THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Willard D. Hanna, Jr., Special Referee

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SC Court of Appeals

Case No. 2006-CP-22-422

Leon P. Butler, Jr. Respondent,

v.

William L. Wilson a/k/a Billy Wilson Appellant.

BRIEF OF RESPONDENT

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I. STATEMENT OF ISSUES ON APPEAL

1. SHOULD THE APPELLANT'S APPEAL BE DISMISSED BY REASON OF THE APPELLANT'S FAILURE TO ADHERE TO THE REQUIREMENTS OF THE SOUTH CAROLINA APPELLATE COURT RULES WITH RESPECT TO PREPARATION OF APPELLANT'S BRIEF AND DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL?

2. SHOULD THE APPELLATE COURT REFUSE TO CONSIDER ALL ARGUMENTS ASSERTED BY APPELLANT THAT ARE GROUNDED UPON THE DOCTRINE OF LACHES AS THE DEFENSE OF LACHES WAS NOT RAISED TO THE TRIAL COURT BY THE APPELLANT, WAS NOT RULED UPON BY THE TRIAL COURT, AND CONSEQUENTLY HAS NOT BEEN PRESERVED FOR APPEAL?

3. THE SPECIAL REFEREE CORRECTLY RULED THAT THE GROUND LEASE AGREEMENT BETWEEN THE RESPONDENT LESSOR AND THE APPELLANT LESSEE AUTOMATICALLY RENEWED FOR THE LEASE PERIOD COMMENCING MAY 15, 2002 AND ENDING MAY 14, 2003, SO THAT THE APPELLANT LESSEE IS LEGALLY OBLIGATED TO PERFORM THE OBLIGATIONS OF THE LESSEE UNDER THE GROUND LEASE AGREEMENT FOR THE LEASE PERIOD COMMENCING MAY 15, 2002 AND ENDING MAY 14, 2003.

4. THE SPECIAL REFEREE CORRECTLY RULED THAT THE RESPONDENT LESSOR AND THE APPELLANT LESSEE DID NOT AGREE TO MODIFY THEIR GROUND LEASE AGREEMENT TO ELIMINATE THE REQUIREMENT THAT THE APPELLANT LESSEE FURNISH WRITTEN NOTICE TO THE RESPONDENT LESSOR OF THE APPELLANT LESSEE'S INTENTION NOT TO EXERCISE HIS OPTION TO EXTEND THE TERM OF THE GROUND LEASE AGREEMENT.

5. THE SPECIAL REFEREE CORRECTLY RULED THAT THE RESPONDENT LESSOR WAS NOT UNDER A LEGAL DUTY TO MITIGATE THE DAMAGES THAT HE SUFFERED AS A RESULT OF THE APPELLANT LESSEE'S FAILURE TO PERFORM HIS OBLIGATIONS UNDER THE GROUND LEASE AGREEMENT.

6. THE FINAL ORDER ENDING ACTION ISSUED BY THE SPECIAL REFEREE SHOULD BE AFFIRMED UPON THE ADDITIONAL SUSTAINING GROUND THAT THE APPELLANT, AS THE PROPONENT OF THE AFFIRMATIVE DEFENSE OF FAILURE TO MITIGATE DAMAGES, FAILED TO SATISFY HIS BURDEN OF PROOF WITH RESPECT TO THE AMOUNT OF DAMAGES THAT THE

RESPONDENT COULD HAVE AVOIDED OR REDUCED BY EFFORTS TO MITIGATE THE DAMAGES THAT HE SUFFERED.

7. **THE SPECIAL REFEREE CORRECTLY RULED THAT THE RESPONDENT LESSOR IS ENTITLED TO PRE-JUDGMENT INTEREST BECAUSE THE RESPONDENT LESSOR'S RIGHT TO PRE-JUDGMENT INTEREST IS NOT AFFECTED BY ANY ALLEGED DISCOUNTS, OFFSETS OR DEFENSES CLAIMED BY THE APPELLANT LESSEE.**

II. STATEMENT OF THE CASE

This action arose by way of a Complaint filed by the Plaintiff Leon P. Butler, Jr., (hereinafter sometimes referred to as "Respondent Butler") against the Defendant William L. Wilson a/k/a Billy Wilson (hereinafter sometimes referred to as "Appellant Wilson") on May 13, 2005 in the Court of Common Pleas for Horry County. (R. pp. 70-77) By a consent Order for Change of Venue, venue for the proceeding was transferred to Georgetown County where the Appellant Wilson resides. (R. pp. 6-7) The Complaint alleges an action at law by the Respondent Butler against the Appellant Wilson for the recovery of money damages for breach of the obligations under a Ground Lease Agreement. The Complaint alleges that the Respondent Butler, as Lessor, and the Appellant Wilson, as Lessee, entered into a Ground Lease Agreement dated May 15, 1998 pursuant to which the Appellant Wilson leased from the Respondent Butler certain commercial real property owned by Respondent Butler that is located in Horry County, South Carolina. A copy of the Ground Lease Agreement was attached to the Complaint, designated as Exhibit "A", and was incorporated into the Complaint by reference. The Complaint further alleges that the initial term of the Ground Lease Agreement was one year, commencing May 15, 1998 and ending May 14, 1999, and that the terms of the Ground Lease Agreement provided for automatic renewal of the Ground Lease

Agreement on an annual basis for up to fourteen consecutive one year terms unless the Appellant Wilson furnished written notice to the Respondent Butler, at least ninety (90) days prior to the expiration of the then current lease period, of the Appellant Wilson's intention not to exercise his option to extend the term of the Ground Lease Agreement. The Plaintiff's Complaint further alleges that the Ground Lease Agreement automatically renewed at the expiration of the lease period ending May 14, 2002; that is, for the period commencing May 15, 2002 and ending May 14, 2003, as the Appellant Wilson did not furnish written notice to the Respondent Butler at least ninety (90) days prior to the expiration of the then current lease period, of his intention not to exercise his option to extend the term of the Ground Lease Agreement for an additional one year period. The Plaintiff's Complaint further alleges that the Appellant Wilson has materially breached his obligations under the Ground Lease Agreement by failing to pay the agreed upon rent and the Horry County real property taxes assessed against the leased property, and by depositing and abandoning debris upon the leased premises in violation of his maintenance covenant under the Ground Lease Agreement. The Complaint further alleges that the Respondent Butler is entitled to judgment against the Appellant Wilson for rent for the period commencing May 15, 2002 and ending May 14, 2003, for Horry County real property taxes assessed against the leased property during the period commencing January 1, 2002 and ending May 14, 2003, for the reasonable costs of removal of debris from the leased property, for pre-judgment interest at the legal contract rate, and for the collection costs incurred by the Respondent Butler, including a reasonable attorney's fee.

The Answer and Counterclaim of the Appellant Wilson admits that the Appellant Wilson, as Lessee, and the Respondent Butler, as Lessor, entered into the Ground Lease Agreement attached to the Respondent Butler's Complaint. (R. pp. 325-362) However, the Appellant Wilson denies the essential allegation of the Respondent Butler's Complaint; that is, that the Ground Lease Agreement automatically renewed for the period commencing May 15, 2002 and ending May 14, 2003. In that regard, the Appellant Wilson contends that he timely opted out of the Ground Lease Agreement by providing verbal notification to Charley Ray, the Respondent Butler's real estate agent, of his intention to opt out of the Ground Lease Agreement. The Appellant Wilson's Answer and Counterclaim also asserted several affirmative defenses to the Plaintiff's Complaint, including: (1) failure to mitigate damages; (2) accord and satisfaction; (3) waiver; (4) laches; (5) failure to state a cause of action; (6) set off; and (7) novation. (R. pp. 78-82)

The matter was referred to Willard D. Hanna, Jr., as Special Referee with authority to enter a final judgment in the matter by virtue of a Consent Order of Reference issued pursuant to Rule 53 SCRCP (R. pp. 8-9). In accordance with the Consent Order of Reference, the Special Referee conducted a bench trial in the matter on October 26, 2007 in Surfside Beach, South Carolina. The Respondent Butler's case in support of his claims consisted of sworn testimony by the Respondent Butler and his real estate agent, Charley Ray, and documents that were admitted into evidence. The Appellant Wilson's case in support of his defenses consisted of sworn testimony from the Appellant Wilson, the Appellant Wilson's business partner, Jackie Woodbury, and the Appellant Wilson's former employee, Betty Bryan. The Appellant Wilson also presented documents that were

admitted into evidence. A record of the proceedings was made by Mrs. Jerry Mabry, the court reporter. Counsel for the Appellant Wilson submitted a Trial Brief at the commencement of the hearing (R. pp. 103-105).

At the conclusion of the Respondent Butler's case, the Appellant Wilson presented an oral Motion for Involuntary Dismissal of the Respondent Butler's case pursuant to SCRCP 41(b) based upon Appellant Wilson's contentions: (1) that the Respondent Butler had demonstrated no right to relief based upon an alleged failure of the Respondent Butler to mitigate damages; (2) that the Respondent Butler was not entitled to pre-judgment interest; and (3) that there had been a verbal modification of the Ground Lease Agreement. The Appellant Wilson also presented an oral Motion for Directed Verdict based upon Appellant Wilson's contentions: (1) that the Respondent Butler failed to mitigate damages; and (2) that the Respondent Butler was not entitled to pre-judgment interest. The Special Referee denied the Appellant Wilson's Motions for Involuntary Dismissal and Directed Verdict, noting that the Appellant Wilson's defense based upon a duty to mitigate is an affirmative defense upon which the Appellant Wilson had not only the burden to establish a failure to mitigate but also the burden to prove how much damages could have been mitigated. The Special Referee indicated that he would revisit the Appellant Wilson's Motion for a Directed Verdict based upon an alleged failure to mitigate damages at the close of the Appellant Wilson's evidence. (R. p. 189, line 17-p. 192, line 10).

At the conclusion of the trial testimony, the Special Referee afforded counsel for the Respondent Butler and the Appellant Wilson an opportunity to submit written post-trial motions and briefs to address the legal issues presented by this case. The Respondent

Butler submitted a written Motion for Directed Verdict, a Trial Brief, and a Reply to the Appellant Wilson's Reply Brief. (R. pp. 429-442; R. pp. 443-460; R. pp. 474-494) The Appellant Wilson submitted a written Motion for Directed Verdict and a Reply Brief to the Respondent Butler's Trial Brief. (R. pp. 461-467; R. pp. 468-473) The Appellant Wilson's written Motion for Directed Verdict sets forth four separate grounds for his Motion for Directed Verdict: (1) that Respondent Butler failed to prove a breach of the Ground Lease Agreement by the Appellant Wilson by failing to prove that the Ground Lease Agreement automatically renewed for the period commencing may 15, 2002 to May 14, 2003; (2) that Respondent Butler failed to mitigate his damages; (3) that Respondent Butler failed to provide competent evidence concerning cost of removal of debris deposited upon the leased property by the Appellant Wilson; and, (4) that Respondent Butler is not entitled to pre-judgment interest as a matter of law. The Appellant Wilson did not present evidence to the Special Referee and did not submit arguments to the Special Referee concerning the remaining affirmative defenses set forth in his Answer, including (1) accord and satisfaction; (2) waiver; (3) laches; (4) failure to state a cause of action; (5) set off; and (6) novation.

The Special Referee considered the parties' post-trial motions, the briefs of counsel, Respondent Butler's Affidavit of Attorney Fees, and a proposed Final Order submitted by counsel for the Respondent Butler that was rejected by the Special Referee. (R. pp. 523-572) Thereafter, on March 27, 2009, the Special Referee issued a Final Order Ending Action that awarded the Respondent Butler a judgment against the Appellant Wilson for money damages in the amount of $133,887.75. The Final Order Ending

Action was filed in the Office of the Clerk of Court for Georgetown County on April 1, 2009. (R. pp. 10-54)

On April 7, 2009, the Appellant Wilson filed a written Motion for Reconsideration which was incorrectly designated as a Motion pursuant to Rule 60 SCRCP. (R. pp. 574-577) The Appellant Wilson's Motion for Reconsideration set forth six (6) alleged errors by the Special Referee in the Final Order Ending Action:

1. That the evidence and testimony showed that the Plaintiff had received adequate notice that the Appellant did not intend to re-let the premises.

2. That the Special Referee erred in asserting that the Plaintiff did not have the duty to mitigate his damages due to the contract provision in the Ground Lease Agreement.

3. That the Special Referee erred in not considering the evidence offered by the Appellant on the issue of mitigation.

4. That the Special Referee erred in awarding the Plaintiff damages for removal of trash abandoned by the Appellant Wilson as the Plaintiff did not present competent evidence of the damages as to the cleanup of the property.

5. That the Special Referee erred in awarding the Plaintiff pre-judgment interest as the Plaintiff was not entitled to pre-judgment interest.

6. That the attorney's fees awarded to the Plaintiff by the Special Referee were excessive and unreasonable.

The Appellant Wilson's Motion for Reconsideration did not contain any arguments concerning the remaining affirmative defenses set forth in his Answer, including (1) accord

and satisfaction; (2) waiver; (3) laches; (4) failure to state a cause of action; (5) set off; and (6) novation.

On April 9, 2009, Respondent Butler filed a written Notice of Motion and Motion for Reconsideration pursuant to Rules 52(b), 59(e) and 60(a) SCRCP, which requested that the Special Referee reconsider and alter or amend the Final Order Ending Action to correct certain deficiencies, including the following:

1. That the Final Order Ending Action be altered or amended pursuant to Rule 60(a) SCRCP to correctly identify the Appellant Wilson as William L. Wilson a/k/a Billy Wilson.

2. To correct the Special Referee's 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.

3. To correct the Special Referee's error in failing to conclude as a matter of law that the Appellant Wilson failed to satisfy his burden of proof with respect to the amount of damages that the Respondent Butler could have avoided by efforts to mitigate the damages that he suffered. (R. pp. 495-497)

On June 2, 2009 the Special Referee conducted a hearing to consider the parties' motions for reconsideration and heard the arguments of counsel. Thereafter, on September 18, 2009, the Appellant Wilson filed a Motion for Deposit in Court pursuant to Rule 67 SCRCP, which sought an Order allowing the Appellant Wilson to deposit the amount of the Judgment in the matter with the Clerk of Court for Georgetown County. The Respondent Butler did not oppose the Appellant Wilson's motion. On August 15, 2011, the Special

Referee issued an Order granting Plaintiff's Motion pursuant to Rule 60(A) SCRCP to identify the Appellant Wilson as William L. Wilson A/K/A Billy Wilson. The Order issued by the Special Referee denied the Respondent Butler's Motion for Reconsideration and the Appellant Wilson's Motion for Reconsideration. The Order issued by the Special Referee granted, with conditions, the Appellant Wilson's Motion to Deposit the amount of the Judgment with the Clerk of Court for Georgetown County. The Appellant Wilson failed to comply with the conditions of the Special Referee's Order granting the Appellant Wilson's Motion to Deposit the amount of the Judgment with the Clerk of Court for Georgetown County and the Appellant Wilson has not deposited the amount of the Judgment with the Clerk of Court for Georgetown County. The Order issued by the Special Referee on August 15, 2011 was filed in the Office of the Clerk of Court for Georgetown County on August 23, 2011 and written notice of entry of the Order was received by counsel for the Appellant Wilson on August 23, 2011. (R. pp. 55-69) Thereafter, the Appellant Wilson filed his Notice of Appeal of the Orders of the Special Referee filed on April 1, 2009 and August 23, 2011.

III. STATEMENT OF FACTS

The real property that is the subject of this litigation is a tract of unimproved land located in Little River, South Carolina that contains approximately five (5) acres. (R. p. 116, lines 6-15; R. pp. 263-266). The unimproved land had been in Respondent Butler's family for a long time and, except for some outdoor billboard leases, the property had not been rented to anyone before being leased to the Appellant Wilson in May of 1998. (R. p. 155, line 13-p. 156, line 17). On May 24, 1996, the Respondent Butler, acting pursuant to

a power of attorney granted to him by his mother, Hazel W. Butler, entered into an "Exclusive Authorization and Right to Lease" with Ray Realty, Inc., pursuant to which the Respondent Butler engaged Ray Realty, Inc., to lease the property for a term of twenty (20) years at a net annual rental of $50,000.00 for the first five years, with annual adjustments thereafter. (R. p. 114, line 16-p. 115, line 7; R. pp. 261-262). Charley Ray's marketing efforts included placing a sign on the real property to notify the public of the availability of the property, listing the property in the realtors' multiple listing service, and advertising. (R. p. 115, line 3-7). Despite Charley Ray's efforts to secure a suitable lessee for the property, there were no significant lease offers tendered for the property until the Appellant Wilson submitted a "Letter of Intent" to lease the property on or about February 25, 1998, and the property was not actually under lease until the Appellant Wilson executed the final draft of the Ground Lease Agreement on May 23, 1998 following extensive lease negotiations. (R. p. 155, line 13-p. 156, line 17; R. p. 157, line 21-p. 161, line 2; R. p. 115, line 21-p. 123, line 9; R. p. 123, line 19-p. 124, line 25; Plaintiff's Trial Exhibits 1, 2, 3, 5, 7, 8, 9, 11, and 12 R. 263-271; R. 275-362). The period of time that elapsed from May 24, 1996, the date that Respondent Butler engaged Ray Realty, Inc., to market the property, until the property was actually leased to the Appellant Wilson was just one day short of two years.

At the time that the Appellant Wilson commenced negotiations to lease the Respondent Butler's property in February of 1998, he was an experienced businessman. He had acquired substantial business experience as a food broker, as a manager for the Nestlé Company, as a convenience store owner and operator, as a real estate developer,

and as the owner and operator of at least four mobile home dealerships. (R. p. 192, line 23-p. 193, line 3; R. p. 209, line 10-p. 211, line 18). He was interested in leasing the Respondent Butler's property as a location for a mobile home dealership to sell mobile homes in connection with his sale of mobile home lots in Horry County mobile home communities that he was developing and marketing. (R. p. 211, line 19-p. 212, line 4). The Appellant saw the Ray Realty, Inc., sign upon the Respondent Butler's land and contacted Charley Ray to begin lease negotiations for Respondent Butler's land. (R. p. 212, lines 5-16).

The Appellant Wilson's initial lease proposal was presented to the Respondent Butler in the form of a written "Letter of Intent" for his execution. (R. p. 212, line 17-p. 214, line 13; Plaintiff's Trial Exhibit 3 R. pp. 269-271). Following the Appellant's initial "Letter of Intent" proposal to lease the property, dated on or about February 25, 1998, there were extensive lease negotiations over the course of three months that culminated in the written Ground Lease Agreement that was executed and delivered by the Respondent Butler, as Lessor, and the Appellant, as Lessee, on or about May 15, 1998. (R. p. 212, line 17-p. 218, line 13; R. p. 155, line 13-p. 156, line 17; R. p. 157, line 21-p. 161, line 2; R. p. 115, line 21-p. 123, line 9; R. p. 123, line 19-p. 124, line 25; Plaintiff's Trial Exhibits 1, 2, 3, 5, 7, 8, 9, 11, 12 and Court's Exhibit #2 R. 263-271; R. 275-362). While Charley Ray served as a middle man in the negotiations and as an advisor to the Respondent Butler, his authority was limited and all final decision making authority concerning the negotiation and acceptance of lease agreements was reserved to the Respondent Butler (R. p. 115, lines 12- 20; R. p. 156, line 18-23). The documented history of the extensive

lease negotiation process demonstrates that the Appellant Wilson clearly understood that the Respondent Butler reserved all final decision making authority concerning the negotiation and acceptance of lease agreements. Significantly, all of the parties' lease negotiation proposals were reduced to writing and set forth in either "Letters of Intent" or formal lease proposals drafted by the parties' respective attorneys for execution by the Respondent Butler and the Appellant Wilson. (R. p. 115, line 21-p. 116, line 5; R. p. 124, lines 1-25; R. p. 157, lines 8-11; R. p. 160, lines 7-24; R. p. 212, line 17-p. 218, line 13) As the Appellant Wilson conceded on cross examination, everything was reduced to writing; it was not done on a handshake. (R. p. 217, lines 19-23) The Respondent Butler and the Appellant Wilson were represented by separate independent legal counsel of their choice during the lease negotiations. (R. p. 215, line 17-p. 216, line 2) Legal counsel for the parties prepared and reviewed drafts of the Ground Lease Agreement and made changes to the Ground Lease Agreement prior to the execution of the final draft of the Ground Lease Agreement. (R. p. 124, lines 6-16; Plaintiff's Trial Exhibits 7, 8, 9, 10, 11, 12, 13, and 14 R. pp. 280-364) The Respondent Butler and the Appellant Wilson made various requests and proposals during the lease negotiations that were set forth in a series of written amendments to the Appellant's original "Letter of Intent". (Plaintiff's Trial Exhibits 1 through 12 and Court's Exhibit 2, R. pp. 263-362) Compromises and concessions were made by both parties during the course of the lease negotiations. (Plaintiff's Trial Exhibits 1 through 12 and Court's Exhibit 2, R. pp. 263-362)

The automatic renewal provision of the Ground Lease Agreement that is the crux of the dispute between the Respondent Butler and the Appellant Wilson is set forth in Paragraph 29 of the Ground Lease Agreement:

> "...Unless the LESSEE furnishes written notice to the LESSOR, at least ninety (90) days prior to the expiration of the original lease term or at least ninety (90) days prior to the expiration of the then current option period, of his intention not to exercise his option to extend the term of this Lease Agreement for an additional one (1) year option period, the LESSEE's option to extend the lease term for an additional one (1) year option period shall be deemed to be exercised automatically..."

The testimony of the witnesses and the documentary evidence pertaining to the lease negotiations reveals that this automatic renewal provision was inserted into the Ground Lease Agreement at the request of the Appellant Wilson during the lease negotiations. (R. p. 121, line 13-p. 123, line 9; R. p. 216, line 3-p. 217, line 6; Plaintiff's Trial Exhibits 8, 9, 10, and 11 R. pp. 282-324).

Based upon the pleadings of the parties, it is undisputed that the Appellant Wilson entered into the Ground Lease Agreement with the Respondent Butler and took possession of the Leased Premises on or about May 15, 1998. Based upon the pleadings of the parties, it is also undisputed that the initial term of the Ground Lease Agreement was one (1) year, commencing on May 15, 1998 and terminating on May 14, 1999, and that the Ground Lease Agreement automatically renewed at the expiration of the original lease term on May 14, 1999 as the Appellant did not furnish written notice to the Respondent Butler, at least ninety (90) days prior to the expiration of the original lease term, of his intention not to exercise his option to extend the term of the Lease Agreement for an additional one (1) year lease period. Likewise, it is undisputed that the Lease

Agreement automatically renewed at the expiration of the lease periods ending May 14, 2000 and May 14, 2001, as the Appellant did not furnish written notice to the Respondent Butler, at least ninety (90) days prior to the expiration of the then current lease period, of his intention not to exercise his option to extend the term of the Lease Agreement for an additional one (1) year lease period. (Admitted by the Defendant's Answer to Paragraph 11 of the Plaintiff's Complaint R. pp. 70-82)

While the Appellant Wilson acknowledges that he did not furnish written notice to the Respondent Butler at least ninety (90) days prior to the expiration of the lease period ending May 14, 2002 of his intention not to exercise his option to extend the term of the Ground Lease Agreement for an additional one (1) year lease period, he nevertheless contends that he opted out of the automatically renewing lease by verbally notifying the Respondent Butler's real estate agent, Charley Ray, that he did not intend to exercise his option to extend the term of the Ground Lease Agreement for an additional one (1) year period. The Appellant Wilson never spoke with the Respondent Butler. (R. p. 160, lines 12-24) Charley Ray denies that the Appellant Wilson verbally notified him that Wilson did not intend to exercise his option to extend the term of the Ground Lease Agreement for an additional one (1) year period. (R. p. 128, line 7-p. 130, line 11; R. p. 148, line 9-p. 150, line 7; Plaintiff's Trial Exhibits 21 and 22 R. pp. 393, 396-397) The Respondent Butler did not agree to modify the Ground Lease Agreement to eliminate the provision that requires written notice of the Lessee's intention not to exercise the Lessee's option to extend the term of the Ground Lease Agreement. Nor did he receive any consideration from the Appellant Wilson to support a modification of the Ground Lease

Agreement to eliminate the provision that requires written notice of the Lessee's intention not to exercise the Lessee's option to extend the term of the Ground Lease Agreement.

The Appellant Wilson testified that in May of 2001 he was struggling financially and asked Charley Ray if he could split the lease payment that was due and payable at the commencement of lease term into two payments. Again, consistent with his course of dealings with the Appellant Wilson, Charley Ray said that he would have to **"run that by Mr. Butler."** (R. p. 198, line 13-p. 199, line 4) Appellant Wilson further testified that he told Charley Ray at that time: "I doubt if I stay here a year." Charley Ray denied having such a conversation with the Appellant Wilson.

Respondent Butler agreed to accommodate Appellant Wilson's request to split the rent payment in two payments so long as Appellant Wilson paid an additional consideration of $1,500.00. Respondent Butler viewed the arrangement as a one time payment accommodation to the Appellant Wilson and not as an amendment of the payment terms of the Ground Lease Agreement. (R. p. 161, line 10-p. 162, line 15)

Despite claiming that he was struggling financially in May of 2001, and further claiming that he told Charley Ray at that time: "I doubt if I stay here a year," the Appellant Wilson secured a building permit on September 14, 2001 for installation of a new mobile home sales office and accessory structures on the Leased Premises valued at $18,870.00. (Plaintiff's Trial Exhibit #18 R. pp. 373-382). Subsequently, on or about February 12, 2002, less than a month after the Appellant Wilson alleges that he told Charley Ray in January of 2002 "I'm definitely out of here now", the Appellant Wilson, acting by and through his mobile home business agent, entered into a three (3) year term

"Outdoor Rental Lighting Agreement" with Santee Cooper for the installation of five outdoor light poles on the Leased Premises. (Plaintiff's Trial Exhibit #17 R. pp. 390-392).

On April 16, 2002, Charley Ray sent an invoice to the Appellant Wilson's place of business for the $50,000.00 rent due and payable on May 15, 2002 pursuant to the terms of the Ground Lease Agreement for the lease period commencing May 15, 2002 and ending May 14, 2003. The Appellant Wilson did not respond to the invoice. (R. p. 128, line 7-p. 129, line 2; Plaintiff's Exhibit 21 R. p. 393). On June 3, 2002 Charlie Ray sent a certified letter to the Appellant Wilson that notified him that the rent due on May 15, 2002 had not been received and that phone calls to Appellant Wilson's Little River office had not been returned. The letter requested advice from the Appellant Wilson concerning his intentions with respect to the leased premises. The Appellant Wilson did not respond to Mr. Ray's certified letter. (R. p. 129, line 3-p. 130, line 5; R. p. 164, line 15-p. 165, line 23; Plaintiff's Exhibit 22 R. pp. 396-397). While ignoring requests for information concerning his intentions with respect to the leased premises and ignoring demands for payment of rent that was due and payable pursuant to the terms of the Ground Lease Agreement, the Appellant Wilson continued to hold possession of the leased premises and continued to conduct his mobile home sales business operations on the leased premises. (R. p. 202, lines 8-12; R. p. 165, line 24-p. 166, line 14). In July of 2002 the Appellant Wilson continued to collect and retain lease income from billboards located upon the Leased Premises. (R. p. 167, line 19-p. 168, line 14; Plaintiff's Exhibit 20 R. p. 395) Pursuant to the provisions of Paragraph 31 of the Ground Lease Agreement

the Appellant Wilson was entitled to collect and receive lease income from billboards located upon the leased premises only if the Appellant Wilson was in lawful possession of the leased premises at that time. (Court's Exhibit # 2 R. p. 359). The Appellant Wilson has not paid the rent and the real property taxes payable with respect to the May 15, 2002 though May 14, 2003 lease year.

The Respondent Butler drove by the leased premises in the late summer or early fall of 2002 and observed that the Appellant Wilson's mobile home inventory had been removed from the Leased Premises. The Respondent Butler does not know the date upon which the Appellant abandoned the Leased Premises. The Appellant Wilson did not call the Respondent Butler nor correspond with the Respondent Butler to inform the Respondent Butler that he was moving from the leased premises (R. p. 172, line 9-16) When the Respondent Butler drove by the leased premises and observed that the Appellant Wilson's mobile home inventory had been removed from the leased premises, he noted that the Appellant Wilson's mailbox and the freestanding business signs advertising the Appellant Wilson's business and telephone number remained upon the leased premises. The Respondent Butler further observed that a partially burned mobile home, a truck, and an illuminated sign were also present on the leased premises. (R. p. 169, line 9-p. 173, line 10; Plaintiff's Trial Exhibits 26, 27, 28 and 29 R. pp. 415, 417) In November of 2002 the Appellant Wilson still had a sign on the leased premises that set forth the telephone number for his mobile home business. (R. p. 234, line 7-p. 235, line 12)

On October 26, 2002 Respondent Butler's legal counsel forwarded to the Appellant Wilson formal written notice of Appellant Wilson's default in performance of his obligation to pay rent pursuant to the Ground Lease Agreement and further notified the Appellant Wilson of his right to cure his default under the Ground Lease Agreement. (Plaintiff's Exhibit #24 R. pp. 409-411) The Respondent Butler took no further action with regard to the leased premises until after the expiration of the lease term on May 14, 2003. The Respondent Butler and his real estate agent, Charley Ray, testified concerning efforts to lease the subject property after the expiration of the lease term on May 14, 2003. Charley Ray testified that someone from his office placed a "For Rent" sign upon the property to advise the public of the availability of the property for lease. Despite efforts of Charley Ray to lease the subject property, the property was not leased again until May 14, 2005. (Defendant's Exhibit 7 R. pp. 425-428).

With respect to the Appellant Wilson's affirmative defense that the Respondent Butler failed to mitigate his damages, the Appellant Wilson failed to present any evidence that he offered the Respondent Butler a substitute tenant for the leased premises or that he exercised his right to assign his leasehold interest or sublease the leased premises to a third party. Likewise, the Appellant Wilson did not present any evidence that the leased premises were readily rentable for the portion of the lease year remaining after the Appellant Wilson abandoned the leased premises without notice to the Respondent Butler. The Appellant Wilson also failed to present any evidence with respect to his additional affirmative defenses of (1) accord and satisfaction; (2) waiver; (3) laches; (4) failure to state a cause of action; (5) set off; and (6) novation.

IV. STANDARD OF REVIEW

A proceeding to recover money damages for breach of obligations under a lease agreement is an action at law. In an action at law tried without a jury, the appellate court will not disturb the trial court's findings of fact unless there is no evidence to reasonably support them. Crossman Communities of North Carolina, Inc. v. Harleysville Mut. Ins. Co., 395 S.C. 40, 717 S.E.2d 589 (2011). The judging of the credibility of witnesses and the weighing of evidence in a law case are uniquely functions of the trial court, not the appellate court. Bivens v Watkins, 313 S.C. 228, 437 S.E.2d 132 (Ct. App. 1993).

V. ARGUMENT

1. THE APPELLANT'S APPEAL SHOULD BE DISMISSED BY REASON OF THE APPELLANT'S FAILURE TO ADHERE TO THE REQUIREMENTS OF THE SOUTH CAROLINA APPELLATE COURT RULES WITH RESPECT TO PREPARATION OF APPELLANT'S INITIAL BRIEF AND DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL.

SCACR 210 (c) pertaining to the content of the Record on Appeal provides that... "The Record shall not, however, include matter which was not presented to the lower court or tribunal." The Appellant's Initial Brief and the Appellant's Designation of Matter to be Included in the Record on Appeal violate both the letter and the spirit of SCACR 210 (c). A comparison of the trial transcript and the source references for certain facts set forth in the Appellant's Initial Brief reveals approximately twenty (20) instances in which the Appellant has referenced matter which was not presented to the lower court for its consideration, and therefore cannot be used in support of arguments that the lower court erred in its rulings. The irrelevant matter includes portions of witness depositions that were not presented to the Special Referee and documents that were not considered by the Special Referee in

connection with issues that are presently on appeal. The use of such materials is inappropriate and the Appellant must not be permitted to make arguments based on information which was not presented to the lower court.

2. THE APPELLATE COURT SHOULD REFUSE TO CONSIDER ALL ARGUMENTS ASSERTED BY APPELLANT THAT ARE GROUNDED UPON THE DOCTRINE OF LACHES AS THE DEFENSE OF LACHES WAS NOT RAISED TO THE TRIAL COURT BY THE APPELLANT, WAS NOT RULED UPON BY THE TRIAL COURT, AND CONSEQUENTLY HAS NOT BEEN PRESERVED FOR APPEAL

Although the Appellant does not list the issue of laches in his Statement of Issues on Appeal, there are numerous references to the doctrine of laches in the body of the Appellant's Initial Brief, including laches arguments appearing upon pages 16, 17, 22, 34, 35, and 36. Indeed, the Conclusion section of Appellant's Initial Brief states that the Respondent's claims are barred by the doctrine of laches. This is an example of the Appellant attempting to raise for the first time on appeal an issue which was not argued before the trial court. The trial transcript, the Appellant's oral Motion for Involuntary Dismissal, the Appellant's written post-trial Motions for Directed Verdict, the Appellant's trial briefs, and the Appellant's Motion for Reconsideration do not set forth any arguments concerning the applicability of the doctrine of laches to the facts of the instant case. As the defense of laches was not raised to and ruled upon by the trial judge, it has not been preserved for appellate review and must not be addressed by this Honorable Court on appeal. Issues not raised and ruled upon in the trial court will not be considered on appeal. S.C. Dept. of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 641 S.E.2d 903 (2007); B & A Dev., Inc. v. Georgetown County, 372 S.C. 261, 641 S.E.2d 888 (2007); Aiken v. World Fin. Corp., 373 S.C. 144, 644 S.E.2d 705 (2007).

3. THE SPECIAL REFEREE CORRECTLY RULED THAT THE GROUND LEASE AGREEMENT BETWEEN THE RESPONDENT LESSOR AND THE APPELLANT LESSEE AUTOMATICALLY RENEWED FOR THE LEASE PERIOD COMMENCING MAY 15, 2002 AND ENDING MAY 14, 2003, SO THAT THE APPELLANT LESSEE IS LEGALLY OBLIGATED TO PERFORM THE OBLIGATIONS OF THE LESSEE UNDER THE GROUND LEASE AGREEMENT FOR THE LEASE PERIOD COMMENCING MAY 15, 2002 AND ENDING MAY 14, 2003.

The language contained in Paragraph 29 of the Ground Lease Agreement concerning automatic renewal of the Ground Lease Agreement is clear, unambiguous, and explicit:

> "...Unless the LESSEE furnishes written notice to the LESSOR, at least ninety (90) days prior to the expiration of the original lease term or at least ninety (90) days prior to the expiration of the then current option period, of his intention not to exercise his option to extend the term of this Lease Agreement for an additional one (1) year option period, the LESSEE's option to extend the lease term for an additional one (1) year option period shall be deemed to be exercised automatically. PROVIDED, HOWEVER, that nothing contained herein shall be construed to permit the LESSEE to extend the term of this Lease Agreement beyond the end of the fourteen (14) successive one (1) year option periods provided for hereinabove."

The above quoted provision of the Ground Lease Agreement imposes an affirmative obligation upon the Lessee to "opt out" of automatic renewal of the Ground Lease Agreement for an additional one (1) year term if the Lessee does not intend to exercise his option to renew the Ground Lease Agreement and clearly defines the obligation of the Lessee to furnish written, as opposed to oral, notice to the Lessor of the Lessee's intention to "opt out" of automatic renewal of the Ground Lease Agreement. When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used, to be taken and understood in their plain, ordinary, and popular sense. C.A.N. Enters., Inc. v. South Carolina Health & Human Servs. Finance Comm'n, 296 S.C. 373,

377, 373 S.E.2d 584, 586 (1988). As the language of the Ground Lease Agreement concerning automatic annual renewal is clear, unambiguous, and explicit the Special Referee was obligated to construe the automatic renewal provision according to the terms that the parties used and understood. As it is undisputed that the Appellant did not furnish written notice to the Respondent of his intention not to exercise his option to extend the term of the Ground Lease Agreement, the Ground Lease Agreement automatically renewed for an additional one (1) year term thereby obligating the Appellant to perform the obligations of the Lessee for the lease period commencing May 15, 2002 and ending May 14, 2003.

If a lease specifies the kind of notice to be given by the lessee for exercising an option concerning the renewal of the lease, there must be compliance with this specification in order to bind the lessor. As stated in Geisdorf v. Doughty:

> "'when the optionee decides to exercise his option he must act unconditionally and precisely according to the terms of the option. Upland Indus. Corp. v. Pacific Gamble Robinson Co., 684 P.2d 638, 640 (Utah 1984) (quoting Williston on Contracts § 61D (3d ed. 1957)). Actual exercise of the option must be 'in accordance with its terms.' J.R. Stone Co. v. Keate, 576 P.2d 1285, 1288 (Utah 1978)." Geisdorf v. Doughty, 972 P.2d 67, 70, 345 Utah Adv. Rep. 16, 18 (Utah 1998).

The policy rationale offered for the strict enforcement of such provisions is that such provisions avoid disputes by promoting certainty and eliminating problems of proof of notice:

> "If the provisions of the lease agreement had been complied with, the problem of proving that the notice had actually been sent on time and received would have been eliminated." In re Joyner, 74. BR 618, 623 (Bankr. MD Ga. 1987) (applying Georgia Law).

4. THE SPECIAL REFEREE CORRECTLY RULED THAT THE RESPONDENT LESSOR AND THE APPELLANT LESSEE DID NOT AGREE TO MODIFY THEIR GROUND LEASE AGREEMENT TO ELIMINATE THE REQUIREMENT THAT THE APPELLANT LESSEE FURNISH WRITTEN NOTICE TO THE RESPONDENT LESSOR OF THE APPELLANT LESSEE'S INTENTION NOT TO EXERCISE HIS OPTION TO EXTEND THE TERM OF THE GROUND LEASE AGREEMENT.

It is undisputed that the Appellant Wilson did not furnish written notice to the Respondent Butler at least ninety (90) days prior to the expiration of the lease period ending May 14, 2002 of his intention not to exercise his option to extend the term of the Ground Lease Agreement for an additional one (1) year period. Nevertheless, Appellant Wilson contends that he opted out of automatic renewal of the Ground Lease Agreement by verbally notifying the Respondent Butler's real estate agent, Charley Ray, that he did not intend to exercise his option to extend the term of the Ground Lease Agreement for an additional one (1) year period. Clearly, if Appellant Wilson verbally notified Respondent Butler's real estate agent of his intention not to exercise his option to extend the term of the Ground Lease Agreement for an additional one (1) year period, such notice does not comply with the provision of the Ground Lease Agreement that requires written notice to the Respondent Butler and his attorney of the Lessee's intention not to exercise his option to extend the term of the Ground Lease Agreement for an additional one (1) year period. However, Appellant Wilson argues that an oral modification of the Ground Lease Agreement excused his compliance with the literal terms of the written Ground Lease Agreement. As the proponent of an alleged oral modification of the Ground Lease Agreement that eliminates the provision of the Ground Lease Agreement that requires written notice to the Lessor of the Lessee's intention not to exercise his option to extend the

term of the Ground Lease Agreement, the Appellant Wilson bears the burden of proving all of the elements necessary to support a valid contract modification. Any modification of a written contract must satisfy all the requirements of a contract, including a meeting of the minds. First Union Mortgage Corp. v. Thomas, 317 S.C. 63, 70, 451 S.E.2d 907, 912 (Ct.App.1994); Rim Associates v. Blackwell 359 S.C. 170, 597 S.E.2d 152 (2005). A valid modification of a contract must satisfy all the criteria essential for a valid original contract, including offer, acceptance, and consideration. Sauner v. Public Service Authority of South Carolina, 354 S.C. 397, 405, 581 S.E.2d 161, 166 (2003); Roberts v. Gaskins, 327 S.C. 478, 483, 486 S.E.2d 771, 773 (Ct. App. 1997); Robinson v. Ada S. McKinley Community Services, Inc., 19 F.3d 359, 364 (7th Cir. 1994). Mutual assent is as much a requisite element in effecting a contractual modification as it is in the initial creation of a contract. Keco Industries, Inc. v. ACF Industries, Inc., 316 F.2d 513, 516 (4th Cir. 1963). Whether parties have orally agreed to modify the terms of a written contract is a question of fact. The South Carolina Nat. Bank. v. Silks, 295 S.C. 107, 110, 367 S.E.2d 421, 422 (Ct. App. 1998). The minds of the parties must be shown to have met on a definite modification. Board of Education of City of Albuquerque v. American National Bank of Oklahoma City, Okl., 294 F. 14 (C.C.A. 8th Cir. 1923). Vague, indefinite, or ambiguous statements will not suffice. EDO Corp. v. Beech Aircraft Corp., 911 F.2d 1447 (10th Cir. 1990).

The Special Referee correctly decided that the Appellant Wilson failed to present any persuasive evidence that the parties orally agreed to modify the Ground Lease Agreement to eliminate the provision that requires written notice to the Lessor of the

Lessee's intention not to exercise his option to extend the term of the Ground Lease Agreement. Appellant Wilson never spoke directly with the Respondent Butler and Butler's real estate agent, Charley Ray, did not have authority to modify the terms of the Ground Lease Agreement. The limitations on Charley Ray's authority in that regard are clearly evident in the documented history of the extensive lease negotiation process. While Charley Ray served as a middle man in the negotiations and as an advisor to the Respondent Butler, all final decision making authority concerning the negotiation and acceptance of lease agreements was reserved to the Respondent Butler (R. p. 115, lines 12-20; R. p. 156, lines 18-23). Furthermore, all of the parties' lease negotiation proposals were reduced to writing and set forth in either "Letters of Intent" or formal lease proposals drafted by the parties' respective attorneys for execution by the Respondent Butler and the Appellant Wilson. (R. p. 115, line 21-p. 116, line 5; R. p. 124, lines 1-25; R. p. 157, lines 8-11; R. p. 160, lines 7-24; R. p. 212, line 17-p. 218, line 13). As the Appellant Wilson conceded on cross examination, everything was reduced to writing; it was not done on a handshake. (R. p. 217, lines 19-23). The Respondent Butler testified that he did not agree to modify the Ground Lease Agreement to eliminate the provision that requires written notice to the Lessor of the Lessee's intention not to exercise his option to extend the term of the Ground Lease Agreement and that he relied upon the terms of the written Ground Lease Agreement. There clearly was no meeting of the minds. The Appellant Wilson failed to offer any evidence that supports the conclusion that the Respondent Butler agreed to modify the Ground Lease Agreement to eliminate the

provision that requires written notice to the Lessor of the Lessee's intention not to exercise his option to extend the term of the Ground Lease Agreement.

Moreover, assuming solely for the sake of argument that oral notice to the Respondent Butler is acceptable under the terms of the Ground Lease Agreement, the Special Referee nevertheless found that the evidence presented by the Appellant Wilson was insufficient to establish that he furnished oral notice to the Respondent Butler of his intention not to exercise his option to extend the term of the Ground Lease Agreement for an additional one (1) year period. In that regard the Special Referee's Final Order Ending Action discusses in detail the shortcomings of the evidence presented by the Appellant Wilson.

In summary, the clear and unambiguous language of the Ground Lease Agreement provides that the Ground Lease Agreement automatically renews at the end of each lease term for an additional one (1) year term unless the Lessee "opts out" of automatic renewal of the Ground Lease Agreement by furnishing written, as opposed to oral, notice to the Lessor of the Lessee's intention to "opt out" of automatic renewal in the manner set forth in the Ground Lease Agreement. The Appellant Wilson failed to "opt out" of automatic renewal of the Ground Lease Agreement by furnishing written, as opposed to oral, notice to the Lessor of the Lessee's intention to "opt out" of automatic renewal in the manner set forth in the Ground Lease Agreement and failed to prove a modification of the Ground Lease Agreement that relieved him of the obligation to furnish written notice of his intention to "opt out" of automatic renewal. Accordingly, the Ground Lease Agreement between the Respondent Butler, as Lessor, and the Appellant Wilson, as Lessee,

automatically renewed at the expiration of the lease period ending May 14, 2002, and the Appellant Wilson is legally obligated to perform the obligations of the Lessee for the lease period commencing May 15, 2002 and ending May 14, 2003.

5. THE SPECIAL REFEREE CORRECTLY RULED THAT THE RESPONDENT LESSOR WAS NOT UNDER A LEGAL DUTY TO MITIGATE THE DAMAGES THAT HE SUFFERED AS A RESULT OF THE APPELLANT LESSEE'S FAILURE TO PERFORM HIS OBLIGATIONS UNDER THE GROUND LEASE AGREEMENT.

The Appellant Wilson has asserted as an affirmative defense the proposition that the Respondent Butler failed to mitigate his damages. In response, the Respondent Butler has asserted that upon the Appellant Wilson's abandonment of the leased premises during the lease period commencing May 15, 2002 and ending May 14, 2003, the Respondent Butler had no legal obligation to mitigate the damages that he suffered as a result of the Appellant Wilson's failure to perform his obligations under the Ground Lease Agreement. It does not appear that the South Carolina Supreme Court has specifically addressed this issue in the context of a fact pattern similar to the facts presented by this case. However, it appears that the weight of authority holds that when a tenant abandons leased property the landlord is under no duty to attempt to re-let the leased property for the balance of the term of the lease to mitigate the tenant's liability under the lease, including his liability for rent.

This majority view is set forth in the Restatement (Second) of Property: Landlord & Tenant

> "§ 12.1 Tenant's Obligation To Pay Rent
>
> (1) Except to the extent the tenant is legally excused from doing so, there is a breach of the tenant's obligation if he fails to pay the rent reserved in the lease on or before the date the rent is due.

(2) Except to the extent the parties to a lease validly agree otherwise, if there is a breach of the tenant's obligation to pay the rent reserved in the lease, the landlord may:

(a) recover from the tenant the amount of the rent that is due; and

(b) terminate the lease if the rent that is due is not paid promptly after a demand on the tenant for the rent, unless equitable considerations justify extending the time for payment.

(3) Except to the extent the parties to the lease validly agree otherwise, if the tenant abandons the leased property, the landlord is under no duty to attempt to relet the leased property for the balance of the term of the lease to mitigate the tenant's liability under the lease, including his liability for rent, but the landlord may: **(emphasis supplied)**

(a) accept the tenant's offer of surrender of the leased property, which offer is inherent in the abandonment, and thereby terminate the lease, leaving the tenant liable only for rent accrued before the acceptance and damage caused by the abandonment; or

(b) notify the tenant that he will undertake to relet the leased property for the tenant's account, thereby relieving the tenant of future liabilities under the lease, including liability for future rent, to the extent the same are performed as a result of a reletting on terms that are reasonable.

Comment *i* to Restatement § 12.1 explains the rationale for the rule:

"If the tenant has abandoned the leased property and the landlord stands by and does nothing, the lease is not terminated. A tenant who abandons leased property is not entitled to insist on action by the landlord to mitigate the damages, absent an agreement otherwise. Abandonment of property is an invitation to vandalism, and the law should not encourage such conduct by putting a duty of mitigation of damages on the landlord.

Prior to any action being taken by the landlord that amounts to an acceptance of the tenant's offer to surrender the leased property, and prior to any reletting of the premises for the benefit of the tenant's account, the tenant may retake possession of the leased property and cancel his abandonment. An assignment or sublease of the leased property by the tenant to another who enters the leased property is a cancellation of the abandonment, if done at a time when the tenant himself could still reenter. If the lease contains a promise against an assignment or a sublease without the consent of the landlord and the landlord unreasonably refuses to give his consent, the tenant may be entitled to assign or sublease.

> An abandonment of the leased property by the tenant occurs when he vacates the leased property without justification and without any present intention of returning and he defaults in the payment of the rent..."

Even in those jurisdictions which embrace the minority rule that a landlord has an obligation to mitigate damages in the event of abandonment by a tenant, the Courts have found that such a duty can be effectively negated by a lease provision that annuls any duty to mitigate:

Thus, in New Towne Ltd. P'shp v. Pier 1 Imports (U.S.), Inc., it was held that:

> "In this case, the lease contains a provision which specifically annuls any duty to mitigate. Parties of equal bargaining power are free to enter into any agreement the terms of which are enforceable at law. (Citations omitted) A rental agreement may include any terms which are not inconsistent with or prohibited by law, (Citations omitted) or against public policy.
>
> In the present matter, the term negating any duty to mitigate damages contained in the lease does not violate any principle of law. Similarly, it does not injure the welfare of the public in any way. As a result, the provision does not violate public policy." (Citations omitted).
>
> New Towne Ltd. P'shp v. Pier 1 Imports (U.S.), Inc., 113 Ohio App.3d 104, 109, 680 N.E.2d 644, 647 (Ohio App. 6 Dist. 1996)

For the same proposition, please see Weingarten/Arkansas, Inc., v. ABC Interstate Theatres, Inc., 306 Ark. 64, 811 S.W.2d 295 (1991)

In the instant case, sophisticated businessmen of equal bargaining power entered into extensive negotiations that resulted in a lease provision which specifically annuls any duty to mitigate (Court's Exhibit #2, R. p. 354):

> "There shall be no obligation on the part of the LESSOR to re-let nor any liability on his part for failure to re-let, and the LESSEE'S liability shall not be diminished or affected by the LESSOR's failure to re-let."

This lease provision is clear and unambiguous. The Special Referee properly concluded that under either the majority view or the minority view the Respondent Butler was not under a duty to mitigate damages as the Respondent Butler and the Appellant Wilson, as sophisticated businessmen, bargained away any obligation on the part of the Respondent Butler to mitigate his damages during extensive arms-length negotiations.

6. THE FINAL ORDER ENDING ACTION ISSUED BY THE SPECIAL REFEREE SHOULD BE AFFIRMED UPON THE ADDITIONAL SUSTAINING GROUND THAT THE APPELLANT, AS THE PROPONENT OF THE AFFIRMATIVE DEFENSE OF FAILURE TO MITIGATE DAMAGES, FAILED TO SATISFY HIS BURDEN OF PROOF WITH RESPECT TO THE AMOUNT OF DAMAGES THAT THE RESPONDENT COULD HAVE AVOIDED OR REDUCED BY EFFORTS TO MITIGATE THE DAMAGES THAT HE SUFFERED.

Assuming for the sake of argument that the Respondent Butler was under a legal duty to mitigate his damages, the Appellant Wilson nevertheless failed to present evidence to satisfy his burden of proof with respect to the amount of damages that the Respondent Butler could have avoided by efforts to mitigate the damages that he suffered. See, Brendle's Stores, Inc., v. OTR, et al., 978 F.2d 150 (C.A. 4 [SC] 1992) (holding under South Carolina law, that the burden of showing failure to mitigate damages falls on the party asserting that claim). The proposition that a party who claims that damages should have been minimized has the burden of proving that they could reasonably have been avoided or reduced is set forth in Tri-Continental Leasing Corp. v. Stevens, Stevens & Thomas, P.A., 287 S.C. 338, 342, 338 S.E.2d 343, 346 (Ct. App. 1985). In that opinion, the South Carolina Court of Appeals held that the party who claims damages should have been minimized has the burden of showing that the course of action to minimize damages was feasible, what the cost of minimization of damages would be, and

whether actions to minimize would, in fact, reduce the damages caused by the Defendant's breach. Id., 287 S.C. 342-43, 338 S.E.2d at 346-47. The Georgia Court of Appeals, in Branon v. Ellbee Pictures Corporation, which was cited and followed by the South Carolina Court of Appeals in Tri-Continental Leasing Corp., stated:

> "Where the Lessor in such a contract brings an action for damages against the lessee for a breach of the contract, and alleges that his damages were the total of the fixed amounts to be paid under the contract...and proves upon the trial the execution of the contract and a breach thereof by the lessee, a prima facie case in favor of the plaintiff for the full amount sued for is made out, and the burden is then upon the defendant to prove that the plaintiff could have lessened its damages, and such proof should include sufficient data to allow the jury to reasonably estimate how much the damages could have been mitigated."

Branon v. Ellbee Pictures Corp., 42 Ga. App. 293, 155 S.E. 923 (Ga. App. 1930) (citing Vitagraph v. Liberty Theatres, 197 Cal. 694, 242 P. 709 (Cal. 1925) and Branch v. Johnson, 9 Ga. App. 699, 71 S.E. 1123 (Ga. App. 1911).

Here, the Appellant Wilson failed to offer any proof which would enable the fact finder to reasonably estimate how much the damages could have been mitigated. See Branon, supra. The Appellant Wilson did not present any evidence that he offered the Respondent Butler a substitute tenant or exercised his right to assign his leasehold interest or sublease the Leased Premises to a third party. The Appellant Wilson also failed to offer evidence that the Leased Premises were readily rentable for the portion of the lease year remaining after the Appellant Wilson abandoned the Leased Premises and left significant amounts of trash to be removed from the Leased Premises. Indeed, the only reasonable conclusions that may be drawn from the evidence in the record are that the property is difficult to rent because of its size, that it was leased by the Respondent Butler

on only two occasions, and on each occasion it was on the market for approximately two (2) years prior to being leased. (R. p. 155, line 13-p. 156, line 17; R. p. 157, line 21-p. 161, line 2; R. p. 115, line 21-p. 123, line 9; R. p. 123, line 19-p. 124, line 25; Defendant's Exhibit 7, R. pp. 425-428). The Appellant Wilson offered no proof that if the Respondent Butler had acted prior to the expiration of the lease term (May 14, 2003) the damages caused by the Appellant Wilson's breach would have been reduced. See, Tri-Continental Leasing Corp., supra.

Inexplicably, the Appellant Wilson argues on appeal that the Special Referee erred in refusing to consider the evidence offered by the Appellant Wilson on the issue of mitigation. That is complete nonsense. The Special Referee cannot refuse to consider evidence that the Appellant did not present. The trial transcript is clear. The Appellant, as the party who claims that the Respondent should have minimized his damages, has the burden of showing that the course of action to minimize damages was feasible, what the cost of minimization of damages would be, and whether actions to minimize would, in fact, reduce the damages caused by the Appellant Wilson's breach. The Appellant made no proffer of any such evidence to the Special Referee. Where no proffer of excluded testimony is made, the Court is unable to determine whether the appellant was prejudiced by the trial judge's refusal to admit the testimony into evidence. State v. Anderson, 304 S.C. 551, 406 S.E.2d 152 (1991); Greenville Memorial Auditorium v. Martin, 301 S.C. 242, 391 S.E.2d 546 (1990)("An alleged erroneous exclusion of evidence is not a basis for establishing prejudice on appeal in the absence of an adequate proffer of evidence in the court below.")

7. **THE SPECIAL REFEREE CORRECTLY RULED THAT THE RESPONDENT BUTLER IS ENTITLED TO PRE-JUDGMENT INTEREST BECAUSE THE RESPONDENT BUTLER'S RIGHT TO PRE-JUDGMENT INTEREST IS NOT AFFECTED BY ANY ALLEGED DISCOUNTS, OFFSETS OR DEFENSES CLAIMED BY THE APPELLANT WILSON.**

The Special Referee correctly ruled that the Respondent Butler is entitled to an award of pre-judgment interest accruing upon rent and real property tax payable by the Appellant Wilson by virtue of South Carolina statutory law and South Carolina appellate decisions interpreting the statutory law. The applicable South Carolina statutory law is set forth at §34-31-20(a) of the South Carolina Code of Laws 1976, as amended:

> "In all cases of accounts stated and in all cases wherein any sum or sums of money shall be ascertained and, being due, shall draw interest according to law, the legal interest shall be at the rate of eight and three-fourths percent per annum."

The operative provisions of the Ground Lease Agreement that are the foundation of the Respondent Butler's claim for pre-judgment interest are contained in Paragraph 29 and Paragraph 10 of the Ground Lease Agreement (Court's Exhibit #2, R. pp. 325-362).

Paragraph 29 of the Ground Lease Agreement deals specifically with the amount of rent payable by the Appellant Wilson to the Respondent Butler and the date upon which payment of rent was due to the Respondent Butler for the lease year that is in the dispute between the Respondent Butler and the Appellant Wilson. The relevant portion of Paragraph 29 of the Ground Lease Agreement states:

"29. OPTION TO RENEW; AUTOMATIC RENEWAL: Provided that the LESSEE has fully complied with all of his obligations hereunder, the LESSEE shall have the option to renew this lease for fourteen (14) successive one (1) year terms, upon the exact same terms and conditions as set forth herein, except that the annual rent for each of the one (1) year option periods shall be as set forth hereinafter. **Rent shall be paid, in advance, at the commencement of each option period...For the fourth one (1) year option period, May 15, 2002, through May 14, 2003, the annual rent shall be FIFTY THOUSAND AND 00/100 ($50,000.00) DOLLARS...Unless the LESSEE furnishes**

written notice to the LESSOR, at least ninety (90) days prior to the expiration of the original lease term or **at least ninety (90) days prior to the expiration of the then current option period, of his intention not to exercise his option to extend the term of this Lease Agreement for an additional one (1) year option period, the LESSEE's option to extend the lease term for an additional one (1) year option period shall be deemed to be exercised automatically.** PROVIDED, HOWEVER, that nothing contained herein shall be construed to permit the LESSEE to extend the term of this Lease Agreement beyond the end of the fourteen (14) successive one (1) year option periods provided for hereinabove." **(emphasis added)**

The quoted provisions of the Ground Lease Agreement which specify the amount of rent and the due date for payment of rent payable by the Lessee to the Lessor are sufficiently specific to determine the Lessee's duties and obligations with respect to payment of a sum certain at a definite time. The Appellant Wilson was obligated to pay rent to the Respondent Butler in the amount of FIFTY THOUSAND AND 00/100 ($50,000.00) DOLLARS on May 15, 2002, and the measure of recovery concerning the Appellant Wilson's rent obligation was therefore fixed on May 15, 2002.

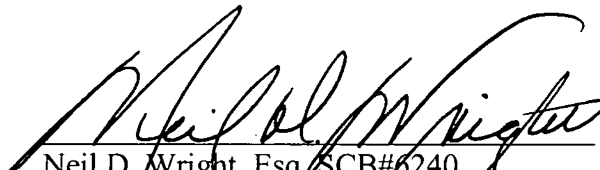
Likewise, Paragraph 10 of the Ground Lease Agreement obligates the Appellant Wilson to pay the Horry County real estate taxes assessed against the Leased Premises during the lease term and provides that the Lessor may pay such taxes if the Lessee fails to do so, "... in which case the amount so paid shall be treated as and shall be immediately due and payable as Additional Rental." The provisions of Paragraph 10 of the Ground Lease Agreement which specify that amounts paid by the Lessor upon the Lessee's default in payment of real property taxes become immediately due and payable as Additional Rent are sufficiently specific to ascertain the scope of the Lessee's duties and obligations with respect to payment of a sum certain at a definite time.

In Babb v. Rothrock, the South Carolina Supreme Court held that South Carolina law allows prejudgment interest on obligations to pay money from the time when, either by agreement of the parties or operation of law, the payment is demandable, and the sum is certain or capable of being reduced to certainty. Babb v. Rothrock, 310 S.C. 350, 353, 426 S.E.2d 789, 791 (1993) See also, Smith-Hunter Const. Co., Inc. v. Hopson, 365 S.C. 125, 616 S.E.2d 419 (2005); Butler Contracting, Inc., v. Court Street LLC, 369 S.C. 121, 631 S.E.2d 252 (2006); and Ancrum v. Slone, 29 S.C.L (2 Speers) 594 (1844). The fact that the sum due is disputed does not render the claim unliquidated for the purposes of an award of prejudgment interest. Babb, 310 S.C. at 353, 426 S.E.2d at 791. The proper test for determining whether prejudgment interest may be awarded is whether or not the measure of recovery, not necessarily the amount of damages, is fixed by conditions existing at the time the claim arose. Id. See also, Smith-Hunter, 365 S.C. at 128, 616 S.E.2d at 421 and Butler, 369 S.C. at 133, 631 S.E.2d at 259. In Butler, the South Carolina Supreme Court held that, "[t]he right of a party to prejudgment interest is not affected by rights of discount or offset claimed by the opposing party. It is the character of the claim and not the defense to it that determines whether prejudgment interest is allowable." Butler, 369 S.C. at 133-34, 631 S.E.2d at 259. See also, Lee v. Thermal Engineering Corp., 352 S.C. 81, 88-99, 572 S.E.2d 298, 302 (Ct. App. 2002); Southern Welding Works, Inc., v. K & S Const. Co., 286 S.C. 158, 164, 332 S.E.2d 102, 106 (Ct. App. 1985); and Robert E. Lee & Co., Inc. v. Commission of Public Works of the City of Greenville, 248 S.C. 92, 100, 149 S.E.2d 59, 63 (1966).

CONCLUSION

Based upon the reasons set forth hereinabove, the Respondent respectfully requests that this Honorable Court affirm the Orders of the Special Referee.

Respectfully submitted,



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This 13th day of August, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Willard D. Hanna, Jr., Special Referee

Case No. 2006-CP-22-422

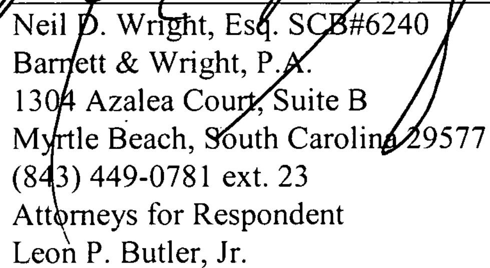
Leon P. Butler, Jr. Respondent,

v.

William L. Wilson a/k/a Billy Wilson Appellant.

CERTIFICATE OF COUNSEL

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



August 13, 2012

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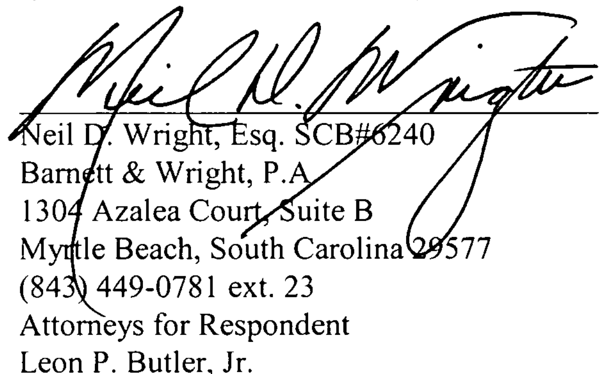
PROOF OF SERVICE

I certify that I have served the Final Brief of Respondent on the Appellant William L. Wilson a/k/a Billy Wilson by hand delivering true and correct copies thereof to the office of his attorneys of record, Howell V. Bellamy, Jr., and George W. Redman, III, Bellamy, Rutenberg, Copeland, Epps, Gravely & Bowers, P.A., 1000 29th Avenue North, Myrtle Beach, SC 29577 on August 13, 2012.

August 13, 2012



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