THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. Supreme Court

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Willard D. Hanna, Jr., Special Referee

Opinion No. 2013-UP-078
(S.C. Ct. App. Filed Feb. 20, 2013)

Leon P. Butler, Jr. . . . . *Respondent,*

v.

William L. Wilson, a/k/a Billy Wilson . . . . *Petitioner.*

PETITIONER'S REPLY TO RESPONDENT'S RETURN

Howell V. Bellamy, Jr.,SCB #00642
George W. Redman, III, SCB #72365
BELLAMY, RUTENBERG, COPELAND, EPPS, GRAVELY & BOWERS, P.A.
1000 29th Avenue North
Post Office Box 357
Myrtle Beach, SC 29578-0357
(843) 448-2400
Attorneys of Record for Petitioner

Other Counsel of Record:
Neil D. Wright, Esquire
Barnett & Wright, P.A.
1304-B Azalea Court
Myrtle Beach, SC 29577
Telephone: (843) 449-0781
Attorney for Respondent

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A. RESPONDENT FORWARDS ABSOLUTELY NO SOUTH CAROLINA PRECEDENT SUPPORTING THE ARGUMENT THAT MITIGATION IS NOT REQUIRED IN SOUTH CAROLINA

The holding of the Special Referee, Affirmed by the Court of Appeals, directly contradicts the precedent of this Court which consistently and unequivocally holds that a party has a duty to mitigate damages where it is reasonable to do so. There has never been any discussion of or citation to **any** authority from the Courts of the State of South Carolina that supports Respondent Leon P. Butler's (Butler) argument to the contrary. As this was an action at law, the Court of Appeals should have corrected this error.[1]

The case at bar involves a standard commercial landlord-tenant dispute whereby the parties dispute whether notice of non-renewal was properly given as well as the landlord's resultant claim for damages. In the case at bar, as in every landlord-tenant case, there are obvious and cogent reasons as to why a duty of mitigation should exist. The only thing that is unique about the case at bar is that Butler willfully and intentionally refused to even try to mitigate his damages. (R. 19; 27, ¶¶ 34-38; 144, ln. 4-10; 185, ln. 3-6).

After refusing to even try to mitigate his damages, Butler's Return now asks this Court to create a confused and multifaceted exception to the duty of mitigation,[2] even though he specifically instructed Petitioner William L. Wilson (Wilson) to

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[1] *See Dawkins v. Mozie*, 399 S.C. 290, 293, 731 S.E.2d 342, 344 (Ct. App. 2012).

[2] *See Respondent's Return*, pp. 17-18 (*citing* RESTATEMENT OF PROPERTY, *Land. & Ten.* § 12.1, and the foreign cases cited by § 12.1).

vacate the property, and had actual notice that the property had been vacated. On April 16, 2002, Butler's agent, Charley Ray (Ray), wrote a letter to Wilson informing him that a $50,000 rent payment for the term May 14, 2002 to May 15, 2003 was due. (R. 368) After not receiving the rent payment, Ray's first demand letter to Wilson of June 3, 2002 stated: "The owner, Mr. Butler, ... **has instructed me to collect the rent or ask you to vacate**." (R. 396-97 (*emphasis added*)) On October 31, 2002, N. David Durant, Esquire, wrote to Butler's attorney, Neil Wright, to confirm that Wilson had informed Ray in early 2002 that the Lease would not be renewed. (R. 412-13) Further, Butler testified that he knew that Wilson had vacated the Property as of November 2002. (R. 26-27, ¶ 32-34; 186; 415, 417) The next correspondence Wilson received was a Summons and Complaint, 2 ½ years later.

This is not a case where the Parties are disputing whether the mitigation that took place was reasonable. This is a case where a landlord admits he intentionally refused to even attempt **any** mitigation whatsoever, where it would not have cost him one cent to do so. Eleven years later, this Landlord unabashedly asks this Court to sustain an award of damages that he intentionally refused to avoid.

B. THE RENT TO BE PAID WAS NOT "EARNED" IN ADVANCE

Butler's Return to this Court states that "Butler's claim is not for future rent, but rather for rent that was **earned and payable** in advance at the beginning of the term."[3] The Ground Lease Agreement which is the subject of this action only states that the rent "shall be payable in advance." While the issue of whether rent was payable and earned was vigorously contested, there was no dispute that the Landlord had actual notice that Wilson had vacated the Property prior to the end of the disputed term. Thus, at a minimum, the rent for this portion of the rental term had not been earned.

As in *Gentry v. Recreation, Inc.*, the measure of actual damages "must be affected by the duty of minimizing damages, especially since the removal **by the lessee** had the effect of restoring possession of the premises to the lessors."[4]

C. THE COURT OF APPEALS ERRED BY FAILING TO SCRUTINIZE OR EVEN REVIEW THE LEASE PROVISION PURPORTING TO ANNUL THE DUTY OF MITIGATION

Butler's Return to this Court quotes one sentence of the Ground Lease Agreement for the proposition that Butler was excused from any duty to mitigate his damages.[5] This quotation from the Lease provision has been misapplied, as it is the

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[3] Respondent's Return, p. 18 (*emphasis added*).

[4] *Gentry v. Recreation, Inc.*, 192 S.C. 429, 7 S.E.2d 63, 66 (1940)(*emphasis added*).

[5] Respondent's Return, p. 21.

last sentence of a paragraph that applies only: "If this Lease Agreement or [Wilson's] possession of the Leased Premises shall be terminated as herein provided or by re-entry, summary dispossession proceedings or any other method ..." (R. 334, ¶ 18) At the insistence of Butler, the Special Referee specifically found as fact that Butler "did not take any action to terminate the [Lease] or [Wilson's] right to possession of the Leased Premises." (R. 27, ¶ 35) Thus, this clause does not apply to the facts of this case, and the Lease did not annul Butler's duty to mitigate his damages.

Secondly, even if the Lease did abrogate the common law duty of mitigation, this Court has specifically held that any such provision would be in the nature of a penalty, and must be subject to scrutiny under the applicable facts and circumstances. The issue of unenforceability based upon a penalty theory was raised in Wilson's Pre-Trial Brief, entered at Trial as "Trial Court's Exhibit 3":

> The duty to mitigate damages cannot be circumvented by language in a contract that states there is no duty to mitigate damages. Such a clause **would be against the public policy of this state and in fact would be in the nature of a penalty**, which is frowned upon. Our courts have on prior occasions ruled similar provisions unconscionable. *Mid-Continent Refrigerator Company v. Willie C. Way*, 263 S.C. 101, 208 S.E.2d 31 (1974) and *Gentry v. Recreation, Inc.*, 192 S.C. 429, 7 S.E.2d 63 (1940). Also see *South Carolina Damages by Terry Richardson and Daniel Haltiwanger-Contract Damages 4-6.* (R. 103-04)

This issue was also preserved in Wilson's Motion for Reconsideration, dated April 7, 2009. (R. 575)

In light of the hotly contested underlying facts and circumstances of this Action,[6] any such scrutiny by the Court of Appeals would have confirmed the above-cited sentence of the Lease was in fact a penalty clause.

D. WILSON PRESENTED EVIDENCE DEMONSTRATING THE LANDLORD WOULD NOT HAVE HAD ANY DAMAGES.

The specific relevant facts and circumstances which should be scrutinized in this case include a Landlord's claim for $50,000.00 in advance rent on property that had been vacated (plus taxes during the period of non-use, pre-judgment interest while waiting 3 years to commence litigation, and attorney fees approximately equal to the actual damages claim), where automatic renewal was vigorously disputed, where the Landlord clearly had actual knowledge the property had been vacated and hence the opportunity to attempt to lessen damages:

1. In January of 2002, over seventeen (17) months prior to the end of the disputed lease term, *i.e.*, May 15, 2003 (R. 201, ln. 23-202, ln. 3);

2. After he had actual knowledge the rent had not been received when due on May 14, 2002;

3. After he specifically instructed Wilson to either pay rent or vacate the premises in June 2002. (R. 165, ln. 20-22, 396-97);

4. After Counsel for Wilson had formally notified Butler's lawyer via letter dated October 31, 2002, that Wilson had provided notice of non-renewal months earlier (R. 412-13); and,

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[6] *See Amended Final Brief of Appellant*, pp. 12-23 (The only non-contradictory testimony demonstrates that notice of non-renewal was given).

5. After Butler visually confirmed that Wilson had vacated the premises. (R. 26-27, ¶ 32; R. 186, ln. 1-8, 415-17).

Butler had actual knowledge that the Property had been vacated, and therefore he had the ability and duty to **attempt** to mitigate his damages in good faith. The Special Referee's Final Order confirms that Butler willfully and intentionally refused to take **any** action to mitigate during the 1 year term the Property was abandoned. (R. 27, ¶¶ 34-38; *see also* R. 144, ln. 4-10; 185, ln. 3-6)

In sum, the Court of Appeals should have considered that the landlord in this Action **intentionally and willfully refused to even attempt** to mitigate his damages where it would not have cost him one cent to do so, and he now seeks to enforce a contractual claim accelerating a year's worth of rent – or in other words – a penalty. There is evidence that Butler could have avoided all of his damages, and this Court should frown upon Butler's asking this Court to enforce an award of damages that could have been avoided.[7]

When a party intentionally refuses to even try to mitigate his damages where it would be reasonable to do so, he should be absolutely precluded from petitioning the Court to recover damages. *See National Bank of South Carolina v. People's Grocery Comany*, 153 S.C. 118, 150 S.E. 478, 480 (1929) (Confirming jury charge stating: The law will not compensate plaintiff who fails or refuses to minimizes his own damages).

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[7] *See Mid-Continent Refrigerator Company v. Willie C. Way*, 263 S.C. 101, 208 S.E.2d 31 (1974) and *Gentry v. Recreation, Inc.*, 192 S.C. 429, 7 S.E.2d 63 (1940).

E. THE SPECIAL REFEREE HAD PREVIOUSLY REJECTED BUTLER'S PROPOSED ADDITIONAL SUSTAINING GROUNDS ALLEGING THAT WILSON FAILED TO PRODUCE EVIDENCE OF MITIGATION

In his Order dated August 23, 2011, the Special Referee held: "In light of my conclusion that [Butler] was not under a legal duty to mitigate damages, any evidence proffered by [Wilson] on [Butler's] efforts to mitigate his damages is unnecessary." (R. 58) In contrast, Butler asks this Court to sustain the decisions of the lower Courts by alleging Wilson did not present any evidence that Butler could have attempted to lessen his damages.[8]

Butler filed a Motion for Reconsideration asking the Special Referee to correct the "error in failing to find that the Appellant Wilson did not present evidence to satisfy his burden of proof with respect to his affirmative defense of failure of the Respondent Butler to mitigate damages." (R. 496-497) Butler's Motion was denied, and the Special Referee specifically deleted any finding **or alternative sustaining ground** which inferred that Wilson failed to introduce evidence that Butler could have mitigated his damages from Butler's proposed Order. (R. 498-500).

The Special Referee was not willing to find that Wilson failed to produce evidence concerning mitigation, and the reason why is obvious. The record is replete with evidence that Butler could have attempted to lessen his damages, yet he intentionally refused to do so.

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[8] *See* Respondent's Return, p. 24.

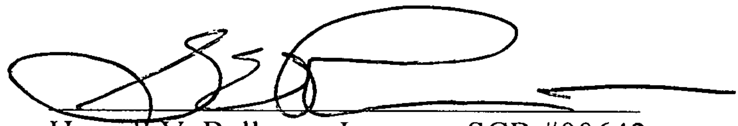
Butler now asks this Honorable Court to enforce and impose a grossly excessive award of damages, which he intentionally refused to even try to avoid.

IV. CONCLUSION

For the reasons stated, Petitioner respectfully prays this Honorable Court will grant the Petition for a Writ of Certiorari to correct the errors of law set forth herein.

Respectfully submitted,

BELLAMY, RUTENBERG, COPELAND, EPPS, GRAVELY & BOWERS, P.A.
1000 29th Avenue North
Post Office Box 357
Myrtle Beach, SC 29578-0357
(843) 448-2400
Attorneys for Petitioner



Howell V. Bellamy, Jr. SCB #00642
George W. Redman, III SCB #72365

Myrtle Beach, South Carolina

June 10, 2013.

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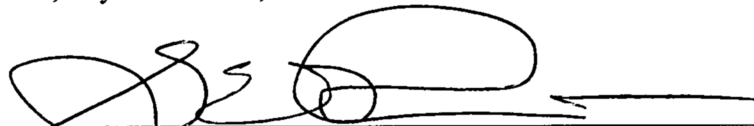
PROOF OF SERVICE

I certify that I have served **Petitioner's Reply to Respondent's Return** on the Respondent by depositing a copy of same in the United States Mail, postage prepaid, on June 10, 2013, addressed to his attorney of record, Neil D. Wright, Esquire, Barnett & Wright, P.A., 1304-B Azalea Court, Myrtle Beach, SC 29577.



Howell V. Bellamy, Jr., SCB #00642
George W. Redman, III, SCB #72365
BELLA MY, RUTENBERG, COPELAND,
EPPS, GRAVELY & BOWERS, P.A.
1000 29th Avenue North
Post Office Box 357
Myrtle Beach, SC 29578-0357
(843) 448-2400
Attorneys of Record for Petitioner

Myrtle Beach, SC
June 13, 2013