was error. Existing precedent makes clear that the legal terms of the contract control, and the first inquiry to be made by the court in an ejectment action. *Rogers v. Nation*, 284 S.C. 330, 326 S.E.2d 182 (Ct.App. 1985). Only after the legal rights of the parties have been determined from the contract are equitable principles available.

The circuit court, sitting as an appellate capacity, affirmed the Magistrate's court, making its own "findings of fact" which "agree[d] with and adopt[ed] the Magistrate's Court's findings of fact, as summarized and restated" in the circuit court order. As did the Magistrate, the circuit court recited certain terms of the lease documents, but made no analysis of them, focusing only on the Summer 2020 emails and focusing solely on the equitable relief requested by Landlord. (R. pp. 15-32).

The South Carolina summary court judge's Bench Book advises magistrates that ejectment can only be granted in three (3) circumstances:

1. When the tenant fails or refuses to pay the rent when due,
2. When the term of tenancy or occupancy ends, or
3. When the terms or condition of the lease are violated.

(SC Judicial Department summary court judge's Bench Book, Section N(3), citing S.C. Code Ann. Section 27-37-10).

Thus, the first question that must be addressed in an ejectment action is, what are the terms of the contract between the parties? Neither the magistrate's court nor the circuit court considered

the documents (although the orders cited to them) nor did they make any effort to determine if Tenant had breached the contract. Landlord postured his case so as to lure both courts to focus exclusively on the equitable remedy of ejectment, based only on the equitable doctrine of detrimental reliance.

The circuit court sitting in an appellate capacity has the ability to make a determination in the same manner as a circuit court in trials without a jury. S.C. Code Ann. §18-7-140; *Vacation Time of Hilton Head Island Inc. v. Kiwi Corp*., 280 S.C. 232, 312 S.E.2d 20 (Ct.App. 1984). This is true even though "the Circuit Court may not have the opportunity to observe the demeanor of the witnesses." *Id*.

On appeal to this Court, "the only determination for this court is whether there is any evidence to support the Circuit Judge's findings of fact [on appeal from a magistrate's order of eviction]." *Vacation Time of Hilton Head Island Inc. v. Kiwi Corp.*, 280 S.C. 232, 312 S.E.2d 20 (1984).

That may be true as to factual issues. However, this appeal presents questions of law. The proper inquiry before both courts was whether Tenant had violated the COVID-19 Amendment (which incorporated the prior leases). The evidence presented by Landlord did not even attempt to prove Tenant had violated the lease. Landlord skipped over the legal issues because Tenant did not breach the COVID-19 Amendment. The magistrate's verdict should have been to deny the relief requested by Landlord. *Skull Creek Club Ltd. Partnership v. Cook and Book Inc*, 313 S.C. 283, 438 S.E.2d 163 (Ct.App. 1993), *cert. granted* August 11, 1994, *cert dismissed as improvidently granted*, 318 S.C. 515, 458 S.E.2d 549 (1995) (application for ejectment and construction of contract are matters of law).

In *Skull Creek,* the landlord sought ejectment of the tenant alleging tenant had breached the lease. The Court of Appeals applied rules of contract construction to determine the tenant's obligations under the lease and whether a breach by tenant had occurred. In *Skull Creek,* the Court of Appeals elaborated on rules applicable to construction of a commercial lease. "A lease is to be construed more strongly against the [Landlord] and in favor of the [Tenant], particularly where the lease was prepared by the [Landlord]. Thus, where the lease admits of two constructions, either of which is reasonable, the one more favorable to the [Tenant] must be adopted." *Id*. 437 S.E.2d at 165.

The inquiry should have ended there. To the extent the emails add to the story, when considered as required in favor of the Tenant, Landlord was not entitled to rely in any way on the content of the emails. Tenant made clear in the email of August 25, 2020 that Tenant had not yet decided whether to exercise the option to renew the lease. The emails do not tell the story, and cannot be used to decide the issues, until the contract is construed and only then, if the terms of the contract are ambiguous. *Landry v. Landry*, 430 S.C. 153, 843 S.E.2d 491 (2020); *McCord v. Laurens County Health Care System*, 429 S.C. 286, 838 S.E.2d 220 (Ct.App. 2020). Neither court construed the matter as one at law, and neither court analyzed the rights of the parties under the contract/lease.

II. TO THE EXTENT EQUITABLE PRINCIPLES SHOULD HAVE BEEN CONSIDERED AT ALL, TENANT'S ASSUMPTION OF COMMERCIAL SPACE FOR A RESTAURANT IN DOWNTOWN CHARLESTON THE EARLY MONTHS OF THE 2020 PANDEMIC WEIGHED IN FAVOR OF CONSTRUING EQUITY IN FAVOR OF TENANT.

Hidden in the noise are the heroic efforts of Tenant to salvage a business during the COVID-19 epidemic. As explained at trial, the original tenant's lease was secured by a personal

guaranty, as was the lease of the tenant from which Appellant Tenant acquired the lease and assumed the obligations of the original lease. (R. p. 285, line 5 – p. 286, line 19). When Appellant Tenant assumed the lease, it agreed to pay a premium, called a security deposit, in order to release the original guarantors. (R. p. 286, lines 14-19).

As noted above, precedent from this Court requires that a commercial lease be construed more strictly against the Landlord and in favor of the tenant. *Skull Creek, supra. Id*. 437 S.E.2d at 165. The Summer 2020 emails upon which Landlord attempts to rely to invalidate the lease option renewal (and the COVID-19 Amendment) were exchanged when the restaurant had barely opened its doors.

Should the court determine that the lower courts' consideration of equitable principles only was proper (with which Tenant disagrees), Tenant asserts that the doctrine of promissory estoppel and detrimental reliance must be judged under the ambit of determining which party comes to the court with clean hands. *Thomerson v. DeVito,* 430 S.C. 246, 844 S.E.2d 378 (2020) (discussing the history of adoption of equitable remedies and concluding that a claim for contract rights under promissory estoppel (an equitable doctrine) is not subject to a statute of limitations).

Under an equitable analysis, there can be no doubt which party comes to the Court with clean hands. Tenant undertook a lease for a restaurant that was closed due to a world-wide pandemic, with government regulations prohibiting it from operating, and with no knowable end in sight. For its part, Landlord has tried to invalidate an enforceable contract (lease) using equitable principles only and asking the courts to ignore the law. Additionally, even while acknowledging that Tenant had the right to exercise the option to renew even on the last day, Landlord attempted to undercut Tenant's lawful exercise of the option to renew by sending a letter <u>after</u> the option had

been exercised, claiming for the first time that Tenant was not properly maintaining the property. (R. p. 444; R. pp. 430-431).

As the exhibits demonstrate, Tenant emailed Landlord (directly, not through a management company) on September 3, 2020 exercising the option to renew the first of two five-year extension of the lease, committing to the financial terms and future increases of rent included in the lease. (R. p. 442). The following day, another copy of the exercise of option was emailed at 10:04 am directly to the Landlord, with copy to the management company. (R. pp. 443-444).

In response, on September 4, 2020, Counsel for Landlord emailed and sent by certified mail a "Default of and waiver of option" claiming that Tenant was in breach of the lease because it did not maintain "normal business hours of 10:00 a.m. to 6:00 p.m. six days a week." (R. pp. 430-431). The letter stated that "many restaurants were operating in the City of Charleston. . . and [c]urrently it appears that all of the other Moe's franchise are currently operating in the City of Charleston." *Id*. This alleged contractual breach "works a fundamental unfairness on Landlord" in some unexplained way.[10] *Id.*

At trial, one of Landlord's witnesses testified that this "breach" was discovered with "a very simple Google search. You go to each different location. You type in Moe's Charleston, it will populate all of the locations . . showing their business hours." (R. p. 268, lines 3-22). For the first time, again after the option to renew the lease had been exercised, Landlord claimed the exercise of option was not accepted, because it had "found a [new] tenant . . . in reliance" on earlier

[10] It was the September 4, 2020 letter which pointed out, for the first time, that the "security deposit" which was a requirement of the COVID-19 Amendment had not been paid. *Id.* As noted above, the funds were immediately sent.

emails. (R. pp. 430-431). These were the same e mails in which Landlord had agreed to notify Tenant if it located a new tenant and no such notice was made.

Astonishingly, the default letter also stated that "Landlord intends to seek damages from Tenant for the resulting damage to Landlord if tenant fails to timely vacate" the premises. *Id.*

Not only did trial establish there was likely no real new tenant,[11] Landlord presented no evidence it had incurred damages as a result of the summer 2020 emails. Then, it sought ejectment on two grounds that were baseless and false, *i.e.*, "The term of tenancy . . . has ended" and "the terms . . . of the Lease have been violated" referencing an August 6, 2020 email. (R. pp. 38-94). As noted, neither was true.

South Carolina law is absolutely clear that one who seeks equity must do equity. The oldest case (available electronically) to recite this as the maxim of the state was in 1877 in *Geigers v. Kaigler,* 9 S.C. 401 (1877). The Supreme Court reaffirmed this as the law as recently as 2011. *Burch v. Burch*, 395 S.C. 318, 717 S.E.2d 757 (2011). In that case the court said:

> [I]t is settled law . . . that '[c]ourts have the inherent power to do all things reasonably necessary to insure that just results are reached to the fullest extent possible.' . . (citations omitted). Equally instructive is the equitable maxim that '[one] who seeks equity must do equity.'

Id.

In reiterating the doctrine, this Court did a thorough analysis of equitable principles in *Provident Life and Acc. Ins. Co. v. Driver*, 317 S.C. 471, 451 S.E.2d 924 (Ct.App. 1994). In doing

[11] Landlord confirmed at trial its "new" tenant (the one for which no lease could be found) was free to walk away at any time without consequence. (R. p. 263, line 25-p.264, line 2). Landlord also confirmed it merely had "concern" there may be a lost opportunity if its new tenant walked away (which would not be necessary if Tenant stayed).

so, this Court cited a 1920 case which set forth "other well-settled maxims, among which may be mentioned:

- No person shall be allowed to reap the benefits arising from his own wrongful acts.
- Equity regards and treats that as done which in good conscience ought to be done.
- Equity looks to the intent rather than the form.
- Equity will not suffer a wrong without a remedy.
- He who seeks equity must do equity.

Id. 451 S.E.2d at 929, citing *Taff v. Smith*, 11 S.C. 306, 103 S.E. 551 (1920).

In the event that the Covid-19 Lease or other contracts which set forth the rights of the parties in this case do not provide the legal result compelled by legal doctrine, Tenant asserts that the equitable scales of justice certainly should prevent Landlord, who attempted repeatedly to take advantage of Tenant, from succeeding in evicting Tenant, who stepped up when the world was crumbling and agreed to pay rent on a piece of commercial real estate in downtown Charleston which was absent all normal pedestrian traffic and could not seat customers for the foreseeable future.

"Ubi jus, ibi remedium. . ." *Griffith v. Charlotte, Columbia & Augusta R.R.Co.*, 23 S.C. 25, 35 (1885).[12] The decision in *Griffith* also restated the equitable doctrine of Boni judicis est ampliari justitiam, which, according to Google, means "[i]t is the duty of a good judge to make precedents in the amplification of justice", citing *Cain v. Chesapeake & Potomac Tel. Co.*, 3

[12] It should not go unnoticed by anyone that South Carolina declared this doctrine of equity in *Griffith* (1885) even before the District Court for the District of Columbia, which waited nine years (1894) longer to proclaim the maxim.

App.D.C. 546 (D.C.Cir. 1894). https://definitions.uslegal.com/b/boni-judicis-est-ampliare-jurisdictionem/ .

III. THE CIRCUIT COURT ERRED IN FINDING AND CONCLUDING THAT THE MAGISTRATE DID NOT HAVE JURISDICTION TO GRANT AN APPEAL BOND FOR THE APPEAL TO THE CIRCUIT COURT. IN ADDITION, LANDLORD DID NOT APPEAL THE MAGISTRATE'S ORDER SETTING THE APPEAL BOND, SO THIS ISSUE WAS NOT PRESERVED FOR REVIEW, WAS MOOT AND SHOULD NOT HAVE BEEN ADDRESSED BY THE CIRCUIT COURT.

Throughout this litigation, Landlord has argued that the Magistrate's court lacked jurisdiction to grant an appeal bond, asserting Tenant should have been evicted following the decision of the Magistrate. Had that occurred, this appeal would be moot, since Tenant would have been required to vacate and no decision by this Court could remediate the lower court's errors.

Ejectment is a remedy afforded by statute. S.C. Code Ann. Section 27-37-10. The proceedings for the remedy are fixed by statute. Sections 27-37-20, 30, 40 and 60. In creating the civil remedy of ejectment and establishing statutes which govern its process, the General Assembly also provided for an appeal to be taken by either party, and for the setting of an appeal bond to preserve the status quo during the appeal. Sections 27-37-120 (granting the right to appeal from the magistrate's court); Section 27-37-130 (prescribing the requirement for an appeal bond during appeal).

The Magistrate issued her order of ejectment on November 4, 2020. (R. pp. 3-12). Notice of Appeal was filed on November 9, 2020.

The Magistrate held a hearing on Tenant's application for appeal bond on November 25, 2020.[13] At the commencement of the hearing, the Magistrate ruled that Tenant was entitled to an appeal bond.

> . . . [E]ntitled to a hearing to the bond on the appeal, and that's kind of procedurally how it's done in Magistrate Court. . . Because he timely filed the appeal, that stayed everything, and thus we're here with this opportunity to figure out what the [amount of the monthly appeal bond] is going to be.

(R. p. 332, lines 14-22).

The magistrate noted Landlord had sent a letter and a $10.00 check to the Magistrate "to execute the eviction that was based on the original order. . ." (R. p. 332, lines 10-14). The Magistrate denied Landlord's request and returned counsel's check for $10.00 to counsel for Landlord since the Landlord's request was denied.[14] (R. p. 332, line 16 – 24; p. 344, lines 7-8).

The Magistrate and counsel discussed whether Tenant would pay Landlord directly for funds due during the term of the appeal bond, or whether the magistrate's office would hold the funds being paid by Tenant in trust during the term of the appeal. (R. p. 333, lines 17-21). The magistrate noted Landlord may have "issues" about accepting payment of bond during appeal, but the Magistrate made it clear she was going to order payments during appeal as part of the terms of

[13] All citations are to the transcript of proceedings on November 25, 2020, prepared by Tenant's employment of Clark & Associates Inc., transcribed by Carol T. Lucic, RPR, RMR on April 13, 2021. The magistrate's staff provided an audio to Tenant's counsel, who had the proceedings professionally transcribed on an expedited basis. The parties jointly shared the expense to produce the expedited transcript for the court's use.

[14] The record before the circuit court on appeal did not include does not include any correspondence from Landlord's counsel which addresses the relief the Landlord was requesting, including but not limited to a November 20 letter referenced by Landlord's counsel at the bond hearing. Therefore, the relief requested by Landlord was not addressed in the magistrate's written order. Landlord filed no appeal from the magistrate's orders (the order of ejectment or the order of appeal bond) and no documentation related to any relief requested by Landlord was a part of the record on appeal before the circuit court. The magistrate's return forms the record on appeal before the circuit court. Rule 8(b), South Carolina Rules of Magistrate's Courts.

an appeal bond. (R. p. 333, line 17 – p. 334, line 7). Landlord's counsel did not take exception to this ruling, nor did Landlord appeal from the written order setting the terms of the appeal bond.

Landlord's counsel asked that "my November 20 letter . . . [be] incorporate[d] into the record" and that request was granted. (R. p. 334, lines 22-25). As noted in the prior footnote, since Landlord did not appeal the grant of the appeal bond to the circuit court, the appropriateness of the appeal bond is the "law of the case." *State v. Rearick*, 417 S.C. 391, 790 S.E.2d 192 (2016). *See also Sloan v. Department of Transportation*, 365 S.C. 299, 618 S.E.2d 876 (2005) (The failure to appeal an alternate ground of the judgment below will result in affirmance, *citing Town of Mt. Pleasant v. Jones*, 335 S.C. 295, 516 S.E.2d 468 (Ct. App. 1999).

Landlord abandoned any right to raise the issue regarding the appeal bond by failing to appeal the magistrate's ruling. S.C. Code Ann. §27-37-100. Once the bond was issued and the tenant paid the amount ordered, the issue became moot. An issue is moot, precluding review, when "a judgment rendered by the Court will have no practical legal effect upon an existing controversy. . ." *Wachesaw Plantation v. Alexander*, 414 S.C. 355, 778 S.E.2d 898 (2015).

Since Landlord did not appeal the denial of its request or the setting of the appeal bond, nor did Landlord ask the magistrate's court for reconsideration, the issue was not preserved for consideration by the circuit court. "When a trial court does not explicitly rule on an argument raised, and the appellant[15] makes no Rule 59(e) SCRCP motion to obtain a ruling, the appellate court may not address the issue. *Smith v. Ncci Inc.*, 369 S.C 236, 631 S.E.2d 268 (Ct.App. 2005).

[15] The rule also requires a cross appeal by a respondent in order to raise an issue on later appeal. *In the Matter of Estate Galen Rider*, 394 S.C. 84, 713 S.E.2d 642 (Ct.App. 2011). In order to preserve this issue for consideration by the circuit court, Landlord should have filed a cross-appeal.

Since an order of the circuit court on the appeal bond can have no effect on the rights of the parties, the circuit court should not address an issue that is moot.

During the hearing on the appeal bond, the magistrate was surprised to learn that Tenant had been paying rent[16] at all times since the COVID-19 Amendment had been executed, and had paid the "rejected October rent, the October Deferral payment and the past due or unpaid security deposit $30,000.00. . . and the November rent" during the ejectment proceedings. (R. p. 335, line 1- p. 337, line 24; p. 339, line 10-24). Tenant assumed the lease during the deferral period, and timely paid the full rent for October and November, 2020 at the time of the hearing on the appeal bond.[17] (R. p. 336, line 1 – p. 337, line 9).[18]

Despite not having appealed from the issuance of the appeal bond, Landlord argued before the circuit court that it lacked jurisdiction to hear the appeal arguing "[T]he bond was never filed as the statute requires" and that the bond was "jurisdictional." (R. p. 365, lines 20-21) Landlord's counsel corrected himself upon inquiry from the circuit court.

The Court: . . . was a bond ever placed with the Magistrate's court?

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[16] Tenant was paying rent pursuant to the terms of the Covid-19 Amendment. (R. pp. 81-86). Section 4 of the COVID-19 Amendment detailed the period of deferred rent (April – June 2020), the period of rent following deferral, and a requirement for an "additional monthly amount of $1,906.00 which equals 1/6th of the aggregate base rent amounts that were deferred and unpaid during the Deferral Period." *Id.* p. 2.

[17] The Magistrate insured that the amount of the appeal bond fully compensated Landlord for the use by Tenant of the premises during the term of the appeal. (Tr. p. 335, line 1– p. 338, line 23). There was even discussion that Tenant would continue to pay by ACH to the management company. (R. p. 343, line 22 – p. 344, line 6). The circuit court was separately being asked to continue the bond in place during appeal to the Court of Appeals, if the magistrate's order is upheld by the circuit court, however she did not do so.

[18] Based on the discussions at the hearing, the parties and the court agreed that the deferral repayment of $1,906.00 for December, 2020 still needed to be paid. (R. p. 339, lines 8-24). Landlord's lawyer stated "in summary, we have an ongoing rent of $9,593.88). (R. p. 340, lines 18-21). The majority of the hearing was spent calculating the amount that would have to be paid monthly during the period of the stay to fully compensate Landlord. (R. pp. 341-343). That detail included an agreement by both parties to allow the existing monthly payments to continue to be paid to the management company during the period of the appeal. (R. p. 343, lines 23 – p. 344, line 1; p. 345, lines 6-13).

Mr. Hellman: Your Honor, there was a bond. And . . . to my knowledge it has been paid timely.

(R. p. 368, lines 2-6).

Tenant's counsel responded briefly to Landlord's jurisdictional argument, distinguishing a case that had been cited by Landlord. (R. p. 371, line 16 – p. 372, line 24). That case, *Ingram v. Kasey's Associates*, 340 S.C. 98, 531 S.E.2d 287 (2000), was an action for specific performance which examined whether the steps taken by the tenant to exercise an option [to purchase] under the facts presented were sufficient to constitute an option under the terms of the contract. The tenant in *Ingram* made intentional misrepresentations to the landlord and "never tendered any portion of the purchase money prior to the end of the lease term." *Id*. 340 S.C. 104.

The Supreme Court stated that the relief being sought in *Ingram* was one in equity, *i.e.*, making equitable principles applicable. Moreover, the Supreme Court expressly stated that its opinion discussed "the law of options" and "specific performance" as two separate issues. The Supreme Court concluded that the tenant did not comply with the terms of the option set forth in the lease. The Court specifically focused on the law of options contained in leases versus "a free-standing real estate option contract." *Id.* 340 S.C. 109. The Supreme Court determined that tenant's exercise of the option was deficient under the terms of the contract.[19]

When deciding the appeal here, the circuit court affirmed on the facts and "adopt[ed]" the findings of fact made by the Magistrate. (R. p. 15). However, the circuit court also addressed the issue of whether the Magistrate's court had jurisdiction to issue an appeal bond, and concluded

[19] The Court did discuss equity and the "doctrines of unclean hands and equitable estoppel" as defenses to obtaining equitable relief. *Id.* footnote 2. But the ruling was that tenant's exercise of the option was not sufficient under the terms of the lease, *i.e.,* the contract. The *Ingram* decision supports Tenant's assertion here that the legal terms of the contract between the parties must be decided before equity become applicable.

that it did not. *Id.* p. 6-7. The circuit court made this ruling even though Landlord had not appealed from the order setting the appeal bond.

There is a long line of cases that prohibits an appellate court from considering an issue that is not raised on appeal. By way of example, Tenant cites to *Neeltec Enters. Inc. v. Long*, 397 S.C. 563, 725 S.E.2d 926 (2012) and *South Carolina Dep't of Motor Vehicles v. McCarson*, 391 S.C. 136, 705 S.E.2d 425 (2011).

The circuit court's ruling that it lacked jurisdiction to review the appeal was error. The South Carolina Supreme Court has expressly held that any delay in or failure to post bond pending appeal from a municipal court does not deprive the reviewing court of jurisdiction. *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 713 S.E.2d 278 (2011). In *Town of Mt. Pleasant*, the Supreme Court made clear that the only jurisdictional inquiry is whether the notice of appeal is timely filed.

Additionally, the issue of whether jurisdiction existed to issue the appeal bond became moot when Landlord failed to appeal from the order granting appeal bond. An issue is moot, precluding review, when "a judgment rendered by the Court will have no practical legal effect upon an existing controversy. . ." *Wachesaw Plantation v. Alexander*, 414 S.C. 355, 778 S.E.2d 898 (2015). Tenant has been paying rent pursuant to the appeal bond during the entirety of this appeal.

"Appellate courts will not pass on moot and academic questions or make an adjudication where there remains no actual controversy." *Moore Co. Ins. v. Shore*, 390 S.C. 432, 558, 703 S.E.2d 499, 506 (2010).

While it is true that questions of subject matter jurisdiction may be raised at any time, the rule will not be applied when the answer to the question will provide no actual relief to the parties. *Linda Co. Ins., supra.*

Here, the circuit court addressed the issue of jurisdiction gratuitously, as Landlord did not appeal the grant of appeal bond, nor was it was necessary to a determination of the issue before the circuit court. As pointed out above in Footnote 2, an appellate court need not decide an additional sustaining ground raised by a respondent on appeal. *Kosiusco v. Parham,* 428 S.C. 481, 510, 836 S.E.2d 362 (Ct.App. 2019), citing *Futch v. McAllister Towing of Georgetown,* 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999).

While Landlord argued the magistrate's court lacked jurisdiction to issue the appeal bond, and the circuit court agreed, the fact remains that the magistrate's court did order an appeal bond. Both parties, Landlord and Tenant, have had the benefit of the appeal bond during the appeal to the circuit court. *Jones v. Dillon-Marion Human Res. Dev. Comm'n,* 277 S.C.2d 533, 291 S.E.2d 195 (1982). *See also Knight Pub. Co. v. Univ. of South Carolina*, 295 S.C. 31, 367 S.E.2d 20 (S.C. 1988).

By way of substance, the magistrate's court ruling and the circuit court's ruling that the failure to post an appeal bond deprived the magistrate's court of jurisdiction to hear the matter, the issue is not one of jurisdiction at all.

A court's subject matter jurisdiction is determined by whether it has the authority to hear the type of case in question." *Allison v. W.L. Gore & Assocs.*, 394 S.C. 185, 188, 714 S.E.2d 547, 549 (2011). There can be no question that the magistrate's court had subject matter jurisdiction to issue the appeal bond. S.C. Code §22-3-310(10).

"The question of subject matter jurisdiction is a question of law for the court." *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 99, 674 S.E.2d 524, 528 (Ct. App. 2009) (citation omitted). *See also Baddourah v. McMaster*, Op. No. 28013 (March 20, 2021) (South Carolina Supreme Court).

The circuit court's reliance on *Wheeler v. Hyler*, 228 S.C. 584, 91 S.E.2d 265 (1956) is misplaced because its holdings were abrogated by the South Carolina Rules of Civil Procedure. [20] The Supreme Court has made clear there is a distinction between jurisdiction to hear a matter versus power or authority to hear a matter. *Baddourah v. McMaster*, Op.No. 28013 (S. Ct. March 10, 2021). *See also First Citizens Bank & Trust Co. v. Taylor*, 431 S.C. 149, 847 S.E.2d 249 (Ct. App. 2020). No existing precedent[21] has construed the applicability of S.C. Code Ann. Section 27-37-130 as it relates to jurisdiction, and an appeal to circuit court is not an appropriate forum in which to address a novel issue, especially one not raised by the parties and instead addressed *sua sponte* by the appellate court.

Lastly, Landlord's argument regarding jurisdiction fails on the merits. While S.C. Code Ann. §27-37-120 discusses the requirement for bond for appeal, the amount of the bond has to be set by the magistrate, which is exactly what happened here. ". . . [T]he tenant shall give an appeal bond as in other civil cases for an amount to be fixed by the magistrate and conditioned for the payment of all costs and damages which the landlord may sustain thereby." *Id.*

[20] The circuit court relied upon *Wheeler v. Hyler*, 228 S.C. 584, 91 S.E.2d 265 (1956), which incorrectly equated a condition precedent to an appeal to a jurisdictional question.

[21] The predecessor to the statute was construed in a 1948 action which was again decided prior to the enactment of the South Carolina Rules of Civil procedure. *Horn v. Blackwell*, 212 S.C. 480, 48 S.E.2d 322 (1948).

Tenant could not possibly know how much bond to post without the magistrate having a hearing to determine what the amount of the bond was. The record does not reflect when the request for bond was made, but at the commencement of the hearing on the bond, the magistrate court stated Landlord had "appealed that decision, and so this hearing was set as a bond to stay execution on appeal." (R. p. 332, lines 7-10). The magistrate said she wanted to hear the bond issue "probably last week" but she ended up having to quarantine. (R. p. 333, lines 1-8).

Landlord did not object to proceeding nor did he raise any omission by Tenant in timely seeking an appeal bond. To the contrary, the magistrate clearly stated the hearing was delayed by her own issues,

Lastly, as noted in the Motion to Reconsider, the courts have been unclear in precedent in carelessly referring to "jurisdiction" for many years, and The Supreme Court has only recently provided helpful guidance on the subject. *Baddourah v. McMaster*, Op. No. 28013 (S. Ct. March 10, 2021). *See also First Citizens Bank & Trust Co. v. Taylor*, 431 S.C. 149, 847 S.E.2d 249 (Ct.App. 2020).

The magistrate court is statutorily empowered to issue an appeal bond. S.C. Code Ann. §18-7-10 (no time period within which appeal bond must be posted). The Summary Court Bench Book, provided to the magistrate's courts by the Supreme Court of South Carolina, specifically provides that the magistrate is to determine the amount of the appeal bond. https://www.sccourts.org/summaryCourtBenchBook/, Section N(3)(f). (R. pp.454-456). Clearly the magistrate cannot determine the amount of appeal bond until the notice of appeal is filed. As here, the court schedules a hearing for appeal bond at the earliest available time.

CONCLUSION

For the reasons set forth above, Tenant respectfully urges that the Order of the Circuit Court and the Magistrate's Court be reversed, and the matter remanded for entry of judgment in favor of Tenant. In so doing, Tenant requests this Court specifically vacate the Circuit Court's order finding a jurisdictional defect in the circuit court proceedings.

Respectfully submitted,

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[22] Undersigned counsel tried desperately to find a need in this brief to cite to the following lyrical language from the decision in *Griffith v. Charlotte, Columbia & Augusta R.R.Co.*: "It is hardly to be conceived that three trains on the same railroad, at the same point, on the same night, were manned by fiends in human shape, if the act was intentional or if by gross negligence, who were so neglectful of their own lives and limbs, as well as the safety of passengers, merchandise and trains, as to wantonly run the risk of derailing the train and producing a general wreck." 23 S.C. 30. The suit was one against multiple railroads, trains of which ran over the body of a murdered man whose murderer had placed the dead body on railroad tracks in what seemed to be an act to destroy the body before it could be discovered.

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STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
DEBRA R. MCCASLIN, CIRCUIT COURT JUDGE

Appellate Case No. 2021-000460

Quality Fresca I, LLC, ...Appellant,

v.

Kenneth R. Davenport, II, Personal Representative of the
Estate of Kenneth R. Davenport, ...Respondent.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief complies with Rule 211(b), SCACR.

Respectfully submitted,

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