IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

2010-CP-40-06486
Appellate Case No. 2012-212377

Kevin Schumacher ..... Appellant,

v.

Lance Hoover ..... Respondent.

BRIEF OF RESPONDENT LANCE HOOVER

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STATEMENT OF THE CASE

Appellant and landlord Kevin Schumacher sued tenant and Respondent Lance Hoover on September 17, 2010, in Richland County, South Carolina, alleging that Dr. Hoover breached a residential lease. Dr. Hoover counterclaimed for damages including his security deposit, attorney fees, costs of moving, and costs of evaluating the toxic mold in the house.

Dr. Hoover is an officer with the U.S. Army and was moved by the Army from Texas to Columbia, South Carolina. On April 30, 2010, he rented a house in Columbia from Mr. Schumacher for his family of five. (R. p. 45, ¶ 4). The lease also contained an option to purchase.

On August 13, 2010, Dr. Hoover told Mr. Schumacher that the house was infested with toxic mold. (Appellant's Initial Brief, p.5). He also gave written notice of the infestation on August 24, 2010. Mr. Schumacher took no action to ensure the safety of the Hoover family. The family left the home in September. (R. p. 59, ¶ 12). Dr. Hoover did not bring suit against Mr. Schumacher. Mr. Schumacher sued Dr. Hoover for breach of the lease agreement. (R. p. 46, ¶ 15).

Judge Casey Manning tried the case to a jury on January 3, 4, and 5, 2012. (R. p. 66). Judge Manning charged the jury as to breach of contract, the duties of a landlord, non-compliance with S.C. Code § 27-40-440 (non-compliance that materially affects health and safety), termination of rental agreements, the affect of a landlord employing an independent contractor, S.C. Code § 27-40-510 (security deposits), and mitigation of damages. (R. pp. 464-471). Mr. Schumacher did not object to these charges. (R. p. 474). The jury found solely for Dr. Hoover and his family.

The parties filed post-trial motions. (R. pp. 209-213). Mr. Schumacher filed a motion for judgment not withstanding the verdict, while Dr. Hoover filed a motion for attorney's fees and damages, as stipulated during the trial. (R. p. 201, lines 3-13; p. 203, lines 10-19; p. 211, line 17 – p. 212, line 12; p. 213, lines 8-12). The Court awarded damages to Dr. Hoover on May 23, 2012, in the amount of $30,910.93. This included attorney fees, costs, and three times the amount of the Hoover security deposit. On May 30, 2012, Mr. Schumacher filed a motion to amend the trial court's order pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure on the grounds his motion was not addressed in the order. This appeal follows.

FACTS

In March 2010, Lieutenant Colonel Lance Hoover received orders that he was being transferred from San Antonio, Texas, to Columbia, South Carolina. The Hoovers searched for a home near their future church and school, and decided to lease 4120 Kilbourne Road. (R. p. 91, line 21 – p. 92, line 8). In April 2010, Lance Hoover signed a lease for his family to move into the home owned by Mr. Schumacher. (R. p. 123, line 23 – p. 124, line 4). The Hoovers paid a security deposit of $2,400 (R. p. 215, lines 2-4).

Throughout negotiations, the Hoovers were represented by their real estate agent, Todd Beckstrom, and Mr. Schumacher was represented by his agent, Terry Bishop. (R. p. 92, lines 9-14; p. 226, lines 6-8).

In early August, the Hoovers found moist, dripping, greenish-black mold growing on the wall in the hallway of the house near their children's bedrooms. The mold covered roughly a two and a half foot area. (R. p. 107, lines 8-10). They informed Mr. Schumacher of the mold on or about August 13, 2010. (Appellant's Initial Brief, p.5). On that day, Mr. Schumacher came by the house to deliver a letter that would allow the Hoovers to install Cable TV. The Hoovers invited Mr. Schumacher to come into the house and view the mold patch. Mr. Schumacher came into the house and went upstairs where he saw the swath of mold growing. (R. p.315, lines 17-19; p. 297, ll. 3-21).

Mr. Schumacher had experienced mold problems in the past, and had moved his family out of the home within a day. (R. p. 314, line 23 – p. 315, line 8). This was not his reaction to finding the greenish mold in his tenants' house. Instead, Mr. Schumacher's first suggestion was for the Hoovers to spray bleach on the wall. When asked why he suggested this course of action, Mr. Schumacher stated he had read it on the internet. He did not offer to pay for a hotel so that the Hoovers could move out, as he did with his own family. (R. p. 128, lines 7-9; p. 320, lines 9-11).

On August 24, 2010, more than a week had passed since the Hoovers had informed Mr. Schumacher about the mold. The mold remained on the wall, and continued to grow. Dr. Hoover was not comfortable with simply spraying bleach on the wall. As an anesthesiologist, he has observed first-hand the effects of mold on human lungs and knew the dangers mold can present. (R. p.131, lines 2-22). Dr. Hoover

contacted Mr. Schumacher's real estate agent, Terry Bishop. Mr. Bishop advised Dr. Hoover to hire a professional mold remediation company. Mr. Beckstrom, the Hoover's agent, memorialized this conversation in an email to Mr. Bishop on August 24, 2010: "Pursuant to our conversation earlier today, I will advise my clients to get a professional mold inspection. Should the inspector find hazardous mold, your client will be responsible for paying for the inspection and the cost of treating the home." (R. p. 491). With Mr. Bishop's blessing, Dr. Hoover hired Biotek to investigate immediately rather than risk the safety of his family. (R. p. 128, lines 21-24; p. 135, lines 2-7; p. 316, lines 16-18).

On August 24, 2010, it had been eleven days since Mr. Schumacher saw the mold. It remained in the house, and the Hoovers knew of no plans to safely remove it. The Hoovers sent emails to their agent, Todd Beckstrom, who forwarded them to Mr. Schumacher's agent, Terry Bishop. The emails stated that the Hoovers "would honor the terms of the lease provided that the owner addresses the potential mold issues, to include an inspection by a licensed mold inspector and whatever treatment is necessary to remedy the problem. As a doctor he is concerned about the health of his children." (R. p. 523). Mr. Schumacher received this communication from his agent via email by August 25th. (R. p. 349, line 11 – p. 350, lines 19).

Still, Mr. Schumacher did not do anything to remediate the problem. (R. p. 349, lines 11 – p. 350, lines 19). Mr. Schumacher did not hire a mold remediation company. (R. p. 298, lines 3-8; p. 300, lines 12-16). He alleges that he instructed a general contractor to cut out the moldy wall, but this did not occur. (R. p. 324, lines 6-9). Mr. Schumacher did not follow up on the general contractor's work. In fact, he would not

address the mold situation for nineteen days, even though Ms. Hoover sent an email stating they had not heard from Mr. O'Neill, the general contractor. She offered her cell phone number for Mr. O'Neill to call, but the work was never done. (R. p. 316, line 24 – p. 317, line 6; p. 355, lines 1-6, 17-24).

Another week passed, and Mr. Schumacher had not addressed the mold issue as of September 1, 2010. It had now been nineteen days since Mr. Schumacher saw the mold himself, and a week since the Hoovers declared they wanted to terminate the lease if the mold issues were not addressed. The Biotek report was sent to the Hoovers on September 1, 2010, and they forwarded it to Mr. Schumacher through their agents. (R. p. 500, p. 183, line 7 – p. 185, line 18). The report indicated that there were high levels of toxic aspergillus mold in the home. It also determined that the Hoovers and their children were inhaling the toxic mold. (R. p. 130, line 9 – p. 131, line 22).

Mr. Schumacher responded to this report by repudiating his earlier agreement to pay for the mold company to investigate. Mr. Schumacher stated in an email that he would "not be paying for" the report or for "anything Biotek does." He did not offer to move the family to a hotel or even to fix the problem. He did not offer a plan to address the problem. He only stated he "would gladly pay for [his] preferred company," but never gave the name of this company so that Dr. Hoover could contact it himself. (R. p. 522, p. 186, lines 12-20; p. 326, line 23 - p. 327, line 7). The Hoover's agent, Mr. Beckstrom, then pleaded with Mr. Schumacher to take care of the problem, summarizing the Hoover's frustration in an email on the evening of September 1, 2010:

> My clients were very concerned about the mold in your home that they are leasing. The contractor who you sent over to take a look was also very concerned. Mold remediation is very serious and if not done correctly opens you up to substantial future liability. The

> company that the Hoover's chose (Biotek) is certified by the EPA and qualified to handle the problem and will made sure that it follow approved protocol so as not to have millions of mold spores go airborne throughout your home. We reported the water intrusion and potential mold problem to you first, and you sent a handyman over to address the water issue but did nothing about the mold. I then informed your agent before the inspection that the Hoover's would pay for the inspection of your home and that if any remediation was needed, that you would be responsible for the cost of the inspection and remediation. The mold that was found appears to be Aspergillis according to the Biotek expert (test will be back tomorrow). This is a deadly mold that if found in a hospital will shut down an entire wing. No one can take the chance that this is will not be done correctly. My clients health and the future saleability of your home hang in the balance. [sic]

(R. p. 500). The full report was forwarded on September 3, 2010, with an email that stated: "my client is giving notice that they are effectively terminating the lease at the end of September. . . . The health of their children is of major concern." (R. p. 489).

As of September 3, twenty-one days (three full weeks) had passed since Mr. Schumacher saw the toxic mold himself. Ten days had passed since the August 24 email specifying that the Hoovers would stay in the property if Mr. Schumacher fixed the mold problem. Because Mr. Schumacher failed to address the problem, the swath on the wall continued to grow. (R. p. 182, lines 14-17). The Hoovers' children were ill. Mrs. Hoover's health continued to deteriorate. (R. p. 488, p. 188, line 16 – p.189, line 3). The family had now been in a house infested with toxic mold for almost a month, and Mr. Schumacher had yet to address the problem. (R. p. 188, lines 4-7; p. 216, line 15; p. 243, lines 12-14; p. 334, lines 1-2).

Concerned that nothing had been done about the mold and that no plans had been communicated to them, the Hoovers made preparations to leave the infested house. (R. p.

182, lines 4-23). Mr. Schumacher still had not communicated when he would fix the problem or how he would fix the problem. (R. p. 187, lines 12-15).

Still another week passed by. By this time, September 8, 2010, it had been almost a month (twenty-six days) since Mr. Schumacher saw the greenish-black dripping mold. It had been fourteen days since Mr. Schumacher received the August 24 email stating the Hoovers would stay if he addressed the mold. It had been over a week since Mr. Schumacher had received the Biotek report showing toxic levels of mold in the home, yet he did not fix the problem or communicate a plan to fix the problem. On September 8, 2010, Mr. Schumacher sent the Hoovers an email stating that he was "in the process" of hiring another mold company, and offered to pay for the Hoovers to go to a hotel. (R. p. 520, p. 189, lines 8-14). Less than four hours later, Mr. Schumacher sent another email that repudiated this offer and cancelled the plans. In this second email, he states as follows:

> The contractor who installed the air conditioning has just informed me that his insurance company is now involved. They will need to make their own inspection to determine what they believe needs to be done to remedy the situation. I do not have control of the timeframe to fix this until an adjuster visits the home and tells me how to proceed. I will let you know as soon as the adjuster contacts me so we can expedite a solution for you.

(R. p. 521; p. 189, line 15 – p. 192, line 23). He did not renew his offer to put the Hoover family in a hotel while they waited in the mold-infested house. (R. p. 336, line 7 – p. 337, line 5).

By September 12, four more days had passed with no word from Mr. Schumacher. It had now been thirty days since Mr. Schumacher first saw the mold,

eighteen days since he received written notice, and the mold remained and grew on the foyer wall. (R. p. 362, lines 1-3; p. 349, line 11 – p. 350, line 19).

The Hoovers left the infested house on September 15, 2010. (R. p. 172, line 22 – p. 173, line 6). They paid rent for the entire month of September. At this time:

- Mr. Schumacher had known about the mold for a month (R. pp. 127, 177-178);
- Mr. Schumacher had been on written notice that the Hoovers would "honor the terms of the lease provided that the owner addresses the potential mold issues" for 21 days (R. p. 523);
- Mr. Schumacher had repudiated the agreement to pay for the Biotek investigation and refused to use Biotek as suggested by the Hoovers (R. p. 522);
- Mr. Schumacher had offered to have a company remediate the mold but then repudiated that offer four hours later indicating that he did "not have control of the timeframe" (R. p. 521); and
- Mr. Schumacher had made no representation as to when the mold would be remediated.

Two days later, on September 17, Mr. Schumacher brought a lawsuit for breach of the lease even though the rent was paid for the full month. Mr. Schumacher had not remediated the mold and did not have a plan to do so or a timetable as to when it would be done.

ARGUMENT

I. THE JURY PROPERLY FOUND THAT SCHUMACHER BREACHED THE LEASE UNDER THE LANDLORD-TENANT ACT BECAUSE SCHUMACHER DID NOT ADDRESS THE TOXIC MOLD MORE THAN FOURTEEN DAYS AFTER THE HOOVERS GAVE HIM WRITTEN NOTICE. LIKEWISE, THE TRIAL JUDGE PROPERLY AWARDED STATUTORY DAMAGES.

A landlord must "comply with the requirements of applicable building and housing codes materially affecting health and safety [and] make all repairs and do whatever is reasonably necessary to put and keep the premises in a fit and habitable condition." S.C. Code Ann. § 27-40-440 (a)(1)(2) (2012). "[I]f there is a material noncompliance by the landlord . . . [under] § 27-40-440, [which] materially affects health and safety or the physical condition of the property, . . . the rental agreement will terminate upon a date not less than fourteen days after receipt of the notice [by the landlord] if the breach is not remedied within fourteen days," unless the landlord has commenced such repair "within the fourteen-day period and is pursued in good faith to completion within a reasonable time." S.C. Code Ann. § 27-40-610 (a)(1)(ii) (2012).

A. Mr. Schumacher received written notice of the toxic mold more than fourteen days before the Hoovers left the infested home and failed to remedy the breach within this time.

The Hoovers and Mr. Schumacher consistently communicated to each other through their agents. Mr. Schumacher never told the Hoovers to alter this method of communication, and the Hoovers continued to convey information to Mr. Schumacher through their respective agents. (R. p. 227, line 3 – p. 237, line 16). Defendant's Exhibit 13 consists of a series of emails between the agents representing the parties. In those emails, the Hoovers state unambiguously that they wanted to terminate the lease and relocate, but that they would "honor the terms of the lease provided that the owner

addresses the potential mold issues, to include an inspection by a licensed mold inspector and whatever treatment is necessary to remedy the problem." (R. p. 523). This email was sent on August 24, 2010. Mr. Schumacher testified that he received this communication from his agent via email no later than August 25, 2010. (R. p. 349, line 11 – p. 350, line 19). In this series of emails, there is written notice of the defective condition as well as notice of termination, satisfying the requirements of Code Section § 27-40-610.

Mr. Schumacher argues that because he did not receive notice written in specific statutory language, he was not required to comply with the Residential Landlord Tenant Act (RLTA) and provide a safe, habitable home. This argument fails. In South Carolina, strict, literal compliance with notice requirements is not required in enforcing a remedial statute such as the RLTA, because the statute must be interpreted consistent with the purpose and intent of the legislature.

The specific section reads:

> Except as provided in this chapter, if there is a material noncompliance by the landlord with the rental agreement or a noncompliance with § 27-40-440 materially affecting health and safety or the physical condition of the property, the tenant may deliver a written notice to the landlord specifying the acts and omissions constituting the breach and that the rental agreement will terminate upon a date not less than fourteen days after receipt of the notice if the breach is not remedied within fourteen days.

S.C. Code Ann. § 27-40-610.

Schumacher argues that the Hoovers must use the statutory language in the notice. This argument fails. South Carolina Code Section 27-40-20 states that the "chapter must be liberally construed and applied to promote its underlying purposes and policies," which are "(1) to simplify, clarify, modernize, and revise the law governing rental of

dwelling units and the rights and obligations of landlords and tenants; (2) to encourage landlords and tenants to maintain and improve the quality of housing." S.C. Code Ann. § 27-40-20 (2012). The statute does not require that exact statutory language be used to provide written notice to a landlord. In addition, our courts have held that precise language does not have to be used when the intent and meaning remains the same. *See Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011), *cert. denied,* 132 S. Ct. 2436 (2012) ("a party is not required to use the exact name of a legal doctrine in order to preserve the issue"); *State v. Crenshaw*, 274 S.C. 475, 477, 266 S.E.2d 61, 62 (1980) ("an indictment charging a statutory crime need not use the precise language of the statute in describing the offense, if the words used are equivalent to those employed by the statute"); *S. Carolina Dept. of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 302-03, 641 S.E.2d 903, 907 (2007) ("Although SCDOT did not phrase its objection in the exact terms used in the issues on appeal, SCDOT's objection on the basis that the verdict form . . . provided a meaningful objection with sufficient specificity to allow the trial court to rule on the issue."); *Kottman v. Ayer*, 1847 WL 2149 (May 1847) ("The law respects the effect and substance of the matter, and not every nicety of form. Words ought to be governed by the intention-they ought to be made subservient to the intent"); *State v. Vill*, 4 S.C.L. 262 (1808) ("although there is not a perfect similarity in the words, there is no variance in the sense, nor can the variance create any doubt in the operation or construction of the law"); *State v. Russell,* 345 S.C. 128, 134, 546 S.E.2d 202, 204 (Ct. App. 2001) (holding that a party need not use the exact name of a legal doctrine in order to preserve an argument, but it must be clear that the argument has been presented on that ground).

The written notice provided to Mr. Schumacher was clear that unless the toxic mold was removed, the Hoovers were going to terminate the lease. The Hoovers proposed an amicable termination of the lease, which Mr. Schumacher denied. (R. p. 491). The email that followed stated that "[t]hey would honor the terms of the lease provided that the owner addresses the potential mold issues, to include an inspection by a licensed mold inspector and whatever treatment is necessary to remedy the problem." (R. p. 523). Just as in the cases cited above, although the precise language of the statute was not used, there can be no doubt that the Hoovers were putting Mr. Schumacher on written notice that they intended to leave unless the mold issue was addressed.

Mr. Schumacher saw the mold on or about August 13, 2010. He rejected Dr. Hoover's plan to remedy the situation and proposed no alternative. As a result, on August 24, 2010, Dr. Hoover gave written notice to Mr. Schumacher that his family would not remain in the house unless the problem was addressed. (R. p. 349, line 11 – p. 350, line 19). Mr. Schumacher still took no actions to make the house safe.

The existence of toxic mold falls within the definition of a noncompliance that materially affects health and safety. (Appellant's Initial Brief, p.13). Mr. Schumacher knew about the mold by August 13, 2010, because he saw it himself at the house. (R. p. 315, lines 17-19; p. 297, lines 3-21). He took no steps to remedy it. (R. p. 324, lines 11-19). He received written notice no later than August 24, 2010 by email. (R. p. 349, line 11 – p. 350, line 19). Since Mr. Schumacher failed to remedy the problem with fourteen days of the Hoover's written notice, Dr. Hoover properly terminated the lease.

B. Mr. Schumacher received actual notice of the toxic mold more than fourteen days before the Hoovers left the infested home, and failed to remedy the breach within this time.

The Residential Landlord Tenant Act "must be liberally construed and applied to promote . . . encourag[ing] landlords and tenants to maintain and improve the quality of housing." S.C. Code Ann. § 27-40-20. "[T]he landlord has a duty . . . to do whatever is reasonably necessary to keep the premises in a fit and habitable condition." S.C. Code Ann. § 27-40-40 (2012). The South Carolina Supreme court has stated plainly that "the preamble and the Act clearly convey intent on the part of the Legislature to provide for a cause of action for injuries resulting from the failure of the landlord, after notice, to keep rented residential premises in repair." *Watson v. Sellers*, 299 S.C. 426, 436, 385 S.E.2d 369, 374 (Ct. App. 1989). Not once have the courts said that the purpose was to protect landlords by forcing tenants to know specific statutory language. Not once have the courts stated that the Act was enacted to protect landlords who do nothing about health and safety violations for a specified period. The courts have determined that the statute should be construed for an action in favor of the tenant and against the landlord for failure, after notice, to keep the property in good repair. *Id.*

When interpreting a statute, a court should first determine the intent of the legislature in passing the act. *E.g., State v. Ramsey,* 311 S.C. 555, 430 S.E.2d 511 (1993). This requires considering not only the language of the phrase being construed, but considering the clause in combination with the purpose and policy expressed in the statute. *Whitner v. State*, 328 S.C. 1, 6, 492 S.E.2d 777, 779 (1997); *Wieters v. Bon–Secours–St. Francis Xavier Hosp., Inc.,* 378 S.C. 160, 170, 662 S.E.2d 430, 436 (Ct. App. 2008); *see also Georgia–Carolina Bail Bonds, Inc., v. County of Aiken,* 354 S.C. 18, 22,

579 S.E.2d 334, 336 (Ct. App. 2003) ("A statute should be given a reasonable and practical construction consistent with the purpose and policy expressed in the statute"). "The real purpose and intent of the lawmakers will prevail over the literal import of the words." *Enos v. Doe*, 380 S.C. 295, 304, 669 S.E.2d 619, 623 (Ct. App. 2008), *citing Browning v. Hartvigsen,* 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992).

In regards to written notice statutes, our courts have found that exacting compliance is not required. For example, our courts have found that exacting compliance with a workers' compensation notice statute did not have to be in writing, even though the statute stated that written notice was required. *Dawkins v. Capitol Const. Co.,* 252 S.C. 536, 539, 167 S.E.2d 439, 440 (1969); *Mize v. Sangamo Elec. Co.,* 251 S.C. 250, 161 S.E.2d 846 (1968). The court explained that the employer in those cases was not prejudiced by lack of written notice because he already had actual notice of the injury. Therefore, compliance with the written notice section of the statute was not required, as long as the employer had actual notice of the injury. *Id.*

In 1990, the South Carolina Supreme Court found that exacting compliance with the written notice requirement in South Carolina Code Section 9-11-210(3) was not needed. *S. Carolina Police Officers Ret. Sys. v. City of Spartanburg*, 301 S.C. 188, 191, 391 S.E.2d 239, 241 (1990). In that case, a police officer attempted to upgrade his retirement benefits, but gave verbal notice rather than written notice, as was prescribed by the statute. *Id.* at 189, 391 S.E.2d at 240. The Court first interpreted the intent of the legislature was to help retirees upgrade retirement, and then came to the conclusion that this purpose would be inconsistent with language that would penalize a retiree who failed

to strictly comply with the statute. 301 S.C. at 190-91, 391 S.E.2d at 241 (1990). The Court held that written notice was not required when oral notice was given. *Id.*

The courts used the same analysis in *James v. State,* 372 S.C. 287, 641 S.E.2d 899 (2007). In that case, the Court held that strict compliance with a written notice requirement in a statute was not required if a person had actual notice. *Id.* at 294-95, 641 S.E.2d at 901. The Court first examined the purpose of the statute, and held that it was to assure that an individual have actual notice that the State is seeking to sentence him under the recidivist statute. Therefore, "so long as the defendant and his counsel, at least ten days prior to trial, possess actual notice of the State's intention to seek a sentence under South Carolina's recidivist statute, the statute has been satisfied." In other words, actual notice trumps written notice. *Id.*

Finally, in the case of *Watson v. Sellers,* 299 S.C. 426, 437, 385 S.E.2d 369, 375 (Ct. App. 1989), the Court held that a cause of action had been created in a case where the landlord had failed to make repairs after being given notice. In the facts of the case, only oral notice was given to the landlord. The landlord did not receive written notice. The Court stated that a cause of action under the Act was created, even though there had not been strict compliance with the statute to provide written notice.

The purpose of the RLTA is to help tenants. It is to ensure that landlords provide a safe and habitable house, and provides a remedy for tenants whose landlords are not complying with the Act. Just as in *South Carolina Police Officers Retirement System*, the purpose is inconsistent with language penalizing a tenant who failed to strictly comply with the statute, especially in a case where a landlord had not only received written notice but had also seen the violation and did nothing. To find otherwise would provide

protection for a landlord whose inaction threatens the health and safety of tenants, simply because the tenants did not know the magic words of a statute.

Mr. Schumacher had notice of the dangerous condition on August 13, 2010, when he saw the mold himself, on August 24, 2010, via email which stated the Hoovers would honor the lease on the condition the mold was addressed, on September 1, 2010, when he received the report from Biotek that stated the mold was toxic, and again on September 3, 2010, when he received the full report from Biotek. Yet, by September 14, 2010, Mr. Schumacher had failed to remove the mold from the home. He did not remediate the mold until October. Because Mr. Schumacher received notice of the mold that affected the Hoovers' health and safety and failed to address it within fourteen days, he breached the lease which Dr. Hoover properly terminated.

C. Mr. Schumacher failed to make a good faith effort to remedy the hazardous condition.

Mr. Schumacher argues he made a good faith effort to fix the problem within fourteen days. (R. p. 336, lines 7-12). This is a question for the jury. *See e.g. Swinton Creek Nursery v. Edisto Farm Credit, ACA,* 334 S.C. 469, 485, 514 S.E.2d 126, 134 (1999) ("Factual inquiries, such as whether the defendants acted in good faith in making the statement . . . are generally left in the hands of the jury"); *Murray v. Holnam, Inc.,* 344 S.C. 129, 144, 542 S.E.2d 743, 751 (Ct. App. 2001) ("a genuine issue[] of fact . . . is properly a question for the jury").

The jury was charged in the statute. The jury found that Mr. Schumacher did not make a good faith effort by ruling against him. There is significant evidence to support this finding.

Mr. Schumacher knew about the mold issue on August 13, 2010, because he saw the mold himself. Mr. Schumacher did not contact a professional mold company to analyze the problem. (R. p. 315, line 12 – p. 316, line 15). Mr. Schumacher insists he acted in good faith because he claims to have hired a general contractor to knock out the moldy wall. (R. p.340, lines 4-9). He agreed at trial that the general contractor he hired was not qualified to remediate mold in a house. (R. p. 317, lines 7-18). Even so, the contractor failed to cut out the mold. (R. p. 319, lines 8-15). A landlord cannot escape his duty by placing the work with an independent contractor. *Durkin v. Hansen,* 313 S.C. 343, 349, 437 S.E.2d 550, 554 (Ct. App. 1993) ("Respondents cannot insulate themselves from liability which has been assumed by agreement and, additionally, imposed by statute, by the mere employment of an independent contractor"). Because Mr. Schumacher cannot escape the duty he owed the Hoovers by hiring a contractor, he is responsible for his failure to act and remediate the mold problem.

Out of concern for his family's health and safety, Dr. Hoover hired Biotek to analyze the mold for toxins and propose a solution. (R. p. 128, lines 18-24). This was the remedy agreed to by the parties. Mr. Schumacher then repudiated this agreement and stated that he would not pay for any work done by Biotek. (R. p. 330, line 24 – p. 331, line 1).

After receiving the report that stated the Hoovers and their children were breathing in high levels of toxic aspergillus mold, Mr. Schumacher still communicated no plan of action to the Hoovers. It was not until September 8, 2010, that Mr. Schumacher sent an email to the Hoovers first giving a plan to fix the problem using a mold remediation specialist. He repudiated this plan less than four hours later. He did not put

the Hoovers into a hotel at any time, and the only offer to do so was repudiated quickly. (R. p. 332, line 11 – p. 335, line 12).

Mr. Schumacher did not communicate a plan to address the mold, failed to follow up with the Hoovers regarding the mold, failed to contact a mold professional until a month after seeing the mold, repudiated his agreement to pay for the Biotek professional report and remediation, waited over a week after receiving the report before addressing the problem, failed to re-locate the Hoovers even after it was determined the mold was toxic, failed to give the Hoovers a plan of action for over three weeks, and did not follow the recommendations of the professional mold company that analyzed the mold.

Because Mr. Schumacher did not make a good faith effort to address the mold within fourteen days of written notice, the exception to S.C. Code Section 27-40-610 does not apply, and the Hoovers properly terminated the lease.

II. AS AN ADDITIONAL SUSTAINING GROUND, THE JURY PROPERLY RULED FOR DR. HOOVER BECAUSE MR. SCHUMACHER TOOK NO STEPS TO MITIGATE HIS DAMAGES.

An appellate court may affirm for any reason appearing in the record. Rule 220(c), SCACR.

During the trial, both Mr. Schumacher and his real estate agent Terry Bishop testified to email correspondence regarding a replacement tenant for the Hoovers. (R. pp. 255-259, pp. 368-372; p. 524). This testimony clearly indicates that Mr. Schumacher did not place the property back on the market to rent. (R. p. 258). It also implies that Mr. Schumacher turned down a renter for the property. (R. p. 255). In Mr. Schumacher's own words "no new renter coming, my wife and I decided against it." (R. p. 370, p. 524).

As the Plaintiff, Mr. Schumacher had a duty to mitigate his damages. *Cisson Const. vs. Reynolds & Associates, Inc.*, 311 S.C. 499, 429 S.E.2d 847 (Ct. App. 1993) ("The duty to mitigate losses applies to contracts"). "The reasonableness of a party's actions to mitigate damages is a question of fact which cannot be decided as a matter of law when there is conflicting evidence." *McClary v. Massey Ferguson, Inc.*, 291 S.C. 506, 511, 354 S.E.2d 405, 408 (Ct. App. 1987). As a landlord, Schumacher had a duty to mitigate damages and place the property back on the market for rent. *Mid-Continent Refrigerator Co. v. Way*, 263 S.C. 101, 208 S.E.2d 31 (1974) (holding lessor could not receive damages when lessee had paid rent until time of surrender and lessor introduced no evidence of attempts to mitigate damages); S.C. Code Ann. 27-40-50 (2012) ("the aggrieved party has a duty to mitigate damages").

By his own testimony, Mr. Schumacher did not mitigate his damages. In fact, there is no evidence that Mr. Schumacher attempted to lease the property and mitigate his damages. The only evidence on this topic is from Mr. Schumacher and Terry Bishop who testified that Mr. Schumacher refused to lease the property to another tenant.

Thus, the jury could have found that even if Dr. Hoover did not properly terminate the lease, Mr. Schumacher did not mitigate his damages. As a result, Mr. Schumacher would not be entitled to recover from Dr. Hoover.

III. DR. HOOVER IS ENTITLED TO HIS SECURITY DEPOSIT, TREBLE DAMAGES, AND ATTORNEY FEES BECAUSE HE WAS THE PREVAILING PARTY, AND HE DID NOT BREACH THE LEASE AGREEMENT.

Dr. Hoover was the prevailing party in this action. The jury was charged in the statutes. There were no objections to the jury charges from either party. The jury found for Dr. Hoover and against Mr. Schumacher on all issues. Mr. Schumacher had notice

under the statute, he did not rectify the violation within the statutory time frame, and he did not act in good faith to rectify the violation. Therefore, he breached the lease, and Dr. Hoover properly terminated the lease.

The jury also found that Mr. Schumacher held Dr. Hoover's security deposit without justification. "In South Carolina, an appellate court must uphold a jury verdict if it is possible to reconcile its various features." *Camden v. Hilton*, 360 S.C. 164, 174, 600 S.E.2d 88, 93 (Ct. App. 2004). "Furthermore, 'a jury verdict should be upheld when it is possible to do so and carry into effect the jury's clear intention.'" *Id.* (quoting *Johnson v. Parker*, 279 S.C. 132, 135, 303 S.E.2d 95, 97 (1983)). "A factual finding of the jury will not be disturbed unless there is no evidence which reasonably supports the findings of the jury." *Pope v. Heritage Communities, Inc.*, 395 S.C. 404, 412, 717 S.E.2d 765, 769 (Ct. App. 2011), reh'g denied (Dec. 12, 2011). There is ample evidence in the record to support the decision of the jury.

If a landlord withholds a security deposit without just cause, "the tenant may recover the property and money in an amount equal to three times the amount wrongfully withheld and reasonable attorney's fees." S.C. Code Ann. § 27-40-410 (2012). Mr. Schumacher admitted in testimony that there was no damage to the house caused by the Hoovers. He also admitted that he did not account for keeping the security deposit. (R. p. 367, lines 6-22). The jury found for Dr. Hoover on his counterclaim for return of his security deposit.

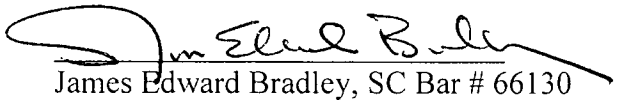
Defendant's Exhibit 1, the lease agreement, states specifically that "[t]he prevailing party shall be entitled to all costs incurred in connection with any legal action brought by either party to enforce the terms hereof or relating to the demised premises,

including reasonable attorney fees." The parties also agreed at trial that the question of attorney fees would be resolved by Judge Manning. (R. p. 211, line 4 – p. 213, line 15). The jury found for Dr. Hoover. Since Dr. Hoover was the prevailing party, he is entitled to costs and reasonable attorney fees.

CONCLUSION

Judge Manning properly charged the jury in the law in this matter, and Mr. Schumacher did not object to the charge. The jury found for Dr. Hoover and against Mr. Schumacher. There was significant evidence in the record to support the finding that Mr. Schumacher breached his duty as a landlord by not timely addressing toxic mold in the house. As a result, this court should affirm the jury's verdict.

Respectfully submitted,



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May 1, 2013

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In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

2010-CP-40-06486
Appellate Case No. 2012-212377

Kevin Schumacher, ...Appellant,

v.

Lance Hoover.....Respondent.

CERTIFICATE OF COUNSEL

I certify that this Brief of Respondent complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I certify that I have served the Brief of Respondent Lance Hoover on the parties to the appeal by depositing a copy of it in the United States Mail, postage prepaid, on April 29, 2013, addressed to attorneys of record as follows:

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