

**RECEIVED**

**Nov 02 2021**

**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,

---

**RESPONDENT’S REPLY TO APPELLANT’S OPPOSITION  
TO MOTION TO DISMISS THE APPEAL,  
OR IN THE ALTERNATIVE, TO DECIDE THE APPEAL  
ON THE BRIEFS, WITHOUT ORAL ARGUMENT**

---

The first two pages of Appellant’s opposition misstate the grounds for the instant motion, incorrectly asserting that the grounds are the “same” as an earlier motion to dismiss, which involved a statutory, jurisdictional, time-restricted bond requirement that this Court left for briefing. The grounds for the instant motion, as clearly set forth in the motion itself, are that Appellant, in its opening brief, did not challenge a different, independent, alternative ruling supporting the circuit court’s order on appeal, which involved Appellant’s failure to move for reconsideration. Under the South Carolina Appellate Court Rules and the two-issue rule, that unchallenged ruling should be affirmed, effectively determining the outcome of this case. Appellant’s subsequent attempt to challenge the ruling in its reply brief was improper and Appellant would not be able to

challenge the ruling at oral argument, if one were to be held.

On the third page of its opposition, Appellant acknowledges the real grounds for the instant motion, described above, and offers the following response:

The issue Landlord claims Tenant has not argued in its Appellant's Brief appears in Landlord's Appellant's Brief as Issue 3 at pp. 22-20. In its Reply Brief, Tenant replied to the Argument made in Respondent's Brief concerning the application of Rule 19 of the magistrate's rules. This is not a new issue raised for the first time in a reply brief but it instead a reply. Rule 208(a)(3), SCACR. "An appellant may file and serve a brief in reply to the brief of respondent."

Observe that Appellant says nothing about its opening brief, thereby conceding the indisputable point that its opening brief does not challenge the issue at hand – a point which Appellant also explicitly admitted on the sixth page of its reply brief, stating: "Landlord argues that tenant's appeal does not argue the [Magistrate Court] Rule 19 ruling by the circuit court. That's true." Appellant's suggestion that its reply brief nevertheless saves the day flies in the face of the rules and law set forth in the instant motion.

Appellant concludes its opposition by denigrating Respondent's need to provide occupancy of the premises to the new tenant he entered into an agreement with, at Appellant's urging in bad faith, as a "woe-is-me claim of prejudice."<sup>1</sup> Appellant also flouts

---

<sup>1</sup> For Appellant to now say that Respondent makes a "woe-is-me claim of prejudice" ignores the course of events that Appellant set into action with its e-mails and all of the people and businesses that have been affected as a result, including Respondent, his family, his broker, and the new tenant. This case is about more than money. It is about relationships and who occupies the property. As more fully set forth on pages 5 through 7 of Respondent's brief with cites to the record, in a bad faith attempt to renegotiate the rent, Appellant, the corporate owner of 67 chain restaurants, represented in a series of e-mails that it could not afford the rent, that it would not exercise its option to extend under the lease under the existing terms, that it would be vacating the property, and that Respondent should find a new tenant. Respondent relied on Appellant's representations by immediately engaging a broker to re-let the premises and by entering into an agreement with a new tenant. Respondent, moreover, had a fiduciary duty to act accordingly, as the personal representative of his father's estate for the benefit of the rest of his family. Furthermore, to the extent this case is about money, it is a misnomer for Appellant to

that it may be three years before an oral argument is held in this case because of this Court's backlog, while reciting the quote: "Patience is a virtue." It is apparent that Appellant's strategy is to take advantage of the writ of supersedeas that this Court granted prior to briefing by remaining in the premises for multiple years, despite having effectively conceded the outcome of this case in its opening brief. This is an abuse of the appellate process.

Wherefore, respectfully, this Court should grant the instant motion to dismiss the appeal, or in the alternative, to decide the appeal on the briefs, without oral argument.

Dated: November 2, 2021

Respectfully submitted,

/s/ Brian A. Hellman

Brian A. Hellman (72399)  
Jason S. Smith (80700)  
HELLMAN & YATES, PA  
105 Broad Street, Third Floor  
Charleston, South Carolina 29401  
Telephone: (843) 266-9099  
Facsimile: (843) 266-9188  
bh@hellmanyates.com  
js@hellmanyates.com

*Counsel for Respondent*

---

suggest that the appeal bond covers the rent, as the lease actually provides for additional holdover rent, which Appellant has not been paying, in addition to attorneys' fees and costs, which Respondent has been incurring in this protracted litigation.

RECEIVED

Nov 02 2021

SC Court of Appeals

**CERTIFICATE OF SERVICE**

I hereby certify that on this date, November 2, 2021, I have served the foregoing  
on Appellant's counsel of record by e-mail.

/Jason S. Smith/  
Jason S. Smith