

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

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SC COURT OF APPEALS

Leon P. Butler, Jr. Respondent,

v.

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

AMENDED FINAL REPLY BRIEF OF APPELLANT

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OTHER AUTHORITIES:

RESTATEMENT (SECOND) OF PROPERTY: *Landlord & Tenant* § 12.1 4

I. ARGUMENTS IN REPLY

Without restating the issues or making redundant arguments which have been thoroughly stated in Appellant's Initial Brief, Appellant offers the following clarifications and rebuttals to the arguments raised by Respondent. If this Court accepts the ruling of the Special Referee, it will be affirming an Order which directly contradicts South Carolina law by holding:

- (1) Landlords in South Carolina **do not** have a duty to minimize their damages as far as they can reasonably do so; and,
- (2) Contractual provisions accelerating unearned rent and negating the common law duty to eliminate any duty to mitigate should not be scrutinized.

This is a case where the landlord instructed the tenant to vacate the Property, thereafter admittedly refused to mitigate his damages, and now asks this Court to enforce a penalty.

A. INCOMPLETE STANDARD OF REVIEW

Respondent's standard of review only discusses a portion of the applicable standard, as it specifically fails to note that "[w]here mixed questions of fact and law are presented, the legal conclusions to be drawn are not entitled to the same deference." *Chambers v. Pingree*, 351 S.C. 442, 449, 570 S.E.2d 528, 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.

Appellant submits that Respondent's Brief intentionally omits several key facts. These omissions are coupled with a clear misstatement of South Carolina law. The resulting legal conclusions are not entitled to deference, and respectfully, must be corrected by this Honorable Court.

**B. GLARING FACTUAL OMISSION:
"MR. BUTLER ... HAS INSTRUCTED ... YOU TO VACATE"**

This action involves a dispute as to whether Respondent Butler should be allowed to accelerate an entire year worth of unearned rent, where Appellant Wilson was specifically instructed to vacate the property by way of letter from Butler's agent, Charley Ray, dated June 3, 2002. The letter specifically states, in pertinent part: "Mr. Butler would like for you to continue renting the property, **but has instructed me to collect the rent or ask you to vacate.**" (Ltr. from Ray to Wilson, June 3, 2002, R. p. 396 (*emphasis added*)) Mr. Butler's written instruction to vacate is not mentioned anywhere in Respondent's Brief, or the lower court's Order as drafted by Counsel for Butler. (*See* First Draft of Final Order, Hr'g of June 2, 2009, R. p. 523) Even if this Court were to find that Wilson did not effectively provide notice of non-renewal as part of an acknowledged modification, there can be no question that he was instructed to leave the Property.

Respondent's Brief also fails to mention the letter that Wilson's attorney, David Durant, wrote to Neil Wright on October 31, 2002, which specifically confirmed that Wilson had vacated the property. Despite this confirmation, "Respondent Butler took no further action with regard to the leased premises until after the expiration of the lease term on May 14, 2003." (Resp. Initial Br. at 18) Respondent does not mention attorney Durant's letter because it conclusively demonstrates that Butler was *intentionally* refusing to mitigate his damages.

Respondent's omission of this key fact is the basis for Respondent's persistent misapplication of the law to the facts of this case, as set forth in Appellant's brief, and below.

C. CONTROLLING LEGAL AUTHORITY NOT DISCUSSED OR DISTINGUISHED

Butler expressly instructed Wilson to vacate the Property, and thereafter intentionally failed and refused to mitigate his damages. Appellant's Brief has cited to South Carolina law which expressly states that a landlord in South Carolina has a duty to minimize his damages where it is reasonable to do so. The duty to minimize damages is not a new or novel proposition in South Carolina. *Burkhalter v. Townsend*, 139 S.C. 324, 138 S.E. 34, 37 (1927) (duty to minimize damages due on "renting contract"); *Nat'l Bank of South Carolina v. People's Grocery Co.*, 153 S.C. 118, 150 S.E. 478, 480 (1929) (Confirming Jury Charge: The law will not compensate

plaintiff who fails or refuses to minimize his own damages). Respondent's Brief makes absolutely no attempt to distinguish or explain why the precedent set by the courts of South Carolina is not controlling in this case.

Instead, Respondent cites to the exact same non-precedential sources of law from one secondary source (referencing obscure cases from foreign jurisdictions) relied upon by the Special Referee. (Resp. Initial Br. at 28–29) As set forth above, Section 12.1 of the RESTATEMENT (SECOND) OF PROPERTY is in direct conflict with the precedent of this Court.

Even if the Restatement did accurately “restate” the law of South Carolina, Comment g. to RESTATEMENT § 12.1 specifically states that Butler would have a duty to mitigate, and his damages would be limited under the facts of this case.

The obligation of the tenant to pay rent does not arise for any period after the lease is terminated. ... If continued payments are required where the landlord terminates the lease due to the tenant's fault, the landlord may have to take reasonable steps to mitigate the payments required of the tenant by reletting the premises (see Comment i).

A lease may be terminated before the end of the period specified for its duration ... because of some default of the tenant ... , or for other reasons. Whatever the cause of the termination of the lease, the obligation to pay rent ceases when the lease is terminated.

As discussed above, Ray wrote a letter to Wilson which stated “**Mr. Butler ... has instructed ... you to vacate.**” (Ltr. from Ray to Wilson, R. p. 396 (*emphasis added*))

When Ray issued this letter on behalf of Butler,¹ he effectively and constructively terminated the Lease. This comment clearly discloses the reason why Respondent's Brief omits any mention of the letter of June 3, 2002.

Respondent's Brief (and the Final Order drafted by Respondent's Counsel) has misstated the law of the State of South Carolina, and thereafter omits specific facts which would lead to a contrary result even under the law as misstated.

D. GROUND LEASE AGREEMENT DOES NOT PROVIDE THAT MITIGATION IS NOT REQUIRED

Appellant's Brief pointed out that the Lease does not provide that mitigation is not required. (*See* App. Final Br. at 27-28) Respondent's Brief does not contest this issue.

E. EVIDENCE OF MITIGATION WAS NOT CONSIDERED BY THE SPECIAL REFEREE

The Order of the Special Referee dated August 23, 2011, denied Wilson's Motion for Reconsideration alleging that evidence of mitigation was not considered by stating: "In light of my conclusion that [Butler] was not under a legal duty to mitigate damages, any evidence proffered by [Wilson] on [Butler's] efforts to mitigate his damages is unnecessary." (Order of Aug. 23, 2011, R. p. 58) In this regard, the trial transcript clearly demonstrates Butler had the opportunity to mitigate his damages

¹ *See* Tr. Trans. Butler, R. p. 183.

completely, yet he intentionally and absolutely refused to do so until some time after May of 2003. (Resp. Br. at 29–34) Neither Ray nor Butler had any specific recollection as to the date when any effort to re-let the Property actually occurred, except to state that there was no mitigation until **after** May 2003. (Tr. Trans. Ray, R. pp. 131, 153-155; Tr. Trans. Butler, R. pp. 173, 185)

While Respondent’s Brief states this entire argument “is complete nonsense,” there can be no question that: (1) the Final Order issued by the Special Referee specifically omits any findings concerning evidence of mitigation; and (2) this omission was intentional.

The Final Order was initially drafted by Counsel for Respondent, and Counsel for Respondent points out,² that the portions of his first draft regarding mitigation were rejected by the Special Referee during the Hearing on Respondent’s Motion for Reconsideration. (Hr’g Tr., R. pp. 558-559, and Ex. 5, R. pp. 523-73) Further, Counsel for Respondent filed a Motion asking the Special Referee to correct the “error in failing to find that the Appellant Wilson did not present evidence to satisfy his burden of proof with respect to his affirmative defense of failure of the Respondent Butler to mitigate damages.” (Resp. Initial Br. at 8) Respondent’s Motion was denied, as the Special Referee specifically deleted any finding **or alternative sustaining ground** which inferred that Wilson failed to introduce

² Resp. Br. at 6.

evidence that Butler could have mitigated his damages. (*See* Ltr. to Sp. Referee, Feb. 18, 2009, R. p. 498; Email Ruling from Sp. Referee dated Feb. 19, 2009, R. p. 500; *See also* Hearing Transcript Ex. 5, R. p. 534 (3rd ¶), R. p. 543 ¶¶ 46, 48–49, and R. pp. 568-569 ¶¶ 33–34 (Deleted Paragraphs)). The deletion of these paragraphs demonstrates that the Special Referee was not willing to find that Wilson failed to produce evidence concerning mitigation, and the reason why is obvious. The record is replete with such evidence, as well as Butler’s flagrant admission concerning his refusal to mitigate alleged damages.

Interestingly enough, the exact portion which the Special Referee deleted on Page 12 of Exhibit 5 (3rd paragraph) (R. p. 534), has once again been reproduced verbatim in Respondent’s Initial Brief at page 18. Inasmuch as Respondent is now quoting his own prior proposed findings — which were specifically rejected by the Special Referee — there should be little doubt as to as to who is peddling “nonsense.”

F. MISQUOTE CONCERNING NOTICE OF NON-RENEWAL

Respondent’s Brief states that Wilson testified he gave notice of non-renewal by telling Ray, “I doubt if I stay here a year.” (*See, e.g.*, Resp. Initial Br. at 15) Pages 93 through 94 of the Trial Transcript (R. pp. 198-199) clearly disclose that the misquoted language is actually testimony concerning a statement made at the end of 2002, and that in January of 2003, Wilson specifically told Ray, “I’m definitely out

of here now.” Wilson likewise specifically testified on cross-examination, “I won’t be here ... at the end of this lease, I’ll be gone. You need to put your sign up and try to rent it for Mr. Butler.” (Tr. Trans. Butler, R. pp. 229-230)

In fact, as set forth in Wilson’s Brief, the only testimony concerning notice which was unequivocal – was that of Wilson.

G. ISSUE PRESERVATION: LACHES

Respondent’s Brief indicates that Wilson did not argue the issue of Laches, and that as a result, the Special Referee did not rule on Appellant’s Affirmative Defenses. (Resp. Initial Br. at 20) These assertions are not true. Issue preservation requires that an issue be raised to and ruled upon by the trial judge, and of course, a party is not required to use the exact name of a legal doctrine in order to preserve an issue. *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011).

Counsel for Wilson specifically questioned Charley Ray as to his inability to recall conversations with Wilson because they took place so long ago, and thereafter Counsel for Wilson specifically questioned Butler as to his failure to take any action whatsoever to resolve these matters until a lawsuit was filed just days before the statute of limitations would have barred his claim. (Tr. Trans. Ray, R. pp. 134-140; Tr. Trans. Butler, R. pp. 185-188) Despite this testimony concerning the prejudicial delays caused by Butler, paragraph 34 at page 42 of the Final Order (R. p. 51) demonstrates that the Special Referee specifically held that the Defendant failed to

satisfy his burden with respect to his affirmative defenses. Based upon the foregoing, these issues were clearly raised to and ruled upon by the Special Referee to the extent necessary to perfect preservation for appellate review.

Further, at the June 2, 2009 Hearing on the Motions for Reconsideration of the Parties, Counsel for Wilson specifically argued that a portion of the fees and costs asserted as damages in this Action were actually and unilaterally caused by Butler's delay in pursuing this Action. (Hr'g Trans., R. p. 502) Further, in the proposed Final Order submitted to the Court as Exhibit 5 (R. p. 523), at the June 2, 2009 Hearing, Counsel for Butler asked the Court to specifically hold that the "Defendant did not present any evidence with respect to his additional affirmative defenses of novation, accord and satisfaction, and laches." (Hr'g Ex. 5, R. p. 534 (3rd ¶)). Even though this proposed finding was expressly rejected by the Special Referee, once again, the same language appears verbatim in Respondent's Brief at page 19.

H. DOCUMENTS WITHIN RECORD ON APPEAL

Respondent disingenuously argues that Appellant's Brief "reveals approximately twenty (20) instances in which Appellant has referenced matter which was not presented to the lower court." (Resp. Br. at 19) Respondent's Brief does not specifically identify any of said instances, most likely because the assertion simply is not true.

First, the undersigned Counsel for Wilson did not represent Wilson and was not present at the trial of this matter. A review of the trial transcript discloses that the parties agreed on “Stipulated Exhibits” which included Plaintiff’s Exhibits 1 through 36, and Defendant’s Exhibits 1 through 11 (of which Respondent has designated each and every one for inclusion within the record on appeal, regardless of whether they were actually cited). For some unknown reason, the court reporter at trial only included three (3) Court exhibits, five (5) of Plaintiff’s exhibits, and two (2) of Defendant’s exhibits. This omission led to some confusion regarding differing citations to **the exact same documents, each and every one of which was actually presented at the trial of this matter.**

Second, a review of the trial transcript indicates the original sealed depositions of William Wilson and Charley Ray were submitted for the Special Referee’s consideration at trial. (Tr. Trans., R. pp. 110, 135-140, and 153)

Finally, Respondent specifically objects to the letter of Robert Maring, Wilson’s trial counsel, to Neil Wright, Esquire, dated October 25, 2007. This letter specifically confirms that Wilson’s testimony concerning his good faith efforts to resolve this matter were truthful, and as such was admissible under Rule 408, SCRE, and Rule 68, SCRCP. Further, and perhaps most importantly, this document actually was submitted to the Special Referee at the June 2, 2009 hearing on the Respondent’s claim for attorney fees. (Hr’g Trans., R. pp. 503-504) All references to this letter, and its inclusion in the Record on Appeal, are proper.

II. CONCLUSION

Based on the foregoing, in addition to the arguments made in Appellant's Initial Brief, the Appellant respectfully requests that the decision and judgment of the Special Referee be Reversed and Vacated.

Respectfully submitted,

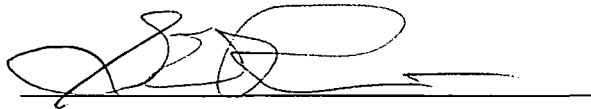
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August 12, 2012

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APPEAL FROM GEORGETOWN COUNTY
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Willard D. Hanna, Jr., Special Referee

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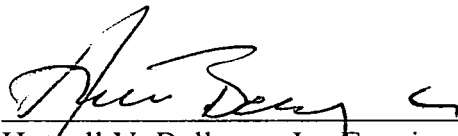
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CERTIFICATE OF COUNSEL

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



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