THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Case No. 2010-CP-40-06486

Kevin Schumacher, ... Appellant,

v.

Lance Hoover, ... Respondent.

BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. **WHETHER HOOVER BREACHED THE LEASE AGREEMENT BETWEEN THE PARTIES BY FAILING TO GIVE SCHUMACHER FOURTEEN DAYS TO REMEDY THE MOLD CONDITION ON THE LEASED PREMISES?**

II. **WHETHER HOOVER IS ENTITLED TO HIS SECURITY DEPOSIT, TREBLE DAMAGES AND ATTORNEY'S FEES?**

STATEMENT OF THE CASE

This case arises out of a lease agreement between the parties that arose in April 2010. Kevin Schumacher ("Schumacher"), the landlord, commenced this action against Lance Hoover ("Hoover" or "Dr. Hoover"), the tenant, by the filing of a summons and complaint on September 17, 2010. In the complaint, Schumacher sought damages arising out of Hoover's alleged breach of the parties' one-year residential lease agreement pursuant to the South Carolina Residential Landlord Tenant Act ("RLTA"), S.C. Code Ann. § 27-40-10, *et seq*. Hoover filed an answer on November 15, 2010 and an amended answer on June 6, 2011.[1] In these pleadings, he asserted counterclaims for breach of contract, negligence/gross negligence, and a return of his security deposit pursuant to the RLTA. The case was called to trial on January 3, 2012.

At the close of Hoover's case-in-chief, Schumacher moved for a directed verdict on the grounds that there was no genuine issue of material fact in the evidence presented, and the case only presented a question of law for the Court to decide in Schumacher's favor. (R. p. 416, lines 6-24.) The trial court denied the motion and submitted the case to

[1] Hoover's wife purported to join the litigation as a counterclaimant by adding her name and a "third-party complaint" to Hoover's initial answer and counterclaim. Schumacher moved to dismiss and/or strike Mrs. Hoover's name and claims from the pleadings on December 14, 2010. This motion was granted by order dated May 17, 2011, and Hoover filed an amended answer and counterclaim that did not include Mrs. Hoover's claims.

the jury. (R. p. 420, lines 23-24.) The jury returned a verdict for Hoover only as to his counterclaim for return of his security deposit. (R. p. 478, lines 22-24.) At the close of trial, the court granted the parties ten days to file post-trial motions. (R. p. 481, lines 19-22.)

On January 17, 2012, both parties submitted post-trial motions: Hoover filed a motion for entry of attorney's fees and damage award and Schumacher filed a motion for judgment notwithstanding the verdict. Schumacher argued that the evidence presented at trial indicated that Schumacher was not given fourteen days to correct the problem as required by S.C. Code Ann. § 27-40-610(a)(1) (Rev. ed. 2007), and accordingly, Hoover wrongfully breached the parties' lease agreement and was not entitled to a return of his security deposit, treble damages, or attorney's fees. Schumacher therefore requested that the trial court set aside the jury's verdict for Hoover, that judgment be entered in Schumacher's favor, and that the trial court order a new trial to determine Schumacher's damages.

The court entered an order on May 23, 2012 granting Hoover's motion for entry of attorney's fees and damage award, awarding damages in the amount of $30,910.93. The court did not make a specific ruling as to Schumacher's motion for judgment notwithstanding the verdict. On May 30, 2012, 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 that the trial court's order did not address Schumacher's post-trial motion. On June 28, 2012, Schumacher timely appealed the trial court's presumed denial of his post-trial motion.[2]

[2] Schumacher filed his notice of appeal even though no express ruling was issued as to his Rule 59(e) motion because of uncertainty as to whether the trial court's May 30, 2012 order constituted a *de*

FACTS

In early 2010, Dr. Hoover and his wife, Mrs. Monica Hoover ("Mrs. Hoover"), began searching the Internet for a home to purchase in Columbia, South Carolina because they were planning on moving from San Antonio, Texas to Columbia. (R. p. 91, lines 21-25, p. 92, lines 1-3.) Through their Internet search, Dr. and Mrs. Hoover identified a home located at 4120 Kilbourne Road ("the Kilbourne property") as an ideal place to live because the house was close to St. Joseph's Catholic Church, which the couple intended to join, and Fort Jackson Army Base, where Hoover planned to work as a doctor. (R. p. 92, lines 4-8.) Schumacher owned the Kilbourne property and contracted with Terrell Bishop Jr., a real estate agent at RE/MAX Advantage Group, to market it for sale. (R. p. 225, lines 4-7; p. 226, lines 3-11.) Schumacher and his family had lived at the Kilbourne property for several years before deciding to move to a smaller home on a cul-de-sac in July 2009 so that his children would have a place to play without as much traffic. (R. p. 282, line 16 – p. 283, line 6.)

Hoover contacted Todd Beckstrom, a real estate agent at ERA Wilder Realty, to make an offer on the Kilbourne property, even before he and his family visited the house in person. (R. p. 92, lines 9-17; p. 159, lines 11-15.) Although the property was marketed for sale, Hoover was only interested in a lease that gave him the option to purchase the home. (R. p. 258, lines 2-17.) The parties signed a one year lease with option to purchase on April 30, 2012. (R. p. 92, lines 15-19; p. 93, lines 19-20. *See also* R. pp. 484-485.)

On June 15, 2010, Hoover picked up the key to the Kilbourne property, and he

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facto denial of his post-trial motion, notwithstanding the absence of an explicit ruling to that effect. Schumacher did not want to run the risk of allowing his right of appeal to expire. *See Quality Trailer Prod., Inc. v. CSL Equip. Co., Inc.*, 349 S.C. 216, 562 S.E.2d 615 (2002).

and his wife stayed at the property on air mattresses for a couple of days while running errands and setting up accounts in Columbia. (R. p. 95, lines 2-19.) Schumacher came by that day to meet the Hoovers and bring the family some pastries. (R. p. 95, lines 20-25; p. 289, lines 15-21.) Hoover informed Schumacher that they had discovered a switch in an upstairs closet that turned on the attic fan, which had been previously been sealed off. (R. p. 289, line 22 – p. 290, line 4.) When the switch was activated and the fan was unable to draw any air, the motor shorted out. (R. p. 291, line 19 – p. 292, line 13.) Schumacher therefore complied with Hoover's request to have the fan opening unsealed. (R. p. 291, line 19 – p. 292, line 22.)

On June 25, 2010, Hoover hired Boysia Home Inspection Services to conduct a home inspection in anticipation that Hoover would exercise the option to purchase at the end of the one year lease. (R. p. 96, lines 7-14.) The inspection report revealed a few minor issues that the Hoover asked Schumacher to repair and which Schumacher repaired within a short period of time. (R. p. 97, lines 10-18.)

Hoover and his family moved into the Kilbourne property on or about July 24, 2010. (R. p. 162, lines 5-7.) Almost immediately after moving in, he and his wife reconsidered whether they should purchase the property and began to look for other houses in the area. (R. p. 168, lines 9-25.) On August 23, 2012, Mrs. Hoover informed Beckstrom by email that she and Dr. Hoover were not interested in purchasing the Kilbourne property. (R. p. 166, lines 6-18; p. 168, lines 10-17; *see also* pp. 491-493.)

As early as August 25, Mrs. Hoover emailed Beckstrom a list of three other houses that she and Dr. Hoover were interested in visiting with the intent to purchase. (R. p. 169, lines 4-13; *see also* R. p. 487.) Only minutes later, Beckstrom responded: "I

can set it up for Friday, but don't we want to wait until we work out the lease first?" (R. p. 487.) Dr. Hoover responded to Beckstrom's email by stating:

> I agree that we need to work out the lease first. I am sure something like this takes time. I will inform Monica to be patient. There may come a point that we have to just settle for staying in the home, but I want to ensure that the mold situation is under control. I do not want the tactics to get too nasty. It appears that the situation is not as amenable as we once thought.

(*Id.*)

Only two months after moving into the Kilbourne property, the Hoovers noticed that the electric bills for the months of June and July were over $500 apiece. (R. p. 163, lines 6-20.) In early August, Dr. Hoover and his wife realized that the ceiling and wall near the stairwell were constantly wet. (R. p. 105, lines 4-18; p. 106, line 10 – p. 107, line 10.) Hoover admitted that he saw the moisture on the ceiling and wall for a period of time before any mold had formed and that he did not take any steps to investigate the source of the problem or notify Schumacher. (R. p. 106, line 15 – p. 107, line 2.)

On or around August 13, 2010, Schumacher came to the Kilbourne property to deliver a letter Hoover had requested from him so that he could order the installation of a cable line to the house. (R. p. 296, lines 18-25.) When Schumacher arrived at the home with the letter, Mrs. Hoover brought up the energy bill issue and showed Schumacher the mold that had begun to form near the stairwell. (R. p. 107, lines 11-20; p. 163, line 22 – p. 164, line 4.) Schumacher was immediately concerned and went into the attic to try and identify the source of the moisture and resulting mold. (R. p. 298, lines 3-6.) Schumacher also asked a licensed contracting company, Johnny Housewright, to come to the Kilbourne property and identify and repair the source of the condensation and address issues that may have been contributing to the Hoovers' high energy bills. (R. p. 298, line

3 – p. 300, line 3.)

Just a day or two after the Hoovers notified Schumacher of the mold and high energy bills, Schumacher and Mike O'Neill, president of Johnny Housewright, identified the source of the moisture. As Schumacher testified during trial:

> There's ductwork in the attic that leads to the air conditioner in the bedroom . . . [and] when it came out of the wall, there's an elbow that wasn't insulated. The rest of the ductwork was all insulated and done properly. For whatever reason, when they installed this [three or four years ago], they had forgotten to insulate that corner. And that corner was showing condensation like a glass of ice water on a hot day outside.

(R. p. 298, lines 5-18.) Additionally, Schumacher and O'Neill determined that the attic fan door that Hoover had asked to be unsealed, a three-by-six or four-by-eight foot opening in the ceiling leading to the attic, had been left open since being unsealed at his request in June, which allowed warm, moist air from the attic to enter the home. (R. p. 299, lines 9-23.) O'Neill believed that the opening of the attic door was the primary cause of the Hoovers' high energy bills and was furthermore causing the moisture and mold to build up near the stairwell. (*Id.* at lines 23-25.) This opinion was corroborated by Hoover's expert, Ancel A. Hamilton, at trial. (R. p. 399, line 25 – p. 400, line 13.)

On or about the same day, Schumacher asked O'Neill "to cut out [the] moldy part of the ceiling and replace it and seal the attic fan so that [Hoover and his family] don't have air conditioning running constantly and then get rid of th[e] condensation problem." (R. p. 300, lines 6-11.) Additionally, Schumacher testified that he "called an air conditioner repairman . . . to reinsulate[] th[e] entire area of ductwork so that . . . [there wasn't] any more condensation." (*Id.* at lines 12-16.) Schumacher testified that he believed O'Neill and the air conditioner repairman went to the Kilbourne property "to seal the attic door and . . . to reinsulate the pipe" within the same week. (*Id.* at lines 18-

22.) After a week, however, Schumacher discovered that O'Neill had never cut the moldy portion of the ceiling after the air conditioner repairman reinsulated the pipe. (R. p. 300, lines 4 – p. 301, line 18.)

Schumacher and O'Neill immediately set out to contact the Hoovers and work to resolve the problem. (R. p. 301, lines 7-9.) However, Hoover and his wife were either non-responsive to telephone calls regarding the scheduling of the necessary repairs or refused to allow Schumacher or his repairmen into the home. (*Id.* at lines 10-18.) Starting August 26, Schumacher contacted his friend Andrew Hackney regarding hiring Mold Solutions, a mold remediation company recommended earlier by Hackney to Schumacher, to clean-up the mold at the Kilbourne property. (R. p. 304, lines 21-22.) In the meantime, however, without consulting with Schumacher, Hoover hired another mold remediation company, Biotek, to inspect the home, provide a report, and propose a plan of remediation. (R. p. 170, lines 9-16.) Hoover did not notify Schumacher that he had hired Biotek to inspect the home until after the inspection was performed. (R. p. 304, lines 5-18.)

Shortly before Biotek issued its report, Hoover asked Schumacher if he would pay for the report and inspection, and Schumacher declined. (*Id.*; *see also* R. pp. 500-503.) Schumacher stated in both an email to Mrs. Hoover dated September 1 and during his trial testimony that he did not want to pay Biotek for the remediation because it did not guarantee its work. (R. p. 303, lines 10-12; *see also* R. pp. 500-503; p. 520.) Schumacher told Mrs. Hoover on September 1: "Regarding the mold inspection you ordered; I will not be paying for that. I have someone that I prefer to use that I trust. I will gladly pay for my preferred company to do an inspection and mold cleanup. I will

not pay for anything Biotek does." (R. pp. 500-503.)

On September 1, 2010, Biotek sent its inspection report to Hoover. (R. p. 170, lines 17-23; p. 171, lines 7-13; *see also* R. p. 486.) Two days later, on September 3, Hoover indicated to Beckstrom via email that a home they wanted to buy, located at 324 Running Fox Road, was available for purchase. (R. p. 115, lines 3-7; *see also* R. p. 486.) That day, Beckstrom forwarded a copy of the Biotek report to Schumacher and notified Schumacher that Hoover was terminating the lease at the end of the month. (R. p. 113, lines 2-9; p. 170, lines 19-21; *see also* R. p. 486.)

After receiving Hoover's written notice of termination of the lease, Schumacher immediately made several attempts to contact Mold Solutions but was unsuccessful because it was the Friday before Labor Day weekend. (R. p. 305, lines 11-18.) However, by September 5, Schumacher had scheduled an appointment for Mold Solutions to remediate the mold condition on September 6, the Labor Day holiday. (R. p. 305, line 19 – p. 306, line 1; *see also* R. p. 505.) On September 5, 2010, Mrs. Hoover emailed Schumacher to confirm the substance of their phone conversation that day: that Mold Solutions would not disturb the mold in the home in any way during the clean-up that was scheduled for September 6. (R. p. 378, lines 2-13; *see also* p. 505.) However, on September 6, 2010, Mrs. Hoover canceled the appointment because her child was at home and feeling sick. (R. p. 188, lines 11-24; *see also* R. p. 526.)

In the interim between when Schumacher scheduled and notified Hoover of Mold Solutions' appointment to remediate the issue and Mrs. Hoover's cancellation of the remediation due to her daughter's sickness, Mrs. Hoover emailed Beckstrom stating:

> I know that the homes at both 324 Running Fox Road [and] 408 Oak Brook are vacant. Are their [sic] any other homes in the Wildewood area

> within are [sic] range that are also vacant. We would like to make a decision on a house at the beginning of this week. I would like to move ASAP.

(R. p. 488.)

On September 7, 2010, after receiving a quote from Mold Solutions to remediate the issue, Schumacher arranged to have remediation take place on or about September 12. (R. p. 306, lines 15-17.) On September 8, Schumacher notified Beckstrom that he was making steps to repair the condition and offered to pay for Hoover and his family to stay at the Whitney Hotel in Columbia while the remediation process took place. (R. p. 307, lines 13-19; p. 189, lines 8-14; *see also* R. p. 520.) ("I have made a tentative reservation at the Whitney in a [two] bedroom, [two] bath suite for the family for these few days. This is the best accommodation I could find for them. I felt the family would want to stay in a large single unit as opposed to two separate rooms.") However, on September 12, 2010, only seven days following Hoover's written notice of termination, Schumacher went to the house to speak to Hoover about getting the remediation performed immediately, but Hoover told him that his family was leaving and would not honor the lease. (R. p. 307, lines 9-25; *see also* R. p. 527.) Hoover would not allow Schumacher to bring anyone into the home for remediation purposes until after his family had moved. (R. p. 527.)

On or about September 15, 2010, only twelve days after his written notice of termination, Hoover and his family vacated the Kilbourne property and moved into 324 Running Fox Road, the home they had been considering purchasing since August. (R. p. 173, lines 3-21.) Just one day before Hoover vacated the Kilbourne property, Schumacher emailed Beckstrom providing notice to Hoover that he intended to sue

Hoover and "pursue all legal means necessary to collect all monies owed as reflected in the lease." (R. p. 527.) Accordingly, three days later, on September 17, 2010, after being notified that Hoover had vacated the premises, Schumacher initiated this action against Hoover for breach of the parties' lease agreement and sought all available remedies under the RLTA. *See generally* Complaint.

However, even after Hoover and his family vacated the premises, they continued to frustrate Schumacher's attempt to fix the mold problem. Mold Solutions attempted to remediate the mold at the property after the family had vacated the home, but Hoover informed Schumacher that he would not allow the company into the home while the Hoovers' furniture was still in the house. (R. p. 308, lines 6-15; *see also* R. p. 504.) When Mold Solutions arrived at the Kilbourne property to remediate the condition, its workers were told that "[Hoover] didn't really want the mold being disturbed while they were moving their things out." (R. p. 278, lines 3-8; *see also* R. p. 504.) Beckstrom, Hoover's real estate agent, admitted that "no one wanted the mold disturbed until the end of September," even though Hoover and his family were completely moved out of the Kilbourne property by the middle of the month. (*Id.* at lines 16-20.)

Eventually Schumacher paid Mold Solutions to remediate the problem and the clean-up was successful. (R. p. 308, line 21 – p. 309, line 11.) A third-party inspector was hired to certify that the remediation performed by Mold Solutions was complete. (*Id.* at lines 12-25; *see also* R. pp. 494-499.)

ARGUMENT

Standard of Review

When reviewing a motion for directed verdict or JNOV, an appellate court must

employ the same standard as the trial court. *Wright v. Craft*, 372 S.C. 1, 18, 640 S.E.2d 486, 495 (Ct. App. 2006); *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006). On appeal from an order denying a directed verdict, an appellate court views the evidence and all reasonable inferences therefrom in a light most favorable to the non-moving party. *Swinton Creek Nursery v. Edisto Farm Credit*, 334 S.C. 469, 476, 514 S.E.2d 126, 130 (1999).

"The appellate court must determine whether a verdict for the opposing party would be reasonably possible under the facts as liberally construed in his favor." *Jones v. General Electric Co.*, 331 S.C. 351, 356, 503 S.E.2d 173, 176 (Ct. App. 1998). "The standard of review for an appeal of an action at law tried by a jury is restricted to corrections of errors of law. 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); *Felder v. K-Mart Corp.*, 297 S.C. 446, 448, 377 S.E.2d 332, 333 (1989).

I. HOOVER BREACHED THE LEASE AGREEMENT BY FAILING TO GIVE SCHUMACHER FOURTEEN DAYS TO REMEDY THE MOLD CONDITION ON THE PREMISES.

The South Carolina General Assembly adopted the Uniform Residential Landlord Tenant Act ("RLTA") in 1986. *See* 1986 S.C. Acts 336. The preamble to the South Carolina RLTA provides, *inter alia*, that the Act is "to provide for landlord obligations, liability and remedies." *Id.* Section 27-40-20 states, in pertinent part, that the purpose of the Act is "to simplify, clarify, modernize, and revise the law governing rental of dwelling units and the rights and obligations of landlords and tenants." Importantly, Section 27-40-50 provides that, "(a) the remedies provided by this chapter must be so

administered that an aggrieved party may recover appropriate damages," and further that, "(b) [a]ny right or obligation declared by this chapter is enforceable by action *unless the provision declaring it specifies a different and limited effect.*" (Emphasis added.)

Section 27-40-440 is the principal statute that imposes affirmative duties upon landlords. It provides: "A landlord shall . . . make all repairs and do whatever is reasonably necessary to . . . keep the premises in a fit and habitable condition; . . ." S.C. Code Ann. § 27-40-440 (Rev. ed. 2007). Section 27-40-610 outlines the mechanism by which a tenant may terminate a residential lease prior to its natural expiration as a result of a landlord's failure to comply with his duties:

> (a) Except as provided in this chapter, if there is a material noncompliance by the landlord with the rental agreement or a noncompliance with Section 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**. The rental agreement shall terminate as provided in the notice **except that**:
>
> > (1) The rental agreement shall not terminate by reason of the breach:
> >
> > > (i) if the breach is remedial by repairs or otherwise and the landlord adequately remedies the breach before the date specified in the notice; or
> > >
> > > (ii) if such remedy for a breach not affecting health and safety cannot be remedied within fourteen days, but is commenced 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)(i-ii) (Rev. ed. 2007) (emphasis added).

Taken in the light most favorable to Hoover, all of the evidence presented at trial indicated that the Kilbourne property had a mold problem. The mold problem reasonably

fell within the parameters of "a noncompliance with § 27-40-440 materially affecting health and safety," and accordingly, Hoover was permitted to terminate the tenancy pursuant to Section 27-40-610, but only if Hoover: (1) provided Schumacher with written notice of the problem and that the tenancy would end if the problem were not corrected within fourteen days; and (2) allowed Schumacher fourteen days to rectify the problem. *See* S.C. Code Ann. § 27-40-610(1) (Rev. ed. 2007). Only if Schumacher failed to remedy the problem within fourteen days of Hoover's written notice would Hoover be justified in terminating the tenancy under the law.

South Carolina courts have held that because the RLTA is in derogation of common law, it should be strictly construed. *See Watson v. Sellers*, 299 S.C. 426, 433, 385 S.E.2d 369, 373 (Ct. App. 1989). "[W]hen a statute confers a right and a remedy where none existed before, its plain meaning must be given effect." *Id.* (*quoting* 1 Am. Jur. 2d *Actions* § 73 (1962)). Therefore, the plain language of the RLTA, particularly the requirement of written notice of an intent to terminate the lease and the fourteen-day cure period, must be strictly construed in determining whether Hoover was justified in terminating the lease.

In *Thompson v. CDL Partners, LLC*, 378 Fed. Appx. 288 (4th Cir. 2010) (applying S.C. law), the United States Court of Appeals for the Fourth Circuit held that a tenant's rights do not arise until he has delivered written notice to the landlord "specifying the acts and omissions constituting the breach" and providing the landlord with a reasonable time to act. *Id.* at 292. The Court noted: "[The] consistent interpretation of the SCRLTA by the Court of Appeals convinces us that the South Carolina Supreme Court would require that the tenant provide the landlord notice . . .

before liability attaches . . . ." *Id.*; *see also Robinson v. Code*, 384 S.C. 582, 682 S.E.2d 495 (2009).

All of the evidence presented at trial clearly showed that Hoover provided Schumacher with written notice of termination of the lease on September 3, 2010. (R. p. 305, lines 9-11; *see also* R. pp. 489-490.) The written notice came in the form of an email from Hoover's real estate agent, Todd Beckstrom, to Schumacher. (R. p. 113, lines 2-9; p. 272, lines 2-8.) There was no other evidence presented at trial, either in the form of another writing or of witness testimony, that would create a genuine issue of material fact as to the date and form of the written notice of termination pursuant to S.C. Code Ann. § 27-40-610 (Rev. ed. 2007).

Hoover went to great lengths at trial to introduce evidence that Schumacher had actual knowledge of the mold problem as early as August 13, 2010. For example, Hoover's real estate agent testified:

> I think – if I may. I think it's important to note that [Hoover's notice of termination] is 21 days after [Schumacher] was initially shown the mold and that he had done nothing at this point to do any reports on his own. He actually had sent one handyman with a bleach bottle and that just – and that scared my client silly. If you can imagine, their family's there and somebody comes out and says, I can have this, you know, knocked down in a few days, and they were going to get it airborne. And [Hoover] and his wife did a lot of research on mold and were very afraid that it was not going to be handled in the correct manner and for the safety of the family.

(R. p. 272, lines 10-22.) Additionally, several of the witnesses testified that Beckstrom had sent written notice of the mold condition to Schumacher's real estate agent by email on August 24 but he did not provide written notice of Hoover's intent to terminate the lease at that time. (R. p. 166, line 22 – p. 167, line 4; p. 242, lines 16-24; p. 275, lines 18-24; *see also* R. pp. 491-493.)

Schumacher's actual knowledge of the presence of mold in the house, whether through oral or written notice of the problem, prior to Hoover's written notice of termination of the lease and stated reasons for the termination, is not relevant to the issue in this case. Rather, as the RLTA clearly states in Section 27-40-610, the landlord has fourteen days from the tenant's *written notice of termination of the lease agreement* and written specification of the reasons for the termination to remedy the problem, not from the date the landlord has written or oral notice of the problem alone.

Evidence in the record indicates that Schumacher was prepared to remedy the problem on or about September 6, 2010, three days after Hoover's written notice of termination, but Schumacher was not allowed to do so because Mrs. Hoover indicated that she and one of her children were sick. (R. p. 188, lines 22-24; *see also* R. p. 526.) Additionally, there is evidence in the record showing that Schumacher was again prepared to remedy the problem on or about September 12, 2010, nine days after receiving written notice of Hoover's intent to terminate the lease, but Schumacher was not allowed to do so. (*See, e.g.* R. pp. 505, 520, 521, 526, 527.) Schumacher testified that on or around September 12, he was told by Hoover in a conversation that he would not be allowed in the residence to make the necessary repairs until the Hoover and his family had vacated the premises. (R. p. 308, lines 12-15; *see also* R. p. 527.) Plaintiff's Exhibit 28 further corroborated this testimony, as Hoover did not allow Mold Solutions into the house on September 21, 2010, a full week after Hoover had moved his family out of the Kilbourne property and into 324 Running Fox Road, because some of the family's belongings were still inside. (R. p. 504.)

All of the evidence submitted at trial shows that Schumacher made several

attempts to remediate the mold within fourteen days after Hoover's written notice of intent to terminate the lease but was prohibited from doing so by either Dr. or Mrs. Hoover. This conduct directly contravenes the duty of good faith imposed upon parties to a residential lease by the RLTA. *See* S.C. Code Ann. § 27-40-220 (Rev. ed. 2007); *see also United States For Use and Benefit of Williams Elec. Co., Inc. v. Metric Constructors, Inc.*, 325 S.C. 129, 134, 480 S.E.2d 447, 449 (1997); *Shannon v. Freeman*, 117 S.C. 480, 109 S.E.406 (1921) (one who has himself prevented performance or tender of performance of a contract at the time set cannot take advantage of the delay).

The evidence submitted by Hoover to support his position that Schumacher did nothing to remediate the mold after oral or written notice of the problem as early as August 13 is irrelevant for purposes of S.C. Code Ann. § 27-40-610. The efforts of Hoover and his wife to frustrate Schumacher's remediation efforts prevented Schumacher from exercising the rights to which he is entitled as a landlord; therefore, Hoover was not justified under the RLTA in terminating the lease.

There was no evidence in the record from which a jury could conclude that Hoover had granted Schumacher the opportunity to correct the mold problem within fourteen days after he notified Schumacher in writing of his intention to terminate the lease. Accordingly, pursuant to S.C. Code Ann. § 27-40-610(1)(i), "[t]he rental agreement . . . [is] not terminate[d] by reason of the [material nonconformity]" because Schumacher was prepared to "remed[y] the breach before the date specified in the notice of termination" but was prevented from doing so by Hoover's own affirmative actions. Therefore, the Court should have directed a verdict in Schumacher's favor and/or granted Schumacher's motion for judgment notwithstanding the verdict.

II. HOOVER IS NOT ENTITLED TO HIS SECURITY DEPOSIT, TREBLE DAMAGES, AND ATTORNEY'S FEES.

Hoover brought a counterclaim against Schumacher in this case for the return of his security deposit pursuant to S.C. Code Ann. § 27-40-410(a) and (b). *See generally* Hoover's Amended Answer. The jury found for Hoover on this claim, but the trial court should have granted Schumacher's motion for judgment notwithstanding the verdict on the basis that the RLTA does not allow a tenant to breach a lease agreement and also recover his security deposit, treble damages, and attorney's fees against the landlord.

The RLTA provides, in relevant part:

> (a) **Upon termination of the tenancy**, property or money held by the landlord as security must be returned less amounts withheld by the landlord for accrued rent and damages which the landlord has suffered by reason of the tenant's noncompliance with Section 27-40-510. Any deduction from the security/rental deposit must be itemized by the landlord in a written notice to the tenant together with the amount due, if any, within thirty days after termination of the tenancy and delivery of possession and demand by the tenant, whichever is later. . . .
>
> (b) If the landlord fails to return to the tenant any prepaid rent or security/rental deposit with the notice required to be sent by the landlord pursuant to subsection (a), 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 (Rev. ed. 2007) (emphasis added). According to the plain language of the Act, this section only applies upon "termination of the tenancy," and does not apply in situations where the tenant breaches the lease agreement.

Section 27-40-410 should be read in light of S.C. Code Ann. § 27-40-610(a)(1)(i), discussed earlier, which provides that

> The **rental agreement** **shall not terminate** by reason of the [material nonconformity]:
>
> (i) **if** the breach is remedial by repairs or otherwise and **the**

> **landlord adequately remedies the breach before the date specified in the notice**; or
>
> (ii) if such remedy for a breach not affecting health and safety cannot be remedied within fourteen days, but is commenced 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)(i-ii) (Rev. ed. 2007) (emphasis added). According to the plain language of S.C. Code Ann. § 27-40-610, a lease agreement does not terminate when either of the exceptions applies. If a lease agreement does not terminate, a tenant is not entitled to a return of his security deposit under S.C. Code Ann. § 27-40-410.

Section 27-40-410 was designed to protect both landlords and tenants. Landlords are allowed under the RLTA to hold a security deposit in the event a tenant breaches the lease agreement, stays in the dwelling after the natural expiration of the lease without paying rent, or causes damage to the dwelling. *See e.g. Atlantic Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 730 S.E.2d 282 (2012) (landlord entitled to retain security deposit where tenant wrongfully remained on the premises without paying rent according to the terms of the lease agreement).

Tenants are likewise protected under the RLTA from a landlord's unjustified or pretextual withholding of the security deposit. *See e.g., Prevatte v. Asbury Arms*, 302 S.C. 413, 396 S.E.2d 642 (Ct. App. 1990). Specifically, the Act allows a tenant to seek treble damages and attorney's fees after the termination of a lease agreement when a landlord does not return the security deposit upon written request and does not provide a written notice of the deductions taken by the landlord. *See* S.C. Code Ann. § 27-40-610(a) and (b).

However, it defies logic, and the purposes of the RLTA, to allow a tenant to

breach a lease agreement, prohibit the landlord from repairing any material non-conformities within fourteen days as allowed by S.C. Code Ann. § 27-40-610, and then recover his security deposit, treble damages and attorney's fees. Accordingly, the provision in the RLTA regarding security deposits states that only "[u]pon termination of the tenancy" must the landlord return amounts for accrued rent and damages. As previously discussed, there was no termination of the tenancy in this case because Hoover did not allow Schumacher fourteen days after written notice of termination of the lease agreement to rectify the mold condition on the property. *See supra* Section I; S.C. Code Ann. § 27-40-610(a)(i-ii). The Court should have directed a verdict in Schumacher's favor with regard to Hoover's wrongful breach of the parties' lease agreement and concomitantly, barred Hoover's counterclaim for return of the security deposit, on the same grounds.

Moreover, even if the lease agreement was terminated as a result of Hoover's written notice of termination and subsequently vacating the property, Schumacher gave written notice to Hoover within thirty days after termination of the tenancy of his intent to retain the security deposit as a direct result of Hoover's breach of the parties' lease agreement. On September 14, 2010, Schumacher emailed Beckstrom stating that he intended to sue Hoover and "pursue all legal means necessary to collect all monies owed as reflected in the lease." (R. p. 527.) Accordingly, three days later, on September 17, 2010, after being notified that Hoover had vacated the premises, Schumacher initiated this action against Hoover for breach of the parties' lease agreement and sought all available remedies under the RLTA. *See generally* Complaint.

In Schumacher's complaint, he notified Hoover that pursuant to the terms of the

parties' lease agreement, Hoover was obligated to pay two thousand four hundred ($2,400) dollars in rent per month until June 15, 2011. *See* Complaint at ¶ 5. Additionally, Schumacher gave notice of accrued rent under the lease as a direct result of Hoover's wrongful breach in the amount of $19,200.00. *Id.* at ¶ 16-17. Schumacher's written notice to Hoover through both his email to Beckstrom and his initiation of this litigation on September 17, 2010 satisfies the requirements of Section 27-40-410 of the RLTA in that both writings gave Hoover notice that Schumacher was withholding the entirety of Hoover's security deposit pending resolution of the litigation.

The trial court erred in granting Hoover's motion for attorney's fees and a damages award in the amount of $30,910.93. Rather, the trial court should have granted Schumacher's post-trial motion for judgment notwithstanding the verdict and also finding that the RLTA provision regarding return of a tenant's security deposit upon termination did not apply to this case.

CONCLUSION

For the foregoing reasons, the trial court should have granted Schumacher's motion for directed verdict and/or Schumacher's motion for judgment notwithstanding the verdict in this case and denied Hoover's motion for attorney's fees and damage award. Schumacher respectfully requests that the result below be reversed, that judgment be entered for Schumacher, and that a new trial as to the issue of Schumacher's damages be ordered.

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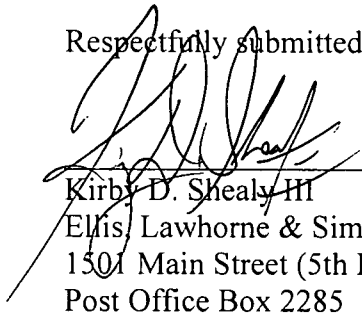
Respectfully submitted,



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April 26, 2013.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Case No. 2010-CP-40-06486

Kevin Schumacher,..... Appellant,

v.

Lance Hoover, ... Respondent.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the Brief and Reply Brief of Appellant comply with Rule 211(b), SCACR.

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PROOF OF SERVICE

I certify that I have served the Brief of Appellant, Reply Brief and Appellant's Certificate of Compliance by depositing a copy in the United States Mail, postage prepaid, on April 29, 2013, addressed to his attorney of record, James Edward Bradley, Esquire, of Moore, Taylor & Thomas, P.A., P.O. Box 5709, West Columbia, South Carolina 29171.

April 29, 2013.

Victoria Moody

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