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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appellate Case No. 2021-000460

APPEAL FROM CHARLESTON COUNTY
DEBRA R. MCCASLIN, CIRCUIT COURT JUDGE
Case No. 2020-CP-10-04936

Quality Fresca I, LLC . . . . . Appellant.

v.

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

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FINAL RESPONSE BRIEF

Dated: October 21, 2021

Respectfully submitted,

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STATEMENT OF ISSUES ON APPEAL

1. On the merits, has the appellant met its burden to show that the circuit court's appellate decision to affirm the magistrate court's ejectment of a commercial tenant was made in error, where the appellant breached the lease by failing to pay a security deposit and the term of the lease ended because the appellant declined the option to extend and was estopped from exercising it later?

2. Has the outcome of this case been conceded by the appellant, where a dispositive ruling by the circuit court, regarding the appellant's failure to file a reconsideration motion to the magistrate court, was not raised as an issue anywhere in the appellant's brief and was therefore abandoned?

3. Are the issues raised in the appellant's statement of issues preserved for review, which were not raised to the magistrate court, and were not stated, as statutorily required, in the notice of appeal to the circuit court?

4. Does appellate jurisdiction exist, where a bond filing was not timely made to the magistrate court, and there is an express statutory requirement for the appeal to be dismissed in that event?

STATEMENT OF THE CASE

This is an appeal of the circuit court's decision, acting in an appellate capacity, affirming the magistrate court's order of ejectment of a commercial tenatant, following a bench trial.

Appellant Quality Fresca I, LLC is the tenant ("Quality Fresca").

Respondent Kenneth R. Davenport II, Personal Representative of the Estate of Kenneth R. Davenport is the landlord ("Davenport").

Davenport filed the application for ejectment on October 1, 2020. (R. pp. 38-94).

The magistrate court held a trial on October 27, 2020. (R. p. 232). The parties expressly waived any right to a jury and agreed to a bench trial. (R. p. 236, ll. 2-25). The parties stipulated to the authenticity of the documentary evidence in the record. (R. p. 239, ll. 16-21, p. 240, ll. 11-16). The parties had the opportunity to call witnesses to testify and to conduct cross-examination. (R. p. 234). Quality Fresca called its Vice President of Operations, Mr. Chris Grooms, as its sole witness. (R. p. 288, l. 3). Mr. Davenport testified himself, and he also called Mr. Daniel Ravenel, the property manager. (R. p. 248, l. 11, p. 277, l. 15).

The magistrate court issued its order of ejectment on November 4, 2020. (R. pp. 3-12). The order included 9 pages of detailed findings and fact and conclusions of law. (R. pp. 3-12). The order required Quality Fresca to vacate the premises on or before November 18, 2020. (R. p. 12).

Quality Fresca did not file a motion for reconsideration with the magistrate court. (R. p. 19).

Quality Fresca filed its notice of appeal to the circuit court on November 9, 2020. (R. pp. 95-96).

Quality Fresca did not make a request for an appeal bond within five days of its notice of appeal to the circuit court. (R. p. 19, p. 332, ll. 10-14, p. 334, ll. 22-24, pp. 451-453).

The magistrate court, *sua sponte*, on November 18, 2020, scheduled a bond hearing, which was held on November 25, 2020, and thereafter accepted a bond from Quality Fresca. (R. p. 19, p. 332, ll. 10-14, p. 334, ll. 22-24, pp. 451-453, p. 14).

The circuit court held an appellate hearing on March 16, 2021. (R. pp. 15, 354).

The circuit court issued its order affirming the magistrate court's order of ejectment on March 26, 2021, which was entered on March 29, 2021. (R. pp. 15-32). That order included 17 pages of detailed findings of fact and conclusions of law. (R. pp. 15-32). The circuit court agreed with, adopted, summarized, and restated the magistrate court's findings of fact and conclusions of law as its own. (R. p. 15).

Quality Fresca filed a motion for reconsideration of that order on April 8, 2021, which the circuit court denied on April 27, 2021. (R. pp. 195, 33).

Quality Fresca filed the instant notice of appeal to this Court on April 29, 2021. (R. p. 209).

Quality Fresca filed a petition for a writ of supersedeas on May 13, 2021. (R. p. 36).

This Court issued an order granting the petition for a writ of supersedeas June 7, 2021. That order notes: "Nothing prevents the parties from arguing in their briefs that the circuit court should have dismissed the appeal." (R. p. 36).

STATEMENT OF FACTS

This ejectment action involves a commercial tenancy in downtown Charleston on the corner of Calhoun Street and King Street, having an address of 381 King Street. (R.

pp. 15-19, 38-94).

The property has been owned by the Davenport family since the 1970's, and as of 2019, it has been held in the estate of the late Mr. Kenneth R. Davenport, with his son, Mr. Kenneth R. Davenport II, serving as the personal representative, acting as a fiduciary for the rest of the family. (R. pp. 15-16, p. 40, p. 248, ll. 11-24).

Over the last two decades, the property was rented to successive corporate owners of a "Moe's" restaurant under a certain lease, as assigned, assumed, and amended (the "Lease").[1] (R. pp. 15-16, 43-86, p. 248, l. 25 – p. 249, l. 23).

Quality Fresca is the corporate owner of 67 "Moe's" restaurants around the country and the new owner of the one operating here. (R. p. 16, p. 288, ll. 10-14). On May 8, 2020, Quality Fresca became the tenant under the Lease, as assigned, assumed, and amended. (R. pp. 16, 43-86, p. 249, ll. 18-20). At that time, the COVID-19 pandemic lockdowns had already been ongoing for nearly two months, since March of 2020. (R. pp. 16, 43-86, p. 243, ll. 12-20). In the mutually agreed upon amendments to the Lease, made in view of the then-ongoing COVID-19 pandemic, Davenport accommodated Quality Fresca by providing some rent deferral, as well as releasing prior individual guarantors, in return for Quality Fresca promising to pay a security deposit. (R. pp. 16, 43-86, p. 243, ll. 12-20, p. 260, ll. 1-14, p. 286, ll. 2-4). The other terms of the Lease remained the same and were affirmed by both Quality Fresca and Davenport. (R. pp. 16, 43-86, p. 260, ll. 1-5).

Now before this Court, three terms of the Lease are pertinent. First, the Lease required Quality Fresca to pay a security deposit of $30,496.00 upon taking the assignment,

[1] The Lease is comprised of three documents, including that certain "Retail Lease," entered into as of September 25, 2013; that certain "Assignment, Assumption and Amendment of Lease," entered into as of October 16, 2018; and that certain "Assignment, Assumption and Amendment to Lease Agreement," entered into as of May 8, 2020. (R. pp. 16, 43-86).

on May 8, 2020, in exchange for the release of all guarantors.[2] (R. pp. 16-17, 43-86, p. 243, ll. 12-20, p. 260, ll. 1-14, p. 286, ll. 2-4). Second, the Lease provided that the term of the Lease would end on September 30, 2020.[3] (R. pp. 16-17, 43-86). Third, the Lease provided an option to extend for two additional five-year terms.[4] (R. pp. 16-17, 43-86).

Upon taking the assignment of the Lease, on May 8, 2020, Quality Fresca did not pay the $30,496.00 security deposit, as agreed and required. (R. pp. 19, 83, p. 278, ll. 8-19, p. 280, l. 22 – p. 281, l. 1). In the months that followed, while the security deposit went unpaid, Quality Fresca's Vice President of Real Estate, Mr. Bob Hartmann, attempted to renegotiate the rent, representing in an e-mail dated July 27, 2020, that Quality Fresca "can't afford any more than we are offering." (R. pp. 17-19, 87-91, p. 249, l. 21 – p. 257, l. 20, pp. 425-444). Then, Mr. Hartmann represented that Quality Fresca would not exercise its option to extend under the Lease under the existing terms, that it would be vacating the property, and that Davenport should find a new tenant. (R. pp. 17-19, 87-91, p. 249, l. 21 – p. 257, l. 20, pp. 425-444). These representations are evidenced in an August 6, 2020 e-mail exchange that Quality Fresca begs this Court to ignore on appeal, where Mr. Davenport states and asks:

> Thank you for your email. These are definitely

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[2] (R. p. 83) (Assignment, Assumption and Amendment to Lease Agreement, Section 4.c) ("On [May 8, 2020], Assignee shall deposit with Landlord a security deposit in the amount of $30,496.00, which equals four (4) months' base rent (the "Security Deposit"), which, except as provided herein, shall be governed by Section 6 of the Lease.").

[3] (R. p. 45) (Retail Lease, Section B.1) ("Tenant agrees to rent the Leased Premises from Landlord for a term of Seven (7) years, beginning on the 1st day of October, 2013, and ending on the 30th day of September, 2020 (hereinafter the "Lease Term").").

[4] (R. p. 45) (Retail Lease, Section B.2) ("Tenant shall have the option to extend this Lease for two (2) additional five (5) year periods with all terms and conditions of the Lease remaining the same with the exception of rent. The base lease rate shall increase on each anniversary date of the Lease and any extensions by (i) 2.5%, or (ii) 7% of the then Gross Sales (hereinafter defined), whichever is greater.").

> unprecedented times. We appreciate your attempts at seeking solutions to your lack of business. If we are unwilling to accept these terms or terms similar to what you are proposing and the lease terms would remain as they currently are, does that mean you are not going to exercise the option and would be vacating the property?

And Mr. Hartmann responds:

> Unfortunately it does. It doesn't make sense to sign up for a situation where you know you are going to take losses with the hope that, at some point in the unknown future, you will start to turn a profit. That is why we offered a short term situation with mutual termination rights, so if you could find someone to pay the freight, you can make the deal and until then, we both ride the wave and take what is available.

(R. pp. 17-18, 88-89, 425-426).[5]

At trial, Mr. Davenport gave uncontroverted testimony that he relied on Mr. Hartmann's representations by immediately engaging a commercial broker to re-let the

[5] The record contains additional e-mails between Mr. Hartmann and Mr. Davenport that further demonstrate Mr. Hartmann's bad faith tactics to pressure Davenport to renegotiate. For instance, in an August 24, 2020 e-mail exchange, Mr. Hartmann wrote to Mr. Davenport:

> I hope this email finds you well. We are a little over a month away from the lease termination date. I need to let our facilities team know if we are leaving so they can put together their closing and de-branding plan. Please let me know if you are interested in us staying on a month-to-month basis at the reduced terms or if we should put our closing plan together.

(R. pp. 17-19, 87-91, p. 249, l. 21 – p. 257, l. 20, p. 425). Davenport rejected every extra-contractual proposal that Mr. Hartmann made, including this one to stay month-to-month at reduced terms. (R. pp. 17-19, 87-91, p. 249, l. 21 – p. 257, l. 20, pp. 425-444). The e-mails in the record also show that Davenport continued to insist that Quality Fresca adhere to the Lease during the last months of the term regarding issues pertaining to the rent and trash disposal and sanitation, which are not germane to the circuit court's order on appeal, but are referred to, out of context, in Quality Fresca's brief and thus mentioned for clarification purposes here. (R. p. 269, l. 3 – p. 270, l. 9, pp. 425-444). The fact that Quality Fresca did not comply with the Lease in these additional ways certainly does not help its case.

premises and by entering into an agreement with a new commercial tenant. (R. pp. 17-19, p. 249, l. 21 – p. 257, l. 20).[6] Acting as the personal representative of his father's estate for the benefit of the rest of the Davenport family, Mr. Davenport testified that was his fiduciary duty under the circumstances, given Mr. Hartmann's representations. (R. pp. 15, 18, p. 275, ll. 6-11).[7] And Mr. Davenport further testified that, having hired a broker and entered into an agreement with a new tenant, the estate would suffer financial damages if the premises were not made available. (R. p. 18, p. 273, l. 17 – p. 274, l. 1).

Mr. Hartmann, the author of the e-mails, did not testify for Quality Fresca. (R. pp. 17, 234). The only witness offered by Quality Fresca, Mr. Grooms, testified that he did not know if what Mr. Hartmann said in his e-mails was true or false and that he did not know the purpose of Mr. Hartmann's e-mails and could not speak to Mr. Hartmann's motives. (R. p. 17, p. 290, l. 16 – p. 291, l. 17).[8]

Later revealing its bad faith, Quality Fresca ultimately attempted to renege on Mr.

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[6] (R. p. 257, ll. 8-20) ("Q. Mr. Davenport, ultimately, would it be fair to say that you -- you relied on the representations that Mr. Hartman[n] made to you in making the decision to find a new tenant? A. Yes. Q. And you, in fact, did find a new tenant. A. We did -- we did find a new tenant, yes. Q. And so now you find yourself in a situation where you have a former tenant that is attempting to exercise an option, and you have a new tenant that would like to move into the property immediately. A. Yes. That is correct."); (R. p. 256, ll. 19-24) ("Q. So do you feel in some way that Mr. Hartman[n] mislead you through this process? A. Well, of course. We were to the point where we went and found a new tenant and engaged a commercial property broker for those activities.").

[7] (R. p. 275, ll. 7-11) ("As the PR to the estate, we have to look out for what's best for the estate. That's the fiduciary duty that we have. Why would we take – why would we take a lesser offer than what the current lease states?").

[8] (R. p. 291, ll. 6-17) ("Q. Do you -- do you believe that the purpose of this email was to get Mr. Davenport to believe that Moe's could not afford any more than was offered? A. I don't know the purpose of this email. This is my first time seeing it. Q. You believe that Mr. Hartman was attempting to get Mr. Davenport to accept less rent based on this representation that Quality Fresca could not afford any more than it was offering? A. Again, I can't speak to his motives.").

Hartmann's representations and disregard the course of events that it was responsible for setting into motion. (R. pp. 17-19, 28-29). On September 3, 2020, Quality Fresca purported to exercise the option to extend that it had already declined. (R. pp. 17-19, 28-29, 87-91, p. 249, l. 21 – p. 257, l. 20, pp. 425-444). Davenport, surprised and misled, responded the next day, September 4, 2020, with a letter reminding Quality Fresca that it had already declined the option to extend and would need to timely vacate the premises as it represented it would do, and that Quality Fresca had additionally been in default for four months for failing to pay the $30,496.00 security deposit. (R. pp. 17-19, 27-28, 30, 158-159, p. 256, l. 11-24, pp. 430-431). Twenty-five days later, on September 29, 2020, on literally the eve of the end of the Lease term, Quality Fresca, wrongfully insisting it would remain in the premises, made a belated attempt to pay the $30,496.00 security deposit, which Davenport did not accept. (R. pp. 17-19, 27-28, 30, p. 278, ll. 8-19, p. 280, l. 8 – p. 281, l. 1).

Quality Fresca has since refused to vacate the premises, past the end of the Lease term, September 30, 2020, and prevented the new tenant from occupying the premises. (R. R. pp. 17-19, 27-28, 30, p. 257, ll. 15-20). Quality Fresca has been paying rent pursuant to the appeal bond issued by the magistrate court, but it has no right under the Lease to remain in the premises. (R. p. 14).[9]

ARGUMENT

I. The Merits

A. The circuit court's appellate decision to affirm the magistrate court's ejectment of a commercial tenant was not made in error

[9] Though Davenport acknowledges that Quality Fresca has been paying rent under the appeal bond, Davenport objects to Quality Fresca's citation to an affidavit that was made during the pendency of this appeal and was not before the lower courts. (App. Br., p. 10) (R. p. 445).

i. Standard of review

The ejectment of a commercial tenant is a statutory action, under S.C. Code Ann. §§ 27-37-10 *et seq*., which sounds in equity, according to *Kiriakides v. United Artists Communications, Inc.*, 312 S.C. 271, 277, 440 S.E. 2d 364 (1993).[10] The underlying issue of declining and then being estopped from exercising a lease option also sounds in equity, according to *Ingram v. Kasey*, 340 S.C. 98, 105, 531 S.E.2d 287 (2000).

Because this action sounds in equity,[11] the Court "may review all the evidence to determine the facts in accordance with our own view of the preponderance or greater weight of the evidence." *Kiriakides*, 312 S.C. 271, 440 S.E. 2d 364; *Ingram*, 340 S.C. 98, 531 S.E.2d 287. Additionally, "[a] legal question in an equity case receives review as in law." *Sloan v. Greenville County*, 356 S.C. 531, 546, 590 S.E.2d 338, 346 (Ct. App. 2003).

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[10] Quality Fresca argues that this is an action at law, citing *Rogers v. Nation*, 284 S.C. 330, 326 S.E.2d 182 (Ct. App. 1985). *Rogers* is inapposite because it does not involve a commercial ejectment or the statute at issue, S.C. Code Ann. §§ 27-37-10 *et seq*. And Quality Fresca ignores the clear holding of *Kiriakides*, which is the seminal commercial ejectment case construing the statute at issue, cited in more than 100 reported cases.

[11] There is some authority that may be read to indicate that the standard of review may be more limited where, as here, the circuit court affirmed the magistrate court, acting in an appellate capacity, under S.C. Code Ann. § 18-7-170. Quality Fresca, the appellant, actually argued for this more limited standard of review in its brief. (App. Br., p. 16). *See Hadfield v. Gilchrist*, 538 S.E.2d 268, 343 S.C. 88 (Ct. App. 2000) ("While the Circuit Court maintains a broad scope of review, our standard is more limited: '[T]he Court of Appeals will presume that an affirmance by a Circuit Court of a magistrate's judgment was made upon the merits where the testimony is sufficient to sustain the judgment of the magistrate and there are no facts that show the affirmance was influenced by an error of law…'") (quoting *Burns v. Wannamaker*, 281 S.C. 352, 315 S.E.2d 179 (Ct. App. 1984)); *but see Sullivan v. Brown (In re Estate of Kay)*, 423 S.C. 476, 816 S.E.2d 542 (2018) ("[W]e hold today that the two-judge rule has no applicability to cases wherein the circuit court, sitting in a purely appellate capacity, as here, affirms the findings of a lower tribunal. Instead, the applicable standard of review is the same as in other equity matters, and the appellate courts of this state may take their own view of the preponderance of the evidence."). Under either standard of review, the decision of the circuit court affirming the magistrate court should be affirmed by this Court.

"However, this broad scope of review does not require an appellate court to disregard the findings below or ignore the fact that the trial judge is in the better position to assess the credibility of the witnesses." *Pinckney v. Warren*, 344 S.C. 382, 387, 544 S.E.2d 620, 623 (2001). "Moreover, the appellant is not relieved of his burden of convincing the appellate court the trial judge committed error in his findings." *Id*. at 387-88, 544 S.E.2d at 623.

ii. Statutory grounds for ejectment

The statutory grounds for the ejectment of a commercial tenant are as follows: "The tenant may be ejected upon application of the landlord or his agent when (1) the tenant fails or refuses to pay the rent when due or when demanded, (2) the term of tenancy or occupancy has ended, or (3) the terms or conditions of the lease have been violated." S.C. Code Ann. § 27-37-10 (a).

iii. The term of the lease ended because the appellant declined the option to extend and was estopped from exercising it later.

One statutory ground that the circuit court affirmed the magistrate court in ejecting Quality Fresca from the premises was that the term of the Lease ended because Quality Fresca declined the option to extend and was estopped from exercising it later. (R. 24-28).

As more fully set forth above in the statement of facts, Mr. Hartmann represented by e-mail that Quality Fresca could not afford the rent and would not exercise its option to extend under the Lease under the existing terms, that it would be vacating the property, and that Davenport should find a new tenant. (R. pp. 17-19, 87-91, p. 249, l. 21 – p. 257, l. 20, pp. 425-444). And there was uncontroverted testimony at trial that Davenport, acting as a fiduciary for his father's estate, relied on Mr. Hartmann's representations by immediately engaging a commercial broker to re-let the premises and by entering into an agreement

with a new commercial tenant.[12] (R. pp. 15, 17-19, p. 249, l. 21 – p. 257, l. 20, p. 273, l. 17 – p. 274, l. 1, p. 275, ll. 6-11). Mr. Hartmann did not testify and the only witness for Quality Fresca testified that he did not know if what Mr. Hartmann said in his e-mails was true or false and that he did not know the purpose of Mr. Hartmann's e-mails and could not speak to Mr. Hartmann's motives.[13] (R. pp. 17, 234, p. 290, l. 16 – p. 291, l. 17).

In its opening brief, Quality Fresca acknowledges that Mr. Hartmann's "emails were admitted into evidence by stipulation as to authenticity and foundation." (App. Br., p. 6, n. 2). But Quality Fresca nonetheless argues that Mr. Hartmann's e-mails and the uncontroverted testimony about Davenport's reliance on them should be disregarded, as well as all principles of equity. (App. Br., pp. 11-17).

In making this argument, tellingly, Quality Fresca makes no mention of *Kiriakides*, the seminal case construing the commercial ejectment statute at issue, cited in more than

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[12] Quality Fresca asserts in its brief that Mr. Davenport admitted on cross-examination that there is no agreement with a new commercial tenant and that his prior testimony on that issue was false. (App. Br., pp. 6, 13). The transcript shows that Mr. Davenport made no such admission during cross-examination; rather, he further confirmed that he did enter into an agreement with a new commercial tenant. (R. p. 263, ll. 11-14). Further, Quality Fresca argues that Mr. Davenport's testimony about acts of reliance on Mr. Hartmann's e-mails was insufficient because he did not support it with documentary evidence. Mr. Davenport's uncontroverted testimony about his own actions, about which he had personal knowledge, is sufficient. *See Wilburn v. Wilburn*, 743 S.E.2d 734, 742, 403 S.C. 372 (2013) ("Wife presented testimony that the funds in each of the three disputed accounts were nonmarital property because they were inherited, gifted, or acquired before the marriage. Husband adduced no evidence to contradict this testimony. Instead, Husband argues her testimony was insufficient because she failed to present any documentary evidence. However, Wife's testimony, absent any evidence to the contrary, is sufficient to establish the source of the funds in these accounts.") (citation omitted).

[13] *See Matthews v. National Fidelity Insurance Company*, 228 S.C. 124, 89 S.E.2d 95 (1955) ("The important point here was the fact that the appellant's agent was present and heard the testimony but was not placed upon the stand to deny the testimony of both the beneficiary and the respondent as to the agreement with him. This fact 'raises the inference that had his testimony been presented it would have been unfavorable to appellant', citing Robinson v. Duke Power Co.").

100 reported cases, and relied upon by the circuit court and the magistrate court. *Kiriakides* explicitly holds that the statute must be applied with "equity and common sense" and provides a multi-factor test to guide the legal analysis. 312 S.C. at 276, 440 S.E. 2d at 366. The circuit court and the magistrate court fully analyzed the facts under the multi-factor test provided by *Kiriakides*.[14] (R. pp. 24-28). Quality Fresca does not mention or offer an alternative analysis of these factors in its brief. (*See generally* App. Br.).

Instead of analyzing the facts under the legal framework provided by *Kiriakides*, Quality Fresca cites to a myriad of inapposite cases, involving different statutes, discussing different legal issues – principally, rules of contract construction. (App. Br. pp. 12-17).

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[14] The circuit court analyzed the facts under the framework provided by *Kiriakides*, as follows:

> The application of each of the five factors reflecting equity and common sense identified in *Kiriakides* likewise turns on Appellant's representations that it would not extend the lease, and that it did not have the financial ability to pay full rent. Beginning with (e), Appellant's own "behavior" undermines its position. 312 S.C. 271, 440 S.E. 2d 364. The other factors all similarly weigh against Appellant for the same fundamental reason. Appellant created this situation with its own representations and cannot claim to be the "injured party" referred to in (a) and (b) or one who will suffer "forfeiture" in (c). *Id*. Rather, the only injured party is Respondent (and by extension its new tenant and brokerage firm) and Appellant can suffer no forfeiture by being bound to its own representations. Appellant also cannot now claim a "likelihood" under (d) of being able to cure by paying full rent when it already represented just the opposite; and furthermore, Respondent already reached an agreement with a new tenant, which of course cannot be undone by Appellant. *Id*. Lastly, Appellant's failure to timely pay the security deposit, a significant sum of $30,496.00, is an additional breach that plainly supports this Application for Ejectment.

(R. p. 28).

The issue here, however, is not one of contract construction. There is no question that the Lease provided an option to extend.[15] (R. pp. 16-17, 45). Mr. Hartmann's e-mails establish that Quality Fresca declined the option and was later estopped from exercising it, not that it never existed to begin with. (R. pp. 17-19, 24-28, 87-91, p. 249, l. 21 – p. 257, l. 20, pp. 425-444).

Another case relied upon by the circuit court and the magistrate court in considering Mr. Hartmann's e-mails was *Ingram*, 340 S.C. 98, 531 S.E.2d 287. (R. pp. 25-28). In *Ingram*, our Supreme Court explained that, as a matter of "equity," a commercial tenant who "misled . . . by promising he would not exercise his option," acting with an "improper ulterior purpose . . . to pressure," was estopped from thereafter enforcing the option. 340 S.C. 98, 531 S.E.2d 287. The circuit court and the magistrate court each provided a detailed analysis of the facts under the legal framework provided by *Ingram*.[16] (R. pp. 25-28).

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[15] In its opening brief, Quality Fresca tries to use Davenport's testimony recognizing the plain language of the option provision to support its position, but that testimony has nothing to do with Mr. Hartmann's e-mails declining the option and misleading Davenport. (App. Br. p. 6); (R. p. 272, ll. 6-21) ("Q. Okay. Tenant – I'll just read it here for the Court's, you know, the word here. "Tenant shall have the option to extend for two additional five-year periods with all terms and conditions of the lease remaining the same with the exception of rent." Do you see that part? A. I do. Q. Are there any other terms in the lease that talk about the option or what the tenant is supposed to do to exercise this option? A. In -- in that section, 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.").

[16] The circuit court analyzed the facts under the framework provided by *Ingram*, as follows:

> Appellant's representations in this matter are analogous to those in *Ingram*, as highlighted above by Judge Young and Professor Spitz. [referring to Roger Young & Stephen Spitz, *SUEM-Spitz Ultimate Equitable Maxim: In Equity, Good Guys Should Win and Bad Guys Should Lose*, 55, S.C. L.Rev., 175, 186 (2003) (discussing *Ingram*)] Appellant cannot maintain any legal or equitable right to remain in the leased premises after representing that it would not extend

Quality Fresca does not take on that legal analysis in its opening brief. (App. Br.).

Instead, Quality Fresca only makes a passing reference to *Ingram*, out of place, in

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> the Lease and that it did not have the financial ability to pay full rent, but would "try and make this location work". In other words, applying the analytical framework of *Ingram*, Appellant admitted that it did not have (1) "the ability to perform" the option, and Appellant certainly did not (2) "do equity." 340 S.C. at 106-7, 531 S.E.2d 287. Instead, like *Ingram*, Appellant "misled . . . by promising he would not exercise his option," acting with an "improper ulterior motive." *Id*. It is clear that the emails from Mr. Hartmann to Mr. Davenport stating that Appellant "couldn't afford" the rent, would not exercise the option, would be vacating the property at the expiration of the term, and would be putting "together the closing and de-branding plan" were all false representations and a concealment of material facts, that Mr. Hartmann intended Respondent to act upon, either by renegotiating the Lease terms with Appellant to provide reduced rent, a shorter lease term, or both. Further, it is clear that Hartmann had knowledge of the true facts, that Appellant had not yet "decided fully the option." Mr. Davenport testified at trial that he accepted Mr. Hartmann's representations as true, and that in reliance thereon he engaged a real estate broker and negotiated for and obtained a new tenant. Davenport further testified that Respondent would suffer financial damages if the new tenant did not take occupancy of the premises. The doctrine of unclean hands therefore applies because Appellant's representation that it would not extend the Lease was unfair, at best. *Ingram*, 340 S.C. at 106-7, 531 S.E.2d 287. The doctrine of equitable estoppel also applies because Appellant concedes the falsity of its representation that it would not extend the Lease, as well its intent to influence Respondent by causing Respondent to be concerned about finding a new tenant. *Id*. Respondent indeed relied on Appellant's misrepresentations, as wrongfully intended, by expending his time and resources to attempt to find a new tenant, which Appellant knew would be a difficult endeavor, and Respondent would now suffer additional financial damages if the new tenant that Respondent labored to find does not take occupancy of the premises.

(R. pp. 25-28).

the section of its opening brief that is dedicated to the appeal bond issue, which is a separate, unrelated issue. (App. Br. p. 26). There, Quality Fresca acknowledges the applicability of *Ingram* to this case, arguing, ostensibly, that the "*Ingram* decision supports Tenant's assertion here that the legal terms of the contract between the parties must be decided before equity become [sic] applicable." (App. Br. p. 26, n.19). Previously, however, in its motion for reconsideration to the circuit court, Quality Fresca argued that the "courts erred in finding *Ingram* [] as binding precedent in that its holding was inapplicable to the facts and distinguishable from this case." (R. p. 206).

Notwithstanding Quality Fresca's unpermitted inconsistency in position and lack of analysis, the circuit court and the magistrate court did not err concluding that *Ingram* further supports the ejectment. (R. pp. 25-28). As in *Ingram*, the facts here show that Quality Fresca, through Mr. Hartmann's e-emails, "misled . . . by promising he would not exercise his option," acting with an "improper ulterior purpose . . . to pressure" Davenport. 340 S.C. at 106-7, 531 S.E.2d 287. (R. pp. 25-28).

iv. The appellant breached the lease by failing to timely pay a security deposit and to timely cure that breach

Another statutory ground that the circuit court affirmed the magistrate court in ejecting Quality Fresca from the premises was that Quality Fresca failed to timely pay a security deposit of $30,496.00 and to cure that breach. (R. pp. 17, 19, 28, 30).

In its opening brief, Quality Fresca does not mention the security deposit in the statement of issues, which constitutes a failure to raise the issue, as discussed below. (App. Br., p.1).

Notwithstanding, in the factual section of its brief, Quality Fresca acknowledges all of the facts necessary to support the conclusion reached by the circuit court in affirming the magistrate court. (App. Br., pp. 8-9). Specifically, Quality Fresca acknowledges that

the security deposit of $30,496.00 was due on May 8, 2020; that no attempt was made to pay it until more than 4 months later, on September 29, 2020, the day before the end of the lease term; that 25 days prior, on September 4, 2020, a notice of default had been given, so the 20 day period to cure had already run; and that Davenport declined to accept the long belated attempt to pay. (App. Br., pp. 8-9). These facts are also confirmed in the documentary evidence and testimony in the record. (R. pp. 17, 19, 28, 30, 83, 158-159, p. 278, ll. 8-19, p. 280, l. 8 – p. 281, l. 1).

In the argument section of its brief (within a subsection discussing COVID-19, which will be addressed in turn), Quality Fresca mentions the security deposit in a footnote, asserting:

> 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*.

(App. Br. p. 19, n. 10) (emphasis added). That assertion is misleading. The funds were not immediately sent. Quality Fresca waited 25 days and then attempted to pay the security deposit on September 29, 2020, as it acknowledged in the factual section of its brief. (App. Br. pp. 8-9) (R. pp. 17, 19, 28, 30, 83, 158-159, p. 278, ll. 8-19, p. 280, l. 8 – p. 281, l. 1). The period to cure provided in the Lease was only 20 days. (R. pp. 17, 19, 28, 30, 56).

Further, the security deposit was more than 4 months overdue, owed since May 8, 2020, by virtue of a promise Quality Fresca made in exchange for Davenport releasing the prior guarantors when Quality Fresca took over the Lease. (R. pp. 16-17, 43-86, p. 243, ll. 12-20, p. 260, ll. 1-14, p. 286, ll. 2-4). And while the security deposit went unpaid, Quality Fresca was representing that it could not afford the rent and trying to renegotiate the terms of the Lease. (R. pp. 17-19, 87-91, p. 249, l. 21 – p. 257, l. 20, pp. 425-444). And by the time Quality Fresca attempted to pay the security deposit, Davenport had already reached

an agreement with a new tenant, relying on Mr. Hartmann's representations on August 6, 2020 that he should do so, as discussed above. (R. pp. 17, 19, 28, 30, p. 249, l. 21 – p. 257, l. 20). Under these circumstances, Quality Fresca's failure to timely pay the security deposit was no trivial matter. It was clearly a material breach, as the circuit court and the magistrate court held. (R. pp. 17, 19, 28, 30). *Kiriakides*, 312 S.C. at 276, 440 S.E. 2d at 366.

In sum, Quality Fresca does not properly raise the issue, concedes the supporting facts, and makes no legal argument regarding the security deposit, other than blaming COVID-19 for its own conduct, which will be discussed next.

v. The appellant cannot blame COVID-19 for its own conduct.

Quality Fresca did not mention the COVID-19 pandemic in its notice of appeal to the circuit court, and now, it argues that COVID-19 is centrally to blame. (*Compare* R. pp. 95-96 *and* App. Br., p. 1). Notwithstanding that this issue was not preserved for review, as will be discussed below, the timing of events belies Quality Fresca's newfound argument. As more fully set forth above in the statement of facts, Quality Fresca assumed the Lease in May of 2020, two months after the COVID-19 shutdowns began, in March of 2020. (R. pp. 16, 43-86, p. 243, ll. 12-20). At that time, Davenport provided accommodations, including rent deferral and the release of personal guarantors, in view of the then-ongoing COVID-19 pandemic, that Quality Fresca readily accepted and were set forth in the Lease, as assumed, assigned, and amended. (R. pp. 16, 43-86, p. 243, ll. 12-20, p. 260, ll. 1-14, p. 286, ll. 2-4). Quality Fresca cannot now feign surprise at COVID-19 or mistreatment by Davenport.

COVID-19 did not cause Mr. Hartmann to write what he wrote in his e-mails, in bad faith. (R. pp. 17-19, 87-91, p. 249, l. 21 – p. 257, l. 20, pp. 425-444). And Quality

Fresca cannot blame Davenport for relying on Mr. Hartmann's e-mails, taking him at his word, by engaging a commercial broker to re-let the premises and by entering into an agreement with a new commercial tenant, as Mr. Hartmann told him to do, and as Davenport had a fiduciary duty to do, as the personal representative of his father's estate. (R. pp. 15, 17-19, p. 249, l. 21 – p. 257, l. 20, p. 273, l. 17 – p. 274, l. 1, p. 275, ll. 6-11). Further, while Mr. Hartmann was misleading Davenport to pressure him to renegotiate the rent, COVID-19 was not the reason that Quality Fresca waited more than four months, to the very last day of the term of the Lease, to attempt to pay the $30,496.00 security deposit that it promised to pay in May of 2020, or to fail to cure that default within 20 after receiving express notice thereof. (R. pp. 17, 19, 28, 30, 56, 83, 158-159, p. 278, ll. 8-19, p. 280, l. 8 – p. 281, l. 1).

II. Additional Grounds For Affirmance

A. The outcome of this case has been conceded by the appellant because a dispositive issue ruled upon by the circuit court, regarding the appellant's failure to file a reconsideration motion to the magistrate court, was not raised in the appellant's brief and was therefore abandoned.

Rule 208(b), SCACR, details the requirements of the parties' initial briefs. "In order for an issue to be properly presented for appeal, the appellant's brief must set forth the issue in the statement of issues on appeal." *Langehans v. Smith*, 554 S.E.2d 681, 347 S.C. 348 (Ct. App. 2001) (discussing Rule 208(b)(1)(B), SCACR). Further, "[a]n appellant may not use either oral argument or the reply brief as a vehicle to argue issues not argued in the appellant's brief." *Bochette v. Bochette*, 300 S.C. 109, 386 S.E.2d 475 (Ct. App. 1989).

In its opening brief, Quality Fresca did not raise a dispositive ruling by the circuit court. Specifically, Quality Fresca did not, either in the statement of issues or the body of

the brief, challenge the circuit court's ruling that the issues Quality Fresca attempted to raise in its appeal to the circuit court were not preserved for review because it did not first make a motion for reconsideration to the magistrate court raising those same issues. (App. Br.) (R. p. 22-24). The circuit court supported that dispositive ruling by discussing Rule 19(d) of the Magistrate Court's Rules, as well as Rule 59(e), SCRCP, and applicable jurisprudence, including *I'ON, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000). (R. p. 22-24). Quality Fresca makes no argument and offers no authority to the contrary in its opening brief. (App. Br.). Notably too, Quality Fresca made no attempt to argue about this issue in the motion for reconsideration that it filed with the circuit court, ironically, after failing to file such a reconsideration motion with the magistrate court. (R. pp. 195-208). This dispositive issue has therefore been abandoned by Quality Fresca and the outcome of this case has thus been conceded.

B. Issues raised in the appellant's brief were not preserved for review.

"The losing party must first try to convince the lower court it is has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred." *I'ON*, 338 S.C. at 422, 526 S.E.2d 716. "This principle underlies the long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments." *Id*.

As discussed immediately above, Quality Fresca did not file a motion for reconsideration to the magistrate court and did not challenge the circuit court's dispositive ruling on its failure to do so, either in its motion for reconsideration to the circuit court, or its opening brief to this Court. (App. Br.) (R. pp. 195-208). Adding to the issue preservation failures, Quality Fresca's notice of appeal from the magistrate court to the

circuit court, which was statutorily required to include a statement of the "grounds" and "particulars" for the appeal,[17] did not raise the issues it now attempts to raise in its appeal brief to this Court. (R. pp. 95-96).

In its entirety, Quality Fresca's notice of appeal from the magistrate court to the circuit court set forth four issues, as follows:

> 1. There was insufficient evidence presented at trial to support a finding that the Appellant / Tenant did not validly exercise its option for an addition term as provided in the written lease.
>
> 2. There was insufficient evidence presented at trial to support a finding that the Appellant / Tenant was equitably estopped from exercising its option.
>
> 3. The Magistrate erred in considering facts not entered into evidence at the hearing.
>
> 4. There was insufficient evidence presented at trial to support a finding that Appellant / Tenant did not pay a security deposit, even though Respondent refused Appellant's attempts to pay all amounts due. Further, the Magistrate Court's finding ignored the plain language of the lease which required notice of default and right to cure, neither of which were given by Respondent.

(R. pp. 95-96).

Compare those four issues to the two issues presented in the statement of issues in Quality Fresca's opening brief (notwithstanding the third issue, relating to the appeal bond, which arose after the notice of appeal to the circuit was filed), as follows:

> 1. 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, and granted relief to landlord solely on

[17] The statutory requirements, in an appeal from the magistrate court to circuit court, are that the appellant "shall serve a notice of appeal, stating the grounds upon which the appeal is founded," S.C. Code Ann. § 18-7-20, and "[i]n the notice of appeal the appellant shall state in what particular or particulars he claims the judgment should have been more favorable to him." S.C. Code Ann. § 18-7-30.

> the basis of equitable doctrines, despite the legal rights spelled out by the contract documents.
>
> 2. 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.

(App. Br. p. 1).

As this comparison shows, Quality Fresca has gone from making arguments that there was insufficient evidence at trial to now making arguments that there were errors of law. And previously, the COVID-19 pandemic was unmentioned by Quality Fresca, whereas now, it is centrally to blame. Observe also that Quality Fresca previously raised the issue of its belated attempt to pay the security deposit, and now, that issue does not appear in the statement of issues (and the facts supporting the circuit court's affirmance of the magistrate court on that issue are acknowledged in the body of the brief, as discussed above).

In sum, Quality Fresca has discarded its old arguments in favor of trying new ones, which is not permitted. *See I'ON*, 338 S.C. at 422, 526 S.E.2d 716.

C. Appellate jurisdiction does not exist because a bond filing was not timely made to the magistrate court, and there is an express statutory requirement for the appeal to be dismissed in that event.

The statutory scheme at issue expressly provides that an appeal of an order of ejectment issued by the magistrate court "shall be dismissed" if the tenant fails to file a bond within five days after serving its notice of appeal, as follows:

> An appeal in an ejectment case will not stay ejectment unless at the time of appealing the 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. In the event the tenant shall fail to file the bond herein required within five days after service of the notice of appeal such

appeal *shall be dismissed* by the trial magistrate.

S.C. Code Ann. § 27-37-130 (emphasis added).

Two cases decided by the South Carolina Supreme Court, *Wheeler v. Hyler*, 91 S.E. 2d 265, 228 S.C. 584 (1956) and *Horn v. Blackwell*, 212 S.C. 480, 48 S.E. 2d 322 (1948), hold that this statutory language, requiring dismissal in the event that the tenant fails to file a bond within five days after serving its notice of appeal of the magistrate court, is a "jurisdictional," "condition precedent" to the right of appeal by a tenant from an order of ejectment.

Here, as detailed above, Quality Fresca filed its notice of appeal from the magistrate court on November 9, 2020. (R. pp. 95-96). Quality Fresca thereafter made no request for an appeal bond within five days. (R. p. 19). That was a fatal failure requiring dismissal of the appeal. Nine days after the jurisdictional, condition precedent deadline passed, the magistrate court, *sua sponte*, on November 18, 2020, scheduled a bond hearing, over Davenport's objections, which was held on November 25, 2020, and thereafter accepted a bond from Quality Fresca. (R. pp. 19-22, 332, 451-453). But the magistrate court's gracious leniency could not and did not cure Quality Fresca's fatal failure. The mandate of the statute is clear: "such appeal shall be dismissed by the trial magistrate." S.C. Code Ann. § 27-37-130. The circuit court correctly recognized this fatal failure as an additional ground for affirming the magistrate court's order of ejectment. (R. pp. 19-22).

Davenport was not required, as Quality Fresca argues, to take his own, separate, independent appeal from the magistrate court in order for the circuit court to recognize that it was not vested with appellate jurisdiction and that the appeal taken by Quality Fresca should be dismissed. (App. Br., pp. 22-30). The fact that, here, the magistrate court, itself, did not dismiss the appeal, as it should have done by statute, is immaterial to the question

of whether there is ongoing appellate jurisdiction, as *Wheeler* explains:

> Under it [the statute now known as S.C. Code Ann. § 27-37-130], the dismissal of the appeal by the 'trial magistrate' is merely the means of establishing the absence of this condition precedent. Here the failure to file the bond is conceded in the agreed case. Because of appellants' non-compliance with this mandatory provision of the statute, the appeal is not properly before us. It is, therefore, unnecessary to decide whether the order of dismissal should have been signed by Judge Moss, before whom the case was tried, instead of by Judge Bellinger, who was presiding in the eleventh circuit when the order was filed. We, therefore, do not reach the question of whether the judgment of the lower court is void for lack of jurisdiction of the issues raised by the pleadings and intimate no opinion thereabout. An objection to jurisdiction of the subject matter may be raised at any time during the progress of an action. However, the conclusion that this appeal is not properly pending before this court exhausts our jurisdiction and precludes consideration of it.

Wheeler, 228 S.C. 584, 91 S.E.2d at 266.

In its opening brief, Quality Fresca makes several attacks on *Wheeler* that are unfounded. (App. Br., p. 29). *Wheeler* was not abrogated by any later adopted rule of civil procedure, as Quality Fresca suggests. Rule 74, SCRCP, expressly makes it clear that the adoption of the rules of civil procedure did not change the fact that the "procedure on appeal to the circuit court . . . shall be in accordance with the statutes providing such appeals." Also, contrary to Quality Fresca's implication otherwise, *Wheeler* construed the same statutory provision at issue here, known now as S.C. Code § 27-37-130 (1976), but known at that time as S.C. Code § 41-113 (1952).[18] *Wheeler* has not been overturned by our

[18] The statutory history is explained in the annotations to the statute. *See* S.C. Code Ann. § 27-37-130 ("HISTORY: 1962 Code Section 41-113; 1952 Code Section 41-113; 1946 (44) 2584; 1950 (46) 2305."). The statutory language has been virtually unchanged since 1946. *Compare* the statutory language from the Act of 1946:

> An appeal in an ejectment case will not stay ejectment unless at the time of appealing the tenant shall give an appeal bond

Supreme Court, so Quality Fresca's contention that it is incorrect is contrary to binding law. *Wheeler*, moreover, was cited as recently as 2020. *See In re Arrieta*, 612 B.R. 342 (Bankr. D.S.C. 2020) (citing *Wheeler*).

Quality Fresca also cites other cases that it argues apply instead of *Wheeler*. (App. Br., pp. 22-30). But none of the cases Quality Fresca cites involve the same statutory language at issue here. For instance, *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 713 S.E.2d 278 (2011), which Quality Fresca contends excuses its failure to timely file for a bond, is a criminal case, where the statute being construed contained no language requiring dismissal based on a temporal restriction regarding a bond. *Id*., 393 S.C. 332, 713 S.E.2d at 284 ("These two provisions of section 14–25–95 do not implicate jurisdiction as there is no temporal restriction in that sentence of the statute.").

Quality Fresca lastly makes assertions that are verifiably inaccurate. Most significantly, on the dispositive issue at hand, Quality Fresca states: "The record does not reflect when the request for bond was made…". (App. Br., p. 30). Indeed, the record does

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> as in other civil cases for an amount to be fixed by the trial magistrate, and conditioned for the payment of all costs and damages which the landlord may sustain thereby. In the event the tenant shall fail to file the bond herein required within five (5) days after service of the notice of appeal such appeal shall be dismissed.

with the current statutory language from S.C. Code Ann. § 27-37-130:

> An appeal in an ejectment case will not stay ejectment unless at the time of appealing the 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. In the event the tenant shall fail to file the bond herein required within five days after service of the notice of appeal such appeal shall be dismissed by the trial magistrate.

reflect that Quality Fresca did not make a request for a bond when it filed its notice of appeal, or at any time before the magistrate court, nine days after the notice of appeal had been filed, *sua sponte*, set a bond hearing. (R. pp. 19-22, 332, 451-453). Quality Fresca did not dispute these explicit findings of fact made by the circuit court in its motion for reconsideration to that court below. (R. pp. 19-22, 195-208). It is too late to dispute these facts now, which are correct in any event.

Quality Fresca also inaccurately states: "Landlord did not object to proceeding nor did he raise any omission by Tenant in timely seeking a bond." (App. Br. p. 30). The transcript of the *sua sponte* bond hearing held by the magistrate court shows that Davenport did object, both at the hearing, and in writing prior thereto in a file-stamped letter that is also part of the record. (R. pp. 19-22, 332, 451-453).

In the end, this issue is simple. Quality Fresca did not follow the statute and the strict consequence for that is dismissal, as the statute itself has explicitly stated for nearly a century. This statutory mandate is within the power and discretion of the legislature, as explained in *Horn*:

> It is well settled that the right of appeal is not an inherent or vested right, but is a matter of grace . . . It follows that in the absence of a constitutional restriction, the legislature in its discretion may abridge or regulate the right of appeal . . . We conclude that the General Assembly may lawfully require the filing of a bond as provided for by Section 30 of the Act under consideration as a condition precedent to the right to appeal from an order of ejectment. We are not unaware of the fact that such a requirement may impose a hardship upon some tenants, but we are here dealing with the power of the General Assembly and not with the question of whether such power was wisely exercised. The Court below did not pass upon the merits of the appeal and it is unnecessary for us to do so. We have no hesitancy in saying, however, that the exceptions relating to the merits are untenable.

Horn, 212 S.C. 480, 48 S.E.2d at 323.

CONCLUSION

On the merits, the circuit court's appellate decision to affirm the magistrate court's ejectment of a commercial tenant was not made in error and is supported by a preponderance of the evidence. Quality Fresca did not timely pay the security deposit and it declined the option to extend the Lease and was estopped from exercising it later. As additional grounds for affirmance, Quality Fresca did not raise a dispositive preservation ruling by the circuit court in its opening brief, while raising other issues that were not preserved for review, and are without merit, in any respect. Further, Quality Fresca did not follow a statute that explicitly requires this appeal to be dismissed. Wherefore, respectfully, the circuit court's affirmance of the magistrate court's order of ejectment should be affirmed by this Court.

Dated: October 21, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this final response brief complies with Rule 211(b), SCACR.

Dated: October 21, 2021

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