THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Willard D. Hanna, Jr., Special Referee

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

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

v.

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

PETITION FOR A WRIT OF CERTIORARI

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I. CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on March 20, 2013.

II. QUESTIONS PRESENTED

1. **DID THE COURT OF APPEALS ERR BY AFFIRMING THE SPECIAL REFEREE'S ORDER WHICH CONCLUDED THAT LANDLORDS DO NOT HAVE A DUTY TO MITIGATE THEIR DAMAGES WHERE IT WOULD BE REASONABLE TO DO SO IN SOUTH CAROLINA?**

2. **DID THE COURT OF APPEALS ERR BY REFUSING TO SCRUTINIZE A LEASE PROVISION WHICH PURPORTS TO ELIMINATE THE DUTY OF MITIGATION, WHERE THE ISSUE HAD BEEN RAISED AT EVERY POSSIBLE AND NECESSARY STAGE OF THE LITIGATION BELOW?**

    a. **DID THE COURT OF APPEALS ERR IN FINDING WILSON DID NOT PRESERVE THE DEFENSE OF UNENFORCEABILITY BASED UPON A PENALTY THEORY?**

    b. **WAS THE LEASE PROVISION MISAPPLIED, AND IN THE NATURE OF AN UNENFORCEABLE PENALTY CLAUSE?**

3. **DID THE COURT OF APPEALS ERR IN REFUSING TO CONSIDER EVIDENCE OFFERED BY APPELLANT WILSON ON THE ISSUE OF MITIGATION?**

III. STATEMENT OF THE CASE

On May 13, 2005, Respondent Leon Butler ("Butler") filed his Complaint in this Action, alleging that Petitioner William Wilson ("Wilson") breached a lease by failing to pay one year of rent in advance ($50,000.00) on May 14, 2002, where Wilson did not occupy the demised premises. (R. 70) Wilson filed his Answer on June 7, 2005, denying the lease had automatically renewed, and forwarded affirmative defenses including the intentional failure to mitigate damages and laches. (R. 78) On October 25, 2007, this Action was referred to Willard D. Hanna, Jr., as Special Referee with authority to enter a final judgment. (R. 8)

On March 27, 2009, seventeen (17) months after a one-day bench trial, the Special Referee entered a Final Order Ending Action, whereby judgment was rendered against Butler in the amount of $133,887.75. (R. 10-53) Thereafter, both Parties filed post-trial Motions for Reconsideration which were denied by the Order of August 23, 2011 (R. pp. 55, 429, 461, 495) On September 15, 2011, Wilson filed his Notice of Appeal with the Court of Appeals, and after Oral Argument on January 9, 2013, the Final Order of the Special Referee was summarily affirmed by Opinion Number 2013-UP-078, dated February 20, 2013 (App. 1). Wilson filed his Motion for Reconsideration with the Court of Appeals on March 7, 2013, which was denied on March 20, 2013 (App. 5-18, 19).

Wilson now respectfully petitions this Honorable Court for a Writ of Certiorari to review the Unpublished Opinion of the Court of Appeals numbered 2013-UP-078, dated February 20, 2013 (App. 1).

IV. STATEMENT OF THE RELEVANT FACTS

Butler employed a real estate broker, Charley Ray ("Ray"), to find a tenant to lease his five (5) acre tract of real property in Horry County, South Carolina (the "Property"). (R. 114-115, 155, 180, 261-62) Ray listed the Property in the Multiple Listing Service, publicly advertised the Property, and placed a sign upon the Property to lease the Property. (R. 115, 261-62)

Sometime in 1998, Wilson contacted Ray to lease the Property to display and sell manufactured homes. (R. 115) Ray acted as Butler's agent as to all negotiations. (R. 160, 197, 203) According to Butler, Wilson had a right to rely on Ray as he was Butler's agent. (R. 177, ln. 2-9)

On May 15, 1998, Wilson and Butler entered into the Ground Lease Agreement (the "Lease"), which provided 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 ... 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 ... $50,000.00 ... **Unless [Wilson] furnishes written notice to [Butler], at least ninety (90) days prior to the expiration of the original lease term ... an additional one (1) year option period shall be deemed to be exercised automatically.** (R. pp. 339-340, ¶ 29)(*emphasis added*)

Prior to the end of each one year term of the Lease, Ray forwarded a rent invoice letter to Wilson. (R. 367-368) Wilson made the rent checks payable to "Ray Realty," and Ray would then deduct his commission and forward the remaining rent to Butler. (R. 369, 371)

In 2001, Wilson's business declined dramatically. (R. 194) After a number of discussions between Wilson and Ray in early 2001, the Parties orally agreed to modify the lease so that rent for 2001-2002 could be paid in two delayed installments and that Wilson would not be renewing the Lease. (R. 195 ln. 7-12; 198, ln. 13 – 199, ln. 14; 201-202; 208, ln. 16-19; 229, ln. 15 – 230, ln. 8) Ray confirmed these conversations and the oral modification to the Lease as to split payments, however, he stated that he could not recall anything further because of the length of time that had passed before Butler commenced this Action. (R. 140, ln. 7-15; 142, ln. 9-16)

In contrast, Wilson testified that he did recall the substance of the Lease modification conversations with Ray. (R. 195 ln. 7-12; 198, ln. 13 – 199, ln. 14; 201-202; 208, ln. 16-19; 229, ln. 15 – 230, ln. 8) Wilson testified that he had informed Ray of his business' difficulties at the same time the first ½ payment of rent was tendered, and informed Ray that renewal of the Lease was in doubt. (*Id.*) Wilson further testified that contemporaneous with the second ½ payment of rent for the 2001-2002 term, and on a number of occasions thereafter, Wilson told Ray that he: (1) was liquidating his inventory; (2) would not be renewing the Lease; and, (3) Ray had permission to attempting to re-let the premises. (*Id.*) Wilson's trial testimony was corroborated by and through his business partner, Jackie Woodbury, and his former employee, Betty Bryant. (R. 243, 246).

On April 16, 2002, Ray wrote a letter to Wilson informing him that a $50,000 rent payment for the term May 14, 2002 to May 15, 2003 was due. (R. 368) After not receiving the rent payment, Ray's first demand letter to Wilson of June 3, 2002 stated:

"The owner, Mr. Butler, would like for you to continue renting the property, **but has instructed me to collect the rent or ask you to vacate.**" (R. 396-97 (*emphasis added*)) In response to Ray's June 3, 2002 letter, Wilson worked to vacate the Property as quickly as possible, and all evidence indicates that Wilson had done so by July 31, 2002. (R. 207, 233, 404).

Even though the Property had been vacated pursuant to the express instructions of Butler's agent, Butler engaged his lawyer, Neil Wright, to author a Notice of Default on October 26, 2002 (R. 409-11), noting that rent had not been paid:

> 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.

On October 31, 2002, N. David Durant, Esquire, responded in writing to confirm that Wilson had informed Ray in early 2002 that the Lease would not be renewed. (R. 412-13) Additionally, Butler testified that he knew that Wilson had vacated the Property as of November 2002. (R. 26-27, ¶ 32-34; 186; 415, 417) The next correspondence Wilson received was a Summons and Complaint, 2 ½ years later.

While the Parties dispute whether the oral modification of the Lease payments included Wilson's oral notice of non-renewal, the Special Referee held: (1) there is no dispute that Butler had actual notice of abandonment; and , (2) thereafter willfully and intentionally refused to take action to mitigate his damages. (R. 27, ¶¶ 35-38; 144, ln. 4-10; 185, ln. 3-6)

V. STANDARD OF REVIEW

Breach of contract is an action at law, and therefore the Appellate Court should have corrected any errors of law. *Linda Mc Co., Inc. v. Shore*, 390 S.C. 543, 555, 703 S.E.2d 499, 505 (2010) "Where mixed questions of fact and law are presented, the legal conclusions to be drawn are not entitled to the same deference" and the Court is obligated under this standard of review to correct such errors. *Chambers v. Pingree*, 351 S.C. 442, 449-50, 454, 570 S.E.2d 528, 532-34 (Ct. App. 2002).

VI. ARGUMENTS

1. THE COURT OF APPEALS SHOULD HAVE REVERSED THE SPECIAL REFEREE'S HOLDING THAT LANDLORDS DO NOT HAVE A DUTY TO MITIGATE THEIR DAMAGES IN SOUTH CAROLINA WHERE IT WOULD BE REASONABLE TO DO SO.

The Court of Appeals erred by affirming the Order of the Special Referee which expressly held a landlord in South Carolina does not have a duty to mitigate damages:

> [I]t 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. ... [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. (R. 38)[1]

[1] *Citing* RESTATEMENT (SECOND) OF PROPERTY, *Land & Ten*, § 12.1.

While the Order of the Special Referee poses this issue as a novel question of law in South Carolina, the cases before him which are cited below demonstrate this is simply not accurate. The holding of the Special Referee directly contradicts the precedent of this Court which has consistently and unequivocally held that a party has a duty to mitigate damages where it is reasonable to do so. There has never been any citation, discussion, citation, or distinction of **any** authority from the Courts of the State of South Carolina as to the duty of mitigation by the Special Referee in his Order, or in Butler's briefing and argument to the Court of Appeals. As this was an action at law, the Court of Appeals should have corrected this error.[2]

At every stage of the litigation of this matter, Counsel for Wilson has forwarded precedent of this Court which is on point and unequivocally indicates that a party claiming a breach of a lease contract has a duty to minimize his damages where it would be reasonable for him to do so. (R. 103-04, 111-13) In *Burkhalter v. Townsend*, 138 S.E. 34, 37 (1927), this Court held that a plaintiff suing for damages on a renting contract had a "duty to minimize their damages as far as they could reasonably do so." In *United States Rubber Co. v. White Tire Company, et al.*, 231 S.C. 84, 97 S.E.2d 403 (1956), this Court again held that a landlord had a duty to minimize damages. Likewise, in *Gentry v. Recreation, Inc.*, 192 S.C. 429, 7 S.E.2d 63, 66 (1940), this Court held that the measure of actual damages "must be affected

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

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."

Of course, the concept of mitigation is applicable in many areas of law. In *Rathborne, Hair & Ridgway Company 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 by having his vehicle repaired)[3]. Based upon the foregoing, there can be no question that a duty to reasonably mitigate in South Carolina exists and applies.

The Opinion of the Court of Appeals provides little guidance (and no reasoning) as it summarily Affirmed the Special Referee's holding concerning mitigation without analysis or comment, other than to provide citations to three (3) cases. Each of the cases cited support the proposition that a landlord does have a duty to mitigate damages, and each is discussed in turn below.

The Opinion first cites to *Cisson Construction, Inc. v. Reynolds & Associates., Inc.*, 311 SC 499, 429 S.E.2d 847, 849-50 (1993) for the proposition that the duty of mitigation **does apply** to contracts, but that the note and guaranty involved

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[3] *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).

specifically annulled any duty of mitigation. The distinctions between *Cisson* and the case at bar are: (1) the **guarantor** in *Cisson* wrongfully argued that the Bank was required to mitigate by waiving remedies against the primary borrower; and (2) the *Cisson* case involved an ordinary debt, and not a landlord-tenant matter. As to the first issue, the contract in this case is a lease agreement involving only the parties to this Action.

As to the second issue, in *Gentry v. Recreation, Inc.*, this Court held that a clause in a lease which provides for acceleration of rent without regard to mitigation in a lease is materially different than an ordinary promissory note which provides for acceleration of debt without mitigation:

> 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.**[4]

Wilson proffered the above-quoted binding precedent of this Court at every possible stage of this litigation, including but not limited to his pre-trial briefing (R. 103-04, 111-13) as well as to the Court of Appeals in Appellant's Brief pp. 28-29.

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[4] *Gentry,* 7 S.E.2d at 66 (*emphasis added*); *see also Mid-Continent Refrigerator Co. v. Way*, 263 S.C. 101, 106, 208 S.E.2d 31, 33 (1974).

The second case cited by the Court of Appeals as to the issue of mitigation was *United States Rubber Co. v. White Tire Co, Inc., et al.*, 231 S.C. 84, 97 S.E.2d 403 (1956) for the proposition that a landlord has a duty to mitigate his damages. The *U.S. Rubber* Court held that the landlord could not have suffered **any** losses because a new tenant was in place before the default, and therefore the landlord would be required to wait to measure his damages until the end of the lease and would then possibly need to return all of a security deposit (a full year of rent).[5] *U.S. Rubber* demonstrates this Court's strong adherence to the fundamental principal of mitigation, supports Wilson's position, and was actually cited in Wilson's Briefing to the Court of Appeals.[6] The Order of the Special Referee, and the briefing of Butler had never referenced or made any attempt to distinguish *U.S. Rubber* or any other South Carolina precedent.[7]

The third and final case cited by the Court of Appeals as to the issue of mitigation is *Surety Realty Corporation v. Asmer,* 249 S.C. 114, 153 S.E.2d 125 (1967). In *Surety Realty*, this Court specifically held that a landlord would not be prejudiced by accepting the tenant's return of the keys, as the court specifically noted that the landlord had actually made an effort to mitigate his damages: "[U]pon receiving the keys to the premises, the respondent secured the services of a reputable

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[5] *U.S. Rubber Co.*, 231 S.C. at 96, 97 S.E.2d at 409.

[6] Wilson's Amended Final Brief, pp. 25-26.

[7] Brief of Respondent, pp. 27-29.

real estate agent in an effort to obtain a tenant for the premises while acting in behalf of the appellant."[8]

Thus, in *U.S. Rubber* and *Surety Realty*, the Supreme Court specifically held that a landlord is only entitled to damages as long as he made a good faith effort to minimize them, where it would have been reasonable to try to do so. In the case at Bar, the Order of the Special Referee specifically found that Butler did not make any effort – the landlord willfully and intentionally refused to take **any** action to mitigate his damages even after he knew the property had been abandoned. (R. 19; 27, ¶¶ 34-38; 144, ln. 4-10; 185, ln. 3-6).

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

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[8] *Sur. Realty Corp.*, 249 S.C. at 116, 153 S.E.2d at 127.

2. THE COURT OF APPEALS SHOULD HAVE FOLLOWED THIS COURT'S PRECEDENT REQUIRING SCRUTINY OF A LEASE PROVISION PURPORTING TO ELIMINATE THE DUTY OF MITIGATION TO ALLOW FOR THE ACCELERATION OF UNEARNED RENT WHERE THIS ISSUE HAD BEEN RAISED AT EVERY POSSIBLE AND NECESSARY STAGE OF THE LITIGATION BELOW.

The Court of Appeals should have corrected the Special Referee's erroneous holding that one out-of-context sentence in the Lease annulled the Landlord's common law duty to mitigate damages.[9] Even if the provision did annul the duty to mitigate, the Court of Appeals should have followed the precedent of this Court which requires the scrutiny of any such provision in light of the applicable facts and circumstances.[10] Wilson has specifically cited the applicable and controlling precedent of the Supreme Court, praying for such scrutiny at every possible stage of the underlying litigation. The Special Referee and the Court of Appeals have never acknowledged or distinguished this Court's precedent. Instead, the Court of Appeals summarily stated the issue was not preserved for appellate review.

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[9] R. 51, ¶ 33 (Citing only last sentence of a paragraph in Lease); *See* 334, ¶ 18 (Referenced paragraph starts: "If these Lease ... shall be terminated").

[10] *See Mid-Continent Refrigerator*, 263 S.C. at 106, 208 S.E.2d at 33 (Acceleration in the nature of a penalty, and if enforceable at all, subject to mitigation); *Gentry*, 7 S.E.2d at 66 (Acceleration in the nature of penalty, subject to duty to minimize damages).

a. THE COURT OF APPEALS ERRED IN FINDING WILSON DID NOT PRESERVE THE DEFENSE OF UNENFORCEABILITY BASED UPON A PENALTY

The Court of Appeals erroneously held that Wilson was required to affirmatively plead an uneforceability defense on a penalty theory in response to a defense that Butler did not raise even after Wilson raised the affirmative defense of failure to mitigate damages.

Rule 8(c) of the *South Carolina Rules of Civil Procedure* requires a party to plead any applicable affirmative defenses. In Wilson's Answer, the affirmative defense of failure to mitigate was specifically pled. (R. 78-79) In Butler's reply, this affirmative defense was not directly addressed, nor was the above-referenced provision of the Lease raised as a possible claim or defense to his intentional refusal to mitigate. (R. 83-84) Butler's claim that the above-referenced provision of the Lease annulled any duty to mitigate was never pled (R. 70-77, 83-84), nor was it raised until much later in the litigation, nor did Butler ever move to amend his pleadings to conform to the testimony or evidence presented in this matter pursuant to Rule 15(b) of the *South Carolina Rules of Civil Procedure*.

Rule 7 of the *South Carolina Rules of Civil Procedure* provides that "in a **pleading** to a responsive pleading, a party **shall** set forth" his affirmative defenses, and "...there **may** be a reply to affirmative defenses as provided in Rule 8(c)." (*emphasis added*) Rule 8(c) provides that a "party **may** file a reply to any of the foregoing affirmative defenses." (*emphasis added*) First, although the rules provide that a reply to a reply to an affirmative defense **may** be allowed, they also provide that

such a reply is not mandatory. Second, the rules certainly do not provide that a party would be required to reply to a defense or claim that was never pled. Finally, this Court has held that the rules of error preservation will not be applied so rigidly as to bar an otherwise properly presented issue. *See Chastain v. Hiltabidle*, 381 S.C. 508, 516, 673 S.E.2d 826, 830 (Ct. App. 2009).

The issue of unenforceability based upon a penalty theory was raised in Wilson's Pre-Trial Brief, which was entered prior to the Trial of the case in front of the Special Referee as "Trial Court's Exhibit 3":

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

This issue was raised by Counsel for Wilson prior to trial, accepted by the Special Referee, and Counsel for Butler was provided an opportunity to respond. (R. 111-13)

The same defense was raised in Wilson's Reply Brief, dated November 9, 2007 (R. 472, ¶ V.), as well as in Wilson's Motion for Reconsideration, dated April 7, 2009 which expressly alleged the following error : "(2) That the Court erred in asserting that the Plaintiff did not have the duty to mitigate his damages due to the contract provision contained in the Ground Lease Agreement" (R. 575).

Based upon the foregoing, Wilson respectfully posits the issue as to the enforceability of the above-quoted provision purporting to excuse Butler from mitigating his damages was properly preserved for review.

b. THE LEASE PROVISION WAS MISAPPLIED, AND IN THE NATURE OF AN UNENFORCEABLE PENALTY CLAUSE

As set forth in Wilson's briefing to the Courts below, said provision: (1) does not say that Butler is excused from mitigation (the subject paragraph would only apply in the event of a termination) because the Special Referee concluded the lease was **not** terminated;[11] and, (2) the provision is in the nature of a penalty, and must be subject to scrutiny under the facts and circumstances of this Action pursuant to the precedent of the South Carolina Supreme Court.

As to the first issue, 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 terminated ..." (R. 334, ¶ 18) 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," this clause does not apply. (R. 27, ¶ 35)

[11] R. 27, ¶ 35 ("I find that the Plaintiff did not take any action to terminate the [Lease]")

As to the second issue, the Court of Appeals should have considered that this Action involved a claim of default that was vigorously disputed.[12] According to the binding precedent of this Court, those facts and circumstances must be incorporated into the scrutiny mandated by the South Carolina Supreme Court in *Mid-Continent Refrigerator Company v. Willie C. Way*, 263 S.C. 101, 208 S.E.2d 31 (1974) and *Gentry v. Recreation, Inc.*, 192 S.C. 429, 7 S.E.2d 63 (1940).

The specific relevant facts and circumstances which should be scrutinized in this case include a Landlord's claim for $50,000.00 in advance rent on abandoned property (plus taxes, pre-judgment interest, and attorney fees), where automatic renewal was hotly disputed, and where the Landlord clearly had the opportunity to attempt to lessen his damages:

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

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

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

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

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

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[12] *See Amended Final Brief of Appellant*, pp. 12-23.

Butler had actual knowledge that the Property had been vacated, and therefore he had the ability and duty to **attempt** to mitigate his damages in good faith. The Special Referee's Final Order confirms there is no dispute that Butler willfully and intentionally refused to take **any** action to mitigate during the 1 year term the Property was abandoned. (R. 27, ¶¶ 34-38; *see also* R. 144, ln. 4-10; 185, ln. 3-6)

In sum, the Court of Appeals should have considered that the landlord in this Action **intentionally and willfully refused to even attempt** to mitigate his damages where it would not have cost him one cent to do so, and he now seeks to enforce a contractual claim accelerating a year's worth of rent – or in other words – a penalty.

3. THE COURT OF APPEALS ERRED IN AFFIRMING THE SPECIAL REFEREE'S ORDER REFUSING TO CONSIDER THE EVIDENCE OFFERED BY APPELLANT WILSON ON THE ISSUE OF MITIGATION.

In his Order dated August 23, 2011, the Special Referee held: "In light of my conclusion that [Butler] was not under a legal duty to mitigate damages, any evidence proffered by [Wilson] on [Butler's] efforts to mitigate his damages is unnecessary." (R. 58) As set forth above, Butler had a duty to mitigate his damages under South Carolina law which was not, and under the facts and circumstances, could not have been bargained away.

At trial, Butler testified that he did not ask his realtor, Charley Ray, to look for a tenant until after the year in dispute. (R. 185, ln. 3 - 6) In stark contrast, Wilson testified that mitigation could have started months before the Lease term in dispute

even began, or at the very latest, when Butler could no longer deny that the property had been abandoned. (*See above,* R. 201, ln. 23 – 202, ln. 3, & R. 412-13). In sum, the testimony of Wilson and Butler, indicates that Butler had ample time and opportunity to attempt to lessen his damages, and it would not have cost him anything to do so.

In this Action, the unique issue is the Special Referee's conclusion that Butler willfully and intentionally refused to take **any** action to mitigate his damages as to any portion of the year that the Property had been abandoned. In other words, Butler **did not even try** to mitigate his damages.

To further unnecessarily add insult to these injuries, Butler silently waited three years to commence this Action. This delay is the stated reason that Butler's agent was not able to recall any of the conversations where he was told Wilson would not be renewing the lease. (R. 140, ln. 7-15; 142, ln. 9-16) This unreasonable delay also inflated Butler's claim for prejudgment interest damages. In *Burnett v. Holliday Bros., Inc.*, 279 S.C. 222, 227, 305 S.E.2d 238, 241 (1983), this 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. (*citations omitted*)

A court of equity should refuse to protect a party's rights if the party's unreasonable delay, coupled with their unreasonable absolute refusal to mitigate damages, 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 duty to minimize damages is not a new or novel proposition in South Carolina. *See Burkhalter*, 138 S.E. at 37 (Duty to minimize damages due on "renting contract" in 1927). When a party intentionally refuses to even try to mitigate his damages where it would be reasonable to do so, he should be absolutely precluded from petitioning the Court to recover damages. *See National Bank of South Carolina v. People's Grocery Comany*, 153 S.C. 118, 150 S.E. 478, 480 (1929) (Confirming jury charge stating: The law will not compensate plaintiff who fails or refuses to minimizes his own damages). In this case, this Honorable Court, and the law of the State of South Carolina, should not compensate one who intentionally absolutely refused to avoid damages where it would have been reasonable to do so.

IV. CONCLUSION

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

Respectfully submitted,

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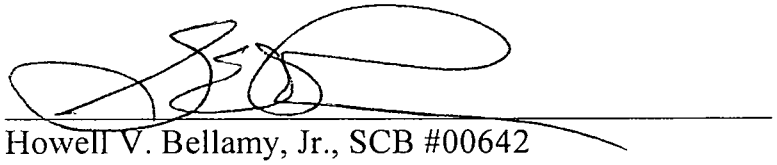
CERTIFICATION OF COUNSEL

The undersigned certifies that a petition for rehearing or reinstatement was made and finally ruled on by the Court of Appeals.



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Attorneys of Record for Petitioner

Myrtle Beach, SC
April 18, 2013

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Willard D. Hanna, Jr., Special Referee

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

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

v.

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

PROOF OF SERVICE

I certify that I have served **Petition for Writ of Certiorari and Appendix** on the Respondent by depositing a copy of same in the United States Mail, postage prepaid, on April 18, 2013, 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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13078

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April 18, 2013

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VIA U.S. MAIL
Jenny Abbott Kitchings, Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Leon P. Butler, Jr. V. William L. Wilson, a/k/a Billy Wilson
Appeal from Georgetown County; C/A No. 2006-CP-22-422
Case Tracking No. 2011-198586

Dear Ms. Kitchings:

We hope this letter finds you well. Enclosed for filing please find a copy of a Petition for Writ of Certiorari with Proof of Service regarding the above-described case. It would be appreciated if you would return a clocked copy of the Petition and Proof of Service to this office in the enclosed self-addressed, stamped envelope.

Should you have any questions, comments, or concerns, please do not hesitate to call us at any time.

With kindest regards, we are

Yours truly,

BELLAMY, RUTENBERG, COPELAND, EPPS, GRAVELY & BOWERS, P.A.

Howell V. Bellamy, Jr.
George W. Redman, III

GWR:pk
Enclosures, as stated
cc: Clerk, Supreme Court of South Carolina
Neil D. Wright, Esquire, Counsel for Respondent
Client