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*.

AMENDED FINAL BRIEF OF APPELLANT

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1. Charley Ray was Butler's Exclusive Paid Agent, and Handled All Communications Related to the Lease;
2. Charley Ray's Testimony is Inherently Biased and Contradictory, and Therefore Not Competent or Credible;
3. The only Competent Evidence in the Record Indicates that Charley Ray Received Notice of Non-Renewal of the Lease as Part of the Acknowledged Modification of the Lease; and,
4. Leon Butler, as the Principal, held out Charley Ray as His Exclusive Paid Agent for All Communications Related to the Lease?

B. Did the Special Referee err in finding and concluding that a Landlord does not have a duty to mitigate damages in South Carolina, where the Tenant has vacated the premises pursuant to the Landlord's written instructions; the Landlord's lawyer declared default and provided a very limited cure period; and, the Landlord knew that the Property had been vacated?

C. Did the Special Referee err by failing to conclude that a contractual provision which purportedly provides that the Landlord does not have a duty to mitigate is an unenforceable penalty clause, where the Landlord instructed the tenant to vacate the Property, and where the Landlord intentionally and willfully refused to mitigate so that he could preserve, and thereby have this Court enforce, his contractual claim to accelerate an entire years worth of rent payments?

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II. STATEMENT OF THE CASE

Plaintiff Leon Butler ("Butler") filed his Complaint in this Action on May 13, 2005, alleging that Defendant William Wilson ("Wilson") breached a lease by failing to pay $50,000.00 in rent which was allegedly due almost exactly three (3) years prior, *i.e.*, May 14, 2002. (R. p. 70) Plaintiff also sought to recover real property taxes, cleanup costs, pre-judgment interest, as well as attorney fees and costs. (*Id.*) Wilson filed his Answer on June 7, 2005, denying any rent was due because the lease was not renewed, and forwarded the affirmative defenses of failure to mitigate damages, accord and satisfaction, waiver, laches, set-off, and novation. (R. p. 78) By way of Consent Order of Reference, dated October 25, 2007, this civil action was referred to Willard D. Hanna, Jr., as Special Referee pursuant to Rule 53(b) of the *South Carolina Rules of Civil Procedure*, to take the testimony arising under the pleadings and to make his findings of fact and conclusions of law with the authority to enter a final judgment in the action. (R. p. 8)

The Special Referee conducted a one-day bench trial on October 26, 2007. On March 27, 2009, approximately seventeen (17) months after the testimony was heard,

the Special Referee entered the forty-four (44) page Final Order Ending Action, whereby judgment was rendered against the Defendant in the amount of $133,887.75. (R. p. 10) Thereafter both Parties filed post-trial Motions for Reconsideration pursuant to Rules 52(b), 59(e), and 60(a) of the *South Carolina Rules of Civil Procedure*. (R. pp. 429, 461, 495) After a hearing held June 2, 2009, the Order of the Special Referee was filed August 23, 2011 (R. p. 55):

1. Granting Plaintiff's Motion to Alter or Amend Final Order Pursuant to Rule 60(a) SCRCP, to Identify the Defendant as William L. Wilson, a/k/a Billy Wilson;

2. Denying Plaintiff's Motion to Reconsider and Alter or Amend Pursuant to Rules 52(b) and 59(e), SCRCP;

3. Denying Defendant's Motion for Reconsideration Pursuant to Rule 59(e), SCRCP; and,

4. Granting Defendant's Motion for Deposit of Funds with Clerk.

On September 15, 2011, Defendant Wilson filed his Notice of Appeal with this Honorable Court.

III. STATEMENT OF FACTS

In 1998, Respondent Leon Butler ("Butler") inherited a five (5) acre tract of real property located in Horry County, South Carolina (hereinafter referred to as the "Property"). (Complaint, ¶1, R. p. 70; Tr. Trans., Butler, R. pp. 155, 180). Butler employed Mr. Charley Ray ("Ray") to find a tenant to lease the Property. (Tr. Trans., Butler, R. pp. 155-56, 180; Tr. Trans., Ray, R. pp. 114-115; *see also*, Buyer's Agency

Disclosure, R. p. 261). Ray is a licensed commercial real estate broker who owns Ray Realty, Inc. (*See* Id.) To find a tenant for the Property, Ray entered the Property in the Multiple Listing Service, publicly advertised the Property, and placed his signage upon the Property in an effort to lease the Property. (Tr. Trans., Ray, R. p. 115; MLS Data Entry Form, May 24, 1996, R. p. 262).

Sometime in 1998, Appellant William Wilson ("Wilson") contacted Ray to inquire as to leasing the Property for the purpose of displaying and selling manufactured homes. (Tr. Test. of Ray, R. p. 117) Ray acted as Butler's agent in the negotiation of the lease. (Lease, R. p. 338, ¶ 26; Buyer's Agency Disclosure, R. p. 261) During the lease negotiations (and all times thereafter) **all communications** concerning the Lease were accomplished through Ray. (Tr. Trans., Butler, R. p. 160; Tr. Trans., Wilson, R. pp. 197, 203) Accordingly, Butler specifically testified that Wilson had a right to rely on Ray as his agent. (Tr. Trans., Butler, R. p. 177)

On May 15, 1998, the Parties concluded negotiations and entered into the Ground Lease Agreement (the "Lease") which is the subject of this Action. The Lease provides that Wilson would rent the Property from Butler for an initial term of one year, and that:

> [Wilson] 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 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 [Wilson] furnishes written notice to [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 this Lease Agreement for an additional one (1) year option period, [Wilson's] option to extend the lease term for an additional one (1) year option period shall be deemed to be exercised automatically.

(Lease, R. pp. 339-340, ¶ 29) Importantly, this paragraph only requires unilateral notice, not an agreement. Further, this paragraph requires notice of non-renewal of the Lease, not notice to renew the Lease in force.

For each of the first three years of the Lease, Ray's office forwarded a rent invoice letter to Wilson prior to the next one (1) year term of the Lease, which instructed Wilson to make checks payable directly to Ray Realty. (*See, e.g.,* Rent Invoice Letters from Ray Realty of May 1, 2000 & April 16, 2001, R. pp. 367-368) The rent checks from Wilson were made payable to "Ray Realty." (*See, e.g.,* Horton Homes ck. #3789, May 17, 2001, R. p. 369) Ray would then deduct his commission and forward the remaining rent to Butler. (*See, e.g.,* Ray Realty ck. #1217, May 22, 2001, R. p. 371)

During 2001 (the third year of the Lease), Wilson's ability to sell manufactured homes decreased dramatically as lenders were suddenly less willing to finance manufactured homes. (Trial Trans., Wilson, R. p. 194) As a result of the sudden downturn, Wilson contacted Ray to propose that the Lease be modified so that the yearly rent would be payable in two installments instead of one. (Tr. Trans., Wilson, R. p. 195) Wilson and Ray had a number of discussions concerning this modification. (Tr. Trans., Ray, R. p. 140; Tr. Trans., Wilson, R. pp. 197, 199, 201-202, 208, 229-230) Due to the amount of time that passed before this Action was filed, Ray was only able to recall that conversations did occur; however, he specifically stated that he could not recall anything concerning the substance of these meetings. (Tr. Trans., Ray, R. p. 140) Despite having no recollection as to what was said during these conversations, Ray somehow asserted that Wilson never told him that the Lease would not be renewed for the period of May 2002 to May 2003. (Tr. Trans., Ray, R. p. 130)

Through a review of documents in his file, Ray did confirm that the Lease was actually modified during this time so that Wilson was allowed to pay ½ of the rent late in May of 2001, and the second half of the rent was to be paid in either October or November of 2001. (Tr. Test. of Ray, R. pp. 133-134; Tr. of Butler, R. p. 178; *see also* Horton Homes ck. to Ray Realty for $26,500.00, May 17, 2001, R. p. 369; Ray Realty Modification Ltr. to Powell, May 22, 2001, R. p. 370; Horton Homes ck. #s

4278 & 4288, for $25,000.00, November 2001, R. pp. 386-387) Ray's file reflected that Wilson paid an additional $1,500.00 for this modification, and Ray was acting as Butler's exclusive paid agent concerning the modification. (*See id.*; *see also* Ray Realty ck. #1217 for $25,175.00, May 22, 2001, R. p. 371; Ray Realty Rent Invoice, Sept. 17, 2001, R. p. 372; Ray Realty ck. #1272 to Butler, for $23,750.00, Nov. 26, 2001, R. p. 388)

Wilson clearly testified that he did recall the substance of the modification conversations with Ray. (Tr. Trans., Wilson, R. pp. 197, 199, 201-202, 208, 229-230) Wilson testified that at the same time the first ½ payment of rent was tendered to Ray, he explained the reason for the modification request, and informed Ray that his renewal of the Lease was in doubt. (*Id.*) Wilson further testified that contemporaneous with the second ½ payment of rent, and on a number of occasions thereafter, Ray was specifically informed that Wilson: (1) was in the process of liquidating his inventory of manufactured homes; (2) would not be renewing the lease the following year; and, (3) that Ray had permission to begin attempting to re-let the premises. (*Id.*) Wilson's trial testimony was corroborated by and through the testimony of his business partner, Jackie Woodbury, and his **former**[1] employee, Betty Bryant. (Tr. Trans., Woodbury, R. p. 243; Tr. Trans., Bryant, R. p. 246; *see also* Horton Home Inv., Jan. 2002, R. p. 389)

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[1] Page 3 of the Final Order erroneously indicates that Betty Bryan was Wilson's employee. (R. p. 12)

While Wilson worked to liquidate the inventory of manufactured homes on the Property in 2001 and 2002, he experienced other difficulties during the final year of the Lease. (Tr. Trans., Bryant, R. p. 246; Horton Homes Inv., Jan. 2002, R. p. 389) First, the primary sales office, computers, and equipment were lost in a fire. (Tr. Trans., Wilson, R. pp. 199, 203) In response, Wilson installed a single-wide manufactured home from his existing inventory to serve as a replacement sales office. (*Id.*; *see also* Zoning Permits, 9-14-2001, R. p. 373; Santee Cooper Reconnect, Sept. 26, 2001, R. p. 383) Prior to being liquidated, Wilson's inventory of manufactured homes was also vandalized a number of times. (Tr. Trans., Wilson, R. p. 230) To prevent further theft, Wilson contracted with Santee Cooper to provide security lighting. (*Id.*; Santee Cooper Security Lighting Agm., Feb. 2, 2002, R. p. 390) Despite his best efforts, Wilson was not able to completely vacate the premises by the end of the Lease term. (Tr. Test. of Wilson, R. pp. 200-202, 230)

On April 16, 2002, Ray wrote a letter to Wilson informing him that rent for the entire term of May 14, 2002 to May 15, 2003 was due. (R. p. 368) After not receiving the rent payment, Ray authored the first demand letter to Wilson, dated June 3, 2002, which stated: "The owner, Mr. Butler, would like for you to continue renting the property, **but has instructed me to collect the rent or ask you to vacate**. Please contact me by next Monday, June 10th and let me know your plans." (Ltr. from Ray to Wilson, June 3, 2002, R. p. 396, (*emphasis added*)) Ray wrote this letter as the

exclusive paid agent of Butler. (Tr. Trans., Ray, R. pp. 140-142) There is no question that a portion of any further rent proceeds would have been paid directly to Ray.

In response to Ray's June 3, 2002 letter, Wilson continued working to vacate the Property. (Tr. Trans., Wilson, R. p. 207) All evidence indicates that Wilson had vacated the Property by July 31, 2002. (*Id.*; Tr. Trans., Wilson, R. p. 233; Monthly Expenditures, ending July 26, 2002, R. p. 398; Santee Cooper Turn-Off Notice, July 19, 2002, R. p. 404; Inetba Phone Invoice, ending July 24, 2002, R. p. 405). Wilson has always agreed to pay rent and incidental expenses for this time period. (*Id.*)

Even though the Property had been vacated pursuant to the express instructions of Butler's agent, (Ltr. from Ray to Wilson, June 3, 2002, R. p. 396), Butler engaged Neil Wright, Esquire, to author another Notice of Default on October 26, 2002 (R. p. 409), which again noted that rent had not been paid, and provided a brief cure period:

> As you have failed to pay rent to Mr. Butler for the option year commencing May 15, 2002, and ending May 14, 2003, you are in default of your obligation to pay rent pursuant to the terms of the Ground Lease Agreement.
>
> You have the right to cure the default in your lease obligations within fifteen (15) days ...

Five days later, October 31, 2002, N. David Durant, Esquire, responded to Mr. Wright's letter, confirming that in or around January and February of 2002, Wilson had informed Ray (who had been held out by Butler's as his paid and exclusive agent at all times), that the Lease would not be renewed. (R. p. 412)

Ray was acting as Butler's exclusive paid agent at this time. In January and February of 2002, Ray was informed that Wilson would not be renewing the Lease for the Property. Certainly Butler and Ray both had actual knowledge that rent had not been received by May 14, 2002. In June 2002, Ray authored a letter on behalf of Butler specifically instructing Wilson to either pay rent or vacate the premises. (Tr. Trans., Butler, R. p. 165) Additionally, Counsel for Wilson had formally notified Butler's lawyer that Wilson was no longer utilizing the Property on October 31, 2002. Finally, Butler drove by the Property in November of 2002 and visually confirmed that Wilson had vacated the premises (Final Or., R. pp. 26-27, ¶ 31-36; Tr. Trans., Butler, R. p. 186; Trans. Exhs. 26-29, R. pp. 415, 417)

Based upon the foregoing, Butler had actual knowledge that the Property had been vacated, as noted in the Special Referee's Final Order. (R. p. 27) There is no dispute that Butler willfully and intentionally failed or refused to take ANY action to re-let the premises until sometime after May 15, 2003. (Final Or., R. p. 27, ¶¶ 37-38; Tr. Trans., Ray, R. pp. 144-146; Tr. Trans., Butler, R. p. 185) Ray further acknowledged that he was not exclusively employed to re-let the Property, and therefore he did not make reasonable efforts to Lease the Property by using the

Multiple Listing Service or publicly advertising the Property. (Tr. Trans., Ray, R. pp. 144-147)

IV. STANDARD OF REVIEW

Breach of contract is an action at law. *Chambers v. Pingree*, 351 S.C. 442, 454, 570 S.E.2d 528, 534 (Ct. App. 2002) "In an action at law, the appellate court will correct any error of law, but it must affirm the special referee's factual findings unless there is no evidence that reasonably supports those findings." *Linda Mc Co., Inc. v. Shore*, 390 S.C. 543, 555, 703 S.E.2d 499, 505 (2010) (*citing Roberts v. Gaskins*, 327 S.C. 478, 483, 486 S.E.2d 771, 773 Ct. App. 1997)) "Where mixed questions of fact and law are presented, the legal conclusions to be drawn are not entitled to the same deference." *Chambers, supra*, at 449-50, 570 S.E.2d at 532 (Ct. App. 2002). Further, where the wrong legal conclusions are drawn or the law misapplied, the Court is obligated under this standard of review to correct such errors. *Id.* at 454, 570 S.E.2d at 534 (Ct. App. 2002).

Counsel for Appellant would respectfully submit that the Final Order in this Action was entered approximately seventeen (17) months after the testimony was actually heard, and the record clearly reflects that pertinent findings of fact are not

reasonably based upon any competent evidence. Appellant further submits that the Special Referee made a number of errors of law, as is more fully set forth below.

V. ARGUMENT

A. The Special Referee erred in Finding and Concluding that Butler was not actually notified that Wilson did not renew the Lease for the Property, where the only Competent Evidence indicates Notice of Non-Renewal was Given to Butler's Agent Contemporaneously with, and as Part of, the Agreed upon Oral Modification

The Special Referee concluded that: the Parties did not agree to modify the Lease; and therefore, even if any oral notice had been provided to Butler's exclusive paid agent by Wilson, it would not be effective to prevent the renewal of the lease. (Final Or., R. pp. 32-36; Order of Aug. 23, 2011, R. pp. 56-57) In South Carolina, written contracts "may be orally modified by the parties, even if, as here, the writing itself prohibits oral modification." *South Carolina National Bank v. Silks*, 295 S.C. 107, 109-110, 367 S.E.2d 421, 422 (Ct. App. 1988). In this case, the Parties both acknowledge that the Lease was orally modified in late 2001 and early 2002, that there were many conversations between Ray, as Butler's exclusive paid agent, and Wilson. The only competent evidence at trial demonstrated that Wilson provided Ray with verbal notice of non-renewal.

1. Ray was Butler's Exclusive Paid Agent, and Handled All Communications Related to the Lease.

During the Trial held on October 26, 2007, Butler and Wilson both testified that they had never communicated directly concerning any matters related to the Lease for the Property, and that all communications went through Ray. (Tr. Trans., Butler, R. p. 160; Tr. Trans., Wilson, R. pp. 197, 203) Therefore, Butler would not be in a position to testify as to whether Wilson provided Ray with notice of non-renewal. The only questions remaining for the Special Referee were: (1) whether notice of non-renewal actually was given to Ray; and, (2) whether notice to Butler's exclusive paid agent would constitute notice to Butler. The only reasonable view of competent evidence in the record discloses that notice was in fact given as part of an acknowledged oral modification. Further, Butler held out Ray as his exclusive paid agent, and therefore Notice to Ray constitutes notice to Butler. Both of these issues are discussed below.

2. Charlie Ray's Testimony is Inherently Biased and Contradictory, and Therefore Not Competent or Credible.

There is no question that Ray was Butler's exclusive agent, that all payments were directed to and made payable to Ray Realty, Inc., and that Ray was paid by Butler from rent proceeds. (*See* Rent Invoice Letters from Ray Realty of May 1, 2000 & April 16, 2001, R. pp. 367-368) As a result, the record clearly discloses that Ray

had a vested interest in collecting as much rent from Wilson as possible, and for this reason, any testimony and evidence adverse to Wilson would be inherently biased. That being said, most of Butler's testimony was not adverse to Wilson.

In addition to the inherent bias as Butler's paid agent, Ray's actual trial testimony can only be viewed, at a minimum, as conflicting. At first, Ray makes an unqualified declaration:

> Q: DID MR. WILSON EVER TELL YOU THAT HE WAS NOT GOING TO RENEW THE LEASE FOR THE PERIOD MAY 15, 2002 THROUGH MAY 14, 2002?
>
> A: NO.[2]

There is no question that this statement directly conflicts with other sworn testimony given by Ray, and is therefore not credible evidence. During the trial, Ray acknowledged that the Lease was orally modified:

> Q: SO, MY QUESTION IS, IN 2001, THE PARTIES ORALLY AGREED TO MODIFY THE PAYMENT TERMS OF THE LEASE, CORRECT?
>
> A: CORRECT, YES.
>
> Q: FOR THAT YEAR?
>
> A: YES, SIR.
>
> Q: THEY DIDN'T SIGN IT?
>
> A: THEY DIDN'T.

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[2] Tr. Trans., Ray, R. p. 130.

Q: IT WAS NOT IN WRITING?

A: IT WASN'T. [3]

While Counsel for Butler will point out that the Lease requires written notice not to renew, there can be no question that the Lease was orally modified at the same time that notice not to renew was to be given. While the modification was acknowledged, Ray also testified that he had many conversations with Wilson during this time period, however, he had no recollection as to what had been said in **ANY** of them.

Q: ... AS YOU TESTIFIED IN YOUR DEPOSITION THAT YOU DID TALK TO MR. WILSON SUBSEQUENT TO MODIFYING THE LEASE IN 2001?

A: YES, SIR.

Q: YOU HAVE NO RECOLLECTION OF WHAT THOSE CONVERSATIONS WERE ABOUT THAT?

A: NO.

Q: IS IT FAIR TO SAY, MR. RAY, THAT YOU HAVE VERY LITTLE INDEPENDENT RECOLLECTION OF THE EVENTS THAT TOOK PLACE DURING THIS WHOLE TRANSACTION?

A: OTHER THAN WHAT I CAN RE-ESTABLISH WITH A FILE UNLESS THERE WAS SOME

[3] Tr. Trans., Ray, R. pp. 133-134.

MONUMENTAL ACTION THAT TOOK PLACE, THAT'S FAIR TO SAY, YES.[4]

Ray then went on to confirm the possibility that he had been told that Wilson would not be renewing the Lease.

Q: MY QUESTION TO YOU, MR. RAY, IS, ISN'T IT POSSIBLE THAT MR. WILSON, DURING ONE OF THOSE CONVERSATIONS THAT YOU HAD EARLIER IN THE YEAR, TOLD YOU THAT HE WAS NOT GOING TO CONTINUE RENTING THE PROPERTY?

A: I DON'T RECALL THAT CONVERSATION.

Q: ISN'T IT POSSIBLE?

A: OH, YES, IT'S POSSIBLE.[5]

In sum, the only reasonable conclusion from Ray's testimony is that it was inherently biased, and at a very minimum, conflicting.

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[4] Tr. Trans, R. p. 140.

[5] Tr. Trans., Ray, R. p. 142.

It is important to note that Plaintiff waited almost three years to commence this Action, and this unreasonable delay is the reason that his own agent was not able to recall ANY of these conversations, and is a basis for Wilson's affirmative defense of laches. In *Burnett v. Holliday Bros., Inc.*, 279 S.C. 222, 227, 305 S.E.2d 238, 241 (1983), the Supreme Court held:

> [T]he Doctrine of Laches simply denotes failure to act for some undue lapse of time, and neglect to act when there was an opportunity to have acted sooner. Where there is an unexplainable delay for an unreasonable length of time, one may be barred, or estopped. *See Stribling v. Fretwell*, 157 S.C. 297, 154 S.E. 415; *Bagwell v. Hinton*, 205 S.C. 377, 32 S.E.2d 147, and other cases.

A court of equity should refuse to protect a party's rights if the party's unreasonable delay has resulted in injury to his adversary. *Gibbs v. Kimbrell*, 311 S.C. 261, 269, 428 S.E.2d 725, 730 (Ct. App. 1993)

3. The only Competent Evidence in the Record Indicates that Charley Ray Received Notice of Non-Renewal of the Lease as Part of the Acknowledged Modification of the Lease.

At all times, Wilson has consistently stated that he provided Butler with notice that he would not be renewing the lease for the term of May 2002 to May 2003, by and through his communications with Butler's agent, Charley Ray. (Tr. Trans., Wilson, R. pp. 197, 199, 201-202, 208, 230-231) At trial, Butler specifically testified

that all of his communications concerning the Lease were with Charley Ray,[6] and that "Charley told me, he says, 'you don't need to deal with those folks. You deal with me.' He said, 'I got you covered, Billy.'"[7] As to notice of non-renewal, Mr. Wilson specifically testified:

> Q: DID YOU GIVE NOTICE TO CHARLEY RAY THAT YOU WERE NOT GOING TO EXERCISE THE TERMS AND TO RE-LEASE IN JANUARY OF 2002?
>
> A: YES, SIR.[8]
>
> ****
>
> A: I TOLD CHARLEY WHEN I TALKED WITH HIM IN JANUARY. I SAID, "CHARLEY, YOU NEED TO GO AHEAD AND PUT UP A SIGN AND TRY TO START RENTING IT."[9]

Wilson's testimony was consistent and unequivocal under cross examination as well:

> Q: NOW, I WANT TO BE CLEAR ABOUT THIS. YOU'RE TELLING US THAT IN JANUARY OF 2002, YOU REMEMBER A CONVERSATION WITH MR. RAY WHERE YOU TOLD HIM YOU DEFINITELY WEREN'T STAYING BEYOND MAY 15TH? ...
>
> A: ... I TOLD HIM IN JANUARY, I SAID, "I WON'T BE HERE ... AT THE END OF THIS LEASE, I'LL BE GONE. YOU NEED TO PUT

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[6] Tr. Trans., Wilson, R. p. 197.

[7] *Id.*, R. p. 197.

[8] *Id.* R. p. 208.

[9] *Id.*, R. pp. 201-202.

YOUR SIGN UP AND TRY TO RENT IT FOR MR. BUTLER.[10]

Wilson's testimony was corroborated by his business partner, Jackie Woodbury, as well as his former employee, Betty Bryant. Mr. Woodbury testified that he and Wilson were attempting to liquidate their inventory of manufactured homes, and that he specifically overheard Wilson providing Ray with verbal notice that the lease would not be renewed. (Tr. Trans., Woodbury, R. p. 243) Ms. Bryant testified that she was retired,[11] and that as part of her former employment she worked to liquidate the inventory of manufactured homes and close down the business on the Property in January of 2002. (Tr. Trans., Bryant, R, p. 446; *see also*, Horton Home Inv., Jan. 2002, R. p. 389) Unlike the testimony of Ray, the testimony of Wilson, Woodbury, and Bryant was not contradictory.

The Final Order of the Special Referee erroneously found that Wilson had taken actions inconsistent with his claim that he was liquidating his inventory.[12] These actions include the installation of a single-wide mobile home to replace the sales office which was destroyed by fire, entering into a contract with Santee Cooper to install a security lighting system (terminable with a minimal payment), and the

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[10] *Id.*, R. p. 230.

[11] Page 3 of The Final Order erroneously indicates that Betty Bryant was Wilson's employee, R. p. 12.

[12] Final Or. R. pp. 16-17, 24-25 (Findings of fact related to the replacement of a sales office, installation of security lighting, and collection of billboard rents on the Property).

collection of rent from billboards on the Property (a bookkeeping oversight of approximately $250.00). (Tr. Trans., Wilson, R. pp. 183, 199, 203, 230; Tr. Trans., Butler, R. p. 185; *see also* Zoning Permits, 9-14-2001, R. p. 373; Santee Cooper Reconnect, Sept. 26, 2001, R. p. 383; Santee Cooper Security Lighting Agm., Feb. 2, 2002, R. p. 390; Billboard Rents rec. for Jan.–June 2002, R. p. 394) These actions are entirely consistent with Wilson working to liquidate inventory so that he could vacate the premises.

4. Leon Butler, as the Principal, held out Charley Ray as His Exclusive Paid Agent for All Communications Related to the Lease.

While the Final Order notes that Ray testified that his authority was limited,[13] there is absolutely no evidence which indicates that any limit on authority was ever conveyed to Wilson by Ray, Butler, or anyone else. Any finding that an undisclosed or secret limitation on Ray's authority as Butler's agent as to communications in connection with some portions of an oral agreement to modify the Lease would be binding upon Wilson would constitute an error and misapplication of the law.

In order to determine whether an agent had authority to act on behalf of his principal, the Court must look to the circumstances surrounding the relationship and find authority which is either express or implied from the type of relationship between Ray as the agent, and Wilson as a third party to the agency. *Moore v. Simpson*, 322

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[13] Final Or., R. pp. 13; p. 24, ¶19; and p. 35.

S.C. 518, 523, 473 S.E.2d 64, 67 (Ct. App.1996). While actual authority is expressly conferred upon the agent by the principal, apparent authority exists when the principal knowingly permits the agent to exercise authority, or the principal holds the agent out to a third party as possessing such. *Richardson v. P.V., Inc.*, 383 S.C. 610, 682 S.E.2d 263, 265 (2009).

In the case at bar, there is no question that Butler retained Ray to act as his agent, and held him out as his agent for **ALL** communications:

> Q: AND IT'S TRUE THAT YOU HIRED MR. RAY TO ACT AS YOUR EXCLUSIVE AGENT IN TRYING TO OBTAIN A RENTER, CORRECT?
>
> A: YES.[14]
>
> ****
>
> Q: FROM THE DATE OF THE INITIAL LETTER OF INTENT THE DATE OF EXECUTION OF THE LEASE ..., HAD YOU HAD ANY VERBAL COMMUNICATION AT ALL WITH MR. BILLY WILSON?
>
> A: NO, NONE AT ALL.
>
> Q: ... UP UNTIL THE DATE THAT YOUR DEPOSITION WAS TAKEN LAST WEEK ..., HAD YOU HAD ANY VERBAL COMMUNICATION AT ALL WITH MR. WILSON?

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[14] Tr. Trans., Butler, R. p. 180; *see also* Buyer's Agent Disclosure and MLS data entry form, R. pp. 261, 262.

A: NO, SIR, NONE AT ALL. I HAD NEVER MET THE MAN.[15]

Again, all evidence indicated that Ray had authority to handle all communications concerning the Lease. There was also no evidence that any purported limit on Ray's authority as to communications was ever conveyed to Wilson. In fact, the only competent evidence indicates the opposite is true:

Q: MR. BUTLER, DID MR. WILSON HAVE THE RIGHT TO RELY ON CHARLEY RAY AS HIS REPRESENTATIVE TOO REGARDING THE TERMS OF THIS LEASE?

A: MR. RAY WAS THE MIDDLEMAN. I WAS THE ONE WHO HAD TO MAKE ALL THE FINAL DECISIONS, BUT, YES, HE COULD RELY ON WHAT MR. RAY WAS TELLING HIM BECAUSE I, IN TURN, WAS TELLING THIS TO MR. RAY.[16]

There can be no question that Butler, acting as the principal, affirmatively held out Ray as his exclusive paid agent for **ALL** communications related to the Lease, and that Wilson had a right to rely on his communications with Ray concerning the modification of the Lease. Butler waited three years to file the underlying action, and this unreasonable delay caused a situation where his exclusive paid agent was unable to recollect the conversations concerning the agreed upon oral modification.

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[15] Tr. Trans., Butler, R. p. 160.

[16] Tr. Trans., Butler, R. p. 177.

The Special Referee erred in finding and concluding that notice of non-renewal was not actually provided by Wilson as part of the acknowledged oral modification of the Lease.

While Wilson did not breach the Lease, he did remain upon the Property from May 15, 2002 to July 31, 2002 (at the latest) as a tenant-at-will as defined by the precedent of this Court. "After termination of a lease, one continuing to occupy the premises, absent a new agreement, express or implied, comes squarely within the definition of a tenant at will." *Bruce v. Durney,* 341 S.C. 563, 570, 534 S.E.2d 720, 724 (Ct. App. 2000) (*citing Townsend v. Singleton*, 257 S.C. 1, 183 S.E.2d 893 (1971)); *Carson v. Living Word Outreach Ministries, Inc.*, 315 S.C. 64, 69, 431 S.E.2d 615, 618 (Ct. App. 1993). Therefore, during the time that Wilson was a tenant at will, he was not bound by terms of prior lease, and he was liable only for reasonable rental value for the Property. *Townsend, supra* at 1, 183 S.E.2d at 893 (1971).

Wilson has always been willing to pay these amounts. (Tr. Trans., Wilson, R. pp. 207, 233)

B. The Special Referee erred in finding and concluding that a landlord does not have a duty mitigate damages in South Carolina, where the Tenant has vacated the Premises pursuant to the Landlord's written instructions, the Landlord's lawyer declared default and provided a very limited cure period, and the Landlord knew that the Property was abandoned.

Even if this Honorable Court were to hold that the notice of non-renewal was not actually and effectively provided by Wilson as set forth above, the Special Referee erred as matter of law by holding that a landlord in South Carolina does not have a duty to mitigate his damages:

> [I]t 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[17]

This erroneous statement of South Carolina law was applied within the Conclusion of Law section of the Final Order:

> I conclude as a matter of law that the Plaintiff was not under a legal obligation under South Carolina law to mitigate the damages that he suffered as a result of the Defendant's failure to perform his obligations under the Ground Lease Agreement and that the Defendant is not entitled to any offset against the damages awarded to the Plaintiff pursuant to this Order. When a tenant abandons leased premises, the landlord is under no legal duty to attempt to re-let the premises for the balance of the term of the lease to mitigate the tenant's liability under the

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[17] Final Or. p. 29, R. p. 38.

> lease, including the tenant's liability for rent, if the landlord does not terminate the lease agreement, does not accept the tenant's surrender of the leased premises, does not act inconsistent with the tenants right to possession of the leased premises during the leasehold term, and does not re-enter and re-take possession of the leased premises. **Restatement (Second) of Property, Land & Ten § 12.1; *Sancourt Realty Corporation v. Dowling*, 220 A.D. 660, 222 N.Y.S. 288 (1st Dept. 1927); *Atkinson v. Rosenthal*, 33 Mass. App. Ct. 219, 598 N.E.2d 666 (Mass. App. Ct. 1992); *Miller v. Gammon & Sons, Inc.*, 67 S.W.3d 613 (Mo. Ct. App. W.D. 2001), *Sandusky Mall Co. v. Pet Corner, Inc.*, 117 Ohio App. 3d 198, 690 N.E.2d 78 (7th Dist. Mahoning County 1997), cause dismissed 79 Ohio St. 3d 1411, 679 N.E.2d 727 (1997)**[18]

The Special Referee's legal conclusions as to the duty of mitigation are incorrect as a matter of law, and are only supported by non-precedential sources of law from one secondary source referencing only a number of obscure cases from foreign jurisdictions. On the other hand, Counsel for Wilson had forwarded several South Carolina cases which are directly on point, which specifically and clearly indicate that a party claiming a breach of lease contract is under a duty to minimize his damages.[19]

In *United States Rubber Co. v. White Tire Co, Inc., et al.*, 231 S.C. 84, 97 S.E.2d 403 (1956), the South Carolina Supreme Court specifically held that where a tenant vacated the demised premises and defaulted in the payment of rent, the landlord had a duty to minimize her damages. In *Burkhalter v. Townsend*,

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[18] Final Order, R. p. 50, § 32 (*emphasis added*); Order of Aug. 23, 2011, R. pp. 57-58.

[19] *See*, Wilson's Trial Brief, R. p. 103, 469-70.

138 S.E. 34, 37 (1927), the Supreme Court held that where the plaintiffs sued for damages due to the defendant's breach of his renting contract, "It was their duty to minimize their damages as far as they could reasonably do so." Likewise, in *Gentry v. Recreation, Inc.*, 192 S.C. 429, 7 S.E.2d 63, 66 (1940), the Supreme Court held that 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."

The concept of mitigation is well known and is applicable in many other areas of the law where damages are claimed. In *Rathborne, Hair & Ridgway Co. v. Williams, et, al.*, 59 F. Supp. 1 (D.S.C. 1945), the Court held:

> The efforts which the injured party must make to avoid the consequences of the wrongful act or omission need only be reasonable under the circumstances of the particular case, his duty being limited by the rules of common sense and fair dealing...

See also, Hutson v. Cummins Carolinas, Inc., 280 S.C. 552, 314 S.E.2d 19 (Ct. App. 1984) (Respondent had a duty to mitigate damages by having his vehicle repaired)[20]

Based upon the foregoing, there can be no question that a duty to mitigate in South Carolina clearly exists and applies. After citing secondary authorities from foreign jurisdictions for the proposition that a landlord does not have a duty to

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[20] *See also, e.g., Baty v. Stanley*, 291 S.C. 546, 354 S.E.2d 571 (Ct. App. 1987); *Kumpf v. United Tel. Co. of Carolinas*, 311 S.C. 533, 539, 429 S.E.2d 869, 873 (Ct. App. 1993).

mitigate in South Carolina, the Special Referee concluded that "Butler was not under a duty to mitigate damages as [Butler] and [Wilson] bargained away any obligation on the part of [Butler] to mitigate his damages during extensive arms length negotiations."[21] As set forth below, this conclusion is erroneous as a matter of law.

C. The Special Referee erred by failing to conclude that a contractual provision which purportedly provides that the Landlord does not have a duty to mitigate is an unenforceable penalty clause, where the Landlord instructed the tenant to vacate the Property, and where the Landlord intentionally and willfully refused to mitigate so that he could preserve, and thereby have this Court enforce, his contractual claim to accelerate an entire years worth of rent payments.

The Special Referee erroneously concluded:

> [A]ny duty of [Butler] to mitigate the damages that he suffered as a result of the [Wilson's] failure to perform his obligations under the [Lease] was negated by the following lease provision which specifically annuls any duty to mitigate ... :
>
> "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 [Wilson's] liability shall not be diminished or affected by [Butler's] failure to re-let."[22]

First, the above-quoted Lease provision has been inaccurately cited and misapplied by the Special Referee, as it is the last sentence of a paragraph that applies only "If this Lease Agreement or [Wilson's] possession of the Leased Premises shall be

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[21] Final Or., R. p. 40.

[22] Final Or. R. p. 51, ¶ 33 (*citing* Lease, R. p. 334, ¶ 18).

terminated ..."[23] Inasmuch as 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,"[24] there can be no question that this clause does not apply.

Even if the above-cited provision in the Lease specifically stated that it would annul any duty to mitigate in any and all circumstances, the Supreme Court has specifically held that the enforceability of any such provision must be closely scrutinized. In *Mid-Continent Refrigerator Co. v. Way*, 263 S.C. 101, 106, 208 S.E.2d 31, 33 (1974), the South Carolina Supreme Court undertook to evaluate a lease provision which purported to accelerate rent:

> The language of the lease relied upon by the plaintiff is in the nature of a penalty, which is not favored in the law, and if enforceable at all, it would only support a cause of action for any damages actually sustained by the plaintiff, the measure of which would be affected by the duty of minimizing its damages.

In *Gentry v. Recreation, Inc.*, 192 S.C. 429, 7 S.E.2d 63, 66 (1940), the Supreme Court first evaluated an acceleration clause in a lease:

> Is a provision in a lease for a term of years providing for an acceleration of rent installments so as to make the rent for the entire term due upon the happening of a specified contingency valid and enforceable?
>
> ****

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[23] Lease, R. p. 334, ¶ 18

[24] Final Or. at R. p. 27, ¶ 35.

> There is, however, quite an obvious difference between the acceleration of an ordinary debt and the acceleration of rent. In the case of ordinary debt the debtor has already received the entire consideration, either in money or in property, while in the case of rent an acceleration would require him to pay for that which he has not yet received.
>
> ****
>
> While this clause might not be considered unconscionable, we think it may be justly and reasonably construed as in the nature of a penalty and thus so far enforceable as to support a cause of action against the lessee for the actual damages sustained, the measure of which must be affected by the duty of minimizing damages.

Despite Wilson's proffer of the above-quoted law,[25] the Special Referee failed to scrutinize the subject provision within the Lease.

The Special Referee should have scrutinized Butler's claim for $50,000.00 in rent, plus taxes, pre-judgment interest, and attorney fees, in light of the following evidence introduced at trial:

1. Butler could have initiated mitigation efforts in January of 2002, over seventeen (17) months prior to the end of the disputed lease term, *i.e.*, May 15, 2003 (Tr. Trans., Butler, R. pp. 202-203);
2. Despite their denying any notice of non-renewal from Wilson, Butler and Ray both certainly had actual knowledge that rent had not been received by May 14, 2002;

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[25] *See* Trial Brief, R. p. 470.

3. In June 2002, Ray's very first default letter on behalf of Butler specifically instructed Wilson to either pay rent or vacate the premises. (Tr. Trans., Butler, R. p. 165);

4. Wilson had vacated the Property by July 31, 2002, and was willing to pay rent and incidental expenses for this time period. (Tr. Trans., Wilson, R. pp. 207, 233; Monthly Expenditures, ending July 26, 2002, R. p. 398; Santee Cooper Turn-Off Notice, July 19, 2002, R. p. 404; Inetba Phone Invoice, ending July 24, 2002, R. p. 405);

5. Counsel for Wilson had formally notified Butler's lawyer that Wilson was no longer utilizing the Property on October 31, 2002 (R. p. 412); and,

6. Butler drove by the Property in November of 2002, and visually confirmed that Wilson had vacated the premises. (Final Or., R. pp. 26-27, ¶ 31-36; Tr. Trans., Butler, R. p. 186; Tr. Exhs., R. pp. 415, 417).

Based upon the foregoing, there is no question that Butler had actual knowledge that the Property had been vacated, and therefore he had the ability and duty to mitigate his damages in good faith.

As noted in the Special Referee's Final Order, there is no dispute that Butler willfully and intentionally failed or refused to take ANY action to re-let the premises until after May 15, 2003. (Final Or., R. p. 18, ¶¶ 37-38; Tr. Trans., Ray, R. pp. 144-146; Tr. Trans., Butler, R. p. 185) Ray further stated that he did not attempt to Lease the Property by using the Multiple Listing Service or publicly

advertising the Property, even though he specifically acknowledged that it would be reasonable to do so. (Tr. Trans., Ray, R. pp. 144-148)

Butler's knowledge that the Property had been vacated pursuant to his agent's instructions, coupled with his delay until the lease expired before taking any action to minimize his damages, can only lead to the conclusion that Butler intentionally and willfully refused to mitigate for the sole purpose of posturing himself to ask this Court to enforce his contractual claim to accelerate an entire year of rent payments.

In this regard, the Special Referee's Final Order cites to a number of cases from foreign jurisdictions to support the proposition that "[n]umerous authorities have enforced lease provisions which specify that notice of an option concerning renewal of a lease must be given in writing and must be transmitted in the manner specified in the lease agreement."[26] Inasmuch as every case cited by the Special Referee deals with a tenant's requirement to provide notice of intent to renew, and not as in the case at bar, a notice of non-renewal, a very obvious distinction exists. In each and every

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[26] Final Or., R. p. 31 (*Citing United Properties Ltd. v. Walgreen Prop., Inc*, 134 N.M. 725, 82 P.3d 535 (N.M. App. 2003); *Western Tire, Inc. v. Skrede*, 307 N.W.2d 558 (N.D. 1981); *Royer v. Honrine*, 68 N.C. 664, 316 S.E.2d 93 (N.C. Ct. App. 1984); *Coulter v. Capitol Fin. Co.*, 266 N.C. 214, 146 S.E.2d 97 (N.C. 1996); *Turman v. MacLachlan*, 257 Ga. 69, 354 S.E.2d 825 (Ga. 1987); *In re Joyner*, 74 B.R. 618 (Bankr. M.D. Ga. 1987); *Host Int'l, Inc. v. Summa Corp.*, 94 Nev. 572, 583 P.2d 1080 (Nev. 1978); *Geisdorf v. Doughty*, 972 P.2d 67 (Utah 1998))

one of the cases cited, the Court was considering whether a landlord should be able to declare a lease void, and thereby effectuate a forfeiture of varying degrees upon a tenant. In the case at bar, Butler laid in wait, willfully and intentionally avoiding any actions to minimize his damages, so that he could thereafter ask this Court to penalize Wilson with a judgment almost three times the previously agreed upon yearly rental.

In sum, the Special Referee failed to properly analyze the purported acceleration clause in this case. Taking the facts and circumstances of this case under consideration, the proper analysis could only have lead to one result – the purported acceleration clause is an unenforceable penalty provision.

D. The Special Referee erred in refusing to consider the evidence offered by Appellant Wilson on the issue of mitigation.

If this Honorable Court were to find and conclude that Wilson actually and effectively provided Wilson with notice of non-renewal in January of 2002, Butler did not suffer damages after July 31, 2002. Even if this Court finds and concludes that the Lease automatically renewed for an entire year, those damages must be reduced by the reasonable good faith actions that Butler could have undertaken to re-let the premises. In this regard, Wilson would have the burden of establishing Butler's lack of due diligence in mitigating damages.

While Wilson attempted to present this evidence, the Special Referee concluded that "[i]n light of my conclusion that [Butler] was not under a legal duty to mitigate damages, any evidence proffered by [Wilson] is unnecessary."[27] As set forth above, Butler did have a duty to mitigate his damages which was not, and under the present facts and circumstances could not have been, bargained away.

As set forth more fully above, Butler could have initiated mitigation efforts in January of 2002, *i.e.* over seventeen (17) months prior to the end of the disputed lease term, *i.e.*, May 15, 2003, or seven (7) months prior to Wilson leaving the Property. (Tr. Trans., Butler R. pp. 201-202) As noted in the Special Referee's Final Order, there is no dispute that Butler willfully and intentionally failed or refused to take ANY action to re-let the premises until after May 15, 2003. (Final Or., R. p. 27, ¶¶ 37-38; Tr. Trans., Ray, R. pp. 144-146; Tr. Trans., Butler, R. p. 185)

When Butler first sought a tenant to Lease the Property, he hired Ray as an exclusive agent. Ray is a licensed commercial real estate broker who owns Ray Realty, Inc. (Tr. Trans., Butler, R. pp. 155-56, 180; Tr. Trans., Ray, R. pp. 114-115, 144-147; *see also*, Buyer's Agency Disclosure, R. p. 261) At that time, Ray's efforts included the use of the Multiple Listing Service, public advertisements concerning the Property, as well as the placement of a sign upon the Property. (*Id.*)

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[27] Order of Aug. 23, 2011, R. p. 58.

At trial, Ray further testified that after May 15, 2003, he was not hired by Butler as an exclusive agent to list the Property, and the acts that he took were not sufficient:

> Q: WOULD I BE USING MY BEST EFFORTS IN LEASING A PIECE OF PROPERTY BY ONLY PLACING A SIGN, "FOR LEASE" ON THE PROPERTY?
>
> A: I THINK YOU NEED MORE THAN THAT.
>
> Q: YOU DO NEED MORE THAN THAT. ALRIGHT, SIR. IN THIS PARTICULAR CASE, SUBSEQUENT TO MR. WILSON LEAVING THE PROPERTY, YOU DIDN'T TAKE ANY OTHER STEPS OTHER THAN PLACING A SIGN ON THE PROPERTY, IS THAT CORRECT?
>
> A: THAT'S CORRECT.[28]

The evidence introduced at trial by Wilson and Ray as Butler's witness, indicates that the Property should and could have been rented in a short period of time.

Butler had a duty to mitigate his damages, and a reasonable good faith effort would have generated inquiries. Inasmuch as Butler willfully and intentionally failed to mitigate, his claim for damages must be barred, as a matter of law.

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[28] Tr. Trans., Ray, R. pp. 46-47.

E. The Special Referee erred in finding that Butler was entitled to Pre-Judgment Interest, where Butler failed to make any effort to mitigate his damages.

For all of the reasons set forth herein this Brief, Butler's claim for pre-judgment interest must fail. Additionally, it is important to note that Butler waited almost three years to commence this Action, and this unreasonable delay coupled with his rent acceleration claim creates a significant element of damages. Wilson should not be penalized due to Butler's unreasonable delay in bringing this Action pursuant to the equitable doctrine of laches.

> [T]he Doctrine of Laches simply denotes failure to act for some undue lapse of time, and neglect to act when there was an opportunity to have acted sooner. Where there is an unexplainable delay for an unreasonable length of time, one may be barred, or estopped. *See Stribling v. Fretwell*, 157 S.C. 297, 154 S.E. 415; *Bagwell v. Hinton*, 205 S.C. 377, 32 S.E.2d 147, and other cases.

Burnett v. Holliday Bros., Inc., 279 S.C. 222, 227, 305 S.E.2d 238, 241 (1983) A court of equity should refuse to protect a party's rights if the party's unreasonable delay has resulted in injury to his adversary. *Gibbs v. Kimbrell*, 311 S.C. 261, 269, 428 S.E.2d 725, 730 (Ct. App. 1993)

The Special Referee awarded Butler pre-judgment interest based upon the account stated and sum certain provisions of S.C. Code Ann. § 34-31-20. Final Order, R. pp. 46 ¶ 18, p. 48 ¶ 23, p. 49 ¶ 28; Order of Aug. 23, 2011, R. pp. 60-61) In the event that this Court finds Wilson provided actual and proper notice of non-

renewal as part of the acknowledged modification, the only damages would relate to his staying on the Property from May 15, 2002 to July 31, 2002 (at the latest) as a tenant-at-will. As such, he was not bound by the terms of the prior lease, and he was liable only for reasonable rental value for the Property. *Townsend v. Singleton*, 257 S.C. 1, 183 S.E.2d 893 (1971) Wilson has always been willing to pay these amounts. Tr. Trans., Wilson, R. pp. 207, 233)

If, on the other hand, this Court finds that the Special Referee correctly held that the lease was automatically renewed, Butler would have a duty to mitigate his damages. *Vaughn Development, Inc. v. Westvaco Development Corp.*, 372 S.C. 576, 642 S.E.2d 757 (2007) This duty represents an intermediate question which must be decided before the measure of damages can be ascertained. This measure of damages is contingent upon what Butler reasonably should have done. "In other words, an award of prejudgment interest is not proper if the measure of recovery is not fixed by conditions existing at the time the claim arose." *Keane v. Lowcountry Pediatrics, P.A.*, 372 S.C. 136, 147-148, 641 S.E.2d 53, 60 (Ct. App. 2007) (*citing Babb v. Rothrock*, 310 S.C. 350, 353, 426 S.E.2d 789, 791 (1993)).

VI. CONCLUSION

Based upon the foregoing, the evidence and testimony presented at trial does not reasonably support the Special Referee's findings of fact or conclusions of law. Appellant prays this Court will reverse the ruling of the Special Referee by holding

that Butler received adequate and proper notice of non-renewal of the Lease through his agent as part of the acknowledged verbal modification of the Lease; that Butler's claims are barred by the doctrine of laches; that Butler had a duty to mitigate any damages; that the Lease does not annul Butler's duty to mitigate; that even if the Lease did attempt to annul Butler's duty to mitigate, any such provision would be an unenforceable penalty under the facts and circumstances of this case; that Butler's claims for damages are barred due to his willful and intentional failure to mitigate his damages; and that Butler's claims for pre-judgment interest are barred as there was no breach, by the doctrine of laches, and because the measure of damages is not certain.

Respectfully submitted,

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Myrtle Beach. South Carolina

August 12, 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

The undersigned certifies that this Appellant's Amended Final Brief complies with Rule 211(b), SCACR. The undersigned further certifies that this Appellant's Amended Final Brief complies with the Supreme Court's Order of August 13, 2007 regarding personal identifiers and sensitive information.

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August 12, 2012

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PROOF OF SERVICE

I certify that I have served the **Amended Final Brief of Appellant** on the Respondent by depositing a copy of it in the United States Mail, postage prepaid, on August 13, 2012, addressed to his attorney of record, Neil D. Wright, Esquire, Barnett & Wright, P.A., 1304-B Azalea Court, Myrtle Beach, SC 29577.

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