

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

APR 19 2013

S.C. Supreme Court

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.

APPENDIX

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

Other Counsel of Record:

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

INDEX

	<u>Page</u>
Index	i
Court of Appeals Opinion No. 2013-UP-078 of February 20, 2013	1
Appellant's Petition for Rehearing filed in Court of Appeals of March 8, 2013	5
Court of Appeals' Ruling on Petition for Rehearing of March 20, 2013	19
Amended Record on Appeal, Volume I of II	Filed Separately
Amended Record on Appeal, Volume II of II	Filed Separately
Brief of Respondent	Filed Separately
Amended Final Brief of Appellant	Filed Separately
Amended Final Reply Brief of Appellant	Filed Separately

[The remaining portion of the Appendix is
composed of a copy of the documents listed in the Index.]

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Leon P. Butler, Jr., Respondent,

v.

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

Appellate Case No. 2011-198586

Appeal From Georgetown County
Willard D. Hanna, Jr., Special Referee

Unpublished Opinion No. 2013-UP-078
Heard January 9, 2013 – Filed February 20, 2013

AFFIRMED

Howell V. Bellamy, Jr., and George W. Redman, III,
both of Bellamy, Rutenberg, Copeland, Epps, Gravely &
Bowers, P.A., of Myrtle Beach, for Appellant.

Neil D. Wright of Barnett & Wright, PA, of Myrtle
Beach, for Respondent.

PER CURIAM: In this dispute over a commercial lease, William L. Wilson appeals the special referee's order, arguing the special referee erred in (1) finding Wilson failed to give his landlord notice of his intent not to renew the lease; (2)

finding Wilson's landlord had no duty to mitigate damages; (3) finding the lease permitted Wilson's landlord to accelerate rental payments; (4) failing to consider evidence concerning mitigation; and (5) awarding pre-judgment interest. We affirm.

"An action for breach of contract seeking money damages is an action at law." *R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 430, 540 S.E.2d 113, 117 (Ct. App. 2000). "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." *Dawkins v. Mozie*, 399 S.C. 290, 293, 731 S.E.2d 342, 344 (Ct. App. 2012) (quoting *Roberts v. Gaskins*, 327 S.C. 478, 483, 486 S.E.2d 771, 773 (Ct. App. 1997)).

As a threshold issue, Butler argues in his Respondent's Brief that the Panel should dismiss this appeal for Wilson's failure to comply with the South Carolina Appellate Court Rules. We decline to address this argument, having already ruled on this issue in the context of Butler's motion to dismiss or strike. On July 10, 2012, this court entered an order striking portions of the record but declining to strike portions of Wilson's brief or dismiss the action. With regard to Butler's remaining issues, we affirm pursuant to the following authorities:

1. As to Wilson's assertions the special referee erred in holding he failed to notify Butler of his intent not to renew the lease and the doctrine of laches bars Butler's claim: *Silver v. Aabstract Pools & Spas, Inc.*, 376 S.C. 585, 591, 658 S.E.2d 539, 542 (Ct. App. 2008) (holding whether the language of a contract is ambiguous is a question of law to be determined by the court by examining the entire contract and not merely whether certain phrases taken in isolation could be interpreted in more than one way, and stating "[o]ne may not, by pointing out a single sentence or clause, create an ambiguity" (internal citation and quotation marks omitted)); *ERIE Ins. Co. v. Winter Constr. Co.*, 393 S.C. 455, 460, 713 S.E.2d 318, 321 (Ct. App. 2011) ("It is not the function of the court to rewrite contracts for parties."); *Heins v. Heins*, 344 S.C. 146, 158, 543 S.E.2d 224, 230 (Ct. App. 2001) ("Where an agreement is clear and capable of legal interpretation, the court's only function is to interpret its lawful meaning, discover the intention of the parties as found within the agreement, and give effect to it."); *ESA Servs., LLC v. S.C. Dep't of Revenue*, 392 S.C. 11, 23, 707 S.E.2d 431, 438 (Ct. App. 2011) ("Any modification of a written contract must satisfy all fundamental elements of a valid contract in order for it to be enforceable, including a meeting of the minds between the parties with regard to all essential terms of the agreement. Thus,

'[w]hile a written contract can be orally modified, there must be a meeting of the minds as to the modification.'" (internal citation omitted)); *Chambers of S.C., Inc. v. Cnty. Council for Lee Cnty.*, 315 S.C. 418, 421, 434 S.E.2d 279, 280 (1993) ("Under the doctrine of laches, if a party, knowing his rights, does not seasonably assert them, but by unreasonable delay causes his adversary to incur expenses or enter into obligations or otherwise detrimentally change his position, then equity will ordinarily refuse to enforce those rights."); *id.* at 421, 434 S.E.2d at 281 (stating that, in determining whether laches bars a claim, the trial court has broad discretion and should consider the circumstances of the case, "including whether the delay has worked injury, prejudice, or disadvantage to the other party"); *Muir v. C.R. Bard, Inc.*, 336 S.C. 266, 297, 519 S.E.2d 583, 599 (Ct. App. 1999) ("The failure to assert a right does not come into existence until there is a reason or situation that demands assertion. The party asserting laches must satisfactorily show negligence, the opportunity to have acted sooner, and material prejudice." (internal citation omitted)).

2. As to Wilson's assertion the special referee erred in holding South Carolina law does not require a landlord to mitigate his damages under the circumstances present in this case: *Cisson Constr., Inc. v. Reynolds & Assocs., Inc.*, 311 S.C. 499, 503, 429 S.E.2d 847, 849 (Ct. App. 1993) ("The duty to mitigate losses applies to contracts."); *id.* at 503-04, 429 S.E.2d at 849-50 (holding terms of note and guaranty prevented guarantor of note, who was a sophisticated party, from attempting to enforce the lender's duty to mitigate damages); *U.S. Rubber Co. v. White Tire Co.*, 231 S.C. 84, 95, 97 S.E.2d 403, 409 (1956) (recognizing a landlord who terminates a lease for the tenant's nonpayment of rent has a duty to mitigate his damages); *Sur. Realty Corp. v. Asmer*, 249 S.C. 114, 119, 153 S.E.2d 125, 128 (1967) ("[T]he relationship of landlord and tenant is terminated where the lessor, for his own purposes, re-enters and relets the demised premises upon the lessee's abandonment of the property and default in the payment of the rent." (citing *U.S. Rubber*, 231 S.C. at 95, 97 S.E.2d at 409)).

3. As to Wilson's assertion the special referee erred in failing to conclude a contractual provision that purportedly excuses a landlord from mitigating his damages is an unenforceable penalty clause: *D & D Leasing Co. of S.C., Inc. v. David Lipson, Ph.D., P.A.*, 305 S.C. 540, 542, 409 S.E.2d 794, 796 (Ct. App. 1991) ("Unenforceability based on a penalty theory is an affirmative defense that must have been pled."); *Sullivan v. Hawker Beechcraft Corp.*, 397 S.C. 143, 152, 723 S.E.2d 835, 840 (Ct. App. 2012) (holding when a question first arises in response to the trial court's final order, a party must raise it to the trial court in a

motion pursuant to Rule 59(e), SCRCF, to preserve it for appellate review (citing *Godfrey v. Heller*, 311 S.C. 516, 520, 429 S.E.2d 859, 862 (Ct. App. 1993))).

4. As to Wilson's claims the special referee erred in failing to consider his evidence on the issue of mitigation and in finding Butler was entitled to prejudgment interest, despite his failure to mitigate his damages: *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

AFFIRMED.

FEW, C.J., WILLIAMS, J., and CURETON, A.J., concur.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Willard D. Hanna, Jr., Special Referee

Civil Action No. 2006-CP-22-422
Appellate Case No. 2011198586

Leon P. Butler, Jr. Respondent,

v.

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

APPELLANT'S PETITION FOR REHEARING

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

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

RECEIVED

MAR 08 2013

SC Court of Appeals

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
I. PETITION FOR REHEARING	1
II. ISSUES FOR RECONSIDERATION	1
III. ARGUMENT IN SUPPORT OF PETITION FOR REHEARING ...	2
A. The Opinion of This Court Affirms an Order Which Directly Contradicts Precedent of the South Carolina Supreme Court: Landlords Do Have a Duty to Reasonably Mitigate Their Damages.	2
B. Contrary to Precedent of the Supreme Court, the Special Referee Erred by Failing to Scrutinize a Lease Provision Which Purports to Eliminate The Duty of Mitigation to Allow for the Acceleration Of Unearned Rent. Even Though This Issue Had Been Raised at Every Possible and Necessary Stage of the Litigation Below, The Opinion of This Honorable Court Erred in Stating This Issue had not Been Preserved for Review.	6
C. Based Upon the Forgoing Issues Set Forth in This Petition for Rehearing, Wilson Prays for Reconsideration as to the Special Referee's Error in Refusing to Consider the Evidence Offered by Wilson on the Issues of Mitigation and Argument Concerning Pre-Judgment Interest	10
IV. CONCLUSION	10

TABLE OF AUTHORITIES

<u>CASES:</u>	<u>Page</u>
<i>Chastain v. Hiltabidle</i> , 381 S.C. 508, 673 S.E.2d 826 (Ct. App. 2009)	7
<i>Cisson Construction, Inc. v. Reynolds & Assocs., Inc.</i> , 11 SC 499, 429 S.E.2d 847 (1993)	3
<i>Dawkins v. Mozie</i> , 399 S.C. 290, 731 S.E.2d 342 (Ct. App. 2012)	2
<i>Gentry v. Recreation, Inc.</i> , 192 S.C. 429, 7 S.E.2d 63 (1940)	3, 8, 9
<i>Mid-Continent Refrigerator Co. v. Way</i> , 263 S.C. 101, 208 S.E.2d 31 (1974)	3, 8, 9
<i>Surety Realty Corp. v. Asmer</i> , 249 S.C. 114, 153 S.E.2d 125 (1967)	4, 5
<i>United States Rubber Co. v. White Tire Co, Inc., et al.</i> , 231 S.C. 84, 97 S.E.2d 403 (1956)	4, 5
<u>COURT RULES:</u>	
Rule 221, SCRAP	1
Rule 7, SCRCF	7
Rule 8(c), SCRCF	6, 7
Rule 15(b), SCRCF	7
<u>OTHER AUTHORITIES:</u>	
RESTATEMENT (SECOND) OF PROPERTY, <i>Land & Ten</i> § 12.1	2
TERRY RICHARDSON & DANIEL HALTIWANGER, SOUTH CAROLINA DAMAGES, <i>Contract Damages</i> § 4-6	8

I. APPELLANT WILSON'S PETITION FOR REHEARING

The Opinion of this Honorable Court was filed on February 20, 2013. In accordance with Rule 221 of the *South Carolina Appellate Court Rules*, Appellant Tenant William L. Wilson, a/k/a Billy Wilson (hereinafter "Wilson"), hereby petitions this Honorable Court for Rehearing.

II. ISSUES FOR RECONSIDERATION

Wilson hereby respectfully petitions this Honorable Court for reconsideration of the following points:

- A. The Opinion of This Court Affirms an Order Which Directly Contradicts Precedent of the South Carolina Supreme Court: Landlords Do Have a Duty to Reasonably Mitigate Their Damages.**
- B. Contrary to Precedent of the Supreme Court, the Special Referee Erred by Failing to Scrutinize a Lease Provision Which Purports to Eliminate the Duty of Mitigation to Allow for the Acceleration of Unearned Rent. Even Though This Issue Had Been Raised at Every Possible and Necessary Stage of the Litigation Below, The Opinion of This Honorable Court Erred in Stating This Issue had not Been Preserved for Review.**
- C. Based Upon the Foregoing Issues Set Forth in This Petition for Rehearing, Wilson Prays for Reconsideration as to the Special Referee's Error in Refusing to Consider the Evidence Offered by Wilson on the Issues of Mitigation as well as Argument Concerning Pre-Judgment Interest.**

III. ARGUMENT IN SUPPORT OF PETITION FOR REHEARING

A. The Opinion of This Court Affirms an Order Which Directly Contradicts Precedent of the South Carolina Supreme Court

The Special Referee erred as a 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.¹

In this regard, the Special Referee's Order directly contradicts the precedent of the South Carolina Supreme Court.² Further, this ruling of the Special Referee is based exclusively upon secondary authority, and does not discuss or cite to **any** authority from the State of South Carolina as to this issue. As this is an action at law, this Honorable Court should have corrected this error of law.³

While the Opinion of this Court summarily Affirms the Special Referee's holding concerning mitigation without analysis or comment, it does cite to three (3) cases, each of which support the axiomatic proposition that a landlord has a duty to mitigate damages, and each are discussed in turn below.

¹ Final Order, R. pp. 38, 50 (*citing* RESTATEMENT (SECOND) OF PROPERTY, *Land & Ten*, § 12.1).

² The Special Referee's legal conclusions as to the duty of mitigation are incorrect as a matter of law for the reasons set forth in Wilson's Amended Final Brief, pp. 24-27, which are incorporated but not repeated herein.

³ See *Dawkins v. Mozie*, 399 S.C. 290, 293, 731 S.E.2d 342, 344 (Ct. App. 2012).

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 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 the case at Bar is a lease agreement, solely between the two parties to this Action.

As to the second issue, the South Carolina Supreme Court in *Gentry v. Recreation, Inc.*, has specifically held that a clause in a lease which provides for acceleration of rent without 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

⁴ *Gentry v. Recreation, Inc.*, 192 S.C. 429, 7 S.E.2d 63, 66 (1940); see also *Mid-Continent* 263 S.C. at 106, 208 S.E.2d at 33.

Wilson proffered the above-quoted binding precedent of the Supreme Court at every possible stage of this litigation, including but not limited to his pre-trial briefing⁵ as well as to this Honorable Court in Appellant's Brief at pp. 28-29.

The second case cited by the Opinion of this Court as to the issue of mitigation is *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. In *U.S. Rubber*, the landlord did not suffer any losses because a new tenant was in place before the default, and therefore the landlord would be required to return all of a security deposit at the end of the lease term (which amounted to a full year of rent).⁶ *U.S. Rubber* demonstrates the Supreme Court's strong adherence to the fundamental principal of mitigation, supports Wilson's position, and was actually cited in Wilson's Final Brief.⁷ The Order of the Special Referee, and the briefing of Respondent Leon P. Butler, Jr. (hereafter "Butler") have never made any attempt to distinguish *U.S. Rubber* or any other South Carolina precedent cited by Wilson as to this issue.⁸

The third and final case cited by the Opinion of this Court as to the issue of mitigation is *Surety Realty Corporation v. Asmer*, 249 S.C. 114, 153 S.E.2d 125

⁵ See Wilson's Pre-Trial Brief, dated October 25, 2007, R. p. 103-04; see also Trial Transcript, R. pp. 111-13 (Cited cases were attached to Wilson's Trial Brief and Accepted by the Special Referee as "Trial Court Exhibit 3").

⁶ *U.S. Rubber Co. v. White Tire Co., et al.*, 231 S.C. 84, 96, 97 S.E.2d 403,409 (1956).

⁷ Wilson's Amended Final Brief, pp. 25-26.

⁸ Brief of Respondent, pp. 27-29.

(1967). In *Surety Realty*, the South Carolina Supreme 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 real estate agent in an effort to obtain a tenant for the premises while acting in behalf of the appellant."⁹

Thus, in *U.S. Rubber* and *Surety Realty*, the Supreme Court specifically held that a landlord is only entitled to damages to the extent that he reasonably tried but could not minimize them. In the case at Bar, the Order of the Special Referee specifically found the opposite had occurred – the landlord willfully and intentionally refused to take **any** action to mitigate his damages even after he knew the property had been abandoned. (Final Or., R. p. 19, R. p. 27, ¶¶ 37-38; Tr. Trans., Butler, R. p. 185).

Counsel for Wilson would respectfully posit that if it is the intent of this Honorable Court to hold that a landlord has no duty to reasonably mitigate his damages after a tenant has abandoned property, this would create a new exception to a longstanding fundamental principle of the law of the State of South Carolina. As such, any such holding should be expressly stated and well-reasoned.

⁹ *Sur. Realty Corp. v. Asmer*, 249 S.C. 114, 116, 153 S.E.2d 125,127 (1967).

B. Contrary to Precedent of the Supreme Court, the Special Referee Erred by Failing to Scrutinize a Lease Provision Which Purports to Eliminate the Duty of Mitigation to Allow for the Acceleration of Unearned Rent. Even Though This Issue Had Been Raised at Every Possible and Necessary Stage of the Litigation Below, The Opinion of This Honorable Court Erred in Stating This Issue had not Been Preserved for Review.

The Special Referee summarily held that the lease between the parties annulled any common law duty to mitigate damages:¹⁰

[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.”¹¹

Even though the precedent of the Supreme Court requires the scrutiny of any such provision in light of the facts and circumstance of the case, and Wilson has specifically prayed for such scrutiny at every possible stage of the litigation in this matter, the Opinion of this Court states this issue has not been preserved for appellate review.

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

¹⁰ The Special Referee's legal conclusions as to the applicability, interpretation, and enforceability of the cited Lease provision are incorrect as a matter of law for the reasons set forth in Wilson's Amended Final Brief, pp. 27-32, which are incorporated but not repeated herein. See also Wilson's Reply Brief, p. 5.

¹¹ Final Or. R. p. 51, ¶ 33 (citing Lease, R. p. 334, ¶ 18).

defense of failure to mitigate was specifically pled.¹² 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. Butler's claim that the above-referenced provision of the Lease annulled any duty to mitigate was never pled,¹³ 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 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.¹⁴

¹² See Answer, R. p. 79.

¹³ See Complaint, R. p. 70; Butler's Reply to Counterclaim, R. p. 83.

¹⁴ *Chastain v. Hiltabidle*, 381 S.C. 508, 516, 673 S.E.2d 826, 830 (Ct. App. 2009).

The issue of unenforceability was clearly 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*.¹⁵

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.¹⁶

The same defense was raised in Wilson's Reply Brief, dated November 9, 2007,¹⁷ 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."¹⁸

Based upon the foregoing, Wilson respectfully posits that the enforceability of the above-quoted provision which purports to excuse Butler from mitigating his

¹⁵ Wilson's Pre-Trial Brief, dated October 25, 2007, R. p. 104. (*emphasis added*)(Cited cases were attached to Wilson's Trial Brief).

¹⁶ Trial Transcript, R. pp. 111-13.

¹⁷ Wilson's Amended Reply Brief, Nov. 9, 2007, R. p. 472.

¹⁸ Wilson's Motion for Reconsideration, filed April 7, 2009, R. 575.

damages was preserved for review by this Court. As set forth in Wilson's briefing, said provision: (1) simply does not apply pursuant to the terms of the entire paragraph of the Lease (which only applies in the event of a termination) because the Special Referee found that the lease was **not** terminated;¹⁹ and, (2) it is in the nature of a penalty, and must be subject to mitigation and scrutiny under the facts and circumstances of this Action pursuant to the precedent of the South Carolina Supreme Court.²⁰

As set forth in Wilson's Brief at pages 12 to 23, the alleged default in this case was vigorously disputed, and the sworn testimony given on behalf of Butler's paid general agent was self-contradicting. These 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).

If the above-quoted provision of the Lease actually stated that mitigation was not required where there was no termination (which it does not), under the facts and circumstance of this case, it is a penalty clause, not favored in the law, and therefore unenforceable.

¹⁹ Wilson's Amended Final Brief, pp. 27-28.

²⁰ Wilson's Amended Final Brief, pp. 28-30.

C. Based Upon the Foregoing Issues Set Forth in This Petition for Rehearing, Wilson Prays for Reconsideration as to the Special Referee's Error in Refusing to Consider the Evidence Offered by Wilson on the Issues of Mitigation and Argument Concerning Pre-Judgment Interest.

This Court's Opinion held that Wilson's claims that the Special Referee erred in failing to consider his evidence on the issue of mitigation and in finding Butler was entitled to prejudgment interest do not need to be reviewed in light of this Court's determination as to the prior issues raised herein. In light of the argument set forth above, Wilson prays this Court will revisit Wilson's arguments as to both of these issues.²¹

IV. CONCLUSION

Counsel for Wilson prays this Court will grant a re-hearing of the matters set forth herein this Petition, and correct the errors of law found within the Order of the Special Referee.

²¹ The Special Referee's legal conclusions as to Wilson's evidence of mitigation and argument concerning prejudgment interest are incorrect as a matter of law for the reasons set forth in Wilson's Amended Final Brief, pp. 32-36, which are incorporated but not repeated herein. *See also* Wilson's Reply Brief, p. 5-7.

Respectfully submitted,

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

1000 29th Avenue North

Post Office Box 357

Myrtle Beach, SC 29578-0357

(843) 448-2400

Attorneys of Record for Appellant

Handwritten signatures of Howell V. Bellamy, Jr. and George W. Redman, III. The signatures are written in dark ink and are positioned above a horizontal line.

Howell V. Bellamy, Jr.

George W. Redman, III

Myrtle Beach, South Carolina

March 7, 2013.

The South Carolina Court of Appeals

Leon P. Butler, Jr., Respondent,

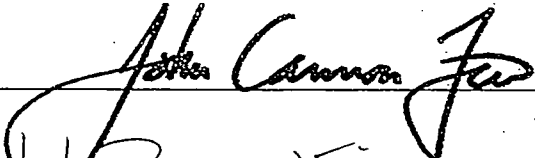
v.

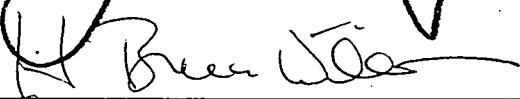
William L. Wilson a/k/a Billy Wilson, Appellant.

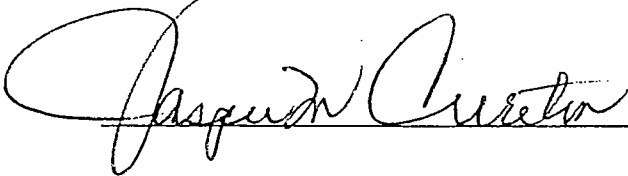
Appellate Case No. 2011-198586

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 C.J.

 J.

 A.J.

Columbia, South Carolina

cc:

Neil D. Wright

Howell V. Bellamy, Jr.

George W. Redman, III

FILED

20 March 2013

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

RECEIVED

APR 23 2013

S.C. Supreme Court

Leon P. Butler, Jr. Respondent,

v.

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

AMENDED RECORD ON APPEAL
VOLUME I OF II

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

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

INDEX - VOLUME I of II

	<u>Page</u>
Consent Order for Change of Venue, April 18, 2006	R. 6
Consent Order of Reference to Special Referee with Authority to Enter Final Judgment, dated October 25, 2007 (Trial Court's Exhibit 1)	R. 8
Final Order Ending Action, filed April 1, 2009	R.10
Order Granting Plaintiff's Motion to Alter or Amend Final Order Pursuant to Rule 60(a) SCRPC to Identify the Defendant as William L. Wilson a/k/a Billy Wilson and Denying Plaintiff's Motion to Reconsider and Alter or Amend Pursuant to Rules 52(b) and 59(e) SCRPC and Denying Defendant's Motion for Reconsideration Pursuant to Rule 59(e) SCRPC and Granting Defendant's Motion for Deposit of Funds with Clerk, filed August 23, 2011	R.55
Complaint filed May 13, 2005	R.70
Answer and Counterclaim of Defendant, filed June 7, 2006	R.78
Plaintiff's Reply to Defendant's Counterclaim, filed July 7, 2006	R.83
Deposition of Charley Ray, dated October 18, 2007, pp. 26-28	R.85
Defendant's Trial Brief, dated October 25, 2007(Trial Court's Exhibit 3)	R.103
Trial Transcript, dated October 26, 2007	R.106
Charley Ray	
Direct Examination by Mr. Wright, p. 9	R.114
Cross Examination by Mr. Waring, p. 26	R.131
Re-Direct Examination by Mr. Wright, p. 43	R.148
Re-Cross Examination by Mr. Waring, p. 46	R.151
Re-Re-Direct Examination by Mr. Wright, p. 49	R.154

Trial Transcript, dated October 26, 2007 (continued):

Leon Butler

Direct Examination by Mr. Wright, p. 50	R.155
Cross Examination by Mr. Waring, p. 72	R.177
Re-Direct Examination by Mr. Wright, p. 83	R.188

William Wilson

Direct Examination by Mr. Waring, p. 87	R.192
Cross Examination by Mr. Wright, p. 104	R.209

Jackie Woodbury

Direct Examination by Mr. Waring, p. 133	R.238
Cross Examination by Mr. Wright, p. 139	R.244

Betty Bryant

Direct Examination by Mr. Waring, p. 140	R.245
Cross Examination by Mr. Wright, p. 144	R.249

All Trial Exhibits from October 26, 2007 trial referenced in the Parties' briefs:

- a. Buyer's Agent Disclosure, dated 5/24/96
(Defendant's Exhibit 2) R.261
- b. Ray Realty Multiple Listing Service data entry form,
dated 5/24/96 (Defendant's Exhibit 9) R.262
- c. Survey dated February 24, 1998, and proposed letter of
intent dated February 25, 1998 (Plaintiff's Exhibit 1) R.263
- d. Documents concerning lease negotiations (Plaintiff's
Exhibits 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11) R.267

INDEX - VOLUME II OF II

	<u>Page</u>
All Trial Exhibits from October 26, 2007 trial referenced in the Parties' briefs (continued):	
e. Ground Lease Agreement, dated 5/15/98 (Trial Court's Exhibit 2 and Plaintiff's Exhibit 12)	R.325
f. Fax from Coffey, Chandler & Johnson to Ray Realty dated May 20, 1998 (Plaintiff's Exhibit 14)	R.363
g. Coffey, Chandler & Johnson Invoice dated June 2, 1998 (Plaintiff's Exhibit 13)	R.365
h. Tax payment invoice letter from Ray Realty, Inc. to Billy Wilson dated October 20, 1998 (Defendant's Exhibit 10)	R.366
i. Rent invoice letter from Ray Realty to Kathy Powell, dated 5/1/00 (Plaintiff's Exhibit 15)	R.367
j. Rent invoice letter from Ray Realty to Kathy Powell, dated 4/16/01 (Plaintiff's Exhibit 15)	R.368
k. Horton Homes' check no. 3789 to Ray Realty in the amount of \$26,500.00, dated May 17, 2001 (Defendant's Exhibit 4)	R.369
l. Modification letter from Ray Realty to Kathy Powell regarding payment, dated 5/22/01 (Defendant's Exhibit 5)	R.370
m. Ray Realty check no. 1217 to Leon Butler for \$25,175.00, dated 5/22/01 (Defendant's Exhibit 6)	R.371
n. Ray Realty rent invoice for \$25,000.00, dated 9/17/2001 (Plaintiff's Exhibit 30)	R.372
o. Zoning & Building permits for replacement sales office, dated 9/25/2001 (Plaintiff's Exhibit 18)	R.373
p. Santee Cooper Reconnect Service Order, dated 09/26/2001 (Plaintiff's Exhibit 17)	R.383

All Trial Exhibits from October 26, 2007 trial referenced in the Parties' briefs
(continued):

q.	Horton Homes' check no. 4278 to Ray Realty in the amount of \$12,500.00, dated November 16, 2001 (Defendant's Exhibit 4)	R.386
r.	Horton Homes' check no. 4288 to Ray Realty in the amount of \$12,500.00, dated November 20, 2001 (Defendant's Exhibit 4)	R.387
s.	Rent Check payable to Ray Realty (<i>illegible</i>) & Ray Realty rent check #1272 to Leon Butler for \$23,750.00, dated 11/26/2001 (Plaintiff's Exhibit 31)	R.388
t.	Horton Homes Inventory January 2002 (Defendant's Exhibit 11)	R.389
u.	Santee Cooper Security Lighting Agreement, dated 02/12/2002 (Plaintiff's Exhibit 17)	R.390
v.	Ray Realty rent invoice for \$50,000.00, dated 4/16/2002 (Plaintiff's Exhibit 21)	R.393
w.	Billboard rents received July - December 2001 and January 2002 - June 2002 (Plaintiff's Exhibits 19 and 20)	R.394
x.	Letter from Ray to Wilson, Inquiry, Pay or Vacate, dated 6/3/02 (Plaintiff's Exhibit 22)	R.396
y.	Detail of Monthly Expenditures, all ending July 2002 (Defendant's Exhibit 3)	R.398
z.	Power Turn-Off Request to Santee Cooper, dated 07/19/2002 (Plaintiff's Exhibit 17)	R.404
aa.	Inetba Phone Service Invoice to Horton Homes, service ending July 2002 (Plaintiff's Exhibit 36)	R.405

All Trial Exhibits from October 26, 2007 trial referenced in the Parties' briefs
(continued):

bb.	Letter from Wright to Wilson, notice of default, dated 10/26/02 (Plaintiff's Exhibits 24, 25)	R.409
cc.	Letter from Durant to Wright, confirmation of January non-renewal notice dated 10/31/02 (Plaintiff's Exhibit 23)	R.412
dd.	Photographs of November 19, 2002 (Plaintiff's Exhibits 26-29)	R.415
ee.	Warranty Deeds, filed Aug. 2, 1999 & Jan. 8, 2002 (Plaintiff's Exhibits 32-32)	R.419
gg.	Memorandum of Lease, Nov. 17, 2005 (Defendant's Exhibit 7)	R.425
	Plaintiff's Post Trial Motions, November 2, 2007	R.429
	Plaintiff's Trial Brief, November 2, 2007	R.443
	Defendant's Post Trial Motions, dated November 2, 2007	R.461
	Defendant's Reply Brief, November 9, 2007	R.468
	Plaintiff's Reply Brief, November 21, 2007	R.474
	Plaintiff's Rule 59 and Rule 60 Motion, filed April 9, 2009	R.495
	Letter from Robert W. Maring to Special Referee Willard D. Hanna, Jr., dated February 18, 2009	R.498
	Email dated February 19, 2009 from Special Referee to counsel	R.500
	Transcript of Hearings of Post-Judgment Motions, dated June 2, 2009, pp. 10, 22-23, and 36-51	R.501
a.	Plaintiff's initial draft of Proposed Final Order (Plaintiff's Hearing Exhibit 5)	R.523
	Motion for Reconsideration, filed April 7, 2009	R.574
	Certificate of Counsel	R.579

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

LEON P. BUTLER, JR.,

Plaintiff,

vs.

BILLY WILSON,

Defendant.

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2005 CP 26-2431

FILED
Horry County
06 APR 25 AM 10:09
MELANIE HUGHES
CLERK OF COURT

ORDER FOR CHANGE OF VENUE

This matter was scheduled for hearing before the Court on March 2, 2006. The Defendant herein had moved for change of venue pursuant to §15-7-30, S.C. Code Ann. Prior to hearing, the parties informed the Court that the matter had been settled. It appears that the Defendant resides in Georgetown County. Accordingly, the Court must, as a matter of law under §15-7-30, S.C. Code Ann., change the venue of this action to Georgetown County. *McKissick v. Cleckley & Co.*, 325 S.C. 327, 479 S.E.2d 67 (Ct. App. 1996).

By consenting to this change of venue pursuant to §15-7-30, S.C. Code Ann., the Plaintiff does not waive or prejudice his right to seek a change of venue from Georgetown County to Horry County based on convenience of the witnesses and promotion of the ends of justice pursuant to §15-7-100(3), S.C. Code Ann.

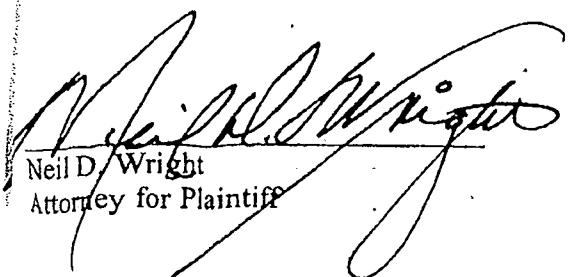
It is therefore ORDERED that the Horry County Clerk of Court transfer this case to Georgetown County.

Georgetown
Conway, S.C.

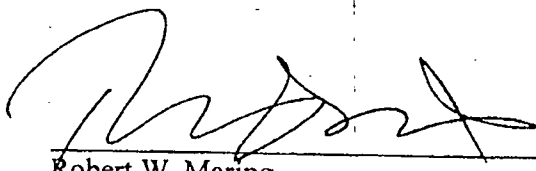
Paula H. Thomas
Paula H. Thomas, Presiding Judge
Fifteenth Judicial Circuit

Date of April 18, 2006

Consent:



Neil D. Wright
Attorney for Plaintiff



Robert W. Maring
Attorney for the Defendant

STATE OF SOUTH CAROLINA

COUNTY OF GEORGETOWN

LEON P. BUTLER, JR.,

Plaintiff,

vs.

BILLY WILSON,

Defendant.

IN THE COURT OF COMMON PLEAS

FIFTEENTH JUDICIAL CIRCUIT

CIVIL ACTION NO. 2006-CP-22-422

**CONSENT ORDER OF REFERENCE TO
SPECIAL REFEREE WITH AUTHORITY
TO ENTER FINAL JUDGMENT**

ADMINISTRATIVE JUDGE:

PLAINTIFF'S ATTORNEY:

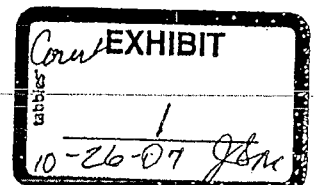
DEFENDANT'S ATTORNEY:

NEIL D. WRIGHT, ESQ.

ROBERT W. MARING, ESQ.

THIS NON-JURY MATTER came before the Honorable Paula H. Thomas, Presiding Judge, at a trial roster meeting on June 18, 2007. At that time, Robert W. Maring, Esq., counsel for the Defendant, informed the Court that counsel involved in this matter were in agreement that the matter should be referred to a Special Referee to be designated by agreement of counsel. Judge Thomas thereupon entered a form Administrative Order referring the matter to a Special Referee with the understanding that a formal Consent Order would be submitted by counsel setting forth the identity of the Special Referee and the terms of the reference. The parties hereto, through their respective legal counsel, have now submitted this Consent Order of Reference that refers all causes of action in this matter to Willard D. Hanna, Jr., as Special Referee with authority to enter a final judgment in the matter.

Based upon the record in this matter and the representations of counsel, it appears that the subject matter of the claim and counterclaim in this action is a lease contract dispute between the Plaintiff and the Defendant. It further appears that counsel agree that the parties would be well



served by reference of this matter to a Special Referee who has experience in litigating cases of this nature. It further appears that Willard D. Hanna, Jr., has experience in litigating cases of this nature and is well qualified to serve as Special Referee in this matter.

Upon consideration of the record in this matter and in further consideration of the agreement between counsel, I find that it is proper to enter an Order of Reference appointing Willard D. Hanna, Jr., as Special Referee with authority to enter a final judgment in the matter. Accordingly, upon Motion of Neil D. Wright, Esq., counsel for the Plaintiff, and with the consent of Robert W. Maring, Esq., counsel for the Defendant,

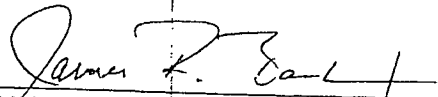
IT IS ORDERED, pursuant to Rule 53SCRPC, that this action be and the same hereby is referred to the Honorable Willard D. Hanna, Jr., as Special Referee, to take the testimony arising under the pleadings and to make his findings of fact and conclusions of law with the authority to enter a final judgment in the action. In accordance with Rule 53(c) SCRPC, the Special Referee shall exercise all power and authority which a circuit judge sitting without a jury would have in a similar matter. In accordance with Rule 53(e) SCRPC, any appeal from any Order or Judgment issued by the Special Referee shall be to the South Carolina Supreme Court or the South Carolina Court of Appeals as provided by the South Carolina Appellate Court Rules.

IT IS FURTHER ORDERED, that the Special Referee shall be entitled to receive compensation for his services as Special Referee in accordance with Rule 53(d) SCRPC;

IT IS FURTHER ORDERED, that all motions to the Special Referee and notice of the hearing thereof shall be served not later than five (5) days before the time specified for the hearing;

AND IT IS SO ORDERED.

October
September 25, 2007


ADMINISTRATIVE JUDGE
FIFTEENTH JUDICIAL CIRCUIT

)

)

)

;

22

)

)

)

)

)

)

2009-07-11 AM 10:46
Client: [REDACTED]
[REDACTED]

I have carefully considered the testimonial and documentary evidence presented as well
~~the arguments made by counsel in their respective motions and briefs concerning the applicable~~
 WDH, Jr.

law. Based upon the evidence presented at the trial and the applicable law, I have concluded that the Plaintiff is entitled to Judgment against the Defendant as set forth hereinafter.

STATEMENT OF THE CASE

The Plaintiff's Complaint alleges that the Plaintiff, as Lessor, and the Defendant Billy Wilson, as Lessee, entered into a Ground Lease Agreement pursuant to which the Defendant Billy Wilson leased from the Plaintiff certain commercial real property owned by the Plaintiff that is located in Horry County, South Carolina. The Plaintiff's Complaint further alleges that the initial term of the Ground Lease Agreement was one year, commencing May 15, 1998 and ending May 14, 1999, and that the terms of the Ground Lease Agreement provided for automatic renewal of the Ground Lease Agreement on an annual basis for up to fourteen consecutive one year terms unless the Defendant Lessee Billy Wilson furnished written notice to the Plaintiff Lessor, at least ninety (90) days prior to the expiration of the then current lease period, of the Defendant Lessee's intention not to exercise his option to extend the term of the Ground Lease Agreement. The Plaintiff's Complaint further alleges that the Ground Lease Agreement automatically renewed at the expiration of the lease period ending May 14, 2002; that is, for the period commencing May 15, 2002 and ending May 14, 2003, as the Defendant Lessee Billy Wilson did not furnish written notice to the Plaintiff Lessor at least ninety (90) days prior to the expiration of the then current lease period, of his intention not to exercise his option to extend the term of the Ground Lease Agreement for an additional one year period. The Plaintiff's Complaint further alleges that the Defendant Lessee Billy Wilson has materially breached his obligations under the Ground Lease Agreement by failing to pay the agreed upon rent and the Horry County real property taxes assessed against the leased property, and by depositing and abandoning debris upon the leased property. The Plaintiff's Complaint further alleges that the WDH, Jr. _____

Plaintiff is entitled to judgment against the Defendant Lessee Billy Wilson for rent for the period commencing May 15, 2002 and ending May 14, 2003, for Horry County real property taxes assessed against the leased property during the period commencing January 1, 2002 and ending May 14, 2003, for the costs of removal of debris from the leased property, for pre-judgment interest at the legal contract rate, and for the collection costs incurred by the Plaintiff, including a reasonable attorney's fee. The Plaintiff's case in support of his claims consisted of sworn testimony by the Plaintiff and the Plaintiff's real estate agent, Charley Ray, and documents that were admitted into evidence.

The Answer and Counterclaim of the Defendant Billy Wilson admits that the Defendant Billy Wilson, as Lessee, and the Plaintiff, as Lessor, entered into the Ground Lease Agreement attached to the Plaintiff's Complaint (Court's Exhibit #2). However, the Defendant Billy Wilson denies the essential allegation of the Plaintiff's Complaint; that is, that the Ground Lease Agreement automatically renewed for the period commencing May 15, 2002 and ending May 14, 2003. In that regard, the Defendant Billy Wilson contends that he verbally notified the Plaintiff's real estate agent, Charley Ray, of his intention not to renew the Ground Lease Agreement. The Defendant Billy Wilson has also asserted several affirmative defenses to the claims of the Plaintiff including the affirmative defense that the Plaintiff failed to mitigate his damages. The Defendant's case in support of his defenses consisted of sworn testimony from the Defendant, the Defendant's business partner, Jackie Woodbury, and the Defendant's employee, Betty Bryan. The Defendant also presented documents that were admitted into evidence.

REVIEW OF EVIDENCE

At all times relevant to this litigation, the Plaintiff Lessor, Leon P. Butler, Jr., was the record owner of a tract of unimproved land located in Little River, South Carolina that contains approximately five (5) acres. From 1959 until April 20, 1998, the Plaintiff's mother, Hazel W. Butler, was the record owner of the land. Hazel W. Butler conveyed the land to the Plaintiff on or about April 15, 1998. (Defendant's Exhibit # 1) In May of 1996, the Plaintiff, acting pursuant to a power of attorney granted to him by his mother, entered into an "Exclusive Authorization and Right to Lease" with Ray Realty, Inc., pursuant to which the Plaintiff engaged Ray Realty, Inc., to lease the property for a term of twenty (20) years at a net annual rental of \$50,000.00. (Defendant's Exhibit #2). The Plaintiff and Charley Ray, the broker-in-charge of Ray Realty, Inc., testified that Charley Ray's authority was limited and that all final decision making authority concerning negotiation and acceptance of lease agreements was reserved to the Plaintiff. Charley Ray testified that his marketing efforts included placing signs on the subject unimproved real property to notify the public of the availability of the property and listing the property in the realtors' multiple listing service.

Charley Ray testified that it was a challenge to secure a suitable lessee for the property because of the size of the property and the net annual rent required by the owner of the property. Charley Ray also testified that while he received inquiries from potential lessees of the property in response to his marketing efforts, there were no significant lease offers tendered for the property until the Defendant submitted a "Letter of Intent" to lease the property on or about February 25, 1998. (Testimony of Charley Ray; Plaintiff's Exhibits #1, #2, #3, #4, and #5).

The evidence reveals that the Defendant is a sophisticated businessman. Prior to commencing his lease negotiations with the Plaintiff's real estate agent, Charley Ray, the WDH, Jr. _____

Defendant had acquired substantial experience as both a land developer and a mobile home dealer. (Testimony of Billy Wilson). The Defendant testified that he leased the Plaintiff's property to establish a mobile home dealership to sell mobile homes in connection with the sale of mobile home lots carved from several Horry County farms that he was developing and marketing as mobile home communities. (Testimony of Billy Wilson) The Defendant saw the Ray Realty, Inc., sign upon the Plaintiff's land and contacted Charley Ray to begin lease negotiations for the Plaintiff's land. (Testimony of Billy Wilson).

Following the Defendant's initial "Letter of Intent" proposal to lease the property, dated on or about February 25, 1998, there were extensive lease negotiations over the course of several months that culminated in the written Ground Lease Agreement that was executed and delivered by the Plaintiff, as Lessor, and the Defendant, as Lessee, on or about May 15, 1998. (Court's Exhibit #2). The Plaintiff and the Defendant were represented by separate independent legal counsel of their choice during the lease negotiations. Legal counsel for the parties prepared and reviewed drafts of the Ground Lease Agreement and made changes to the Ground Lease Agreement prior to the execution of the final draft of the Ground Lease Agreement. (Testimony of Leon P. Butler, Jr.; Testimony of Billy Wilson; Plaintiff's Exhibits #7, #8, #9, #10, #11, #12, #13, and #14) The Plaintiff and the Defendant made various requests and proposals during the lease negotiations that were set forth in a series of written amendments to the Defendant's original "Letter of Intent". (Plaintiff's Exhibits #1 through #12; Court's Exhibit #2; Testimony of Charley Ray; Testimony of Leon P. Butler, Jr.; and Testimony of Billy Wilson). Compromises and concessions were made by both parties during the course of the lease negotiations. (Plaintiff's Exhibits #1 through #12; Court's Exhibit #2; Testimony of Charley Ray; Testimony of Leon P. Butler, Jr.; and Testimony of Billy Wilson)

WDH, Jr. _____

The automatic renewal provision of the Ground Lease Agreement that is the focal point of the dispute between the Plaintiff and the Defendant is set forth in Paragraph 29 of the Ground Lease Agreement:

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

The testimony of the witnesses and the documentary evidence pertaining to the lease negotiations reveals that this automatic renewal provision was inserted into the Ground Lease Agreement at the request of the Defendant during the lease negotiations. (Testimony of Charley Ray; Testimony of Leon P. Butler, Jr.; and Testimony of Billy Wilson; Plaintiff's Exhibits #8, #9, #10, and #11).

Based upon the pleadings of the parties, it is undisputed that the Defendant Billy Wilson entered into the Ground Lease Agreement with the Plaintiff and took possession of the Leased Premises on or about May 15, 1998. Based upon the pleadings of the parties, it is undisputed that the initial term of the Ground Lease Agreement was one (1) year, commencing on May 15, 1998 and terminating on May 14, 1999, and that the Ground Lease Agreement automatically renewed at the expiration of the original lease term on May 14, 1999 as the Defendant did not furnish written notice to the Plaintiff, at least ninety (90) days prior to the expiration of the original lease term, of his intention not to exercise his option to extend the term of the Lease Agreement for an additional one (1) year lease period. Likewise, it is undisputed that the Lease Agreement automatically renewed at the expiration of the lease periods ending May 14, 2000 and May 14, 2001, as the Defendant did not furnish written notice to the Plaintiff, at least ninety

WDH, Jr. _____

(90) days prior to the expiration of the then current lease period, of his intention not to exercise his option to extend the term of the Lease Agreement for an additional one (1) year lease period. (Admitted by the Defendant's Answer to Paragraph 11 of the Plaintiff's Complaint.)

While the Defendant acknowledges that he did not furnish written notice to the Plaintiff at least ninety (90) days prior to the expiration of the lease period ending May 14, 2002 of his intention not to exercise his option to extend the term of the Ground Lease Agreement for an additional one (1) year lease period, he nevertheless contends that he opted out of the automatically renewing lease by verbally notifying the Plaintiff's real estate agent, Charley Ray, in May of 2001 that he did not intend to exercise his option to extend the term of the Ground Lease Agreement for an additional one (1) year period. The Defendant concedes that he never spoke with the Plaintiff. (Testimony of Billy Wilson) Charley Ray denies that Billy Wilson verbally notified him that he did not intend to exercise his option to extend the term of the Ground Lease Agreement for an additional one (1) year period. (Testimony of Charley Ray) The Plaintiff testified that he did not agree to modify the Ground Lease Agreement to eliminate the provision that requires written notice of the Lessee's intention not to exercise the Lessee's option to extend the term of the Ground Lease Agreement. The Plaintiff further testified that he relied upon the terms of the written Ground Lease Agreement.

Evidence was presented pertaining to the Defendant's actions with respect to the Leased Premises during and following the annual lease period that ended on May 14, 2002. On or about September 14, 2001, approximately four months after the Defendant allegedly gave verbal notice to the Plaintiff's real estate agent that he did not intend to exercise his option to extend the term of the Ground Lease Agreement for an additional one (1) year period, the Defendant secured a building permit for installation of a new mobile home sales office and accessory structures on the WDH, Jr. _____

Leased Premises valued at \$18,870.00. (Plaintiff's Exhibit #18) Subsequently, on or about February 12, 2002, approximately three months prior to the May 14, 2002 end of the annual lease period, the Defendant, acting by and through his mobile home business agent, entered into a three (3) year term "Outdoor Rental Lighting Agreement" with Santee Cooper for the installation of five outdoor light poles on the Leased Premises. (Plaintiff's Exhibit #17) The Defendant continued to hold possession of the Leased Premises following the expiration of the annual lease period that ended on May 14, 2002 and continued to conduct his mobile home sales business operations on the Leased Premises. (Testimony of Billy Wilson; Testimony of Leon P. Butler, Jr.) In July of 2002 the Defendant continued to collect and retain lease income from billboards located upon the Leased Premises. (Plaintiff's Exhibit #20) Pursuant to the provisions of Paragraph 31 of the Ground Lease Agreement the Defendant was entitled to collect and receive lease income from billboards located upon the Leased Premises only if the Defendant was in lawful possession of the Leased Premises at that time. (Court's Exhibit # 2) On April 16, 2002, the Plaintiff's property rental agent, Charley Ray, forwarded a rent invoice in the amount of \$50,000.00 for the annual rent payable for the May 15, 2002 to May 14, 2003 lease period to the Defendant's business address (Plaintiff's Exhibit #21). On June 3, 2002, the Plaintiff's property rental agent, Charley Ray, forwarded correspondence to the Defendant by certified mail requesting advice concerning the Defendant's intentions as the Defendant failed to tender the rent payable pursuant to the Ground Lease Agreement and failed to respond to multiple telephone messages left at his office by Charley Ray. (Plaintiff's Exhibit #22) The Defendant failed to respond to these written communications. (Testimony of Leon P. Butler, Jr.) The Defendant concedes that he has not paid the rent and the real property taxes payable with respect to the May 15, 2002 through May 14, 2003 lease year.

WDH, Jr. _____

The Plaintiff testified that during the summer of 2002 he drove by the Leased Premises and observed mobile home inventory on the Leased Premises and business activities which he interpreted as the normal business operations of the Defendant. (Testimony of Leon P. Butler, Jr.) The Plaintiff further testified that because he had not received written notice that the Defendant did not intend to exercise his option to extend the term of the Ground Lease Agreement for an additional one (1) year period and because he had observed inventory and activity on the Leased Premises that he interpreted as continuing business operations of the Defendant, he believed that the Ground Lease Agreement had automatically renewed and that the Defendant was merely late in tendering the agreed upon rent. (Testimony of Leon P. Butler, Jr.)

The Plaintiff testified that he again drove by the Leased Premises in the late summer or early fall of 2002 and observed that the Defendant's mobile home inventory had been removed from the Leased Premises. The Plaintiff does not know the date upon which the Defendant abandoned the Leased Premises. (Testimony of Leon P. Butler, Jr.) Likewise, the Defendant does not know the date upon which he abandoned the Leased Premises. (Testimony of Billy Wilson) At the time that the Plaintiff drove by the Leased Premises and observed that the Defendant's mobile home inventory had been removed from the Leased Premises, he noted that the Defendant's mailbox and the freestanding business signs advertising the Defendant's business and telephone number remained upon the Leased Premises. The Plaintiff further observed that a partially burned mobile home, a truck, and an illuminated sign were also present on the Leased Premises. (Testimony of Leon P. Butler, Jr.; Plaintiff's Exhibits # 26, 27, 28 and 29) The Defendant testified that he had abandoned a partially burned mobile home, a truck, and an illuminated sign on the Leased Premises. (Testimony of Billy Wilson) On October 26, 2002

WDH, Jr. _____

Plaintiff's legal counsel forwarded to the Defendant formal written notice of Defendant's default in performance of his obligation to pay rent pursuant to the Ground Lease Agreement and further notified the Defendant of his right to cure his default. (Plaintiff's Exhibit #24)

The Plaintiff testified that he took no further action with regard to the Leased Premises until after the expiration of the lease term on May 14, 2003. The Plaintiff and his real estate agent, Charley Ray, testified concerning the efforts to lease the subject property after the expiration of the lease term on May 14, 2003. Charley Ray testified that he placed a "For Rent" sign upon the property to advise the public of the availability of the property for lease. Despite the efforts of Charley Ray to lease the subject property, the property was not leased again until May 14, 2005. (Testimony of Leon P. Butler, Jr.; Defendant's Exhibit #7) The Plaintiff testified that when he relet the property in May of 2005 he negotiated a lease credit of \$2,500.00 to the lessee for cleaning up the trash abandoned by the Defendant upon the Leased Premises.

The Plaintiff testified that he claims the following damages as a result of the Defendant's breach of the Ground Lease Agreement:

1. Unpaid Rent- \$50,000.00 due and payable on 5/15/2002
2. Interest On the unpaid rent computed at the legal interest rate of 8.75% from 5/15/2002 until the date of entry of judgment.
3. 2002 Taxes \$4,982.87 paid by Plaintiff on 3/12/2003
4. Interest On the unpaid 2002 taxes computed at the legal interest rate of 8.75% from 3/12/2003 until the date of entry of judgment.
5. 2003 Taxes \$1,800.75 Defendant's share (1/1/03-5/14/03) paid by Plaintiff on 1/9/2004
6. Interest On the unpaid 2003 taxes computed at the legal interest rate of 8.75% from 1/9/2004 until the date of entry of judgment.

7. Cleaning \$2,500.00 Lease credit amount negotiated by Plaintiff with subsequent lessee for removal of the trash left by the Defendant when he abandoned the Leased Premises

In addition to the above damages claimed by the Plaintiff, the Plaintiff testified that he is asserting claims for reimbursement of the following expenses that he has incurred in his efforts to collect the unpaid obligations of the Defendant Billy Wilson pursuant to the Ground Lease Agreement, including a reasonable attorney's fee (Paragraph 18 Default):

- A. \$150.00 Horry County Clerk-Filing fee for this action
- B. \$ 15.00 Orangeburg County Sheriff-Service fee upon Defendant
- C. \$ 50.00 Graham Detective Agency-Service of subpoena
- D. \$ 25.00 NextMedia-Subpoena fee for document production
- E. \$1,357.75 Mabry Court Reporters-Court reporting fees
- F. \$ 374.00 Davis Title Service-Certified copies of Horry County records
- G. Special Referee Fees
- H. \$39,145.00 Attorney Fees-per Affidavit of Plaintiff's counsel

To support his claim that he verbally notified the Plaintiff's real estate agent, Charley Ray, that he did not intend to exercise his option to extend the term of the Ground Lease Agreement for an additional one (1) year period, the Defendant offered his own testimony and the testimony of his business partner, Jackie Woodbury. Mr. Woodbury testified that he overheard a telephone conference between the Defendant and someone whom the Defendant referred to as "Charley", during which the Defendant stated that he did not intend to renew the Lease Agreement. (Testimony of Jackie Woodbury)

The Defendant testified that the circumstance that motivated him to opt out of the automatic renewal of the Ground Lease Agreement was a tightening of credit markets that made WDH, Jr. _____

it difficult to finance the sale of mobile homes. The Defendant also offered testimony from his former employee, Betty Bryan, concerning the relocation of certain mobile home inventory from the Leased Premises.

FINDINGS OF FACT

Based upon the pleadings of the parties, the testimony of the witnesses, the documentary evidence in the record, and my personal observation of the demeanor of the witnesses while they testified, I make the following Findings of Fact:

1. Based upon the greater weight of the evidence, I find that at all times relevant to this matter, the Plaintiff was the record owner of a tract of unimproved land located in Little River, South Carolina, that contains approximately five (5) acres.

2. Based upon the greater weight of the evidence, I find that the Plaintiff, acting on behalf of his mother pursuant to a Power of Attorney, entered into an "Exclusive Authorization and Right to Lease" with Ray Realty, Inc., on or about May 24, 1996, pursuant to which the Plaintiff engaged Ray Realty, Inc., to lease the subject unimproved real property for a term of twenty (20) years at a net annual rental of \$50,000.00.

3. Based upon the greater weight of the evidence, I find that Charley Ray, the broker-in-charge of Ray Realty, Inc., placed signs on the subject unimproved real property to notify the public of the availability of the property for lease and listed the property in the realtors' multiple listing service but there were no significant offers to lease the Plaintiff's unimproved real property until February of 1998, when the Defendant Billy Wilson saw the Ray Realty, Inc., sign upon the property and contacted Charley Ray to begin negotiations to lease the Plaintiff's property.

4. Based upon the greater weight of the evidence, I find that the Defendant Billy Wilson is a sophisticated businessman who had acquired substantial experience as both a land developer and
WDH, Jr. _____

a mobile home dealer prior to commencing negotiations to lease the Plaintiff's unimproved real property.

5. Based upon the greater weight of the evidence, I find that the Defendant desired to lease the Plaintiff's unimproved property to establish a mobile home dealership to sell mobile homes in connection with the sale of mobile home lots carved from several Horry County farms that the Defendant was developing and marketing as mobile home communities.

6. Based upon the greater weight of the evidence, I find that the Defendant Billy Wilson tendered an initial written offer to lease the Plaintiff's unimproved real property, designated as a "Letter of Intent", on or about February 25, 1998.

7. Based upon the greater weight of the evidence, I find that following the Defendant's initial "Letter of Intent" offer to lease the Plaintiff's unimproved real property, dated on or about February 25, 1998, there were extensive lease negotiations in the form of written requests and proposals exchanged by the Plaintiff and the Defendant over the course of several months that culminated in the execution and delivery of the written Ground Lease Agreement dated on or about May 15, 1998.

8. Based upon the greater weight of the evidence, I find that the Plaintiff and the Defendant were represented during the Ground Lease Agreement negotiations by independent legal counsel who prepared, reviewed, and made changes to drafts of the Ground Lease Agreement prior to execution of the final draft of the Ground Lease Agreement by the Plaintiff and the Defendant.

9. Based upon the greater weight of the evidence, I find that both the Plaintiff and the Defendant made compromises and concessions during the course of the Ground Lease Agreement negotiations.

10. Based upon the greater weight of the evidence, I find that the Plaintiff and the Defendant were in essentially equal bargaining positions during the Ground Lease Agreement negotiations.

11. Based upon the greater weight of the evidence, I find that during the Ground Lease Agreement negotiations the Defendant Billy Wilson requested the inclusion of an automatic annual lease renewal provision in the Ground Lease Agreement.

12. Based upon the greater weight of the evidence, I find that the Plaintiff, as Lessor, and the Defendant, as Lessee, executed and delivered the written Ground Lease Agreement (Court's Exhibit #2) on or about May 15, 1998.

13. Based upon the greater weight of the evidence, I find that the Defendant took possession of the Leased Premises on or about May 15, 1998.

14. Based upon the greater weight of the evidence, I find that the initial term of the Ground Lease Agreement was one (1) year, commencing on May 15, 1998 and terminating on May 14, 1999.

15. Based upon the greater weight of the evidence, I find that the Ground Lease Agreement automatically renewed at the expiration of the original lease term on May 14, 1999 as the Defendant did not furnish written notice to the Plaintiff, at least ninety (90) days prior to the expiration of the original lease term, of his intention not to exercise his option to extend the term of the Lease Agreement for an additional one (1) year period.

16. Based upon the greater weight of the evidence, I find that the Ground Lease Agreement automatically renewed for an additional one (1) year term at the expiration of the lease term ending May 14, 2000, as the Defendant did not furnish written notice to the Plaintiff, at

least ninety (90) days prior to the expiration of the then current lease term, of his intention not to exercise his option to extend the term of the Lease Agreement for an additional one (1) year period.

17. Based upon the greater weight of the evidence, I find that the Ground Lease Agreement automatically renewed for an additional one (1) year term at the expiration of the lease term ending May 14, 2001, as the Defendant Billy Wilson did not furnish written notice to the Plaintiff, at least ninety (90) days prior to the expiration of the lease term ending May 14, 2001, of his intention not to exercise his option to extend the term of the Lease Agreement for an additional one (1) year period.

18. Based upon the greater weight of the evidence, I find that the Defendant did not furnish written notice to the Plaintiff, at least ninety (90) days prior to the expiration of the lease term ending May 14, 2002, of his intention not to exercise his option to extend the term of the Lease Agreement for an additional one (1) year period commencing May 15, 2002, and ending May 14, 2003.

19. Based upon the greater weight of the evidence, I find that the Plaintiff's real estate agent, Charley Ray, did not have authorization from the Plaintiff to make final decisions concerning the negotiation, acceptance, and modification of lease agreements for the Plaintiff's real property and that final decision making authority concerning the negotiation, acceptance, and modification of lease agreements for the Plaintiff's real property was reserved by the Plaintiff.

20. Based upon the greater weight of the evidence, I find that the Defendant Billy Wilson and the Plaintiff did not discuss modification of the Ground Lease Agreement to eliminate the provision of the Ground Lease Agreement that requires written notice of the Lessee's intention not to exercise his option to extend the term of the Ground Lease Agreement.

WDH, Jr. _____

21. Based upon the greater weight of the evidence, I find that on or about September 14, 2001 the Defendant secured a building permit from Horry County for installation of a new mobile home sales office and accessory structures on the Leased Premises valued at \$18,870.00.

22. Based upon the greater weight of the evidence, I find that on February 12, 2002 the Defendant, acting by and through his mobile home business agent, entered into a three (3) year term "Outdoor Rental Lighting Agreement" with Santee Cooper for the installation of five outdoor light poles on the Leased Premises.

23. Based upon the greater weight of the evidence, I find that the Defendant continued to hold possession of the Leased Premises following the expiration of the annual lease period that ended on May 14, 2002 and continued to conduct his mobile home sales business operations on the Leased Premises.

24. Based upon the greater weight of the evidence, I find that in July of 2002 the Defendant continued to collect and retain lease income from billboards located upon the Leased Premises.

25. Based upon the greater weight of the evidence, I find that on April 16, 2002 the Plaintiff's property rental agent, Charley Ray, forwarded to the Defendant's business address a rent invoice in the amount of \$50,000.00 for the annual rent payable for the May 15, 2002 to May 14, 2003 lease period.

26. Based upon the greater weight of the evidence, I find that on June 3, 2002 the Plaintiff's property rental agent, Charley Ray, forwarded correspondence to the Defendant by certified mail requesting advice concerning the Defendant's intentions as the Defendant failed to tender the rent payable pursuant to the Ground Lease Agreement and failed to respond to multiple telephone messages left at his office by Charley Ray.

WDH, Jr. _____

27. Based upon the greater weight of the evidence, I find that the Defendant failed to respond to the written communications of the Plaintiff's property rental agent dated April 16, 2002 and June 3, 2002.

28. Based upon the greater weight of the evidence, I find that the Plaintiff drove by the Leased Premises during the summer of 2002 and observed mobile home inventory on the Leased Premises and business activities which he interpreted as the normal business operations of the Defendant.

29. Based upon the greater weight of the evidence, I find that the Plaintiff formed an impression during the summer of 2002 that the Ground Lease Agreement had automatically renewed for the period commencing May 15, 2002 and ending May 14, 2003 as he had not received written notice that the Defendant did not intend to exercise his option to extend the term of the Lease Agreement for the period commencing May 15, 2002 and ending May 14, 2003 and he had observed inventory and continuing business operations of the Defendant upon the Leased Premises.

30. Based upon the greater weight of the evidence, I find that the Plaintiff drove by the Leased Premises in late summer or early fall of 2002 and observed that the Defendant's mobile home inventory had been removed from the Leased Premises.

31. Based upon the greater weight of the evidence, I find that when the Plaintiff drove by the Leased Premises in late summer or early fall of 2002 he observed that the Defendant's mailbox and freestanding business signs advertising the Defendant's business and telephone number remained upon the Leased Premises and that the Defendant had abandoned a partially burned mobile home, a truck, and an illuminated sign on the Leased Premises.

32. Based upon the greater weight of the evidence, I find that the Defendant abandoned the Leased Premises without prior notice to the Plaintiff at some time during the late summer or early fall of 2002.

33. Based upon the greater weight of the evidence, I find that there is not sufficient evidence to establish the exact date upon which the Defendant abandoned the Leased Premises.

34. Based upon the greater weight of the evidence, I find that on October 26, 2002 legal counsel for the Plaintiff forwarded to the Defendant formal written notice of Defendant's default in performance of his obligations pursuant to the Ground Lease Agreement and further notified the Defendant of his right to cure his default.

35. Based upon the greater weight of the evidence, I find that the Plaintiff did not take any action to terminate the Ground Lease Agreement or the Defendant's right to possession of the Leased Premises when he learned of the Defendant's abandonment of the Leased Premises.

36. Based upon the greater weight of the evidence, I find that the Plaintiff did not accept a surrender of the Leased Premises from the Defendant when he learned of the Defendant's abandonment of the Leased Premises.

37. Based upon the greater weight of the evidence, I find that the Plaintiff did not act in a manner inconsistent with the Defendant's right to possession of the Leased Premises when he learned of the Defendant's abandonment of the Leased Premises.

38. Based upon the greater weight of the evidence, I find that the Plaintiff entered and took possession of the Leased Premises upon the expiration of the Defendant's lease term on or about May 15, 2003.

39. Based upon the greater weight of the evidence, I find that the Defendant did not pay any rent to the Plaintiff for the May 15, 2002 through May 14, 2003 lease term.

WDH, Jr. _____

40. Based upon the greater weight of the evidence, I find that the Defendant did not pay any portion of the Horry County real property taxes on the Leased Premises for the 2002 calendar year in the amount of \$4,982.87.

41. Based upon the greater weight of the evidence, I find that the Plaintiff paid the Horry County real property taxes on the Leased Premises for the 2002 calendar year in the amount of \$4,982.87 on March 12, 2003.

42. Based upon the greater weight of the evidence, I find that the Defendant did not pay the portion of Horry County real property taxes on the Leased Premises for the 2003 calendar year allocable to the period of January 1, 2003 to May 14, 2003 in the amount of \$1,800.75.

43. Based upon the greater weight of the evidence, I find that the Plaintiff paid the portion of Horry County real property taxes on the Leased Premises for the 2003 calendar year allocable to the period of January 1, 2003 to May 14, 2003 in the amount of \$1,800.75 on January 9, 2004.

44. Based upon the greater weight of the evidence, I find that the Plaintiff caused his real estate agent, Charley Ray, to place a "For Rent" sign upon the Leased Premises after he entered and took possession of the Leased Premises on or about May 15, 2003.

45. Based upon the greater weight of the evidence, I find that despite Mr. Ray's efforts to lease the subject property, the property was not leased again until May 14, 2005.

46. Based upon the greater weight of the evidence, I find that when the Defendant abandoned the Leased Premises he left a mailbox, a partially burned mobile home, a truck, an illuminated sign, and freestanding business signs on the Leased Premises.

47. Based upon the greater weight of the evidence, I find that the Plaintiff negotiated a lease credit to the lessee in the amount of \$2,500.00 when he re-let the Leased Premises on May 14, 2005 for clean up of debris abandoned by the Defendant upon the Leased Premises.

48. Based upon the greater weight of the evidence, I find that the Plaintiff has incurred the following expenses in his efforts to collect the unpaid obligations of the Defendant Billy Wilson pursuant to the Ground Lease Agreement, including a reasonable attorney's fee (Paragraph 18 Default):

- A. \$150.00 Horry County Clerk-Filing fee for this action
- B. \$ 15.00 Orangeburg County Sheriff-Service fee upon Defendant
- C. \$ 50.00 Graham Detective Agency-Service of subpoena
- D. \$ 25.00 NextMedia-Subpoena fee for document production
- E. \$1,357.75 Mabry Court Reporters-Court reporting fees
- F. \$ 374.00 Davis Title Service-Certified copies of Horry County records
- G. Special Referee Fees
- H. \$39,145.00 Attorney Fees-per Affidavit of Plaintiff's counsel.

LEGAL ISSUES

Upon consideration of the pleadings, the testimony of the witnesses, the documentary evidence, and the arguments of counsel concerning the applicable law, it appears that the determination of the following legal issues is central to the resolution of the disputes between the parties.

- I. Whether the provision of the Ground Lease Agreement that imposes an affirmative obligation upon the Lessee to furnish written, as opposed to oral, notice to the Lessor of the Lessee's intention to "opt out" of automatic renewal of the Ground Lease Agreement is void as against public policy?

- II. Whether the Plaintiff, as Lessor, and the Defendant, as Lessee, agreed to modify the Ground Lease Agreement to eliminate the requirement that the Lessee furnish written notice to the Lessor of the Lessee's intention not to exercise his option to extend the term of the Ground Lease Agreement?
- III. Whether the Defendant was under a legal duty to mitigate the damages that he suffered as a result of the Defendant's failure to perform his obligations under the Ground Lease Agreement?
- IV. Whether the Plaintiff is entitled to an award of pre-judgment interest?

DISCUSSION

- I. ~~Is the provision of the Ground Lease Agreement that imposes an affirmative obligation upon the Lessee to furnish written, as opposed to oral, notice to the Lessor of the Lessee's intention to "opt out" of automatic renewal of the Ground Lease Agreement void as against public policy?~~

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

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

The above quoted provision of the Ground Lease Agreement imposes an affirmative obligation upon the Lessee to "opt out" of automatic renewal of the Ground Lease Agreement for an additional one (1) year term if the Lessee does not intend to exercise his option to renew the Ground Lease Agreement and clearly defines the obligation of the Lessee to furnish written, as opposed to oral, notice to the Lessor of the Lessee's intention to "opt out" of automatic renewal of the Ground

Lease Agreement. When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used, to be taken and understood in their plain, ordinary, and popular sense. C.A.N. Enters., Inc. v. South Carolina Health & Human Servs. Finance Comm'n, 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988). As the language of the Ground Lease Agreement concerning automatic annual renewal is clear, unambiguous, and explicit, this Court is obligated to construe the automatic renewal provision according to the terms that the parties used and understood. In light of the Defendant's concession that he did not furnish written notice to the Plaintiff of his intention not to exercise his option to extend the term of the Ground Lease Agreement, it appears that the Ground Lease Agreement automatically renewed for an additional one (1) year term thereby obligating the Defendant to perform the obligations of the Lessee for the lease period commencing May 15, 2002 and ending May 14, 2003.

The Defendant seeks to avoid that result by arguing that the provision of the Ground Lease Agreement that requires written notice to the Lessor of the Lessee's intention not to exercise his option to extend the term of the Ground Lease Agreement "is void as against public policy." Based upon my review of the case law submitted by counsel for my consideration, I have concluded that the provision in the Ground Lease Agreement that requires written notice to the Lessor of the Lessee's intention not to exercise his option to extend the term of the Ground Lease Agreement is not void as against public policy. Numerous authorities have enforced lease provisions which specify that notice of exercise 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. United Properties Limited Co. v. Walgreen Properties, 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. App. 664; 316 S.E.2d 93 (N.C. App. 1984); Coulter v. Capitol Finance Co., 266 N.C. 214, 146 S.E.2d 97 (N.C. 1966); WDH, Jr. _____

Turman v. MacLachlan, 257 Ga. 69, 354 S.E.2d 825 (Ga. 1987); In re Joyner, 74 B.R. 618 (Bkrtcy.M.D.Ga. 1987); Host Intern., Inc., v. Summa Corp., 94 Nev. 572; 583 P.2d 1080 (Nev. 1978). If a lease specifies the kind of notice to be given by the lessee for exercising an option concerning the renewal of the lease, there must be compliance with this specification in order to bind the lessor. As stated in Geisdorf v. Doughty:

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

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

“If the provisions of the lease agreement had been complied with, the problem of proving that the notice had actually been sent on time and received would have been eliminated.” In re Joyner, 74 B.R. at 623 (applying Georgia Law).

II. Did the Plaintiff, as Lessor, and the Defendant, as Lessee, agree to modify the Ground Lease Agreement to eliminate the requirement that the Lessee furnish written notice to the Lessor of the Lessee’s intention not to exercise his option to extend the term of the Ground Lease Agreement?

As noted above, the Defendant concedes that he did not furnish written notice to the Plaintiff Lessor at least ninety (90) days prior to the expiration of the lease period ending May 14, 2002 of his intention not to exercise his option to extend the term of the Ground Lease Agreement for an additional one (1) year period. Nevertheless, he contends that he opted out of automatic renewal of the Ground Lease Agreement by verbally notifying the Plaintiff’s real estate agent, Charley Ray, in May of 2001 that he did not intend to exercise his option to extend the term of the Ground Lease Agreement for an additional one (1) year period. Clearly, the

Defendant Lessee's alleged verbal notice to the Plaintiff's real estate agent of his intention not to exercise his option to extend the term of the Ground Lease Agreement for an additional one (1) year period does not comply with the provision of the Ground Lease Agreement that requires written notice to the Plaintiff Lessor of the Lessee's intention not to exercise his option to extend the term of the Ground Lease Agreement for an additional one (1) year period. However, the Defendant argues that an oral modification of the Ground Lease Agreement excused his compliance with the literal terms of the written Ground Lease Agreement. As the proponent of an alleged oral modification of the Ground Lease Agreement that eliminates the provision of the Ground Lease Agreement that requires written notice to the Lessor of the Lessee's intention not to exercise his option to extend the term of the Ground Lease Agreement, the Defendant bears the burden of proving that oral modification. The burden of proving all of the elements necessary to support a valid contract modification is on the proponent of the modification. Taran Distributing, Inc. v. Ami, Inc., 237 F.2d 488 (7th Cir. 1956); Johnson v. Mosley, 179 F.2d 573 (8th Cir. 1950); Smokeless Fuel Co. v. Western United Corp., 19 F.2d 834 (C.C.A. 4th Cir. 1927); The Jobshaven, 270 F. 60 (C.C.A. 2nd Cir. 1920); Johnson-Rast & Hays, Inc. v. Cole, 294 Ala. 32, 310 So.2d 885 (Ala. 1975). Yeazell v. Copins, 98 Ariz. 109, 402 P.2d 541 (Ariz. 1965); Thermo-Kinetic Corp. v. Allen, 16 Ariz. App. 341, 493 P.2d 508 (Ariz. App. 1972); Lar-Rob Bus Corp. v. Town of Fairfield, 170 Conn. 397, 365 A.2d 1086 (Conn. 1976).

A modification of a contract is a change in one or more respects, which introduces new elements into the details of the contract and cancels others but leaves the general purpose and effect undisturbed. International Business Lists, Inc. v. American Tel. & Tel. Co., 147 F.3d 636, 641 (7th Cir. 1998). A valid modification of a contract must satisfy all the criteria essential for a valid original contract, including offer, acceptance, and consideration. Sauner v. Public Service
WDH, Jr. _____

Authority of South Carolina, 354 S.C. 397, 405, 581 S.E.2d 161, 166 (2003); Roberts v. Gaskins, 327 S.C. 478, 483, 486 S.E.2d 771, 773 (Ct. App. 1997); Robinson v. Ada S. McKinley Community Services, Inc., 19 F.3d 359, 364 (7th Cir. 1994). A modification of a contract requires the mutual assent of both parties to the contract. Wheeler v. New Brunswick & C. R. Co., 115 U.S. 29, 5 S. Ct. 1061, 29 L. Ed 341 (1885). Mutual assent is as much a requisite element in effecting a contractual modification as it is in the initial creation of a contract. Keco Industries, Inc. v. ACF Industries, Inc., 316 F.2d 513, 516 (4th Cir. 1963).

Whether parties have orally agreed to modify the terms of a written contract is a question of fact. The South Carolina Nat. Bank v. Silks, 295 S.C. 107, 110, 367 S.E.2d 421, 422 (Ct. App. 1998). The minds of the parties must be shown to have met on a definite modification. Board of Education of City of Albuquerque v. American National Bank of Oklahoma City, Okl., 294 F. 14 (C.C.A. 8th Cir. 1923); Marnon v. Vaughan Motor Co., 184 Or. 103, 194 P.2d 992 (Or. 1948). The circumstances surrounding the conduct of the parties must be sufficient to support a finding of mutual intention that the modification of the contract be effective. Cardinal Development Co. v. Stanley Const. Co., Inc., 255 Va. 300, 497 S.E.2d 847 (Va. 1998); Jackson Hewitt, Inc. v. Greene, 865 F. Supp. 1199 (E.D. Va. 1994); C. F. Halstead Contractor, Inc. v. Dirt, Inc., 294 Ala. 644, 320 So.2d 657 (Ala. 1975); Stowers v. Harper, 376 S.W.2d 34 (Tex. Civ. App. 1964); Rosellini v. Banchemo, 83 Wash. 2d 268, 517 P.2d 955 (Wash. 1974). Vague, indefinite, or ambiguous statements will not suffice. EDO Corp. v. Beech Aircraft Corp., 911 F.2d 1447 (10th Cir. 1990). The party alleging the modification must show that the parties demonstrated both a subjective and objective intent to be bound by the terms of the new contract. Fondedile, S.A. v. C.E. Maguire, Inc., 610 A.2d 87 (R.I. 1992).

Upon consideration of the evidence presented by the Defendant to prove that the parties orally agreed to modify the Ground Lease Agreement to eliminate the provision that requires written notice to the Lessor of the Lessee's intention not to exercise his option to extend the term of the Ground Lease Agreement, I conclude that the Defendant has not carried his burden of proof. The Defendant concedes that he never spoke directly with the Plaintiff. Rather, the Defendant communicated with the Plaintiff's real estate agent, Charley Ray, who did not have authority to modify the terms of the Ground Lease Agreement. The Plaintiff and Charley Ray testified that Charley Ray's authority was limited and that all decision making authority concerning the Ground Lease Agreement was reserved to the Plaintiff. The Plaintiff further testified that he did not agree to modify the Ground Lease Agreement to eliminate the provision that requires written notice to the Lessor of the Lessee's intention not to exercise his option to extend the term of the Ground Lease Agreement and that he relied upon the terms of the written Ground Lease Agreement. The Defendant failed to offer any evidence that supports the conclusion that the Plaintiff agreed to modify the Ground Lease Agreement to eliminate the provision that requires written notice to the Lessor of the Lessee's intention not to exercise his option to extend the term of the Ground Lease Agreement.

Moreover, assuming solely for the sake of argument that the Plaintiff and the Defendant mutually agreed to modify the Ground Lease Agreement to permit oral notice to the Plaintiff Lessor of the Defendant Lessee's intention not to exercise his option to extend the term of the Ground Lease Agreement, I am not persuaded that the evidence presented by the Defendant satisfies his burden of proof to establish that he furnished oral notice to the Plaintiff of his intention not to exercise his option to extend the term of the Ground Lease Agreement for an additional one (1) year period. Again, the Defendant has conceded that he never spoke with the Plaintiff. The

WDH, Jr. _____

Defendant testified that he verbally notified the Plaintiff's real estate agent, Charley Ray, in May of 2001 that he did not intend to exercise his option to extend the term of the Ground Lease Agreement for an additional one (1) year period. However, Charley Ray testified that the Defendant did not verbally notify him of the Defendant's intention not to exercise his option to extend the term of the Ground Lease Agreement for an additional one (1) year period. The testimonial evidence concerning the alleged oral notice to the Plaintiff's real estate agent of the Defendant's intention with respect to exercise of his option to extend the term of the Ground Lease Agreement is, at best, conflicting, and actions taken by and on behalf of the Defendant during the relevant time period contradict his assertion that he did not intend to exercise his option to extend the term of the Ground Lease Agreement for an additional one (1) year period. Among other things: (1) the Defendant secured a building permit and made significant improvements to the Leased Premises valued at \$18,780.00 in September of 2001 (Plaintiff's Exhibit #18) approximately four months after he alleges that he verbally notified Charley Ray that he did not intend to exercise his option to extend the term of the Lease Agreement; (2) on or about February 12, 2002, approximately three months prior to the May 14, 2002 end of the annual lease period, the Defendant, acting by and through his mobile home business agent, entered into a three year term "Outdoor Rental Lighting Agreement" with Santee Cooper for the installation of five outdoor light poles on the Leased Premises (Plaintiff's Exhibit #17); (3) the Defendant continued to hold possession of the Leased Premises following the expiration of the annual lease period that ended on May 14, 2002, and continued to conduct his mobile home sales business operations on the Leased Premises (Testimony of Billy Wilson; Testimony of Leon P. Butler, Jr.); (4) in July of 2002, the Defendant continued to collect and retain lease income from billboards located upon the Leased Premises which was permitted only if the Ground Lease

WDH, Jr. _____

Agreement was in good standing (Plaintiff's Exhibit #20; Court's Exhibit #2); and (5) the Defendant never responded to a rental invoice (Plaintiff's Exhibit #21), telephone messages and correspondence forwarded to the Defendant by certified mail requesting a statement of his intentions concerning exercise of his option to extend the term of the Lease Agreement. (Plaintiff's Exhibit #22).

In summary, the clear and unambiguous language of the Ground Lease Agreement provides that the Ground Lease Agreement automatically renews at the end of each lease term for an additional one (1) year term unless the Lessee "opts out" of automatic renewal of the Ground Lease Agreement by furnishing written, as opposed to oral, notice to the Lessor of the Lessee's intention to "opt out" of automatic renewal in the manner set forth in the Ground Lease Agreement. The Defendant Lessee failed to "opt out" of automatic renewal of the Ground Lease Agreement by furnishing written, as opposed to oral, notice to the Lessor of the Lessee's intention to "opt out" of automatic renewal in the manner set forth in the Ground Lease Agreement and failed to prove a modification of the Ground Lease Agreement that eliminated his obligation to furnish written notice of his intention to "opt out" of automatic renewal. Accordingly, the Ground Lease Agreement between the Plaintiff, as Lessor, and the Defendant, as Lessee, automatically renewed at the expiration of the lease period ending May 14, 2002, and the Defendant is legally obligated to perform the obligations of the Lessee for the lease period commencing May 15, 2002 and ending May 14, 2003.

III. Was the Defendant under a legal duty to mitigate the damages that he suffered as a result of the Defendant's failure to perform his obligations under the Ground Lease Agreement?

The Defendant has asserted an affirmative defense that the Plaintiff failed to mitigate his damages. In response, the Plaintiff contends that upon the Defendant's abandonment of the WDH, Jr. _____

Leased Premises during the lease period commencing May 15, 2002 and ending May 14, 2003, the Plaintiff had no legal obligation to mitigate the damages that he suffered as a result of the Defendant's failure to perform his obligations under the Ground Lease Agreement. Based upon the briefs submitted by counsel for the parties, it does not appear that the South Carolina Supreme Court has specifically addressed this issue in the context of a fact pattern similar to the facts presented by this case. However, based upon the legal authorities submitted by counsel for my consideration, it appears that the weight of authority holds that when a tenant abandons leased property the landlord is under no duty to attempt to re-let the leased property for the balance of the term of the lease to mitigate the tenant's liability under the lease, including his liability for rent.

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

“§ 12.1 Tenant's Obligation To Pay Rent

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

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

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

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

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

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

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

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

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

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

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

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

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

"In this case, the lease contains a provision which specifically annuls any duty to mitigate. Parties of equal bargaining power are free to enter into any agreement the terms of which are enforceable at law. (Citations omitted) A rental

agreement may include any terms which are not inconsistent with or prohibited by law, (Citations omitted) unreported, or against public policy.

In the present matter, the term negating any duty to mitigate damages contained in the lease does not violate any principle of law. Similarly, it does not injure the welfare of the public in any way. As a result, the provision does not violate public policy.” (Citations omitted).

New Towne L.P. v. Pier 1 Imports (U.S.), Inc., 113 Ohio App.3d 104, 109, 680 N.E.2d 644, 647 (Ohio App. 6 Dist. 1996)

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

In the instant case, sophisticated businessmen of equal bargaining power entered into extensive negotiations that resulted in a lease provision which specifically annuls any duty to mitigate (Court’s Exhibit #2, Paragraph 18, page 10):

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

This lease provision is clear and unambiguous. I conclude that under either the majority view or the minority view the Plaintiff was not under a duty to mitigate damages as the Plaintiff and the Defendant, as sophisticated businessmen, bargained away any obligation on the part of the Plaintiff to mitigate his damages during extensive arms length negotiations.

IV. Is the Plaintiff entitled to pre-judgment interest?

The Plaintiff claims that he is entitled to an award of pre-judgment interest accruing upon rent and real property tax payable by the Defendant by virtue of South Carolina statutory law and South Carolina appellate decisions interpreting the statutory law. Based upon the facts of the case and the applicable law, I agree that the Plaintiff is entitled to recover pre-judgment interest accruing upon rent and real property tax payable by the Defendant.

The applicable South Carolina statutory law is set forth at §34-31-20(a) of the South Carolina Code of Laws 1976, as amended:

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

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

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

“29. OPTION TO RENEW; AUTOMATIC RENEWAL: Provided that the LESSEE has fully complied with all of his obligations hereunder, the LESSEE shall have the option to renew this lease for fourteen (14) successive one (1) year terms, upon the exact same terms and conditions as set forth herein, except that the annual rent for each of the one (1) year option periods shall be as set forth hereinafter. **Rent shall be paid, in advance, at the commencement of each option period...For the fourth one (1) year option period, May 15, 2002, through May 14, 2003, the annual rent shall be FIFTY THOUSAND AND 00/100 (\$50,000.00) DOLLARS...Unless the LESSEE furnishes written notice to the LESSOR, at least ninety (90) days prior to the expiration of the original lease term or at least ninety (90) days prior to the expiration of the then current option period, of his intention not to exercise his option to extend the term of this Lease Agreement for an additional one (1) year option period, the LESSEE's option to extend the lease term for an additional one (1) year option period shall be deemed to be exercised automatically. PROVIDED, HOWEVER, that nothing contained herein shall be construed to permit the LESSEE to extend the term of this Lease Agreement beyond the end of the fourteen (14) successive one (1) year option periods provided for hereinabove.” (emphasis added)**

The quoted provisions of the Ground Lease Agreement which specify the amount of rent and the due date for payment of rent payable by the Lessee to the Lessor are sufficiently specific to determine the Lessee's duties and obligations with respect to payment of a sum certain at a
WDH, Jr. _____

definite time. The Defendant was obligated to pay rent to the Plaintiff in the amount of FIFTY THOUSAND AND 00/100 (\$50,000.00) DOLLARS on May 15, 2002, and the measure of recovery concerning the Defendant's rent obligation was therefore fixed on May 15, 2002.

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

In Babb v. Rothrock, the South Carolina Supreme Court held that South Carolina law allows prejudgment interest on obligations to pay money from the time when, either by agreement of the parties or operation of law, the payment is demandable, and the sum is certain or capable of being reduced to certainty. Babb v. Rothrock, 310 S.C. 350, 353, 426 S.E.2d 789, 791 (1993) See also, Smith-Hunter Const. Co., Inc. v. Hopson, 365 S.C. 125, 616 S.E.2d 419 (2005); Butler Contracting, Inc., v. Court Street LLC, 369 S.C. 121, 631 S.E.2d 252 (2006); and Ancrum v. Slone, 29 S.C.L (2 Speers) 594 (1844). The fact that the sum due is disputed does not render the claim unliquidated for the purposes of an award of prejudgment interest. Babb, 310 S.C. at 353, 426 S.E.2d at 791. The proper test for determining whether prejudgment interest may be awarded is whether or not the measure of recovery, not necessarily the amount of damages, is fixed by conditions existing at the time the claim arose. Id. See also, Smith-Hunter, 365 S.C. at 128, 616 S.E.2d at 421 and Butler, 369 S.C. at 133, 631 S.E.2d at 259. In Butler, the
WDH, Jr. _____

South Carolina Supreme Court held that, “[t]he right of a party to prejudgment interest is not affected by rights of discount or offset claimed by the opposing party. It is the character of the claim and not the defense to it that determines whether prejudgment interest is allowable.” Butler, 369 S.C. at 133-34, 631 S.E.2d at 259. See also, Lee v. Thermal Engineering Corp., 352 S.C. 81, 88-99, 572 S.E.2d 298, 302 (Ct. App. 2002); Southern Welding Works, Inc., v. K & S Const. Co., 286 S.C. 158, 164, 332 S.E.2d 102, 106 (Ct. App. 1985); and Robert E. Lee & Co., Inc. v. Commission of Public Works of the City of Greenville, 248 S.C. 92, 100, 149 S.E.2d 59, 63 (1966).

CONCLUSIONS OF LAW

1. I conclude as a matter of law that the Court of Common Pleas for Georgetown County, South Carolina has jurisdiction over both the parties and the subject matter of this action and venue is proper pursuant to §15-7-30 of the Code of Laws of South Carolina, 1976, as amended.

2. I conclude as a matter of law that this non-jury matter is properly before the undersigned Special Referee who is authorized to enter a final judgment in this matter by virtue of a Consent Order of Reference issued pursuant to Rule 53 SCRPC (Court’s Exhibit #1).

3. I conclude as a matter of law that the Plaintiff, as Lessor, and the Defendant, as Lessee, entered into a binding Ground Lease Agreement (Court’s Exhibit #2) on or about May 15, 1998, pursuant to which the Plaintiff Lessor agreed to lease the unimproved real property described in the Ground Lease Agreement to the Defendant Lessee in exchange for the promise of the Defendant Lessee to perform the obligations of the Lessee under the terms of the Ground Lease Agreement, including the obligations to pay rent for the unimproved real property as set forth in the Ground Lease Agreement, to pay taxes assessed upon the unimproved real property, and to maintain the unimproved real property in a clean and orderly condition.

WDH, Jr. _____

4. I conclude as a matter of law that the initial term of the Ground Lease Agreement was one (1) year, which term commenced on May 15, 1998 and ended on May 14, 1999.

5. I conclude as a matter of law that Paragraph 29 of the Ground Lease Agreement contains an automatic annual renewal provision that was inserted in the Ground Lease Agreement at the request of the Defendant Lessee.

6. I conclude as a matter of law that the language of Paragraph 29 of the Ground Lease Agreement concerning automatic annual renewal of the Ground Lease Agreement is clear, unambiguous, and explicit.

7. I conclude as a matter of law that Paragraph 29 of the Ground Lease Agreement imposes an affirmative obligation upon the Lessee to "opt out" of automatic renewal of the Ground Lease Agreement if the Lessee intends not to exercise his option to renew the Ground Lease Agreement and clearly defines the obligation of the Lessee to furnish written, as opposed to oral, notice to the Lessor of the Lessee's intention to "opt out" of automatic renewal of the Ground Lease Agreement.

8. I conclude as a matter of law that the automatic annual renewal provision set forth in Paragraph 29 of the Ground Lease Agreement that requires written notice to the Lessor of the Lessee's intention not to exercise his option to extend the term of the Ground Lease Agreement in order to "opt out" of annual renewal of the Ground Lease Agreement is not void as against public policy.

9. I conclude as a matter of law that the Plaintiff and the Defendant did not agree to modify the Ground Lease Agreement to eliminate the provision set forth in Paragraph 29 of the Ground Lease Agreement that requires written notice to the Lessor of the Lessee's intention not to exercise his option to extend the term of the Ground Lease Agreement.

WDH, Jr. _____

10. I conclude as a matter of law that the Ground Lease Agreement automatically renewed at the expiration of the original lease term on May 14, 1999 as the Defendant did not furnish written notice to the Plaintiff, at least ninety (90) days prior to the expiration of the original lease term, of his intention not to exercise his option to extend the term of the Lease Agreement for an additional one (1) year period.

11. I conclude as a matter of law that the Ground Lease Agreement automatically renewed for an additional one (1) year term at the expiration of the lease term ending May 14, 2000, as the Defendant did not furnish written notice to the Plaintiff, at least ninety (90) days prior to the expiration of the then current lease term, of his intention not to exercise his option to extend the term of the Lease Agreement for an additional one (1) year period.

12. I conclude as a matter of law that the Ground Lease Agreement automatically renewed for an additional one (1) year term at the expiration of the lease term ending May 14, 2001, as the Defendant did not furnish written notice to the Plaintiff, at least ninety (90) days prior to the expiration of the lease term ending May 14, 2001, of his intention not to exercise his option to extend the term of the Lease Agreement for an additional one (1) year period.

13. I conclude as a matter of law that the Ground Lease Agreement automatically renewed for an additional one (1) year term at the expiration of the lease term ending May 14, 2002, as the Defendant did not furnish written notice to the Plaintiff, at least ninety (90) days prior to the expiration of the lease term ending May 14, 2002, of his intention not to exercise his option to extend the term of the Lease Agreement for an additional one (1) year period.

14. I conclude as a matter of law that the Defendant is legally obligated to perform the obligations of the Lessee under the terms of the Ground Lease Agreement for the lease period commencing May 15, 2002 and ending May 14, 2003, including the obligations to pay rent for the WDH, Jr. _____

unimproved real property as set forth in the Ground Lease Agreement, to pay taxes assessed upon the unimproved real property, and to maintain the unimproved real property in a clean and orderly condition.

15. I conclude as a matter of law that the provisions of Paragraph 29 of the Ground Lease Agreement obligated the Defendant to pay the sum of FIFTY THOUSAND AND 00/100 (\$50,000.00) DOLLARS to the Plaintiff on or before May 15, 2002 as rent for the Leased Premises for the lease period commencing May 15, 2002 and ending May 14, 2003.

16 I conclude as a matter of law that the Defendant materially breached his obligations pursuant to the Ground Lease Agreement by failing to pay the required rent of FIFTY THOUSAND AND 00/100 (\$50,000.00) DOLLARS to the Plaintiff on or before May 15, 2002 for the lease period commencing May 15, 2002 and ending May 14, 2003. A breach of the Lessee's obligation occurs if the Lessee fails to pay the rent reserved in the lease on or before the date the rent is due. Restatement (Second) of Property, Land. & Ten. § 12.1 (1977).

17. I conclude as a matter of law that the Plaintiff is entitled to judgment against the Defendant for the amount of FIFTY THOUSAND AND 00/100 (\$50,000.00) DOLLARS by reason of the Defendant's breach of his Ground Lease Agreement obligation to pay rent for the Leased Premises for the lease period commencing May 15, 2002 and ending May 14, 2003.

18. I conclude as a matter of law that the Plaintiff is entitled to judgment against the Defendant for prejudgment interest, computed at the legal rate of eight and three-fourths (8.75%) percent per annum, upon the unpaid rent in the amount of FIFTY THOUSAND AND 00/100 (\$50,000.00) DOLLARS from May 15, 2002 through the date of entry of judgment by virtue of §34-31-20(a) Code of Laws of South Carolina 1976, as amended. The provisions of Paragraph 29 of the Ground Lease Agreement which specify when the Lessee's rent payment is due and the

WDH, Jr. _____

amount of the rent owed by the Lessee to the Lessor are sufficiently specific to ascertain the scope of the Lessee's duties and obligations with respect to payment of a sum certain at a definite time. As the Defendant was obligated to pay rent to the Plaintiff in the amount of FIFTY THOUSAND AND 00/100 (\$50,000.00) DOLLARS on May 15, 2002, the measure of recovery was fixed on May 15, 2002.

19. I conclude as a matter of law that the provisions of Paragraph 10 of the Ground Lease Agreement obligated the Defendant to pay the Horry County real estate taxes assessed against the Leased Premises for the 2002 calendar year in the amount of \$4,982.87. Paragraph 10 of the Ground Lease Agreement provides in relevant part:

"LESSEE hereby agrees to pay the full amount of all real estate taxes assessed or to be assessed against the Leased Premises and all improvements added thereto by the LESSEE during the term of this Agreement...In the event that the LESSEE fails to pay such taxes in a timely manner, the LESSOR may, at his option, pay such taxes together with all penalties, interest, and costs accruing thereon, in which case the amount so paid shall be treated as and shall be immediately due and payable as Additional Rental."

20. I conclude as a matter of law that the Defendant materially breached his obligations pursuant to the Ground Lease Agreement by failing to pay the Horry County real estate taxes assessed against the Leased Premises for the 2002 calendar year in the amount of \$4,982.87.

21. I conclude as a matter of law that the Plaintiff paid the 2002 Horry County real estate taxes assessed against the Leased Premises in the amount of \$4,982.87 on March 12, 2003 and the said amount of \$4,982.87 became immediately due and payable as Additional Rental pursuant to the provisions of Paragraph 10 of the Ground Lease Agreement.

22. I conclude as a matter of law that the Plaintiff is entitled to judgment against the Defendant for the amount of \$4,982.87 by reason of the Defendant's breach of his Ground Lease.

Agreement obligation to pay the Horry County real estate taxes assessed against the Leased Premises for the 2002 calendar year.

23. I conclude as a matter of law that the Plaintiff is entitled to judgment against the Defendant for prejudgment interest, computed at the legal rate of eight and three-fourths (8.75%) percent per annum, upon the Plaintiff's payment of Horry County real estate taxes assessed against the Leased Premises for the 2002 calendar year in the amount of \$4,982.87 from March 12, 2003 through the date of entry of judgment by virtue of §34-31-20(a) Code of Laws of South Carolina 1976, as amended. The provisions of Paragraph 10 of the Ground Lease Agreement which specify that amounts paid by the Lessor upon the Lessee's default in payment of real property taxes become immediately due and payable as Additional Rent are sufficiently specific to ascertain the scope of the Lessee's duties and obligations with respect to payment of a sum certain at a definite time.

24. I conclude as a matter of law that the provisions of Paragraph 10 of the Ground Lease Agreement obligated the Defendant to pay an allocable portion of the Horry County real estate taxes assessed against the Leased Premises for the 2003 calendar year (1/1/2003 to 5/14/2003) in the amount of \$1,800.75.

25. I conclude as a matter of law that the Defendant materially breached his obligations pursuant to the Ground Lease Agreement by failing to pay his allocable portion of the Horry County real estate taxes assessed against the Leased Premises for the 2003 calendar year (1/1/2003 to 5/14/2003) in the amount of \$1,800.75.

26. I conclude as a matter of law that the Plaintiff paid the Defendant's allocable portion of the 2003 Horry County real estate taxes assessed against the Leased Premises in the amount of

\$1,800.75 on January 9, 2004 and the said amount of \$1,800.75 became immediately due and
WDH, Jr. _____

payable as Additional Rental pursuant to the provisions of Paragraph 10 of the Ground Lease Agreement.

27. I conclude as a matter of law that the Plaintiff is entitled to judgment against the Defendant for the amount of \$1,800.75 by reason of the Defendant's breach of his Ground Lease Agreement obligation to pay his allocable share of the Horry County real estate taxes assessed against the Leased Premises for the 2003 calendar year.

28. I conclude as a matter of law that the Plaintiff is entitled to judgment against the Defendant for prejudgment interest, computed at the legal rate of eight and three-fourths (8.75%) percent per annum, upon the Plaintiff's payment of the Defendant's allocable share of Horry County real estate taxes assessed against the Leased Premises for the 2003 calendar year in the amount of \$1,800.75 from January 9, 2004 through the date of entry of judgment by virtue of §34-31-20(a) Code of Laws of South Carolina 1976, as amended. The provisions of Paragraph 10 of the Ground Lease Agreement which specify that amounts paid by the Lessor upon the Lessee's default in payment of real property taxes become immediately due and payable as Additional Rent are sufficiently specific to ascertain the scope of the Lessee's duties and obligations with respect to payment of a sum certain at a definite time.

29. I conclude as a matter of law that the provisions of Paragraph 13 of the Ground Lease Agreement obligated the Defendant to maintain the Leased Premises in a clean and orderly condition.

30. I conclude as a matter of law that the Defendant materially breached his obligation pursuant to the provisions of Paragraph 13 of the Ground Lease Agreement to maintain the Leased Premises in a clean and orderly condition by abandoning a mailbox, a partially burned mobile

home, a truck, an illuminated sign, and freestanding business signs upon the Leased Premises when he abandoned the Leased Premises at some time during the late summer or fall of 2002.

31. I conclude as a matter of law that the Plaintiff is entitled to judgment against the Defendant for \$2,500.00, the amount of lease credit allowed by the Plaintiff to the next tenant of the Leased Premises for cleaning up the trash abandoned by the Defendant upon the Leased Premises, by reason of the Defendant's breach of his Ground Lease Agreement obligation to maintain the Leased Premises in a clean and orderly condition.

32. 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 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 tenant's 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). In the present case there was no evidence to support a finding: (1) that the Plaintiff terminated the WDH, Jr. _____

Ground Lease Agreement; (2) that the Plaintiff accepted a surrender of the premises by the Defendant; (3) that the Plaintiff acted in a manner inconsistent with the Defendant's right to continued possession of the Leased Premises; and (4) that the Plaintiff re-entered and took possession of the Leased Premises prior to the end of the lease term on May 14, 2003.

33. I conclude as a matter of law that any duty of the Plaintiff to mitigate the damages that he suffered as a result of the Defendant's failure to perform his obligations under the Ground Lease Agreement was negated by the following lease provision which specifically annuls any duty to mitigate (Court's Exhibit #2, Paragraph 18, page 10):

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

This clear, unambiguous, and explicit lease provision was negotiated by sophisticated businessmen of equal bargaining power and is enforceable at law. New Towne Limited Partnership v. Pier 1 Imports, 113 Ohio App. 3rd 104, 680 N.E.2d 644; Weingarten/Arkansas, Inc., v. ABC Interstate Theatres, Inc., 306 Ark. 64, 811 S.W.2d 295 (1991).

34. I conclude as a matter of law that the Defendant failed to satisfy his burden of proof with respect to his affirmative defenses of novation, accord and satisfaction, and laches.

35. I conclude as a matter of law that the Plaintiff is entitled to judgment against the Defendant for the reasonable expenses that he has incurred in his efforts to collect the unpaid obligations of the Defendant pursuant to the Ground Lease Agreement, including a reasonable attorney's fee for Plaintiff's counsel. The provisions set forth in Paragraph 18 of the Ground Lease Agreement specifically provide that the Lessee shall be liable for payment of the Lessor's costs of collection, including reasonable attorney's fees incurred by the Lessor. Based upon an affidavit submitted to this Court by counsel for the Plaintiff which sets forth the attorney's fees

WDH, Jr. _____

and costs incurred by the Plaintiff and having heard no objection to the award of same, I conclude that the Plaintiff is entitled to judgment against the Defendant for the following costs of collection:

- A. \$150.00 Horry County Clerk-Filing fee for this action
- B. \$ 15.00 Orangeburg County Sheriff-Service fee upon Defendant
- C. \$ 50.00 Graham Detective Agency-Service of subpoena
- D. \$ 25.00 NextMedia-Subpoena fee for document production
- E. \$1,357.75 Mabry Court Reporters-Court reporting fees
- F. \$ 374.00 Davis Title Service-Certified copies of Horry County records
- G. \$39,145.00 Attorney Fees

H. While the Ground Lease agreement specifically provides for the recovery of attorney's fees, it fails to include in its provisions for the recovery of Special Referee's Fees. In failing to do so, I find that the provisions of Rule 53(d) would control as to the award of these fees.

ORDERED

IT IS THEREFORE ORDERED, that the Plaintiff have judgment against the Defendant in the amount of \$ 133,887.75, which sum is comprised of the following:

1. Rent in the amount of \$50,000.00 payable by the Defendant for the lease period commencing May 15, 2002 and ending May 14, 2003, which amount was due and payable on May 15, 2002 pursuant to Paragraph 29 of the Ground Lease Agreement;
2. Pre-Judgment Interest on the unpaid rent in the amount of \$30,037.64 computed at the legal interest rate of 8.75% from May 15, 2002 through the date of entry of this judgment;
3. 2002 Horry County real property taxes on the Leased Premises in the amount of \$4,982.87 paid by Plaintiff on March 12, 2003;

4. Pre-Judgment Interest on the 2002 Horry County real property taxes in the amount of \$2,633.92 computed at the legal interest rate of 8.75% from March 12, 2003 through the date of entry of this judgment;
5. 2003 Horry County real property taxes on the Leased Premises in the amount of \$1,800.75 Defendant's share (1/1/03-5/14/03) paid by Plaintiff on January 9, 2004;
6. Pre-Judgment Interest on the 2003 Horry County real property taxes in the amount of \$816.06 computed at the legal interest rate of 8.75% from January 9, 2004 through the date of entry of this judgment;
7. Cleanup expenses in the amount of \$2,500.00 incurred for removal of the trash abandoned by the Defendant on the Leased Premises; and,
8. Collection expenses in the aggregate amount of \$41,116.75, including:
 - A. \$150.00 Horry County Clerk-Filing fee for this action
 - B. \$ 15.00 Orangeburg County Sheriff-Service fee upon Defendant
 - C. \$ 50.00 Graham Detective Agency-Service of subpoena
 - D. \$ 25.00 NextMedia-Subpoena fee for document production
 - E. \$1,357.75 Mabry Court Reporters-Court reporting fees
 - F. \$ 374.00 Davis Title Service-Certified copies of Horry County records
 - H. \$39,145.00 Attorney Fees
 - I. The Plaintiff's request for award for his share of the Special Referee's Fees is denied,

and the parties are ordered to pay \$2,076.25 each in fees to the Special referee within thirty days of the date of this order.

AND IT IS SO ORDERED.

March 27, 2009


Willard D. Hanna, Jr., Special Referee
FIFTEENTH JUDICIAL CIRCUIT

WDH, Jr. _____

)

)

i

,

1

1

22

)

、

)

1

)

)

)

)

1

U

107 000 0 000 0

1

it

2

STATE OF SOUTH CAROLINA

COUNTY OF GEORGETOWN

LEON P. BUTLER, JR.,

Plaintiff,

vs.

WILLIAM L. WILSON A/K/A BILLY
WILSON,

Defendant.

) IN THE COURT OF COMMON PLEAS
) FIFTEENTH JUDICIAL CIRCUIT
) CIVIL ACTION NO. 2006-CP-22-422

) ORDER GRANTING PLAINTIFF'S MOTION
) TO ALTER OR AMEND FINAL ORDER
) PURSUANT TO RULE 60(A) SCRPC TO
) IDENTIFY THE DEFENDANT AS WILLIAM
) L. WILSON A/K/A BILLY WILSON AND
) DENYING PLAINTIFF'S MOTION TO
) RECONSIDER AND ALTER OR AMEND
) PURSUANT TO RULES 52(B) AND 59(E)
) SCRPC AND DENYING DEFENDANT'S
) MOTION FOR RECONSIDERATION
) PURSUANT TO RULE 59(E) SCRPC AND
) GRANTING DEFENDANT'S MOTION FOR
) DEPOSIT OF FUNDS WITH CLERK

Date of Hearing: June 2, 2009
Hearing Officer: Willard D. Hanna, Jr., Special Referee
Counsel for Plaintiff: Neil D. Wright
Counsel for Defendant: Robert W. Maring
Court Reporter: Jerry S. Mabry

FILED
GEORGETOWN COUNTY, S.C.
2011 AUG 23 AM 9:26
ALMA Y. WHITE
CLERK OF COURT

This non-jury matter is before me as Special Referee by virtue of a Consent Order of Reference issued pursuant to Rule 53 SCRPC (Court's Exhibit #1). I issued a Final Order Ending Action in this matter on March 27, 2009, which Order was filed in the Office of the Clerk of Court for Georgetown County on April 1, 2009. Thereafter, on April 7, 2009, the Defendant Billy Wilson filed a timely written Motion for Reconsideration of my Final Order Ending Action, which Motion for Reconsideration was incorrectly designated as a Motion pursuant to Rule 60 SCRPC. On April 9, 2009, the Plaintiff Leon P. Butler, Jr., filed a timely written Notice of Motion and Motion pursuant to Rules 52(b), 59(e) and 60(a) SCRPC, which requested that I reconsider and alter or amend my Final Order Ending Action. On June 2, 2009 I conducted a hearing to consider the parties' motions for reconsideration and heard the arguments of counsel concerning each issue raised in those motions. The parties were not present at that hearing. Thereafter, on September 18,

2009, the Defendant Billy Wilson filed a Motion for Deposit in Court pursuant to Rule 67 SCRPC which seeks an Order allowing the Defendant to deposit the amount of the judgment in this matter with the Clerk of Court for Georgetown County. I will address these motions in the sequence in which they were filed.

Defendant's Motion for Reconsideration

The Defendant's written Motion for Reconsideration requests that I reconsider six (6) alleged errors in my Final Order Ending Action:

1. **Defendant's Motion for Reconsideration alleges that the evidence and testimony showed that the Plaintiff had received adequate notice that the Defendant did not intend to re-let the premises.**

At the hearing that I conducted on June 2, 2009, counsel for the Defendant revisited and reiterated the arguments that he made concerning this issue during the trial and in his written post-trial motions and brief. After careful consideration of the evidence presented during the trial and the arguments set forth in the Defendant's post-trial motions and brief, I rejected the Defendant's arguments in my Final Order Ending Action. The Ground Lease Agreement between the Plaintiff, as Lessor, and the Defendant, as Lessee, imposed an affirmative obligation upon the Defendant Lessee to "opt out" of the automatic renewal of the Ground Lease Agreement for an additional one (1) year term if the Defendant Lessee did not intend to exercise his option to renew the Ground Lease Agreement. Furthermore, the Ground Lease Agreement clearly defines the obligation of the Defendant Lessee to furnish written, as opposed to oral, notice to the Plaintiff Lessor of the Defendant Lessee's intention to "opt out" of automatic renewal of the Ground Lease Agreement. In light of the Defendant's concession that he did not furnish written notice to

the Plaintiff of his intention not to exercise his option to extend the term of the Ground Lease Agreement, the Ground Lease Agreement automatically renewed for an additional one (1) year term thereby obligating the Defendant to perform his obligations as Lessee for the lease period commencing May 15, 2002 and ending May 14, 2003.

After considering the arguments made by counsel during the motion hearing that I conducted on June 2, 2009, I again reject the Defendant's arguments on this issue as unpersuasive. I find no basis for modifying my Final Order Ending Action as a result of my reconsideration of this issue.

2. Defendant's Motion for Reconsideration alleges that I erred in asserting that the Plaintiff did not have the duty to mitigate his damages due to the contract provision in the Ground Lease Agreement.

In his Answer and Counterclaim the Defendant asserted as an affirmative defense that the Plaintiff failed to mitigate his damages. The issue of the Plaintiff's alleged duty to mitigate his damages was extensively addressed in my Final Order Ending Action. Based upon the evidence presented at trial, I made findings of fact that the Plaintiff and the Defendant were sophisticated businessmen, that the Ground Lease Agreement between the Plaintiff and the Defendant was the product of extensive lease negotiations over the course of several months, that the Plaintiff and the Defendant were represented during the negotiations by independent legal counsel who prepared, reviewed, and made changes to drafts of the Ground Lease Agreement, that both the Plaintiff and the Defendant made compromises and concessions during the negotiations, and that the Plaintiff and the Defendant were in essentially equal bargaining positions during the negotiations. I also concluded as a matter of law that any duty of the Plaintiff to mitigate damages

suffered as a result of the Defendant's failure to perform his obligations under the Ground Lease Agreement was negated by the following lease provision which specifically annuls any duty to mitigate (Court's Exhibit #2, Paragraph 18, page 10):

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

The Plaintiff was not under a duty to mitigate damages as the Plaintiff and the Defendant, as sophisticated businessmen, bargained away any obligation on the part of the Plaintiff to mitigate his damages during extensive arms length negotiations.

~~After considering the arguments made by counsel during the motion hearing that I~~ conducted on June 2, 2009, I again reject the Defendant's arguments on this issue as unpersuasive. I find no basis for modifying my Final Order Ending Action as a result of my reconsideration of this issue.

3. Defendant's Motion for Reconsideration alleges that I erred in not considering the evidence by the Defendant on the issue of mitigation.

This error alleged by the Defendant's Motion for Reconsideration is allied with the Defendant's immediately preceding assignment of error. In light of my conclusion that the Plaintiff was not under a legal duty to mitigate damages, any evidence proffered by the Defendant on the issue of Plaintiff's efforts to mitigate his damages is unnecessary. After considering the arguments made by counsel during the motion hearing that I conducted on June 2, 2009, I reject the Defendant's arguments on this issue as unpersuasive. I find no basis for modifying my Final Order Ending Action as a result of my reconsideration of this issue.

4. Defendant's Motion for Reconsideration alleges that I erred in awarding the Plaintiff damages for removal of trash abandoned by the Defendant on the Leased Premises as the Plaintiff did not present competent evidence of the damages as to the cleanup of the property.

Testimonial evidence and documentary evidence was presented concerning this issue at the trial of the case. This issue was specifically addressed in the post trial motions and briefs of the parties and in my Final Order Ending Action.

The provisions of the Ground Lease Agreement obligate the Defendant to maintain the Leased Premises in a clean and orderly condition. It is undisputed that the Defendant breached his maintenance obligation under the Ground Lease Agreement as he left a mailbox, a partially burned mobile home, a truck, an illuminated sign, and freestanding business signs on the Leased Premises when he abandoned the Leased Premises. (Testimony of Leon P. Butler, Jr.; Testimony of Billy Wilson; and Plaintiff's Exhibits # 26, 27, 28 and 29). When the Plaintiff re-let the Leased Premises on May 14, 2005 the items abandoned by the Defendant were still on the Leased Premises and the Plaintiff negotiated a credit in the amount of \$2,500.00 against the rent payable by the new tenant for clean up of the debris abandoned by the Defendant upon the Leased Premises. The Plaintiff provided sworn testimony concerning the lease payment credit that he negotiated for the clean up of the Leased Premises and the Defendant failed to present any evidence to controvert the reasonableness of the \$2,500.00 lease payment credit negotiated by the Plaintiff for clean up of the debris abandoned by the Defendant upon the Leased Premises.

At the hearing that I conducted on June 2, 2009, counsel for the Defendant reiterated the arguments that he made concerning this issue during the trial and in his written post-trial motions

and brief. After considering the arguments made by counsel during the motion hearing that I conducted on June 2, 2009, I again reject the Defendant's arguments on this issue as unpersuasive. I find no basis for modifying my Final Order Ending Action as a result of my reconsideration of this issue.

5. Defendant's Motion for Reconsideration alleges that I erred in awarding the Plaintiff pre-judgment interest as the Plaintiff was not entitled to pre-judgment interest.

South Carolina law allows prejudgment interest on obligations to pay money from the time when, either by agreement of the parties or operation of law, the payment is demandable, and the sum is certain or capable of being reduced to certainty. The provisions of the Ground Lease Agreement which specify when the Defendant Lessee's rent payment is due and the amount of the rent owed by the Defendant Lessee to the Plaintiff Lessor are sufficiently specific to determine when the Defendant's payment is demandable and the amount of the payment. Thus, prejudgment interest is authorized by South Carolina law with respect to the Defendant's rent payment obligation to the Plaintiff. Likewise, the provisions of the Ground Lease Agreement which obligate the Defendant to pay Horry County real estate taxes assessed against the Leased Premises are sufficiently specific to determine when the Defendant's payment is demandable and to ascertain the amount of the payment and prejudgment interest is thus authorized by South Carolina law with respect to the Defendant's tax payment obligation.

This legal issue was addressed extensively in the parties' post-trial motions and briefs and in my Final Order Ending Action. At the hearing that I conducted on June 2, 2009, counsel for the Defendant reiterated the arguments that he made concerning this issue during the trial and in his written post-trial motions and brief. I again reject the Defendant's arguments on this issue as

unpersuasive. I find no basis for modifying my Final Order Ending Action as a result of my reconsideration of this issue.

6. Defendant's Motion for Reconsideration alleges that I erred in awarding attorney's fees to the Plaintiff that the Defendant characterizes as excessive and unreasonable.

At the conclusion of the trial in this matter, I requested that counsel for the parties submit written post trial motions and briefs addressing the legal issues presented for determination. Thereafter, I conducted a conference call with counsel to inform counsel of my findings and conclusions concerning the issues presented for determination. During that conference call with counsel, I requested that counsel for the Plaintiff prepare a proposed final Order for my consideration. As the Ground Lease Agreement specifically provides that the Defendant Lessee shall be liable for payment of the Lessor's costs of collection, including reasonable attorney's fees incurred by the Lessor, and as the Plaintiff's Complaint in this matter specifically demands judgment against the Defendant for costs of collection, including reasonable attorney's fees incurred by the Plaintiff, I requested that counsel for the Plaintiff provide an Affidavit Concerning Attorney Fees incurred by the Plaintiff in this matter. I informed counsel for the Defendant that if the Defendant objected to the attorney fees set forth in the Affidavit of Plaintiff's counsel I would conduct an evidentiary hearing to afford the Defendant an opportunity to cross examine Plaintiff's counsel concerning the Attorney Fees incurred by the Plaintiff in this matter.

In accordance with my request, Plaintiff's counsel provided an Affidavit Concerning Attorney Fees incurred by the Plaintiff which included a detailed and itemized list of the

professional services rendered by counsel for the Plaintiff in this matter. I examined Plaintiff counsel's Affidavit Concerning Attorney Fees in the course of my consideration of a reasonable attorney's fee to be awarded to the Plaintiff. I examined counsel's Affidavit Concerning Attorney Fees in light of the six factors that our South Carolina Supreme Court has set forth as factors to be considered in determining a reasonable attorney's fee ¹:

- (1) the nature, extent, and difficulty of the case;
- (2) the time necessarily devoted to the case;
- (3) professional standing of counsel;
- (4) contingency of compensation;
- (5) beneficial results obtained; and,
- (6) customary legal fees for similar services.

The fourth factor, contingency of compensation, does not apply in this case and therefore was not considered. I determined that the attorney fee set forth in counsel's Affidavit Concerning Attorney Fees appeared to be reasonable in light of the remaining five factors and awarded Plaintiff attorney fees in the amount of \$39,145.00 in my Final Order Ending Action.

As the Defendant challenged the award of attorney fees as excessive and unreasonable, I conducted an evidentiary hearing on the issue of attorney fees on June 2, 2009, and afforded the Defendant's counsel an opportunity to examine Plaintiff's counsel concerning the professional services performed for the Plaintiff and counsel's charges for those services.

Neil D. Wright, Esq., Plaintiff's counsel of record, testified concerning the professional services that he and Matthew N. Wright, Esq., rendered to the Plaintiff in this matter. Mr.

Wright also submitted five (5) exhibits in support of his testimony concerning the professional services rendered to the Plaintiff:

1. Plaintiff counsel's Affidavit Concerning Attorney Fees;

1. Glasscock v. Glasscock 304 S.C. 158, 403 S.E.2d 313 (SC 1991).

2. Plaintiff's Interrogatories to Defendant;
3. Plaintiff's Request for Production of Documents to Defendant;
4. Letter from Defendant's counsel, dated October 25, 2007, setting forth Defendant's settlement proposal; and,
5. Proposed Final Order Ending Action by counsel for the Plaintiff-dated 12/16/08.

Counsel for the Defendant conceded at the hearing that Plaintiff's counsel is an experienced litigator who is highly regarded among his peers for his abilities as a litigator and his diligent preparation for litigation. Counsel for the Defendant further conceded at the hearing that the hourly rate charged by Plaintiff's counsel for the professional services rendered to the Plaintiff was less than the customary legal fees in the community for similar services. The crux of the Defendant's complaint about the Plaintiff's legal fees is that he believes that Plaintiff's counsel spent too many hours preparing the Plaintiff's case against the Defendant.

In response, Plaintiff's counsel testified that while this collection action should have been a simple matter, the Defendant's vigorous denial of the Plaintiff's claim and assertion of numerous affirmative defenses and counterclaims converted the simple collection action into a complex legal matter that required extensive work by Plaintiff's counsel. Plaintiff's counsel pointed to extensive, custom drafted interrogatories and requests for production directed to the Defendant, and extensive document subpoenas directed to third parties that were designed to extract information concerning the date upon which the Defendant actually abandoned possession of the Leased Premises. This information was essential to establish the Plaintiff's

claim that the Defendant maintained possession of and enjoyed the use of the Plaintiff's property long after the commencement of the lease term that the Defendant has attempted to disavow. Moreover, Plaintiff's counsel obtained documents under subpoena from the Horry County Building Department and Santee Cooper which detailed improvements made to the Leased Premises by the Defendant shortly before he abandoned the Leased Premises. Those documents belie the crux of the Defendant's defense; that is, his claim that he informed the Plaintiff's real estate agent in May of 2001 that he was vacating the Leased Premises in May of 2002.

The exhaustive briefs and the Final Order Ending Action prepared by Plaintiff's counsel in this action attest to the vigorous manner in which the parties to this action contested every issue. They also attest to the many hours of research, analysis, and writing necessarily devoted to this matter by counsel for the Plaintiff. I find that the number of hours devoted by Plaintiff's counsel to the preparation and trial of the Plaintiff's case against the Defendant were reasonable and justified and commensurate with the nature, extent, and difficulty of the case, which was made more difficult by the vigorous manner in which the Defendant contested every issue.

To emphasize the beneficial results obtained by the Plaintiff as a result of counsel's efforts, Plaintiff's counsel referenced the letter from Defendant's counsel, dated October 25, 2007, which set forth the Defendant's pre-trial settlement proposal. In that proposal, the Defendant offered to settle the Plaintiff's claim for the sum of \$19,756.38, which included Plaintiff's attorney fee. Plaintiff's counsel noted that the Plaintiff's award of \$133,887.75 under the terms of the Final Order Ending Action was a very beneficial result which reflected that the Plaintiff had prevailed upon all elements of his cause of action and upon all affirmative defenses asserted by the Defendant.

After considering the testimonial and documentary evidence presented by Plaintiff's counsel at the hearing on June 2, 2009, the concessions by Defendant's counsel concerning the professional standing of Plaintiff's counsel and the reasonableness of the hourly rate charged by Plaintiff's counsel, and the applicable factors which must be considered in determining a reasonable attorney's fee, I find and conclude that the sum of \$39,145.00 is a reasonable attorney's fee for the services of Plaintiff's counsel in this matter. Accordingly, I find no basis for modifying my Final Order Ending Action as a result of my reconsideration of this issue.

Motions Presented by the Plaintiff

The Plaintiff's written Motion for Reconsideration requests that I reconsider and alter or amend my Final Order Ending Action as follows:

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

The Defendant is identified in the Ground Lease Agreement and in the Plaintiff's Complaint as Billy Wilson. Based upon a transcript of the Defendant's deposition that was presented for my consideration at the hearing on June 2, 2009, it appears that the Defendant identified himself at the deposition as William L. Wilson. Accordingly, I hereby grant the Plaintiff's motion to amend the Final Order Ending Action to correctly identify the Defendant as William L. Wilson a/k/a Billy Wilson.

2. Plaintiff's Motion for Reconsideration alleges that I erred in failing to conclude as a matter of law that the Plaintiff is entitled to judgment against the Defendant for all fees that I charged for my services as Special Referee which were paid by the Plaintiff.

Paragraph 18 of the Ground Lease Agreement provides for the recovery of costs of collection of rentals due under the Ground Lease Agreement, including reasonable attorney's fees. Plaintiff argues that "costs of collection of rentals" should be interpreted to include the recovery of Special Referee's Fees. The Ground Lease Agreement does not specifically provide for the recovery of Special Referee's Fees. Accordingly, I find that the provisions of Rule 53(d) SCRCPP are controlling with respect to the award of Special Referee's fees. Pursuant to Rule 53(d) SCRCPP, I made the determination in the Final Order Ending Action that my fees as Special Referee should be divided equally between the Plaintiff and the Defendant.

After considering the arguments made by counsel during the motion hearing that I conducted on June 2, 2009, I reject the Plaintiff's argument on this issue as unpersuasive. I find no basis for modifying my Final Order Ending Action as a result of my reconsideration of this issue.

3. Plaintiff's Motion for Reconsideration alleges that I erred in failing to find that the Defendant did not present evidence to satisfy his burden of proof with respect to his affirmative defense that the Plaintiff failed to mitigate damages.

The Plaintiff argues that the Defendant, as the proponent of the affirmative defense of failure to mitigate damages, bears the burden of proof with respect to that affirmative defense. The Plaintiff further argues that the Defendant did not introduce any evidence concerning the amount of damages that the Plaintiff could have avoided by efforts to mitigate the damages that he suffered. The Plaintiff specifically makes reference to my deletion of proposed Findings of Fact 46, 48, and 49 of the Plaintiff's draft of a proposed Final Order Ending Action dated December 16, 2008.

After considering the arguments made by counsel during the motion hearing that I conducted on June 2, 2009, I find no basis for modifying my Final Order Ending Action as a result of my reconsideration of this issue. In light of my legal conclusion that the Plaintiff was not under a duty to mitigate damages, evidence concerning the amount of damages that the Plaintiff could have avoided by efforts to mitigate the damages that he suffered is irrelevant.

4. **Plaintiff's Motion for Reconsideration alleges that I erred in failing to conclude as a matter of law that the Defendant failed to satisfy his burden of proof with respect to the amount of damages that the Plaintiff could have avoided by efforts to mitigate the damages that he suffered.**

The Plaintiff again argues that the Defendant, as the proponent of the affirmative defense of failure to mitigate damages, bears the burden of proof with respect to that affirmative defense. The Plaintiff specifically makes reference to my deletion of proposed Conclusion of Law 34 of the Plaintiff's draft of a proposed Final Order Ending Action dated December 16, 2008.

After considering the arguments made by counsel during the motion hearing that I conducted on June 2, 2009, I find no basis for modifying my Final Order Ending Action as a result of my reconsideration of this issue. In light of my legal conclusion that the Plaintiff was not under a duty to mitigate damages, evidence concerning the amount of damages that the Plaintiff could have avoided by efforts to mitigate the damages that he suffered is irrelevant.

Defendant's Motion for Deposit in Court Pursuant to Rule 67 SCRPC

On September 18, 2009, the Defendant filed a Motion for Deposit in Court pursuant to Rule 67 SCRPC, which motion seeks an Order allowing the Defendant to deposit the amount of the Judgment in this matter with the Clerk of Court for Georgetown County. The Plaintiff does not

oppose the Defendant's motion. I have been advised by counsel for the parties that they have agreed, by an exchange of correspondence, that if the final Judgment amount is in fact deposited by the Defendant with the Clerk of Court for Georgetown County in accordance with the terms of an amended Final Order issued by the undersigned as Special Referee in this matter, that interest accruing on the Judgment amount at the statutory judgment interest rate shall cease as of September 18, 2009.

Pursuant to South Carolina Supreme Court Order 2009-01-05-01, the legal rate of interest for judgments and money decrees for the period January 15, 2009, through January 14, 2010, is 7.25% compounded annually. Accordingly, interest at the statutory rate of 7.25% or \$26.60 per day accrued upon the Judgment amount of \$133,887.75 set forth in the Final Order Ending Action from March 27, 2009 through September 18, 2009. The Judgment amount as of September 18, 2009 was therefore \$138,542.75.

As the parties appear to be in agreement concerning the Defendant's Motion to deposit the amount of the Judgment in this matter with the Clerk of Court for Georgetown County, I hereby grant the Defendant's Motion pursuant to Rule 67 SCRPC to deposit the amount of the Judgment in this matter with the Clerk of Court for Georgetown County conditioned upon the Defendant's compliance with the terms of this Order.

ORDERED

IT IS THEREFORE ORDERED, that the Plaintiff's Motion pursuant to Rule 60(a) SCRPC to alter or amend the Final Order Ending Action in this matter to correctly identify the Defendant as William L. Wilson a/k/a Billy Wilson is hereby GRANTED.

IT IS FURTHER ORDERED, that the Plaintiff's Motion for Reconsideration is DENIED with respect to all other requests for reconsideration.

IT IS FURTHER ORDERED, that the Defendant's Motion for Reconsideration is DENIED.

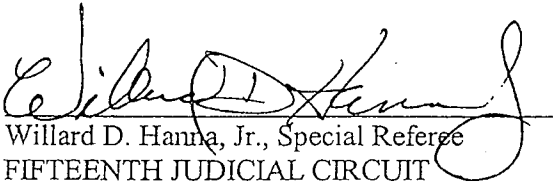
IT IS FURTHER ORDERED, that the Defendant's Motion to Deposit the amount of the Judgment in this matter with the Clerk of Court for Georgetown County is GRANTED upon the condition that the Defendant deposit the sum of \$138,542.75 with the Clerk of Court for Georgetown County, South Carolina within TEN (10) DAYS of the date of this Order.

IT IS FURTHER ORDERED, that upon receipt of the sum of \$138,542.75 from the Defendant, the Clerk of Court for Georgetown County shall deposit the said sum in an interest bearing account.

IT IS FURTHER ORDERED, that the disposition of the funds deposited by the Defendant with the Clerk of Court for Georgetown County and any interest accruing thereon by reason of investment of such funds by the Clerk of Court shall be determined by subsequent Order of the Court.

AND IT IS SO ORDERED.

August 15, 2011


Willard D. Hanna, Jr., Special Referee
FIFTEENTH JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

LEON P. BUTLER, JR.,

PLAINTIFF,

VS.

BILLY WILSON,

DEFENDANT.

) IN THE COURT OF COMMON PLEAS

) FIFTEENTH JUDICIAL CIRCUIT

) CASE NO. 2005-CP-26- 2431

) COMPLAINT

) NON-JURY

) COLLECTION SUIT ON GROUND LEASE

) AGREEMENT FOR PAYMENT OF

) UNPAID RENT, TAXES, INSURANCE,

) INTEREST, ATTORNEY'S FEES AND COSTS

) AMOUNT IN CONTROVERSY

) EXCEEDS \$25,000.00

HORRY COUNTY
CLERK OF COURT
05 MAY 2006 PM 3:41

The Plaintiff above named, complaining of the Defendant above named, would respectfully show unto this Honorable Court and allege as follows:

1. That the Plaintiff Leon P. Butler Jr., is an individual, *sui juris*, who is a citizen and resident of Horry County, South Carolina. The Plaintiff Leon P. Butler Jr., is the fee simple owner of certain commercial real property located in Horry County, South Carolina that was leased to the Defendant Billy Wilson and is the subject of this action.

2. That the Plaintiff is informed and believes and therefore alleges upon information and belief that the Defendant Billy Wilson is an individual, *sui juris*, who is a citizen and resident of South Carolina.

3. That the Defendant Billy Wilson entered into a certain Ground Lease Agreement with the Plaintiff dated May 15, 1998, pursuant to which the Defendant Billy Wilson leased and took possession of certain commercial real property owned by the Plaintiff that is located in Horry County, South Carolina. Pursuant to the terms of the Ground Lease Agreement between the Plaintiff and the Defendant, the Defendant agreed to perform certain contractual obligations

in Horry County, South Carolina, including, *inter alia*, an obligation to pay rent, an obligation to pay all Horry County ad valorem real property taxes assessed against the subject property, an obligation to purchase casualty and liability insurance on the subject property, and an obligation to maintain the subject property.

4. That this is an action by the Plaintiff to recover money damages from the Defendant Billy Wilson for defaults in performance of obligations under the Ground Lease Agreement that the Defendant Billy Wilson agreed to perform in Horry County. This Honorable Court has jurisdiction over the Parties and the subject matter of this action.

5. That on May 15, 1998, the Defendant Billy Wilson, as Lessee, entered into that certain Ground Lease Agreement with Leon P. Butler Jr., as Lessor, for the lease of certain commercial real property owned by Leon P. Butler, Jr., in Little River, Horry County, South Carolina. A true and correct copy of the said Ground Lease Agreement is attached hereto, designated as Exhibit "A" and is incorporated herein by this reference as fully as if set forth herein verbatim.

6. That pursuant to Paragraph 3 of the aforesaid Ground Lease Agreement the initial term of the Lease was one (1) year, commencing on May 15, 1998, and terminating on May 14, 1999.

7. That pursuant to Paragraph 29 of the aforesaid Ground Lease Agreement, the Defendant Lessee was granted the option to renew the lease for fourteen (14) successive one (1) year terms upon the exact same terms and conditions as the initial term except for the annual rent to be paid during the option years, which was specified in Paragraph 29 of the Ground Lease Agreement.

8. That pursuant to Paragraph 29 of the aforesaid Ground Lease Agreement, the Lessor and the Lessee covenanted and agreed that "...Unless the LESSEE furnishes written notice to the LESSOR, at least ninety (90) days prior to the expiration of ... the then current option period, of his intention not to exercise his option to extend the term of the Lease Agreement for an additional one (1) year option period, the LESSEE'S option to extend the lease term for an additional one (1) year option period shall be deemed to be exercised automatically."

9. That Paragraph 28 of the aforesaid Ground Lease Agreement, which governs the method of furnishing notices under the Ground Lease Agreement, provides in relevant part:

" 28. ADDRESS OF LESSOR AND LESSEE; NOTICES: Unless the LESSOR designates another address by written notice to the LESSEE, all Rent and Additional Rent to be paid to the LESSOR pursuant to the provisions of Paragraph 4 hereof, and all other sums to be paid by LESSEE to LESSOR shall be paid to LESSOR at:

Leon P. Butler, Jr.,
1011 Third Avenue
Conway, South Carolina 29526-5101

All written communications by LESSEE to LESSOR shall likewise be given to LESSOR at the said address, with a copy of said communication contemporaneously forwarded to:

Neil D. Wright, Esq.
1304-B Azalea Court
Myrtle Beach, South Carolina 29577

All written communications by LESSOR to LESSEE shall be given to the LESSEE at:

Billy Wilson
7464 Five Chop Road
Santee, South Carolina 29142

With a copy of said communication contemporaneously forwarded to:

The Parties hereto may from time-to-time designate, in writing, other persons or addresses expressly for the purpose of receipt of notice hereunder.

All notices required under this Lease Agreement shall be in writing, shall be signed by the Party giving such notice, shall be transmitted by registered or certified mail, return receipt requested, and shall be deemed duly given when delivery is executed by the postal service with appropriate receipt showing proof of delivery to the address of the recipient."

10. That the Defendant Billy Wilson obtained possession of the Leased Premises on or about May 15, 1998, and continued to occupy the Leased Premises for several years before abandoning the Leased Premises in the fall of 2002.

11. That the Ground Lease Agreement automatically renewed at the expiration of the original lease term on May 14, 1999, as the Defendant Billy Wilson did not furnish written notice to the LESSOR, at least ninety (90) days prior to the expiration of the original lease term, of his intention not to exercise his option to extend the term of the Lease Agreement for an additional one (1) year option period. Likewise, the Ground Lease Agreement automatically renewed at the expiration of the option periods ending May 14, 2000, May 14, 2001, and May 14, 2002, as the Defendant Billy Wilson did not furnish written notice to the LESSOR, at least ninety (90) days prior to the expiration of the then current option period, of his intention not to exercise his option to extend the term of the Lease Agreement for an additional one (1) year option period.

12. That the Ground Lease Agreement automatically renewed for the renewal term commencing May 15, 2002 and ending May 14, 2003 as the Defendant Billy Wilson did not furnish written notice to the LESSOR, in accordance with the notice procedures specified in Paragraph 28 of the Ground Lease Agreement, at least ninety (90) days prior to the expiration of ... the then current option period, of his intention not to exercise his option to extend the term of the Lease Agreement for an additional one (1) year option period.

13. That pursuant to Paragraphs 4 and 29 of the Ground Lease Agreement, the Plaintiff and the Defendant Billy Wilson covenanted and agreed that the annual rent for the Leased Premises during the option period commencing May 15, 2002, and ending May 14, 2003, would be FIFTY THOUSAND AND 00/100 (\$50,000.00) DOLLARS, payable in advance.

14. That the Defendant Billy Wilson failed to pay the annual rent for the Leased Premises during the option period commencing May 15, 2002, and ending May 14, 2003, in the amount of FIFTY THOUSAND AND 00/100 (\$50,000.00) DOLLARS on the May 15, 2002, due date.

15. That on June 3, 2002, the Plaintiff, acting by and through his real estate agent, Charles Ray, furnished written notice to the Defendant Billy Wilson of his failure to timely pay rent when due in accordance with the terms of the Ground Lease Agreement.

16. That on October 28, 2002, the Plaintiff, acting by and through his legal counsel, served a written notice of default and right to cure upon the Defendant Billy Wilson based upon his failure to timely pay rent when due in accordance with the terms of the Ground Lease Agreement.

17. That despite receipt of written notice of his default in performance under the Ground Lease Agreement and right to cure, the Defendant Billy Wilson has willfully failed and refused to perform his obligations under the provisions of the Ground Lease Agreement.

18. That in addition to his default in performance of his obligation to pay rent in accordance with the terms of the Ground Lease Agreement, the Defendant Billy Wilson has materially breached his obligations to the Plaintiff pursuant to the terms of the Ground Lease Agreement by failing to pay Horry County ad valorem real property taxes assessed against the

subject property, failing to properly maintain the subject property by depositing and abandoning debris upon the property.

19. That Paragraph 18 (DEFAULT) of the Ground Lease Agreement provides that the Defendant Billy Wilson is liable upon default for costs of collection of rentals due under the Ground Lease Agreement, including reasonable attorneys' fees.

20. That as a result of the defaults in performance by the Defendant Billy Wilson, it has become necessary for the Plaintiff to employ legal counsel to prosecute this action on behalf of the Plaintiff and the Plaintiff is informed and believes and therefore alleges upon information and belief that he is entitled to recover the costs of collection of rentals due under the Ground Lease Agreement, including reasonable attorneys' fees.

21. That as a result of the above described defaults in performance of the Ground Lease Agreement obligations of the Defendant Billy Wilson, the Plaintiff is informed and believes and therefore alleges upon information and belief that he is entitled to judgment against the Defendant Billy Wilson, for the following:

(a) For the sum of FIFTY THOUSAND AND 00/100 (\$50,000.00) DOLLARS rent for the lease term commencing May 15, 2002 and ending May 14, 2003;

(b) For a sum equivalent to the Horry County ad valorem real property taxes assessed against the subject property during the period commencing January 1, 2002 and ending May 14, 2003;

(c) For the costs incurred by the Plaintiff for removing debris from the Leased Premises for the purpose of reletting the Leased Premises;

(d) For pre-judgment interest at the legal contract rate accrued on the past due rent in the amount of FIFTY THOUSAND AND 00/100 (\$50,000.00) DOLLARS and the Horry

County ad valorem real property taxes assessed against the subject property during the period commencing January 1, 2002 and ending May 14, 2003;

(e) For the reasonable attorney's fees incurred by the Plaintiff in the prosecution of this action; and,

(f) For the costs of this action.

WHEREFORE, the Plaintiff prays for the following relief:

(a) For judgment against the Defendant Billy Wilson in the amount of FIFTY THOUSAND AND 00/100 (\$50,000) DOLLARS for rent for the lease term commencing May 15, 2002 and ending May 14, 2003;

(b) For judgment against the Defendant Billy Wilson for a sum equivalent to the Horry County ad valorem real property taxes assessed against the subject property during the period commencing January 1, 2002 and ending May 14, 2003;

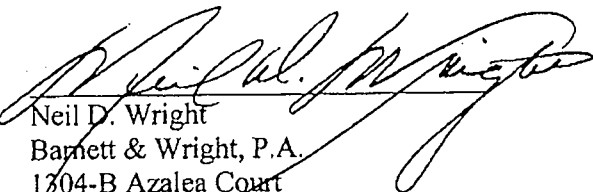
(c) For judgment against the Defendant Billy Wilson for the costs incurred by the Plaintiff to remove debris from the Leased Premises for the purpose of reletting the Leased Premises;

(d) For judgment against the Defendant Billy Wilson for pre-judgment interest at the legal contract rate accrued on the past due rent in the amount of FIFTY THOUSAND AND 00/100 (\$50,000.00) DOLLARS and the Horry County ad valorem real property taxes assessed against the subject property during the period commencing January 1, 2002 and ending May 14, 2003;

(e) For judgment against the Defendant Billy Wilson costs of collection and for the reasonable attorney's fees incurred by the Plaintiff in the prosecution of this action; and,

(f) For such other and further relief as this Court may deem just and proper.

Myrtle Beach, SC
Dated: May 13, 2005

A handwritten signature in black ink, appearing to read "Neil D. Wright", is written over the printed name and address.

Neil D. Wright
Barnett & Wright, P.A.
1304-B Azalea Court
Myrtle Beach, SC 29577
(843) 449-0781
Attorneys for the Plaintiff
Leon P. Butler

STATE OF SOUTH CAROLINA)

COUNTY OF GEORGETOWN)

LEON P. BUTLER, JR.,)

Plaintiff,)

vs.)

BILLY WILSON,)

Defendant.)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2006 CP 22-422

ANSWER AND COUNTERCLAIM
OF DEFENDANT

COMES NOW the Defendant, answering the Plaintiff's Complaint, and alleges as follows:

1. The Defendant admits the allegations of paragraphs 1, 2, 3, 5, 6, 7, 8, 9, 11, 13, 15, and 16 of Plaintiff's Complaint.
2. The Defendant denies the allegations of paragraphs 12, 14, 17, 18, 20, and 21, including subparagraphs a through f, inclusive of Plaintiff's Complaint.
3. Defendant can neither admit or deny the allegations of paragraph 4 as it is a legal conclusion.
4. Defendant admits the allegation of paragraph 10 of Plaintiff's Complaint, except that he denies that he "abandoned" the premises.
5. Defendant admits only that paragraph 19 is a paraphrasing of the provisions of Section 18 of Exhibit "A" but denies that Defendant is entitled to any relief thereon.
6. Any other allegations set forth in Plaintiff's Complaint, not specifically admitted, are denied.

**FIRST AFFIRMATIVE DEFENSE
FAILURE TO MITIGATE DAMAGES**

The Defendant incorporates the allegations set forth in paragraphs 1 through 6, above, and would further allege:

7. That the Defendant sent his agent, Charlie Ray to collect rent. Defendant told Plaintiff's agent, at least 90 days before the renewal date in 2002, that he could no longer stay in business and that he would be terminating the lease. Defendant paid Plaintiff's agent the sum of \$25,000.00 as rental for one-half (½) year's lease payment.

8. That Plaintiff refused and failed to attempt to rent or lease the subject premises after Defendant terminated the lease. Plaintiff has failed his common law duty to mitigate his damages by re-letting the premises.

**SECOND AFFIRMATIVE DEFENSE
ACCORD AND SATISFACTION**

The Defendant incorporates the allegations set forth in paragraphs 1 through 8, above, and would further allege:

9. That the Defendant has paid to the Plaintiff, the sum of \$25,000.00 which is full and adequate compensation for the benefit received by the Defendant.

10. Plaintiff's claim should be extinguished as being satisfied.

**THIRD AFFIRMATIVE DEFENSE
WAIVER**

The Defendant incorporates the allegations set forth in paragraphs 1 through 10, above, and would further allege:

11. The Plaintiff, by accepting \$25,000.00 for the one-half (½) year rent, and by his silence as to Defendant's intentions conveyed to Plaintiff's agent, has waived and condoned any default alleged on the part of Defendant.

**FOURTH AFFIRMATIVE DEFENSE
LACHES**

The Defendant incorporates the allegations set forth in paragraphs 1 through 11, above, and would further allege:

12. That the Plaintiff has failed to enforce his rights under the lease, when they became ripe, to the prejudice of the Defendant.

13. The Plaintiff is guilty of laches.

**FIFTH AFFIRMATIVE DEFENSE
FAILURE TO STATE A CAUSE OF ACTION**

The Defendant incorporates the allegations set forth in paragraphs 1 through 13, above, and would further allege:

14. The allegations set forth in Plaintiff's Complaint fail to set forth facts sufficient to state a cause of action.

15. Plaintiff's Complaint should be dismissed for failure to state a cause of action.

**SIXTH AFFIRMATIVE DEFENSE
BY WAY OF COUNTERCLAIM
SET OFF**

The Defendant incorporates the allegations set forth in paragraphs 1 through 15, above, and would further allege:

16. The Defendant has already paid to the Plaintiff, the sum of \$25,000.00 as rent on the subject property.

17. If the Court enters judgment against the Defendant, on Plaintiffs Complaint, the Defendant is entitled to an off set against that judgment of \$25,000.00.

**SEVENTH AFFIRMATIVE DEFENSE
BY WAY OF COUNTERCLAIM
NOVATION**

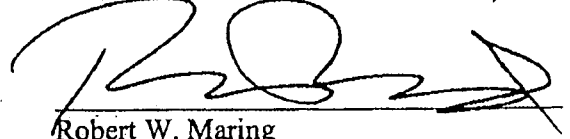
The Defendant incorporates the allegations set forth in paragraphs 1 through 17, above, and would further allege:

18. The Plaintiff and Defendant had a valid lease agreement from 1998 until 2002.
19. In 2002, the Defendant timely gave notice to the Plaintiff he would not be renewing the lease. Defendant paid Plaintiff, \$25,000.00 for one-half (½) years lease.
20. By accepting the Defendant's money and standing silent as to his intention not to renew the lease, the Plaintiff assented to a new contract between the parties.
21. The Defendant has fully performed the terms of the new contract. The Plaintiff is not entitled to further compensation.

WHEREFORE, Defendant prays for an order of this Court as follows:

- a. for dismissal of Plaintiff's Complaint;
- b. for judgment against the Plaintiff on Defendants affirmative defenses of failure to mitigate damages, accord and satisfaction, waiver and laches;
- c. for a judgment granting the Defendant a set-off against any judgment in favor of the Plaintiff; and
- d. for a declaration of this Court that the parties were no longer subject to the original lease agreement and that they had entered into a new agreement in 2002 to which the Defendant had fully performed.

DUNCAN, CROSBY & MARING, LLC

A handwritten signature in black ink, appearing to read 'Robert W. Maring', is written over a horizontal line.

Robert W. Maring
P.O. Box 736
Georgetown, SC 29442
Telephone: 843-546-1212
Facsimile: 843-545-0177
Attorney for the Defendant

Georgetown, South Carolina
June 7, 2006

PLAINTIFF'S REPLY TO
DEFENDANT'S COUNTERCLAIM

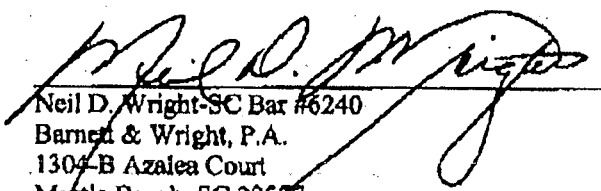
allegations set forth in the Defendant's Affirmative Defenses One through Six that are incorporated by reference in the Defendant's Seventh Affirmative Defense by way of Counterclaim-Novation and demands strict proof thereof.

4. Further replying to the allegations contained in the Defendant's Seventh Affirmative Defense by way of Counterclaim-Novation, the Plaintiff Leon P. Butler, Jr., admits only so much of the allegations set forth in Paragraph 18 of the Defendant's Seventh Affirmative Defense by way of Counterclaim-Novation as allege that a valid lease agreement existed between the Plaintiff and the Defendant. To the extent that the allegations contained in Paragraph 18 of the Defendant's Seventh Affirmative Defense by way of Counterclaim-Novation may be construed to allege certain time parameters concerning the commencement and the termination of the said lease agreement, the Plaintiff denies the allegations and demands strict proof thereof.

5. Further replying to the allegations contained in the Defendant's Seventh Affirmative Defense by way of Counterclaim-Novation, the Plaintiff Leon P. Butler, Jr., denies the allegations set forth in Paragraphs 19, 20, and 21 of the Defendant's Seventh Affirmative Defense by way of Counterclaim-Novation and demands strict proof thereof.

WHEREFORE, having fully replied to the Counterclaim of the Defendant, the Plaintiff prays that the Counterclaim of the Defendant be dismissed and that the Plaintiff be granted the relief requested in the Plaintiff's Complaint in this action.

Myrtle Beach, SC
Dated: July 6, 2006



Neil D. Wright-SC Bar #6240
Barnett & Wright, P.A.
1304-B Azalea Court
Myrtle Beach, SC 29577
(843) 449-0781
Attorneys for the Plaintiff Leon P. Butler, Jr.

STATE OF SOUTH CAROLINA IN THE COURT OF COMMON
PLEAS

COUNTY OF GEORGETOWN

06-CP-26-422

LEON P. BUTLER, JR.,

PLAINTIFF,

-VS-

BILLY WILSON,

DEFENDANT,

COPY

DEPOSITION OF
JOSEPH CHARLEY RAY

OCTOBER 18, 2007
1:05 P.M. TO 2:05 P.M.

TAKEN BY JERRY S. MABRY, NOTARY PUBLIC AND
VERBATIM REPORTER AT THE MCCUTCHEON LAW FIRM, 208
ELM STREET, CONWAY, SOUTH CAROLINA.

Mabry Court Reporting
Verbatim Reporters

Jerry S. Mabry
1607 Magnolia Drive
N. Myrtle Beach, SC 29582
(843) 249-2831

[This page intentionally left blank]

[This page intentionally left blank]

[This page intentionally left blank]

[This page intentionally left blank]

[This page intentionally left blank]

1 WILSON?

2 A YES, I KNOW WE DID.

3 Q WHAT WOULD HAVE BEEN THE REASON FOR YOU
4 SPEAKING TO MR. WILSON SUBSEQUENT TO HIS SECOND
5 PAYMENT OF HIS \$25,000.00 INSTALLMENT?

6 A THE PURPOSE WOULD HAVE BEEN TO COLLECT THAT
7 RENT.

8 Q WHEN WAS THE NEXT TIME THAT YOU RECALL THAT YOU
9 SPOKE WITH MR. WILSON?

10 A I DON'T HAVE A RECOLLECTION.

11 Q WOULD IT HAVE BEEN AFTER THE MAY 15, 2002 LEASE
12 PERIOD COMMENCED?

13 A I DON'T KNOW.

14 Q IT APPEARS FROM YOUR CORRESPONDENCE THAT Y'ALL
15 DISCUSSED THIS IN MAY OF 2001, THIS BIFURCATING
16 OF THE RENT? Y'ALL AGREED TO THAT? WELL, I
17 SAY "YOU", MR. BUTLER AND MR. WILSON AGREED TO
18 THAT. YOU WROTE THE LETTER SAYING, OKAY, YOU
19 GUYS AGREE TO THIS. YOU'RE PAYING A \$1500.00
20 SERVICE CHARGE. THAT WAS IN MAY OF 2001.

21 A OKAY.

22 Q WHAT IS THE NEXT TIME YOU CAN RECALL TALKING TO
23 MR. WILSON?

24 A I DON'T RECALL.

25 Q DID YOU EVER SPEAK TO MR. WILSON SUBSEQUENT TO

1 THAT DATE?

2 A I'M SURE WE DID, BUT I CANNOT TELL YOU THE GIST
3 OF THE CONVERSATION.

4 Q YOU WERE NOT MANAGING THE PROPERTY, CORRECT?

5 A THAT'S CORRECT.

6 Q YOU REALLY HAD NO REASON TO CONTACT MR. WILSON
7 REGARDING HOW THE PROPERTY WAS GOING? DO YOU
8 HAVE ANY PROBLEMS WITH THE PROPERTY? I MEAN,
9 YOU WERE MANAGING THE PROPERTY, CORRECT?

10 A CORRECT.

11 Q BASICALLY YOUR JOB WAS, COLLECT THE RENT WHEN
12 IT WAS DUE?

13 A THAT ACTUALLY WASN'T MY JOB, BUT I DID ASSIST.

14 Q YOU DID ASSIST IN THAT?

15 A YES.

16 Q YOU REALLY HAD NO REASON TO TALK TO MR. WILSON,
17 IS THAT CORRECT?

18 A NO.

19 Q DID Y'ALL HAVE A SOCIAL RELATIONSHIP?

20 A WE DID.

21 Q HOW ABOUT IN 2000 AND 2002, DO YOU RECALL
22 WHETHER OR NOT Y'ALL HAD A SOCIAL RELATIONSHIP
23 THEN? DID Y'ALL PLAY GOLF TOGETHER?

24 A NO.

25 Q DID YOU GO FISHING THAT YEAR?

1 A YES.

2 Q IN 2002, DID YOU GO FISHING?

3 A YES, SIR.

4 Q I SAW A LETTER. I BELIEVE THERE'S A LETTER IN
5 HERE THAT SAID SOMETHING ABOUT THAT.

6 A I NEED TO CORRECT THAT. I PAID HIM TO GO
7 FISHING. I HIRED HIM TO GO FISHING. SO WE HAD
8 A BUSINESS ARRANGEMENT. IT WAS A GOOD TRIP.

9 Q YOU WENT AS WELL?

10 A YES. WE'RE TALKING ABOUT FISHING IN SANTEE.

11 Q DO YOU KNOW WHEN THAT TRIP WOULD HAVE BEEN?

12 A NO.

13 Q OTHER THAN THAT ONE FISHING TRIP WITH MR.
14 WILSON, DID YOU HAVE ANY OTHER SOCIAL CONTACT
15 WITH HIM?

16 A I DON'T RECALL ANY.

17 Q YOU DIDN'T PLAY GOLF TOGETHER OR DO ANYTHING
18 ELSE TOGETHER?

19 A NO.

20 Q YOU JUST RECALL THE ONE FISHING TRIP?

21 A YES.

22 Q OTHER THAN THE ONE FISHING TRIP, DO YOU RECALL
23 --- YOU DON'T HAVE ANY RECOLLECTION OF SPEAKING
24 TO MR. WILSON FROM THE TIME THAT YOU WROTE THE
25 LETTER IN MAY OF 2001 UNTIL THE FOLLOWING YEAR,

[This page intentionally left blank]

[This page intentionally left blank]

[This page intentionally left blank]

[This page intentionally left blank]

[This page intentionally left blank]

[This page intentionally left blank]

[This page intentionally left blank]

[This page intentionally left blank]

STATE OF SOUTH CAROLINA

COUNTY OF GEORGETOWN

LEON P. BUTLER, JR.,

Plaintiff,

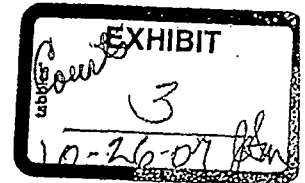
vs.

BILLY WILSON,

Defendant.

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2006-CP-22-422

TRIAL BRIEF



FACTUAL STATEMENT

Plaintiff/Lessor Leon P. Butler, Jr., and Defendant/Lessee Billy Wilson entered into a contract for the lease of a certain piece of property. Under the terms of the lease, Defendant had the right to extend the lease each year for another year (limited number of years) provided he gave Plaintiff notice in writing of his intent to possess the property for another year.

Defendant gave verbal notice to Plaintiff's agent, Charley Ray (agency is not disputed), that he did not intend to exercise his option to possess the property for another year (note that despite a provision in the lease that notice must be in writing, our courts have held that verbal notice is sufficient). Subsequently, Agent Ray sent a letter to Defendant informing him to pay the rent or vacate. Later, a letter was sent to Plaintiff's attorney by Defendant's attorney stating that the lease was ended and Defendant would not be re-entering the property.

Despite the notice to Plaintiff's agent, notice to Plaintiff's attorney and personal knowledge of Plaintiff and his agent, Charley Ray, that the Defendant had in fact vacated the property, the Plaintiff brought this suit three years later.

Plaintiff did not attempt to re-lease the premises or at least did not take reasonable steps to re-lease the said premises during the period for which he is suing the Defendant for rent and pre-judgment interest.

DUTY TO MITIGATE DAMAGES

The law is well settled law in South Carolina that a party claiming a breach of contract is under a duty to minimize his damages. *United States Rubber Company v White Tire Company, Inc.*, 231 S. C. 84, 97 S. E. 2d 403 (1956). But this concept of a duty on the part of the plaintiff to

mitigate damages is broader than a contract case; it extends into other areas of the law where damages are claimed. *Rathborne, Hair & Ridgway Co. v Williams*, 59 Supp. 1 (E.D.S.C. 1945) and *B. H. Hutson v. Cummins Carolinas, Inc.*, 280 S. C. 552, 314 S. E. 2d 19 (CT. App. 1984)

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*.

PREJUDGMENT INTEREST

A plaintiff is not entitled to prejudgment interest unless it is in his contract or allowed by statute.

Under the facts of this case, there is not a contractual right to prejudgment interest because it is not contained in the terms of the contract.

There is no applicable statute in South Carolina allowing prejudgment interest in this matter. The account stated and sum certain provision of 34-31-20 does not apply for the following reasons. In the first place this is not an account. In addition, the plaintiff in this matter is under a duty to mitigate damages. As a matter of law, which means despite the terms of the contract, there was an intermediate question, which had to be decided before the measure of damages could be ascertained. The measure of damages could only be measured after that determination was made. *Vaughn Development, Inc. v. Westvaco Development Corp.*, 372 S. C. 576, 642 S. E. 2d 757 (2007).

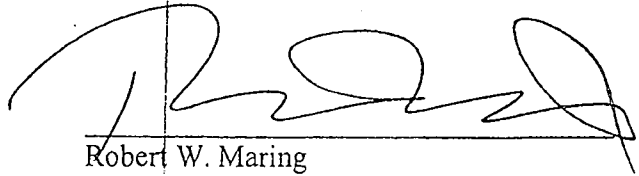
A liquidated claim is not involved in this case because monies were not due in a fixed amount at the time the contract was entered into. Despite the amount mentioned in the contract, the amount due the plaintiff by the defendant is contingent upon whether the plaintiff re-leases the property. Thus, the amount due is affected by the duty of minimizing damages. If it were otherwise, there would be no duty to mitigate in this case and as a matter of law there does exist such a duty.

VERBAL MODIFICATION OF A WRITTEN CONTRACT

It is well settled law in South Carolina that a written contract can be modified verbally even though there is a provision in the contract that states that any modification must be in written. *Carolina Amusement Company, Inc. v Connecticut Life Insurance Company*, 313 S. C. 215, 437 S.

E. 2d 122(1993) and *The South Carolina National Bank v Silks, et al.*, 295 S. C. 107, 367 S. E. 2d 421 (1988).

MARING LAW FIRM, P.A.



Robert W. Maring
1130 Highmarket Street
P.O. Box 478
Georgetown, SC 29442-0478
Telephone: (843) 545-9544
Facsimile: (843) 545-9735
Attorney for

Georgetown, SC

October 25, 2007

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

STATE OF SOUTH CAROLINA IN THE COURT OF COMMON
COUNTY OF GEORGETOWN PLEAS
 FIFTEENTH JUDICIAL
 CIRCUIT
 06-CP-22-422

LEON P. BUTLER, JR.
 PLAINTIFF,
 -VS-
BILLY WILSON,
 DEFENDANT.

**CONSENT ORDER OF REFERENCE TO SPECIAL REFEREE
WITH AUTHORITY TO ENTER FINAL JUDGMENT**

TAKEN BY JERRY S. MABRY, VERBATIM REPORTER AND
NOTARY PUBLIC FOR THE STATE OF SOUTH CAROLINA ON
OCTOBER 26, 2007 IN THE OFFICE OF WILLARD D. HANNA,
GLENN'S BAY DRIVE, SURFSIDE BEACH, SOUTH CAROLINA.

****THIS IS AN OFFICIAL TRANSCRIPT GOVERNED BY
25A SOUTH CAROLINA CODE ANN. REGS. 67-615D (SUPP.
2000). THE UNAUTHORIZED COPYING OF THIS DOCUMENT
IS DEEMED TO BE CONVERSION OF AN ASSET BELONGING TO
THE COURT REPORTER.**

A P P E A R A N C E S

FOR THE PLAINTIFF: NEIL D. WRIGHT, ESQ.
1304-B AZALEA COURT
MYRTLE BEACH, S.C. 29577

FOR THE DEFENDANT: ROBERT W. MARING, ESQ.
P. O. BOX 478
GEORGETOWN, S.C. 29442

INDEX TO EXAMINATION

CHARLEY RAY:

DIRECT EXAMINATION BY MR. WRIGHT PAGE 9
CROSS EXAMINATION BY MR. WARING PAGE 26
RE-DIRECT EXAMINATION BY MR. WRIGHT PAGE 43
RE-CROSS EXAMINATION BY MR. WARING PAGE 46
RE-RE-DIRECT EXAMINATION BY MR. WRIGHT . PAGE 49

LEON BUTLER:

DIRECT EXAMINATION BY MR. WRIGHT PAGE 50
CROSS EXAMINATION BY MR. WARING PAGE 72
RE-DIRECT EXAMINATION BY MR. WRIGHT PAGE 83

WILLIAM WILSON:

DIRECT EXAMINATION BY MR. WARING PAGE 87
CROSS EXAMINATION BY MR. WRIGHT PAGE 104

JACKIE WOODBURY:

DIRECT EXAMINATION BY MR. WARING PAGE 133
CROSS EXAMINATION BY MR. WRIGHT PAGE 139

1 BETTY BRYANT:

2 DIRECT EXAMINATION BY MR. WARING PAGE 140
3 CROSS EXAMINATION BY MR. WRIGHT PAGE 144

6
7 EXHIBITS

8 COURT'S:

- 9 1. COURT'S ORDER OF REFERENCE TO
10 SPECIAL REFEREE WITH AUTHORI-
11 ZATION TO ENTER FINAL JUDGMENT PAGE 4
12 2. GROUND LEASE AGREEMENT PAGE 5
13 3. TRIAL BRIEF PAGE 6

14 PLAINTIFF'S:

- 15 30. INVOICE FROM RAY REALTY TO
16 SANTEE MOBILE HOMES DATED
9/17/01 PAGE 22
17 31. COPY OF TWO CHECKS PAGE 23
18 32. WARRANTY DEED FOR 4 LOTS PAGE 120
19 33. WARRANTY DEED FOR 1 LOT PAGE 120
20 36. INETBA INVOICE PAGE 133

21
22 DEFENDANT'S:

- 23 10. LETTER FROM RAY REALTY TO WILSON
24 DATED 10/20/98 PAGE 33
25 11. LIST OF INVENTORY PAGE 143

1 MR. HANNA: ON THE NOTICE FROM THE
2 PLEADINGS THIS MORNING IN THE ORDER OF
3 REFERENCE I DIDN'T GET A SIGNED COPY,
4 BUT THE CONSENT ORDER HAS BEEN SIGNED.
5 I HAVE A COPY IN FRONT OF ME. I'D LIKE
6 TO MAKE THAT A PART OF THE RECORD TO
7 START WITH.

8 MR. HANNA: I NOTICE FROM THE ORDER THAT
9 ALL MOTIONS HAD TO BE FILED PRIOR TO
10 THIS PROCEEDING AND THERE ARE NONE.

11 MR. WARING: I HAVE NONE, YOUR HONOR.

12 MR. WRIGHT: NOR HAVE I, YOUR HONOR.

13 MR. HANNA: I CAN ASSUME FROM THAT I CAN
14 MARK THIS AS COURT'S EXHIBIT NUMBER "1".
15 COURT'S EXHIBIT NUMBER "1" IS BEING THE
16 STIPULATED DOCUMENTS.

17 MR. WRIGHT: THAT'S FINE FROM OUR STAND-
18 POINT.

19 MR. WARING: THAT'S FINE, YOUR HONOR.

20 CONSENT ORDER OF REFERENCE
21 TO SPECIAL REFEREE WITH
22 AUTHORITY TO ENTER FINAL
23 JUDGMENT MARKED FOR IDEN-
24 TIFICATION AND INTRODUCED
25 INTO EVIDENCE AS COURT'S

1 EXHIBIT "1".

2 MR. HANNA: IN MY REVIEW OF THE DOCU-
3 MENTS, I DO NOT SEE AN EXECUTED LEASE
4 AGREEMENT. LET'S MARK THAT AS COURT'S
5 EXHIBIT NUMBER "2". FOR THE RECORD
6 ALSO, WE HAVE OPENED THE ORIGINAL
7 DEPOSITION OF MR. WILLIAM WILSON, AND
8 THE LEASE AGREEMENT THAT IS ATTACHED IS
9 THE AGREEMENT THAT WAS SIGNED BY THE
10 PARTIES. AM I CORRECT, GENTLEMEN?

11 MR. WRIGHT: YES.

12 GROUND LEASE AGREEMENT
13 MARKED FOR IDENTIFICA-
14 TION AND INTRODUCED INTO
15 EVIDENCE AS COURT'S EXHIBIT
16 "2".

17 MR. HANNA: AM I CORRECT IN MY REVIEW OF
18 COURT'S EXHIBIT NUMBER "2" THAT THERE IS
19 NOT AN EXECUTED COPY IN THAT? LET'S
20 MAKE THE LEASE THAT IS ATTACHED TO MR.
21 WILSON'S ORIGINAL DEPOSITION, THE LEASE
22 ITSELF, WHICH MAKES IT COURT'S EXHIBIT
23 NUMBER "3" WITHOUT OBJECTION FROM BOTH
24 PARTIES?

25 MR. WRIGHT: NO OBJECTION, YOUR HONOR.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. HANNA: MR. MARING?

MR. WARING: NO OBJECTION. WHAT THIS IS
IS THE CASE LAW SUPPORTING THE TRIAL
BRIEF, YOUR HONOR.

TRIAL BRIEF MARKED FOR
IDENTIFICATION AND
INTRODUCED INTO EVIDENCE
AS COURT'S EXHIBIT "3".

MR. HANNA: NOW, AS I UNDERSTAND IT, MR.
WARING HAS MOVED TO SEQUESTER THE
WITNESSES. WHAT DO YOU SAY ABOUT THAT,
MR. WRIGHT?

MR. WRIGHT: I HAVE NO PROBLEM WITH
THAT.

MR. HANNA: AS I UNDERSTAND THE RULES,
THAT DOES NOT APPLY TO THE PARTIES BUT
THEY ARE TO BE IN THE ROOM AT ALL TIMES.

MR. WARING: THAT'S MY UNDERSTANDING,
YOUR HONOR.

MR. HANNA: ANY OTHER HOUSEKEEPING
MEASURES WE NEED TO GET INTO BEFORE WE
GET STARTED?

MR. WARING: YOUR HONOR, JUST BRIEFLY
FOR THE DEFENDANT. I JUST WANT THE

1 COURT TO TAKE JUDICIAL NOTICE AS TO THE
2 LAW ON THE DUTY TO MITIGATE DAMAGES.
3 IT'S PROVIDED FOR IN MY TRIAL BRIEF.
4 NOW, THERE IS CASE LAW I SHOULD SUPPLY
5 TO THE COURT AND TO MR. WRIGHT,
6 REGARDING NOT ONLY THE DUTY TO MITIGATE
7 BUT ALSO ON THE INABILITY PARDONS THE
8 CONTRACT AWAY THE DUTY TO MITIGATE.
9 CASE LAW HAS BEEN PROVIDED TO THE COURT
10 THAT TAKES THOSE TWO POSITIONS. THE
11 COURT WOULD TAKE JUDICIAL NOTICE AS TO
12 THE LAWS OF THE STATE OF SOUTH CAROLINA.

13 MR. HANNA: WHEN I RECEIVED YOUR TRIAL
14 BRIEF THIS MORNING, A COPY HAS BEEN
15 SUPPLIED TO MR. WRIGHT.

16 MR. WRIGHT: RECEIVED THAT THIS
17 MORNING.

18 MR. HANNA: HE'S NOT HAD A CHANCE TO
19 REVIEW IT. BECAUSE HE HAS NOT HAD A
20 CHANCE TO REVIEW IT IN ADVANCE OF THE
21 HEARING, I'M GONNA GIVE YOU TO THE END
22 OF NEXT WEEK TO RESPOND TO ANY CASE LAW,
23 AND THEN I'LL GIVE YOU SEVEN DAYS AFTER
24 THAT TO RESPOND ONLY TO THE THINGS HE
25 BRINGS UP NEW IN HIS CASE. SO, Y'ALL

1 CAN ADDRESS THOSE ISSUES AND FLUSH THOSE
2 OUT.

3 MR. WARING: THAT'S FINE. LIKEWISE,
4 YOUR HONOR, THE OTHER ISSUE IS TAKING
5 JUDICIAL NOTICE AS TO THE LAW THAT ALLOWS
6 ORAL MODIFICATION OF CONTRACTS. THE LAW
7 OF SOUTH CAROLINA RECOGNIZES THAT YOU CAN
8 ORALLY MODIFY A WRITTEN CONTRACT.

9 MR. HANNA: BOTH OF THOSE ARE INCLUDED IN
10 THE BRIEF ALSO?

11 MR. WARING: YES, SIR.

12 MR. HANNA: I'M GOING TO DIRECT MR.
13 WRIGHT TO RESPOND TO BOTH THOSE ISSUES OR
14 ANY ISSUES AS CONTAINED IN THE BRIEF
15 WITHIN SEVEN DAYS. AND LIKEWISE, YOU GET
16 A CHANCE TO RESPOND.

17 MR. WARING: THANK YOU, YOUR HONOR.

18 MR. HANNA: ANYTHING ELSE? NO MORE HOUSE
19 KEEPING? ARE YOU READY?

20 MR. WRIGHT: READY, YOUR HONOR.

21 MR. WARING: READY.

22 MR. HANNA: IF YOU WILL CALL THE PARTIES
23 IN, WE WILL CALL YOUR FIRST WITNESS.

24 MR. WRIGHT: YOUR HONOR, AT THIS TIME,
25 THE PLAINTIFF WOULD CALL MR. CHARLEY RAY.

1 CHARLIE RAY, HAVING BEEN DULY SWORN, TESTIFIED AS
2 FOLLOWS:

3 DIRECT EXAMINATION BY MR. WRIGHT:

4 Q MR. RAY, WOULD YOU PLEASE TELL THE COURT WHAT
5 PROFESSION YOU'RE INVOLVED IN?

6 A REAL ESTATE.

7 Q HAVE YOU HAD OCCASION IN YOUR PROFESSION TO
8 PERFORM ANY SERVICES FOR THE PLAINTIFF, MR.
9 LEON BUTLER?

10 A I HAVE.

11 Q WHEN DID YOU FIRST HAVE OCCASION TO PERFORM
12 SERVICES FOR MR. BUTLER?

13 A I CAN'T TELL YOU THE DATE. I NEED REFRESHING.
14 I MAY HAVE WORKED FOR HIM ON SOMETHING PRIOR
15 TO THE MATTER HERE.

16 Q ALRIGHT. LET ME SEE IF THIS WILL REFRESH YOUR
17 RECOLLECTION. I ASK YOU TO LOOK AT DEFEN-
18 DANT'S EXHIBIT NUMBER "9", AND DEFENDANT'S
19 EXHIBIT NUMBER "2".

20 A MAY OF '96.

21 Q WHAT SERVICES, IF ANY, DID YOU AGREE TO PER-
22 FORM FOR MR. BUTLER IN MAY OF 1996?

23 A I AGREED TO WORK TOWARD THE LEASING OF
24 PROPERTY FROM UP IN LITTLE RIVER.

25 Q TO YOUR RECOLLECTION, WAS THAT A TRACT OF

1 UNDEVELOPED LAND?

2 A IT WAS A VACANT TRACT.

3 Q WHAT DID YOU DO FOR MR. BUTLER IN AN ATTEMPT
4 TO MARKET THAT PIECE OF PROPERTY?

5 A I PLACED IT IN THE MULTIPLE LISTING SERVICE.
6 I PLACED A 'FOR SALE' SIGN ON IT AND DID SOME
7 ADVERTISING.

8 Q DID YOU SUBSEQUENTLY RECEIVE ANY INQUIRIES
9 CONCERNING THAT PROPERTY FROM THE DEFENDANT,
10 BILLY WILSON?

11 A YES.

12 Q NOW, WITH RESPECT TO YOUR RELATIONSHIP WITH
13 MR. BUTLER CONCERNING THAT PROPERTY, DID YOU
14 HAVE THE FINAL AUTHORITY TO MAKE AGREEMENTS
15 CONCERNING THAT PROPERTY? OR AS BETWEEN YOU
16 AND MR. BUTLER, WHO RESERVED THE AUTHORITY TO
17 MAKE FINAL AGREEMENTS CONCERNING THE PROPERTY?

18 A WELL, IT WAS A TYPICAL AGENT RELATIONSHIP. I
19 DID NOT HAVE THE AUTHORITY TO MAKE DECISIONS
20 FOR HIM. HE HAD TO ... HE MADE THE DECISIONS.

21 Q IN THE COURSE OF YOUR DEALINGS WITH MR. WILSON
22 ON THIS PROPERTY, COULD YOU TELL THE COURT
23 PLEASE, WHAT YOUR CUSTOM WAS WITH RESPECT TO
24 WHETHER OR NOT YOU REDUCED PROPOSALS TO
25 WRITING?

1 A YES. WE HAD A, WHAT I CALL A SKELETON LETTER
2 OF INTENT. OUTLINING THE TERMS OF THE
3 PROPOSED LEASE AGREEMENT OR OFFER FROM MR.
4 WILSON. THAT WAS SUBMITTED TO MR. BUTLER FOR
5 HIS REVIEW AND HOPEFULLY APPROVAL.

6 Q WOULD YOU LOOK PLEASE AT PLAINTIFF'S EXHIBIT
7 NUMBER "1" AND ASK IF YOU CAN IDENTIFY THAT
8 DOCUMENT?

9 A YES, I CAN.

10 Q WHAT IS THAT DOCUMENT?

11 A OF COURSE, A SURVEY OF THE PROPERTY, SURVEY OF
12 THE PROPERTY, AND THEN A ... AT THAT POINT I'M
13 THINKING, IN LOOKING AT THE FAX COVER SHEET,
14 IT'S A PROPOSED, AT THAT POINT, LETTER OF
15 INTENT TO LEASE THE PROPERTY.

16 Q WHAT IS THE DATE OF THAT CORRESPONDENCE?

17 A THAT IS FEBRUARY 24TH.

18 Q DID YOU SUBSEQUENTLY TAKE THAT PROPOSAL TO MR.
19 BUTLER FOR HIS CONSIDERATION?

20 A THIS ONE IS NOT SIGNED. I DON'T KNOW. I KNOW
21 THERE WERE SOME CHANGES ALONG THE WAY AT SOME
22 POINT. I'M THINKING I PROBABLY DID, BUT THIS
23 ONE IS NOT THE SIGNED COPY AND I'M THINKING IT
24 DID GO TO HIM. I DON'T KNOW IF THERE WERE ANY
25 CHANGES FROM THE PROPOSAL TO WHAT WAS ACTUALLY

1 SUBMITTED TO HIM. I RECALL THERE WERE SOME
2 WORKING CHANGES ALONG THE WAY.

3 Q AND AGAIN, THE DATE OF THAT INITIAL PROPOSAL?

4 A THE FAX IS DATED FEBRUARY 24TH. THE LETTER OF
5 INTENT IS DATED FEBRUARY 25, '98.

6 Q ALRIGHT. I'LL ASK PLEASE IF YOU WOULD TAKE A
7 LOOK AT A DOCUMENT THAT IS PLAINLY STIPULATED
8 EXHIBIT NUMBER "2".

9 A OKAY.

10 Q CAN YOU IDENTIFY THAT DOCUMENT?

11 A YES. THIS IS A CHECK FOR \$3,000.00 MADE PAY-
12 ABLE TO MY OFFICE FOR PART OF THE DEPOSIT ON
13 THAT LEASE AGREEMENT.

14 Q WHO FORWARDED THE DEPOSIT TO YOU?

15 A I CAN'T SAY OTHER THAN WHAT I CAN READ. IT
16 SAYS, SANTEE DISCOUNT HOMES ISSUED THE CHECK.
17 THAT THIS IS A COPY OF. I'M ASSUMING THAT
18 THEY FORWARDED IT ON THE BANK.

19 Q OKAY. AND SANTEE DISCOUNT HOMES, DO YOU KNOW
20 WHETHER MR. WILSON WAS AFFILIATED WITH THAT
21 COMPANY?

22 A THAT'S HIS COMPANY AS I UNDERSTAND IT.

23 Q IF YOU WOULD PLEASE TAKE A LOOK AT PLAINTIFF'S
24 STIPULATED EXHIBIT NUMBER "3".

25 A OKAY. I GOT IT. YES, SIR.

1 Q CAN YOU IDENTIFY THAT AS THE FIRST EXECUTED
2 LETTER OF INTENT BETWEEN MR. WILSON AND MR.
3 BUTLER?

4 A YES.

5 Q UNDER THAT ARRANGEMENT, HOW WAS THE LEASE TO
6 BE SET UP?

7 A THE LEASE WAS TO BE PREPARED IN ACCORDANCE
8 WITH THE SKELETON OR THE FRAME THAT'S OUTLINED
9 HERE IN THE LETTER OF INTENT.

10 Q AND THAT WOULD BE EXHIBIT NUMBER "3"?

11 A YES.

12 Q WOULD YOU LOOK AT PLAINTIFF'S STIPULATED
13 EXHIBIT NUMBER "5".

14 A OKAY.

15 Q ARE YOU ABLE TO IDENTIFY THAT DOCUMENT?

16 A YES. IT'S PART OF THE NEGOTIATIONS MOVING
17 TOWARDS A FORMAL LEASE AGREEMENT.

18 Q WERE THERE ANY CHANGES CONCERNING THE AMOUNT
19 OF RENT?

20 A YES. IN LOOKING AT THIS, WHAT HAPPENED WAS
21 THAT MR. WILSON HAD OFFERED THIRTY-SIX
22 THOUSAND FOR THE FIRST TWO YEARS OR THREE
23 YEARS. IT MUST HAVE BEEN THE FIRST TWO YEARS,
24 AND IT WAS AMENDED TO MAKE IT FORTY-TWO FIVE,
25 WHICH WAS ACCEPTABLE WITH MR. BUTLER FOR YEARS

1 ONE, TWO AND THREE, WITH YEARS FOUR THROUGH
2 SEVEN BEING FIFTY THOUSAND.

3 Q COULD YOU TELL US WHETHER OR NOT THERE WAS A
4 CHANGE MADE TO THE PROPOSAL TO GIVE MR. WILSON
5 ADDITIONAL OPTIONS TO EXPAND THE TERM OF THE
6 LEASE.

7 A OH. THE ORIGINAL ... THE TERM OF THE LEASE
8 WAS FOR ONE YEAR. IT'S A ONE YEAR TERM WITH
9 FOURTEEN ONE YEAR OPTIONS TO RENEW. IS THAT
10 WHAT YOU'RE REFERRING TO?

11 Q THAT'S RIGHT. DO YOU RECALL IF THAT WAS A
12 CHANGE FROM THE EARLIER PROPOSAL?

13 A I DON'T BELIEVE IT WAS.

14 Q OKAY. LET ME ASK YOU TO TAKE A LOOK AT NUMBER
15 "1" AGAIN.

16 A OKAY. IT WENT FROM ELEVEN TO FOURTEEN. OKAY.
17 I SEE IT'S PENCILED THROUGH, YES.

18 Q NOW, UNDER THOSE PROPOSALS, WHO HAD THE
19 OBLIGATION TO PROVIDE NOTICE IF THERE WAS
20 GOING TO BE A CONTINUATION OF THE LEASE?

21 A WELL, THE WAY ... MY UNDERSTANDING AND THE WAY
22 WE WERE DOING IT, IT WAS A ONE YEAR LEASE WITH
23 THE LESSEE HAVING THE OPTION TO EXTEND IT YEAR
24 TO YEAR. IT WAS A ONE YEAR LEASE WITH FOUR-
25 TEEN ONE YEAR OPTIONS.

1 Q WHAT WERE THE MECHANICS FOR EXTENDING THE
2 LEASE?

3 A TYPICAL AS ALWAYS. THE LESSEE/TENANT MAKES
4 THAT DECISION. JUST EXERCISES HIS OPTION YEAR
5 TO YEAR.

6 Q DID THE AGREEMENT PROVIDE FOR ANY METHOD OF
7 DOING THAT?

8 A I'D HAVE TO LOOK AT THE FINALIZED LEASE
9 AGREEMENT. AGAIN, I JUST DID THE SKELETON. I

10 FRAMED IT, AND YOU GUYS, WHEN Y'ALL PREPARED
11 THE LEASE AGREEMENT, DID THOSE DETAILS AND
12 MECHANICS FOR THE PROCEDURE THAT WOULD FOLLOW.

13 Q IF YOU WILL PLEASE LOOK AT PLAINTIFF'S STIP-
14 ULATED EXHIBIT NUMBER "7".

15 A THESE ARE SOME CHANGES THAT WERE MADE TO THE
16 ORIGINAL LETTER OF INTENT, A PART OF OUR
17 NEGOTIATIONS IS WE MOVED TOWARD A FORMAL LEASE
18 AGREEMENT.

19 Q WERE THOSE CHANGES SIGNED BY MR. BUTLER AND
20 MR. WILSON?

21 A YES, SIR.

22 Q IF YOU WOULD, PLEASE TAKE A LOOK AT PLAIN-
23 TIFF'S STIPULATED EXHIBIT NUMBER "8", AND I'LL
24 ASK IF YOU CAN IDENTIFY THAT?

25 A THIS IS MY FAX TO MR. WILSON REGARDING THE

1 FORMAL LEASE AGREEMENT.

2 Q WHEN DID YOU SEND THAT FAX TO MR. WILSON?

3 A APRIL 15, '98.

4 Q WHAT DID YOU SEND TO MR. WILSON WITH YOUR FAX?

5 A WELL, I THINK ... IT APPEARS I FAXED HIM JUST
6 A HEADS-UP TELLING HIM THAT I WOULD BE MAILING
7 HIM THESE. THAT WOULD BE MY GUESS OR THOUGHTS
8 AND LOOKING AT THE DOCUMENTS, I FAXED TO TELL
9 HIM I WOULD BE MAILING HIM THESE AND THEN I
10 DID A CO-LETTER APPARENTLY WITH THE LEASE
11 AGREEMENT, THREE COPIES OF THE LEASE AGREE-
12 MENT.

13 Q CAN YOU IDENTIFY THAT AS A COVER LETTER THAT
14 YOU SENT TO MR. WILSON FORWARDING THE FORMAL
15 DRAFT FOR THE PROPOSED LEASE AGREEMENT?

16 A YES.

17 Q NOW, AS A RESULT OF FORWARDING THAT DOCUMENT,
18 DID MR. WILSON REQUEST ANY CHANGES TO THAT
19 PROPOSED LEASE AGREEMENT? IN THAT REGARD, I
20 HAND THE WITNESS PLAINTIFF'S STIPULATED
21 EXHIBIT NUMBER "9"?

22 A AFTER THE FORMAL LEASE AGREEMENT WAS PREPARED,
23 APPARENTLY, WE CONTINUED TO NEGOTIATE A COUPLE
24 OF PROVISIONS, THREE OR FOUR PROVISIONS WERE
25 NEGOTIATED INTO THE DRAFT LEASE. AND, YOU

1 KNOW, WE MADE NOTE ON `EM, HAD THE PARTIES
2 SIGN `EM AND THEY WERE, AS I RECALL, EVENTU-
3 ALLY INCORPORATED INTO THE FINAL LEASE AGREE-
4 MENT.

5 Q SO, AGAIN, WHATEVER INTENT THERE WAS BACK AND
6 FORTH, IT WAS SIGNED BY EACH PARTY?

7 A YES, SIR.

8 Q WHAT WERE THE CHANGES THAT MR. WILSON WAS
9 REQUESTING TO THE DRAFT LEASE AGREEMENT THAT
10 HAD BEEN FORWARDED TO HIM FOR CONSIDERATION?

11 A THAT HE WANTED ALL THE RENTS FROM THE BILL-
12 BOARDS. THAT THE LEASE AGREEMENT WOULD BE
13 CHANGED FROM HIM HAVING AN OPTION TO RENEW TO
14 HAVING ... I CALL IT AN OPTION TO QUIT. THAT
15 THE LEASE AGREEMENT WOULD AUTOMATICALLY RENEW
16 AND IF HE DIDN'T WANT IT TO RENEW THEN HE
17 WOULD GIVE NOTICE AND IT WOULD TERMINATE. SO,
18 REALLY, IT REALLY SHIFTED FROM AN OPTION TO
19 RENEW, IN MY WORDS, AN OPTION TO QUIT. IT
20 WOULD BE WHAT I THINK WOULD BE A FIFTEEN YEAR
21 LEASE AND THAT HE COULD QUIT AT ANY TIME
22 ANNUALLY SO LONG AS HE PROVIDED WRITTEN
23 NOTICE. AND, LET'S SEE, WHAT ELSE? I DON'T
24 KNOW. I REALLY DON'T KNOW WHY WE CHANGED THE
25 DATE. MAYBE WE WERE STILL NEGOTIATING AND

- 1 JUST HADN'T GOTTEN THE LEASE AGREEMENT SIGNED,
2 BUT IN PARAGRAPH THREE, WE STATED WHEN THE
3 TERM OF THE LEASE WAS COMMENCING, AND THEN IT
4 WAS IMPORTANT TO HIM THAT HE HAVE THE RIGHT TO
5 ASSIGN THE LEASE AGREEMENT OR SUB-LEASE IT.
6 IT'S IMPORTANT TO MR. BUTLER THAT IF HE DID
7 THAT, THAT MR. WILSON WOULD CONTINUE TO BE
8 PERSONALLY LIABLE FOR THE PERFORMANCE OF THE
9 LEASE.
- 10 Q I'LL ASK YOU TO LOOK AT A DOCUMENT THAT IS
11 MARKED AS PLAINTIFF'S STIPULATED EXHIBIT
12 NUMBER "10".
- 13 A OKAY.
- 14 Q I'LL ASK YOU TO IDENTIFY THAT DOCUMENT AS A
15 REDLINE DRAFT INCORPORATING THE CHANGES THAT
16 WERE REQUESTED BY MR. WILSON.
- 17 A IT DOES APPEAR TO BE SO, BUT AS FAR AS KNOWING
18 OR RECALLING, I CAN'T TELL YOU.
- 19 Q I'LL ASK YOU TO LOOK AT DOCUMENTS THAT HAVE
20 BEEN MARKED AS PLAINTIFF'S EXHIBITS "11" AND
21 "12".
- 22 A OKAY.
- 23 Q ARE YOU ABLE TO IDENTIFY PLAINTIFF'S EXHIBIT
24 "11"?
- 25 A I AM.

1 Q WHAT IS THAT?

2 A THAT'S THE FINAL LEASE AGREEMENT.

3 Q I BELIEVE THAT MAY BE NUMBER "12". THOSE ARE
4 TWO EXHIBITS.

5 A "11".. OKAY, "11" AND "12", OKAY?

6 Q OKAY. CAN YOU IDENTIFY "11"?

7 A "11" IS A COPY OF MY FAX COVER SHEET TO MR.
8 WILSON'S ATTORNEY, MR. COFFEE. I SENT HIM A
9 COPY OF THE MODIFIED LEASE AGREEMENT OR THE
10 LEASE AGREEMENT WITH THE INCORPORATED CHANGES.
11 THE REQUEST FOR THE CHANGES.

12 Q DID YOU MAKE ANY COMMENTS ON YOUR FAX SHEET AS
13 TO WHO HAD REQUESTED THE CHANGES THAT HAD BEEN
14 MADE?

15 A THIS AGREEMENT INCORPORATES THE CHANGES
16 REQUESTED BY MR. BILLY WILSON.

17 Q NOW, UP TO THAT POINT, MR. RAY, WITH RESPECT
18 TO ANY NEGOTIATIONS THAT YOU HANDLED BY THE
19 PARTIES, UP TO AND INCLUDING THE FINAL LEASE
20 AGREEMENT, WHICH IS PLAINTIFF'S EXHIBIT NUMBER
21 "12", WERE ALL OF THE NEGOTIATIONS REDUCED TO
22 WRITING?

23 A THEY WERE.

24 Q AND SIGNED BY THE PARTIES?

25 A YES, SIR.

1 Q FOLLOWING THE EXECUTION OF THE LEASE AGREE-
2 MENT, DID YOU HAVE OCCASION TO FORWARD CORRES-
3 PONDENCE TO THE TENANT REQUESTING PAYMENT OF
4 THE ANNUAL RENT?

5 A I DID.

6 Q I'LL ASK YOU TO LOOK AT A DOCUMENT THAT'S BEEN
7 MARKED AS PLAINTIFF'S STIPULATED EXHIBIT
8 NUMBER "15", AND IT'S ACTUALLY TWO PAGES. SEE
9 IF YOU CAN IDENTIFY THAT.

10 A YES, SIR. THOSE I WROTE TO MISS POWELL,
11 SANTEE MOBILE HOMES, REGARDING THE RENT
12 PAYMENT FOR 2000, 2001.

13 Q IN RESPONSE TO THE LETTERS THAT WERE SENT, DID
14 YOU RECEIVE RENT CHECKS FROM TIME TO TIME FROM
15 THE TENANT?

16 A I DID.

17 Q I'LL TURN YOUR ATTENTION TO EXHIBIT NUMBER "5"
18 AND NUMBER "6". I'LL ASK YOU TO TAKE A LOOK
19 AT THOSE AND THEN I'LL HAVE A QUESTION FOR
20 YOU.

21 A OKAY.

22 Q ARE YOU ABLE TO IDENTIFY DEFENDANT'S
23 STIPULATED EXHIBIT NUMBER "5"?

24 A YES, SIR.

25 Q WHAT IS DEFENDANT'S EXHIBIT NUMBER "5"?

1 A IT'S A LETTER TO MISS POWELL ACKNOWLEDGING
2 RECEIPT OF PAYMENT OF \$26,500.00, AND JUST RE-
3 STATING OUR UNDERSTANDING OF OUR AGREEMENT FOR
4 THEM TO PAY THE BALANCE AT A LATER DATE.

5 Q TELL US PLEASE ABOUT THAT CORRESPONDENCE AND
6 THAT TRANSACTION, AND WHAT I WANT TO ASK OF
7 YOU IS, DID THAT REPRESENT A DEVIATION FROM
8 WHAT THE PRACTICE HAD BEEN PRIOR TO MAY OF
9 2001?

10 A IT REPRESENTED A DEVIATION FROM THE STANDPOINT
11 THAT THE RENT WAS DUE IN ONE LUMP SUM AND THAT
12 YEAR THEY AGREED THAT IT COULD BE PAID INTO
13 TWO PAYMENTS.

14 Q DID MR. WILSON OR ANYBODY WORKING WITH MR.
15 WILSON REQUEST THAT THE PAYMENT BE MADE IN TWO
16 INSTALLMENTS IN 2001?

17 A THEY DID.

18 Q DID YOU TAKE THAT REQUEST TO MR. BUTLER?

19 A I DID.

20 Q WHAT WAS MR. BUTLER'S RESPONSE TO THEIR
21 REQUEST TO PAY THE RENT IN TWO INSTALLMENTS?

22 A HE WAS AGREEABLE.

23 Q WAS THAT CONFIRMED IN WRITING BY YOUR CORRES-
24 PONDENCE?

25 A IT WAS.

1 Q MR. RAY, I'M GONNA HAND YOU DOCUMENTS WHICH
2 HAVE BEEN MARKED AS PLAINTIFF'S EXHIBITS "30"
3 AND "31", AND ASK IF YOU CAN IDENTIFY THOSE.

4 A YES.

5 Q FIRST WITH RESPECT TO NUMBER "30". COULD YOU
6 IDENTIFY THAT FOR THE RECORD PLEASE?

7 A "30" IS AN INVOICE THAT WAS MAILED TO MS.
8 KATHY POWELL AT SANTEE MOBILE HOMES ON SEPTEMBER
9 17, 2001 INVOICING HER FOR THE BALANCE OF
10 THE RENT DUE FOR 2001 IN THE AMOUNT OF TWENTY-
11 FIVE THOUSAND.

12 INVOICE FROM RAY REALTY
13 TO KATHY POWELL, SANTEE
14 MOBILE HOMES DATED 9/17/01
15 MARKED FOR IDENTIFICATION
16 AND INTRODUCED INTO EVIDENCE
17 AS PLAINTIFF'S EXHIBIT "30".

18 Q ALRIGHT, SIR. IF YOU WOULD PLEASE, TELL US
19 WHAT PLAINTIFF'S EXHIBIT NUMBER "31"
20 REPRESENTS.

21 A "31", OKAY. "31" IS THE RECEIPT OF \$25,000.00
22 FROM HORTON HOMES SUPER CENTER IN A CASHIER'S
23 CHECK AND IT WAS MADE PAYABLE TO ME AND I DE-
24 DUCTED A FIVE PERCENT LEASING FEE AND SENT MR.
25 BUTLER THE OTHER CHECK, MY TRUST CHECK FOR

1 \$23,750.00. I CUT THE CHECK ON NOVEMBER 26,
2 2001.

3 COPY OF TWO CHECKS MARKED
4 FOR IDENTIFICATION AND
5 INTRODUCED INTO EVIDENCE
6 AS PLAINTIFF'S EXHIBIT "31".

7 Q I'LL ASK YOU TO LOOK AT DOCUMENT WHICH IS
8 PLAINTIFF'S STIPULATED EXHIBIT NUMBER "21".

9 A OKAY.

10 Q ARE YOU FAMILIAR WITH THAT DOCUMENT?

11 A YES.

12 Q WHAT IS THAT DOCUMENT?

13 A IT'S AN INVOICE FROM MY OFFICE TO SANTEE
14 MOBILE HOMES FOR RENT FOR MAY 15, 2002 TO MAY
15 14, 2003 IN THE AMOUNT OF FIFTY THOUSAND.

16 Q NOW, WHEN WAS THAT FORWARDED?

17 A IT'S DATED APRIL 16, 2002. SO, I WOULD ASSUME
18 IT WAS MAILED THAT DAY OR THE NEXT, BUT ABOUT
19 THAT TIME.

20 Q WAS IT YOUR CUSTOMARY PROCESS TO SEND AN
21 INVOICE FOR THE RENT BEFORE THE RENT WAS DUE
22 AND PAYABLE?

23 A YES, SIR.

24 Q IN RESPONSE TO THAT INVOICE, DID YOU RECEIVE
25 ANY CORRESPONDENCE FROM MR. WILSON OR ANYONE

1 ACTING ON MR. WILSON'S BEHALF?

2 A NO.

3 Q I'M GOING TO ASK YOU NOW TO LOOK AT PLAIN-
4 TIFF'S STIPULATED EXHIBIT NUMBER "22".

5 A OKAY.

6 Q ARE YOU ABLE TO IDENTIFY THAT DOCUMENT?

7 A I AM..

8 Q WHAT IS THAT DOCUMENT?

9 A THAT'S A LETTER THAT I MAILED MR. WILSON ON
10 JUNE 3, 2002 BY CERTIFIED MAIL.

11 MR. HANNA: WHAT WAS THE DATE AGAIN?

12 A JUNE 3, 2002.

13 Q WITH RESPECT TO THAT LETTER THAT YOU FORWARDED
14 TO MR. WILSON ON JUNE 3, 2002, DID YOU REQUEST
15 THAT HE ADDRESS THE MATTER OF HIS INTENTION
16 ABOUT WHETHER HE INTENDED TO CONTINUE
17 OCCUPYING THE PREMISES?

18 A YES, I DID.

19 Q HAD YOU MADE ATTEMPTS TO CONTACT MR. WILSON BY
20 TELEPHONE PRIOR TO THAT TIMES?

21 A NUMEROUS ATTEMPTS.

22 Q DID HE RETURN ANY OF YOUR PHONE CALLS?

23 A NO.

24 Q DID ANYONE ELSE IN HIS OFFICE RETURN ANY OF
25 YOUR PHONE CALLS?

1 A NO.

2 Q DID MR. WILSON EVER RESPOND TO THAT LETTER
3 THAT YOU SENT TO HIM EITHER IN WRITING OR
4 VERBALLY?

5 A NO.

6 Q MR. RAY, PRIOR TO MAY 15TH 2002, AND YOUR
7 LETTER OF JUNE 3RD 2002, DID MR. WILSON EVER
8 TELL YOU THAT HE WAS NOT GOING TO RENEW THE
9 LEASE FOR THE PERIOD MAY 15, 2002 THROUGH MAY
10 14, 2002?

11 A NO.

12 Q DID MR. BUTLER AT ANY TIME AFTER JUNE 3RD 2002
13 REQUEST THAT YOU ASSIST HIM WITH RESPECT TO
14 RE-LETTING THE PROPERTY?

15 A HE DID.

16 Q WHAT COULD YOU TELL US ABOUT THAT?

17 A AS I RECALL, I DID GO BACK AND PUT A 'FOR
18 LEASE' SIGN ON THE PROPERTY AND DID WORK WITH
19 A NUMBER OF PEOPLE IN AN EFFORT TO RE-LEASE
20 THE PROPERTY.

21 Q DO YOU RECALL SPECIFICALLY THE DATE WHEN YOU
22 WENT BACK TO DO THAT?

23 A NO.

24 Q I'LL ASK YOU TO LOOK AT SOME PHOTOGRAPHS THAT
25 HAVE BEEN MARKED AS PLAINTIFF'S STIPULATED

1 EXHIBIT NUMBERS "26", "27", "28" AND "29".
2 WHEN YOU WENT BACK TO PUT YOUR SIGN ON THE
3 PROPERTY, DO THOSE PHOTOGRAPHS THAT YOU JUST
4 REVIEWED, "26", "27", AND "28" AND "29",
5 REFLECT THE CONDITION OF THE PROPERTY WHEN YOU
6 WENT BACK TO PUT YOUR SIGN ON IT?

7 A I DIDN'T GO BACK TO PUT THE SIGN ON IT. I
8 WOULD HAVE SENT SOMEONE. BUT, I DID HAVE THE
9 OCCASION TO VISIT THE PROPERTY AND THAT
10 REPRESENTS THE CONDITION OF THE PROPERTY, YES,
11 SIR.

12 Q SO, WHEN YOUR SIGN WENT BACK ON THE PROPERTY
13 TO RE-LEASE THE PROPERTY, THERE WAS STILL A
14 HORTON HOMES SIGN ON THE PROPERTY?

15 A YES.

16 Q AND THERE WAS STILL APPARENTLY A VEHICLE AND A
17 DAMAGED MOBILE HOME ON THE PROPERTY?

18 A YES.

19 Q MR. RAY, THOSE ARE ALL THE QUESTIONS I HAVE
20 FOR YOU. PLEASE ANSWER ANY QUESTIONS THAT MR.
21 MARING HAS FOR YOU.

22 CROSS EXAMINATION BY MR. MARING:

23 Q MR. RAY, I'M GONNA CALL YOUR ATTENTION BACK TO
24 FIRST THE 2001 MODIFICATION OF THE AGREEMENT.
25 YOU JUST TESTIFIED THAT THE PARTIES CHANGED

1 THE AGREEMENT TO PAY THE REMAINING LEASE
2 AMOUNT IN TWO INSTALLMENTS, IS THAT CORRECT?

3 MR. WRIGHT: I WOULD OBJECT TO THE
4 QUESTION IN THAT THE WITNESS DID NOT
5 TESTIFY THAT THE AGREEMENT WAS MODIFIED.
6 HE INDICATED THAT THERE WAS AN AGREEMENT
7 TO MAKE THE PAYMENT IN TWO PAYMENTS. OUR
8 POSITION IS THAT IT WAS AN ACCOMMODATION
9 TO THE DEFENDANT. IT WAS NOT A PERMANENT

10 MODIFICATION OF THE AGREEMENT BECAUSE IT
11 WAS NOT REDUCED TO WRITING AND, IN FACT,
12 THE NEXT RENT PAYMENT OR THE NEXT INVOICE
13 THAT WAS SENT OUT WAS FOR THE ENTIRE
14 AMOUNT OF \$50,000.00 IN APRIL OF 2002.

15 MR. HANNA: I UNDERSTAND THE TESTIMONY TO
16 MEAN THAT THERE WAS A MODIFICATION THAT
17 THAT WOULD BE THE WAY IT WOULD BE DONE
18 LATER ON, BUT IT WAS AN ADJUSTMENT TO THE
19 RENTAL. TRY AND REPHRASE YOUR QUESTION
20 AND SEE IF WE CAN GET BY WITH THAT.

21 Q DID THE PARTIES ORALLY MODIFY THE AGREEMENT IN
22 2001 IN REGARDS TO THE METHOD OF PAYMENT?

23 MR. WRIGHT: SAME OBJECTION.

24 MR. WARING: AS TO THAT YEAR, YOUR HONOR?

25 MR. HANNA: AS TO THAT YEAR, I HAVE NO

1 PROBLEM WITH THAT.

2 A I WOULD SAY THAT THEY AGREED TO MODIFY THE
3 RENT PAYMENT FOR THAT PERIOD.

4 Q THE AGREEMENT BETWEEN THE PARTIES, THE LEASE
5 AGREEMENT, WHICH IS NUMBER "2", PAGE 16, AND
6 I'LL ASK YOU, IF YOU COULD, TO REVIEW
7 PARAGRAPH NUMBER 34, PLEASE.

8 A YES, SIR.

9 Q DID YOU REVIEW THAT?

10 A YES, SIR.

11 Q WHAT IS YOUR UNDERSTANDING OF PARAGRAPH 34 OF
12 THE LEASE?

13 A IF THE LEASE AGREEMENT IS MODIFIED OR CHANGED
14 IT MUST BE IN WRITING-BY THE PARTIES. THAT
15 WOULD BE MY INTERPRETATION.

16 Q AND SIGNED BY BOTH PARTIES, IS THAT CORRECT?

17 A YES, SIR.

18 Q ALRIGHT, SIR. SO, MY QUESTION IS, IN 2001,
19 THE PARTIES ORALLY AGREED TO MODIFY THE
20 PAYMENT TERMS OF THE LEASE, CORRECT?

21 A CORRECT, YES.

22 Q FOR THAT YEAR?

23 A YES, SIR.

24 Q THEY DIDN'T SIGN IT?

25 A THEY DIDN'T.

1 Q IT WAS NOT IN WRITING?

2 A IT WASN'T.

3 Q THE ONLY WRITING ... IN FACT, THAT THERE WAS
4 ONLY ONE WRITING, AND THAT WAS YOUR LETTER TO
5 MR. WILSON, IS THAT CORRECT?

6 A THAT'S CORRECT. THAT I'M AWARE OF.

7 Q THAT YOU'RE AWARE OF?

8 A RIGHT.

9 Q ALRIGHT, SIR. DO YOU RECALL DURING THE TAKING
10 OF YOUR DEPOSITION THAT YOU STATED THAT YOU
11 HAD SEVERAL CONVERSATIONS WITH MR. WILSON SUB-
12 SEQUENT TO THE CHANGING THE TERMS OF THE LEASE
13 IN 2001, BUT COULD NOT RECALL THE ACTUAL
14 CONVERSATIONS?

15 A IN REGARDS TO SPLITTING THE PAYMENT THAT YEAR?

16 Q THAT IS CORRECT. DURING THAT PERIOD OF TIME?

17 A YES, SIR.

18 Q SO, YOU TESTIFIED AT YOUR DEPOSITION THAT YOU
19 HAD CONVERSATIONS WITH MR. WILSON DURING THAT
20 TIME OF THE YEAR, IS THAT CORRECT?

21 A YES, SIR.

22 Q AND, I BELIEVE YOU TESTIFIED THAT YOU THOUGHT
23 IT WAS REGARDING A FISHING TRIP THAT YOU TOOK
24 WITH MR. WILSON?

25 A I BELIEVE I DID TESTIFY TO THAT. I DID

1 TESTIFY TO THE FISHING TRIP. I DIDN'T TESTIFY
2 THAT ALONG ABOUT THAT TIME IT WAS REGARDING A
3 FISHING TRIP. BUT ... AND I'M NOT EVEN SURE
4 THE TWO ARE IN THE SAME TIME PERIOD, BUT MAY
5 HAVE WELL BEEN.

6 MR. WARING: YOUR HONOR, I'VE GOT THE
7 ORIGINAL DEPOSITION HERE.

8 MR. HANNA: LET THE RECORD REFLECT THAT I
9 AM OPENING THE ORIGINAL OF THE DEPOSITION
10 OF MR. CHARLEY RAY DATED OCTOBER THE
11 18TH, 2007. DO YOU HAVE A COPY FOR MR.
12 RAY TO LOOK AT?

13 MR. WARING: I DO, YOUR HONOR.

14 MR. HANNA:--- WHICH PAGE ARE YOU-REFERRING
15 TO?

16 MR. WARING: I'M ON PAGE 26. CAN I TAKE
17 A SHORT RECESS WHILE HE'S DOING THAT?

18 MR. HANNA: SURE.

19 OFF THE RECORD

20 Q MR. RAY, I'D LIKE TO ASK YOU SOME SPECIFIC
21 QUESTIONS REGARDING IT, BUT YOU DO RECALL
22 TESTIFYING THAT YOU BELIEVE THAT YOU HAD SOME
23 CONVERSATIONS WITH MR. WILSON SUBSEQUENT TO
24 Y'ALL'S DISCUSSIONS REGARDING THE RENTAL
25 CHANGE OR THE PAYMENT CHANGE IN '01?

1 A I'M SURE WE MUST HAVE OR WE WOULDN'T HAVE ...
2 PROBABLY, SIR, WE DID OR WE WOULDN'T HAVE
3 MODIFIED. SO, I DID HAVE DISCUSSIONS WITH
4 SOMEONE AND THAT MAY HAVE BEEN WHAT I WAS
5 REFERRING TO.

6 Q THE QUESTION THAT I ASKED YOU WAS SUBSEQUENT
7 TO THAT, DO YOU RECALL EVER SPEAKING WITH MR.
8 WILSON?

9 A SUBSEQUENT TO AGREEING TO THE MODIFICATION OF
10 THE RENT PAYMENT?

11 Q THAT'S CORRECT.

12 A I DON'T REMEMBER BUT I'M CERTAIN THAT WE MUST
13 HAVE HAD A LOT OF CONVERSATIONS OR WE WOULDN'T
14 HAVE MODIFIED THIS.

15 Q AFTER YOU MODIFIED ... LET ME ASK IT THAT WAY.
16 AFTER YOU MODIFIED THE AGREEMENT, DO YOU
17 RECALL SPEAKING TO MR. WILSON?

18 A I DON'T RECALL THE CONVERSATION, NO.

19 Q IN YOUR DEPOSITION ON PAGE 26, THE VERY LAST
20 QUESTION, I ASKED YOU, "DID YOU EVER SPEAK TO
21 MR. WILSON SUBSEQUENT TO THAT DATE?" YOUR
22 ANSWER WAS, "I'M SURE I DID." AND THEN LATER
23 ON, YOU WENT ON TO SAY THAT YOU THOUGHT IT WAS
24 REGARDING A FISHING TRIP.

25 A NO.

1 Q MAYBE I ASKED YOU IN 2002, "DID YOU GO
2 FISHING?" TURN TO THE TOP OF PAGE 28.

3 A BOTTOM OF PAGE 27.

4 Q BOTTOM OF PAGE 27. I ASKED THE QUESTION, "DID
5 YOU GO FISHING IN 2007?"

6 A NO. I'M TRYING TO ASK THE QUESTION BUT I
7 DON'T BELIEVE THAT'S ... I DON'T MEAN TO BE
8 ARGUMENTATIVE, BUT I DON'T BELIEVE WHAT THIS
9 SAYS.

10 Q "DID YOU GO FISHING THAT YEAR?" THE QUESTION
11 ON THE BOTTOM OF PAGE 27. ALRIGHT, TURN THE
12 PAGE.

13 A OKAY. "IN 2002, DID YOU GO FISHING?"

14 Q WHAT WAS YOUR RESPONSE?

15 A "YES, SIR."

16 Q I'M GOING TO SHOW YOU A COPY OF THIS LETTER.
17 DO YOU SEE THIS LETTER?

18 A UH-HUH. (AFFIRMATIVE RESPONSE.) I REMEMBER
19 THIS LETTER.

20 Q YOU REMEMBER THAT LETTER?

21 A UH-HUH. (AFFIRMATIVE RESPONSE.)

22 Q IS THAT REGARDING THE FISHING TRIP?

23 MR. HANNA: HAS THAT LETTER BEEN MARKED
24 AS AN EXHIBIT? LET'S MARK IT FOR ID.
25 I'M NOT GONNA ASK YOU TO PUT IT IN THE

1 RECORD, THAT'S UP TO YOU, BUT I NEED IT
2 MARKED FOR ID IF HE'S GONNA LOOK AT IT.

3 MR. WARING: I WAS GONNA HAVE HIM ...
4 QUESTION HIM ABOUT IT AND THEN PUT IT
5 INTO EVIDENCE, YOUR HONOR.

6 MR. HANNA: I DON'T THINK YOU CAN
7 QUESTION HIM ABOUT IT UNTIL YOU PUT IT
8 INTO EVIDENCE. YOU CAN ASK HIM IF HE CAN
9 IDENTIFY IT.

10 Q CAN YOU IDENTIFY THIS LETTER?

11 A YES, SIR. IT'S A LETTER I WROTE MR. WILSON ON
12 OCTOBER 20TH 1998.

13 COPY OF LETTER FROM
14 RAY REALTY TO WILSON
15 DATED 10/20/98 MARKED
16 FOR IDENTIFICATION AND
17 INTRODUCED INTO EVIDENCE
18 AS DEFENDANT'S EXHIBIT "10".

19 Q WHAT WAS THE CONTENTS OF THE LETTER REGARDING?

20 A PARAGRAPH ONE I ACKNOWLEDGED A FISHING TRIP
21 THAT WE TOOK. PARAGRAPH TWO, I SENT A TAX
22 NOTICE. BILLED HIM FOR SOME TAXES.

23 MR. HANNA: THAT'S EXHIBIT WHAT NUMBER?

24 MR. WARING: IT'S MARKED AS DEFENDANT'S
25 EXHIBIT NUMBER "10".

- 1 Q THE ONLY REASON I'M ASKING YOU ABOUT THIS
2 LETTER, MR. RAY, IS THAT YOU TESTIFIED IN YOUR
3 DEPOSITION THAT YOU HAD NO BUSINESS TO TALK TO
4 MR. WILSON REGARDING, WITH THE EXCEPTION OF
5 ONE TIME WHEN YOU HAD ONE SOCIAL INTERACTION
6 WHICH WAS A FISHING TRIP, IS THAT CORRECT?
- 7 A AGAIN, I'M JUST NOT FOLLOWING YOUR QUESTION.
- 8 Q MY QUESTION TO YOU ... I'LL REPHRASE THE
9 QUESTION. DID YOU HAVE ANY REASON TO TALK TO
10 BILLY WILSON OTHER THAN REGARDING HIS AGREE-
11 MENT WITH MR. BUTLER?
- 12 A NO.
- 13 Q AGAIN, YOU WERE FRIENDS?
- 14 A YEAH, -WE WERE -FRIENDS. . . .
- 15 Q THE ONLY SOCIAL INTERACTION YOU TESTIFIED TO
16 IS THAT Y'ALL DID GO FISHING ONCE?
- 17 A I EMPLOYED HIM AS A GUIDE TO TAKE MY SON
18 FISHING ONE TIME.
- 19 Q ALRIGHT. OKAY. AND THAT WAS IN 1998?
- 20 A I DON'T KNOW ABOUT THE DATE NOW. I'M NOT
21 BEING DIFFICULT BUT I JUST DON'T RECALL.
- 22 Q BASED ON YOUR LETTER DATED OCTOBER 20TH 1998,
23 WHICH IS DEFENDANT'S "10", IT WOULD HAVE BEEN
24 BEFORE THAT DATE?
- 25 A CORRECT.

1 MR. HANNA: HAS THAT BEEN INTRODUCED?

2 MR. WARING: IT WAS DEFENDANT'S "10"

3 MR. HANNA: I KNEW IT HAD BEEN MARKED BUT
4 I DIDN'T KNOW WHETHER IT HAD BEEN INTRO-
5 DUCED. WITHOUT OBJECTION?

6 MR. WRIGHT: NO OBJECTION.

7 Q ALRIGHT, SIR. SO, YOU DID TALK TO MR. WILSON
8 SUBSEQUENT TO OR AFTER THE TIME OF WHICH ...
9 WELL, AS YOU TESTIFIED IN YOUR DEPOSITION THAT

10 YOU DID TALK TO MR. WILSON SUBSEQUENT TO MODI-
11 FYING THE LEASE IN 2001?

12 A YES, SIR.

13 Q YOU HAVE NO RECOLLECTION OF WHAT THOSE CONVER-
14 SATIONS WERE ABOUT THAT?

15 A NO.

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

19 A OTHER THAN WHAT I CAN RE-ESTABLISH WITH A FILE
20 UNLESS THERE WAS SOME MONUMENTAL ACTION THAT
21 TOOK PLACE. THAT'S FAIR TO SAY, YES.

22 Q ALRIGHT, SIR. IF YOU COULD PLEASE, TAKE A
23 LOOK AT PLAINTIFF'S EXHIBIT NUMBER "22". IF
24 YOU COULD PLEASE, SIR, READ ME THE SECOND SEN-
25 TENCE OF THE SECOND PARAGRAPH.

- 1 A "THE OWNER, MR. BUTLER, WOULD LIKE FOR YOU TO
2 CONTINUE RENTING THE PROPERTY BUT HAS
3 INSTRUCTED ME TO COLLECT THE RENT OR ASK YOU
4 TO VACATE."
- 5 Q ALRIGHT SIR. THANK YOU. MY QUESTION TO YOU,
6 MR. RAY, IS THIS IS YEARS '98, '99, 2000,
7 2001, NOW 2002, CORRECT? THIS IS THE FIFTH
8 YEAR OF THIS LEASE?
- 9 A I WOULD SAY YES.
- 10 Q ALRIGHT. SO, THERE WERE NO PROBLEMS WITH
11 REGARDS TO ANY TYPE OF PAYMENTS FROM MR.
12 WILSON FOR THE FIRST FOUR YEARS OF THE TERMS
13 OF THIS LEASE, IS THAT CORRECT?
- 14 A ~~I DON'T KNOW OF ANY PROBLEMS.~~
- 15 Q OTHER THAN THE CHANGE OR THE MODIFICATION OF
16 THE 2001 PAYMENT, WHICH WAS PAID ...
- 17 A IN TWO INSTALLMENTS.
- 18 Q ... IN TWO INSTALLMENTS WITH A \$1,500.00
19 SERVICE CHARGE, IS THAT CORRECT?
- 20 A YES.
- 21 Q YOU TESTIFIED EARLIER THAT YOU WERE WRITING
22 MR. WILSON A LETTER TO REMIND HIM OF THE RENT,
23 IS THAT CORRECT?
- 24 A I SENT INVOICES.
- 25 Q YOU SENT HIM INVOICES?

1 A UH-HUH. (AFFIRMATIVE RESPONSE.)

2 Q SO, WITHOUT HAVING ANY CONVERSATIONS WITH MR.
3 WILSON, YOUR LETTER TO HIM, YOUR FIRST LETTER,
4 INDICATES THAT, "MR. BUTLER WOULD LIKE FOR YOU
5 TO CONTINUE RENTING THE PROPERTY, BUT HAS
6 INSTRUCTED ME TO EITHER COLLECT THE RENT OR TO
7 ASK YOU TO VACATE."

8 A YES, SIR.

9 Q MY QUESTION TO YOU, MR. RAY, IS, ISN'T IT

10 POSSIBLE THAT MR. WILSON, DURING ONE OF THOSE
11 CONVERSATIONS THAT YOU HAD EARLIER IN THE
12 YEAR, TOLD YOU THAT HE WAS NOT GOING TO CON-
13 TINUE RENTING THE PROPERTY?

14 A I DON'T RECALL THAT CONVERSATION.

15 Q IS IT POSSIBLE?

16 A OH, YES, IT'S POSSIBLE.

17 Q ALRIGHT, SIR. BECAUSE THE LETTER INDICATES
18 THAT, "WE WOULD LIKE YOU TO CONTINUE TO KEEP
19 RENTING IT."?

20 A RIGHT.

21 Q BUT, WOULD ASK YOU TO VACATE ...

22 A IF YOU'RE NOT GONNA PAY.

23 Q ... IF YOU'RE NOT GONNA PAY?

24 A UH-HUH. (AFFIRMATIVE RESPONSE.)

25 Q YOU WROTE THIS LETTER EVEN THOUGH THE TERMS OF

1 THE LEASE INDICATED THAT MR. WILSON'S LEASE
2 AUTOMATICALLY RENEWED BY THAT TIME, IS THAT
3 CORRECT?

4 A THAT'S RIGHT.

5 Q SO, IT'S FAIR TO SAY THAT YOUR LETTER WAS NOT
6 SUPPORTED BY THE TERMS OF THE RENEWAL OF THE
7 AGREEMENT?

8 MR. WRIGHT: OBJECTION. THAT CALLS FOR A
9 LEGAL CONCLUSION.

10 MR. HANNA: REPHRASE THE QUESTION.

11 Q I'LL REPHRASE THE QUESTION. DID YOUR LETTER
12 TO MR. WILSON SAY THAT YOUR LEASE IS AUTOMAT-
13 ICALLY RENEWED. WE WOULD LIKE YOU TO PAY
14 \$50,000.00?

15 A NO.

16 MR. WRIGHT: OBJECTION. THE LETTER
17 SPEAKS FOR ITSELF.

18 MR. HANNA: HE'S ON CROSS AND I THINK YOU
19 CAN ASK THAT QUESTION. THE LETTER DOES
20 SPEAK FOR ITSELF, BUT I JUST THINK HE'S
21 TRYING TO MAKE A POINT. GO AHEAD.

22 A ASK ME THE QUESTION AGAIN.

23 Q THE QUESTION WAS, YOUR LETTER DID NOT STATE OR
24 YOU DID NOT WRITE A LETTER TO MR. WILSON THAT
25 YOUR LEASE HAS AUTOMATICALLY RENEWED AND WE

1 WANT YOU TO PAY THE \$50,000.00 LEASE, IS THAT
2 CORRECT?

3 A THAT'S CORRECT.

4 Q ALRIGHT, SIR. I WANT TO BRING YOUR ATTENTION
5 TO A QUESTION THAT WAS BROUGHT UP HERE EARLIER
6 REGARDING WHAT TOOK PLACE SUBSEQUENT TO MR.
7 WILSON VACATING THE PROPERTY. DID MR. BUTLER
8 HIRE YOU TO LEASE THE PROPERTY AFTER MR.
9 WILSON LEFT?

10 A NO.

11 Q ALRIGHT, SIR. DID MR. BUTLER HIRE ANYBODY?

12 A HIRE. I DIDN'T USE THE WORD HIRE. WHAT
13 HAPPENED, HE ASKED ME TO DO IT AND I DON'T
14 KNOW IF I ... I MAY HAVE JUST FAILED TO GET AN
15 EXCLUSIVE AUTHORIZATION. I MAY NOT HAVE HAD
16 THE ENERGY, BUT FOR SOME REASON, I DID IT ON A
17 BEST EFFORT. I DIDN'T LIST IT. WE DID NOT
18 ENTER INTO A FORMAL AGENCY AGREEMENT. IT WAS
19 A BEST EFFORT. I DON'T KNOW IF THAT ANSWERS
20 YOUR QUESTION.

21 Q LET ME ASK THIS QUESTION, MR. RAY. YOU
22 TESTIFIED IN YOUR DEPOSITION THAT YOUR AREA OF
23 EXPERTISE IN THE REAL ESTATE MARKET IS COM-
24 MERCIAL LEASING.

25 A I THINK I SAID IT WAS COMMERCIAL, AND I'M

1 SPENDING MORE TIME ON COMMERCIAL LEASES.

2 Q SO YOU'RE SPENDING A GOOD BIT OF TIME IN YOUR
3 BUSINESS DOING COMMERCIAL LEASES?

4 A YES, SIR.

5 Q IS IT REASONABLE FOR SOMEONE WANTING TO LEASE
6 A PIECE OF COMMERCIAL PROPERTY ... IS IT
7 REASONABLE FOR THAT PERSON TO PLACE THAT
8 OFFERING ON THE MULTIPLE LISTING SYSTEM?

9 A I THINK SO.

10 Q WOULD IT BE REASONABLE FOR SOMEONE TO ADVER-
11 TISE A PIECE OF PROPERTY?

12 A I DON'T KNOW IF IT MAKES A WHOLE LOT OF
13 DIFFERENCE.

14 Q IT IS REASONABLE FOR SOMEONE TO HIRE AN EXCLU-
15 SIVE AGENT TO TRY TO SECURE A TENANT FOR A
16 PIECE OF PROPERTY?

17 A YES.

18 Q THOSE ARE ALL REASONABLE EXPECTATIONS TO
19 SECURE A TENANT FOR A PIECE OF PROPERTY?

20 A I THINK SO, BUT, YOU KNOW, THE OWNER AND
21 FOLKS, WHILE THEY HAVE DIFFERENT IDEAS ABOUT
22 THAT ...

23 Q MR. RAY, YOU ARE A REAL ESTATE AGENT, CORRECT?

24 A YES.

25 Q ALRIGHT, SIR. MY QUESTION TO YOU IS, IN ORDER

1 TO LEASE A PIECE OF PROPERTY, IS IT REASONABLE
2 FOR THAT PIECE OF PROPERTY TO BE PLACED IN THE
3 MULTIPLE LISTING SYSTEM?

4 A I THINK IT'S REASONABLE, YES.

5 Q IF I WERE OFFERING A PIECE OF PROPERTY FOR
6 LEASE, WOULD IT BE REASONABLE FOR ME TO HIRE
7 AN EXCLUSIVE AGENT TO SECURE A POTENTIAL
8 TENANT?

9 A YES.

10 Q WOULD ME PLACING A SIGN ON MY PIECE OF
11 PROPERTY STATING, "FOR LEASE", WOULD THAT BE
12 CONSIDERED A REASONABLE EFFORT IN, IN THAT
13 ALONE, IN TRYING TO SECURE A TENANT FOR MY
14 PIECE OF PROPERTY?

15 A DO THE QUESTION AGAIN BECAUSE I THINK THERE
16 ARE TWO PARTS TO IT.

17 Q OKAY. WOULD I BE USING MY BEST EFFORTS IN
18 LEASING A PIECE OF PROPERTY BY ONLY PLACING A
19 SIGN, "FOR LEASE" ON THE PROPERTY?

20 A I THINK YOU NEED MORE THAN THAT.

21 Q YOU DO NEED MORE THAN THAT. ALRIGHT, SIR. IN
22 THIS PARTICULAR CASE, SUBSEQUENT TO MR. WILSON
23 LEAVING THE PROPERTY, YOU DIDN'T TAKE ANY
24 OTHER STEPS OTHER THAN PLACING A SIGN ON THE
25 PROPERTY, IS THAT CORRECT?

- 1 A THAT'S CORRECT.
- 2 Q ALL OF THE COMMUNICATION BETWEEN MR. WILSON
- 3 AND MR. BUTLER CAME THROUGH YOU, IS THAT
- 4 CORRECT?
- 5 A I DON'T KNOW.
- 6 Q TO THE BEST OF YOUR RECOLLECTION, WAS THERE
- 7 ANY COMMUNICATION BETWEEN MR. BUTLER AND MR.
- 8 WILSON?
- 9 A I DON'T RECALL THAT.
- 10 Q DO YOU RECALL THAT YOU WERE THE MIDDLE MAN
- 11 BASICALLY IN THIS DEAL?
- 12 A YES, SIR.
- 13 Q ALRIGHT, SIR. DO YOU KNOW IF MR. BUTLER
- 14 ~~SUBSEQUENTLY LEASED HIS PIECE OF PROPERTY?~~
- 15 A I THINK SO BUT I DON'T KNOW.
- 16 Q YOU WEREN'T PAID ANYTHING FOR A FUTURE
- 17 LEASING?
- 18 A NO.
- 19 Q MR. RAY, WHEN MR. BUTLER HIRED YOU IN 1998,
- 20 DID YOU PLACE THE PROPERTY IN THE MULTIPLE
- 21 LISTING SYSTEM?
- 22 A I DID.
- 23 Q DID YOU ADVERTISE THE PROPERTY?
- 24 A YES, SIR.
- 25 Q DID YOU MAKE ALL THE EFFORTS THAT AN EXCLUSIVE

1 AGENT WOULD TAKE IN ORDER TO SECURE A POTEN-
2 TIAL TENANT?

3 A YES, SIR.

4 MR. WARING: THAT'S ALL THE QUESTIONS I
5 HAVE, YOUR HONOR.

6 MR. HANNA: RE-DIRECT?

7 MR. WRIGHT: YES, PLEASE.

8 RE-DIRECT EXAMINATION BY MR. WRIGHT:

9 Q MR. RAY, I BELIEVE YOU TESTIFIED IN CROSS
10 EXAMINATION IF THERE WAS ANYTHING OF SIGNIFI-
11 ANCE THAT WOULD COME UP IN YOUR CONVERSATION
12 THAT YOU WOULD HAVE RECALLED THAT?

13 A I THINK SO. PROBABLY.

14 Q NOW, AS MR. BUTLER'S AGENT IN THIS TRANSACTION
15 WITH THE DUTY TO COMMUNICATE WITH YOUR PRINCI-
16 PAL, MR. BUTLER, IF MR. WILSON HAD TOLD YOU
17 THAT HE WAS NOT RENEWING THE LEASE, IS THAT
18 SOMETHING THAT YOU WOULD HAVE TOLD MR. BUTLER?

19 A YES, SIR.

20 Q DID YOU EVER TELL MR. BUTLER THAT HE WAS NOT
21 RENEWING THE LEASE?

22 A NO.

23 Q I'D LIKE TO DIRECT YOU TO EXHIBITS "21" AND
24 "22".

25 MR. HANNA: IS THAT PLAINTIFF'S "21" AND

1 "22"?

2 MR. WRIGHT: YES, YOUR HONOR.

3 Q MR. RAY, IF MR. WILSON HAD TOLD YOU PRIOR TO
4 FEBRUARY 15, 2002, THAT HE WAS NOT GOING TO
5 RENEW THE LEASE, WOULD YOU HAVE HAD ANY REASON
6 TO SEND HIM A BILL FOR THE ANNUAL RENT ON
7 APRIL 16, 2002?

8 A NO.

9 Q AND THAT'S WHAT YOU DID ON APRIL 16, 2002,
10 WHICH IS PLAINTIFF'S EXHIBIT NUMBER "16", IS
11 THAT CORRECT?

12 A CORRECT.

13 Q AND WITH RESPECT TO PLAINTIFF'S EXHIBIT NUMBER
14 "22", WHICH IS YOUR LETTER OF JUNE 3RD 2002 TO
15 MR. WILSON. WITH RESPECT TO THE FIRST
16 SENTENCE IN THE SECOND PARAGRAPH, DID YOU
17 REQUEST MR. WILSON AT THAT TIME TO ADVISE YOU
18 OF HIS INTENTIONS?

19 A YES.

20 Q MY QUESTION, SIR, IS WHY WOULD YOU WRITE THAT
21 LETTER IF HE HAD, IN FACT, ADVISED YOU PRIOR
22 TO THAT TIME THAT HE WAS NOT RENEWING THE
23 LEASE?

24 MR. WARING: OBJECT TO THE FORM.

25 LEADING, YOUR HONOR.

1 MR. HANNA: I DON'T THINK IT'S NECES-
2 SARILY LEADING. GO AHEAD. HE'S ASKING
3 HIM WHY. HE DIDN'T ASK HIM A YES OR NO
4 QUESTION. HE ASKED HIM MORE A WHY
5 QUESTION.

6 MR. WRIGHT: I WOULDN'T HAVE ASKED HIM
7 HAD I KNOWN THE ANSWER.

8 Q NOW, YOU WERE ASKED SOME QUESTIONS ABOUT
9 METHODS OF MARKETING PROPERTY AND WHAT IS A
10 REASONABLE METHOD OF MARKETING PROPERTY. MR.
11 RAY, OVER THE YEARS, HAVE YOU LEASED
12 PROPERTIES IN RESPONSE TO PHONE INQUIRIES THAT
13 YOU RECEIVED FROM SIGNS THAT YOU HAVE ON THE
14 PROPERTY?

15 A YES, SIR.

16 Q IS THAT A METHOD OF LEASING PROPERTY OR ADVER-
17 TISING PROPERTY FOR SALE THAT IS CUSTOMARY IN
18 THE REAL ESTATE TRADE?

19 A IT IS.

20 Q AND IF YOU GO BACK TO THE INITIAL INQUIRY THAT
21 YOU HAD FROM MR. WILSON IN THIS CASE, WAS MR.
22 WILSON REFERRED TO YOU BY ANOTHER REALTOR.
23 DID ANYONE BRING HIM INTO YOUR OFFICE AND SAY,
24 "I SAW THIS IN MULTIPLE LISTING AND I'M CON-
25 TACTING YOU."?

1 A NO.

2 Q NO FURTHER QUESTIONS.

3 MR. HANNA: ANY RE-CROSS?

4 MR. WARING: YES, YOUR HONOR.

5 RE-CROSS EXAMINATION BY MR. WARING:

6 Q MR. RAY, YOU DIDN'T PUT YOUR SIGN ON THE
7 PROPERTY UNTIL AFTER THE LEASE EXPIRED FOR
8 2003, ISN'T THAT NOT CORRECT?

9 A I DON'T KNOW.

10 Q YOU DON'T RECALL PUTTING OUT THE SIGN, ISN'T
11 THAT CORRECT?

12 A THAT'S CORRECT.

13 Q THE QUESTION WAS, MR. BUTLER TESTIFIED EARLIER
14 TODAY THAT IN MAY OF 2003, AFTER THE LEASE
15 YEAR PERIOD FOR MR. WILSON HAD EXPIRED, THAT
16 HE WANTED YOU TO PUT A SIGN BACK ON THE
17 PROPERTY? IS THAT AN ACCURATE STATEMENT?
18 WHAT WAS YOUR ANSWER?

19 MR. WRIGHT: I OBJECT TO THAT AS PITTING
20 THE WITNESS BECAUSE WHAT WE'RE REFERRING
21 TO IS THE TESTIMONY OF MR. BUTLER.
22 COUNSEL WAS REPRESENTING HIM, BUT THAT
23 WAS TESTIMONY OF MR. BUTLER AND MR.
24 BUTLER WAS NOT IN THE ROOM AND MR. RAY
25 BASICALLY IS ... WHATEVER YOU'RE SAYING

1 HIS TESTIMONY WAS, THAT'S RIGHT, BUT MR.
2 RAY DIDN'T TESTIFY TO THAT.

3 MR. HANNA: I DON'T THINK THAT'S QUITE
4 THE PROPER USE OF THE DEPOSITION TO START
5 WITH. AS I UNDERSTAND, THE DEPOSITION
6 CAN ONLY BE USED FOR IMPEACHMENT. SO,
7 YOU'RE ASKING A QUESTION AND IF HE GIVES
8 YOU A DIFFERENT ANSWER OTHER THAN WHAT
9 WAS GIVEN IN THE DEPOSITION, THEN YOU CAN
10 IMPEACH HIM WITH IT. BUT LET'S PURSUE
11 THAT. YOU ASK HIM A QUESTION AND SEE IF
12 HE GIVES A DIFFERENT ANSWER THAN HE DID
13 IN THE DEPOSITION. WHAT WAS THE QUESTION
14 YOU ASK HIM?

15 MR. WARING: YOUR HONOR, I ASKED HIM
16 EARLIER, WAS IT TRUE THAT HE WAITED UNTIL
17 AFTER THE LEASE HAD EXPIRED TO ... AND HE
18 SAID, "NO. HE HAS NO RECOLLECTION OF
19 THAT." HE DIDN'T KNOW. BUT WHAT HE SAYS
20 IN THE DEPOSITION THAT WAS AFTER MAY OF
21 2003. THAT'S AN ACCURATE STATEMENT. I
22 ASKED HIM IF MR. BUTLER'S STATEMENT WAS
23 ACCURATE.

24 MR. HANNA: ASK YOUR QUESTION AGAIN.

25 Q DID YOU WAIT UNTIL AFTER MAY OF 2003 TO PUT

1 YOUR SIGN ON THE PROPERTY AFTER MR. WILSON'S
2 LEASE WAS NO LONGER IN EFFECT?

3 A AGAIN, I DON'T RECALL.

4 Q I'LL CALL YOUR ATTENTION TO THE APPROXIMATE
5 DATE OF MAY 31. I BELIEVE YOU TESTIFIED ON
6 OCTOBER 18TH. I ASKED A QUESTION ... WOULD YOU
7 READ THE QUESTION?

8 MR. HANNA: YOU ASKED HIM THE QUESTION,
9 DID HE PUT IT UP OR WHEN HE PUT IT UP AND
10 HE SAID HE DOESN'T RECALL. NOW, WHERE IS
11 THAT QUESTION IN THE DEPOSITION?

12 MR. WARING: THE QUESTION IS THAT MR.
13 BUTLER TESTIFIED EARLY TODAY THAT IN MAY
14 OF '03, AFTER THE LEASE PERIOD FOR MR.
15 WILSON EXPIRED, THAT YOU PUT A SIGN BACK
16 UP ON THE PROPERTY? IS THAT AN ACCURATE
17 STATEMENT.

18 MR. HANNA: THAT'S NOT PROPER CROSS
19 EXAMINATION. YOU CAN CROSS EXAMINE HIM
20 ON A QUESTION THAT YOU ASK HIM THE
21 QUESTION OR WHAT YOU'RE EXAMINING HIM ON
22 STATEMENTS THAT SOMEBODY ELSE MADE. IF
23 YOU WANT TO REPHRASE IT ALONG THOSE
24 LINES, I'LL BE HAPPY TO RULE ON THAT.

25 MR. WARING: THANK YOU, YOUR HONOR.

1 Q COULD IT HAVE BEEN MAY 15TH OF 2003 THAT YOU
2 PUT THE SIGN ON THE PROPERTY?

3 A COULD HAVE BEEN.

4 MR. WARING: THAT'S ALL I HAVE, YOUR
5 HONOR.

6 MR. HANNA: IT ACCOMPLISHED THE SAME
7 THING. ANY OBJECTION TO MR. RAY'S BEING
8 EXCUSED?

9 MR. WRIGHT: YOUR HONOR, JUST ONE VERY
10 BRIEF ...

11 MR. HANNA: IF IT'S SOMETHING THAT HE
12 BROUGHT UP.

13 MR. WRIGHT: IT GOES TO WHEN THE SIGN
14 WENT UP.

15 RE-RE-DIRECT EXAMINATION BY MR. WRIGHT:

16 Q THE QUESTION IS THIS, BY THE TIME YOU PUT THE
17 SIGN UP, OR HAD THE SIGN PUT UP, HAD MR.
18 WILSON VACATED THE PROPERTY?

19 MR. HANNA: HE'S ALREADY TESTIFIED TO
20 THAT. YES. I THINK THAT WAS YOUR
21 ANSWER, WASN'T IT?

22 A MY ANSWER WOULD BE THAT I DON'T RECALL. I
23 DON'T KNOW EXACTLY WHAT VACATING MEANS.

24 MR. HANNA: HE DOESN'T RECALL. HE JUST
25 KNOWS A SIGN WENT UP, CORRECT? ANYTHING

1 ELSE?

2 MR. WARING: NOTHING FURTHER, YOUR HONOR.

3 MR. HANNA: ANY OBJECTION TO HIM BEING
4 EXCUSED?

5 MR. WRIGHT: NONE FROM THE PLAINTIFF.

6 MR. HANNA: HOW LONG IS YOUR NEXT WITNESS
7 GONNA TAKE? WHO'S THE NEXT WITNESS?

8 OFF THE RECORD

9

10 LEON P. BUTLER, JR., HAVING FIRST BEEN DULY SWORN,

11 TESTIFIED AS FOLLOWS:

12 DIRECT EXAMINATION BY MR. WRIGHT:

13 Q THE TRACT CONTAINING FIVE ACRES IS THE SUBJECT
14 OF THIS LITIGATION. HOW DID YOU ACQUIRE THAT
15 PROPERTY?

16 A THAT PROPERTY WAS ACQUIRED THROUGH A DEED FROM
17 MY MOTHER, WHO, IN ESSENCE, GAVE IT TO ME FOR
18 LOVE AND AFFECTION.

19 Q HAD THAT PROPERTY BEEN IN YOUR FAMILY FOR A
20 LONG TIME?

21 A YES, SIR, LONG AS I CAN REMEMBER.

22 Q TO YOUR KNOWLEDGE, HAD IT BEEN RENTED TO ANY-
23 ONE PRIOR TO 1996?

24 A NO, SIR.

25 Q DID YOU MAKE ANY EFFORTS IN 1996 TO ATTEMPT TO

1 LEASE THE PROPERTY?

2 A YES, I DID. I TALKED WITH CHARLEY RAY AND
3 ASKED HIM TO HELP ME TO LEASE IT OR TO GET
4 SOME CASH FLOW OUT OF THE PROPERTY AS SUCH.

5 Q DID YOU HAVE ANY SPECIFIC REQUIREMENTS WITH
6 MR. RAY WITH RESPECT TO HIS EFFORTS ON YOUR
7 BEHALF? DID YOU TRY TO TELL HIM HOW YOU
8 WANTED HIM TO MARKET THE PROPERTY?

9 A NO, I DIDN'T. I ASSUMED THAT HE WAS ... IN MY
10 ESTIMATION AT LEAST, A REAL ESTATE PROFES-
11 SIONAL AND HE WOULD KNOW WHAT TO DO AND HOW TO
12 DO IT. I WAS NOT.

13 Q ALRIGHT, SIR. TELL US, DID ANYONE, TO YOUR
14 KNOWLEDGE, SUBMIT A PROPOSAL FOR LEASING THE
15 PROPERTY PRIOR TO THE DEFENDANT, BILLY WILSON?

16 A NO, SIR. HE WAS THE FIRST ONE I WAS MADE
17 AWARE OF.

18 Q ALRIGHT, NOW. AS BETWEEN YOU AND MR. RAY AND
19 HIS RELATIONSHIP AND MARKETING THE PROPERTY ON
20 YOUR BEHALF, DID MR. RAY HAVE AUTHORITY TO
21 MAKE FINAL BINDING AGREEMENTS WITH RESPECT TO
22 LEASING THE PROPERTY?

23 A NO, HE DID NOT. I RESERVED THAT RIGHT.

24 Q YOU WERE HERE WHEN WE WENT THROUGH A NUMBER OF
25 DOCUMENTS WITH MR. RAY. I'M NOT GONNA SPEND

1 QUITE AS MUCH TIME ON THEM WITH YOU. BUT I'D
2 LIKE TO ASK YOU TO TAKE A LOOK BRIEFLY AT
3 PLAINTIFF'S STIPULATED EXHIBIT NUMBER "3".

4 A YES. THIS WAS EARLY IN THE NEGOTIATIONS ON
5 THE LEASE. THIS WAS MR. BILLY WILSON'S
6 CORRESPONDENCE TO CHARLEY, WHICH WAS THEN
7 GIVEN TO ME.

8 Q DID YOU AT ANY TIME DURING THE NEGOTIATIONS
9 HAVE ANY COMMUNICATIONS WITH MR. WILSON THAT
10 WERE NOT WRITTEN COMMUNICATIONS?

11 A NO, SIR, I DID NOT.

12 Q I BELIEVE YOU INDICATED PLAINTIFF'S EXHIBIT
13 "3" WAS THE INITIAL COMMUNICATIONS CONCERNING
14 THE LEASE TERMS?

15 A I BELIEVE THERE WAS AN EARLIER PROPOSAL WHERE
16 HE HAD PROPOSED THIRTY-SIX THOUSAND PER YEAR
17 AND THEN AS WE WERE MORE INTO THE NEGOTIA-
18 TIONS, THIS WAS CHANGED WHERE I HAD INITIALED
19 IT, AND I WAS TELLING HIM I WAS ASKING FORTY-
20 TWO FIVE FOR THE FIRST TWO YEARS.

21 Q PLAINTIFF'S STIPULATED EXHIBIT NUMBER "9", AND
22 THAT'S A THREE PAGE EXHIBIT AND I'M GOING TO
23 ASK YOU TO FOCUS UPON THE THIRD PAGE OF THAT
24 EXHIBIT.

25 A YES, I REMEMBER THIS LETTER.

1 Q WHAT DOES THAT DOCUMENT PURPORT TO BE?

2 A THIS IS AN ADDENDUM TO THE ORIGINAL LETTER OF
3 INTENT. IT STIPULATES SOME CHANGES WHICH MR.
4 WILSON HAD ASKED FOR IN THE LEASE. THESE WERE
5 REQUIREMENTS THAT HE WANTED TO IMPOSE IN
6 HAVING THE LEASE.

7 Q NOW, SIR, DID YOU EXECUTE THAT DOCUMENT TO
8 SIGNIFY YOUR AGREEMENT TO THE REQUESTED
9 CHANGES THAT WERE MADE BY MR. WILSON?

10 A YES, I DID.

11 Q WHAT DATE WAS THAT DOCUMENT EXECUTED BY YOU?

12 A THE 12TH DAY OF MAY, 1998.

13 Q SPECIFICALLY WHAT CHANGES WERE BEING REQUESTED
14 BY MR. WILSON?

15 A WELL, THE FIRST ONE WAS THAT HE WANTED ... MR.
16 WILSON WANTED TO RECEIVE ALL THE RENTS FROM
17 THE BILLBOARDS THAT WERE ON THE PREMISES.
18 HERETOFORE I HAD BEEN GETTING THOSE RENTS.

19 Q IF I CAN STOP YOU THERE FOR JUST A MOMENT.
20 DID YOU HAVE AN AGREEMENT WITH A SIGN COMPANY
21 TO MAINTAIN BILLBOARDS ON THE PROPERTY?

22 A YES.

23 Q WAS THERE A WRITTEN LEASE AGREEMENT IN EFFECT
24 FOR THOSE SIGNS?

25 A YES, THERE WAS.

1 Q AND THAT AGREEMENT PRE-DATED THIS ADDENDUM
2 DATED MAY 12, 1998?

3 A YES, BY SEVERAL YEARS AS I REMEMBER.

4 Q DID YOU UNDERSTAND WHY MR. WILSON WAS
5 REQUESTING THE RENT FROM THE BILLBOARDS?

6 A WELL, I WAS ASKING FOR MORE RENT INITIALLY AND
7 I THINK HE HAD A CONCERN ABOUT SOMEONE PUTTING
8 UP A COMPETITOR'S SIGN ON THE BILLBOARD THAT
9 WAS ADJACENT TO WHERE HIS LOT WAS GOING TO BE.

10 Q WHAT OTHER CHANGES HAD BEEN REQUESTED AT THAT
11 TIME BY MR. WILSON?

12 A WELL, NUMBER TWO ON THIS LETTER, "THE LEASE
13 AGREEMENT SHALL AUTOMATICALLY RENEW FROM YEAR
14 --TO YEAR UNLESS NOTICE IS GIVEN BY MR. WILSON
15 NINETY DAYS PRIOR TO THE EXPIRATION DATE."
16 THIS WAS AT HIS REQUEST. NUMBER THREE, MOVING
17 ON WAS, "THE LEASE TERMS SHALL COMMENCE ON MAY
18 THE 15TH 1998, AND EXPIRE ON THE 14TH DAY OF
19 MAY, 1999. THAT ALL RENEWAL TERMS SHALL RUN
20 FROM MAY 15TH TO MAY 14TH OF THE FOLLOWING
21 YEAR." THIS WAS NECESSARY BECAUSE WE HAD
22 HOPED TO GET IT ACCOMPLISHED AND SIGNED OFF
23 EARLIER, BUT TIME CONSTRAINTS OR WHATEVER
24 DIDN'T ALLOW US. SO, WE HAD TO CHANGE THE
25 EFFECTIVE DATE OF THE LEASE. AND NUMBER FOUR,

1 "MR. WILSON SHALL HAVE THE RIGHT TO ASSIGN THE
2 LEASE AGREEMENT OR SUB-LEASE, BUT SHALL REMAIN
3 PERSONALLY LIABLE FOR THE LEASES PERFORMANCE."
4 THOSE WERE THE FOUR THINGS THAT HE ASKED ME TO
5 INCLUDE IN THE LEASE AGREEMENT, WHICH I AGREED
6 TO.

7 Q WITH RESPECT TO PLAINTIFF'S STIPULATED EXHIBIT
8 NUMBER "12", IS THAT THE FINAL LEASE AGREEMENT
9 THAT WAS EXECUTED ON MAY 15, 1998 BY YOU AS
10 LANDLORD?

11 A THIS WAS THE FINAL LEASE AGREEMENT.

12 Q FROM THE DATE OF THE INITIAL LETTER OF INTENT
13 THROUGH THE DATE OF EXECUTION OF THE LEASE
14 AGREEMENT OF MAY 15TH 1998, HAD YOU HAD ANY
15 VERBAL COMMUNICATION AT ALL WITH MR. BILLY
16 WILSON?

17 A NO, NONE AT ALL.

18 Q FOLLOWING THE DATE OF EXECUTION OF THE LEASE
19 AGREEMENT AND UP UNTIL THE DATE THAT YOUR
20 DEPOSITION WAS TAKEN LAST WEEK AT THE
21 MCCUTCHEN LAW FIRM IN CONWAY, HAD YOU HAD ANY
22 VERBAL COMMUNICATION AT ALL WITH MR. WILSON?

23 A NO, SIR, NONE AT ALL. I HAD NEVER MET THE
24 MAN.

25 Q DID YOU HAVE ANY DISCUSSIONS WITH ANYBODY

1 WORKING FOR MR. WILSON, TO YOUR KNOWLEDGE?

2 A NO, SIR.

3 Q ALRIGHT. WITH RESPECT TO THE PAYMENT OF THE
4 RENT UNDER THE LEASE AGREEMENT, DID YOU
5 RECEIVE CHECKS DIRECTLY FROM MR. WILSON OR DID
6 YOU RECEIVE CHECKS FROM MR. RAY?

7 A I WOULD GET A CHECK FROM MR. RAY, PRESUMABLY
8 AFTER HE HAD GOTTEN THE CHECK FROM MR. WILSON
9 AND TAKEN OUT HIS COMMISSION.

10 Q I'D LIKE TO DIRECT FOCUS TO THE CALENDAR YEAR
11 2001, AND SPECIFICALLY MAY OF 2001. DO YOU
12 RECALL IF THERE WERE ANY DISCUSSIONS AT THAT
13 POINT IN TIME ABOUT ACCOMMODATING A REQUEST BY
14 MR. WILSON TO PAY THE RENT IN TWO INSTALL-
15 MENTS RATHER THAN IN ONE INSTALLMENT AS SET
16 FORTH IN THE LEASE AGREEMENT?

17 A WELL, AS I RECALL, MR. RAY GOT IN TOUCH WITH
18 ME AND SAID THAT MR. WILSON HAD PROPOSED THAT
19 HE WOULD PAY HALF NOW AND THE OTHER HALF IN
20 SIX MONTHS IF HE WOULD AGREE TO THAT. AND I
21 MADE THE STIPULATION THAT FOR A, I GUESS, A
22 SERVICE CHARGE OR AN ACCOMMODATIONS CHARGE OR
23 WHATEVER OF \$1500.00. IF HE WOULD PAY THAT
24 INITIALLY THEN SIX MONTHS LATER I WOULD THEN
25 ACCEPT THE OTHER HALF, WHICH WAS THE OTHER

1 \$25,000.00 PRINCIPAL AMOUNT.

2 Q WAS THERE ANY DISCUSSION AT THAT TIME ABOUT
3 WHETHER THERE WOULD BE AN AMENDMENT TO THE
4 LEASE AGREEMENT SO THAT THE RENT WOULD BE PAID
5 IN TWO INSTALLMENTS IN THE FUTURE?

6 A NO. THE ... IT WAS MY UNDERSTANDING THAT THIS
7 WAS A ONE TIME ACCOMMODATION TO MR. WILSON AND
8 I SAW NO REASON TO ... HE HAD NOT ASKED ME TO
9 CHANGE THE LEASE. THERE WAS NO CORRESPONDENCE

10 FROM HIM IN WRITING ASKING ME TO CHANGE IT OR
11 TO AMEND THE ORIGINAL LEASE. SO, I ASSUMED
12 THAT THE ORIGINAL LEASE WOULD STILL BE IN
13 EFFECT. THAT HE WOULD STILL HAVE THE RIGHT TO
14 REMAIN ON THE PROPERTY AS LONG AS HE PAID THE
15 RENT.

16 Q WAS THE RENT FOR THE 2001/2002, AND I'M
17 TALKING NOW MAY 15, 2001 THROUGH MAY 14, 2002.
18 WAS THAT RENT PAID IN FULL?

19 A YES, THE RENT WAS PAID IN FULL.

20 Q PRIOR TO MAY 15, 2002, DID YOU HAVE ANY INFOR-
21 MATION THAT MR. WILSON WAS NOT GOING TO
22 CONTINUE TO LEASE THE PROPERTY FROM YOU?

23 A I HAD NO COMMUNICATIONS TO THAT EFFECT.

24 Q FOLLOWING THE AGREEMENTS IN MAY OF 2001, TO
25 SPLIT THE RENT PAYMENTS INTO TWO INSTALLMENTS

1 FOR THAT YEAR, DID YOU RECEIVE ANY DOCUMENTA-
2 TION AT ALL FROM MR. WILSON CONCERNING THE
3 LEASE AGREEMENT?

4 A I GOT A LETTER WITH A SIGNATURE FROM MR.
5 WILSON CONCERNING THE SPLIT PAYMENT THAT HE
6 HAD AGREED TO THAT, AND WHERE I HAD AGREED TO
7 IT, BUT THERE WAS NO OTHER COMMUNICATION
8 CONCERNING THE LEASE.

9 Q I'D LIKE YOU TO TAKE A LOOK AT PLAINTIFF'S
10 "31" PLEASE. CAN YOU IDENTIFY PLAINTIFF'S
11 EXHIBIT "31".

12 A YES. THIS APPEARS TO BE A COPY OF THE CHECK
13 THAT RAY REALTY SENT TO ME DATED NOVEMBER 26,
14 2001, AND IT'S ALSO A COPY OF APPARENTLY THE
15 CASHIERS CHECK PAYABLE TO RAY REALTY. I CAN'T
16 MAKE OUT WHO SIGNED IT.

17 Q ALRIGHT. I'M GOING TO ASK YOU TO TAKE A LOOK
18 PLEASE AT DEFENDANT'S EXHIBITS "5" AND "6".
19 WITH RESPECT TO DEFENDANT'S EXHIBIT NUMBER
20 "5", YOU TESTIFIED PREVIOUSLY ABOUT SEEING A
21 WRITTEN AGREEMENT CONCERNING THE SPLITTING OF
22 THE LEASE PAYMENT. WHAT I WANT TO ASK YOU, IS
23 THAT THE DOCUMENT YOU SAW OR WAS THERE SOME
24 OTHER DOCUMENT THAT YOU RECALL?

25 A I BELIEVE THERE WAS ANOTHER DOCUMENT, BUT THIS

1 WAS THE LETTER FROM CHARLEY SAYING THAT, "WE
2 ARE IN RECEIPT OF YOUR PAYMENT." THIS WAS IN
3 MAY AND THEN IT SAID THAT THE RENT THAT I HAD
4 AGREED TO DO ... MAYBE THE OTHER PART WAS
5 WHERE WE JUST AGREED FROM CHARLEY AND THIS WAS
6 THE ACTUAL LETTER THAT WAS SENT TO SANTEE
7 MOBILE HOMES STATING THE BALANCES OR THE PART
8 THAT WAS DUE NOW, AND THE BALANCE THAT WOULD
9 BE DUE.

10 Q DID YOU RECEIVE A RENT CHECK FROM MR. WILSON
11 ON OR ABOUT MAY 15TH 2002?

12 A 2002?

13 Q UH-HUH. (AFFIRMATIVE RESPONSE.)

14 A NO, I DID NOT.

15 Q WHEN YOU DID NOT RECEIVE A RENT CHECK FROM MR.
16 WILSON AT THAT TIME, DID YOU TAKE ANY ACTION?

17 A I ... A FEW DAYS LATER I CALLED ... I KNOW I
18 CALLED CHARLEY RAY AND ASK HIM, "WHAT WAS UP?
19 WHY HADN'T THE RENT BEEN PAID?" IN ESSENCE,
20 "HAVE YOU RECEIVED A CHECK AND JUST NOT SENT
21 ME MINE YET?" AND HE TOLD ME HE HAD NOT
22 RECEIVED THE CHECK.

23 Q IN RESPONSE TO HIS COMMENT TO YOU THAT HE HAD
24 NOT RECEIVED A CHECK, DID YOU ASK HIM TO TAKE
25 ANY ACTION ON YOUR BEHALE?

1 A I ASKED HIM TO WRITE TO MR. WILSON OR TO GET
2 IN CONTACT WITH MR. WILSON AND TO, IN ESSENCE,
3 TO FIND OUT WHY THE RENT WAS LATE. BECAUSE IT
4 WAS MY DETERMINATION FROM THE ORIGINAL LEASE
5 THAT IT WOULD AUTOMATICALLY RENEW. SO, I HAD
6 FULL CONFIDENCE THAT HE WAS GOING TO CONTINUE
7 TO BE ON THE PROPERTY AND THAT FOR SOME
8 REASON, NOT KNOWN TO ME, IT WAS OBVIOUSLY
9 LATE.

10 Q I'D ASK YOU TO TAKE A LOOK PLEASE AT PLAIN-
11 TIFF'S STIPULATED EXHIBIT NUMBER "22". ARE
12 YOU ABLE TO IDENTIFY THAT DOCUMENT?

13 A THIS WAS A LETTER WHICH CHARLEY RAY, ON BEHALF
14 OF RAY REALTY, SENT TO MR. BILLY WILSON DATED
15 JUNE THE 3RD, STATING THAT THE RENT WAS DUE ON
16 MAY THE 15TH AND HE'D NOT RECEIVED A PAYMENT.
17 THAT HE HAD LEFT HIM A NUMBER OF MESSAGES, HAD
18 NOT HEARD FROM HIM. ASKED HIM TO ADVISE US OF
19 HIS INTENTIONS AND THAT I, OBVIOUSLY, WOULD
20 LIKE FOR HIM TO CONTINUE BUT I INSTRUCTED HIM
21 OR THE LETTER SAYS THAT EITHER PAY THE
22 RENT OR ASK HIM TO VACATE. AND AS I RECALL,
23 WE NEVER GOT A RESPONSE TO THIS LETTER.

24 Q AT OR ABOUT THE TIME THAT LETTER WAS SENT, DID
25 YOU MAKE ANY EFFORT TO GO BY THE PROPERTY, 116

1 HIGHWAY 17 IN LITTLE RIVER TO DETERMINE IF THE
2 TENANT WAS STILL IN POSSESSION OF THE
3 PROPERTY?

4 A YES, I DID. AFTER NOT RECEIVING A REPLY, WE
5 BECAME VERY CONCERNED AND I MADE A SPECIAL
6 TRIP UP AND RODE BY AND IT APPEARED THAT THERE
7 WERE STILL MOBILE HOMES ON THE LOT AND THERE
8 WAS STILL A SIGN OUT FRONT AND IT LOOKED TO BE
9 BUSINESS AS USUAL. SO, I HAD NO REASON TO
10 BELIEVE THAT ANYTHING WAS AWRY. IT WAS MY
11 UNDERSTANDING THAT I STILL WAS, BY THE AGREE-
12 MENT, RESPONSIBLE TO MR. WILSON TO LEASE IT TO
13 HIM. ALTHOUGH THE RENT HAD NOT BEEN PAID AT
14 THIS TIME.

15 Q I'M GONNA ASK YOU TO GO BACK AND LOOK AT
16 PLAINTIFF'S EXHIBIT NUMBER "12", WHICH IS THE
17 GROUND LEASE AGREEMENT, AND I'M GONNA ASK YOU
18 TO FOCUS SPECIFICALLY UPON PARAGRAPH 31 ON
19 PAGE 16. WHAT WAS YOUR UNDERSTANDING WITH
20 RESPECT TO MR. WILSON'S RIGHT TO RECEIVE THE
21 LEASE PAYMENTS FOR THE BILLBOARD LEASES ON THE
22 PROPERTY?

23 A WELL, THIS PARTICULAR PART OF THE LEASE WAS IN
24 RESPONSE TO HIS ORIGINAL REQUEST TO RECEIVE
25 THE MONEY FROM THE SIGNS, AND THE CIRCUM-

1 STANCES WERE THAT IT SAYS AS LONG AS HE WAS IN
2 LAWFUL POSSESSION OF THE LEASED PREMISES, PUR-
3 SUANT TO THE TERMS OF THIS LEASE AGREEMENT,
4 AND AS LONG AS HE WAS NOT IN DEFAULT WITH HIS
5 OBLIGATIONS THAT HE WOULD BE ENTITLED TO
6 COLLECT AND RECEIVE ALL THE RENT THAT IS PAID.
7 AND THIS WAS PURSUANT TO THE AGREEMENT THAT
8 WAS ORIGINALLY IN MY MOTHER'S NAME BECAUSE SHE
9 HAD OWNED THE PROPERTY AT THAT TIME.

10 Q ALRIGHT, NOW. DO YOU RECALL HOW THE BILLBOARD
11 LEASE PAYMENTS WERE NORMALLY MADE? WERE THEY
12 MADE MONTHLY, SEMI-ANNUALLY, ANNUALLY?

13 A THEY WERE PAID TWICE A YEAR AFTER ... I MEAN,
14 THEY WEREN'T PAID IN ADVANCE. IN JANUARY, I
15 BELIEVE, THEY PAID FOR THE PRIOR SIX MONTHS
16 AND THEN THE FOLLOWING JULY, IF I REMEMBER
17 CORRECTLY, THEY WOULD PAY FOR THE FIRST HALF
18 OF THE YEAR.

19 Q NOW, DID MR. WILSON AT ANY TIME IN 2002 SEND
20 YOU ANY RENT CHECKS THAT HAD BEEN SENT TO HIM
21 FOR THE BILLBOARD LEASE PAYMENTS?

22 A NO, SIR. I RECEIVED NO RENT PAYMENTS ON THE
23 SIGNS OR SIGNED LEASE THING.

24 Q DID YOU FORM ANY IMPRESSION ABOUT MR. WILSON'S
25 INTENTIONS BASED ON YOUR FAILURE TO RECEIVE

1 THE BILLBOARD RENT PAYMENTS?

2 A WELL, I FELT LIKE IF HE HAD VACATED THE
3 PROPERTY, HE WOULD HAVE TURNED THOSE PAYMENTS
4 BACK OVER TO ME AS CALLED FOR IN THE LEASE.
5 BUT, APPARENTLY, HE TOOK THE MONEY OR CASHED
6 THE CHECKS. SO, I COULD ONLY ASSUME THAT HE
7 WAS STILL IN POSSESSION AND THE SIGN WAS STILL
8 ON THE PROPERTY AND THERE WERE STILL MOBILE
9 HOMES ON THE PROPERTY AFTER THE ANNIVERSARY

10 DATE OF THE LEASE. SO, I ASSUMED IT WAS
11 BUSINESS AS USUAL, AND FOR WHATEVER THE
12 REASON, THE CHECK WAS JUST LATE. I FELT AS IF
13 HE PAID THE RENT THAT WOULD ENTITLE HIM TO BE
14 THERE THROUGH MAY 14TH OF '03.

15 Q I'LL DIRECT YOUR ATTENTION TO THE LEASE AGREE-
16 MENT, SPECIFICALLY PARAGRAPH NUMBER TEN
17 PERTAINING TO TAXES. PARAGRAPH TEN OF THE
18 LEASE STATES ... I'M NOT GONNA ASK YOU TO READ
19 IT. I'M NOT GOING TO ASK YOU TO PUBLISH IT.
20 I WANTED YOU TO REFRESH YOUR MEMORY. WHAT WAS
21 YOUR UNDERSTANDING AS TO THE OBLIGATION OF THE
22 PARTIES TO THE LEASE AGREEMENT WITH RESPECT TO
23 PAYMENT OF THE REAL PROPERTY TAXES ON THE
24 LEASED PREMISES?

25 A AS I UNDERSTOOD, AND AS THE LEASE SAID, IT WAS

1 MR. WILSON'S RESPONSIBILITY TO PAY THE
2 PROPERTY TAXES FOR THE YEARS THAT HE WAS ON
3 THE PROPERTY AND RENTED THE PROPERTY.

4 Q YOU HAVE ALREADY TESTIFIED THAT YOU WERE ON
5 THE SITE AND EVERYTHING APPEARED TO BE
6 BUSINESS AS USUAL. DID YOU ACTUALLY TO UP AND
7 TALK TO ANYONE ON THE PREMISES?

8 A NO, I DID NOT.

9 Q DID THERE COME A TIME WHEN YOU FORMED AN
10 IMPRESSION THAT THE SITUATION WAS NO LONGER
11 BUSINESS AS USUAL?

12 A IT WAS ... I DON'T RECALL EXACTLY BUT IT WAS
13 LATER IN THE SUMMER OR EARLY IN THE FALL THAT
14 ~~I WENT BY AND THERE WAS~~ PART OF AN OLD
15 DILAPIDATED MOBILE HOME STILL THERE AND MAYBE
16 A TRUCK OR VEHICLE OF SOME SORT, AND, OF
17 COURSE, THERE WAS STILL A SIGN ON THE
18 PROPERTY. MR. WILSON'S SIGN, BUT IT LOOKED
19 FOR THE MOST PART THAT IT HAD BEEN VACATED.
20 THAT WAS MY IMPRESSION.

21 Q AT THAT POINT IN TIME, WHAT DID YOU DO?

22 A I GOT IN TOUCH WITH YOU AND TOLD YOU WHAT IT
23 APPEARED AND THAT I WOULD LIKE FOR YOU TO
24 WRITE A LETTER AS SUCH TO MR. WILSON AND SORT
25 OF FIND OUT WHAT THE SITUATION WAS. HE HAD

1 NOT TAKEN ... APPARENTLY, HE HAD NOT TAKEN THE
2 TIME TO RESPOND TO MR. RAY'S LETTER EARLIER
3 ON. I THOUGHT, WELL, MAYBE IF HE GETS A
4 LETTER FROM MY ATTORNEY, WE'LL GET A RESPONSE.

5 Q I WANT YOU TO LOOK AT A DOCUMENT THAT HAS BEEN
6 ENTERED AS PLAINTIFF'S STIPULATED EXHIBIT
7 NUMBER "24" AND ASK IF YOU'VE SEEN THAT
8 BEFORE?

9 A YES. THIS WAS THE LETTER WHICH YOU SENT TO
10 MR. BILLY WILSON BY CERTIFIED MAIL STATING
11 THAT YOU WERE REPRESENTING ME AND THAT HE HAD
12 FAILED TO PAY THE RENT AND THAT HE WAS IN
13 DEFAULT.

14 Q WHAT EFFORT, IF ANY, MR. BUTLER, DID YOU
15 UNDERTAKE AFTER I SENT NOTICE OF DEFAULT TO
16 MR. WILSON IN OCTOBER OF 2002?

17 A AS I RECALL, I WENT UP AND TOOK SOME PHOTO-
18 GRAPHS OF THE PROPERTY. I BELIEVE THOSE WERE
19 IN NOVEMBER OF '02.

20 Q ALRIGHT, SIR. I'M GOING TO ASK YOU TO LOOK AT
21 THESE DOCUMENTS THAT HAVE BEEN ENTERED AS
22 PLAINTIFF'S STIPULATED EXHIBIT NUMBER "26",
23 "27", "28" AND "29".

24 A YES. THESE ARE THE PHOTOGRAPHS THAT I TOOK AT
25 THAT TIME.

1 Q ALRIGHT, SIR. AND BASED ON YOUR EXAMINATION
2 OF THE PHOTOGRAPHS, ARE YOU ABLE TO DETERMINE
3 APPROXIMATELY WHEN THOSE PHOTOGRAPHS WERE
4 TAKEN?

5 A I BELIEVE THE DATE STAMP ON HERE WAS NOVEMBER
6 THE 19TH, MAYBE THE 18TH. I CAN'T QUITE READ
7 WHAT IS STAMPED ON THERE. OF '02.

8 Q AND YOU TOOK THOSE PHOTOGRAPHS?

9 A YES.

10 Q AND BASED UPON YOUR OBSERVATIONS OF WHEN THE
11 PHOTOGRAPHS WERE TAKEN, DO THOSE PHOTOGRAPHS
12 ACCURATELY REPRESENT THE CONDITION OF THE
13 PREMISES AT THE TIME THE PHOTOGRAPHS WERE
14 TAKEN?

15 A YES.

16 Q AT THAT TIME, DID MR. WILSON STILL HAVE A SIGN
17 ADVERTISING HIS BUSINESS ON THE PREMISES?

18 A YES. IN FACT, HE HAD TWO SIGNS IN EXHIBIT
19 NUMBER "27".

20 Q AT THAT TIME, DID MR. WILSON STILL HAVE A
21 MAILBOX ON THE PREMISES FOR DELIVERY OF MAIL?

22 A THERE IS A MAILBOX IN THE PHOTOGRAPH, YES, ON
23 THE PROPERTY.

24 Q AT THAT TIME WAS THERE ANY TRASH LEFT ON THE
25 PREMISES BY MR. WILSON OR SOMEONE HOLDING

1 POSSESSION UNDER MR. WILSON?

2 A YES. THERE APPEARS TO BE AN OLDER TRUCK.

3 THERE APPEARS TO BE A SOMEWHAT ABANDONED

4 LOOKING MOBILE HOME. THERE IS A SIGN WITH AN

5 ARROW ON THE TOP THAT'S KIND OF DILAPIDATED

6 LOOKING, AND THEN THERE WERE THE TWO LARGE

7 BILLBOARD SIGNS THAT WERE ON THE PROPERTY. IT

8 APPEARS TO BE RATHER WEED-GROWN.

9 Q MR. BUTLER, AT ANY TIME AFTER MAY 15, 2002,

10 DID MR. WILSON CALL YOU TO TELL YOU THAT HE

11 WAS VACATING THE PREMISES?

12 A NO, HE DID NOT.

13 Q AT ANY TIME AFTER MAY 15, 2002, DID MR. WILSON

14 SEND YOU ANY CORRESPONDENCE INDICATING THAT HE

15 WAS VACATING THE PREMISES?

16 A NO, HE DID NOT.

17 Q MR. BUTLER, DID YOU, AT ANY TIME, SUBSEQUENT

18 TO THESE PHOTOGRAPHS YOU TOOK ON OR ABOUT

19 NOVEMBER 19, 2002, AT ANY TIME, DID YOU ASK

20 MR. RAY TO MAKE ANY EFFORTS TO MARKET THE

21 PREMISES TO OTHER POTENTIAL LESSEES?

22 A AT ANY TIME AFTER THESE SIGNS?

23 Q YES.

24 A YES, I DID.

25 Q TELL US ABOUT THAT PLEASE.

1 A WELL, I FELT OBLIGATED BY THE LEASE THAT
2 HAVING NOT BEEN NOTIFIED THAT HE WAS STILL IN
3 POSSESSION OF THE PROPERTY UNTIL MAY THE 14TH
4 OF '03, EVEN THOUGH THE RENT HAD NOT BEEN PAID
5 OR THE LEASE PAYMENT HAD NOT BEEN PAID. I
6 FELT LIKE AT ANY TIME I COULD GET A CHECK AND
7 THAT HE WOULD HAVE THE RIGHT TO GO BACK ON
8 THERE. AND SO IT WAS AFTER THAT DATE EXPIRED
9 OR PASSED, IF MY RECOLLECTION IS RIGHT, BUT I
10 ASK CHARLEY TO TRY TO GET ME ANOTHER TENANT.
11 Q I'D LIKE TO GO OVER WITH YOU THE DAMAGES THAT
12 YOU ARE ALLEGING AGAINST THE DEFENDANT, MR.
13 WILSON.
14 A - OKAY.
15 Q WOULD YOU DO THAT FOR US PLEASE?
16 A I CAN. CAN I REFER TO MY NOTES?
17 Q YES, SIR.
18 A I DON'T HAVE ALL THE FIGURES IN MY HEAD.
19 Q WHAT ARE YOU REQUESTING FROM MR. WILSON?
20 A WELL, INITIALLY THE \$50,000.00 WHICH WAS DUE
21 AND PAYABLE ON MAY 15, 2002. THAT PAYMENT WAS
22 NEVER MADE. AND AN AMOUNT OF INTEREST THAT
23 WAS COMPUTED, AS IT SAYS ON MY NOTES, IF THE
24 LEGAL INTEREST RATE OF 8.75 PERCENT FROM MAY
25 THE 15TH UNTIL THE TRIAL DATE OF OCTOBER 26,

1 2007. THAT AMOUNT BEING \$23,840.75. THE NEXT
2 ITEM WERE THE 2002 TAXES CAUSE HE WAS ON THE
3 PROPERTY AND I HAD NOT BEEN NOTIFIED OF HIM
4 LEAVING. THAT AMOUNT WAS \$4,982.87, WHICH I
5 ULTIMATELY PAID WHEN HE DID NOT. THE INTEREST
6 ON THAT UNPAID TAX AMOUNT CAME TO \$1,999.36.
7 AGAIN, COMPUTED AT THE LEGAL INTEREST RATE OF
8 8.75 PERCENT FROM MAY 12TH '03 UNTIL THE TRIAL
9 DATE OF OCTOBER 26, 2007. THE NEXT ITEM,
10 NUMBER FIVE, IS THE DEFENDANT'S SHARE OF THE
11 2004 TAXES. THIS WOULD BE FROM JANUARY 1, '03
12 TO MAY 14TH, '03. THIS AMOUNT WAS CALCULATED
13 AT \$1,800.75. ITEM SIX IS THE INTEREST
14 ACCRUED ON THAT UNPAID BALANCE. THAT AMOUNT
15 BEING \$597.47 COMPUTED AGAIN, AT THE INTEREST
16 RATE OF 8.75 PERCENT FROM JANUARY THE 9TH 2004
17 UNTIL THE TRIAL DATE OF OCTOBER 26, 2007. THE
18 NEXT ITEM IS FOR CLEANING. THIS IS THE
19 APPROXIMATE COST OF THE REMOVAL OF THE TRASH
20 LEFT BY THE DEFENDANT WHEN HE ABANDONED THE
21 PREMISES. AND THIS WAS IN THE AMOUNT OF
22 \$2500.00. THIS CORRELATES WITH WHAT I HAD TO
23 FORGIVE, IN ESSENCE, TO THE NEXT TENANT WHO
24 CAME TO LEASE IT. THAT WAS THE AGREEMENT.
25 Q SO THAT WAS AGREED UPON WITH NEXT TENANT?

1 A NEXT TENANT.

2 Q THEY WERE GIVEN CREDIT AGAINST THEIR LEASE
3 PAYMENTS?

4 A GIVEN CREDIT AGAINST THEIR LEASE PAYMENT.

5 Q FOR THE COST OF CLEANING?

6 A YEAH. AND THEY DID THE CLEANING UP. I DID
7 NOT DO IT.

8 Q DID THAT INCLUDE THE REMOVAL OF THE SIGNS OF
9 THE DEFENDANT, BILLY WILSON? THE HORTON HOME
10 SIGN SHOWN IN THIS PHOTOGRAPH?

11 A WELL, TO BE QUITE HONEST WITH YOU, I'M NOT
12 SURE WHO TOOK THAT SIGN DOWN. I WAS NOT
13 THERE.

14 Q ~~OKAY. ALRIGHT, SIR. ANY OTHER ITEMS THAT~~
15 YOU'RE CLAIMING?

16 A I'M CLAIMING A \$150.00, THE AMOUNT OF THE
17 HORRY COUNTY CLERK FILING FEE. \$15.00 FOR THE
18 ORANGEBURG COUNTY SHERIFF SERVICE FEE. \$50.00
19 FOR THE GRAHAM DETECTIVE AGENCY, SERVICE OF
20 SUBPOENA. \$25.00 FOR THE NEXT MEDIA SUBPOENA
21 FEE. PLUS THE GROUND LEASE AGREEMENT
22 OBLIGATES THE DEFENDANT TO PAY A REASONABLE
23 ATTORNEY FEES FOR MY COUNSEL. ALSO COURT
24 REPORTER FEES AND ANY FEES ASSESSED BY THE
25 SPECIAL REFEREE. THOSE HAVE NOT BEEN

1 DETERMINED YET.

2 MR. WRIGHT: YOUR HONOR, WITH RESPECT TO
3 THE ISSUE OF ATTORNEY'S FEES, I WOULD
4 REQUEST THAT THE RECORD BE HELD OPEN SO
5 WE CAN FILE AN AFFIDAVIT BECAUSE
6 OBVIOUSLY THE ATTORNEY'S FEES ARE CON-
7 TINUING TO GO ON.

8 MR. HANNA: ANY OBJECTION?

9 MR. WARING: JUST THE OPPORTUNITY TO BE
10 ABLE TO CROSS EXAMINE HIM. THE AMOUNT OF
11 SUCH FEES AND THE REASONS FOR SUCH FEES.

12 MR. HANNA: WHY DON'T WE HANDLE IT THIS
13 WAY. WHY DON'T YOU PREPARE AT THE CLOSE
14 OF THE CASE TO DETERMINE THOSE AND
15 INCLUDE THIS PAPER THAT YOU SUBMIT WITH
16 AN AFFIDAVIT AS TO YOUR ATTORNEY'S FEES
17 AND WE'LL GET THAT TO MR. MARING AND
18 AFTER REVIEWING THE AFFIDAVIT AND SUBJECT
19 TO THIS AGREEMENT OR DISAGREEMENT AS TO
20 THE AMOUNT OF DAMAGES. IF YOU WANT TO
21 BRING ANY MORE WITNESSES.

22 MR. WRIGHT: THAT IS ALL THE QUESTIONS I
23 HAVE OF MR. BUTLER.

24 MR. HANNA: CROSS?

25 MR. WARING: THANK YOU, YOUR HONOR.

1 CROSS EXAMINATION BY MR. WARING:

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

5 A MR. RAY WAS THE MIDDLE MAN. I WAS THE ONE WHO
6 HAD TO MAKE ALL THE FINAL DECISIONS, BUT, YES,
7 HE COULD RELY ON WHAT MR. RAY WAS TELLING HIM
8 BECAUSE I, IN TURN, WAS TELLING THIS TO MR.
9 RAY.

10 Q MR. BUTLER, THIS IS MORE FOR CLARIFICATION. I
11 THINK YOU TESTIFIED THAT THERE WAS AN AGREE-
12 MENT OR LETTER SIGNED BY MR. WILSON REGARDING
13 THE SPLIT OF THE PAYMENTS. DID YOU TESTIFY
14 ~~EARLIER THAT THERE WAS A LETTER SIGNED BY MR.~~
15 WILSON?

16 A THE LETTER I THINK I WAS REFERRING TO WAS THE
17 ONE THAT WAS EVENTUALLY SENT THAT I SIGNED
18 SAYING THAT I WOULD AGREE TO THIS.

19 Q WAS THAT THE LETTER SENT BY CHARLEY RAY TO MR.
20 WILSON THAT SAID IT WAS ACCEPTABLE? IS THAT
21 THE LETTER YOU'RE REFERRING TO?

22 A YES, THAT'S WHAT I RECALL. YES, SIR.

23 Q YOU WOULD AGREE WITH ME, MR. BUTLER, THAT YOU
24 AND MR. WILSON ORALLY MODIFIED THE TERMS OF
25 THE LEASE FROM MAY 15 OF 2001 TO MAY 14 OF

1 2002, ISN'T THAT CORRECT?

2 A YOU'RE ASKING ME IF WE ORALLY MODIFIED THE
3 LEASE?

4 Q THE TERMS OF THE LEASE AGREEMENT DURING THE
5 YEAR OF ... DURING THE TIME FROM MAY 15, '01
6 TO MAY 14 OF '02?

7 A WELL, I DIDN'T THINK OF IT IN TERMS OF A MOD-
8 IFICATION OF THE ORIGINAL LEASE. THAT WAS
9 STILL IN EFFECT. THIS WAS AN ACCOMMODATION

10 BECAUSE OF WHATEVER MR. WILSON WAS REASONED,
11 BUT IT WAS TOLD TO ME THAT HE COULD PAY HALF
12 NOW AND HALF SIX MONTHS LATER. BUT, THERE WAS
13 NO REASON TO GO IN AND MODIFY THE LEASE. I
14 WAS NOT REQUESTED TO DO THAT.

15 Q IT CHANGED THE PAYMENT TERMS OF YOUR GROUND
16 LEASE AGREEMENT, ISN'T THAT CORRECT?

17 A IT DID FOR THAT ONE YEAR, YES, SIR.

18 Q AND YOUR LEASE AGREEMENT DOES PROVIDE THAT IF
19 THERE'S ANY MODIFICATION OF THE TERMS OF THAT
20 LEASE, THAT IT HAS TO BE IN WRITING AND SIGNED
21 BY BOTH PARTIES, ISN'T THAT CORRECT?

22 A YES.

23 Q SO, MY QUESTION TO YOU IS, IS THAT YOU AND MY
24 CLIENT, MR. WILSON, DEVIATED FROM THAT PROVI-
25 SION OF THE CONTRACT IN MAY 15, '01 THROUGH

1 MAY 14 OF 2002, ISN'T THAT CORRECT?

2 A THAT WE DEVIATED ...

3 Q THAT YOU MODIFIED THE TERMS OF THE CONTRACT?

4 A THERE WAS A LETTER THAT WE BOTH AGREED TO DO
5 THIS FOR THIS ONE YEAR, YES.

6 Q SO, THE ANSWER TO THAT QUESTION IS YES?

7 A YES. WE AGREED TO SPLIT PAYMENTS FOR THE YEAR
8 2001.

9 Q DID YOU EVER HAVE ANY CONVERSATION WITH MR.
10 RAY AT THE POINT IN TIME WHERE HE CAME TO YOU
11 WITH THE REQUEST FROM MR. WILSON THAT THE PAY-
12 MENTS OF THE 2001 RENTS BE SPLIT?

13 A I THINK THE CONVERSATION WAS, FROM MY POINT OF
14 VIEW WAS, WELL, IF WE SPLIT IT UP, I'M NOT
15 GETTING WHAT I'M ENTITLED TO WHEN I'M ENTITLED
16 TO GET IT. THEREFORE, I WOULD LIKE AN EXTRA
17 SERVICE CHARGE PUT ON THERE SO THAT I, IN
18 ESSENCE, WAS FINANCING HIM FOR SIX MONTHS FOR
19 HALF OF THE LEASE PAYMENT.

20 Q ALRIGHT, SIR.

21 A IS THAT WHAT YOU'RE ASKING ME?

22 Q THAT'S YOUR ANSWER, MR. BUTLER. WHEN YOU
23 ORIGINALLY WENT TO MR. RAY TO LEASE THE
24 PROPERTY, DID YOU ENTER INTO AN AGREEMENT?

25 A WHEN I ORIGINALLY WENT TO MR. RAY?

1 Q THAT'S CORRECT.

2 A YES, WE DID.

3 Q THAT WAS IN WHAT YEAR? WAS THAT 1996?

4 A I BELIEVE THAT'S CORRECT, YES, SIR.

5 Q IT IS TRUE THAT IN 1996 THE PROPERTY ACTUALLY
6 BELONGED TO YOUR MOTHER AT THAT POINT IN TIME.

7 A THAT'S CORRECT, YES, SIR.

8 Q IT WAS ACTUALLY CONVEYED TO YOU IN APRIL OF
9 1998, IS THAT CORRECT?

10 A I BELIEVE THAT'S WHAT THE RECORD WILL SHOW.

11 Q THAT'S WHAT THE RECORD WILL SHOW?

12 A YEAH.

13 Q SO, THAT WOULD BE A MONTH PRIOR TO YOU
14 ENTERING INTO THIS AGREEMENT IS WHEN YOU
15 ACTUALLY WERE GIVEN TITLE TO THE PROPERTY?

16 A THAT'S CORRECT.

17 Q AND IT'S TRUE THAT YOU HIRED MR. RAY TO ACT AS
18 YOUR EXCLUSIVE AGENT IN TRYING TO OBTAIN A
19 RENTER, CORRECT?

20 A YES.

21 Q AND THAT YOU ULTIMATELY OBTAINED A LEASE
22 AGREEMENT THAT WE ALL AGREE ON HERE FOR MR.
23 WILSON IN 1998, IS THAT CORRECT?

24 A YES.

25 Q AND EVERYTHING WENT ... I'M GONNA USE THE

1 WORK, "LIKE CLOCKWORK" UNTIL 2001, IS THAT
2 CORRECT?

3 A YES. HE PAID THE FEES AND ...

4 Q NO DEVIATIONS FROM THE CONTRACT?

5 A NOPE.

6 Q SO IN MAY OF 2001, MR. RAY CAME TO YOU STATING
7 THAT THERE WAS GOING TO BE A SPLIT IN THE
8 RENTS. DO YOU RECALL WHETHER OR NOT YOU
9 RECEIVED THE SECOND INSTALLMENT ON TIME THAT
10 YEAR?

11 A I BELIEVE THAT I DID OR VERY CLOSE TO IT.
12 'CAUSE SOMETIMES I THINK THE CHECK WOULD GO TO
13 CHARLEY AND THEN IT MIGHT BE A FEW DAYS BEFORE
14 ~~HE COULD GET THE CHECK CUT AND SENT TO ME.~~ I
15 DON'T REMEMBER THE EXACT DATE I GOT THE CHECK.

16 Q ALRIGHT, SIR. IT WAS YOUR TESTIMONY THAT IN
17 MAY OF 2002, YOU DID NOT RECEIVE A RENT
18 PAYMENT, CORRECT?

19 A THAT'S CORRECT.

20 Q THAT YOU INQUIRED TO MR. RAY, CORRECT? YOU
21 INQUIRED AS TO WHY FROM MR. RAY?

22 A I TOLD HIM THAT I HAD NOT RECEIVED THE RENT
23 PAYMENT AND ASKED HIM IF HE HAD RECEIVED IT.

24 Q AND YOU DIRECTED MR. RAY TO WRITE A LETTER, IS
25 THAT CORRECT?

1 A YES.

2 Q DO YOU RECALL WHAT YOU TOLD MR. RAY TO PUT IN
3 THAT LETTER?

4 A WELL, I'M REMINDED BY HAVING READ IT AGAIN
5 RECENTLY, BUT I WANTED MY MONEY BECAUSE I HAD
6 NOT HEARD FROM MR. WILSON AND I ASSUMED THAT
7 HE WAS STILL RENTING THE PROPERTY AND I
8 WONDERED WHERE MY MONEY WAS. AND THAT WAS THE
9 LETTER I WANTED CHARLEY TO SEND WAS TO SAY,

10 YOU KNOW, A GENTLE REMINDER. I NEED TO BE
11 PAID.

12 Q DID YOU EVER TELL CHARLEY RAY TO TELL MR.
13 WILSON TO EITHER PAY OR VACATE?

14 A I DON'T REMEMBER USING THOSE SPECIFIC WORDS,
15 NO. I THINK THAT WAS POSSIBLY SOMETHING THAT
16 CHARLEY PUT IN THERE, BUT THE INTENT OBVIOUSLY
17 WAS YOU EITHER PAY FOR WHAT YOU'RE GETTING OR
18 YOU'LL HAVE TO LEAVE.

19 Q ALRIGHT, SIR. AND YOU TESTIFIED THAT YOU
20 NEVER GOT ANY RESPONSE AT ALL? LET ME MAKE
21 SURE. I WROTE THE TESTIMONY DOWN HERE OR I'LL
22 HAVE THE COURT REPORTER READ IT BACK IF I
23 CAN'T GET IT CORRECT. THAT MR. WILSON
24 PROVIDED YOU NO CORRESPONDENCE STATING THAT HE
25 WAS LEAVING AFTER MAY 15TH OF 2002?

- 1 A NO CORRESPONDENCE.
- 2 Q DID ANYBODY REPRESENTING MR. WILSON EVER GIVE
- 3 YOU CORRESPONDENCE STATING THAT HE WAS
- 4 LEAVING?
- 5 A NO, SIR, NOT THAT I READ.
- 6 Q ALRIGHT, SIR. I'M GONNA CALL YOUR ATTENTION
- 7 TO PLAINTIFF'S EXHIBIT NUMBER "23". SIR, MAY
- 8 I ASK YOU TO TAKE A LOOK AT THAT LETTER.
- 9 A UH-HUH. (AFFIRMATIVE RESPONSE.) THIS IS A
- 10 LETTER TO MY ATTORNEY, NEIL WRIGHT, REGARDING
- 11 THE GROUND LEASE AGREEMENT FROM N. DAVID
- 12 DURANT.
- 13 Q ALRIGHT, SIR. COULD YOU READ THE CONTENTS OF
- 14 PARAGRAPH-NUMBER FIVE.
- 15 A "ON THE LATTER PART OF JANUARY OR FIRST PART
- 16 OF FEBRUARY, MY CLIENT ADVISED MR. RAY THAT HE
- 17 WAS NOT GOING TO EXTEND THE GROUND LEASE FOR
- 18 AN ADDITIONAL ONE YEAR TERM."
- 19 Q AND THE NEXT PARAGRAPH PLEASE.
- 20 A "INASMUCH AS MR. RAY WAS THE AGENT FOR MR.
- 21 BUTLER, WE BELIEVE THAT THERE HAS BEEN SUFFI-
- 22 CIENT NOTICE TO MR. BUTLER IN THIS MATTER THAT
- 23 MY CLIENT WAS NOT GOING TO EXTEND THE LEASE
- 24 TERM."
- 25 Q ALRIGHT, SIR. WHEN YOU TESTIFIED EARLIER THAT

1 YOU RECEIVED NO CORRESPONDENCE STATING THAT HE
2 WAS LEAVING, YOU WEREN'T SPEAKING OF THIS
3 DOCUMENT?

4 A NO. I DON'T REMEMBER THIS LETTER. THIS DOES
5 NOT COME BACK TO MY CONSCIOUSNESS.

6 Q SO, YOU WOULD NOT DISPUTE THAT MR. WILSON'S
7 ATTORNEY STATED THAT HE WOULD NOT BE COMING
8 BACK ON THE PROPERTY?

9 MR. WRIGHT: OBJECTION TO THAT. I THINK
10 IT MISSTATES THE LETTER.

11 MR. WARING: I'LL READ THE LETTER. I'LL
12 WITHDRAW THAT QUESTION, YOUR HONOR.

13 MR. HANNA: IF YOU'LL JUST LET ME READ
14 IT. I CAN READ IT MYSELF WHILE Y'ALL ARE
15 CARRYING ON IF YOU WANT ME TO. I CAN GO
16 AHEAD AND READ IT. I'M GONNA ASK TO SEE
17 IT ANYWAY.

18 Q IS IT ALSO YOUR TESTIMONY THAT FOR 2003, YOU
19 ASKED MR. BUTLER TO FIND YOU ANOTHER TENANT?
20 THAT WAS YOUR TESTIMONY HERE A MINUTE AGO, IS
21 THAT CORRECT?

22 A I'M MR. BUTLER.

23 Q I'M SORRY. MR. BUTLER.

24 A THAT'S QUITE ALL RIGHT.

25 Q I APOLOGIZE FOR THAT. THAT MAY HAVE BEEN THE

1 WORSE THING I DID TODAY.

2 A APOLOGY ACCEPTED.

3 Q IS YOUR TESTIMONY HERE TODAY THAT YOU ASKED
4 CHARLEY RAY AFTER MAY 15TH OF 2003 TO FIND YOU
5 ANOTHER TENANT?

6 A AFTER MAY OF 2003, YES.

7 Q ITEM 26, WHICH WAS ... 20, EXCUSE ME. THIS IS
8 PLAINTIFF'S EXHIBIT "20". THIS IS THE CHECK
9 FROM CLEAR CHANNEL DATED 7/12/02?

10 A YES.

11 Q IT'S YOUR TESTIMONY HERE TODAY THAT THIS CHECK
12 WAS FOR THE FIRST PART OF THE YEAR OF 2002,
13 ISN'T THAT CORRECT?

14 A ~~I THINK THEY PAID THE CHECKS IN ARREARS. THAT~~
15 WAS MY UNDERSTANDING.

16 Q SO, WHEN THIS CHECK WAS PAID AND WAS GIVEN TO
17 MR. WILSON, THAT WOULD HAVE BEEN FROM JANUARY
18 1 OF '02 THROUGH THE SUMMER OF '02, IS THAT
19 CORRECT?

20 A THROUGH ... YEAH. PROBABLY THROUGH JULY.

21 Q THE FIRST HALF OF 2002?

22 A YES.

23 Q AND THAT WAS DURING THE LATTER PART OF THE
24 2001 TO 2002 LEASE TERM, ISN'T THAT CORRECT?

25 A I BELIEVE THAT'S CORRECT, YES.

1 Q IN NOVEMBER WHEN YOU TOOK THOSE PICTURES, YOU
2 SAID THAT THE WEEDS HAD GROWN UP?

3 A YES, SIR.

4 Q AND LOOKED LIKE IT HAD BEEN ABANDONED FOR SOME
5 TIME?

6 Q I DON'T KNOW HOW FAST WEEDS GROW BUT IT LOOKED
7 ABANDONED WHEN I WENT DOWN IN NOVEMBER, YES,
8 SIR.

9 Q ALRIGHT, SIR. MR. BUTLER, YOU TESTIFIED

10 EARLIER WITH REGARDS TO ITEMS YOU FELT YOU
11 WERE ENTITLED TO REGARDING THIS PARTICULAR
12 CASE. IN REGARDS TO THE INTEREST THAT YOU ARE
13 CLAIMING AS A DAMAGE HERE TODAY, I JUST WANT
14 TO MAKE SURE IT'S CLEAR THAT THERE IS NO PRO-
15 VISION FOR INTEREST INVOLVED ... THERE IS NO
16 PROVISION PROVIDING FOR INTEREST CONTAINED IN
17 YOUR CONTRACT, ISN'T THAT CORRECT?

18 A I DON'T BELIEVE IT SAYS ANYTHING IN THE
19 CONTRACT SPECIFICALLY RELATING TO THIS, BUT
20 OBVIOUSLY, HE WAS IN ARREARS IN HIS PAYMENT.

21 Q ALRIGHT, SIR. BUT MY QUESTION IS, THERE'S NO
22 PROVISION IN THIS CONTRACT THAT PROVIDES FOR
23 THE PAYMENT OF INTEREST OR ANY ARREARAGES,
24 ISN'T THAT CORRECT?

25 A YES.

1 Q REGARDING THE CLEAN UP OF THE PROPERTY, YOU
2 SAID THIS IN YOUR DEPOSITION, AND YOU SAID
3 THIS HERE TODAY, THAT IT WAS AN APPROXIMATE
4 COST. YOU CAN'T BREAK DOWN THE ACTUAL COST OF
5 ANY CLEAN UP ON THE PROPERTY, ISN'T THAT TRUE,
6 MR. BUTLER?

7 A WELL, THIS WAS THE AMOUNT THAT I HAD TO NEGOT-
8 IATE WITH MY NEXT CLIENT. SO, BEING THAT I
9 HAD TO GIVE HIM CREDIT FOR THAT, I FELT LIKE,
10 IN MY ESTIMATIONS, SIR, THAT THAT WAS THE COST
11 OF CLEANING IT UP.

12 Q ALRIGHT, SIR. BUT YET YOU PROVIDED NO ...
13 YOU'VE PROVIDED NO INFORMATION ... YOU
14 PROVIDED NO WRITTEN EVIDENCE THAT WOULD
15 CORROBORATE THE \$2500.00, ISN'T THAT CORRECT?

16 A I DON'T BELIEVE I HAVE PROVIDED THAT.

17 MR. WARING: YOUR HONOR, MAY I JUST HAVE
18 ONE SECOND WITH MY CLIENT?

19 MR. HANNA: SURE.

20 OFF THE RECORD

21 Q DID YOU HAVE YOUR ATTORNEY WRITE A LETTER ON
22 OCTOBER 26 OF 2002?

23 A YES.

24 Q THE NEXT THING THAT HAPPENED WAS A COMPLAINT
25 THAT YOU FILED ON MAY 13TH OF 2005, ISN'T THAT

1 CORRECT?

2 A IF THAT'S WHAT THE RECORD SHOWS. I DO NOT
3 REMEMBER THAT DATE OFF THE TOP OF MY HEAD.

4 Q I UNDERSTAND. THERE WAS NO ADDITIONAL
5 CORRESPONDENCE FROM THE LETTER THAT WAS SENT
6 TO MR. WILSON ON OCTOBER 31ST THAT YOU JUST
7 READ THAT WAS WRITTEN TO YOUR ATTORNEY? THERE
8 WAS NO OTHER WRITTEN CORRESPONDENCE BY YOU OR
9 ANYONE ACTING ON YOUR BEHALF UNTIL THIS

10 COMPLAINT WAS FILED ON MAY 13TH OF 2005, ISN'T
11 THAT CORRECT?

12 A THAT'S MY UNDERSTANDING. I DON'T RECALL ANY
13 OF THE CORRESPONDENCE.

14 MR. HANNA: RE-DIRECT?

15 RE-DIRECT EXAMINATION BY MR. WRIGHT:

16 Q IN ANY CORRESPONDENCE ... DID YOU EVER RECEIVE
17 A CORRESPONDENCE DIRECTLY FROM MR. WILSON
18 AFTER MR. RAY'S LETTER WAS SENT ON JUNE 3RD
19 2002?

20 A NO. I NEVER HEARD FROM MR. WILSON.

21 Q DID MR. WILSON EVER CALL YOU AT ANY TIME
22 SAYING, "I'M NOT GOING TO RENEW THE LEASE."?

23 A NO, HE DID NOT.

24 MR. WRIGHT: NO FURTHER QUESTIONS.

25 MR. HANNA: THANK YOU, MR. BUTLER. NEXT

1 WITNESS.

2 MR. WRIGHT: YOUR HONOR, THAT CONCLUDES
3 PLAINTIFF'S CASE.

4 MR. HANNA: ARE YOU GOING TO WAIT AND
5 SAVE YOUR MOTIONS UNTIL THE END, AREN'T
6 YOU?

7 MR. WARING: YOUR HONOR, I DON'T WANT TO
8 WAIVE ANY RIGHTS THAT I MAY HAVE.

9 MR. HANNA: I DON'T THINK UNDER THE RULES
10 YOU DO NOW. WILL YOU STIPULATE TO THAT?
11 I DON'T THINK YOU WAIVE ANY RIGHTS BY
12 MAKING ANY MOTIONS TO CLOSE THIS CASE.

13 MR. WARING: YOUR HONOR, I COULD JUST ...
14 ~~JUST TO BE ON THE SAFE SIDE. I'LL BE~~
15 VERY BRIEF, YOUR HONOR.

16 MR. HANNA: SURE, SURE.

17 MR. WARING: I WANT TO MOVE FOR A DISMIS-
18 SAL OF THIS ACTION UNDER RULE 41(b),
19 WHICH IS AN INVOLUNTARY DISMISSAL BASED
20 ON THE FACT THAT THE PLAINTIFF HAS ...
21 BASED ON THE FACTS AND THE LAW, THE
22 PLAINTIFF HAS SHOWN NO RIGHT TO RELIEF
23 AND I'M GONNA RELY UPON THE LAW THAT IS
24 PRESENTED TO YOU IN MY TRIAL BRIEF BASED
25 ON THE DUTY TO MITIGATE DAMAGES, PRE-

1 JUDGMENT INTEREST AND VERBAL MODIFICATION
2 FROM A WRITTEN CONTRACT. IF I CAN INCOR-
3 PORATE THAT INTO THE RECORD.

4 MR. HANNA: BETTER MAKE THAT AN EXHIBIT.

5 MR. WARING: I'LL MAKE THAT INTO AN
6 EXHIBIT. IN ADDITION, YOUR HONOR, I'D
7 ALSO MAKE A MOTION FOR AN EVENT THAT IS
8 NOT CREATED. I'LL MAKE A MOTION FOR A
9 DIRECTED VERDICT. AGAIN, ON THE GROUNDS
10 THAT UNDER SOUTH CAROLINA LAW, PLAINTIFF
11 IS NOT ENTITLED TO DAMAGES IF HE FAILED
12 TO TAKE REASONABLE STEPS TO MITIGATE
13 DAMAGES. THE LAW ... AGAIN, TO RELY UPON
14 THE LAW PROVIDED IN MY TRIAL BRIEF, YOUR
15 HONOR. AGAIN, UNDER THE ... AGAIN, A
16 DIRECTED VERDICT ON THE GROUNDS OF THE
17 PLAINTIFF AS TO THE ALLEGATIONS OF PRE-
18 JUDGMENT INTEREST, YOUR HONOR. THIS CASE
19 IS INVOLVING RENT. ANY CASE INVOLVING
20 RENT, THERE'S AN INTERMEDIATE QUESTION AS
21 TO WHAT WILL BE THE DAMAGES BASED ON THE
22 DUTY TO MITIGATE THOSE DAMAGES, YOUR
23 HONOR. NO ONE KNEW AT THE TIME THE
24 CONTRACT WAS SIGNED THE AMOUNT OF RENT
25 THAT MIGHT BE RECEIVED BY THE PLAINTIFF

1 FROM A THIRD PART AFTER THE DEFENDANT
2 VACATED THE PREMISES. THE DUTY TO MITI-
3 GATE DAMAGES BY MAKING A GOOD FAITH
4 EFFORT.. TO RELEASE THE PREMISES MEANS
5 THAT ONE DOES NOT KNOW AT THE TIME OF THE
6 BREACH, IF THERE WAS A BREACH, WHAT THE
7 AMOUNT IS DUE THE PLAINTIFF. THIS MEANS
8 THAT IN CASES INVOLVING RENT, THE SUM IS
9 NOT A LIQUIDATED AMOUNT NOR SOME CERTAIN.
10 THEREFORE, CANNOT BE SUBJECT TO PRE-
11 JUDGMENT INTEREST. ANY PROVISION IN THE
12 CONTRACT THAT ATTEMPTS TO NEGATE THE DUTY
13 TO MITIGATE DAMAGES AGAINST PUBLIC POLICY
14 AND THEREFORE, INVALID. I JUST WANT TO
15 PLACE THAT ON THE RECORD, YOUR HONOR.

16 MR. HANNA: LET ME ASK YOU A QUESTION IF
17 I MIGHT. IS THE DUTY TO MITIGATE NOT AN
18 AFFIRMATIVE DEFENSE?

19 MR. WARING: IT WAS PLED, YOUR HONOR.

20 MR. HANNA: I REALIZE THAT. IT IS AN
21 AFFIRMATIVE DEFENSE BUT THE BURDEN OF
22 PROOF IS ON YOU NOT ON THE PROOF OF FAIL-
23 URE TO MITIGATE BUT TO HOW MUCH, IS THAT
24 CORRECT? SO, BASED ON THAT, I THINK IT
25 WOULD BE PREMATURE FOR ME TO RULE ON THAT

1 UNTIL I HEAR YOUR SIDE OF THE CASE. I'M
2 GONNA RULE THAT THE TIME IS NOT RIGHT NOW
3 TO HEAR THAT MOTION. I'LL BE HAPPY TO
4 REVISIT THAT AT THE CLOSE OF YOUR
5 EVIDENCE.

6 MR. WARING: THANK YOU, YOUR HONOR.

7 MR. HANNA: ANYTHING ELSE?

8 MR. WARING: THAT'S IT, YOUR HONOR.

9 MR. HANNA: OF COURSE, I'M GONNA DENY THE
10 FIRST MOTION. CALL YOUR FIRST WITNESS.

11 MR. WARING: I'LL CALL BILLY WILSON, YOUR
12 HONOR.

13
14 WILLIAM L. "BILLY" WILSON, HAVING BEEN DULY SWORN,
15 TESTIFIED AS FOLLOWS:

16 DIRECT EXAMINATION BY MR. WARING:

17 Q STATE YOUR NAME FOR THE RECORD PLEASE, SIR.

18 A IT'S WILLIAM L. WILSON.

19 Q MR. WILSON, WHAT DO YOU DO FOR A LIVING NOW?

20 A I'M BASICALLY RETIRED. I STILL GOT A
21 CONTRACTOR'S LICENSE BUT I'M NOT BUILDING
22 ANYTHING.

23 Q LET'S GO BACK INTO 1998. WHAT WERE YOU ...
24 WHAT BUSINESS CONCERNS WERE YOU INVOLVED IN
25 BACK IN 1998?

1 A I HAD FIVE . . . FOUR MANUFACTURING HOME
2 BUSINESSES AND I DID SOME LAND DEVELOPMENT
3 ALSO.

4 Q ALRIGHT, SIR. TELL ME ABOUT THE BUSINESS
5 RELATED TO THIS LAWSUIT HERE TODAY.

6 A YOU TALKING ABOUT THE RENTAL PROPERTY?

7 Q YEAH, REGARDING THE RENTAL PROPERTY THAT'S THE
8 SUBJECT OF THE LAWSUIT.

9 A IN 1998, I WAS LOOKING FOR A CHANCE TO EXPAND
10 A LITTLE BIT 'CAUSE BUSINESS WAS GOOD. WE HAD
11 A LOT OF LENDERS AND, YOU KNOW, WE WERE MAKING
12 PRETTY GOOD MONEY IN THAT BUSINESS AND I
13 WANTED TO MOVE TO THE BEACH AND I HAVE A YOUNG
14 SON, AND SO I SAID, "I'LL OPEN A BUSINESS AND
15 TRY TO EXPAND UP THAT WAY." SO, A PROPERTY I
16 RAN INTO WAS CHARLEY RAY HAD IT LISTED AND I
17 CALLED CHARLEY AND WE'VE BEEN THROUGH IT
18 TODAY. WE DECIDED ON A LEASE.

19 Q ALRIGHT, SIR.

20 A AND I WENT IN BUSINESS UP THERE.

21 Q WHAT KIND OF BUSINESS WAS THAT?

22 A MANUFACTURED HOME BUSINESS.

23 Q TELL ME A LITTLE BIT ABOUT WHAT HAPPENED WITH
24 YOUR BUSINESS STARTING IN 1998. JUST A BRIEF
25 OVERVIEW. WHAT WAS GOING ON FROM '98 FORWARD?

1 A WELL, AS I MENTIONED, BUSINESS WAS GOOD. WE
2 HAD, YOU KNOW, WE HAD BOMB BARTAE PLAYING AND
3 DUESHA AND GE AND ALL KIND OF LENDERS WERE
4 FIGHTING OVER PAPER, GREEN TREE, AND THEY
5 WERE, YOU KNOW, FOUR OR FIVE DIFFERENT
6 BUSINESSES UP IN NORTH MYRTLE BEACH AND ALL OF
7 'EM WERE DOING GOOD AND THEN ALL OF A SUDDEN,
8 THEY WERE GIVING OUT TOO MUCH PAPER. THEY
9 WERE BUYING DEALS WITH NO DOWN PAYMENTS AND
10 EVERYTHING ELSE, AND IT WENT SOUTH. WE
11 STARTED LOSING MONEY, GOSH, IN '99, 2000,
12 2001. IT WENT SOUTH ON US.

13 Q WHEN YOU SAY IT WAS GETTING HARD TO FIND
14 LENDERS, WHAT DO YOU MEAN BY THAT?

15 A THE PEOPLE THAT WERE LENDING MONEY FOR MANU-
16 FACTURED HOME BUYERS JUST QUIT WITH THE
17 MARKET. THEY WITHDREW. THEY SAID, "WE'RE NO
18 LONGER LENDING IN THE MANUFACTURED HOME
19 BUSINESS."

20 Q WHAT IMPACT, IF ANY, DID THAT HAVE ON YOUR
21 BUSINESS?

22 A IT WAS A DISASTER. IT HURT ME IN ALL THE
23 LOCATIONS. I FIRST CLOSED JAMESTOWN AND THEN
24 I WAS LOOKING AT CLOSING LITTLE RIVER BUT I
25 HAD A LOT OF INVENTORY. SO, I STARTED PULLING

1 BACK IN 2001. I DIDN'T ORDER ANY MORE HOUSES
2 EXCEPT FOR RETAIL SOLD. WHAT I WAS RUNNING
3 INTO AT THE BEACH WAS, UNLIKE SANTEE AND THE
4 OTHER LOCATIONS I HAD, PEOPLE WOULD BUY YOUR
5 INVENTORY, BUT EVERYBODY THAT WAS BUYING AT
6 THE BEACH, THEY'D WANT TO BUY AND ORDER IT.
7 SO, CONSEQUENTLY, I HAD A HARD TIME GETTING
8 RID OF MY INVENTORY AND, YOU KNOW, I ANTICI-
9 PATED GETTING OUT OF BUSINESS WHEN I PAID THE
10 \$26,500.00. I TOLD MR. RAY, I SAID, "THIS IS
11 THE REASON I'M NEGOTIATING THIS IS BECAUSE I
12 AIN'T GONNA BE HERE IN A YEAR."

13 Q LET'S TAKE A STEP BACKWARD. DID YOU HAVE ANY
14 BUSINESS PARTNERS WITH YOU AT THE LITTLE RIVER
15 LOCATION?

16 A YES. JACKIE WOODBURY.

17 Q WHAT RELATIONSHIP DID JACKIE WOODBURY HAVE
18 WITH YOU?

19 A JACKIE OWNED ONE-THIRD OF THE BUSINESS AND I
20 OWNED TWO-THIRDS IN LITTLE RIVER, AND AT THE
21 SAME TIME, WE OPENED UP OVER AROUND LORIS AT
22 THE GREEN SEA AREA AND HE OWNED THE LAND OVER
23 THERE. SO, HE TOOK A SIXTY PERCENT SHARE AND
24 I HAD A FORTY PERCENT SHARE. SO, WE WERE
25 BUSINESS PARTNERS AT BOTH PLACES.

1 Q ALRIGHT, SIR. AT ANY TIME, DID Y'ALL CEASE
2 BEING PARTNERS IN THE LITTLE RIVER AREA?

3 A YEAH.

4 Q ABOUT WHAT TIME?

5 A THAT HAPPENED IN THE SUMMER OF 2001. AFTER WE
6 HAD CHANGED THE CONTRACT OR DEVIATED FROM THE
7 CONTRACT, JACKIE SAYS, "WELL, MAN, I NEED TO
8 GET OUT." HE SAID ... WE'D CHECKED OUR
9 RECORDS AND WE WERE LOSING, LOSING, LOSING. I
10 SAID, "WELL, I DON'T HAVE NO CHOICE BUT TO
11 STAY BECAUSE ALL THIS INVENTORY IS UNDER MY
12 FLOOR PLAN." AND I SAID, "WHAT I'LL DO IS
13 I'LL TAKE OVER THIS BUSINESS AND YOU TAKE OVER
14 THE GREEN SEA", WHICH I STILL OWNED FORTY
15 PERCENT OF. "IF YOU'LL TAKE SOME OF MY INVEN-
16 TORY OFF OF ME, HELP ME GET OUT OF THIS THING,
17 I'LL MOVE SOME TO SANTEE AND I'LL, YOU KNOW,
18 PUT SOME IN THE OCEAN BREEZE SUBDIVISION THAT
19 I WAS WORKING ON OVER HERE", AND WE WERE
20 TRYING TO ELIMINATE OUR STOCK, SO WE COULD
21 VIRTUALLY GO OUT OF BUSINESS. IF IT'S \$137.00
22 A DAY IS WHAT I WAS PAYING MR. BUTLER, PLUS
23 TAXES AND EVERYTHING ELSE. THAT WAS JUST FOR
24 THE LEASE AND I COULDN'T COVER MY OVERHEAD
25 DOING THAT. I WAS WAY OUT THE BALLPARK.

1 Q ALRIGHT, SIR. HOW DID YOU COMMUNICATE WITH
2 MR. WILSON DURING THE TERM OF YOUR LEASE?

3 A I HAD NO COMMUNICATION WITH MR. WILSON. I DID
4 ALL MY COMMUNICATIONS WITH CHARLEY RAY.
5 CHARLEY'S A REAL LIKEABLE FELLOW, YOU KNOW,
6 AND I'M FROM WILLIAMSBURG COUNTY, MAN. YOU
7 KNOW, A HANDSHAKE AND A DEAL AND TALKING IT
8 OVER, YOU KNOW, YOU PRETTY WELL THINK EVERY-
9 THING IS STRAIGHT UP. I NEVER HAD ANYTHING
10 BAD TO SAY ABOUT MR. BUTLER OR MR. RAY OR
11 ANYTHING UNTIL ... YOU KNOW, ALL MY COMMUNI-
12 CATIONS WAS WITH CHARLEY. AND I JUST FIGURED
13 IF I SAID IT TO CHARLEY, IT WAS HANDLED.

14 A --ALRIGHT, --SIR--

15 Q I KNOW HE DIDN'T REPRESENT ME BUT STILL, YOU
16 KNOW, I MEAN, HE TOLD ME ... HE TOLD ME ONE
17 TIME ... WELL, I WON'T SAY THAT.

18 Q MR. WILSON, LET ME ASK YOU THIS QUESTION:
19 DURING THE FIRST FEW YEARS OF YOUR LEASE, DID
20 YOU HAVE MUCH COMMUNICATION WITH CHARLEY RAY?

21 A NO. I THINK THE FIRST YEAR THAT CHARLEY AND I
22 WENT FISHING AND I TOOK HIS LITTLE BOY AND I'M
23 A LICENSED COAST GUARD GUIDE DOWN AT SANTEE
24 COOPER. SO, HE SAID, "WELL, I'D LIKE TO HIRE
25 YOU." AND SO, I TOOK HIM FISHING, BUT FAR AS

1 ANY PLAYING GOLF OR ANY OTHER RELATIONSHIPS,
2 GOING FISHING OR ANYTHING, I NEVER HAD
3 ANYTHING. JUST BUSINESS.

4 Q DID YOU HAVE ANY REASON TO TALK TO HIM
5 REGARDING THIS LEASE THE FIRST FEW YEARS YOU
6 WERE THERE?

7 A I TALKED WITH HIM, YOU KNOW, WHEN IT WOULD
8 COME DUE. YOU KNOW, BUT MOST OF THE TIME HE
9 ... THEY DIDN'T HAVE ANY PROBLEM WITH ME. I

10 PAID 'EM, YOU KNOW. I KNEW WHEN IT WAS DUE
11 AND I'D STEP UP AND PAY IT AS LONG AS I COULD
12 STAY IN BUSINESS THERE.

13 Q ALRIGHT, SIR. NOW, LET'S DIRECT YOUR ATTEN-
14 TION TO 2001. DID THERE COME A TIME IN 2001
15 THAT YOU APPROACHED MR. RAY REGARDING THE
16 PAYMENT OF THAT YEAR'S RENT?

17 A YEAH. WHEN I PAID THE TWENTY-SIX THOUSAND, I
18 TOLD HIM, I SAID, YOU KNOW ... TWENTY-FIVE
19 THOUSAND PLUS \$1500.00 INTEREST OR WHATEVER
20 THEY CHARGED ME. AND I TOLD HIM, I SAID, "YOU
21 KNOW, I GOT TO PAY THIS, CHARLEY, OR I'M GONNA
22 HAVE TO GET MY STUFF AND GET OUT OF HERE
23 'CAUSE, YOU KNOW, I DON'T HAVE \$50,000.00 IN
24 THE BANK." HE SAID, "WELL, LET ME RUN THAT BY
25 MR. BUTLER." I SAID, YOU KNOW, "THINGS AIN'T

1 GOOD." AND I SAID, "I DOUBT IF I STAY HERE A
2 YEAR. CAN I DO IT A HALF YEAR?" "YEAH". AND
3 I SAID, "YOU KNOW, IF I STAY HERE, I'LL PAY
4 YOU THE REST OF IT." SO, THAT'S THE WAY IT
5 STARTED OFF. WELL, IN JANUARY, I TOLD HIM, I
6 SAID, "I'M DEFINITELY OUT OF HERE NOW. I'M
7 MAKING AN ALL-OUT EFFORT TO FIND OUT WHERE I
8 CAN PUT THESE MANUFACTURED HOMES AND GET OUT
9 OF HERE BECAUSE THIS IS COSTING ME A FORTUNE."
10 YOU KNOW, JACKIE AND I HAD MEETINGS ABOUT IT.
11 EVERYBODY KNEW I WAS GOING OUT OF BUSINESS.
12 IT WASN'T NO SECRET. JUST EVERYBODY KNEW IT.
13 I MEAN, I WAS DOWN TO JUST A VERY FEW MOBILE
14 HOMES...

15 Q WAS THERE A TIME DURING THAT POINT OF THE YEAR
16 THAT YOU HAD YOUR SALES OFFICE BURN DOWN?

17 A YES. IN THE SUMMER OF 2001. I HAD A DOUBLE
18 WIDE THERE AND THAT'S PART OF THE DEBRIS
19 THAT'S ON THE BACK OF THE WOODS BACK THERE WAS
20 A BURNOUT. HALF OF IT'S GONE. I SOLD FIFTY-
21 SEVEN. GUY COME ASKED ME WHAT I WANTED FOR
22 IT. I HAD IT MOVED BACK THERE AND I PULLED IN
23 A SINGLE WIDE AND KEPT ON TRYING TO STAY IN
24 BUSINESS, AND I TOLD HIM HE COULD HAVE IT IF
25 HE PULLED IT OFF. WELL, HE PULLED OFF THE

1 SIDE WITH THE REFRIGERATOR AND STOVE AND
2 FURNACE AND EVERYTHING AND THEN LEFT THE OTHER
3 HALF. THE OLD VEHICLE THAT WAS THERE WAS OUR
4 TOUTER, BUT INSURANCE GOT SO HIGH ON IT, I HAD
5 TO PARK IT. JACKIE ENDED UP GETTING IT,
6 TAKING IT TO GREEN SEA.

7 Q SO THIS WAS BACK IN 2001? YOU SAID YOU HAD
8 MEETINGS WITH JACKIE DURING THAT PERIOD OF
9 TIME ABOUT THE STATE OF THE BUSINESS?

10 A OH, YEAH. JACKIE WAS STILL IN BUSINESS WITH
11 ME UNTIL MAY OR JUNE OF 2001.

12 Q WHERE DID THE REST OF YOUR INVENTORY GO?

13 A I HAD OCEAN BREEZE SUBDIVISION OUT HERE IN
14 SURFSIDE ... I MEAN GARDEN CITY. I SOLD SOME
15 OF IT AT COST, AND I MOVED SOME TO SANTEE.
16 SOME OF 'EM SOLD THROUGH SANTEE.

17 Q I'LL BRING YOUR ATTENTION NOW TO JANUARY OF
18 2002, WHAT DID YOU TELL CHARLEY RAY IN JANUARY
19 OF THAT YEAR?

20 A I TOLD CHARLEY I'D BE OUT OF THERE BUT I
21 DIDN'T QUITE MAKE IT. I STAYED OVER, I THINK,
22 UNTIL JUNE, AND I GOT THAT LETTER IN JUNE. I
23 SAID, "WELL, EVIDENTLY, YOU KNOW, THEY DON'T
24 WANT ... THEY OKAY WITH EVERYTHING. I'LL
25 JUST GET ON OUT OF HERE HARD AS I CAN." I

1 THINK THE RECORDS WILL SHOW WHEN I ACTUALLY
2 LEFT.

3 Q DO YOU RECALL WHEN THE LAST EMPLOYEE WAS PAID?
4 A 21ST OF JUNE.

5 Q THAT WAS THE LAST TIME AN EMPLOYEE WAS PAID?
6 A YEP.

7 Q AT THAT BUSINESS?

8 A YEAH. I THINK THAT'S WHAT BETTY GAVE ME.

9 Q ALRIGHT, SIR. WHEN YOU SAY YOU TRIED TO GET
10 OUT OF THERE, EXPLAIN TO ME WHAT YOU MEAN BY
11 THAT.

12 A I DIDN'T QUITE MAKE IT BY MAY 15TH. IT WAS
13 GONNA COST ME MORE TO MOVE THAT INVENTORY.

14 ~~THE FEW HOUSES I HAD LEFT, I DECIDED I WAS,~~
15 YOU KNOW ... I TOLD CHARLEY, YOU KNOW, "I'LL
16 PRO-RATE THIS THING NOW WHATEVER I'M OVER
17 HERE. YOU GIVE ME A BILL AND I'LL PAY IT." I
18 MEAN, I GOT A 762 BEACON SCORE. I AIN'T NEVER
19 HAD A JUDGMENT AGAINST ME. I'VE BEEN IN
20 BUSINESS FOR TWENTY YEARS AND, YOU KNOW, THIS
21 ISN'T COMMON. YOU KNOW, I WASN'T TRYING TO
22 MESS MR. BUTLER OUT OF HIS RENT.

23 Q DID YOU TELL MR. RAY ANYTHING REGARDING FUTURE
24 TENANTS?

25 A I TOLD CHARLEY WHEN I TALKED WITH HIM IN

1 JANUARY. I SAID, "CHARLEY, YOU NEED TO GO
2 AHEAD AND PUT UP A SIGN AND TRY TO START
3 RENTING IT." I MEAN, YOU KNOW, I'M HEARING IT
4 ALL ABOUT MY SIGNS BUT, YOU KNOW, THAT WOULD
5 HELP ANOTHER RENTER. MOBILE HOME BUSINESS IS
6 THERE NOW. HE PROBABLY PAINTED OVER IT AND
7 PUT HIS NAME ON IT. THEM SIGNS COST ME
8 \$2,000.00 APIECE. FAR AS THE LEASE ON THAT
9 SIGN, THE LEASE ON THAT SIGN CAME TO BETTY.

10 IT WAS DEPOSITED IN THE SANTEE HOMES. SHE
11 GETS A LOTS OF CHECKS. I WAS STILL DOING
12 BUSINESS THERE. SHE DIDN'T KNOW NOT TO
13 DEPOSIT IT, AND IF I OWE THEM ANYTHING ON THE
14 SIGN, I DONE OFFERED AND I'M GLAD TO PAY, YOU
15 KNOW. ONLY CORRESPONDENCE I GET FROM MR.
16 BUTLER'S SIDE OF THE TABLE IS THROUGH AN
17 ATTORNEY TELLING ME HOW MUCH MONEY I OWE 'EM.
18 THAT'S ALL.

19 Q AFTER YOU RECEIVED A LETTER FROM MR. BUTLER'S
20 ATTORNEY, DID YOU THEN CONTACT AN ATTORNEY?

21 A DAVID DURANT.

22 Q DID HE WRITE A LETTER ON YOUR BEHALF?

23 A YEAH, HE DID.

24 Q DO YOU RECALL THE CONTENTS OF THAT LETTER?

25 LET ME SHOW IT TO YOU. IT'S PLAINTIFF'S

1 EXHIBIT NUMBER

2 A I KNOW WHAT I TOLD DAVID. I TOLD HIM, I SAID,
3 "YOU KNOW, I AIN'T NEVER TALKED WITH MR.

4 BUTLER. I HAVEN'T NEVER MET HIM." CHARLEY
5 TOLD ME, HE SAYS, "YOU DON'T NEED TO DEAL WITH
6 THOSE FOLKS. YOU DEAL WITH ME." HE SAID, "I
7 GOT YOU COVERED, BILLY." SO, I BELIEVED THAT.

8 SO, I DEALT WITH CHARLEY RAY, AND I SAID,
9 "JUST WRITE `EM A LETTER AND TELL `EM CHARLEY
10 KNEW ABOUT THIS." GETTING BACK TO THE

11 BURNOUT, YOU KNOW, MY LEASE BURNT UP IN THAT
12 OFFICE. IT WAS AN ACCIDENT. I KNOW SOME
13 PEOPLE BURN STUFF ON PURPOSE, BUT I GOT PAID
14 \$25,000.00 FOR A \$35,000.00 MOBILE HOME

15 BECAUSE IT WAS ON MY FLOOR PLAN SOURCE. I
16 DIDN'T GET PAID ANYTHING FOR ANYTHING THAT WAS
17 IN IT. SO, I LOST ALL MY COMPUTERS, EQUIPMENT
18 AND THE STUFF THAT I WAS DOING BUSINESS WITH.

19 Q ALRIGHT, SIR. AGAIN, LET'S TALK ABOUT DURING
20 THIS TIME. WHEN DID YOU LEAVE THE PREMISES?

21 A I DON'T KNOW THE EXACT DATE BUT IT WAS
22 PROBABLY IN JUNE MAYBE, JULY, BEFORE EVERY-
23 THING WAS MOVED OFF.

24 Q YOU KNOW WHEN YOUR LAST EMPLOYEE WAS PAID,
25 ISN'T THAT CORRECT?

1 A NO. I GOT BETTY TO GET THE RECORDS. I DIDN'T
2 KNOW THAT DURING MY DEPOSITION, BUT THAT'S
3 COME UP SINCE THEN.

4 Q ALRIGHT, SIR. SO, YOU THINK YOUR LAST
5 EMPLOYEE WAS PAID JUNE 21ST?

6 A THAT'S WHAT SHE'S GOT A RECORD OF.

7 Q ALRIGHT, SIR. IS IT YOUR TESTIMONY TODAY THAT
8 THE REST OF YOUR PROPERTY OR THE REST OF THE
9 HOMES WERE MOVED SOON THEREAFTER?

10 A OH, ABSOLUTELY, YEAH. YEAH. I DON'T KNOW THE
11 EXACT DATE, BUT I WASN'T DOING VERY MUCH AFTER
12 THAT. OBVIOUSLY, PROBABLY I WAS GONE IN JUNE,
13 BUT I MIGHT HAVE BEEN THERE A FEW DAYS IN
14 JULY, WORSE SCENARIO.

15 Q DID YOU HAVE A OPPORTUNITY TO GO BY THAT
16 PROPERTY LATER ON DURING THE YEAR?

17 A YEAH. I WENT BY IT SEVERAL TIMES.

18 Q DID YOU NOTICE ANY 'FOR LEASE' SIGNS?

19 A NOT A ONE.

20 Q DID YOU THINK THERE WAS SOMETHING UP WITH
21 THAT?

22 A I FIGURED HE MUST BE TRYING TO SELL IT. I
23 SAID, "WELL, HE MUST BE TRYING TO SELL IT OR
24 KNOW SOMEBODY OR SOMETHING BECAUSE, YOU KNOW,
25 SEVERAL TIMES I PASSED THERE AND I DIDN'T SEE

1 ANY FOR IT.

2 Q DO YOU KNOW WHETHER OR NOT MR. BUTLER
3 ATTEMPTED TO TRY TO LEASE THAT PROPERTY FROM
4 MAY 15TH OF 2002 UNTIL MAY 14TH OF 2003?

5 A WHEN I GOT THAT LETTER SAYING, YOU KNOW, "PAY
6 YOUR MONEY OR VACATE" I GOT RIGHT AT A MILLION
7 ... I HAD NO REASON ... I MEAN, YOU KNOW, THEY
8 NEVER SENT ME SOMETHING IF I OWED A PRO-RATED
9 BILL AND I'LL PAY IT. I SAID, "I PAY MY
10 BILLS."

11 Q DO YOU KNOW WHETHER OR NOT MR. BUTLER
12 ATTEMPTED TO LEASE THAT PROPERTY AFTER YOU
13 VACATED IT?

14 A ~~THEY WASN'T NO SIGN. I DON'T THINK HE TRIED~~
15 TO. THEY MAY BE A SIGN UP THERE TWO YEARS
16 LATER OR WHATEVER, I DON'T KNOW. IT WASN'T
17 NOTHING UNTIL A LONG TIME AFTER I WAS GONE.

18 Q DO YOU THINK YOU OWE MR. BUTLER SOMETHING FOR
19 THE PERIOD OF TIME THAT YOU WERE THERE?

20 A YES. BUT NOT WHAT HE'S ASKING FOR. I MEAN, I
21 CAN'T PAY THAT. I MEAN, I OWE HIM PRO-RATED
22 WHILE I WAS THERE, AND YOU KNOW, I'M SURE, YOU
23 KNOW, I OWE HIM SOMETHING.

24 Q DO YOU BELIEVE THAT MR. ...

25 A LIKE I SAID, THERE'S \$137.00 A DAY JUST TO

1 KEEP THE DOORS OPEN, AND THEY SAID THEY
2 SQUEAKED.

3 Q MR. WILSON, DO YOU THINK MR. BUTLER TOOK
4 REASONABLE STEPS IN TRYING TO RE-LEASE THE
5 PROPERTY?

6 A NO.

7 Q DO YOU THINK THAT NOT ENGAGING A REAL ESTATE
8 AGENT FROM MAY 15TH OF 2002 THROUGH MAY 14TH OF
9 2003 WAS REASONABLE?

10 MR. WRIGHT: OBJECTION.

11 MR. HANNA: I THINK THAT CALLS FOR EXPER-
12 TISE THAT HE DOESN'T HAVE. HE WOULDN'T
13 BE HERE IF HE THOUGHT IT WAS REASONABLE.
14 BUT I KNOW WHAT THE ANSWER TO THE
15 QUESTION IS.

16 MR. WARING: ALL RIGHT, SIR.

17 Q MR. WILSON, HAVE YOU EVER HAD THE OCCASION TO
18 HAVE TO RENT COMMERCIAL PROPERTIES?

19 A HAVE I EVER RENTED ...

20 Q HAVE YOU EVER HAD THE OCCASION TO RENT ANY OF
21 YOUR PROPERTIES?

22 A YEAH, I'VE LEASED PROPERTIES.

23 Q WHAT STEPS DID YOU TAKE IN LEASING YOUR
24 PROPERTIES?

25 MR. WRIGHT: OBJECTION. RELEVANCY.

1 MR. HANNA: I REALLY DON'T SEE THE RELE-
2 VANCY.

3 MR. WARING: ALL RIGHT, SIR.

4 Q MR. WILSON, DO YOU RECALL THIS LETTER HERE
5 REGARDING THE BUTLER LEASE?

6 A YEAH. IT'S A MATTER OF READING IT HERE.

7 Q UNDER PARAGRAPH TWO, WHAT WAS YOUR UNDER-
8 STANDING AFTER READING THIS LETTER?

9 A I SAID, "DOGGONE, YOU KNOW, CHARLEY KNOWS I'M
10 GONE. I DON'T KNOW WHY HE WANTS ME TO ADVISE
11 HIM OF MY INTENTIONS." I'D ALREADY TOLD HIM
12 THAT I WASN'T GONNA BE RENTING. AT THIS POINT
13 IN TIME ON JUNE 3RD, I MIGHT HAVE HAD TWO OR
14 THREE HOUSES LEFT. I HAD THE OFFICE AND MAYBE
15 A COUPLE HOUSES THAT I WAS ALREADY TRYING TO
16 ARRANGE MOVERS TO GET OUT OF THERE. IT SAYS,
17 "THE OWNER, MR. BUTLER, WOULD LIKE FOR YOU TO
18 CONTINUE RENTING THE PROPERTY BUT HAS
19 INSTRUCTED ME TO COLLECT THE RENT OR ASK YOU
20 TO VACATE."

21 Q WHAT DID YOU DO?

22 A I SAID, "WELL, I'D ALREADY DISCUSSED THIS
23 STUFF WITH CHARLEY THAT I'D PAY HIM WHATEVER I
24 OWED HIM." I SAID, "EVIDENTLY, THEY DON'T
25 WANT NOTHING. I'LL JUST GIT ON OFF OF HERE."

1 BEING AS I CLEARED ALL THE LAND AND SPENT
2 THOUSANDS OF DOLLARS THERE TO IMPROVE THE
3 PROPERTY VERSUS, YOU KNOW ...

4 Q TELL ME A LITTLE BIT ABOUT YOUR IMPROVING THE
5 PROPERTY.

6 A WELL, IT WAS ...

7 MR. WRIGHT: I'M GONNA OBJECT TO THAT AS
8 BEING BEYOND THE SCOPE OF THE PLEADINGS.
9 THAT'S NOT BEEN RAISED AS A DEFENSE IN

10 THIS MATTER.. THERE'S NO BETTERMAN'S
11 CLAIM. IT'S TOTALLY IRRELEVANT TO THE
12 ISSUES WE'RE HERE FOR.

13 MR. HANNA: WHAT'S IRRELEVANT?

14 MR. WARING: I'LL WITHDRAW THE QUESTION,
15 YOUR HONOR.

16 Q DID YOU GIVE NOTICE TO CHARLEY RAY THAT YOU
17 WERE NOT GOING TO EXERCISE THE TERMS AND TO
18 RE-LEASE IN JANUARY OF 2002?

19 A YES, SIR.

20 MR. WARING: THAT'S ALL THE QUESTIONS I
21 HAVE, YOUR HONOR.

22 MR. HANNA: CROSS EXAM?

23 MR. WRIGHT: MAY I ASK FOR A BRIEF
24 RECESS?

25 MR. HANNA: UNLESS COUNSEL HAS ANY

1 OBJECTIONS.

2 MR. WARING: I DON'T HAVE ANY PROBLEMS
3 WITH IT.

4 MR. HANNA: I DON'T SEE ANY REASON WHY
5 NOT.

6 OFF THE RECORD

7 MR. HANNA: REMEMBER YOU'RE STILL UNDER
8 OATH, MR. WILSON.

9 CROSS EXAMINATION BY MR. WRIGHT:

10 Q OKAY, MR. WILSON. I BELIEVE I HEARD YOU SAY
11 ON DIRECT EXAMINATION YOU'RE JUST AN OLE
12 COUNTRY BOY FROM WILLIAMSBURG COUNTY, AND YOU
13 DO DEALS ON A HANDSHAKE, IS THAT CORRECT?

14 A YEAH,--I--PROBABLY SAID THAT.--

15 Q YEAH, THAT'S WHAT I THOUGHT I HEARD. NOW, IN
16 FACT, PRIOR TO THE TIME THAT YOU STARTED TO DO
17 BUSINESS WITH MR. BUTLER, YOU WERE ALREADY A
18 PRETTY SOPHISTICATED BUSINESSMAN. IF I RECALL
19 WHEN WE TOOK YOUR DEPOSITION, YOU TOLD US THAT
20 YOU HAD SOME EXPERIENCE AS A FOOD BROKER, IS
21 THAT CORRECT?

22 A YES, SIR.

23 Q AND YOU WORKED AS A MANAGER FOR THE NESTLE
24 COMPANY FOR A NUMBER OF YEARS?

25 A THAT'S CORRECT.

1 Q AND YOU OWNED AND OPERATED A CONVENIENCE STORE
2 ON INTERSTATE 95 THAT YOU STARTED ABOUT 1990?

3 A 1987.

4 Q BUT AGAIN, ABOUT TEN YEARS BEFORE YOU STARTED
5 DOING BUSINESS WITH MR. BUTLER, CORRECT?

6 A TEN YEARS BEFORE I DONE BUSINESS WITH MR.
7 BUTLER?

8 Q YES, SIR.

9 A YES, SIR.

10 Q I BELIEVE YOU ALSO TOLD US THAT YOU HAD BEEN
11 BUYING AND SUBDIVIDING AND SELLING LAND SINCE
12 AT LEAST 1990 IN ORANGEBURG COUNTY?

13 A UH-HUH. (AFFIRMATIVE RESPONSE.) I LIVED
14 THERE.

15 Q AND YOU HAD SEVERAL SUBDIVISIONS THERE. AS I
16 RECALL, YOU TOLD US YOU WERE THE DEVELOPER OR
17 ONE OF THE DEVELOPERS OF THE FIELDCREST
18 SUBDIVISION?

19 A YES, SIR.

20 Q YOU WERE THE DEVELOPER OF THE LIVINGSTON
21 BRANCH SUBDIVISION?

22 A YES, SIR.

23 Q AND THE PARLOR TRACT SUBDIVISION?

24 A YES, SIR.

25 Q AND THE SAND TRAIL SUBDIVISION?

1 A YES, SIR.

2 Q AND I BELIEVE YOU ALSO HAD SOME OPERATIONS IN
3 HORRY COUNTY, IS THAT CORRECT?

4 A YES, SIR. I HAD PARTNERS IN ALL OF THESE.
5 SHAREHOLDERS.

6 Q SURE. AND YOU WERE INVOLVED IN THE SUBDIV-
7 ISION OF BLUE RIBBON PLANTATION, ISN'T THAT
8 CORRECT?

9 A YES, SIR.

10 Q AND SUGAR BEAR SUBDIVISION UP AROUND LORIS?

11 A YES, SIR.

12 Q AND I BELIEVE YOU ALSO HAD SOME AGREEMENTS
13 WITH THE SMITH LAND COMPANY WHERE YOU WERE

14 ~~BUYING LOTS FROM THEM IN THE OCEAN BREEZE SUB-~~
15 DIVISION IN GARDEN CITY, AND THEN YOU WERE RE-
16 SELLING THEM TO THIRD PARTIES, IS THAT
17 CORRECT?

18 A YES, SIR.

19 Q AND WHEN YOU FIRST CAME TO HORRY COUNTY WHEN
20 YOU WERE LOOKING ... LET ME REPHRASE THE
21 QUESTION. WHEN YOU WERE LOOKING FOR PROPERTY
22 FOR A MOBILE HOME LOT IN HORRY COUNTY, YOUR
23 MOTIVATION IN LOOKING FOR THAT PROPERTY WAS TO
24 HAVE A PLACE TO SELL MOBILE HOMES, TO PUT THE
25 MOBILE HOME LOTS THAT YOU HAD IN THE VARIOUS

1 SUBDIVISIONS SUCH AS BLUE RIBBON PLANTATION
2 AND SUGAR BEAR SUBDIVISION. DO YOU REMEMBER
3 TELLING ME THAT IN YOUR DEPOSITION?

4 A YES, SIR.

5 Q ALRIGHT. WHEN YOU CAME TO HORRY COUNTY
6 LOOKING FOR LAND, DID YOU CONTACT ANYBODY
7 THROUGH THE MLS ABOUT MR. BUTLER'S LAND?

8 A NO. I SAW THE SIGN UP THERE AND CALLED IT.

9 Q OKAY. SO THE SIGN THAT WAS ON THE PROPERTY,

10 MR. RAY'S SIGN IS WHAT ATTRACTED YOU TO THE
11 PROPERTY AND YOU CALLED HIM TO FOLLOW UP?

12 A THAT'S TRUE.

13 Q APPARENTLY, THAT WAS A REASONABLE EFFORT ON
14 MR. RAY'S BEHALF TO GET SOME ATTENTION BECAUSE
15 THAT SIGN GOT YOUR ATTENTION, DIDN'T IT?

16 A YES, SIR.

17 Q NOW, LET'S TALK ABOUT YOUR NEGOTIATIONS AND
18 YOUR LETTERS OF INTENT. I'M GONNA ASK YOU TO
19 LOOK FIRST AT PLAINTIFF'S EXHIBIT NUMBER "3".

20 A OKAY. OH, IT'S THE WHOLE THING? I DON'T KNOW
21 WHETHER THIS IS THE FINAL ONE OR NOT. IS THAT
22 WHAT YOU'RE ASKING?

23 Q NO, SIR. I JUST ASKED YOU TO LOOK AT IT.

24 A OH, OKAY.

25 Q WHAT I WANT TO ASK YOU, SIR, THIS LETTER

1 BEARING YOUR ADDRESS ... YOUR NAME, YOUR
2 ADDRESS?

3 A YES, SIR.

4 Q , DATED FEBRUARY 28TH ...

5 EXCUSE ME. FEBRUARY 25TH 1998?

6 A RIGHT.

7 Q THAT WAS A PROPOSAL, LETTER OF AGREEMENT THAT
8 YOU MADE TO MR. BUTLER, CORRECT?

9 A THIS WAS MY PROPOSAL?

10 Q YES, SIR.

11 A NOW, UNDER THAT PROPOSAL, WOULD YOU AGREE WITH
12 ME THAT WHAT YOU WERE PROPOSING WAS A ONE YEAR
13 LEASE WITH AN OPTION TO EXTEND FOR ELEVEN
14 ADDITIONAL ONE YEAR TERMS?

15 A UH-HUH. (AFFIRMATIVE RESPONSE.) "YEAH, THAT'S
16 WHAT THAT SAYS. THERE WAS SOME NEGOTIATION
17 AFTER THIS, RIGHT?

18 Q YES, SIR. WOULD YOU ALSO AGREE WITH ME THAT
19 UNDER THE TERMS OF YOUR PROPOSAL, YOU WOULD
20 PROVIDE NOTICE TO MR. BUTLER NINETY DAYS PRIOR
21 TO THE EXPIRATION OF EACH TERM OF YOUR INTEN-
22 TION TO RENEW THE LEASE AGREEMENT?

23 A UH-HUH. (AFFIRMATIVE RESPONSE.) YES, SIR.

24 Q SO, THAT WOULD PUT THE BURDEN ON YOU TO NOTIFY
25 HIM IN YOU WANTED TO CONTINUE?

1 A THAT IS CORRECT.

2 Q AND YOU RECALL THAT MR. BUTLER HAD SOME DIS-
3 AGREEMENT FOR YOUR PROPOSED RENT FOR THE FIRST
4 TWO YEARS? YOU WERE PROPOSING THIRTY-SIX
5 THOUSAND AND HE WANTED FORTY-TWO FIVE?

6 A YES, SIR.

7 Q YOU AGREED FROM THE VERY BEGINNING THAT YOU
8 WERE GONNA PROVIDE ALL MAINTENANCE TO THE
9 PROPERTY AND YOU WERE GONNA PAY ALL PROPERTY
10 TAXES, CORRECT?

11 A YES, SIR.

12 Q THAT WAS YOUR PROPOSAL TO HIM?

13 A YES, SIR.

14 Q I'M GOING TO ASK YOU TO TAKE A LOOK PLEASE AT
15 PLAINTIFF'S EXHIBIT NUMBER "5" AND SEE IF YOU
16 CAN IDENTIFY THAT.

17 A THIS IS FOR FIFTEEN YEARS TOTAL. AND IT'S
18 INITIALED BY EVERYONE.

19 Q DO YOU RECALL REQUESTING ADDITIONAL YEARS
20 UNDER THE ARRANGEMENT BECAUSE MR. BUTLER WAS
21 WANTING ADDITIONAL RENT IN THE FIRST TWO
22 YEARS?

23 A YEAH. THIRTY-SIX IS WHAT I PROPOSED AND HE
24 WENT TO FORTY-TWO FIVE.

25 Q BASED ON THAT YOU WANTED TO EXTEND THE TERM OF

1 THE LEASE AGREEMENT SO YOU COULD HAVE IT UP TO
2 FIFTEEN YEARS?

3 A I THINK THAT'S WHAT IT IS.

4 Q NOW, YOU RECALL THAT I PREPARED A DRAFT OF THE
5 LEASE AGREEMENT INCLUDING THOSE TERMS THAT YOU
6 HAD AGREED UPON AND MR. RAY FORWARDED THAT
7 DOCUMENT TO YOU FOR REVIEW? DO YOU RECALL
8 THAT?

9 A YEAH.

10 Q LET ME SEE IF THIS WILL REFRESH YOUR RECOLLEC-
11 TION. TAKE A LOOK AT PLAINTIFF'S "8". DOES
12 IT REFRESH YOUR RECOLLECTION THAT WE PREPARED
13 A DRAFT OF THE LEASE ENCLOSING THE TERMS THAT

14 ~~YOU AND MR. BUTLER HAD ESSENTIALLY AGREED UPON~~
15 IN THE LETTER OF INTENT?

16 A YES, SIR.

17 Q NOW, DO YOU RECALL ALSO THAT AFTER YOU
18 RECEIVED THAT DOCUMENT, YOU TOOK IT TO
19 ATTORNEY JOE COFFEE AND ASKED HIM TO REVIEW IT
20 ON YOUR BEHALF?

21 A YES, SIR.

22 Q AND HE DID REVIEW IT ON YOUR BEHALF?

23 A YES, SIR.

24 Q AND HE SUGGESTED SOME CHANGES FOR YOUR PROTEC-
25 TION, DIDN'T HE?

1 A I WOULD ASSUME HE DID. THAT'S WHAT WE DID IN
2 THE LAST DEPOSITION, I THINK.

3 Q I'M GONNA ASK YOU TO TAKE A LOOK PLEASE AT
4 PLAINTIFF'S EXHIBIT NUMBER "9" AND PARTICULAR-
5 ARLY THE THIRD PAGE. ALRIGHT, SIR. LOOKING
6 AT THE THIRD PAGE, CAN YOU IDENTIFY THAT AS AN
7 ADDENDUM TO A LETTER OF INTENT THAT YOU AND
8 MR. BUTLER SIGNED?

9 A YES, SIR.

10 Q AND THE DAY ON THAT IS MAY 12TH?

11 A UH-HUH. (AFFIRMATIVE RESPONSE.)

12 Q DOES THAT ADDENDUM MODIFY THE LETTER OF INTENT
13 TO INCLUDE THE PROVISIONS THAT YOU HAD
14 REQUESTED?

15 A YES, SIR.

16 Q THE FIRST ONE IS YOU WANTED ALL RENTS FROM THE
17 BILLBOARD PRESENTLY LOCATED ON THE PREMISES,
18 CORRECT?

19 A YES, SIR.

20 Q AND THE SECOND ONE REPRESENTS A CHANGE FROM
21 THE PRIOR DOCUMENT, DOESN'T IT?

22 A YES, SIR.

23 Q BECAUSE NOW, INSTEAD OF YOU HAVING THE OBLIGA-
24 TION TO NOTIFY MR. BUTLER EVERY YEAR IF YOU
25 WANTED TO CONTINUE THIS AGREEMENT, NOW IT

1 PROVIDES THAT IT WOULD AUTOMATICALLY RENEW
2 FROM YEAR TO YEAR UNLESS YOU GAVE NOTICE
3 NINETY DAYS PRIOR TO EXPIRATION DATE?

4 A UH-HUH. (AFFIRMATIVE RESPONSE.)

5 Q AND YOU REQUESTED THAT CHANGE, DIDN'T YOU?

6 A YES.

7 Q ALRIGHT, SIR. ALSO THE FIRST DOCUMENT PRO-
8 HIBITED ASSIGNMENT OF THE LEASE AND PROHIBITED
9 ANY SUB-LEASING AND YOU REQUESTED TO ASSIGN
10 THE LEASE OR TO SUB-LEASE IT, BUT YOU AGREED
11 THAT YOU WOULD REMAIN PERSONALLY LIABLE FOR
12 THE LESSEES PERFORMANCE?

13 A UNDERSTOOD, YES, SIR. ALL THAT CAME FROM RAY
14 REALTY.

15 Q WERE THESE DOCUMENTS THE CHANGES THAT YOU
16 REQUESTED?

17 A RIGHT. AND ALL THE CORRESPONDENCE WAS FROM
18 RAY REALTY.

19 Q AND IT ALL WAS DONE BY CORRESPONDENCE?

20 A YES, SIR.

21 Q EVERYTHING WAS REDUCED TO WRITING. IT WASN'T
22 DONE ON A HANDSHAKE?

23 A THAT'S RIGHT.

24 Q JUST BRIEFLY, TAKE A LOOK AT PLAINTIFF'S
25 EXHIBIT NUMBER "12". I'LL ASK YOU TO LOOK

1 SPECIFICALLY IF YOU WOULD ON THE SIGNATURE
2 PAGE.

3 A UH-HUH. (AFFIRMATIVE RESPONSE.) THAT'S MY
4 SIGNATURE.

5 Q THAT IS YOUR SIGNATURE ON PAGE 18 OF THE LEASE
6 AGREEMENT?

7 A YES, SIR.

8 Q THAT WAS THE FINAL LEASE AGREEMENT THAT YOU
9 HAD WITH MR. BUTLER, IS THAT CORRECT?

10 A 15TH DAY OF MAY. YES, SIR.

11 Q NOW, THAT'S THE AGREEMENT YOU WERE OPERATING
12 UNDER?

13 A YES, SIR.

14 Q AS I RECALL YOUR TESTIMONY ON DIRECT EXAMINA-
15 TION, YOU STATE THAT YOU STARTED LOSING MONEY
16 IN 1999?

17 A MY TAX RECORDS WOULD SHOW, BUT I WOULD SAY I
18 LOST MONEY EVERY YEAR I WAS THERE.

19 Q SO YOU LOST MONEY IN 1999 AND THEN AUTOMATI-
20 CALLY RENEWED THE LEASE? YOU DIDN'T GIVE ANY
21 NOTICE TO MR. BUTLER THAT YOU WEREN'T GONNA
22 CONTINUE BECAUSE YOUR TAX RECORDS SHOWED THAT
23 YOU WERE LOSING MONEY?

24 A I HAD PRETTY WELL COMMITTED WHEN YOU GOT A
25 MILLION DOLLARS WORTH OF INVENTORY.

1 Q AND IN 2000, YOU SAY YOU WERE LOSING MONEY?

2 A YES, SIR.

3 Q AND AGAIN, YOU PERMITTED THAT LEASE TO AUTO-
4 MATICALLY RENEW?

5 A YES, SIR. LIKE I SAID, MY TAX RECORDS WOULD
6 SHOW WHAT I MADE AND WHAT I DIDN'T.

7 Q ALRIGHT, SIR. IN 2001, YOU SAID YOU WERE
8 LOSING MONEY THERE, IS THAT CORRECT?

9 A IN THAT OPERATION, I THINK I WAS.

10 Q IN 2001, YOU DIDN'T GIVE ANYBODY NOTICE THAT
11 YOU WEREN'T GONNA CONTINUE IN 2001 THROUGH
12 2002, IS THAT CORRECT?

13 A YEAH. I TOLD CHARLEY RAY.

14 Q ~~NO, SIR. WHAT I'M ASKING YOU IS THIS: IN~~
15 2001, DID YOU PROVIDE ANY WRITTEN NOTIFICA-
16 TION?

17 A NO WRITTEN, NO, SIR.

18 Q NOW, YOU SAID YOU WERE LOSING MONEY AND THAT'S
19 WHAT YOUR TAX RECORDS WOULD SHOW, CORRECT?

20 A UH-HUH. (AFFIRMATIVE RESPONSE.)

21 Q WHAT I WANT TO ASK YOU, SIR, THE TAX RECORDS
22 THAT YOU'RE TALKING ABOUT ARE TAX RECORDS FOR
23 BILLY WILSON, ISN'T THAT CORRECT? OR ARE THE
24 TAX RECORDS YOU'RE TALKING ABOUT TAX RECORDS
25 FOR HORTON HOMES?

- 1 A HORTON HOMES, THAT LOCATION WAS LOSING MONEY.
- 2 Q MY QUESTION, SIR, THE TAX RECORDS THAT YOU'RE
- 3 REFERRING TO, THOSE ARE NOT BILLY WILSON'S TAX
- 4 RECORDS, ARE THEY?
- 5 A INDIVIDUAL?
- 6 Q YES, SIR.
- 7 A I DO CORPORATION AND INDIVIDUAL.
- 8 Q WELL, I'M ASKING THE TAX RECORDS YOU'RE
- 9 REFERRING TO ARE NOT YOUR PERSONAL TAX
- 10 RETURNS, IS THAT CORRECT?
- 11 A NO RESPONSE.
- 12 Q YOU'RE NOT SAYING YOU WERE LOSING MONEY?
- 13 YOU'RE SAYING THE CORPORATION WAS LOSING
- 14 MONEY?
- 15 A THAT LOCATION WAS LOSING MONEY.
- 16 Q ALRIGHT, SIR.
- 17 A BECAUSE THE LEASE OVERHEAD WAS TOO HIGH.
- 18 Q BUT YOU, IN FACT, WERE MAKING MONEY HAND OVER
- 19 FIST AT THE SAME TIME?
- 20 A OH, YEAH, I MAKE MONEY ON LAND. I WASN'T
- 21 MAKING IT IN THE MOBILE HOME BUSINESS.
- 22 Q NO. YOU WERE JUST SELLING THE MOBILE HOMES ON
- 23 THE LOTS YOU WERE SELLING AND THAT'S WHERE YOU
- 24 WERE MAKING ALL YOUR MONEY?
- 25 A NO, NOT NECESSARILY.. THAT'S NOT TRUE. I WAS

1 MAKING MONEY IN SANTEE. I WASN'T MAKING NO
2 MONEY IN HORRY COUNTY I DON'T THINK.

3 Q MY PURPOSE OF PLAINTIFF'S EXHIBIT NUMBER "32"

4 ...

5 MR. HANNA: HAS THAT BEEN IDENTIFIED?
6 HAS HE IDENTIFIED THAT. DID HE EVER
7 IDENTIFY THAT?

8 MR. WRIGHT: WELL, HE ASKED ME FOR A SHOW
9 OF RELEVANCE.

10 MR. HANNA: WELL, BEFORE YOU GET TO THAT
11 YOU HAVE TO LAY A FOUNDATION TO GET TO
12 DEVELOPMENT.

13 Q ALRIGHT, SIR. IF YOU WOULD PLEASE TAKE A LOOK
14 AT EXHIBIT "32" AND "33".

15 A I ENTERED INTO AN EXCLUSIVE AGREEMENT WITH
16 SMITH LAND COMPANY AND THEIR REQUIREMENT WAS I
17 BUY FOUR LOTS AND THEN MAINTAIN THREE SET-UP
18 MANUFACTURED HOMES IN THIS SUBDIVISION IN
19 GARDEN CITY, AND ... WHAT'S YOUR QUESTION NOW?

20 Q MY QUESTION, SIR, DID YOU GET A WARRANTY DEED
21 FROM SMITH LAND COMPANY IN AUGUST OF 1999 FOR
22 FOUR LOTS, BEING LOT 2, LOT 4, LOT 67 AND LOT
23 73 IN THE OCEAN BREEZE PLANTATION? DID YOU
24 ACQUIRE FOUR LOTS FOR THE SUM OF \$5.00?

25 A FOR \$5.00?

1 Q TAKE A LOOK AT THE DEED, SIR.

2 MR. WARING: OBJECTION, YOUR HONOR. THAT
3 BILLY WILSON WAS MAKING MONEY ON OTHER
4 LAND DEALS IS NOT RELEVANT TO THIS CASE.

5 MR. HANNA: HOW IS IT RELEVANT, MR.
6 WRIGHT?

7 MR. WRIGHT: IT'S RELEVANT BECAUSE HE
8 BROUGHT UP THE ISSUE OF HOW HE'S LOSING
9 MONEY. THE TENANT UNDER THIS LEASE IS
10 NOT HORTON HOMES. IT IS NOT SANTEE
11 DISCOUNT MOBILE HOMES. IT'S BILLY
12 WILSON. AND UNDER THE LEASE AGREEMENT,
13 HE AGREED TO BE PERSONALLY LIABLE UNDER
14 THE TERMS OF THE LEASE, NOT ANY ASSIGNEE
15 OR SUB-LESSEE. NOW, HE BROUGHT ...
16 OPENED A CAN OF WORMS HERE TALKING ABOUT
17 HOW HE WAS LOSING MONEY.

18 MR. HANNA: I AGREE WITH BOTH OF YOU. I
19 DON'T SEE THE RELEVANCE OF THIS LINE OF
20 TESTIMONY. I DON'T THINK IT'S GOT ANY-
21 THING TO DO WITH WHETHER OR NOT HE
22 BREACHED THE LEASE OR NOT, WHETHER HE WAS
23 MAKING MONEY THERE OR NOT, BUT YOU OPENED
24 THE DOOR AND HE TESTIFIED TO IT, SO I'LL
25 LET HIM CROSS ON IT.

1 MR. WARING: WE'LL STIPULATE THAT WE'RE
2 NOT CLAIMING THAT MR. WILSON DIDN'T HAVE
3 THE ABILITY ... I DON'T KNOW. WE'LL GO
4 FORWARD. YOU'RE RIGHT, YOUR HONOR.

5 MR. HANNA: IF I SOLD A CONVENIENCE STORE
6 IN SANTEE FOR \$550,000.00, BUT I WASN'T
7 MAKING MONEY AT THE LOCATION IN NORTH
8 MYRTLE BEACH ...

9 Q YOU SAID YOU WERE NOT MAKING ANY MONEY IN
10 Horry County, IS THAT CORRECT?

11 A I MADE MONEY AT OCEAN BREEZE.

12 Q OKAY, YOU GOT A LOT FOR \$5.00 AND I BELIEVE
13 YOU TOLD US IN YOUR DIRECT TESTIMONY THAT IN
14 ~~JANUARY OF 2002, WHEN YOU WERE TALKING TO~~
15 CHARLEY RAY, THAT YOU JUST DIDN'T HAVE ANY
16 MONEY. YOU DIDN'T HAVE ANY MONEY IN THE BANK
17 ACCOUNT. IF WE TAKE A LOOK AT PLAINTIFF'S
18 EXHIBIT NUMBER "33", LOT NUMBER 73, ONE OF
19 THOSE LOTS YOU GOT FOR \$5.00, YOU SOLD FOR
20 \$118,150.00.

21 A NOT JUST THE LOT.

22 Q IT WAS ONE OF THOSE MOBILE HOMES YOU SOLD AS
23 WELL, WASN'T IT?

24 A IT WAS A DOUBLE WIDE WITH BRICK UNDERPIN AND
25 PAVED DRIVEWAYS, AND IT PAYS THE TAP FEES. I

1 SPENT ABOUT TWENTY SOME THOUSAND FOR A MOBILE
2 HOME, PLUS THE COST FOR THE MOBILE HOME BEFORE
3 PUTTING IT IN THERE.

4 Q AND YOU MADE A TIDY PROFIT ON IT?

5 A YEAH, SURE, YOU MAKE A PROFIT.

6 Q AND YOU HAD MONEY?

7 A YEAH.

8 Q THE SAME TIME YOU'RE TELLING CHARLEY RAY

9 YOU'RE BROKE. YOU HAD MONEY BECAUSE YOU'RE

10 SELLING MOBILE HOMES AND LOTS IN GARDEN CITY
11 IN HORRY COUNTY?

12 A I MUST HAVE HAD \$26,000.00. I PAID HIM THAT
13 MONEY.

14 Q NO, SIR. THIS WAS IN JANUARY OF 2002. THIS
15 IS NINE MONTHS AFTER YOU PAID HIM \$26,000.00.

16 A YOU KNOW, MY MONEY FLUCTUATES BACK AND FORTH.
17 SOMETIMES I GOT IT AND SOMETIMES I DON'T.

18 ANYBODY THAT DEALS IN LAND DOES THAT.

19 Q AT THE TIME THAT YOU TOLD CHARLEY RAY THAT YOU
20 WERE LOSING MONEY, AND I BELIEVE YOU FIRST
21 TOLD HIM THAT YOU WERE READY TO GET OUT IN MAY
22 OF 2001? IS THAT WHEN YOU TOLD HIM YOU WERE
23 GETTING OUT?

24 A YEAH. WHENEVER WE PAID THE \$26,000.00 I TOLD
25 CHARLEY, I SAID, "I'VE HAD A BAD YEAR. I

1 AIN'T PROBABLY GONNA BE HERE IN A YEAR."

2 Q THAT WAS MAY OF 2001, CORRECT?

3 A I BELIEVE SO, YES.

4 Q YOU SAY YOU TOLD HIM THAT?

5 A UH-HUH. (AFFIRMATIVE RESPONSE.)

6 WARRANTY DEED FOR LOTS

7 2, 4, 67 AND 73 IN OCEAN

8 BREEZE PLANTATION MARKED

9 FOR IDENTIFICATION AND

10 INTRODUCED INTO EVIDENCE

11 AS PLAINTIFF'S EXHIBIT "32".

12 WARRANTY DEED FOR LOT 73

13 IN OCEAN BREEZE MARKED

14 FOR IDENTIFICATION AND

15 INTRODUCED INTO EVIDENCE

16 AS PLAINTIFF'S EXHIBIT "33".

17 Q ALRIGHT, SIR. NOW, ABOUT FOUR MONTHS LATER

18 ... FOUR MONTHS LATER AFTER YOU WERE TELLING

19 CHARLEY YOU WERE LOSING MONEY AND HAD TO GET

20 OUT, YOU WENT TO THE EXPENSE OF HAVING A NEW

21 SALES TRAILER INSTALLED ON THE PROPERTY THAT'S

22 THE SUBJECT OF THIS LITIGATION, ISN'T THAT

23 CORRECT?

24 A I PUT A NEW ONE UP THERE WHEN THAT ONE BURNED

25 DOWN?

1 Q YES, SIR.

2 A YEAH.

3 Q AND THAT WAS IN SEPTEMBER OF 2001, FOUR MONTHS
4 AFTER YOU TOLD CHARLEY RAY YOU WERE GETTING
5 OUT?

6 A CAN I ANSWER WHY I DID THAT?

7 MR. HANNA: SURE, YOU CAN.

8 A YOUR HONOR, I HAD INVENTORY THERE.

9 MR. HANNA: ANSWER HIS QUESTION FIRST.

10 A YES, SIR, I DID. I HAD ... I STILL HAD
11 INVENTORY THERE IN SEPTEMBER, 2001, AND I HAD
12 TO HAVE A WAY TO SELL IT AND I HAD A SINGLE
13 WIDE ON THE LOT AND I PULLED IT IN THERE AND
14 GOT THE ELECTRICITY HOOKED UP AND WENT BACK IN
15 BUSINESS TO TRY AND MOVE THAT INVENTORY.

16 Q AT THE SAME TIME, YOU HAD ANOTHER MOBILE HOME
17 LOT DOWN IN SANTEE, ISN'T THAT CORRECT?

18 A YES, SIR. UH-HUH. (AFFIRMATIVE RESPONSE.)

19 Q AND YOU HAD A MOBILE HOME LOT OUT IN GREEN
20 SEA, ISN'T THAT CORRECT?

21 A YEAH. I OWN FORTY PERCENT OF THAT.

22 Q AND YOU COULD HAVE MOVED THOSE TRAILERS UP
23 THERE? ALL YOU HAD TO DO WAS HOOK `EM UP AND
24 MOVE `EM?

25 A WELL, I HAD A COUPLE OF HOUSES THERE THAT WAS

1 UNDER CONTRACT, YOU KNOW, AND I WAS ARRANGE-
2 ... I DIDN'T START MAKING ARRANGEMENTS TO DO
3 THIS UNTIL JANUARY OF 2002. TO GET EVERYTHING
4 OFF THE LOT.

5 Q BUT YOU WERE ALREADY LOSING MONEY AND YOU
6 SPENT MORE MONEY TO BUILD ANOTHER FACILITY,
7 ANOTHER SALES FACILITY ...

8 A CAN I LOOK AT THAT?

9 Q SURELY.

10 A ALL RIGHT. THE INVOICE IS \$18,150.00. YOU
11 CAN'T CONTINUE IN A BUSINESS ... I HAD A FIVE
12 BEDROOM DOUBLE WIDE THERE THAT GOT BURNED OUT,
13 AND THAT'S A LITTLE SINGLE WIDE THERE THAT I
14 PULLED IN TO TRY TO MOVE MY INVENTORY. I HAD
15 NO INTENTIONS THEN OF STAYING.

16 Q BUT EVEN THOUGH YOU SAID YOU HAD NO INTENTIONS
17 OF STAYING THERE, YOU SPENT THE MONEY TO BRING
18 IN ANOTHER TRAILER AND HOOK IT UP, HAVE IT
19 PERMITTED, COMPLY WITH REQUIREMENTS OF THE
20 AMERICANS WITH DISABILITY ACT TO HAVE IT SET
21 UP. YOU SPENT ALL THAT MONEY AT A LOCATION
22 WHERE YOU SAY YOU WERE LEAVING.

23 A IF YOU GOT EIGHT MOBILE HOMES THAT'S LOT SET
24 TO SHOW TO A CUSTOMER, OR FIVE, IT'LL COST YOU
25 MORE TO TEAR THAT DOUBLE WIDE DOWN AND MOVE IT

1 THAN IT WILL TO PULL THIS SINGLE WIDE A
2 HUNDRED YARDS AND SET IT UP AND HOOK IT UP TO
3 THE ALREADY SEWER AND WATER THAT YOU GOT. SO,
4 I DIDN'T SPEND A WHOLE LOT OF MONEY. THIS WAS
5 A QUICK WAY OUT, AND BESIDES THAT, MY LEASE
6 WAS PAID UP. I DIDN'T EXPECT MR. BUTLER TO
7 REFUND MY MONEY BECAUSE I WAS GONNA GET OUT OF
8 THERE. I HAD PAID FOR SIX MONTHS.

9 Q ALRIGHT, SIR. AND I BELIEVE YOU TOLD US WHEN
10 EVERYTHING BURNED DOWN IN THE SUMMER OF 2001,
11 THAT YOU LOST EVERYTHING THAT YOU HAD. YOU
12 LOST YOUR COMPUTERS. YOU LOST EVERYTHING THAT
13 YOU HAD IN THAT TRAILER?

14 A I HAD DOCUMENTS IN THAT MANUFACTURED HOME THAT
15 WAS SET UP FOR AN OFFICE ON MY DOSHER FLOOR
16 PLAN OR EITHER TRANSAMERICA, OKAY. IT WASN'T
17 INSURED SEPARATELY AS BEST I RECALL. I THINK
18 IT WAS A LOSING SITUATION. I DIDN'T GET PAID
19 FOR THE CONTENTS, THE FIXTURES IN THE MANUFAC-
20 TURED HOME.

21 Q AFTER THAT BURNED DOWN, EVEN THOUGH YOU'RE
22 TELLING US YOU'RE LOSING MONEY UP THERE, YOU
23 NOT ONLY SET THIS UP BUT YOU ALSO PUT THE
24 COMPUTERS AND EVERYTHING ELSE THAT YOU NEEDED
25 TO CONTINUE BUSINESS, INCLUDING THE POWER SET

1 UP FOR THIS UNIT, ISN'T THAT CORRECT?

2 A POWER SET UP?

3 Q YES, SIR. YOU HAD TO HAVE POWER TO YOUR UNIT,

4 DIDN'T YOU?

5 A I PUT IT RIGHT AT THE SAME PLACE THAT THE

6 OFFICE WAS.

7 Q LET'S TAKE A LOOK PLAINTIFF'S EXHIBIT NUMBER

8 "17". YOU HAD TO HAVE A POWER CONNECTION FROM

9 SANTEE COOPER AT THE SAME TIME, DIDN'T YOU?

10 A YEAH. HOW MUCH WAS THAT?

11 Q DON'T KNOW, SIR, BUT YOU DID HAVE TO HAVE

12 POWER.

13 A I'M SURE THE POWER THING BURNT UP ALONG WITH

14 ~~THE HOUSE.~~

15 Q NOW, I WANT TO BE CLEAR ABOUT THIS. YOU'RE

16 TELLING US THAT IN JANUARY OF 2002, YOU

17 REMEMBER A CONVERSATION WITH MR. RAY WHERE YOU

18 TOLD HIM YOU DEFINITELY WEREN'T STAYING BEYOND

19 MAY 15TH? WOULD HE PLEASE SEND YOU AN INVOICE

20 FOR PRO-RATED RENT BEYOND MAY 15TH. WOULD HE

21 PLEASE SEND YOU AN INVOICE FOR PRO-RATED RENT?

22 A NO. I DIDN'T SAY, "SEND ME A PRO-RATED RENT."

23 I TOLD HIM IN JANUARY, I SAID, "I WON'T BE

24 HERE ... AT THE END OF THIS LEASE, I'LL BE

25 GONE. YOU NEED TO PUT YOUR SIGN UP AND TRY TO

1 RENT IT FOR MR. BUTLER." IN OTHER CONVERSA-
2 TIONS WITH HIM, I TOLD HIM, I SAID, "I KNOW
3 I'M A LITTLE BIT LATE. PRO-RATE IT. WHATEVER
4 THE PRO-RATION IS, I'LL PAY YOU. I'M GETTING
5 OUT, CHARLEY, AS HARD AS I CAN." "YES, SIR. I
6 SURE WILL DO THAT."

7 Q SO JANUARY YOU SAID, "I'M GETTING OUT."?

8 A YEP.

9 Q AND IN FEBRUARY OF 2002, A MONTH, MAYBE LESS
10 THAN A MONTH AFTER YOU SAID YOU HAD THAT
11 CONVERSATION WITH MR. RAY, SARAH KEET, WHO WAS
12 YOUR OFFICE MANAGER AT THAT OFFICE, SIGNED A
13 LEASE AGREEMENT WITH SANTEE COOPER TO PUT
14 ADDITIONAL LIGHT POSTS ON THE PROPERTY. BUT
15 YOU HAD ALREADY TOLD MR. RAY THAT YOU WERE
16 LEAVING?

17 A IT SEEMS I WAS GETTING BROKEN INTO PROBABLY.
18 THAT'S THEM BIG OLD HEADLIGHTS. I WANTED TO
19 LIGHT IT UP SO I COULD SEE WHAT THEY'S DOING.

20 Q OR I GUESS YOU COULD HAVE JUST MOVED ALL THAT
21 STUFF OUT, COULDN'T YOU?

22 A WELL, I'D PAID UP THE LEASE FOR THREE MORE
23 MONTHS SO ...

24 MR. WARING: OBJECTION.

25 MR. HANNA: I'M GONNA OVERRULE THE

1 OBJECTION ON THAT BASED ON I THINK THERE
2 WAS AN OPENING OF THE DOOR ON THAT. I
3 DON'T THINK THE ISSUES ARE ALL UP TO MY
4 DETERMINATION BUT I'M GONNA LET HIM HAVE
5 HIS SHOT IN THE DARK.

6 Q I'D HAVE YOU LOOK AT 3.35 PLEASE.

7 A WHAT DOES THIS HAVE TO DO WITH A SIGN OR WHAT?

8 Q I'M JUST ASKING IF YOU CAN IDENTIFY THIS.

9 DOES IT BEAR YOUR SIGNATURE?

10 A IT'S MY SIGNATURE BUT I REALLY DON'T KNOW WHAT
11 IT IS. WHAT IS THIS?

12 MR. HANNA: NO, YOU CAN'T ASK ANY

13 QUESTIONS. IF YOU DON'T KNOW WHAT IT IS,

14 ~~YOU DON'T KNOW WHAT IT IS AND THAT'S YOUR~~

15 RESPONSE. I CAN'T ALLOW YOU TO ASK HIM

16 QUESTIONS BACK. HE CAN FOLLOW UP ON IT

17 IF HE WANTS TO. IT'S IN OUR CONTROL.

18 BOTH OF THEM GET TO ASK SOME QUESTIONS.

19 HE DOESN'T RECOGNIZE IT. NEXT QUESTION.

20 A MCFARLAND CIRCLE. THAT SOUNDS FAMILIAR BUT I

21 ...

22 Q DID YOU HAVE A SUB-LEASE AGREEMENT WITH PALM
23 SHORES DEVELOPMENT CORPORATION?

24 MR. WARING: YOUR HONOR, I'M GOING TO

25 OBJECT ON THE RELEVANCY. THIS IS A 1997

1 LEASE WITH ... IT HAS NOTHING TO DO WITH
2 THIS DEAL.

3 MR. HANNA: HE HASN'T IDENTIFIED IT YET.
4 DON'T KNOW WHAT IT IS.

5 A I CAN'T REMEMBER PALM SHORES. I'M NOT DENYING
6 IT. I JUST DON'T ...

7 Q LET ME ASK YOU THIS: DID YOU SIGN A TERMINA-
8 TION AGREEMENT TO GET OUT OF THE LEASE
9 AGREEMENT THAT YOU HAD WITH PALM SHORES?

10 MR. WARING: OBJECTION, RELEVANCY.

11 MR. HANNA: WHAT'S THE RELEVANCY OF THAT?

12 MR. WRIGHT: I'M JUST SHOWING HE KNOWS
13 HOW TO SIGN AGREEMENTS TO GET OUT OF
14 LEASES.

15 MR. HANNA: JUST BECAUSE OF TIME AND I
16 DON'T THINK HE HAS ANY, AND I UNDERSTAND
17 WHERE YOU ARE AND I UNDERSTAND WHERE YOU
18 GOING TO. YOUR POINT IS YOU'VE BEEN
19 TRYING TO MAKE THROUGHOUT THIS WHOLE LINE
20 OF TESTIMONY THAT HE'S NOT SO DUMB THAT
21 HE DOESN'T KNOW ABOUT THIS KIND OF THING?

22 MR. WRIGHT: YES, SIR.

23 Q ALRIGHT, SIR. I BELIEVE YOU SAID THAT I THINK
24 THE LAST PAYCHECK YOU WROTE FOR SOMEONE WAS IN
25 JUNE, IS THAT CORRECT?

1 A YEAH. I THINK SO, YEAH. I HAVEN'T SEEN
2 DOCUMENTATION ON THAT. MY SECRETARY TOLD ME
3 THAT TODAY.

4 Q SO, YOU DON'T HAVE ANY INDEPENDANT KNOWLEDGE
5 OF THAT?

6 A I HAVE NOT SEEN ANYTHING. I WAS TRYING TO
7 FIGURE OUT THE EXACT DATE OF WHEN I WAS OFF
8 THE PROPERTY, AND THAT'S RELEVANT TO THIS.

9 Q ALRIGHT, SIR. I'M GONNA GO BACK TO PLAIN-
10 TIFF'S EXHIBIT NUMBER "17" WHICH ARE THE
11 DOCUMENTS THAT DEAL WITH SANTEE COOPER. I'M
12 GONNA ASK YOU TO LOOK AT THESE DOCUMENTS ON
13 HORTON HOMES SUPER CENTER FAX COVER SHEET.

14 A ~~UH-HUH.. (AFFIRMATIVE RESPONSE..)~~

15 Q DO YOU RECOGNIZE THE SIGNATURE OF SARAH KEET?

16 A SARAH KEET ON 7/19/02.

17 Q AND SARAH KEET WAS YOUR OFFICE MANAGER AT THE
18 LOCATION WHICH IS THE SUBJECT OF THIS DISPUTE?

19 A YES, SIR.

20 Q WHAT DID MS. KEET TELL SANTEE COOPER ON JULY
21 19, 2002 CONCERNING THE CUT OFF DATE FOR THE
22 POWER?

23 A PLEASE DISCONNECT AS OF 7/31/02.

24 Q DID SHE INDICATE THAT THEY WERE TO CALL YOU IF
25 THEY HAD ANY QUESTIONS?

1 A THAT'S RIGHT.

2 Q YOU AUTHORIZED TO SHUT THE POWER OFF AS OF THE
3 END OF JULY?

4 A YES. SHE PROBABLY DID THAT. I HAVE SEEN THIS
5 BEFORE, YES, SIR. IS THERE ANYTHING ELSE YOU
6 WANTED TO KNOW?

7 Q NO, SIR. NOW, YOU HAD A TELEPHONE AT THAT
8 LOCATION, ISN'T THAT CORRECT?

9 A YES, SIR. UH-HUH. (AFFIRMATIVE RESPONSE.)

10 Q THE TELEPHONE NUMBER, I BELIEVE, WAS ...

11 A 380-4893, IS THAT CORRECT?

12 Q NO.

13 A NOW, THAT TELEPHONE WAS FORWARDED TO SARAH
14 KEET'S HOME ADDRESS. WHEN IT RANG THAT NUMBER
15 IT WOULD RING TO HER HOUSE BECAUSE SARAH WAS
16 SENDING IN SERVICE TO HORTON INDUSTRIES TO DO
17 MY SERVICE SINCE I WAS OUT OF BUSINESS THERE.
18 SO, THAT'S WHY IT GOES ON TO NOVEMBER.

19 Q ALRIGHT, SIR. SO, YOU CONTINUED TO HAVE A
20 SIGN ON THE PROPERTY REFLECTING A PHONE NUMBER
21 OF 280-7553?

22 A YES, SIR.

23 Q AND THAT PHONE SERVICE YOU SAID WENT TO SARAH
24 KEETS ...

25 A SARAH KEETS HOUSE, YEAH.

1 Q WOULD IT BE A FAIR STATEMENT THAT ANYBODY THAT
2 WANTED TO GET IN TOUCH WITH YOU, THEY COULD
3 CALL THAT NUMBER AND IT WOULD GO THROUGH TO
4 SARAH KEET? SO ANYBODY THAT WENT BY AND SAW
5 THE SIGNS WOULD BE ABLE TO CALL SARAH KEET
6 USING THE PHONE NUMBER THAT WAS LISTED ON YOUR
7 SIGN THAT WAS STILL ON THE PROPERTY?

8 A IN OUR DEPOSITION PRIOR TO THIS, I TOLD YOU I
9 DIDN'T KNOW WHY IT WENT ON FOR SO LONG BECAUSE
10 THEY WASN'T NO MANUFACTURED HOME DOWN THERE.
11 AND SO, IN CONVERSATION, I ASKED WHY DID WE
12 PAY THESE BILLS SO LONG ...

13 MR. WRIGHT: I'M GONNA OBJECT TO
14 ANYTHING, CONVERSATION WITH THIRD PARTIES
15 THAT'S NOT HERE TO TESTIFY.

16 MR. HANNA: IT MAKES IT AWKWARD FOR THE
17 TRUTH. I HAVEN'T HEARD WHAT HE'S SAID
18 YET. WHAT THE CONVERSATION WAS ABOUT.

19 A IN CONVERSATION WITH MY SECRETARY, SHE SAID,
20 "YOU KNOW, I CONTINUED TO PAY THAT BILL" AND
21 IT WAS GOING TO SARAH TO HANDLE SERVICE ON THE
22 LAST FEW HOMES WE HAD. SEE, WE HAVE ...

23 MR. HANNA: YOU'VE ALREADY TESTIFIED TO
24 THAT ANYWAY.

25 Q I'LL ASK YOU TO LOOK AT PLAINTIFF'S EXHIBIT

1 "36". IS THIS AN INVOICE FROM INETBA FOR LONG
2 DISTANCE SERVICE ASSOCIATED WITH THE ACCOUNT
3 AT 116 HIGHWAY 17, LITTLE RIVER, SOUTH
4 CAROLINA?

5 A YES, IT IS. I WOULD PRESUME THAT. I NOTICED
6 SOME OF THESE. LIKE I SAID, MY SECRETARY
7 HANDLED THESE.

8 Q WELL, THIS IS ONE OF THE DOCUMENTS YOUR
9 ATTORNEY PRODUCED TO US IN RESPONSE TO OUR
10 DISCOVERY REQUEST. THIS DOCUMENT SHOWS LONG
11 DISTANCE CALLS TO SANTEE WHERE YOUR OFFICE IS
12 LOCATED. IS THAT YOUR OFFICE NUMBER THERE IN
13 SANTEE, (803) 854-3435?

14 A I THINK THAT'S A FAX. ONE'S A FAX AND ONE'S A
15 PHONE.

16 Q THESE ARE CALLS ORIGINATING FROM THE NUMBER
17 ... THESE WERE THE NUMBERS THAT WERE ASSIGNED
18 TO THAT ACCOUNT, IS THAT CORRECT?

19 A I DON'T KNOW. LET ME SEE THAT SIGN AGAIN.
20 SOME OF 'EM ARE. SOME OF THOSE NUMBERS ARE
21 7553 AND SOME OF THEM ARE 8192. UH-HUH.
22 (AFFIRMATIVE RESPONSE.) 7573.

23 Q WERE THOSE ADDITIONAL CALL LINES THAT YOU HAD
24 COMING OUT OF THE PHONE SYSTEM AT THAT
25 LOCATION?

1 A YES, SIR. BUT TELL ME WHAT THIS MEANS?

2 Q WHAT IT SHOWS IS CALLS WERE ORIGINATING FROM
3 THAT LOCATION ON JULY 24TH.

4 A IS THAT THE LAST DATE ON THERE?

5 Q IT'S THE LAST DATE THAT I SEE LONG DISTANCE
6 CALLS MADE.

7 A OKAY. AND THAT WOULD HAVE HAD TO HAVE BEEN
8 MADE FROM THE HEADQUARTERS POINT AT LITTLE
9 RIVER?

10 Q IT SAYS THAT'S THE ORIGIN LOCATION FROM ALL
11 THREE OF THOSE NUMBERS THAT YOU'VE IDENTIFIED
12 AS NUMBERS AT THAT LOCATION.

13 A IF THAT PHONE HAD OF BEEN TURNED OVER TO SARAH
14 KEET, IT WOULD STILL SHOW UP AT THAT LOCATION.
15 I DON'T KNOW. I'M ASKING QUESTIONS AGAIN,
16 YOUR HONOR. I JUST DON'T KNOW.

17 MR. HANNA: THAT'S WHAT NUMBER?

18 MR. WRIGHT: "36".

19 MR. HANNA: ARE YOU GOING TO INTRODUCE
20 THAT?

21 MR. WRIGHT: YES.

22 MR. WARING: OBJECTION. YOUR HONOR, I
23 DON'T THINK HE CAN AUTHENTICATE IT. HE
24 SAYS HE DOESN'T KNOW.

25 MR. HANNA: THOSE ARE DOCUMENTS THAT YOU

1 PRODUCED IN DISCOVERY AND IF IT'S
2 RELEVANT TO QUESTION HIM, WHICH I THINK
3 IT IS, AS TO WHEN HE VACATED THE
4 PROPERTY, I THINK IT'S RELEVANT. YOU'VE
5 AUTHENTICATED IT BY THE FACT THAT YOU
6 PRODUCED IT, I THINK.

7 INVOICE FROM INETBA MARKED
8 FOR FOR IDENTIFICATION AND
9 INTRODUCED INTO EVIDENCE
10 AS PLAINTIFF'S EXHIBIT "36".

11 Q I HAVE NO FURTHER QUESTIONS.
12 OFF THE RECORD

13
14 JACKIE WOODBURY, HAVING FIRST BEEN DULY SWORN,
15 TESTIFIED AS FOLLOWS:

16 DIRECT EXAMINATION BY MR. WARING:

17 Q STATE YOUR NAME AND ADDRESS FOR THE RECORD.

18 A JACKIE WOODBURY, GREEN
19 SEA.

20 Q WHAT DO YOU DO FOR A LIVING?

21 A I OWN A CONVENIENCE STORE AND IN THE MOBILE
22 HOME BUSINESS.

23 Q HOW LONG HAVE YOU BEEN IN THE MOBILE HOME
24 BUSINESS?

25 A PROBABLY SEVEN, EIGHT YEARS.

1 Q ALRIGHT, SIR... HOW ABOUT, DO YOU KNOW MR.
2 WILSON SITTING HERE TODAY?

3 A YES, I DO.

4 Q TELL ME ABOUT YOUR RELATIONSHIP WITH MR.
5 WILSON.

6 A WELL, ME AND BILLY HAD A PLACE ... WELL, WE
7 HAD SEVERAL PLACES, BUT WE HAD A PLACE, THE
8 ONE I THINK WE'RE TALKING ABOUT, THE ONE AT
9 THE BEACH. WE ... YOU WANT TO WHOLE STORY?

10 Q JUST TELL ME WHAT KIND OF BUSINESS INTEREST
11 Y'ALL HAVE TOGETHER.

12 A WE JUST HAD A ... I HAD A THIRD IN THE
13 BUSINESS AND HE HAD SIXTY-SIX PERCENT.

14 Q ~~HOW ABOUT THE GREEN SEA BUSINESS?~~

15 A HE HAD FORTY PERCENT.

16 Q HE OWNED FORTY PERCENT OF THAT?

17 A AND I HAD SIXTY.

18 Q I'M GOING TO DIRECT YOUR ATTENTION ... WHAT
19 POINT IN TIME DID Y'ALL ENTER INTO PARTNER-
20 SHIP TOGETHER?

21 A IT WAS MAYBE IN '99, MAYBE '98.

22 Q WAS THERE A POINT IN TIME WHERE YOU AND MR.
23 WILSON PARTED WAYS AS FAR AS THE PARTNERSHIP
24 YOU HAD IN THE LITTLE RIVER SITE?

25 A YES, SIR.

1 Q WHAT WERE THE REASONS BEHIND THAT?

2 A MONEY SITUATION. LOSING MONEY.

3 MR. WRIGHT: AGAIN, I'M GOING TO OBJECT
4 ON THE BASIS OF RELEVANCE.

5 MR. HANNA: WHAT IS THE RELEVANCE?

6 MR. WARING: I'M GOING TO GET AROUND TO
7 IT, YOUR HONOR, BECAUSE IT'S GONNA GET TO
8 THE POINT WHERE MR. WOODBURY TOOK SOME
9 INVENTORY AND ACTUALLY WAS A WITNESS TO A

10 CONVERSATION THAT MR. BUTLER HAD ON THE
11 TELEPHONE.

12 MR. HANNA: YOU'VE LAID A FOUNDATION FOR
13 THAT. GO AHEAD.

14 Q AT WHAT POINT IN TIME DID YOU AND MR. WILSON
15 PART WAYS?

16 A WHEN I GOT OUT ... NOW, LIKE I SAID, DATES. I
17 MIGHT NOT BE TELLING YOU EXACTLY THE RIGHT
18 DATES. BUT WHEN I GOT OUT, IT WAS SOME TIME
19 THE YEAR BEFORE. I'M GONNA SAY SOME TIME IN
20 THE SUMMER, END OF THE SUMMER.

21 Q WAS IT AROUND THE TIME THEY WERE TALKING ABOUT
22 A FIRE OF A MOBILE HOME?

23 A I HAD BEEN OUT AT THAT TIME.

24 Q NOW, Y'ALL STILL HAD BUSINESS RELATIONSHIPS
25 WITH GREEN SEA?

- 1 A YES, SIR.
- 2 Q DID Y'ALL MEET REGULARLY?
- 3 A ON AND OFF, YEAH.
- 4 Q DID YOU EVER HAVE THE OCCASION TO MEET WITH
- 5 MR. WILSON IN JANUARY OF 2002?
- 6 A MR. WILSON?
- 7 Q MR. WILSON.
- 8 A YES, I DID.
- 9 Q IF YOU COULD TELL ME WHAT THE BASIS OF THAT
- 10 PARTICULAR MEETING WAS ABOUT.
- 11 A WELL, LIKE I SAID, I HAD BEEN OUT OF THE
- 12 BUSINESS AND BILLY ... ME AND BILLY HAD BEEN
- 13 TALKING BACK AND FORTH ABOUT THE LOSING SITU-
- 14 ~~ATION. IT WAS DOING THE SAME THING. HE WAS~~
- 15 TRYING TO GET RID OF THE INVENTORY BECAUSE WE
- 16 WERE LOSING MONEY, AND HE WAS LOSING MONEY.
- 17 SO, WE HAD A MEETING AND HE WAS WANTING ME TO
- 18 COME DOWN AND DISCUSS IF I COULD TAKE PART OF
- 19 THE INVENTORY OFF OF THAT LOT AND MOVE IT TO
- 20 GREEN SEA AND HE WAS GONNA TAKE THE OTHER PART
- 21 AND MOVE TO SANTEE AND THEN WAS JUST GONNA TRY
- 22 TO DISBURSE IT EVERYWHERE WE COULD TO GET OFF
- 23 OF THE LOT THAT HE WAS ON.
- 24 Q ALRIGHT, SIR. DID YOU OBSERVE ANY CONVERS-
- 25 TIONS THAT MR. WILSON HAD ON THE TELEPHONE?

1 A WELL, THE REASON ... WELL, I GUESS ONE REASON
2 I DO REMEMBER THIS IS BECAUSE THAT'S WHY WE
3 HAD MET AT BILLY'S OFFICE. WE HAD MET THERE
4 TO DISCUSS HIM LEAVING THE BUSINESS OR GETTING
5 OUT OF THE BUSINESS. THE BEST WAY TO PERFORM
6 EVERYTHING AS FAR AS CLOSING DOWN, WHERE TO
7 MOVE THE HOUSES. WHILE I WAS IN THE OFFICE
8 THAT DAY, WE PUT EVERYTHING TOGETHER. BILLY
9 CALLED MR. RAY. I GUESS IT WAS CHARLEY RAY

10 'CAUSE HE CALLED HIM CHARLEY, AND HE ANSWERED
11 THE PHONE.

12 MR. WRIGHT: OBJECTION TO THIS LINE OF
13 TESTIMONY.

14 MR. HANNA: YOU GOT TO DO BETTER IN
15 IDENTIFYING WHO HE THINKS IS CHARLEY, I
16 THINK. I THINK THIS IS BEING OFFERED NOT
17 FOR THE TRUTH OF THE MATTER ASSERTED BUT
18 TO SHOW NOTICE AND, OF COURSE, THAT'S AN
19 EXCEPTION TO THE HEARSAY RULE. BUT, I
20 THINK YOU GOT TO DO BETTER THAN TO SAY,
21 "I THINK IT WAS CHARLEY."

22 MR. WARING: I UNDERSTAND, YOUR HONOR.

23 Q DID MR. WILSON TELL YOU WHO HE WAS TALKING TO?

24 A YES, SIR. WE CALLED CHARLEY RAY'S REALTY
25 COMPANY.

1 MR. WRIGHT: SAME OBJECTION.

2 MR. HANNA: MOVE ON.

3 Q MOVE ON FROM THERE. WHAT HAPPENED?

4 A WELL, BILLY CALLED MR. CHARLEY AT THE REALTY
5 COMPANY TO TELL HIM WHAT WE WERE DOING. WE
6 WERE DISCUSSING LEAVING THE PROPERTY, GETTING
7 OUT OF THE CONTRACT AND LEAVING THE PROPERTY.
8 HE WAS JUST LETTING HIM KNOW THAT'S WHAT WE
9 WERE GONNA DO AND I WAS GOING TO TAKE PART OF
10 THE HOMES AND THAT HE WAS LEAVING. LIKE I
11 SAID, I WASN'T IN IT AT THAT TIME, BUT I JUST
12 HAPPENED TO BE IN THAT OFFICE AND WE WERE
13 DISCUSSING THAT WHILE I WAS DOWN THERE THAT
~~14 DAY WAS TO CLEAR UP GETTING OUT OF THIS~~

15 BUSINESS.

16 Q DID YOU END UP TAKING SOME OF MR. WILSON'S
17 INVENTORY?

18 A YES, SIR. WE TOOK SOME OF IT.

19 Q DO YOU KNOW WHERE THE REST OF THE INVENTORY
20 WENT?

21 A MOST OF IT, I THINK, WENT TO SANTEE. BUT IT'S
22 KIND OF A JOB, YOU KNOW, TO MOVE THAT MUCH
23 PROPERTY. IT'S, YOU KNOW, MOVING EVERYTHING
24 OFF THOSE LOTS IS NOT REAL SIMPLE. YOU KNOW,
25 IT TAKES A LITTLE TIME AND YOU HAVE TO TAKE

1 TIME TO DO IT BECAUSE OF THE FLOOR PLAN SITUA-
2 TIONS.

3 Q ANSWER ANY QUESTIONS MR. WRIGHT MAY HAVE FOR
4 YOU.

5 CROSS EXAMINATION BY MR. WRIGHT:

6 Q YOU'VE HAD A BUSINESS RELATIONSHIP WITH THE
7 DEFENDANT, BILLY WILSON, FOR QUITE A FEW
8 YEARS, HAVEN'T YOU?

9 A YES, SIR.

10 Q AND YOU CONTINUE TO HAVE A BUSINESS RELATION-
11 SHIP WITH HIM TODAY, ISN'T THAT CORRECT?

12 A YES, SIR.

13 Q THE TWO OF YOU OWN SOME SUBDIVISIONS YET?

14 A YES, SIR.

15 Q BLUE RIBBON PLANTATION?

16 A YES, SIR.

17 Q AND SUGAR BEAR PLANTATION?

18 A YES, SIR.

19 Q HOW ABOUT THE CROSSINGS?

20 A YES, SIR.

21 Q SO THE TWO OF YOU GOT A LOT OF INTEREST
22 ALIGNED TOGETHER, ISN'T THAT CORRECT?

23 A THAT'S TRUE, SIR.

24 Q AND IT JUST SO HAPPENED THAT YOU HAPPENED TO
25 GO BY WHEN MR. WILSON WAS PLACING A CALL TO

1 MR. RAY, IS THAT CORRECT?

2 A YES, SIR, THAT IS TRUE.

3 Q HAVE YOU EVER SPOKEN TO MR. RAY?

4 A NEVER IN MY LIFE EXCEPT WHEN HE COME IN THAT
5 DOOR.

6 Q OH, WHEN HE CAME IN THE DOOR?

7 A YES, SIR.

8 Q WHAT DOOR?

9 A THAT FRONT DOOR OF THIS BUILDING RIGHT HERE,
10 SIR.

11 Q SO YOU SAW HIM TODAY?

12 A YES, SIR.

13 Q NEVER SPOKE TO HIM BEFORE?

14 A ~~NOT THAT I KNOW OF TO MY KNOWLEDGE.~~

15 Q COULDN'T RECOGNIZED HIS VOICE BECAUSE YOU
16 DIDN'T KNOW WHO HE WAS?

17 A NO, SIR.

18 Q SO THE ONLY INFORMATION YOU HAVE MR. WILSON
19 WAS TALKING TO CHARLEY RAY WAS BECAUSE MR.
20 WILSON SAID HE WAS TALKING TO CHARLEY RAY?

21 A YES, SIR.

22 Q NO FURTHER QUESTIONS.

23 MR. WARING: NO FURTHER QUESTIONS. WE'LL
24 CALL OUR NEXT WITNESS.

25 MR. HANNA: ANSWER ANY QUESTIONS THESE

1 GENTLEMAN MAY HAVE.

2

3 BETTY BRYANT, HAVING BEEN DULY SWORN, TESTIFIED AS
4 FOLLOWS:

5 DIRECT EXAMINATION BY MR. WARING:

6 Q MS. BRYANT, IT'S LATE TODAY AND I WON'T KEEP
7 YOU HERE TOO LONG BECAUSE I KNOW YOU'VE GOT A
8 LONG DRIVE. JUST TELL THE COURT PLEASE WHO
9 YOU ARE AND WHAT YOU DO.

10 A I AM A BOOKKEEPER/ACCOUNTANT. I'M RETIRED NOW
11 BUT I WORKED FOR BILLY WILSON AT SANTEE HOMES
12 FROM '97 UNTIL THE END OF 2005 WHEN HE CLOSED
13 THE BUSINESS.

14 Q WERE YOU KIND OF BILLY'S RIGHT-HAND PERSON UP
15 THERE AT SANTEE?

16 A YES.

17 Q I JUST WANT TO CALL YOUR ATTENTION TO PARTICU-
18 LARLY IN JANUARY OF 2002. DO YOU RECALL ANY-
19 THING AT ALL GOING ON WITH THE LITTLE RIVER
20 STORE THAT MR. WILSON OWNED?

21 A TOWARDS THE END OF JANUARY, MR. WILSON CAME IN
22 AND SAID THAT HE WAS GONNA HAVE TO CLOSE THE
23 LITTLE RIVER LOT. THAT HE WAS LOSING TOO MUCH
24 MONEY.

25 Q I'M GOING TO SHOW YOU THIS DOCUMENT. MS.

1 BRYANT, DO YOU RECOGNIZE THIS?

2 A YES. AFTER BILLY HAD TOLD ME HE WAS GONNA
3 CLOSE THE BUSINESS, I CALLED SARAH KEET, WHO
4 WORKED AT THE LITTLE RIVER LOT AND ASKED HER
5 TO SEND ME A COPY OF THE HOUSES ... THE
6 INVENTORY, SO WE COULD MOVE INTO OUR OTHER
7 LOTS.

8 Q IS THIS THE DOCUMENT THAT YOU WERE ...

9 A THIS IS WHAT SHE FAXED TO ME.

10 Q WHEN DID SHE FAX THAT TO YOU?

11 A JANUARY THE 31ST OF 2002.

12 Q HOW ARE YOU CERTAIN THAT WAS THE PARTICULAR
13 DATE?

14 A BECAUSE IT'S ON HERE.

15 MR. WARING: YOUR HONOR, I MOVE TO ADMIT
16 THIS AS DEFENDANT'S EXHIBIT NUMBER "11".

17 MR. HANNA: ANY OBJECTION.

18 MR. WRIGHT: YOUR HONOR, I WOULD HAVE
19 SOME OBJECTIONS WITH THIS DOCUMENT
20 WITHOUT FURTHER FOUNDATION BECAUSE I'M
21 TOLD THAT THIS IS SUPPOSED TO BE A LIST
22 AS OF JANUARY 31, 2002. THERE ARE NOTES
23 ON THIS DOCUMENT THAT REFERENCE JULY 12.
24 THERE ARE NOTES IN THIS DOCUMENT THAT
25 NOTE APRIL 26. YOU KNOW, I CERTAINLY

1 DON'T THINK I CAN AGREE TO ADMIT IT AS IT
2 WAS REPRESENTED.

3 MR. HANNA: GO INTO A BIT MORE FOUNDA-
4 TION.

5 Q MA'AM, THERE'S A BUNCH OF ... LOOKS LIKE THERE
6 ARE SOME HIGHLIGHTED MARKS AND THERE ARE SOME
7 NOTES THAT WERE MADE ON THIS SHEET. WHERE ...

8 A THESE WERE NOTES THAT I MADE OF EVERYTHING
9 THAT COULD ... THE FAX ITSELF WAS BLACK AND

10 WHITE. BUT I MADE NOTES ON THIS SHEET AS THE
11 HOUSES WERE REMOVED FROM THE LOT, AS WE MOVED
12 THEM TO OTHER LOTS. THE COLORS AND THE NOTES
13 ARE WHAT I MADE.

14 MR. WARING: WE'D NOW LIKE TO INTRODUCE
15 THIS AS DEFENDANT'S EXHIBIT NUMBER "11".

16 MR. WRIGHT: NO OBJECTION.

17 MR. HANNA: DEFENDANT'S "11" ALLOWED
18 WITHOUT OBJECTION.

19 LIST OF INVENTORY MARKED
20 FOR IDENTIFICATION AND
21 INTRODUCED INTO EVIDENCE
22 AS DEFENDANT'S EXHIBIT "11".

23 Q MS. BRYANT, PRIOR TO JANUARY OF 2002, WERE YOU
24 INVOLVED WITH THE INVENTORY OF THE LITTLE
25 RIVER SUPER CENTER?

1 A I WAS NOT INVOLVED WITH THE INVENTORY ITSELF.
2 I WAS LIKE ... IF THEY HAD A TECHNICAL QUES-
3 TION OR ANYTHING, THEY WOULD CALL ME. I DID
4 GO DOWN AND SET UP THEIR COMPUTER FOR `EM.
5 BUT AS FOR THE NORMAL, EVERY DAY WORK OF
6 LITTLE RIVER, I JUST GOT REPORTS.

7 Q AND IT WASN'T UNTIL JANUARY OF 2002 THAT YOU
8 WERE LOOKING IN TERMS OF TRYING TO FIND HOMES
9 OR FIND PLACES FOR THESE HOMES?

10 A THAT'S CORRECT.

11 MR. WARING: THAT'S ALL THE QUESTIONS I
12 HAVE, YOUR HONOR.

13 MR. HANNA: CROSS?

14 CROSS EXAMINATION BY MR. WRIGHT:

15 Q AS I UNDERSTAND IT, YOU WORKED FOR MR. WILSON
16 FOR A PERIOD OF EIGHT YEARS?

17 A YES, SIR.

18 Q AND I BELIEVE YOU INDICATED THAT YOU WERE
19 BOOKKEEPER AND ALSO DID SOME ACCOUNTING WORK?

20 A YES. WHAT I DID WAS THE EVERY DAY BOOKKEEPING
21 AND THEN I WOULD COMPILE ALL OF THE LOTS, END
22 OF THE YEAR FINANCIALS TO TAKE THEM TO THE
23 CPA.

24 Q SO, LET ME ASK THIS QUESTION: DID SANTEE
25 DISCOUNT MOBILE HOMES FILE A CONSOLIDATED TAX

1 RETURN THAT INCLUDED THE RESULTS OF ALL
2 SUBSIDIARIES?

3 A NO, SIR. EACH SUBSIDIARY HAD THEIR OWN TAX
4 RETURN. THE REASON I WOULD COMPILE 'EM WAS
5 FOR BILLY WILSON TO DO HIS PERSONAL TAXES, AND
6 HE HAD TO HAVE A TAX RETURN FROM EACH BUSINESS
7 TO DO HIS PERSONAL TAXES.

8 Q WHAT BUSINESSES DID YOU DO RETURNS FOR MR.
9 WILSON SO THAT HE COULD DO HIS PERSONAL TAXES?

10 A I WOULD COLLECT THE RETURNS THAT WERE
11 COMPLETED FROM THE OTHER BUSINESSES.

12 Q I'M ASKING YOU TO IDENTIFY THOSE BUSINESSES.

13 A THE GREEN SEA HORTON HOME CENTER, THE LITTLE
14 RIVER HORTON HOME CENTER AND THE OCEAN BREEZE
15 LOTS WAS WITH SANTEE HOMES. IT WASN'T A
16 SEPARATE CORPORATION. THERE WAS JAMESTOWN FOR
17 AWHILE. A LOT IN JAMESTOWN.

18 Q DID YOU HAVE ANY RESPONSIBILITY WITH RESPECT
19 TO MR. WILSON'S PERSONAL RETURN?

20 A NO, SIR. THE ONLY RESPONSIBILITY I HAD WAS TO
21 TAKE IT TO HIS CPA.

22 Q WHAT INFORMATION, IF ANY, DID YOU COMPILE
23 CONCERNING MR. WILSON'S OWNERSHIP OF SUBDIVI-
24 SIONS WITH JACKIE WOODBURY?

25 A I HAVE NO KNOWLEDGE OF THAT.

1 Q SO, I TAKE IT THAT YOU WOULDN'T KNOW WHETHER
2 HE MADE MONEY OR LOST MONEY ON THOSE LAND
3 TRANSACTIONS?

4 A I HAVE NO KNOWLEDGE OF THAT.

5 Q WHAT ABOUT OCEAN BREEZE? I BELIEVE YOU
6 INDICATED THAT YOU HAD SOME RESPONSIBILITIES
7 FOR THAT.

8 A THE BANK STATEMENTS WOULD COME TO MY OFFICE
9 AND I WOULD DO A SPREADSHEET ON THOSE. THEN
10 END OF THE YEAR, I TOOK THOSE SPREADSHEETS TO
11 THE ACCOUNTANT.

12 Q WAS THAT MR. WILSON INDIVIDUALLY?

13 A YES, SIR.

14 Q ~~NOW, BASED ON YOUR REVIEW OF DEFENDANT'S~~

15 EXHIBIT NUMBER "11", WITH RESPECT TO THE VERY
16 FIRST LINE. "AGF'00". WHAT DOES THAT DESIG-
17 NATE?

18 A OKAY. AGF IS THE MODEL OF HORTON HOME. AGF
19 DESIGNATES THAT IT'S A SINGLE WIDE, SIXTEEN BY
20 SEVENTY-SIX MOBILE HOME. THE '00 IS THE YEAR
21 IT WAS MADE. HORTON HOMES GOES FROM JULY 1ST
22 THROUGH JUNE THE 30TH OF THE FOLLOWING YEAR.
23 THAT MEANS IT WAS MADE BETWEEN JULY THE 1ST,
24 '99 TO JUNE THE 20TH OF '04.

25 Q WITH RESPECT TO THE SECOND COLUMN, THE NUMBER

1 210987, WHAT DOES THAT INDICATE?

2 A SERIAL NUMBER OF THE HOME.

3 Q THAT WOULD BE THE SERIAL NUMBER OF THE HOME?

4 A YES.

5 Q AND THE NEXT COLUMN LOOKS LIKE "DUCT"?

6 A YES. DEUCHER AND TRANSAMERICAN BOMBARDIA WERE
7 FINANCIERS, BANKS. IT WAS A FLOOR PLAN WITH
8 IT.

9 Q AND THE VERY NEXT COLUMN THERE'S A DOLLAR

10 AMOUNT, \$18,870.00?

11 A THAT'S THE COST OF THE HOME FROM THE FACTORY.

12 Q NOW, IS THERE ANYTHING THAT INDICATES HOW MUCH
13 IS OWED ON THE UNIT?

14 A NO, NOT ON HERE.

15 Q WITH RESPECT TO THIS FIRST LINE, WHICH I
16 BELIEVE YOU IDENTIFIED AS A HORTON HOME AGF
17 2000, SERIAL NUMBER 210987. CAN YOU TELL US
18 WHAT DISPOSITION WAS MADE OF THAT MOBILE HOME?

19 A IT WENT TO SANTEE AND IT WAS SOLD FROM THE
20 SANTEE LOT.

21 Q CAN YOU TELL US WHEN IT WENT TO THE SANTEE
22 LOT?

23 A IT WOULD HAVE BEEN BETWEEN THIS DATE, AND I
24 THINK, JUNE THE 21ST IS WHEN WE CLOSED THE LOT.
25 I DON'T HAVE THE PAPERWORK SHOWING WHEN IT

1 WENT.

2 Q WOULD IT BE A FAIR STATEMENT THAT YOU DON'T
3 HAVE ANY PAPERWORK TO SHOW WHEN ANY OF THESE
4 UNITS LEFT THAT LOT?

5 A NOT WITH ME. THERE'S ... I DID BRING ONE BILL
6 BUT THE OFFICE AT SANTEE HAD GOTTEN BROKEN
7 INTO AND THE FILES WERE ALL OVER THE FLOOR,
8 AND I JUST WENT THROUGH AS FAST AS I COULD TO
9 GET WHAT I COULD TO BRING.

10 Q SO, YOUR ANSWER IS NO?

11 A NO.

12 Q NO FURTHER QUESTIONS.

13 MR. HANNA: ANY FURTHER QUESTIONS?

14 MR. WARING: NO RE-DIRECT, YOUR HONOR.

15 MR. HANNA: NEXT WITNESS.

16 MR. WARING: THAT'S IT, YOUR HONOR.

17 MR. HANNA: REBUTTAL?

18 MR. WRIGHT: NO REBUTTAL FROM THE
19 PLAINTIFF.

20 MR. HANNA: I'M GONNA HANDLE THE MOTIONS
21 THIS WAY: I'M GONNA LET YOU SUBMIT THEM
22 IN WRITING TO GIVE YOU WHATEVER TIME TO
23 REFLECT ON THE TESTIMONY RATHER THAN
24 HAVING TO COME UP WITH IT. I KNOW EVERY-
25 BODY IS BUSY. YOU'LL GET YOUR RESPONSE

1 BY MAIL. ANY PROBLEMS WITH THAT?

2 MR. WARING: NO OBJECTION WITH THAT.

3 WHAT DATE DO YOU WANT IT?

4 MR. HANNA: LET'S DO IT AT THE SAME TIME
5 SO NOBODY GETS AN ADVANTAGE HERE. WHY
6 DON'T WE SAY YOU MAIL THEM TO ME AT 4:00
7 NEXT FRIDAY. Y'ALL SEND THEM AT THE SAME
8 TIME. THAT WAY WE DON'T HAVE ... WE'LL
9 DO IT AT FOUR IN THE AFTERNOON. THEN

10 I'LL ... IF I NEED FURTHER BRIEFING I'LL
11 LET YOU KNOW. IF THEY'RE OBVIOUS, I CAN
12 MAKE A RULING ON IT. LET ME MAKE SOME
13 COMMENTS ON THE RECORD FIRST SO I DON'T
14 FORGET ABOUT THIS 'CAUSE I LIKE TO TRY
15 AND RECAP AT THE END KIND OF TO GIVE
16 Y'ALL AN INDICATION ... THIS IS BY NO
17 MEANS A RULING. IT'S JUST AN INITIAL
18 RESPONSE TO THE FACTS OF THE CASE, KIND
19 OF A GUT REACTION WITHOUT HAVING THE
20 BENEFIT TO REVIEW THE CASES THAT Y'ALL
21 CITED TO ME, THE LAW THAT YOU'VE GIVEN TO
22 ME, WHAT YOUR POSITION IS, BUT AN OFF THE
23 CUFF RESPONSE. FIRST OF ALL, I WANT TO
24 THANK BOTH OF YOU ATTORNEYS THE WAY YOU
25 TRIED THE CASE SHOWED A LOT OF PROFES-

1 SIONALISM. I'VE HAD SOME OTHER CASES
2 WITH OTHER ATTORNEYS THAT HAVE TAKEN TWO
3 DAYS TO GET THROUGH IT. I APPRECIATE THE
4 PREPARATION THAT Y'ALL PUT INTO IT TO GET
5 READY AND TRY THIS CASE. AS TO THE
6 PARTIES, I'M GOING TO SAY THIS TO BOTH OF
7 YOU, I THINK THAT YOU'RE WHAT'S THE
8 WORD I'M LOOKING FOR? YOU WERE BELIEVE-
9 ABILITY ON THE STAND. I BELIEVE THAT
10 BOTH OF YOU TRIED TO TELL THE TRUTH AND
11 THAT YOU CAN RECOLLECT AFTER THIS MANY
12 YEARS IS GOING TO BE HARD SOMETIMES, AND
13 I UNDERSTAND THAT. I HAVE ... THE ISSUES
14 ~~THAT I HAD IN THE CASE ARE~~ ... LET'S
15 START, FIRST OF ALL, THE QUESTION YOU HAD
16 TO GET TO BEFORE YOU GET ANYWHERE ELSE
17 WAS THERE AN EXTENSION OF THE LEASE OR
18 NOT. AS I UNDERSTAND IT, PLAINTIFF'S
19 POSITION IS KIND OF AN OPT OUT SITUATION.
20 HE DIDN'T GIVE ANY NOTICE OF IT, AND
21 THEREFORE, DEFENDANT'S LOCKED IN FOR
22 ANOTHER YEAR. DEFENDANT SAYS HE GAVE
23 THAT NOTICE TO MR. RAY, AN AGENT OF THE
24 DEFENDANT. I HAVE A COUPLE PROBLEMS WITH
25 THAT IN THAT THERE NEVER WAS ANY REAL

1 TESTIMONY EXACTLY WHAT THE WORDING OF IT
2 WAS. THE EXACT STATEMENTS THAT WERE MADE
3 TO MR. RAY. MY RECOLLECTION OF THE
4 RECORD, THE VERSIONS WERE A LITTLE BIT
5 OFF, AND THAT'S TO BE EXPECTED IN HAVING
6 TO RECALL THAT LONG AGO. BUT, THE REAL
7 QUESTION I HAVE IN USING THAT AS A BASIS
8 TO SAY THAT HE HAD OPTED OUT WAS THAT I
9 DIDN'T EVER HEAR ANY TESTIMONY

10 CONCRETELY. MR. RAY, "I AM NOT GOING TO
11 BE THERE. ADVISE YOUR CLIENT THAT I'M
12 NOT GOING TO BE THERE. I'M NOT RENEWING
13 THE LEASE." I DIDN'T EVER HEAR HIM
14 TESTIFY, "I'M NOT GOING TO RENEW THE
15 LEASE." THAT GIVES ME A LITTLE BIT OF
16 HEARTBURN. ANOTHER THING THAT GIVES ME
17 HEARTBURN IS TRYING TO SAY THAT YOU ARE
18 NOT RENEWING THE LEASE, BUT AT THE SAME
19 TIME, YOU'RE TAKING ADVANTAGE OF IT AND
20 YOU'RE STAYING THERE AND YOU'RE RECEIVING
21 SOME BENEFIT AS OCCUPANTS OF THE LAND
22 INSOFAR AS BREACHING IT IN NOVEMBER OF
23 '02. THEN THE OTHER SIDE OF THE COIN, I
24 KNOW THE OPERATOR WAS TAKING A BEATING
25 WITH THE ECONOMY, AND THERE WAS A LEASE

1 IN EFFECT. BECAUSE THERE WAS A LEASE IN
2 EFFECT BUT HE HAD OPTED OUT, HE COULDN'T
3 TAKE ANY MEASURE TO PROTECT HIS MITIGATED
4 DAMAGES ON THE BASIS THAT HE THOUGHT THAT
5 IT WAS OVER. IF HE BREACHED THE LEASE,
6 THAT'S A BREACH OF THE LEASE NOT TO
7 OCCUPY. THAT'S WHAT THESE PROCEEDINGS
8 ARE ALL ABOUT. I'VE GOT A LITTLE PROBLEM
9 WITH THAT AND I'LL ADDRESS ALL THESE
10 ISSUES THAT ARE PUT IN FRONT OF ME AND
11 I'LL POINT IT OUT TO YOU. CONTRACT WITH
12 REGARDS TO DOING AWAY WITH THE REQUIRE-
13 MENT TO MITIGATE. IT'S NOT VALID IN
14 SOUTH CAROLINA. I'LL LOOK AT THE CASE.

15 I DO HAVE SOME PROBLEMS WITH THE FACT
16 THOUGH THAT MITIGATION OF DAMAGES IS AN
17 AFFIRMATIVE DEFENSE AND AS I UNDERSTAND
18 IT, NOT ONLY IS IT AN AFFIRMATIVE DEFENSE
19 WITH REGARDS TO PROVING THE FAILURE TO
20 MITIGATE, YOU HAVE TO OFFER TESTIMONY AS
21 TO HOW MUCH OF A FAILURE IT WAS. SOME
22 KIND OF OBJECTIVE STANDARD. IT CAN BE
23 OFFSET AGAINST THE LEASE ITSELF AND I
24 DIDN'T HEAR A WHOLE LOT OF THAT. THERE
25 WERE SOME THINGS ... THERE WERE SOME

1 THINGS ... THAT WERE SOME INFERENCES AS
2 TO HOW LONG THAT MIGHT HAVE BEEN, WHAT
3 THE DAMAGES MIGHT BE BUT I DIDN'T HEAR
4 CONCRETE TESTIMONY OF THAT. THESE ARE
5 SOME OF THE THINGS THAT ARE GIVING ME
6 SOME PROBLEMS. NOW, THAT I'VE POINTED
7 OUT THE PROBLEMS TO BOTH OF YOU, AND I DO
8 THIS IN EVERY ARBITRATION I DO, AND AFTER
9 I GIVE EVERYBODY THE BENEFIT OF MY
10 OBJECTIVE OBSERVATIONS ABOUT THE
11 TESTIMONY AND THE EVIDENCE AND THE LAW, I
12 ASK YOU IN THE NEXT WEEK, CONSIDER THE
13 POSSIBILITY OF RE-VISITING THE ISSUE OF
14 TRYING TO SETTLE THE CASE WITHOUT ME
15 HAVING TO MAKE A DECISION ON IT. IT'LL
16 SAVE ALL OF YOU TIME, TROUBLE AND MONEY,
17 ATTORNEY'S FEES AND EVERYTHING ELSE
18 BEFORE IT'S ALL OVER WITH, AND THIS GIVES
19 YOU SOME KIND OF BASIS TO RE-EVALUATE AND
20 SIT DOWN AND EXAMINE THE POSITION. I'VE
21 DONE THIS IN EVERY ARBITRATION THAT I'VE
22 EVER DONE, AND BELIEVE IT OR NOT, ONLY
23 ONE OF THEM DID THEY NOT SETTLE THE CASE
24 AFTER THE BENEFIT OF KIND OF A POST-GAME
25 ANALYSES OF QUARTER-BACKING OF HOW THE

1 GAME IS PLAYED. SEE WHAT Y'ALL CAN DO
2 NEXT WEEK ABOUT TRYING TO RE-VISIT AND
3 SETTLING THE CASE. I WOULD ENCOURAGE YOU
4 TO DO THAT. IF THERE'S ANYTHING I CAN
5 HELP YOU IN THAT AS FAR AS LOOKING AT
6 YOUR MOTIONS, PLEASE DO THAT. ANY
7 QUESTIONS? ANY OBJECTIONS TO WHAT I
8 SAID?

9 MR. WRIGHT: NONE, YOUR HONOR.

10 MR. WARING: THANK YOU, YOUR HONOR.
11
12
13
14

15
16
17
18
19
20
21
22
23
24
25

1 SOUTH CAROLINA,

2

CERTIFICATE

3 HORRY COUNTY.

4 I, JERRY S. MABRY, A NOTARY PUBLIC AND
5 VERBATIM REPORTER IN AND FOR THE STATE OF SOUTH
6 CAROLINA DO HEREBY CERTIFY THAT THE WITNESSES WERE
7 DULY SWORN PRIOR TO THE TAKING OF THEIR TESTIMONY
8 AND THAT THE FOREGOING ONE HUNDRED FIFTY-FOUR (154)
9 PAGES CONSTITUTE A TRUE AND ACCURATE TRANSCRIPT OF

10 THE EVIDENCE AS GIVEN BY SAID WITNESSES AND AS
11 TAKEN DOWN AND TRANSCRIBED BY ME. I FURTHER
12 CERTIFY THAT THE PERSONS WERE PRESENT AS STATED IN
13 THE CAPTION.

14 I FURTHER CERTIFY THAT I AM NOT OF COUNSEL FOR
15 NOR IN THE EMPLOY OF ANY OF THE PARTIES TO THIS
16 ACTION NOR AM I INTERESTED EITHER DIRECTLY OR
17 INDIRECTLY IN THE RESULTS THEREOF.

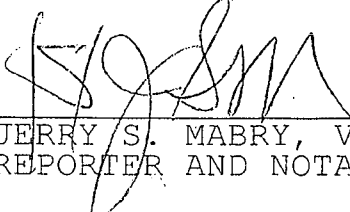
18 I FURTHER CERTIFY THAT I AM NOT RELATED BY
19 BLOOD OR MARRIAGE TO ANY OF THE PARTIES TO THIS
20 ACTION.

21 THIS THE 8TH DAY OF SEPTEMBER, 2011.

22

23

24


JERRY S. MABRY, VERBATIM
REPORTER AND NOTARY PUBLIC

25 MY COMMISSION EXPIRES:
NOVEMBER 22, 2012.



2000, SOUTH CAROLINA 29526 • 803/248-6511

INFORMATION & DISCLOSURE REGARDING REAL ESTATE AGENCY RELATIONSHIPS



An agency relationship arises whenever two persons agree that one is to act on behalf of the other and in accordance with the direction of the other. The creation of an agency relationship imposes certain legal duties on the agent. They are the fiduciary duties of disclosure, confidentiality, reasonable care and diligence, and accounting in dealings with the client.

Before a seller or a buyer enters into a discussion with a real estate agent regarding a real property transaction, the seller and buyer should each understand what type of agency relationship or representation the seller and/or the buyer may have with each agent.

IF THE AGENT REPRESENTS THE SELLER: The agent becomes the seller's agent by entering into a listing agreement with the seller. The agent may act as a subagent through a listing agent. A subagent may work for a different real estate company. A listing agent can assist the buyer but does not represent the buyer. A listing agent or subagent must place the interests of the seller first. The agent should not tell a listing agent or subagent anything the buyer would not want the seller to know, because a listing agent or subagent must disclose to the seller any information he or she knows. It is an agent's duty to disclose to all parties all facts known to the agent which materially affect the value or desirability of the property, and which are not known to or apparent with diligent attention and observation of the parties.

IF THE AGENT REPRESENTS THE BUYER: The agent typically becomes the buyer's agent by entering into an agreement to represent the buyer. A buyer's agent can assist the seller but does not represent the seller. A buyer's agent must place the interests of the buyer first. The agent should not tell a buyer's agent anything of a personal or confidential nature that the seller would not want the buyer to know, because a buyer's agent must disclose to the buyer any information he or she knows. It is an agent's duty to disclose to all parties all facts known to the agent which materially affect the value or desirability of the property, and which are not known to or apparent with diligent attention and observation of the parties.

IF THE AGENT REPRESENTS BOTH THE SELLER AND THE BUYER AT THE SAME TIME: an agent may not act as an agent for both parties to a transaction without the disclosed and informed consent of both the seller and the buyer. The agent is required to treat both the seller and the buyer honestly and impartially so as not to favor one party or work to the disadvantage of any party. When permission from the seller or the buyer, whichever is appropriate, is obtained, the agent is prohibited from disclosing: (a) a price less than the asking price; (b) that the buyer will pay a price greater than the price submitted in a written offer; and (c) confidential information; or (d) any other information a party specifically instructs the agent in writing not to disclose, unless disclosure is required by law. Therefore, the agent's duties are more limited if he or she represents both parties. There are potential conflicts of interest when an agent represents more than one party. The agent is obligated to inform each party of all facts the agent knows which affect the party's decision to permit the agent to represent both the seller and the buyer.

You have the right to choose the type of representation you wish to receive. Payment of a fee to an agent does not necessarily establish the type of representation you receive. If you have any questions regarding the duties and responsibilities of the agent, you should resolve them before entering into an agency relationship. Regardless of the agency relationship which may be established, you have the responsibility to protect your own interests. Once you have read and discussed this information with the agent, please acknowledge your receipt of a copy of this form to the Real Estate Commission. Your cooperation will help the agent to comply with the Regulations of the South Carolina Department of Labor, Licensing and Regulation, Real Estate Commission. The agent is required to provide this form to you and to disclose below whom the agent represents.

The duties of the agent in a real estate transaction do not relieve a seller or a buyer from the responsibility to protect his/her interests. You should carefully read all agreements to assure that they adequately express your understanding of the transaction. If legal assistance is desired, consult a competent professional.

Throughout your real property transaction you may receive more than one disclosure form, depending upon the number of agents involved in the transaction. The law requires each agent with whom you have more than a casual relationship to present you with this disclosure form. You should read its contents each time it is presented to you, considering the relationship between you and the real estate agent involved in the transaction.

DISCLOSURE OF AGENCY:

Agent represents:

[Signature]
Broker/Company Name (Agent)

By:

[Signature]
Broker or Sales Associate

[Signature]
seller and buyer

Date:

ACKNOWLEDGEMENT OF RECEIPT OF AGENCY DISCLOSURE FORM: I acknowledge I have received a copy of this form. I understand the contents of this form and the agency relationships and that the agent may represent both seller and buyer.

[Signature]
Seller

Date:

[Signature]
Buyer

Date:



(3) AREA (3) 7-C (4) PRICE (8) \$ 50000 (5) ADDRESS Nwy 17 N (6) CITY (15) NMB

(19) # OF ACRES (8) 4.8 ac (20) PRICE PER ACRE (6) \$ (21) # OF LOTS (6) (22) LISTING AGENT (20) Ray Charley (23) C S O SUBAGENTS (15) (24) CO-LISTER(S) (30) (25) OWNER'S NAME (25) L. Butler (26) LIST DATE (MDY) (5) 11/30/98 (27) EXP. DATE (MDY) (5) (28) ESTM. LOT SIZE (16) 4.8 ac (29) SECTION/SUBDIVISION (20) (30) ZONING (31) TAX MAP NUMBER (18) 130-00-05-026 (32) LEGAL DESCRIPTION (12) (33) DEED BOOK/Pg. # (7) (34) ESTM. ROAD FRONTAGE (4) (35) SCHOOLS (4/4/4) NMB NMB (36) POA AMOUNT (10) NA (37) PREVIOUS YEAR TAX (10) 51533

GENERAL INFORMATION

FEATURE CODES

A NUMBER OF LOTS ? **F UTILITIES TO SITE** **K TERMS OF SALE**

1. ONE 1. ELECTRICITY 1. CONVENTIONAL
2. TWO 2. GAS 2. CASH
3. THREE 3. WATER 3. ASSUMPTION
4. FOUR 4. SEWER 4. LEASE / OPTION
5. FIVE 5. PHONE 5. OWNER
6. SIX 6. TV CABLE 6. EXCHANGE
7. SEVEN OR MORE 7. UNDERGROUND UTILITIES 7. MULTIPLE MORTGAGES
8. OTHER 8. OTHER

B SALE OPTION **G WATER** **L TYPE OF LISTING**

1. ENTIRE PARCEL ONLY 1. PRIVATE 1. MLS EXCLUSIVE RIGHT TO SELL
2. WILL SELL SEPARATELY 2. PUBLIC 2. EXCLUSIVE AGENCY
3. WILL BUILD 3. WELL
4. WILL EXCHANGE 4. NO DEVELOPED WATER
5. WILL SUBDIVIDE 5. OTHER
6. WILL SUBORDINATE
7. OTHER

C LOT DESCRIPTION **H SEWER** **M IMPROVEMENTS**

1. IRREGULAR 1. PUBLIC 1. RESIDENCE
2. CUL-DE-SAC 2. SEPTIC INSTALLED 2. MOBILE HOME
3. CORNER 3. SEPTIC PERMIT REQUIRED 3. GARAGE
4. WOODED 4. NONE 4. UTILITY BUILDING
5. LEASED 5. OTHER 5. STORAGE BUILDING
6. RECTANGULAR 6. OTHER 6. CONCRETE SLAB
7. OTHER 7. OTHER 7. FENCED
8. OTHER 8. OTHER 8. CROSS FENCED
9. OTHER 9. OTHER 9. DRIVEWAY
10. OTHER 10. OTHER 10. BOAT DOCK
11. OTHER 11. OTHER 11. BOAT RAMP
12. OTHER 12. OTHER 12. STABLE(S)
13. OTHER 13. OTHER 13. OTHER

D ROAD ACCESS **I POSSESSION** **N RESIDENCE**

1. EASEMENT ONLY 1. NEGOTIABLE 1. LAND ONLY
2. PRIVATE ROAD 2. PRE-CLOSING 2. 1 BEDROOM
3. STATE ROAD 3. CLOSING 3. 2 BEDROOMS
4. INTERSTATE 4. 30-60 DAYS 4. 3 OR MORE BEDROOMS
5. COUNTY ROAD 5. MLS LOCK BOX 5. 1 BATHROOM
6. CITY STREET 6. MLS LOCK BOX - OCCUPIED 6. 2 BATHROOMS
7. OTHER 7. OTHER 7. 3 OR MORE BATHROOMS
8. OTHER 8. OTHER 8. + HALF BATHROOM
9. OTHER 9. OTHER 9. LIVING ROOM
10. OTHER 10. OTHER 10. FAMILY ROOM
11. OTHER 11. OTHER 11. DINING ROOM
12. OTHER 12. OTHER 12. TENANT OCCUPIED
13. OTHER 13. OTHER 13. BRICK VENEER
14. OTHER 14. OTHER 14. FRAME

E ROAD SURFACE **J SHOWING**

1. CONCRETE 1. CALL LISTING OFFICE
2. BLACKTOP 2. SIGN ON PROPERTY
3. GRAVEL 3. BOUNDARIES VISIBLY MARKED
4. DIRT 4. OTHER
5. OTHER 5. OTHER

P ADDITIONAL INFORMATION

1. TIMBER
2. CLEARED
3. PASTURE
4. UNDER CULTIVATION
5. GARDEN PLOT
6. SPOILAGE
7. POND(S)
8. IRRIGATION
9. TOBACCO ALLOTMENTS
10. TOBACCO BARN(S)
11. TIMBER RESERVATIONS
12. MINERAL RESERVATIONS
13. STORM WATER RETENTION AREA
14. RAILROAD SIDING

DEFENDA EXHIBIT

10-18-07

(51) ASSUMABLE (Y/N) (1) (52) ESCALATE (Y/N) (1) (53) QUALIFY (Y/N) (1) (54) APPROX DWN. PMT. (8) (55) PRESENT PAYMENT (8)
(56) YEARS LEFT ON TERM (8) (57) PRES. INT. RATE (10) (58) MTG. TYPE: ARM, GPM, FIX, OWNER (10) (59) TRANSFER FEE (8)
(60) OTHER MTGS. (10) (61) AS OF (8) (62) OTHER FINANCING AVAILABLE: TYPE LENDER (10)
(63) MORTGAGE AMOUNT (10) (64) % RATE, TERM (10) (65) PAYMENT (10) (66) BALLOON, TERM (10)
(71) FINANCING REMARKS (25)

REMARKS: DO NOT EXCEED 45 CHARACTERS AND SPACES PER LINE
For New Construction, Enter R-Value, Thickness and Type of Insulation on Line 1
72 FLOOR INSULATION 10 INCHES 1500001 AKA 194 INCHES ADJUSTMENT
73 20 194 INCHES 1500001 AKA 194 INCHES ADJUSTMENT
74 20 194 INCHES 1500001 AKA 194 INCHES ADJUSTMENT
75 20 194 INCHES 1500001 AKA 194 INCHES ADJUSTMENT
76 20 194 INCHES 1500001 AKA 194 INCHES ADJUSTMENT

Ray Realty, Inc.
P. O. Box 416
1304 - 4th Avenue
Conway, S. C. 29526
email: cray@compuserve.com

Fax Cover Sheet

DATE: February 24, 1998 TIME: 4:17 PM
TO: Mr. Billy Wilson PHONE: [Their phone number]
 [Company Name] FAX: 803-854-3138
FROM: Charley Ray PHONE: 803-248-6363
 Ray Realty, Inc. FAX: 803-248-6721
RE: 5 acre Hwy 17

Number of pages including cover sheet: 4

Message

Billy:

Look this over and call me with questions or changes, if you have any.

Let's do a deal.

Charley

PLAINTIFF'S
EXHIBIT

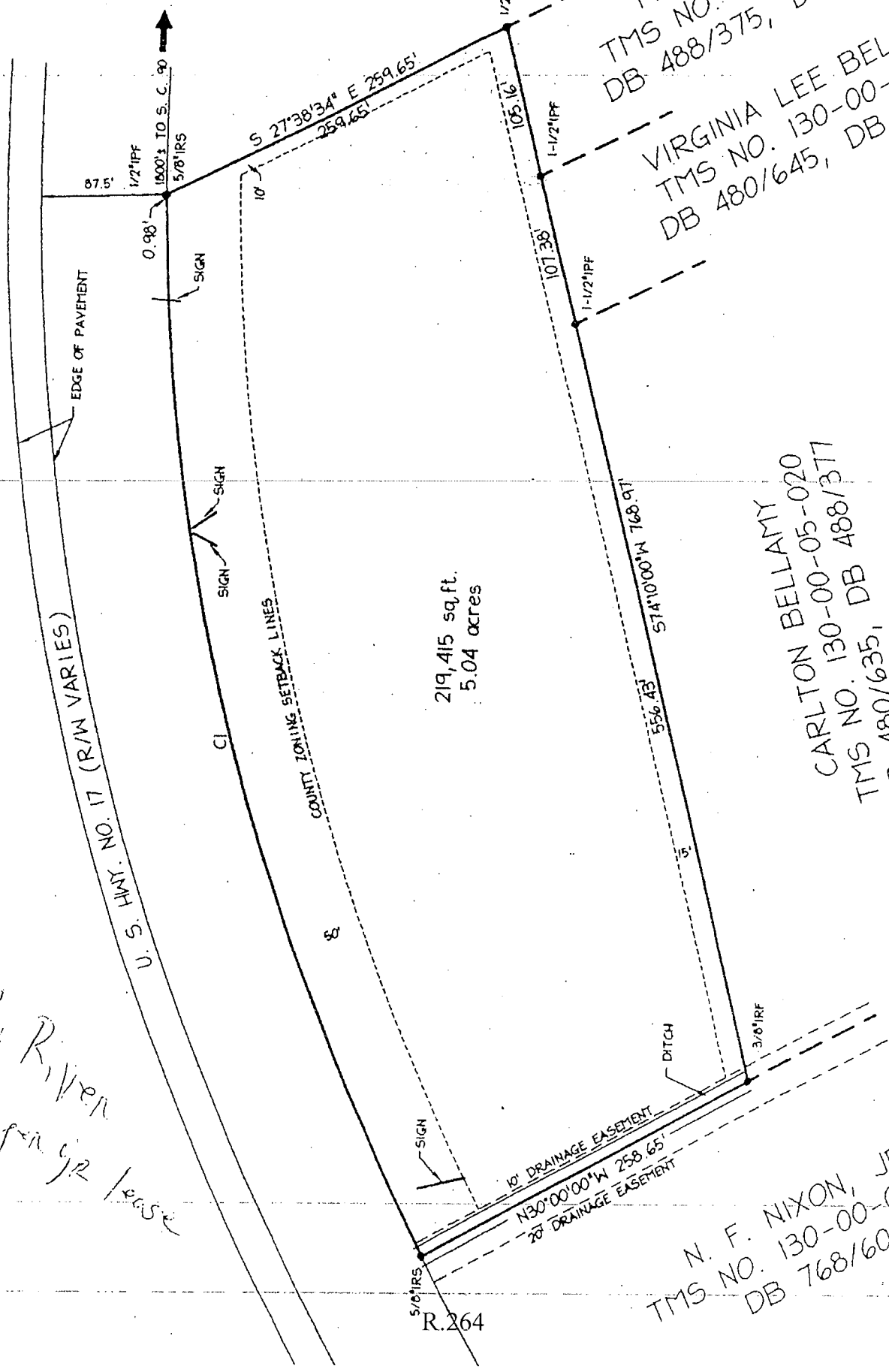
TMS. NO. DB 17741

MARY IDA
TMS NO. 130-00-0-
DB 488/375, DB 488/31

VIRGINIA LEE BELLAMY
TMS NO. 130-00-05-019
DB 480/645, DB 488/377

CARLTON BELLAMY
TMS NO. 130-00-05-020
DB 488/377
DB 480/635,

N. F. NIXON, JR.
TMS NO. 130-00-05-004
DB 768/603



219,415 sq.ft.
5.04 acres

R.264

Little River
50,000 per yr lease

Billy Wilson

Santee, S. C. 29142

February 25, 1998

Mr. Leon Butler
c/o Ray Realty, Inc.
PO Box 416
Conway, S.C. 29528

Re: 5.04 acres Hwy 17

Dear Mr. Butler:

I hereby offer and propose to lease the above described property, being 5.04 acres on U.S. Hwy 17, Little River, SC, on the following terms and conditions:

1. Term - One year with the option to extend for 11 additional one year terms. I will notice you 90 days prior to the expiration of each term of my intention to renew the lease agreement.

2. Rents - Years 1 & 2 \$36,000 per year.
Years 3-7 \$50,000 per year.
Years 8-12 \$60,000 per year.
All rents shall be payable annually in advance.
3. The property being zoned so as to allow the premises to be used as a Mobile Homes Sales Lot.
4. The property shall be served by Public Water and Sewer.
5. The lease shall commence on April 15, 1998. I will be granted possession immediately for the purpose of readying the lot for my intended use as a Mobile Home Sales Lot.
6. I will provide all maintenance to the property and pay all property taxes.
7. During the term of the lease I will provide you with Public Liability Insurance with limits of \$300,000.

8. Subject to me obtaining all necessary permits from SCDOT for driveway connection permits.
9. A deposit of \$3,000 is paid herewith which shall be applied to the first year rent.

Upon you acceptance you will prepare a lease agreement in accordance with the above, at your expense, for execution.

Billy Wilson

Acceptance:

Leon Butler

Santee Discount Homes And
7484 Five Chop Road
Santee, S. C. 29142
(803) 854-4430
Fax (803) 854-3138

Santee Housing Showcase
9180 Old #8 Hwy
Santee, S. C. 29142
(803) 854-2289
Fax (803) 854-3240

Santee Discount Homes

Fax

Ray Realty
To: Leon Butler From: Billy Wilson
Fax # 248 6721 Pages: 2 Phone: 854-4430 Date: 2-25-98
Re: Little River Property CC:
☐ Urgent ☐ For Review ☐ Please Comment ☐ Please Reply ☐ Please Recycle

• Comments:

Attached is a check for deposit on
5.04 acres on US Hwy 17, Little River, SC

**PLAINTIFF'S
EXHIBIT**

10-17-07 JLM



SANTEE DISCOUNT
MOBILE HOME, INC. II
HT 2 BOX 370-AA 003-824 4430
SANTEE, SC 29142

EXPLANATION	DATE	AMOUNT

5.02

7754

CHECK
AMOUNT

TO THE ORDER OF		DESCRIPTION	DATE	CHECK NO.	ADDT. NO.	DOLLARS
Ray Realty		Deposit on hand	2-25-98	7754		\$ 3000.00
		OR				

FIRST NATIONAL BANK
SANTEE, SOUTH CAROLINA 29142

William S. Holman
Betty Jean Bryant

Ray Realty, Inc.
P. O Box 416
1304 - 4th Avenue
Conway, S. C. 29526
email: cray@compuserve.com

Fax Cover Sheet

DATE: February 26, 1998

TIME: 1:09 PM

TO: Billy Wilson
[Company Name]

PHONE: [Their phone number]

FAX: 803-854-3138

FROM: Charley Ray
Ray Realty, Inc.

PHONE: 803-248-6363

FAX: 803-248-6721

RE: 5 acres - Little River

Number of pages including cover sheet: 3

Message

Billy:

Enclosed is the signed letter of intent. Please initial the change for years 1 and 2 to \$42,500 and fax it back. I understand you will bring the check.

Charley

PLAINTIFF'S
EXHIBIT

Billy Wilson

Santee, S. C. 29142

February 25, 1998

Mr. Leon Butler
c/o Ray Realty, Inc.
PO Box 416
Conway, S.C. 29528

Re: 5.04 acres Hwy 17

Dear Mr. Butler:

I hereby offer and propose to lease the above described property, being 5.04 acres on U.S. Hwy 17, Little River, SC, on the following terms and conditions:

1. Term - One year with the option to extend for 11 additional one year terms. I will notice you 90 days prior to the expiration of each term of my intention to renew the lease agreement.
2. Rents - Years 1 & 2 ^{\$42,500 JAB} ~~\$36,000~~ per year.
Years 3-7 \$50,000 per year.
Years 8-12 \$60,000 per year.
All rents shall be payable annually in advance.
3. The property being zoned so as to allow the premises to be used as a Mobile Homes Sales Lot.
4. The property shall be served by Public Water and Sewer.
5. The lease shall commence on April 15, 1998. I will be granted possession immediately for the purpose of readying the lot for my intended use as a Mobile Home Sales Lot.
6. I will provide all maintenance to the property and pay all property taxes.
7. During the term of the lease I will provide you with Public Liability Insurance with limits of \$300,000.

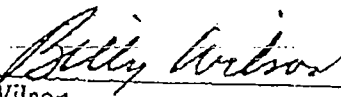
eb-24-98 03:50P Ray Realty Inc

803 248-6721

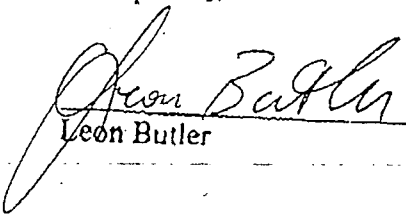
P.04.

8. Subject to me obtaining all necessary permits from SCDOT for driveway connection permits.
9. A deposit of \$3,000 is paid herewith which shall be applied to the first year rent.

Upon your acceptance you will prepare a lease agreement in accordance with the above, at your expense, for execution.


Billy Wilson

Acceptance:


Leon Butler

SAHWA, N. C. 28142
(803) 854-4438
Fax (803) 854-5138

SAHWA, N. C. 28142
(803) 854-2288
Fax (803) 854-3240

Santee Discount Homes

Fax

To: Charles Roy From: Billy Walker
Fax #: _____ Page: _____ Phone: _____ Date: _____
Re: _____ CC: _____
☐ Urgent ☒ For Review ☐ Please Comment ☐ Please Reply ☐ Please Recycle

Comments:

Check,

When we make it have included the payment

- (1) 14 additional years*
- (2) Rents Years 1-3 \$42,500*
Years 4-8 \$50,000
Years 8-15 \$60,000

*Let's get this done and let it be at your office
no later than Monday March 2nd so get everything
signed with a check.*

*Regards,
Billy Walker*

**PLAINTIFF'S
EXHIBIT**

R.272

4
10-17-07 JS

Billy Wilson

Santee, S. C. 29142

February 25, 1998

Mr. Leon Butler
c/o Ray Realty, Inc
PO Box 416
Conway, S.C. 29528

Re: 5.04 acres Hwy 17

Dear Mr. Butler:

I hereby offer and propose to lease the above described property, being 5.04 acres on U.S. Hwy 17, Little River, SC, on the following terms and conditions:

1. ~~Term - One year with the option to extend for 14 additional one year terms. I will~~
notice you 90 days prior to the expiration of each term of my intention to renew
the lease agreement.
2. Rents - Years 1 & 2 ^{will be \$2,500} ~~\$16,000~~ ^{WFW} per year.
Years ~~3-7~~ ⁴⁻⁷ ~~\$50,000~~ ^{\$50,000} per year.
Years ~~8-12~~ ⁸⁻¹² ~~\$60,000~~ ^{\$60,000} per year.
All rents shall be payable annually in advance.
3. The property being zoned so as to allow the premises to be used as a Mobile
Home Sales Lot.
4. The property shall be served by Public Water and Sewer.
5. The lease shall commence on April 15, 1998. I will be granted possession
immediately for the purpose of readying the lot for my intended use as a Mobile
Home Sales Lot.
6. I will provide all maintenance to the property and pay all property taxes.
7. During the term of the lease I will provide you with Public Liability Insurance with
limits of \$300,000.

Ray Realty Inc

803 248-6721

P.03

P.03

Feb 24-98 03:50P Ray Realty Inc

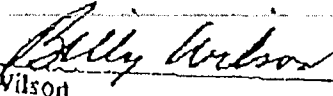
803 248-6721

P.04

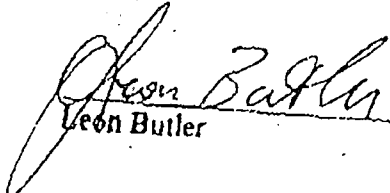
8. Subject to me obtaining all necessary permits from SCDOT for driveway connection permits.

9. A deposit of \$3,000 is paid herewith which shall be applied to the first year rent

Upon you acceptance you will prepare a lease agreement in accordance with the above, at your expense, for execution.


Billy Wilson

Acceptance:


Leon Butler

SAHWA, B. C. 29142
(803) 854-4430
FAX (803) 854-3138

SAHWA, B. C. 29142
(803) 854-2289
FAX (803) 854-3240

003 034 3138

P.01

Santee Discount Homes

Fax

To: Charles Ray From: Billy Wilson
Fax # _____ Pages: _____ Phone: _____ Date: _____
Re: _____ CC: _____
☐ Urgent ☒ For Review ☐ Please Comment ☐ Please Reply ☐ Please Recycle

Comments:

Chuck,

Please review when I have initialed the proposal

(1) 14 additional years

(2) Rents Years 1-3 \$42,500
Years 4-8 \$50,000
Years 8-15 \$60,000

Let's get this done and see us at your office
no later than Monday March 2nd so get everything
signed with a check.

Regards,
Billy Wilson

**PLAINTIFF'S
EXHIBIT**

R.275

5
10 17 07 BM

Billy Wilson

Santee, S. C. 29142.

February 25, 1998

Mr. Leon Butler
c/o Ray Realty, Inc
PO Box 416
Conway, S.C. 29528

Re: 5.04 acres Hwy 17

Dear Mr. Butler:

I hereby offer and propose to lease the above described property, being 5.04 acres on U.S. Hwy 17, Little River, SC, on the following terms and conditions:

1. Term - One year with the option to extend for 14 additional one year terms. I will notice you 90 days prior to the expiration of each term of my intention to renew the lease agreement. *wkw*
2. Rents - Years 1 & 2 *\$42,500* *per year*
Years 3-4 *\$36,000* *per year*
Years 5-7 *\$50,000* *per year*
Years 8-12 *\$60,000* *per year*
All rents shall be payable annually in advance. *wkw*
3. The property being zoned so as to allow the premises to be used as a Mobile Home Sales Lot.
4. The property shall be served by Public Water and Sewer.
5. The lease shall commence on April 15, 1998. I will be granted possession immediately for the purpose of readying the lot for my intended use as a Mobile Home Sales Lot.
6. I will provide all maintenance to the property and pay all property taxes.
7. During the term of the lease I will provide you with Public Liability Insurance with limits of \$300,000.

Ray Realty Inc

803 248-6721

P.03

Feb-24-98 03:50P Ray Realty Inc

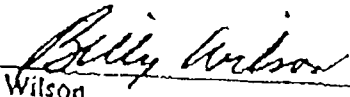
803 248-6721

P.04

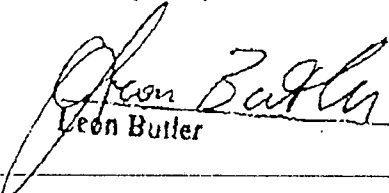
8. Subject to me obtaining all necessary permits from SCDOT for driveway connection permits.

9. A deposit of \$3,000 is paid herewith which shall be applied to the first year rent

Upon your acceptance you will prepare a lease agreement in accordance with the above, at your expense, for execution.


Billy Wilson

Acceptance:


Leon Butler

Ray Realty, Inc.

P. O Box 416

1304 - 4th Avenue

Conway, S. C. 29526

email: cray@compuserve.com

Fax Cover Sheet

DATE: March 19, 1998 **TIME:** 12:30 PM
TO: Billy Wilson **PHONE:** [Their phone number]
Santee Discount Home **FAX:** 803-854-3138
FROM: Charley Ray **PHONE:** 803-248-6363
Ray Realty, Inc. **FAX:** 803-248-6721

RE: 5.04 Acres Little River

Number of pages including cover sheet: 2

Message

Billy:

I have attached an addendum reflecting the changes we discussed earlier today. If you have questions, call me. Sign and fax a copy back and I will proceed to get Mr. Butler signed off.

Regarding zoning, I spoke with Ms. Tammy Powell at the Horry Co Planning Office and she states this Property is properly zoned for a mobile home sales lot. You should verify this her number is 803-248-1211. The property you are leasing is TMS Number 130-00-05-026.

Also at this same office, I spoke with Ms. Sherry Peal and she states the County will require you to provide them with a site plan showing the office location and parking. The office will have to be handicap accessible. You may be able to draw the office and parking in on the map of the property and avoid having to get a surveyor to do it. You or your representative should contact Ms. Peal.

**PLAINTIFF'S
EXHIBIT**

Addendum to Letter of Intent

Whereas, Billy Wilson and Leon Butler entered into a letter of intent, dated February 27, 1998, to lease 5.04 acres located on Hwy. 17, Little River, S. C. they hereby agree to amend and or add the following provisions.

1. Billy Wilson shall be authorized to remove old tires, which have been dumped on the subject premises, from the premises with Leon Butler paying the cost, which shall not exceed \$1,000.00.
2. Leon Butler agrees to pay upto \$2,250.00 towards the cost of water and septic system. The \$2,250.00 shall be paid by a deduction of \$750.00 from the rent for years 1, 2 and 3. In the event Wilson does not exercise his option to renew for years 2 and 3 there will be no obligation of payment on the part of Butler.
3. Billy Wilson hereby waive all contingencies contained in the referenced letter of intent and directs Leon Butler to complete the preparation of the formal lease agreement.

Signed and dated this ____ day of March 1998.

Billy Wilson

Leon Butler



Ray Realty, Inc.
P. O. Box 416
Conway, S. C. 29526-0416

FAX

To:

Billy Wilson
803-854-3138

From:

Charley Ray

Date: 3-27-98

Number of Pages: 2

Phone: 803-248-6363

Fax: 803-248-6721

Remarks:

Billy:

Here's a Signed Copy
of the Changes.

Mr Butler is moving ahead
with the Lease Agreement.

[Signature]

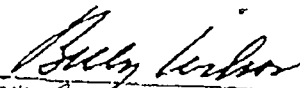
PLAINTIFF'S
EXHIBIT

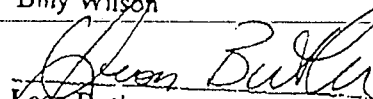
Addendum to Letter of Intent

Whereas, Billy Wilson and Leon Butler entered into a letter of intent, dated February 27, 1998, to lease 5.04 acres located on Hwy. 17, Little River, S. C. they hereby agree to amend and or add the following provisions.

1. Billy Wilson shall be authorized to remove old tires, which have been dumped on the subject premises, from the premises with Leon Butler paying the cost, which shall not exceed \$1,000.00.
2. Leon Butler agrees to pay upto \$2,250.00 towards the cost of water and septic system. The \$2,250.00 shall be paid by a deduction of \$750.00 from the rent for years 1, 2 and 3. In the event Wilson does not exercise his option to renew for years 2 and 3 there will be no obligation of payment on the part of Butler.
3. Billy Wilson hereby waive all contingencies contained in the referenced letter of intent and directs Leon Butler to complete the preparation of the formal lease agreement.

Signed and dated this 26 day of March 1998.


Billy Wilson


Leon Butler

Ray Realty, Inc.
P. O Box 416
1304 - 4th Avenue
Conway, S. C. 29526
email: cray@compuserve.com

Fax Cover Sheet

DATE: April 15, 1998

TIME: 3:30pm

TO: Billy Wilson

PHONE: [Their phone number]

Santee Discount Home FAX: 803-854-3138

FROM: Charley Ray

PHONE: 803-248-6363

Ray Realty, Inc. FAX: 803-248-6721

RE: 5.04 Acres - Lease Agreement

Number of pages including cover sheet: 1

Message

Billy:

Earlier today, Mr. Butler delivered to me copies of the lease agreement. I am forwarding those today for your review and execution.

I hope things are going well and look forward to meeting you. Let me know if I can be of assistance.

Charley

PLAINTIFF'S
EXHIBIT

RAY REALTY, INC.

Mailing Address:
P.O. Box 416
Conway, South Carolina 29528

Street Address:
1304 Fourth Avenue
Conway, South Carolina 29526

April 15, 1998

Mr. Billy Wilson
Santee Discount Homes

Santee, SC 29142

Re: Lease Agreement

Dear Billy:

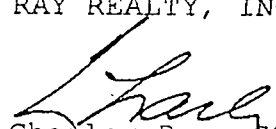
I have enclosed three copies of the lease agreement which have been executed by Mr. Butler. Review them and should you have any questions, give me a call. Additionally, I have enclosed copies of the existing billboard leases for your review. If these meet with your approval, please execute all three copies in the presence of two witnesses. One of the witnesses must sign in the presence of a notary. There is a sample which reflects the proper execution in red.

Please return two copies, keeping one copy for your files along with the first year rent payment in the amount of \$38,750 (\$41,750 less \$3,000 you previously paid).

Thank you for allowing me to work with you and should you have any questions please don't hesitate to call.

Sincerely,

RAY REALTY, INC.


Charley Ray, CCIM, CFP
President

CR/sl

encs.

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

GROUND LEASE AGREEMENT

THIS GROUND LEASE AGREEMENT (hereinafter sometimes referred to as the "Agreement" or "Lease Agreement"), made and entered into this _____ day of April, 1998, by and between LEON P. BUTLER, JR., of _____ Conway, South Carolina 29526-5101 (hereinafter referred to as "LESSOR")

AND

BILLY WILSON of _____, Santee, South Carolina 29142 (hereinafter referred to as "LESSEE")

W I T N E S S E T H:

WHEREAS, the LESSOR is the owner of a certain unimproved tract of real property located in Horry County, South Carolina, which is more specifically shown and described on that certain "Plat of 5.04 Acres of Land in Little River Township, Horry County, S.C., Surveyed for Leon Butler, Jr.," by Terry M. Watson, R.L.S., dated April 9, 1997, and recorded in Plat Book 154 at Page 144, in the Office of the R.M.C. for Horry County, South Carolina, said plat being incorporated herein by this reference as fully as if set forth herein verbatim; and,

WHEREAS, the LESSEE is desirous of leasing the aforesaid unimproved real property from the LESSOR upon the terms and conditions set forth hereinafter; and,

WHEREAS, the LESSOR is desirous of leasing the aforesaid unimproved real property to the LESSEE upon the terms and conditions set forth hereinafter.

NOW, THEREFORE, in consideration of the rent to be paid by the LESSEE to the LESSOR and the use and enjoyment of the Leased Premises by the LESSEE, and in further consideration of the Parties' agreements and covenants and the conditions contained hereinafter, the Parties hereto agree as follows:

1. LEASE OF PREMISES: The LESSOR hereby leases and demises to the LESSEE and the LESSEE hereby leases, accepts, and rents from the LESSOR, upon the terms and conditions set forth herein, the unimproved real property more fully described and shown upon that certain "Plat of 5.04 Acres of Land in Little River Township, Horry County, S.C., Surveyed for Leon Butler, Jr.," by Terry M. Watson, R.L.S., dated April 9, 1997, and recorded in Plat Book 154 at Page 144, in the Office of the R.M.C.

for Horry County, South Carolina, said plat being incorporated herein by this reference as fully as if set forth herein verbatim. This lease of the described unimproved real property is subject to existing advertising display (sign) leases more specifically described in Paragraph 7 and any renewals or extensions thereof. This lease of the described unimproved real property specifically includes the right to utilize, during the term of this Lease Agreement, all easements, rights and hereditaments belonging or appertaining to the described unimproved real property.

2. LESSEE'S ACCEPTANCE OF PROPERTY: Neither the LESSOR nor his agents have made any representations or express warranties to the LESSEE or his agents concerning the condition of the property which comprises the Leased Premises. **THIS IS A GROUND LEASE OF UNIMPROVED REAL PROPERTY AND THE LESSOR HEREBY SPECIFICALLY DISCLAIMS ALL WARRANTIES, EXPRESS AND/OR IMPLIED, CONCERNING THE CONDITION OF THE PROPERTY, INCLUDING, BUT NOT LIMITED TO, ALL IMPLIED WARRANTIES OF HABITABILITY, AND ALL WARRANTIES OF FITNESS OR SUITABILITY FOR A PARTICULAR PURPOSE. THE LESSOR FURTHER SPECIFICALLY DISCLAIMS ALL WARRANTIES, EXPRESS AND/OR IMPLIED, CONCERNING THE QUANTITY OF ACREAGE CONTAINED WITHIN THE BOUNDARIES OF THE PROPERTY AS DELINEATED UPON THE AFORESAID PLAT WHICH IS INCORPORATED HEREIN BY REFERENCE.** The LESSEE acknowledges that the LESSOR has not caused any studies or surveys to be performed to determine whether there are any "wetlands" on the subject property and that the LESSOR has not caused any studies or surveys to be performed to determine whether there are any "hazardous materials" stored on the subject property. The LESSEE further acknowledges that neither the LESSOR nor his agents have made any representations or express warranties to the LESSEE or his agents that the Leased Premises do not contain "wetlands" or "hazardous materials." The LESSEE further acknowledges that he has examined or has been afforded adequate opportunity to examine the Leased Premises to his satisfaction and that he accepts same in an "as is" condition. The taking of possession of the Leased Premises by the LESSEE shall be conclusive evidence that the LESSEE accepts the same "as is", and that the LESSEE is relying upon his own judgment concerning the suitability of the Leased Premises for the uses and purposes proposed by the LESSEE.

3. TERM: The term of this Lease Agreement shall commence on April 15, 1998, and, unless sooner terminated as herein provided, shall continue for a period of one (1) year until midnight, April 14, 1999.

4. RENTAL: The LESSEE shall pay to the LESSOR as Rent for the Leased Premises during the lease term the sum of FORTY ONE

THOUSAND SEVEN HUNDRED FIFTY AND 00/100 (\$41,750.00) DOLLARS which Rental shall be payable in advance upon the execution of this Lease Agreement. All Rent payable hereunder shall be paid without any offsets or deductions. All Rental payments payable by the LESSEE to the LESSOR shall be payable to LESSOR at:

Leon P. Butler, Jr.,

Conway, South Carolina 29526-5101

5. TIME IS OF THE ESSENCE: The Parties hereto agree that time is of the essence of all of the provisions of this Lease Agreement, specifically including but not limited to the time set forth for the payment of the Rental provided for herein.

6. USE OF LEASED PREMISES: It is understood and agreed by and between the LESSOR and the LESSEE that the LESSEE shall use the Leased Premises only for a mobile home sales lot. While using the Leased Premises the LESSEE shall comply with all applicable laws, ordinances, rules and regulations of the local, state and federal governments, and any other public authority having jurisdiction which may affect the Leased Premises. The LESSEE acknowledges that neither the LESSOR nor his agents have made any representation or warranty to the LESSEE or the LESSEE's agents concerning whether the Leased Premises are suitable for or may be legally used for a mobile home sales lot and the LESSEE further acknowledges that the LESSEE is responsible for conducting his own inspection and investigation to determine whether the LESSEE'S intended use of the Leased Premises complies with zoning ordinances, deed restrictions and any other applicable limitations.

7. RESTRICTIONS AND EASEMENTS, ZONING, AND SIGN LEASES: The Parties hereto understand and agree that the LESSEE is taking possession of the Leased Premises subject to the following:

- (a) Easements, restrictions and limitations, whether apparent on the ground or of public record;
- (b) Applicable zoning ordinances and governmental regulations; and,
- (c) Terms and conditions of those certain Lease Agreements for outdoor advertising displays (signs) heretofore executed by the LESSOR'S predecessor in title, Hazel W. Butler, and POA Acquisition Corporation. The LESSOR has delivered to the LESSEE true and correct copies of the aforesaid Lease Agreements for outdoor advertising displays prior to or contemporaneous with the execution

of this Ground Lease Agreement. The LESSEE acknowledges that he has read the Lease Agreements for outdoor advertising displays and that his intended use of the Leased Premises will not conflict with or impair in any manner the rights and privileges accorded POA Acquisition Corporation pursuant to the aforesaid Lease Agreements for outdoor advertising displays. More specifically, the LESSEE acknowledges and agrees that POA Acquisition Corporation and/or its designee shall have an easement over the Leased Premises to construct, maintain, operate, remove or replace the advertising displays, including rights of ingress and egress over the Leased Premises, and the right to maintain the approaches to the advertising displays free of obstructive vegetation. LESSEE acknowledges and agrees that the LESSOR has and shall retain the right to renew, extend, or re-lease the said outdoor advertising display (sign) leases from time to time and that the LESSEE's use and possession of the Leased Premises will remain subject to the terms of such outdoor advertising display (sign) leases.

8. QUIET ENJOYMENT: LESSOR covenants, represents and warrants to the LESSEE that he has the full right and authority to lease the Leased Premises to the LESSEE upon the terms and conditions herein set forth. For and so long as the LESSEE pays the Rent provided for in this Agreement and performs and observes all of the covenants and provisions to be performed and observed by the LESSEE hereunder, the LESSEE shall quietly and peacefully enjoy the Leased Premises, subject, however, to the terms of this Agreement, including the matters and things set forth in the immediately preceding paragraph, and the LESSOR will warrant and defend LESSEE in the quiet enjoyment and peaceful possession of the Leased Premises throughout the term of this Agreement.

9. UTILITIES: During the term of this Agreement the LESSEE shall be fully responsible for and shall promptly pay, when due, all charges for water, sewer, sanitation service, electricity, fuel, gas, telephone and any other utilities used and/or consumed on the Leased Premises. The LESSEE shall make arrangements directly with utility service providers to obtain the utility services which the LESSEE deems necessary for the LESSEE's use of the Leased Premises, and the LESSEE shall be responsible for payment of all capital improvement assessments and/or charges, service connection fees and/or charges, impact fees, deposits and other charges which may be imposed by the respective utility service providers as a condition precedent to providing the utility services required by the LESSEE. The LESSEE shall make such arrangements as the LESSOR may reasonably require from time

to time for the storage and disposal of all garbage and refuse. In the event that public sewer facilities are not available to serve the Leased Premises, the LESSEE shall install, at his sole expense, a private on-site waste disposal system which meets or exceeds the current regulations and standards of the South Carolina Department of Health and Environmental Control for installation and operation of a private on-site waste disposal system.

10. TAXES: In addition to the LESSEE's Rent obligation set forth hereinabove, LESSEE hereby agrees to pay the full amount of all real estate taxes assessed or to be assessed against the Leased Premises and all improvements added thereto by the LESSEE during the term of this Agreement. Said taxes shall be paid by the LESSEE prior to the due date thereof and the LESSEE shall furnish LESSOR with a paid receipt issued by the Horry County Treasurer showing such payment within THIRTY (30) DAYS after such payment. In the event that the LESSEE fails to pay such taxes in a timely manner, the LESSEE shall be responsible for the payment of all penalties, interest, and costs accruing thereon by reason of the LESSEE's failure to pay such taxes in a timely manner. In the event that the LESSEE fails to pay such taxes in a timely manner, the LESSOR may, at his option, pay such taxes together with all penalties, interest, and costs accruing thereon, in which case the amount so paid shall be treated as and shall be immediately due and payable as Additional Rental.

If the LESSEE desires to contest any tax or assessment or valuation to be paid by him under this Paragraph, he shall notify LESSOR of his intention to do so at least TWENTY (20) DAYS prior to the delinquency of such tax or assessment. In the event that the LESSEE contests any tax or assessment or valuation to be paid by the LESSEE hereunder, the LESSEE shall not be in default hereunder until THIRTY (30) DAYS after the final determination of the validity thereof, within which time the LESSEE shall satisfy and discharge such tax, assessment, charge or other items to the extent held valid, and all penalties, interest, and costs in connection therewith, as the case may be; but the satisfaction and discharge of any such tax or assessment, together with penalties, interest, and costs, shall not in any case be delayed until sale is made of the whole or any part of the Leased Premises on account thereof. In the event of any such contest, the LESSEE shall protect and indemnify the LESSOR against all loss, expense and damage resulting therefrom, including the posting of bonds to secure payment. The LESSEE shall also timely pay all taxes on personal property placed on the Leased Premises by LESSEE.

11. FIRE AND CASUALTY INSURANCE: At all times during the term of this Agreement the LESSEE shall maintain fire and extended

coverage hazard insurance upon all buildings, improvements, and fixtures erected upon the Leased Premises by the LESSEE in an amount equal to **ONE HUNDRED (100%) PERCENT** of the full replacement cost thereof. A duplicate original copy of the initial insurance policy procured by the LESSEE to satisfy the coverage requirements established hereunder or other evidence of insurance coverage satisfactory to the LESSOR, together with a paid receipt for the policy premium, shall be deposited with the LESSOR upon occupancy of the Leased Premises by the LESSEE. Duplicate original copies of subsequent policies and any renewals thereof shall be promptly delivered to the LESSOR, together with a paid receipt for all premiums becoming due thereon. In the event that the LESSEE fails to pay any premium or premiums for such coverage when due, the LESSOR may, at his option, pay such premium or premiums, in which case the amount so paid shall be treated as and shall be immediately due and payable as Additional Rent. Each policy procured by the LESSEE shall provide that the LESSOR shall be given copies of all notices issued pursuant to the policy and shall further provide that the policy shall not be canceled for any reason unless and until the LESSOR is given TWENTY (20) DAYS prior written notice by the insurance company.

12. LIABILITY INSURANCE: At all times during the term of this Agreement the LESSEE shall maintain in force policies of workmen's compensation insurance and public liability insurance. All policies of public liability insurance which the LESSEE is required to maintain hereunder shall protect the LESSEE, as named insured, and the LESSOR, as additional insured, against all claims for damages to person(s) or property or loss of life occurring upon, in, or about the Leased Premises with minimum limits of not less than \$300,000.00 for each occurrence of bodily injury and \$25,000.00 for each occurrence of property damage. All public liability insurance coverage required hereunder shall be procured at the sole cost and expense of the LESSEE and shall be effected under standard form policies issued by insurers of recognized responsibility which, at the time of issuance of the policy or policies, are rated as superior by A.M. Best Company. A duplicate original copy of the initial insurance policy procured by the LESSEE to satisfy the coverage requirements established hereunder or other evidence of insurance coverage satisfactory to the LESSOR, together with a paid receipt for the policy premium, shall be deposited with the LESSOR upon occupancy of the Leased Premises by the LESSEE. Duplicate original copies of subsequent policies and any renewals thereof shall be promptly delivered to the LESSOR, together with a paid receipt for all premiums becoming due thereon. In the event that the LESSEE fails to pay any premium or premiums for such coverage when due, the LESSOR may, at his option, pay such premium or premiums, in which case the amount so paid shall be treated as and shall be immediately due and payable

as Additional Rent. Each policy procured by the LESSEE shall provide that the LESSOR shall be given copies of all notices issued pursuant to the policy and shall further provide that the policy shall not be canceled for any reason unless and until the LESSOR is given TWENTY (20) DAYS prior written notice by the insurance company.

13. LESSEE'S MAINTENANCE COVENANT: The LESSEE shall, at his sole cost and expense, maintain and make all necessary repairs and replacements to the Leased Premises. The LESSEE shall maintain all parking spaces, shrubbery, and all landscape treatments on the Leased Premises in a clean and orderly condition. The LESSEE shall not cause, allow, or create upon the Leased Premises any condition which may constitute a nuisance or danger.

In the event of a default by the LESSEE in making repairs or replacements, LESSOR may make, but shall not be required to make, repairs and replacements for the LESSEE's account, and the expense thereof shall constitute and be collectible as Additional Rent which shall be immediately due and payable by the LESSEE upon the completion of such repairs or replacements by the LESSOR.

14. ALTERATIONS AND IMPROVEMENTS TO THE LEASED PREMISES: LESSEE shall not make any structural alterations or improvements to the Leased Premises without the prior written consent of the LESSOR, which consent shall not be unreasonably withheld. The LESSEE shall furnish the LESSOR with an adequate opportunity to review complete copies of all final construction drawings for all proposed structural alterations and improvements as a condition precedent to obtaining the LESSOR's written consent to such alterations and improvements to the Leased Premises. In the event that the LESSOR consents to the alterations and improvements proposed by the LESSEE, all costs incurred in connection with such alterations and improvements shall be the responsibility of the LESSEE and the LESSEE shall protect, defend, fully indemnify and save the LESSOR harmless from any and all claims, penalties, and demands, including court costs and attorney's fees, whatsoever arising, directly or indirectly, out of or from the LESSEE's alterations and improvements to the Leased Premises. All alterations and improvements to the Leased Premises shall remain thereon at the termination of this Agreement and shall become the property of LESSOR. Any furniture, furnishings, fixtures, equipment, appliances, and personal property of the LESSEE which is not removed by the LESSEE within ten (10) days after the expiration of this Agreement, or within ten (10) days of the sooner termination of this Agreement shall be deemed abandoned to the LESSOR by the LESSEE.

15. LESSEE'S COVENANTS AS TO ENVIRONMENTAL REGULATIONS: In connection with LESSEE's covenants and agreements that he shall make no unlawful use of the Leased Premises and shall comply with all applicable laws, ordinances, rules and regulations of the local, state and federal governments, and any other public authority having jurisdiction which may affect the Leased Premises as set forth in Paragraph 6 hereinabove, LESSEE shall not transport to the Leased Premises, or generate, use, store or allow to remain thereon, or dispose of upon, within, about or under the Leased Premises any waste, debris or contamination described as follows: (a) any "hazardous waste" as defined by the Resource Conservation and Recovery Act of 1976, as amended from time to time, and regulations promulgated thereunder; (b) any "hazardous substance" as defined by the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended from time to time, and regulations promulgated thereunder; and (c) any substance the presence of which on the Leased Premises is prohibited or regulated by any federal, state or local law, ruling, rule or regulation similar or dissimilar to those set forth in this paragraph (such substance and such "hazardous waste" and "hazardous substance" above described are hereinafter collectively referred to as "Hazardous Material"). LESSEE hereby agrees to indemnify and hold LESSOR, his successors and assigns, harmless from and against any and all losses, liabilities, damages, injuries, penalties, fines, costs, expenses and claims of any and every kind whatsoever (including attorneys fees and costs) paid, incurred or suffered by, or asserted against, LESSOR, his successors and assigns, as a result of any claim, demand or judicial or administrative action by any person or entity (including governmental or private entities) for, with respect to, or as a direct or indirect result of, the LESSEE's transportation, generation, storage, use, or disposal of Hazardous Material upon, within, about or under the Leased Premises, or the escape, seepage, leakage, spillage, discharge, emission or release from the Leased Premises of such Hazardous Material transported to, generated, stored, used or disposed of by the LESSEE upon the Leased Premises (including costs, expenses or claims asserted or arising under the Comprehensive Environmental Response, Compensation and Liability Act, as amended, or any state or local environmental "Superfund" or "Superlien" law, or any other federal, state or local statute, law, ordinance, code, rule, regulation, order or decree regulating, relating to, or imposing liability or establishing standards of conduct concerning, any Hazardous Material). The warranties and indemnity contained in this Paragraph shall survive the termination of this Lease.

If LESSEE shall fail to comply with the covenants and agreements to be performed by the LESSEE hereunder with respect to Hazardous Materials, or if LESSEE shall at any time fail to comply

with all environmental requirements of federal, state or local law, statute, ordinance or regulation, rule, court or administrative order or decree, or private agreement, then the occurrence of any of such events shall be considered a default hereunder and if such default shall continue for a period of FIFTEEN (15) DAYS following written notice thereof from LESSOR, LESSOR shall have such rights and be permitted to exercise such remedies for such default as are set forth in the provisions of Paragraph 18 hereinafter.

16. LESSOR'S RIGHT OF ENTRY: In addition to the other rights and privileges of the LESSOR granted herein or by applicable law, the LESSOR shall have the right to enter upon the Leased Premises at all reasonable times during the term of this Agreement: (a) to inspect the Leased Premises at any reasonable time following reasonable notice to LESSEE; (b) to perform any work and make repairs or replacements to the Leased Premises made necessary by reason of the LESSEE'S default under the terms of this Agreement; and (c) to display "For Rent" signs within the Leased Premises at prominent locations at any time within the last SIXTY (60) DAYS of the term of this Agreement and to show the Leased Premises to prospective tenants or purchasers. The exercise by the LESSOR of any of his rights, whether herein enumerated or otherwise, shall never be deemed to be an eviction of LESSEE nor a disturbance of the LESSEE's use and possession of the Leased Premises.

17. CONDEMNATION: If the Leased Premises, or any part thereof, should be taken or condemned for a public or quasi-public use or purpose, the LESSOR and the LESSEE agree to submit to arbitration the question of whether such taking or condemnation shall constitute a termination of this Lease Agreement. Each Party hereto shall appoint one arbitrator and the two arbitrators so designated shall appoint a third arbitrator. The decision of the majority of the three arbitrators as to whether this Lease Agreement shall be terminated by such taking or condemnation shall be binding on the Parties hereto. In making their decision, the three arbitrators shall consider all facts and circumstances they deem relevant, including but not limited to, the following: the LESSEE'S ability to continue the conduct of his normal business operations on the Leased Premises remaining after such taking or condemnation; the amount of rent that shall thereafter be payable by the LESSEE to the LESSOR; the continuing obligation of the LESSEE to pay such rent; the length of the remaining term of the Lease Agreement; the amount of any award made by the condemnation authority; and the continuing obligation of the LESSOR on any mortgage existing on the Leased Premises.

The amount of any award resulting from such condemnation or taking shall be allocated between the LESSOR and the LESSEE by the arbitrators, and the decision of a majority of the arbitrators shall be binding on the Parties hereto. If this Lease Agreement shall be terminated in the manner hereinabove provided, both Parties shall be relieved of and from any further liability hereunder except that accrued up to the time of such termination.

18. DEFAULT: It is agreed by and between the LESSOR and the LESSEE that in the event of a default by the LESSEE in the payment of any Rent or Additional Rent upon the day when the same shall become due and payable, or in the event of a default by the LESSEE in the performance of any of the other terms, conditions, or covenants of this Lease Agreement which the LESSEE is required to perform, which shall continue for a period of FIFTEEN (15) DAYS after written notice of said default is given pursuant to Paragraph 28 hereof, then all unpaid Rental amounts shall be accelerated and shall be immediately due and payable, and the LESSOR may enter into and upon the Leased Premises or any part thereof and repossess the same, with or without terminating this Lease Agreement, and without prejudice to any of his remedies for Rent, Additional Rent, or breach of covenant, and in any such event may, at his option, terminate this Lease Agreement by giving written notice of his election to do so. In the event the LESSOR shall exercise his right to terminate this Lease Agreement he will not thereby be deprived of any other rights he may have against the LESSEE, but shall at all times be entitled to recover of said ~~LESSEE any and all Rent, Additional Rent, or other obligations due~~ by LESSEE and all damages sustained by LESSOR on account of the breach of any covenants or agreements herein contained which LESSEE is obligated to perform. LESSEE shall be liable for the costs of seizure and repossession of the Leased Premises and/or costs of collection of Rentals due hereunder, including reasonable attorney's fees incurred by the LESSOR as a result of the seizure and repossession of the Leased Premises, and/or collection of Rentals and/or enforcement of any of the other terms and conditions hereunder.

If this Lease Agreement or the LESSEE'S possession of the Leased Premises shall be terminated as herein provided or by re-entry, summary dispossession proceedings or any other method, the LESSOR may, at the LESSOR'S option, as an additional remedy, re-let the Leased Premises or any part or parts thereof for the account of the LESSEE for the remainder of the term or for a period extending beyond the date when this Lease Agreement would have expired and deem that portion of the period within the term as a Rental for the account of the LESSEE. In any of such events, the LESSOR may receive the Rent therefor, applying the same first to the payment of such expenses as the LESSOR may have incurred in

recovering possession of the Leased Premises and in connection with the re-letting of the Leased Premises and then to the fulfillment of the covenants and agreements of the LESSEE hereunder including the payment of the Rent and Additional Rent, and the LESSEE shall remain liable for any deficiency. There shall be no obligation on the part of the LESSOR to re-let nor any liability on his part for failure to re-let, and the LESSEE'S liability shall not be diminished or affected by the LESSOR's failure to re-let.

In the event of the termination of this Lease as herein provided, or if LESSEE'S possession is terminated by re-entry, or any other method, whether or not the premises shall re-let, the LESSEE shall remain liable for the Rent and all other charges herein reserved less the net proceeds of any such re-letting, and the same shall be due and payable by the LESSEE to the LESSOR as above provided. Upon such termination of the Lease or LESSEE'S possession, neither the LESSEE nor his creditors and representatives shall thereafter have any right in or to the Leased Premises or any portion thereof, or of any of the proceeds of re-letting, if any, except insofar as a specific credit is provided herein.

In the event of a default by the LESSOR in the performance of any of the terms, conditions, or covenants of this Lease Agreement which the LESSOR is required to perform, the LESSEE shall furnish the LESSOR with FIFTEEN (15) DAYS written notice of any such default pursuant to Paragraph 28 hereof prior to commencement of any action to remedy such default. Prior to exercising any rights it might have with respect to a default hereunder by LESSOR, LESSEE shall give written notice of such default to the holder of any mortgage upon the Leased Premises which has furnished LESSEE with its name and address in writing, and such mortgagee(s) shall be afforded a reasonable time, not exceeding FIFTEEN (15) DAYS, to cure such default provided said mortgagee proceeds with due diligence to cure such default.

19. REMEDIES CUMULATIVE/NON-WAIVER: No remedy herein or otherwise conferred upon or reserved to the LESSOR shall be considered exclusive of any other remedy, but the same shall be distinct, separate and cumulative and shall be in addition to every other remedy given hereunder, or now or hereafter existing at law or in equity or by statute; every power and remedy given by this Lease Agreement to the LESSOR may be exercised from time to time as often as occasion may arise, or as may be deemed expedient. No delay or omission of the LESSOR to exercise any right or power arising from any default on the part of the LESSEE shall impair such right or power, or be construed to be a waiver of any such default or an acquiescence thereto.

20. BANKRUPTCY: The filing by or on behalf of the LESSEE or against the LESSEE of any petition or pleading to declare the LESSEE bankrupt under any bankruptcy law or act, or to declare the LESSEE insolvent or unable to pay his debts, or the attachment of any property of the LESSEE located on the Leased Premises or the appointment by any Court or under any law of a receiver, trustee or other custodian of a substantial part of the property, assets or business of the LESSEE, or the attachment of any judgment lien to LESSEE'S interest in this Lease Agreement or to LESSEE'S interest in the Leased Premises, or the levy of execution or other taking of property, assets or the leasehold interest of the LESSEE, by process of the law or otherwise for the satisfaction of any judgment, debt, tax liens, or claim, shall, at the option of the LESSOR, operate as a termination of this Lease Agreement immediately and without prejudice to the LESSOR'S right to prosecute any other remedy which he may have for a breach under this Lease Agreement; subject, however, to the right of the LESSEE to correct any condition causing termination under this Paragraph within FIFTEEN (15) DAYS after written notice by the LESSOR.

21. INDEMNIFICATION: At all times during the term of this Agreement the LESSEE shall protect, defend, fully indemnify and save the LESSOR harmless from any and all claims, penalties, and demands, including court costs and attorney's fees for the defense thereof, which may arise directly or indirectly out of or from the LESSEE's use or occupancy of the Leased Premises, or the conduct or management of the LESSEE's business thereon, or from any act of negligence of the LESSEE, his agents, contractors, servants, suppliers, employees or customers, in or about the Leased Premises.

LESSEE agrees to pay and discharge any mechanic's, materialman's or other lien(s) against the Leased Premises or LESSEE'S or LESSOR'S interest therein, claimed in respect to any labor, services, materials, supplies or equipment furnished or alleged to have been furnished to or upon the request of the LESSEE, his agents, contractors, sub-lessees, servants or employees, provided that LESSEE may contest such lien claim upon posting such bond as is required by the statutory laws of the State of South Carolina to have said Leased Premises released from said lien.

LESSEE further agrees to pay and discharge any federal or state tax lien or other liens including judgment liens assessed against or which may attach to the LESSEE'S interest in the Leased Premises, within ten (10) days after the filing of said lien.

22. LESSOR'S PERFORMANCE FOR ACCOUNT OF LESSEE: If LESSEE shall continue in default in the performance of any of the covenants or agreements herein contained after the expiration of the time limit hereinabove set forth for the curing of said default(s), then LESSOR may, at the LESSOR's option, cure said default(s) on behalf of LESSEE. Any amount paid or expense or liability incurred by LESSOR in the performance of any such matter for the account of LESSEE shall be deemed to be Additional Rent and the same, together with interest thereon at the rate of TWELVE (12%) PERCENT per annum from the date upon which any such expense shall have been incurred, shall be immediately due and payable as Additional Rent. Nothing contained herein shall be construed to prevent LESSOR from immediately collecting from LESSEE, by suit or otherwise, any such Additional Rent.

23. APPLICATION OF PAYMENTS RECEIVED FROM LESSEE: LESSOR shall have the right, at his sole discretion, to apply any payments made by LESSEE to the satisfaction of any debt or obligations of LESSEE to LESSOR regardless of the instructions of LESSEE as to application of any sum whether such instructions be endorsed upon LESSEE's check or otherwise, unless otherwise agreed upon by both Parties in writing. The acceptance by LESSOR of a check or checks drawn by a drawer other than the LESSEE shall in no way affect the LESSEE's liability hereunder nor shall it be deemed an approval of any assignment of this Lease by LESSEE.

24. ASSIGNMENT AND SUBLEASE: The LESSEE shall not assign, mortgage, or encumber this Agreement or his interest herein, nor sublet or permit the Leased Premises or any part thereof to be used by others, without the prior written consent of the LESSOR; PROVIDED, HOWEVER, that the LESSOR's consent shall not be unreasonably withheld. In the event that the LESSOR consents to an assignment of this Lease Agreement or a subletting of the Leased Premises by the LESSEE, such consent shall not be construed as a release of the LESSEE and the LESSEE shall remain and continue legally bound for the performance of the LESSEE's obligations hereunder. Any purported assignment, mortgage or encumbrance of this Lease Agreement or the LESSEE's interest herein, or any sublease of the Leased Premises, without the prior written consent of the LESSOR shall be null and void. The consent of the LESSOR to an assignment of this Lease Agreement or a sublease of the Leased Premises shall not be construed to relieve the LESSEE from obtaining the written consent of the LESSOR to any further assignment or subletting.

25. ESTOPPEL CERTIFICATES: Each Party hereto agrees that during the term of this Lease Agreement he shall, upon written request from the other Party hereto, execute, acknowledge and deliver to such other Party a written statement certifying that

this Lease Agreement has not been modified and that it remains in full force and effect (or if there have been modifications, that the Lease Agreement is in full force and effect as modified), the dates to which the Rent, Additional Rent and other charges have been paid, and any other factual data relating to this Lease Agreement or the Leased Premises which such Party may reasonably request.

26. BROKERAGE: Each of the Parties hereto represents and warrants to the other Party hereto that the only broker or agent involved in connection with this Agreement is Ray Realty (Charlie Ray-Broker in Charge). The LESSOR has agreed to compensate Ray Realty (Charlie Ray-Broker in Charge) for all brokerage services rendered by the said agency in connection with this Agreement pursuant to a separate written Commission Agreement between the LESSOR and the said agency. The LESSOR hereby covenants to indemnify and hold harmless the LESSEE from and against any liability for any compensation, commissions and charges claimed by Ray Realty (Charlie Ray-Broker in Charge) for all brokerage services rendered by the said agency in connection with this Agreement.

27. ADDITIONAL INSTRUMENTS: The Parties hereto agree to execute and deliver any written instruments, including a Memorandum of Lease suitable for recording, necessary to carry out any agreement, term, condition or assurance in this Lease Agreement whenever occasion shall arise and request for such instrument shall be made.

28. ADDRESS OF LESSOR AND LESSEE; NOTICES: Unless the LESSOR designates another address by written notice to the LESSEE, all Rent and Additional Rent to be paid to the LESSOR pursuant to the provisions of Paragraph 4 hereof, and all other sums to be paid by LESSEE to LESSOR shall be paid to LESSOR at:

Leon P. Butler, Jr.,

Conway, South Carolina 29526-5101

All written communications by LESSEE to LESSOR shall likewise be given to LESSOR at the said address, with a copy of said communication contemporaneously forwarded to:

Neil D. Wright, Esq.

1304-B Azalea Court

Myrtle Beach, South Carolina 29577

All written communications by LESSOR to LESSEE shall be given to the LESSEE at:

Billy Wilson

Santee, South Carolina 29142

With a copy of said communication contemporaneously forwarded to:

The Parties hereto may from time-to-time designate, in writing, other persons or addresses expressly for the purpose of receipt of notice hereunder.

All notices required under this Lease Agreement shall be in writing, shall be signed by the Party giving such notice, shall be transmitted by registered or certified mail, return receipt requested, and shall be deemed duly given when delivery is executed by the postal service with appropriate receipt showing proof of delivery to the address of the recipient.

29. OPTION TO RENEW: Provided that the LESSEE has fully complied with all of his obligations hereunder, LESSEE shall have the option to renew this lease for fourteen (14) successive one (1) year terms, upon the exact same terms and conditions as set forth herein, except that the annual rent for each of the one (1) year option periods shall be as set forth hereinafter. Rent shall be paid, in advance, at the commencement of each option period. For the first (1) year option period, April 15, 1999 through April 14, 2000, the annual rent shall be FORTY ONE THOUSAND SEVEN HUNDRED FIFTY AND 00/100 (\$41,750.00) DOLLARS. For the second one (1) year option period, April 15, 2000 through April 14, 2001, the annual rent shall be FORTY NINE THOUSAND TWO HUNDRED FIFTY AND 00/100 (\$49,250.00) DOLLARS. For the third one (1) year option period, April 15, 2001 through April 14, 2002, the annual rent shall be FIFTY THOUSAND AND 00/100 (\$50,000.00) DOLLARS. For the fourth one (1) year option period, April 15, 2002 through April 14, 2003, the annual rent shall be FIFTY THOUSAND AND 00/100 (\$50,000.00) DOLLARS. For the fifth one (1) year option period, April 15, 2003 through April 14, 2004, the annual rent shall be FIFTY THOUSAND AND 00/100 (\$50,000.00) DOLLARS. For the sixth one (1) year option period, April 15, 2004 through April 14, 2005, the annual rent shall be FIFTY THOUSAND AND 00/100 (\$50,000.00) DOLLARS. For the seventh one (1) year option period commencing April 15, 2005, and ending April 14, 2006, and for each one (1) year option period thereafter through and including the fourteenth one (1) year option period, the annual rent shall be SIXTY

THOUSAND AND 00/100 (\$60,000.00) DOLLARS. The option(s) hereby granted to the LESSEE to extend the lease term may be exercised only by LESSEE giving written notice, in the manner specified in Paragraph 28 hereinabove, to the LESSOR at least ninety (90) days prior to the expiration of the Lease or any previously exercised option term. If said notice is not timely given by the LESSEE, then this Lease shall terminate at the end of the term or the previously exercised option period, as the case may be.

30. REMOVAL OF TIRES: The LESSOR and the LESSEE understand and agree that a number of old, abandoned tires are presently located upon the Leased Premises and that the LESSEE desires to remove such tires from the Leased Premises. The LESSOR and the LESSEE further understand and agree that the LESSEE shall be permitted to dispose of the old, abandoned tires located upon the Leased Premises by removal of same from the Leased Premises and that the LESSOR shall pay the sum of ONE THOUSAND AND 00/100 (\$1,000.00) DOLLARS, and no more, toward the cost of removal of the said tires.

31. PRONOUNS: All pronouns and any variations thereof shall be deemed to refer to the masculine, feminine, neuter, singular or plural, as the identity of the person(s), firm(s), or corporation(s) may require.

32. COUNTERPARTS: This Lease Agreement may be executed in counterparts all of which taken together shall be deemed to be one original.

33. AMENDMENT AND MODIFICATION: This Lease Agreement embodies the full agreement of the Parties and supersedes any and all prior understandings or commitments concerning the subject matter of this Lease Agreement. Any modification or amendment must be in writing and must signed by both Parties hereto.

34. BINDING EFFECT: This Lease Agreement shall be binding upon and shall inure to the benefit of the Parties hereto, and their respective successors and assigns, except as herein provided to the contrary.

35. CONTROLLING LAW: This Lease Agreement and the rights of the LESSOR and LESSEE hereunder shall be construed and enforced in accordance with the law of the State of South Carolina.

36. PARTIAL INVALIDITY: In the event that any part or provision of this Lease Agreement shall be determined to be invalid or unenforceable, the remaining parts and provisions of

this Lease Agreement which can be separated from the invalid, unenforceable provision shall continue in full force and effect.

37. CAPTIONS: The paragraph titles, numbers and captions contained in this Lease Agreement are inserted only as a matter of convenience and for reference, and in no way define, limit, extend, modify or describe the scope or intent of this Lease Agreement or any provision hereof.

38. SUBORDINATION: The LESSEE shall, upon the request of the LESSOR, subject and subordinate all or any of his rights under this Lease to any and all mortgages now existing or hereafter placed on the Leased Premises; PROVIDED, HOWEVER, that LESSEE will not be disturbed in the use or enjoyment of the Leased Premises so long as he is not in default hereunder. The LESSEE agrees that this Lease shall remain in full force and effect notwithstanding any default or foreclosure under any such mortgage, and the LESSEE shall attorn to any receiver(s) appointed pursuant to the terms of any such mortgage, and to the receiver's successors or assigns, and to the purchaser or assignee of the Leased Premises upon any foreclosure of any such mortgage upon the Leased Premises. The LESSEE shall, upon request of the LESSOR, execute and deliver to the LESSOR, or to any other person designated by LESSOR, any instrument or instruments required to give effect to the provisions of this Paragraph.

39. RECORDING COSTS: Either Party may cause a Memorandum of this Lease Agreement to be recorded in the Office of the Register of Mesne Conveyances for Horry County, South Carolina, and the Party recording same shall be responsible for and shall pay all costs incurred as a result of the filing of said Memorandum.

IN WITNESS WHEREOF, the Parties hereto have executed this Ground Lease Agreement on the day and year first above written.

WITNESS:

LESSOR:

Loren L. Carriek
Neil R. Wright

Leon P. Butler, Jr.
LEON P. BUTLER, JR.

WITNESS:

LESSEE:

BILLY WILSON

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY) PROBATE

PERSONALLY appeared before me the undersigned witness and made oath that (s)he saw the within named LEON P. BUTLER, JR., sign, seal, and as his act and deed deliver the within written Ground Lease Agreement and that (s)he with the other witness named above witnessed the execution thereof.

SWORN and subscribed to
before me this 15th day
of April, 1998.

Karen L. Carrick (SEAL)

Philip L. Wright
Notary Public for South Carolina
My Commission Expires: 1-6-2004

STATE OF SOUTH CAROLINA)
)
COUNTY OF _____) PROBATE

PERSONALLY appeared before me the undersigned witness and made oath that (s)he saw the within named ~~BILLY WILSON~~ sign, seal, and as his act and deed deliver the within written Ground Lease Agreement and that (s)he with the other witness named above witnessed the execution thereof.

SWORN and subscribed to
before me this _____ day
of _____, 19____.

(SEAL)

Notary Public for South Carolina
My Commission Expires: _____



Ray Realty, Inc.
P. O. Box 416
Conway, S. C. 29526-0416

FAX

To:

Billy Wilson
803-854-3138

From:

CHARLEY RAY

Date: 5-11-98

Number of Pages: 3

Phone: 803-248-6363

Fax: 803-248-6721

Remarks:

Billy:

Look this over. if it is OK
SIGN & FAX BACK & I will Get
Butler to SIGN.

Charley

P.S. SIGN & RETURN Landlord/Tenant
Disclosure.

PLAINTIFF'S
EXHIBIT



LANDLORD/TENANT DISCLOSURE REGARDING REAL ESTATE AGENCY RELATIONSHIPS

803 248-6721

P.03



Brokerage Company Ray Realty Inc
(Print or type)
Licensee Charley Ray
(Print or type)
Landlord or Tenant Leon Butler
(Print or type)

Prior to discussing with a Landlord or Tenant any details of a real estate transaction, the aforementioned licensee/company must explain agency representation as described below:

LANDLORD AGENCY: The brokerage company (BIC) becomes the Landlord's agent by entering into a written listing agreement with the Landlord. Landlord becomes the client of the company. Licensees associated with the company also represent the Landlord/client as agents. A subagent is a designated broker and all associated licensees engaged by a broker or another company. A subagent owes the same duties and responsibilities to the client as the client's primary broker. A brokerage company may or may not offer or accept subagency. A Landlord's agent has the following fiduciary duties to the Landlord: reasonable care, undivided loyalty, confidentiality, full disclosure, diligence, obedience, and accounting in all dealings. In dealings with a Tenant, Landlord's agent should: exercise reasonable skill and care, deal honestly and in good faith, and disclose all facts known by agent related to the physical condition of a property.

TENANT AGENCY: The brokerage company (BIC) becomes the Tenant's agent by entering into a written agreement with the Tenant to represent the Tenant. Tenant becomes the client of the company. Licensees associated with the company also represent the Tenant/client as agents. A Tenant's agent has the following fiduciary duties to the Tenant: reasonable care, undivided loyalty, confidentiality, full disclosure, diligence, obedience, and accounting in all dealings. In dealings with a Landlord, Tenant's agent should exercise reasonable skill and care and deal honestly.

LANDLORD AND TENANT AGENCY (DUAL AGENT): A licensee/company may act as a dual agent representing both Landlord and Tenant in the same transaction only with the prior written disclosure to and the informed consent of both the Landlord and the Tenant. A Landlord's and Tenant's consent to dual agency is valid only as to the specific transaction for which each has granted his or her consent. A dual agent is required to treat both the Landlord and the Tenant honestly and impartially as not to favor one or work to the disadvantage of the other. Unless written permission from the Landlord or the Tenant is obtained, the dual agent is prohibited from disclosing: (1) that the Landlord will accept a price less than the asking price; (2) that the Tenant will pay a price greater than the price submitted in a written offer; (3) any confidential information; or (4) any other information a party specifically instructs the dual agent in writing not to disclose, unless disclosure is required by law. Therefore, the agent's duties and the representation Landlord/Tenant receives are more limited if he or she represents both parties; and (5) the licensee/company cannot give advice, counsel, or use their negotiating skills to the advantage of one party over another while serving as a dual agent.

☒ **TENANT CHOOSES NOT TO BE REPRESENTED BY LICENSEE/COMPANY. TENANT WILL RECEIVE SERVICES AS A CUSTOMER OF LICENSEE/COMPANY.** (Initials) LM ← Here

DISCLOSURE OF AGENCY: LICENSEE/COMPANY NAMED ABOVE WILL:

- ☒ ACT AS AGENT/SUBAGENT FOR LANDLORD/CLIENT
☐ ACT AS AGENT FOR TENANT/CLIENT

☐ **LANDLORD/CLIENT OR TENANT/CLIENT AGREES THAT LICENSEE/COMPANY MAY REQUEST PERMISSION TO BECOME A DUAL AGENT AS PREVIOUSLY EXPLAINED WHEN OFFERING ITS COMPANY LISTINGS. SUCH REQUEST MAY BE DENIED. IF THE REQUIRED CONSENT IS OBTAINED FROM BOTH LANDLORD/CLIENT AND TENANT/CLIENT, A SEPARATE ACKNOWLEDGMENT MUST BE OBTAINED USING THE REAL ESTATE COMMISSION APPROVED "DISCLOSURE AND CONSENT TO DUAL AGENCY" FORM PURSUANT TO SECTION 40-57-137(M) OF THE SOUTH CAROLINA REAL ESTATE LICENSE LAW.**

(Initials)

By signing below, I Tenant (Landlord or Tenant) acknowledge that:

- (1) This form is a disclosure indicating my choice of representation by licensee/company and is not a substitute for a written agency agreement when I am being represented by and a client of licensee/company.
- (2) I understand that I am not relieved of my responsibility to protect my own interest, which may include, at my discretion, seeking legal, accounting or other professional advice.
- (3) Licensee/company has explained the above information to me and I understand it. I have received a signed copy of this form.

SIGNATURES:

(Date) _____

Leon Butler
(Landlord or Tenant)

(Date) _____

5-11-98

(Date)

Charley Ray
(Licensee)

The foregoing form is available for use by the entire real estate industry. The use of the form is not intended to identify the user as a REALTOR. REALTOR is the registered collective membership mark which may be used only by real estate licensees who are members of the NATIONAL ASSOCIATION OF REALTORS and who subscribe to the Code of Ethics. Expressly prohibited is the duplication or reproduction of such form or the use of the name "South Carolina Association of REALTORS" in connection with any written form without the prior written consent of the South Carolina Association of REALTORS.

(12/97)

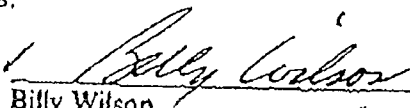
Form 111

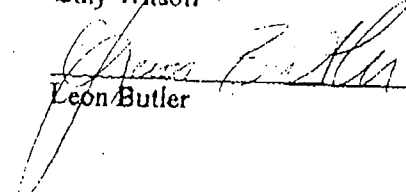
Addendum to Letter of Intent

Whereas, Billy Wilson and Leon Butler entered into a letter of intent, dated February 27, 1998, to lease 5.04 acres located on Hwy. 17, Little River, S. C. they hereby agree to amend and or add the following provisions.

1. Wilson shall receive all rents from the billboards presently located on the premises
2. The Lease agreement shall automatically renew from year to year, unless notice is given by Wilson 90 days prior to the expiration date.
3. The Lease term shall commence on May 15, 1998, and expire on the 14th day of May 1999. All renewal terms shall run from May 15 to May 14 of the following year.
4. Wilson shall have the right to assign the lease agreement or sublease, but shall remain personally liable for the leases performance.

Signed and dated this 14th day of May 1998.


Billy Wilson


Leon Butler

Post-It™ brand fax transmittal memo 7671		# of pages ▶ 1
To <u>Billy Wilson</u>	From <u>Chancy R. J.</u>	
Co.	Co.	
Dept.	Phone # <u>813-278-365</u>	
Fax # <u>813-278-3138</u>	Fax # <u>813-278-6721</u>	

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

GROUND LEASE AGREEMENT

THIS GROUND LEASE AGREEMENT (hereinafter sometimes referred to as the "Agreement" or "Lease Agreement"), made and entered into this _____ day of April-May, 1998, by and between LEON P. BUTLER, JR., of _____, Conway, South Carolina 29526-5101 (hereinafter referred to as "LESSOR")

AND

BILLY WILSON of _____ Santee, South Carolina 29142 (hereinafter referred to as "LESSEE")

W I T N E S S E T H:

WHEREAS, the LESSOR is the owner of a certain unimproved tract of real property located in Horry County, South Carolina, which is more specifically shown and described on that certain "Plat of 5.04 Acres of Land in Little River Township, Horry County, S.C., Surveyed for Leon Butler, Jr.," by Terry M. Watson, R.L.S., dated April 9, 1997, and recorded in Plat Book 154 at Page 144, in the Office of the R.M.C. for Horry County, South Carolina, said plat being incorporated herein by this reference as fully as if set forth herein verbatim; and,

WHEREAS, the LESSEE is desirous of leasing the aforesaid unimproved real property from the LESSOR upon the terms and conditions set forth hereinafter; and,

WHEREAS, the LESSOR is desirous of leasing the aforesaid unimproved real property to the LESSEE upon the terms and conditions set forth hereinafter.

NOW, THEREFORE, in consideration of the rent to be paid by the LESSEE to the LESSOR and the use and enjoyment of the Leased Premises by the LESSEE, and in further consideration of the Parties' agreements and covenants and the conditions contained hereinafter, the Parties hereto agree as follows:

1. LEASE OF PREMISES: The LESSOR hereby leases and demises to the LESSEE and the LESSEE hereby leases, accepts, and rents from the LESSOR, upon the terms and conditions set forth herein, the unimproved real property more fully described and shown upon that certain "Plat of 5.04 Acres of Land in Little River Township, Horry County, S.C., Surveyed for Leon Butler, Jr.," by Terry M. Watson, R.L.S., dated April 9, 1997, and recorded in Plat Book 154 at Page 144, in the Office of the R.M.C.

for Horry County, South Carolina, said plat being incorporated herein by this reference as fully as if set forth herein verbatim. This lease of the described unimproved real property is subject to existing advertising display (sign) leases more specifically described in Paragraph 7 and any renewals or extensions thereof. This lease of the described unimproved real property specifically includes the right to utilize, during the term of this Lease Agreement, all easements, rights and hereditaments belonging or appertaining to the described unimproved real property.

2. LESSEE'S ACCEPTANCE OF PROPERTY: Neither the LESSOR nor his agents have made any representations or express warranties to the LESSEE or his agents concerning the condition of the property which comprises the Leased Premises. **THIS IS A GROUND LEASE OF UNIMPROVED REAL PROPERTY AND THE LESSOR HEREBY SPECIFICALLY DISCLAIMS ALL WARRANTIES, EXPRESS AND/OR IMPLIED, CONCERNING THE CONDITION OF THE PROPERTY, INCLUDING, BUT NOT LIMITED TO, ALL IMPLIED WARRANTIES OF HABITABILITY, AND ALL** ~~WARRANTIES OF FITNESS OR SUITABILITY FOR A PARTICULAR PURPOSE.~~ **THE LESSOR FURTHER SPECIFICALLY DISCLAIMS ALL WARRANTIES, EXPRESS AND/OR IMPLIED, CONCERNING THE QUANTITY OF ACREAGE CONTAINED WITHIN THE BOUNDARIES OF THE PROPERTY AS DELINEATED UPON THE AFORESAID PLAT WHICH IS INCORPORATED HEREIN BY REFERENCE.** The LESSEE acknowledges that the LESSOR has not caused any studies or surveys to be performed to determine whether there are any "wetlands" on the subject property and that the LESSOR has not caused any studies or surveys to be performed to determine whether there are any "hazardous materials" stored on the subject property. The LESSEE further acknowledges that neither the LESSOR nor his agents have made any representations or express warranties to the LESSEE or his agents that the Leased Premises do not contain "wetlands" or "hazardous materials." The LESSEE further acknowledges that he has examined or has been afforded adequate opportunity to examine the Leased Premises to his satisfaction and that he accepts same in an "as is" condition. The taking of possession of the Leased Premises by the LESSEE shall be conclusive evidence that the LESSEE accepts the same "as is", and that the LESSEE is relying upon his own judgment concerning the suitability of the Leased Premises for the uses and purposes proposed by the LESSEE.

3. TERM: The term of this Lease Agreement shall commence on ~~April~~May 15, 1998, and, unless sooner terminated as herein provided, shall continue for a period of one (1) year until midnight, ~~April~~May 14, 1999.

4. RENTAL: The LESSEE shall pay to the LESSOR as Rent for the Leased Premises during the lease term the sum of FORTY ONE

THOUSAND SEVEN HUNDRED FIFTY AND 00/100 (\$41,750.00) DOLLARS which Rental shall be payable in advance upon the execution of this Lease Agreement. All Rent payable hereunder shall be paid without any offsets or deductions. All Rental payments payable by the LESSEE to the LESSOR shall be payable to LESSOR at:

Leon P. Butler, Jr.,

Conway, South Carolina 29526-5101

5. TIME IS OF THE ESSENCE: The Parties hereto agree that time is of the essence of all of the provisions of this Lease Agreement, specifically including but not limited to the time set forth for the payment of the Rental provided for herein.

6. USE OF LEASED PREMISES: It is understood and agreed by and between the LESSOR and the LESSEE that the ~~LESSEE shall use the Leased Premises~~ shall only be used for a mobile home sales lot. While using the Leased Premises the LESSEE shall comply with all applicable laws, ordinances, rules and regulations of the local, state and federal governments, and any other public authority having jurisdiction which may affect the Leased Premises. The LESSEE acknowledges that neither the LESSOR nor his agents have made any representation or warranty to the LESSEE or the LESSEE's agents concerning whether the Leased Premises are suitable for or may be legally used for a mobile home sales lot and the LESSEE further acknowledges that the LESSEE is responsible for conducting his own inspection and investigation to determine whether ~~the LESSEE'S intended~~ use of the Leased Premises as a mobile home sales lot complies with zoning ordinances, deed restrictions and any other applicable limitations.

7. RESTRICTIONS AND EASEMENTS, ZONING, AND SIGN LEASES: The Parties hereto understand and agree that the LESSEE is taking possession of the Leased Premises subject to the following:

- (a) Easements, restrictions and limitations, whether apparent on the ground or of public record;
- (b) Applicable zoning ordinances and governmental regulations; and,
- (c) Terms and conditions of those certain Lease Agreements for outdoor advertising displays (signs) heretofore executed by the LESSOR'S predecessor in title, Hazel W. Butler, and POA Acquisition Corporation. The LESSOR has delivered to the LESSEE true and correct copies of the aforesaid Lease Agreements for outdoor advertising displays prior to or contemporaneous with the execution

of this Ground Lease Agreement. The LESSEE acknowledges that he has read the Lease Agreements for outdoor advertising displays and that his intended use of the Leased Premises will not conflict with or impair in any manner the rights and privileges accorded POA Acquisition Corporation pursuant to the aforesaid Lease Agreements for outdoor advertising displays. More specifically, the LESSEE acknowledges and agrees that POA Acquisition Corporation and/or its designee shall have an easement over the Leased Premises to construct, maintain, operate, remove or replace the advertising displays, including rights of ingress and egress over the Leased Premises, and the right to maintain the approaches to the advertising displays free of obstructive vegetation. LESSEE acknowledges and agrees that the LESSOR has and shall retain the right to renew, extend, or re-lease the said outdoor advertising display (sign) leases from time to time and that the ~~LESSEE's use and possession of the Leased Premises will~~ remain subject to the terms of such outdoor advertising display (sign) leases.

8. QUIET ENJOYMENT: LESSOR covenants, represents and warrants to the LESSEE that he has the full right and authority to lease the Leased Premises to the LESSEE upon the terms and conditions herein set forth. For and so long as the LESSEE pays the Rent provided for in this Agreement and performs and observes all of the covenants and provisions to be performed and observed by the LESSEE hereunder, the LESSEE shall quietly and peacefully enjoy the Leased Premises, subject, however, to the terms of this Agreement, including the matters and things set forth in the immediately preceding paragraph, and the LESSOR will warrant and defend LESSEE in the quiet enjoyment and peaceful possession of the Leased Premises throughout the term of this Agreement.

9. UTILITIES: During the term of this Agreement the LESSEE shall be fully responsible for and shall promptly pay, when due, all charges for water, sewer, sanitation service, electricity, fuel, gas, telephone and any other utilities used and/or consumed on the Leased Premises. The LESSEE shall make arrangements directly with utility service providers to obtain the utility services which the LESSEE deems necessary for the LESSEE's use of the Leased Premises, and the LESSEE shall be responsible for payment of all capital improvement assessments and/or charges, service connection fees and/or charges, impact fees, deposits and other charges which may be imposed by the respective utility service providers as a condition precedent to providing the utility services required by the LESSEE. The LESSEE shall make ~~such arrangements as the LESSOR may reasonably require from time~~

to time for the storage and disposal of all garbage and refuse. In the event that public sewer facilities are not available to serve the Leased Premises, the LESSEE shall install, at his sole expense, a private on-site waste disposal system which meets or exceeds the current regulations and standards of the South Carolina Department of Health and Environmental Control for installation and operation of a private on-site waste disposal system.

10. TAXES: In addition to the LESSEE's Rent obligation set forth hereinabove, LESSEE hereby agrees to pay the full amount of all real estate taxes assessed or to be assessed against the Leased Premises and all improvements added thereto by the LESSEE during the term of this Agreement. Said taxes shall be paid by the LESSEE prior to the due date thereof and the LESSEE shall furnish LESSOR with a paid receipt issued by the Horry County Treasurer showing such payment within THIRTY (30) DAYS after such payment. In the event that the LESSEE fails to pay such taxes in a timely manner, the LESSEE shall be responsible for the payment of all penalties, interest, and costs accruing thereon by reason of the LESSEE's failure to pay such taxes in a timely manner. In the event that the LESSEE fails to pay such taxes in a timely manner, the LESSOR may, at his option, pay such taxes together with all penalties, interest, and costs accruing thereon, in which case the amount so paid shall be treated as and shall be immediately due and payable as Additional Rental.

~~If the LESSEE desires to contest any tax or assessment or valuation to be paid by him under this Paragraph, he shall notify LESSOR of his intention to do so at least TWENTY (20) DAYS prior to the delinquency of such tax or assessment. In the event that the LESSEE contests any tax or assessment or valuation to be paid by the LESSEE hereunder, the LESSEE shall not be in default hereunder until THIRTY (30) DAYS after the final determination of the validity thereof, within which time the LESSEE shall satisfy and discharge such tax, assessment, charge or other items to the extent held valid, and all penalties, interest, and costs in connection therewith, as the case may be; but the satisfaction and discharge of any such tax or assessment, together with penalties, interest, and costs, shall not in any case be delayed until sale is made of the whole or any part of the Leased Premises on account thereof. In the event of any such contest, the LESSEE shall protect and indemnify the LESSOR against all loss, expense and damage resulting therefrom, including the posting of bonds to secure payment. The LESSEE shall also timely pay all taxes on personal property placed on the Leased Premises by LESSEE.~~

11. FIRE AND CASUALTY INSURANCE: At all times during the term of this Agreement the LESSEE shall maintain fire and extended

coverage hazard insurance upon all buildings, improvements, and fixtures erected upon the Leased Premises by the LESSEE in an amount equal to **ONE HUNDRED (100%) PERCENT** of the full replacement cost thereof. A duplicate original copy of the initial insurance policy procured by the LESSEE to satisfy the coverage requirements established hereunder or other evidence of insurance coverage satisfactory to the LESSOR, together with a paid receipt for the policy premium, shall be deposited with the LESSOR upon occupancy of the Leased Premises by the LESSEE. Duplicate original copies of subsequent policies and any renewals thereof shall be promptly delivered to the LESSOR, together with a paid receipt for all premiums becoming due thereon. In the event that the LESSEE fails to pay any premium or premiums for such coverage when due, the LESSOR may, at his option, pay such premium or premiums, in which case the amount so paid shall be treated as and shall be immediately due and payable as Additional Rent. Each policy procured by the LESSEE shall provide that the LESSOR shall be given copies of all notices issued pursuant to the policy and shall further provide that the policy shall not be canceled for any reason unless and until the LESSOR is given TWENTY (20) DAYS prior written notice by the insurance company.

12. LIABILITY INSURANCE: At all times during the term of this Agreement the LESSEE shall maintain in force policies of workmen's compensation insurance and public liability insurance. All policies of public liability insurance which the LESSEE is required to maintain hereunder shall protect the LESSEE, as named insured, and the LESSOR, as additional insured, against all claims for damages to person(s) or property or loss of life occurring upon, in, or about the Leased Premises with minimum limits of not less than \$300,000.00 for each occurrence of bodily injury and \$25,000.00 for each occurrence of property damage. All public liability insurance coverage required hereunder shall be procured at the sole cost and expense of the LESSEE and shall be effected under standard form policies issued by insurers of recognized responsibility which, at the time of issuance of the policy or policies, are rated as superior by A.M. Best Company. A duplicate original copy of the initial insurance policy procured by the LESSEE to satisfy the coverage requirements established hereunder or other evidence of insurance coverage satisfactory to the LESSOR, together with a paid receipt for the policy premium, shall be deposited with the LESSOR upon occupancy of the Leased Premises by the LESSEE. Duplicate original copies of subsequent policies and any renewals thereof shall be promptly delivered to the LESSOR, together with a paid receipt for all premiums becoming due thereon. In the event that the LESSEE fails to pay any premium or premiums for such coverage when due, the LESSOR may, at his option, pay such premium or premiums, in which case the amount so paid shall be treated as and shall be immediately due and payable

as Additional Rent. Each policy procured by the LESSEE shall provide that the LESSOR shall be given copies of all notices issued pursuant to the policy and shall further provide that the policy shall not be canceled for any reason unless and until the LESSOR is given TWENTY (20) DAYS prior written notice by the insurance company.

13. LESSEE'S MAINTENANCE COVENANT: The LESSEE shall, at his sole cost and expense, maintain and make all necessary repairs and replacements to the Leased Premises. The LESSEE shall maintain all parking spaces, shrubbery, and all landscape treatments on the Leased Premises in a clean and orderly condition. The LESSEE shall not cause, allow, or create upon the Leased Premises any condition which may constitute a nuisance or danger.

In the event of a default by the LESSEE in making repairs or replacements, LESSOR may make, but shall not be required to make, repairs and replacements for the LESSEE's account, and the expense thereof shall constitute and be collectible as Additional Rent which shall be immediately due and payable by the LESSEE upon the completion of such repairs or replacements by the LESSOR.

14. ALTERATIONS AND IMPROVEMENTS TO THE LEASED PREMISES: LESSEE shall not make any structural alterations or improvements to the Leased Premises without the prior written consent of the LESSOR, which consent shall not be unreasonably withheld. The LESSEE shall furnish the LESSOR with an adequate opportunity to review complete copies of all final construction drawings for all proposed structural alterations and improvements as a condition precedent to obtaining the LESSOR's written consent to such alterations and improvements to the Leased Premises. In the event that the LESSOR consents to the alterations and improvements proposed by the LESSEE, all costs incurred in connection with such alterations and improvements shall be the responsibility of the LESSEE and the LESSEE shall protect, defend, fully indemnify and save the LESSOR harmless from any and all claims, penalties, and demands, including court costs and attorney's fees, whatsoever arising, directly or indirectly, out of or from the LESSEE's alterations and improvements to the Leased Premises. All alterations and improvements to the Leased Premises shall remain thereon at the termination of this Agreement and shall become the property of LESSOR. Any furniture, furnishings, fixtures, equipment, appliances, and personal property of the LESSEE which is not removed by the LESSEE within ten (10) days after the expiration of this Agreement, or within ten (10) days of the sooner termination of this Agreement shall be deemed abandoned to the LESSOR by the LESSEE.

15. LESSEE'S COVENANTS AS TO ENVIRONMENTAL REGULATIONS: In connection with LESSEE's covenants and agreements that he shall make no unlawful use of the Leased Premises and shall comply with all applicable laws, ordinances, rules and regulations of the local, state and federal governments, and any other public authority having jurisdiction which may affect the Leased Premises as set forth in Paragraph 6 hereinabove, LESSEE shall not transport to the Leased Premises, or generate, use, store or allow to remain thereon, or dispose of upon, within, about or under the Leased Premises any waste, debris or contamination described as follows: (a) any "hazardous waste" as defined by the Resource Conservation and Recovery Act of 1976, as amended from time to time, and regulations promulgated thereunder; (b) any "hazardous substance" as defined by the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended from time to time, and regulations promulgated thereunder; and (c) any substance the presence of which on the Leased Premises is prohibited or regulated by any federal, state or local law, ruling, rule or regulation similar or dissimilar to those set forth in this paragraph (such substance and such "hazardous waste" and "hazardous substance" above described are hereinafter collectively referred to as "Hazardous Material"). LESSEE hereby agrees to indemnify and hold LESSOR, his successors and assigns, harmless from and against any and all losses, liabilities, damages, injuries, penalties, fines, costs, expenses and claims of any and every kind whatsoever (including attorneys fees and costs) paid, incurred or suffered by, or asserted against, LESSOR, his successors and assigns, as a result of any claim, demand or judicial or administrative action by any person or entity (including governmental or private entities) for, with respect to, or as a direct or indirect result of, the LESSEE's transportation, generation, storage, use, or disposal of Hazardous Material upon, within, about or under the Leased Premises, or the escape, seepage, leakage, spillage, discharge, emission or release from the Leased Premises of such Hazardous Material transported to, generated, stored, used or disposed of by the LESSEE upon the Leased Premises (including costs, expenses or claims asserted or arising under the Comprehensive Environmental Response, Compensation and Liability Act, as amended, or any state or local environmental "Superfund" or "Superlien" law, or any other federal, state or local statute, law, ordinance, code, rule, regulation, order or decree regulating, relating to, or imposing liability or establishing standards of conduct concerning, any Hazardous Material). The warranties and indemnity contained in this Paragraph shall survive the termination of this Lease.

If LESSEE shall fail to comply with the covenants and agreements to be performed by the LESSEE hereunder with respect to Hazardous Materials, or if LESSEE shall at any time fail to comply

with all environmental requirements of federal, state or local law, statute, ordinance or regulation, rule, court or administrative order or decree, or private agreement, then the occurrence of any of such events shall be considered a default hereunder and if such default shall continue for a period of FIFTEEN (15) DAYS following written notice thereof from LESSOR, LESSOR shall have such rights and be permitted to exercise such remedies for such default as are set forth in the provisions of Paragraph 18 hereinafter.

16. LESSOR'S RIGHT OF ENTRY: In addition to the other rights and privileges of the LESSOR granted herein or by applicable law, the LESSOR shall have the right to enter upon the Leased Premises at all reasonable times during the term of this Agreement: (a) to inspect the Leased Premises at any reasonable time following reasonable notice to LESSEE; (b) to perform any work and make repairs or replacements to the Leased Premises made necessary by reason of the LESSEE'S default under the terms of this Agreement; and (c) to display "For Rent" signs within the Leased Premises at prominent locations at any time within the last SIXTY (60) DAYS of the term of this Agreement and to show the Leased Premises to prospective tenants or purchasers. The exercise by the LESSOR of any of his rights, whether herein enumerated or otherwise, shall never be deemed to be an eviction of LESSEE nor a disturbance of the LESSEE's use and possession of the Leased Premises.

17. CONDEMNATION: If the Leased Premises, or any part thereof, should be taken or condemned for a public or quasi-public use or purpose, the LESSOR and the LESSEE agree to submit to arbitration the question of whether such taking or condemnation shall constitute a termination of this Lease Agreement. Each Party hereto shall appoint one arbitrator and the two arbitrators so designated shall appoint a third arbitrator. The decision of the majority of the three arbitrators as to whether this Lease Agreement shall be terminated by such taking or condemnation shall be binding on the Parties hereto. In making their decision, the three arbitrators shall consider all facts and circumstances they deem relevant, including but not limited to, the following: the LESSEE'S ability to continue the conduct of his normal business operations on the Leased Premises remaining after such taking or condemnation; the amount of rent that shall thereafter be payable by the LESSEE to the LESSOR; the continuing obligation of the LESSEE to pay such rent; the length of the remaining term of the Lease Agreement; the amount of any award made by the condemnation authority; and the continuing obligation of the LESSOR on any mortgage existing on the Leased Premises.

The amount of any award resulting from such condemnation or taking shall be allocated between the LESSOR and the LESSEE by the arbitrators, and the decision of a majority of the arbitrators shall be binding on the Parties hereto. If this Lease Agreement shall be terminated in the manner hereinabove provided, both Parties shall be relieved of and from any further liability hereunder except that accrued up to the time of such termination.

18. DEFAULT: It is agreed by and between the LESSOR and the LESSEE that in the event of a default by the LESSEE in the payment of any Rent or Additional Rent upon the day when the same shall become due and payable, or in the event of a default by the LESSEE in the performance of any of the other terms, conditions, or covenants of this Lease Agreement which the LESSEE is required to perform, which shall continue for a period of FIFTEEN (15) DAYS after written notice of said default is given pursuant to Paragraph 28 hereof, then all unpaid Rental amounts shall be accelerated and shall be immediately due and payable, and the LESSOR may enter into and upon the Leased Premises or any part thereof and repossess the same, with or without terminating this Lease Agreement, and without prejudice to any of his remedies for Rent, Additional Rent, or breach of covenant, and in any such event may, at his option, terminate this Lease Agreement by giving written notice of his election to do so. In the event the LESSOR shall exercise his right to terminate this Lease Agreement he will not thereby be deprived of any other rights he may have against the LESSEE, but shall at all times be entitled to recover of said LESSEE any and all Rent, Additional Rent, or other obligations due by LESSEE and all damages sustained by LESSOR on account of the breach of any covenants or agreements herein contained which LESSEE is obligated to perform. LESSEE shall be liable for the costs of seizure and repossession of the Leased Premises and/or costs of collection of Rentals due hereunder, including reasonable attorney's fees incurred by the LESSOR as a result of the seizure and repossession of the Leased Premises, and/or collection of Rentals and/or enforcement of any of the other terms and conditions hereunder.

If this Lease Agreement or the LESSEE'S possession of the Leased Premises shall be terminated as herein provided or by re-entry, summary dispossession proceedings or any other method, the LESSOR may, at the LESSOR'S option, as an additional remedy, re-let the Leased Premises or any part or parts thereof for the account of the LESSEE for the remainder of the term or for a period extending beyond the date when this Lease Agreement would have expired and deem that portion of the period within the term as a Rental for the account of the LESSEE. In any of such events, the LESSOR may receive the Rent therefor, applying the same first to the payment of such expenses as the LESSOR may have incurred in

recovering possession of the Leased Premises and in connection with the re-letting of the Leased Premises and then to the fulfillment of the covenants and agreements of the LESSEE hereunder including the payment of the Rent and Additional Rent, and the LESSEE shall remain liable for any deficiency. There shall be no obligation on the part of the LESSOR to re-let nor any liability on his part for failure to re-let, and the LESSEE'S liability shall not be diminished or affected by the LESSOR'S failure to re-let.

In the event of the termination of this Lease as herein provided, or if LESSEE'S possession is terminated by re-entry, or any other method, whether or not the premises shall re-let, the LESSEE shall remain liable for the Rent and all other charges herein reserved less the net proceeds of any such re-letting, and the same shall be due and payable by the LESSEE to the LESSOR as above provided. Upon such termination of the Lease or LESSEE'S possession, neither the LESSEE nor his creditors and representatives shall thereafter have any right in or to the Leased Premises or any portion thereof, or of any of the proceeds of re-letting, if any, except insofar as a specific credit is provided herein.

In the event of a default by the LESSOR in the performance of any of the terms, conditions, or covenants of this Lease Agreement which the LESSOR is required to perform, the LESSEE shall furnish the LESSOR with FIFTEEN (15) DAYS written notice of any such default pursuant to Paragraph 28 hereof prior to commencement of any action to remedy such default. Prior to exercising any rights it might have with respect to a default hereunder by LESSOR, LESSEE shall give written notice of such default to the holder of any mortgage upon the Leased Premises which has furnished LESSEE with its name and address in writing, and such mortgagee(s) shall be afforded a reasonable time, not exceeding FIFTEEN (15) DAYS, to cure such default provided said mortgagee proceeds with due diligence to cure such default.

19. REMEDIES CUMULATIVE/NON-WAIVER: No remedy herein or otherwise conferred upon or reserved to the LESSOR shall be considered exclusive of any other remedy, but the same shall be distinct, separate and cumulative and shall be in addition to every other remedy given hereunder, or now or hereafter existing at law or in equity or by statute; every power and remedy given by this Lease Agreement to the LESSOR may be exercised from time to time as often as occasion may arise, or as may be deemed expedient. No delay or omission of the LESSOR to exercise any right or power arising from any default on the part of the LESSEE shall impair such right or power, or be construed to be a waiver of any such default or an acquiescence thereto.

20. BANKRUPTCY: The filing by or on behalf of the LESSEE or against the LESSEE of any petition or pleading to declare the LESSEE bankrupt under any bankruptcy law or act, or to declare the LESSEE insolvent or unable to pay his debts, or the attachment of any property of the LESSEE located on the Leased Premises or the appointment by any Court or under any law of a receiver, trustee or other custodian of a substantial part of the property, assets or business of the LESSEE, or the attachment of any judgment lien to LESSEE'S interest in this Lease Agreement or to LESSEE'S interest in the Leased Premises, or the levy of execution or other taking of property, assets or the leasehold interest of the LESSEE, by process of the law or otherwise for the satisfaction of any judgment, debt, tax liens, or claim, shall, at the option of the LESSOR, operate as a termination of this Lease Agreement immediately and without prejudice to the LESSOR'S right to prosecute any other remedy which he may have for a breach under this Lease Agreement; subject, however, to the right of the LESSEE to correct any condition causing termination under this Paragraph within FIFTEEN (15) DAYS after written notice by the LESSOR.

21. INDEMNIFICATION: At all times during the term of this Agreement the LESSEE shall protect, defend, fully indemnify and save the LESSOR harmless from any and all claims, penalties, and demands, including court costs and attorney's fees for the defense thereof, which may arise directly or indirectly out of or from the LESSEE's use or occupancy of the Leased Premises, or the conduct or management of the LESSEE's business thereon, or from any act of negligence of the LESSEE, his agents, contractors, servants, suppliers, employees or customers, in or about the Leased Premises.

LESSEE agrees to pay and discharge any mechanic's, materialman's or other lien(s) against the Leased Premises or LESSEE'S or LESSOR'S interest therein, claimed in respect to any labor, services, materials, supplies or equipment furnished or alleged to have been furnished to or upon the request of the LESSEE, his agents, contractors, sub-lessees, servants or employees, provided that LESSEE may contest such lien claim upon posting such bond as is required by the statutory laws of the State of South Carolina to have said Leased Premises released from said lien.

LESSEE further agrees to pay and discharge any federal or state tax lien or other liens including judgment liens assessed against or which may attach to the LESSEE'S interest in the Leased Premises, within ten (10) days after the filing of said lien.

22. LESSOR'S PERFORMANCE FOR ACCOUNT OF LESSEE: If LESSEE shall continue in default in the performance of any of the covenants or agreements herein contained after the expiration of the time limit hereinabove set forth for the curing of said default(s), then LESSOR may, at the LESSOR's option, cure said default(s) on behalf of LESSEE. Any amount paid or expense or liability incurred by LESSOR in the performance of any such matter for the account of LESSEE shall be deemed to be Additional Rent and the same, together with interest thereon at the rate of TWELVE (12%) PERCENT per annum from the date upon which any such expense shall have been incurred, shall be immediately due and payable as Additional Rent. Nothing contained herein shall be construed to prevent LESSOR from immediately collecting from LESSEE, by suit or otherwise, any such Additional Rent.

23. APPLICATION OF PAYMENTS RECEIVED FROM LESSEE: LESSOR shall have the right, at his sole discretion, to apply any payments made by LESSEE to the satisfaction of any debt or obligations of LESSEE to LESSOR regardless of the instructions of LESSEE as to application of any sum whether such instructions be endorsed upon LESSEE's check or otherwise, unless otherwise agreed upon by both Parties in writing. The acceptance by LESSOR of a check or checks drawn by a drawer other than the LESSEE shall in no way affect the LESSEE's liability hereunder nor shall it be deemed an approval of any assignment of this Lease by LESSEE.

24. ASSIGNMENT AND SUBLEASE: The LESSEE shall not ~~assign, mortgage, or encumber~~ have the right to assign this Agreement or his interest herein, nor sublet or permit the Leased Premises or any part thereof to be used by others, and shall further have the right to sublet the Leased Premises to a third party without the prior written consent of the LESSOR; PROVIDED, HOWEVER, that the LESSOR's consent shall not be unreasonably withheld. In the event that the LESSOR consents to an assignment of this Lease Agreement or a subletting of the Leased Premises by the LESSEE, such consent shall not be construed as a release of the LESSEE and the LESSEE shall remain and continue legally bound for the performance of the LESSEE's obligations hereunder. Any ~~purport~~ PROVIDED, FURTHER, that any assignee of this Lease Agreement or any sublessee of the Leased Premises shall take possession of the Leased assignment, mortgage or encumbrance of this Lease Agreement or the LESSEE's interest herein, or any sublease of the Leased Premises, without the prior written consent of the LESSOR shall be null and void. The consent of the LESSOR to an assignment of this Lease Agreement or a sublease of the Leased Premises shall not be construed to relieve the LESSEE from obtaining the written consent of the LESSOR to any further assignment or subletting Premises subject to the terms of this

Lease Agreement, including, but not limited to, the restrictions set forth in Paragraphs 6 and 7 hereinabove.

25. ESTOPPEL CERTIFICATES: Each Party hereto agrees that during the term of this Lease Agreement he shall, upon written request from the other Party hereto, execute, acknowledge and deliver to such other Party a written statement certifying that this Lease Agreement has not been modified and that it remains in full force and effect (or if there have been modifications, that the Lease Agreement is in full force and effect as modified), the dates to which the Rent, Additional Rent and other charges have been paid, and any other factual data relating to this Lease Agreement or the Leased Premises which such Party may reasonably request.

26. BROKERAGE: Each of the Parties hereto represents and warrants to the other Party hereto that the only broker or agent involved in connection with this Agreement is Ray Realty (Charlie Ray-Broker in Charge). The LESSOR has agreed to compensate Ray Realty (Charlie Ray-Broker in Charge) for all brokerage services rendered by the said agency in connection with this Agreement pursuant to a separate written Commission Agreement between the LESSOR and the said agency. The LESSOR hereby covenants to indemnify and hold harmless the LESSEE from and against any liability for any compensation, commissions and charges claimed by Ray Realty (Charlie Ray-Broker in Charge) for all brokerage services rendered by the said agency in connection with this Agreement.

27. ADDITIONAL INSTRUMENTS: The Parties hereto agree to execute and deliver any written instruments, including a Memorandum of Lease suitable for recording, necessary to carry out any agreement, term, condition or assurance in this Lease Agreement whenever occasion shall arise and request for such instrument shall be made.

28. ADDRESS OF LESSOR AND LESSEE; NOTICES: Unless the LESSOR designates another address by written notice to the LESSEE, all Rent and Additional Rent to be paid to the LESSOR pursuant to the provisions of Paragraph 4 hereof, and all other sums to be paid by LESSEE to LESSOR shall be paid to LESSOR at:

Leon P. Butler, Jr.,

Conway, South Carolina 29526-5101

All written communications by LESSEE to LESSOR shall likewise be given to LESSOR at the said address, with a copy of said communication contemporaneously forwarded to:

Neil D. Wright, Esq.
1304-B Azalea Court
Myrtle Beach, South Carolina 29577

All written communications by LESSOR to LESSEE shall be given to the LESSEE at:

Billy Wilson

Santee, South Carolina 29142

With a copy of said communication contemporaneously forwarded to:

The Parties hereto may from time-to-time designate, in writing, other persons or addresses expressly for the purpose of receipt of notice hereunder.

All notices required under this Lease Agreement shall be in writing, shall be signed by the Party giving such notice, shall be transmitted by registered or certified mail, return receipt requested, and shall be deemed duly given when delivery is executed by the postal service with appropriate receipt showing proof of delivery to the address of the recipient.

29. OPTION TO RENEW; AUTOMATIC RENEWAL: Provided that the LESSEE has fully complied with all of his obligations hereunder, the LESSEE shall have the option to renew this lease for fourteen (14) successive one (1) year terms, upon the exact same terms and conditions as set forth herein, except that the annual rent for each of the one (1) year option periods shall be as set forth hereinafter. Rent shall be paid, in advance, at the commencement of each option period. For the first one (1) year option period, April May 15, 1999 through April May 14, 2000, the annual rent shall be FORTY ONE THOUSAND SEVEN HUNDRED FIFTY AND 00/100 (\$41,750.00) DOLLARS. For the second one (1) year option period, April May 15, 2000 through April May 14, 2001, the annual rent shall be FORTY NINE THOUSAND TWO HUNDRED FIFTY AND 00/100 (\$49,250.00) DOLLARS. For the third one (1) year option period, April May 15, 2001 through April May 14, 2002, the annual rent shall

be FIFTY THOUSAND AND 00/100 (\$50,000.00) DOLLARS. For the fourth one (1) year option period, AprilMay 15, 2002 through AprilMay 14, 2003, the annual rent shall be FIFTY THOUSAND AND 00/100 (\$50,000.00) DOLLARS. For the fifth one (1) year option period, AprilMay 15, 2003 through AprilMay 14, 2004, the annual rent shall be FIFTY THOUSAND AND 00/100 (\$50,000.00) DOLLARS. For the sixth one (1) year option period, AprilMay 15, 2004 through AprilMay 14, 2005, the annual rent shall be FIFTY THOUSAND AND 00/100 (\$50,000.00) DOLLARS. For the seventh one (1) year option period commencing AprilMay 15, 2005, and ending AprilMay 14, 2006, and for each one (1) year option period thereafter through and including the fourteenth one (1) year option period, the annual rent shall be SIXTY THOUSAND AND 00/100 (\$60,000.00) DOLLARS. The ~~option(s) hereby granted to the LESSEE to extend~~ Unless the LESSEE furnishes written notice to the lease term may be exercised only by LESSEE giving written notice, in the manner specified in Paragraph 28 hereinabove, to the LESSORLESSOR, at least ninety (90) days prior to the expiration of the Lease or any previously exercised original lease term or at least ninety (90) days prior to the expiration of the then current option period, of his intention not to exercise his option to option term. If said notice is not timely given by the LESSEE, then this Lease shall terminate at the end of the term or the previously exercised option period, as the case may be. extend the term of this Lease Agreement for an additional one (1) year option period, the LESSEE's option to extend the lease term for an additional one (1) year option period shall be deemed to be exercised automatically. PROVIDED, HOWEVER, that nothing contained herein shall be construed to permit the LESSEE to extend the term of this Lease Agreement beyond the end of the fourteen (14) successive one (1) year option periods provided for hereinabove.

30. REMOVAL OF TIRES: The LESSOR and the LESSEE understand and agree that a number of old, abandoned tires are presently located upon the Leased Premises and that the LESSEE desires to remove such tires from the Leased Premises. The LESSOR and the LESSEE further understand and agree that the LESSEE shall be permitted to dispose of the old, abandoned tires located upon the Leased Premises by removal of same from the Leased Premises and that the LESSOR shall pay the sum of ONE THOUSAND AND 00/100 (\$1,000.00) DOLLARS, and no more, toward the cost of removal of the said tires.

31. RENTAL INCOME FROM OUTDOOR ADVERTISING DISPLAYS: As an inducement to the LESSEE to enter into this Lease Agreement, the LESSOR hereby agrees with the LESSEE that so long as the LESSEE is in lawful possession of the Leased Premises pursuant to the terms of this Lease Agreement and so long as the LESSEE is not in default of his obligations pursuant to the terms of this Lease

Agreement, the LESSEE shall be entitled to collect and receive all rent that is paid pursuant to the terms and conditions of those certain Lease Agreements for outdoor advertising displays (signs) heretofore executed by the LESSOR'S predecessor in title, Hazel W. Butler, and POA Acquisition Corporation.

342. PRONOUNS: All pronouns and any variations thereof shall be deemed to refer to the masculine, feminine, neuter, singular or plural, as the identity of the person(s), firm(s), or corporation(s) may require.

323. COUNTERPARTS: This Lease Agreement may be executed in counterparts all of which taken together shall be deemed to be one original.

334. AMENDMENT AND MODIFICATION: This Lease Agreement embodies the full agreement of the Parties and supersedes any and all prior understandings or commitments concerning the subject matter of this Lease Agreement. Any modification or amendment must be in writing and must signed by both Parties hereto.

345. BINDING EFFECT: This Lease Agreement shall be binding upon and shall inure to the benefit of the Parties hereto, and their respective successors and assigns, except as herein provided to the contrary.

356. CONTROLLING LAW: This Lease Agreement and the rights of the LESSOR and LESSEE hereunder shall be construed and enforced in accordance with the law of the State of South Carolina.

367. PARTIAL INVALIDITY: In the event that any part or provision of this Lease Agreement shall be determined to be invalid or unenforceable, the remaining parts and provisions of this Lease Agreement which can be separated from the invalid, unenforceable provision shall continue in full force and effect.

378. CAPTIONS: The paragraph titles, numbers and captions contained in this Lease Agreement are inserted only as a matter of convenience and for reference, and in no way define, limit, extend, modify or describe the scope or intent of this Lease Agreement or any provision hereof.

389. SUBORDINATION: The LESSEE shall, upon the request of the LESSOR, subject and subordinate all or any of his rights under this Lease to any and all mortgages now existing or hereafter placed on the Leased Premises; PROVIDED, HOWEVER, that LESSEE will not be disturbed in the use or enjoyment of the Leased Premises so long as he is not in default hereunder. The LESSEE agrees that

this Lease shall remain in full force and effect notwithstanding any default or foreclosure under any such mortgage, and the LESSEE shall attorn to any receiver(s) appointed pursuant to the terms of any such mortgage, and to the receiver's successors or assigns, and to the purchaser or assignee of the Leased Premises upon any foreclosure of any such mortgage upon the Leased Premises. The LESSEE shall, upon request of the LESSOR, execute and deliver to the LESSOR, or to any other person designated by LESSOR, any instrument or instruments required to give effect to the provisions of this Paragraph.

3940. RECORDING COSTS: Either Party may cause a Memorandum of this Lease Agreement to be recorded in the Office of the Register of Mesne ~~Conveyance~~ Deeds for Horry County, South Carolina, and the Party recording same shall be responsible for and shall pay all costs incurred as a result of the filing of said Memorandum.

IN WITNESS WHEREOF, the Parties hereto have executed this Ground Lease Agreement on the day and year first above written.

WITNESS:

LESSOR:

LEON P. BUTLER, JR.

WITNESS:

LESSEE:

BILLY WILSON

STATE OF SOUTH CAROLINA)

) PROBATE

182

COUNTY OF HORRY)

PERSONALLY appeared before me the undersigned witness and made oath that (s)he saw the within named LEON P. BUTLER, JR., sign, seal, and as his act and deed deliver the within written Ground Lease Agreement and that (s)he with the other witness named above witnessed the execution thereof.

SWORN and subscribed to
before me this ____ day
of _____, 19__.

(SEAL)

Notary Public for South Carolina
My Commission Expires: _____

STATE OF SOUTH CAROLINA)
COUNTY OF _____)

PROBATE

PERSONALLY appeared before me the undersigned witness and made oath that (s)he saw the within named BILLY WILSON sign, seal, and as his act and deed deliver the within written Ground Lease Agreement and that (s)he with the other witness named above witnessed the execution thereof.

SWORN and subscribed to
before me this ____ day
of _____, 19__.

(SEAL)

Notary Public for South Carolina
My Commission Expires: _____

Ray Realty, Inc.
P. O Box 416
1304 - 4th Avenue
Conway, S. C. 29526
email: cray@compuserve.com

Fax Cover Sheet

DATE: May 20, 1998 TIME: 10:16 AM
TO: Mr. Billy Coffee PHONE: [Their phone number]
FAX: 803-435-8915
FROM: Charley Ray PHONE: 803-248-6363
Ray Realty, Inc. FAX: 803-248-6721

RE: Santee Mobile Homes

Number of pages including cover sheet: 20

Message

Mr. Coffee:

Mr. Chris Wilson asked me to fax you a copy of the modified lease agreement.
This agreement incorporates the changes requested by Mr. Billy Wilson.

Should you have questions, please give me a call.

Charley Ray

PLAINTIFF'S
EXHIBIT