

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

S.C. Supreme Court

Willard D. Hanna, Jr., Special Referee

Case No. 2006-CP-22-422

Leon P. Butler, Jr. *Respondent,*

v.

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

AMENDED RECORD ON APPEAL
VOLUME II 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

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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 15th day of 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 May 15, 1998, and, unless sooner terminated as herein provided, shall continue for a period of one (1) year until midnight, 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 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 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 have the right to assign this Agreement or his interest herein 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 an assignment of this Lease Agreement or a subletting of the Leased Premises by the LESSEE 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. PROVIDED, FURTHER, that any assignee of this Lease Agreement or any sublessee of the Leased Premises shall take possession of the Leased 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, May 15, 1999 through 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, May 15, 2000 through 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, May 15, 2001 through 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, May 15, 2002 through May 14, 2003, the annual rent shall be FIFTY THOUSAND AND 00/100 (\$50,000.00) DOLLARS. For the fifth one (1) year option period, May 15, 2003 through May 14, 2004, the annual rent shall be FIFTY THOUSAND AND 00/100 (\$50,000.00) DOLLARS. For the sixth one (1) year option period, May 15, 2004 through May 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 May 15, 2005, and ending May 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. 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.

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.

32. 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.

33. COUNTERPARTS: This Lease Agreement may be executed in counterparts all of which taken together shall be deemed to be one original.

34. 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.

35. 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.

36. 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.

37. 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.

38. 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.

39. 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.

40. RECORDING COSTS: Either Party may cause a Memorandum of this Lease Agreement to be recorded in the Office of the Register of 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:

Karen Carrick

Phil A. 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 May, 1998.

Karen Carrick (SEAL)

Phil A. Wright
Notary Public for South Carolina
My Commission Expires: 1-6-2004

STATE OF SOUTH CAROLINA)

COUNTY OF _____)

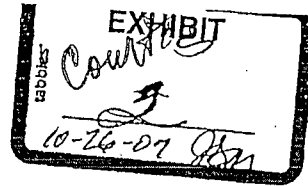
PROBATE

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: _____



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 15th day of 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 May 15, 1998, and, unless sooner terminated as herein provided, shall continue for a period of one (1) year until midnight, 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 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 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 have the right to assign this Agreement or his interest herein 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 an assignment of this Lease Agreement or a subletting of the Leased Premises by the LESSEE 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. PROVIDED, FURTHER, that any assignee of this Lease Agreement or any sublessee of the Leased Premises shall take possession of the Leased 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, May 15, 1999 through 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, May 15, 2000 through 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, May 15, 2001 through 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, May 15, 2002 through May 14, 2003, the annual rent shall be FIFTY THOUSAND AND 00/100 (\$50,000.00) DOLLARS. For the fifth one (1) year option period, May 15, 2003 through May 14, 2004, the annual rent shall be FIFTY THOUSAND AND 00/100 (\$50,000.00) DOLLARS. For the sixth one (1) year option period, May 15, 2004 through May 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 May 15, 2005, and ending May 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. 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.

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.

32. 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.

33. COUNTERPARTS: This Lease Agreement may be executed in counterparts all of which taken together shall be deemed to be one original.

34. 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.

35. 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.

36. 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.

37. 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.

38. 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.

39. 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.

40. RECORDING COSTS: Either Party may cause a Memorandum of this Lease Agreement to be recorded in the Office of the Register of 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:

Karen Carrick
Neil H. Wright

LESSOR:

Leon P. Butler, Jr.
LEON P. BUTLER, JR.

WITNESS:

Barry R.
Becky Layton

LESSEE:

Billy Wilson
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 May, 1998.

Karen Carrick (SEAL)

Neil H. Wright
Notary Public for South Carolina
My Commission Expires: 1-6-2004

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 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 23rd day
of May, 1998.

Paul R.

Notary Public for South Carolina
My Commission Expires: 2-2-99

Betty Gayle (SEAL)

COFFEY, CHANDLER & JOHNSON, P.A.
8 SOUTH BROOKS STREET
POST OFFICE BOX 1292
MANNING, SOUTH CAROLINA 29102
TELEPHONE (803) 435-8847
FACSIMILE (803) 435-8915

PLAINTIFF'S
EXHIBIT

DATE: 5/20/98

TIME: 11:15

14
10-17-07

NUMBER OF PAGES: 1, including cover sheet

TO: (COMPANY NAME) Ray Rensley

ATTENTION: _____

FACSIMILE NUMBER: 803-248-6721

REGARDING: FAX YOU SENT THIS AM.

SENT BY: _____

MESSAGE: WE RECEIVED A 10-PAGE FAX FM YOU
THIS AM.

IT CONTAINED NO COVER PAGE & THE
FIRST PAGE TRANSMITTED WAS PAGE 2
OF THE LEASE DOCUMENT.

PLS FAX MISSING PAGES OR CALL US IF
THIS WAS MIS-SENT.

THX.

INGRID FLEWELING

To: **COFFEY, CHANDLER & JOHNSON**
PROFESSIONAL ASSOCIATION
ATTORNEYS AT LAW
POST OFFICE BOX 1292
MANNING, SOUTH CAROLINA 29102
Federal I. D. #57-0561837

File Number: 980485BR

Attorney: WCC

Date: June 2, 1998

435-8847
Carol

Mr. Billy Wilson
Santee Discount Homes

Santee, South Carolina 29142

RE: Lease Agreement - Leon P. Butler and Billy Wilson

Review of Amended Lease Agreement
Consultation with Billy Wilson
Consultation with Jim Thigpen
Consultation with Charles Ray

Total

\$ 275.00

CL # 8386
6-5-98

**PLAINTIFF'S
EXHIBIT**

13
10-17-07

Please make checks payable to Coffey, Chandler & Johnson
Payments made since the statement date will
be reflected on the next statement.

R.364

for David Durant
843-650-8090

10

RRI

RAY REALTY, INC.
PO Box 416 (29528)
1304 - 4th Avenue
Conway SC 29526

FAX

To:
Billy Wilson
803-854-3138

From:
Lancey

Date: 1-14-99
Number of Pages: 2
Phone: 843-248-6363
Fax: 843-248-6721

Remarks:

Billy:
This bill will incur a
Penalty after the 15th of JAN.

Lancey
1-14-99

RAY REALTY, INC.

Mailing Address:
P.O. Box 416
Conway, South Carolina 29528

Street Address:
1304 Fourth Avenue
Conway, South Carolina 29526

October 20, 1998

Mr. Billy Wilson
Santee Discount Mobile Home, Inc.
Route 2, Box 920-AA
Santee, SC 29142

Re: 1998 Tax Notice
North Myrtle Beach property

Dear Billy:

Hopefully things are going well for you and your North Myrtle Beach sales lot. We sure enjoyed our fishing trip with you, and in fact Joey still talks about it.

I have enclosed a copy of the 1998 tax notice for the North Myrtle Beach lot. The total is \$1,521.10 of which your portion is 7½ months beginning May 15, 1998 through December 31, 1998 for an amount of \$950.69. Please forward your check made payable to Mr. Leon P. Butler, Jr.

Should you have questions of if I may be of assistance, please give me a call.

Sincerely,

RAY REALTY, INC.

Charley Ray, CCIM, CFP
President

CR/sl

enc.

Phone: (803) 248-6363 • Fax: (803) 248-6721

email: cray@compuserve.com

R.366

RAY REALTY, INC.

Mailing Address:

P Box 416
C ay, South Carolina 29528

Street Address:

1304 Fourth Avenue
Conway, South Carolina 29526

May 1, 2000

Ms. Kathy Powell
Santee Mobile Homes
116 Hwy. 17 North
Little River, SC 29566

Re: Annual Rent Due

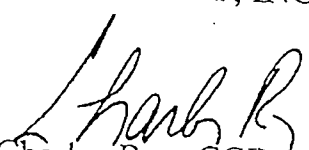
Dear Ms. Powell:

As per your lease agreement dated May 15, 1998, your annual rent is due for the period beginning May 15, 2000 to May 14, 2001 in the amount of \$49,250.00. Please make your check payable to Leon P. Butler.

Should you have any questions, please give me a call.

Sincerely,

RAY REALTY, INC.


Charley Ray, CCIM
President

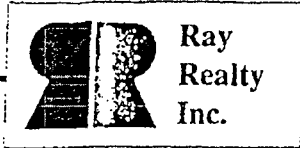
CR/sl

PLAINTIFF'S
EXHIBIT

15
10-17-07

R.367

Phone: (843) 248-6363 • Fax: (843) 248-6771



April 16, 2001

Ms. Kathy Powell
Santee Mobile Homes
116 Hwy. 17 North
Little River, SC 29566

Re: Annual Rent Due

Dear Ms. Powell:

As per your lease agreement dated May 15, 1998, your annual rent is due for the period beginning May 15, 2001 to May 14, 2002 in the amount of \$50,000.00. Please make your check payable to Leon P. Butler.

Should you have any questions, please give me a call.

Sincerely,

RAY REALTY, INC.

Charley Ray, CCIM
President

CR/sl

HORTON HOMES SUPERCENTER
178 HWY 17
LITTLE RIVER, SC 29556
(843) 780-7000

DATE May 17, 2001

3789
27

FOR DEPOSIT ONLY
PAY TO THE ORDER OF Ray D. Realty \$ 26,500.-

Ray D. Realty
HONAY COUNTY STATE BANK
LORIS, SC 29568

Ray D. Realty
10002650000

HONAY CO.
ST. INC.
LORIS, S.C.
843/58-5383

HY 22.01

1000 43535

HONAY CO.
ST. INC.
LORIS, S.C.
843/58-5383

DEFENDANT'S
EXHIBIT

4
10-18-07 JSM



May 22, 2001

Ms. Kathy Powell
Santee Mobile Homes
116 Hwy 17 North
Little River, SC 29566

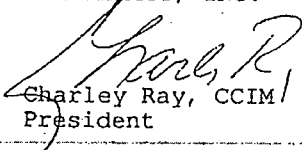
Dear Ms. Powell:

We are in receipt of your payment in the amount of \$26,500.00. Your rent is \$50,000.00 which was due on May 15, 2001. The owner has agreed to allow you to pay \$25,000.00 plus a service charge of \$1,500.00 for a total of \$26,500.00 now with the balance of \$25,000.00 being due on October 3, 2001.

Should you have any questions, please give me a call.

Sincerely,

RAY REALTY, INC.


Charley Ray, CCIM
President

CR/sl

cc: Mr. Leon Butler

DEFENDANT'S
EXHIBIT

1304 Fourth Ave. • P.O. Box 416 • Conway, SC 29528
Phone: (843) 248-6363 • Fax: (843) 248-6721
email: rri@sccoast.net

5
10-18-07 JRM

OC Breeze
357-9068

Harvey

10-18-07 6 *Q. 10*

RAY REALTY, INC.
P.O. Box 416
Conway, SC 29528
(843) 248-6363

TO

Ms. Kathy Powell
Santee Mobile Homes
116 Hwy. 17 North
Little River, SC 29566

RETURN THIS UPPER PORTION WITH YOUR REMITTANCE

\$

STATEMENT TERMS

DATE 9/17/01

DATE	DESCRIPTION	AMOUNT	
	PREVIOUS BALANCE		
	Payment due October 3, 2001	\$25,000.00	
PREVIOUS BAL.	CHARGES	PAYMENTS	NEW BALANCE

RAY REALTY, INC.

Message to JCL
Bradley Woodbury
Horton Homes
Little River
2833-1480
Tax map # D He/Property
8/2
TIME 2:10
CALL TAKEN BY
77039
CAME IN
YOU CALL BACK
WITH CALL AGAIN

PLAINTIFF'S
EXHIBIT

30
10-25-02

FLOOD ZONE K

BFE

PANEL # 582

ECERT REQ

APPROVED [Signature]

(Must be fully completed in Ink)

HORRY COUNTY PERMIT APPLICATION

DATE IN

FEES PD \$

CLERK

REVIEW #

REF #

DATE OUT

APPROVED

Name of Owner (as listed on Tax book) Horton Hooks Super Center I

Mailing Address 116 Hwy 17 Little River, SC 29526

Site Address Same Telephone (543) 280-755

Project Name NONE Subdivision NONE Lot #

Type of Work: New ☒ Addition ☐ Alter ☐ Repair ☐ Move ☐ Demolish ☐ Other

Use of Improvements: Single Family ☐ Mobile Home ☒ Duplex ☐ Apartment ☐ Commercial ☐ Institutional ☐ Utility

Warehouse ☐ Manufacturing ☐ Condo ☐ Industrial ☐ Farm Building ☐ Sign ☐ Other

Type of Construction: Metal ☐ Wood ☐ Steel ☐ Concrete ☐ Other

Exterior: Brick ☐ Conc. Block ☐ Stone ☐ Brick Veneer ☐ Stucco ☐ Metal ☐ Wood ☐ Glass ☒ Vinyl ☒ Other

No of Stories 1 No. of Bedrooms 3 No. of Baths 2 No. of Half Baths 0 Total No. of Rooms

Type of Heating: Hot Air ☐ Hot Water ☐ Central Air Cond. ☐ Heat Pump ☐ Other

Type of Fuel: Oil ☐ Gas ☐ Electricity ☒ Wood ☐ Other

Unheated areas: Garage ☐ Carport ☐ Porches ☐ Decks ☐ No. of Masonry Fireplaces 0

Total No. of Square Feet 1152 Heated Space 1152 Unheated 0

Remarks: Septic Tank per Code

Value of Construction \$ 18,870.00

Building Permit Fees \$ 100.00

Zoning Fees \$ 50.00

M I G C Fire Fee \$

\$

\$

Total Fees \$ 150.00

Contractor or Builder

Address

Architect or Engineer

Address

Estimated Date of Completion 13000-05-026 TMS #

HIS PERMIT MAY BE SUSPENDED OR REVOKED FOR VIOLATION OF ANY REGULATION IN EFFECT BY ORDINANCE OR OTHERWISE BUILDING PERMITS ARE NOT REFUNDABLE OR TRANSFERABLE.

By [Signature] Date 9-14-01

By [Signature] Date 9-14-01

By [Signature] Date 9-14-01

By [Signature] Date 9-14-01

By [Signature] Date 9-14-01

PLAINTIFF'S EXHIBIT

Permit # 78602

Mobile Home Sticker # 97592

Fire Receipt #

Farm #

Business License #

State License # 18

Telephone # 10-17-07

Telephone #

Fax #

Zone HC

Verified [Signature]

Owner ☐ Contractor ☐ Agent ☒

R.373

9/19/01

APPLICATION AND CERTIFICATE OF ZONING COMPLIANCE

135359

COMMERCIAL

TAX MAP NUMBER: 13000-05-026

ZONE: HC
FRONT SETBACK: 50.00
REAR SETBACK: 15.00
LEFT SETBACK: 10.00
RIGHT SETBACK: 10.00
HEIGHT OF STRUCTURE: 120
UNITS RESIDENTIAL: 0000
DISTANCE BETWEEN BLDGS: 006
SQUARE FOOTAGE:

OF UNITS: 000
ROOMING UNITS: 000
MIN LOT SIZE:
TOTAL ACRES:
STORIES: 001
OFF-STREET PARKING SPACES: 0006
UNITS BUSINESS: 0000
TYPE OF USE: 31 OFFICE
STREET FOOTAGE:

I HEREBY MAKE APPLICATION FOR A ZONING COMPLIANCE CERTIFICATE FOR THIS PROPERTY TO BE USED AS SHOWN ABOVE. ALL STATEMENTS ARE TRUE AND HAVE BEEN VERIFIED BY ME.

SARA
AGENT

KEET

9/18/01
DATE

ADDRESS: 116 HIGHWAY 17
CTY: LITTLE RIVER ST: SC ZIP: 29566
PHONE: 280-7553

THE USE OF THE BUILDING(S) AND/OR LAND AS SHOWN ABOVE CONFORMS TO THE REQUIRMENTS OF THE ZONING ORDINANCE OF HORRY COUNTY. SUBJECT TO THE FOLLOWING CONDITIONS, RESTRICTIONS, AND LIMITATIONS:

REPLACING M H SALES OFFICE THAT BURNED.
STICKER# 97592

(THIS CERTIFICATE IS SUBJECT TO CANCELLATION IF ANY MISREPRESENTATIONS HAVE BEEN MADE OR IF ANY CHANGES ARE MADE WHICH VIOLATE ANY ZONING ORDINANCE PROVISIONS.)

CERTIFICATE BASED ON ABOVE APPLICATION;

9/19/01
DATE

MARY ALLEN

ZONING ADMINISTRATOR

9/14/01

APPLICATION AND CERTIFICATE OF ZONING COMPLIANCE

101748

COMMERCIAL TAX MAP NUMBER: 13000-05-026

ZONE: HC	# OF UNITS: 000
FRONT SETBACK: 50.00	# ROOMING UNITS: 000
REAR SETBACK: 15.00	MIN LOT SIZE:
LEFT SETBACK: 10.00	TOTAL ACRES:
RIGHT SETBACK: 10.00	# STORIES: 001
HEIGHT OF STRUCTURE: 120	# OFF-STREET PARKING SPACES: 0006
# UNITS RESIDENTIAL: 0000	# UNITS BUSINESS: 0000
DISTANCE BETWEEN BLDGS: 006	TYPE OF USE: 52 TEMCONST
SQUARE FOOTAGE:	STREET FOOTAGE:

I HEREBY MAKE APPLICATION FOR A ZONING COMPLIANCE CERTIFICATE FOR THIS PROPERTY TO BE USED AS SHOWN ABOVE. ALL STATEMENTS ARE TRUE AND HAVE BEEN VERIFIED BY ME.

Sara Keet
SARA KEET
AGENT

9/14/01
DATE

ADDRESS: 116 HIGHWAY 17
CTY: LITTLE RIVER ST: SC ZIP: 29566
PHONE: 280-7553

THE USE OF THE BUILDING(S) AND/OR LAND AS SHOWN ABOVE CONFORMS TO THE REQUIREMENTS OF THE ZONING ORDINANCE OF HORRY COUNTY. SUBJECT TO THE FOLLOWING CONDITIONS, RESTRICTIONS, AND LIMITATIONS:

REPLACING CONSTRUCTION TRAILER THAT BURNED.
STICKER# 97592

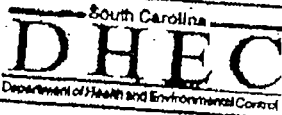
(THIS CERTIFICATE IS SUBJECT TO CANCELLATION IF ANY MISREPRESENTATIONS HAVE BEEN MADE OR IF ANY CHANGES ARE MADE WHICH VIOLATE ANY ZONING ORDINANCE PROVISIONS.)

CERTIFICATE BASED ON ABOVE APPLICATION;

9/14/01
DATE

Mary Allen
MARY ALLEN
ZONING ADMINISTRATOR

Says in H Says Office



PERMIT TO CONSTRUCT - CERTIFICATE OF FINAL APPROVAL Onsite Sewage Treatment and Disposal System

Permit No.: 1998040031

Name: Christopher D. Wiker

Type Facility: Sales Office - 800 sq ft with storage unit for employees (4) bathroom TMS#: 130-00-05-0

Subdivision: N/A (Little Rock Area)

Address: 746 E. 17th St. Santee, S.C.

Sys. Category: 362-22

Street: U.S. Hwy 17N

Section/Lot: N/A

Type Water Supply: P.B.I.

SYSTEM SPECIFICATIONS
Max. Est. Daily Flow: 158 gpd
Loading Rate: 0.89 gpd/sq ft
Tank Size(s): 60 gal
Trenches: Length: 100'
Width: 36"
Max. Bottom Depth: 15"
Aggregate Depth: 16"
Min. Pump Capacity: N/A gpm
at N/A ft. of Head

SPECIAL INSTRUCTIONS/CONDITIONS

Install system as shown. Call Health Dept if unsure of exact location.

ACTUAL INSTALLATION

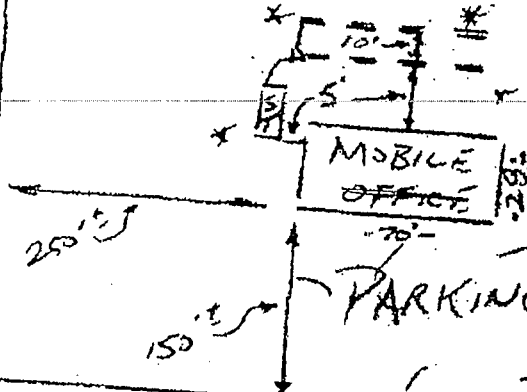
Installer: _____
Tank(s) Mfg.: _____
Aggregate Type: _____
Well Installed: ☐ Yes ☐ No
Nearest Actual Distance to:
Well: _____
Building: _____
Property Line: _____
Stream/Impoundment: _____

Line No. _____ Elevation Readings
Stubout _____
S/T Inlet: _____
S/T Outlet: _____

PERMIT TO CONSTRUCT

5.09 Acres (NTS)

* System must be barricaded against traffic.



No Scale

2 lines @ 5' each line.

U.S. Hwy. 17 North

ANY CHANGES TO SYSTEM MUST BE AUTHORIZED BY THE HEALTH DEPARTMENT PRIOR TO INSTALLATION.

CERTIFICATE OF FINAL APPROVAL

(NTS)

THIS CERTIFICATE OF FINAL APPROVAL IN NO WAY GUARANTEES THE LIFE OF THE SYSTEM OR THAT IT WILL FUNCTION PROPERLY UNDER ANY OR ALL CONDITIONS.

Issued By: _____

Date: 5/9/98

Approved By: _____

Date: _____

AFFIDAVIT

ELECTRICAL AUTHORIZATION

FOR A PREVIOUSLY OCCUPIED RESIDENTIAL SITE

me Horton Homes Super Center I

Telephone# (843) 280-7553

Address 116 Hwy 17 Little River, SC 29526

TMS# 130-00-05-026 Proposed Usage Const. Trailer Mobile

The exact directions to this property are: Hwy 90 to Hwy 17 north.

Prop located on Right 1 1/2 miles north of Underway bridge. Three miles
South of Little River

I do hereby warrant, represent, and certify that this site has a waste disposal system which is not defective and which is adequate and functioning properly. I further certify that I agree and understand that if at any time Horry County, the Horry County Health Department or any other agency having jurisdiction thereof, determines that the waste disposal system at this site is inadequate, defective or is not functioning properly, then such determination will be grounds for Horry County to revoke its permit and to order a cessation of use of the property until an adequate waste disposal system is installed and approved by the appropriate agency.

I hereby grant permission to the Horry County Building Inspection Department or Health Department officials to visit this site, at reasonable hours, for the purpose of inspection or evaluation if such agency or department deems same necessary in its sole discretion.

I further certify and represent that no agent, servant, or employee of Horry County has made any representation to me concerning the adequacy of the waste disposal system now located upon the site. I understand that there is possibility that the system may have malfunctions and may need repairs and agree to repair same when the need arises. In consideration of Horry County issuing a permit, I hereby release Horry County, its agencies or employees from and against any claims of any kind or nature arising directly or indirectly from the use of the waste disposal system located upon the site or any matters that may arise therefrom.

The above statement is given under oath with all penalties of law related thereto.

Sara Kat
Signature

9.14.01
Date

SWORN to before me this
14th day of Sept, 2001.

(C) Steward (L.S.)
Notary Public for South Carolina

My Commission Expires: May 23, 2010 R.377

HORRY COUNTY CODE ENFORCEMENT ROSTER CARD

OWNER Horton Homes Super Center

PERMIT NUMBER 73602

DATE 9-14-01

TRADE	CONTRACTOR	SC STATE LICENSE	COUNTY BUSINESS LICENSE	PHONE#	INSPECTOR
PLUMBER	Jack Dawson		00000 1906	477-3635	
ELECTRICIAN	Jack Dawson		00000 1906	477-3635	
HEATING & AC	Jack Dawson	172018	00000 1906	477-3635	
SIDING					
INSULATION					
ROOFER					
FLOOR COVERING					
MASON					
DRY WALL					
CARPENTER					
WALLPAPERER					
PAINTER					
MOBILE HOME SETUP	W. H. G. Wilson	6102914	006553		
POOL					
SIGN					
FIRE SPRINKLER					
FIRE ALARM					
LANDSCAPING					
HOME MOVER	W. H. G. Wilson	6102914	006553		
PILE DRIVING					
DOCKS/SEA WALLS					
INTERIOR RENOVATION					
FOUNDATION/SLAB					
PEST CONTROL					
INTERIOR TRIM					
HOME BUILDER					
GENERAL CONTRACTOR					
OTHER					

SIGNED [Signature]

DATE 9-14-01

CLARK COUNTY CODE ENFORCEMENT DIVISION

248-1365 / 626-1365 / 756-2121 ext. 365

PERMIT # 78602 281531

WER PERMIT # 97071 DATE 9-25-01

NAME Horton Homes Super Center

LOCATION 116 Hwy 17 N.

TIME ARRIVED 0830 TIME DEPART 0900

SETBACKS: FR _____ LT _____ RT _____ RR _____

TYPE INSPECTION	P	I		P	I
TEMP SERVICE	—	—	FOUNDATION	—	—
PILASTER	—	—	SLAB / POLY WARE	—	—
SLAB PLUMBING	—	—	ROUGH PLUMBING	—	—
NAILING	—	—	ROUGH ELECTRICAL	—	—
FRAMING	—	—	BRICK FLASHING	—	—
ROUGH MECHANICAL	—	—	ROUGH FIRE	—	—
INSULATION	—	—	FINAL	—	—
FINAL FIRE	—	—	C/OCCUPANCY	—	—
MOBILE HOME	—	—	SWIMMING POOL	—	—
IGN	—	—	METER SERVICE	—	—
WO/S	—	—	TILE SIZE	—	—

REMARKS OK for power

INSPECTOR Don't Caring #1

RECEIVED BY _____

CLAY COUNTY CODE ENFORCEMENT DIVISION

248-1365 / 626-1365 / 756-2121 ext. 365

PERMIT # 78602

281528

OWNER PERMIT # _____

DATE 9-25-01

NAME Hortan Homes Supercenter

LOCATION 116 Hwy 17

TIME ARRIVED 0900 TIME DEPART 0920

SETBACKS: FR _____ LT _____ RT _____ RR _____

TYPE INSPECTION

	P	I		P	I
TEMP SERVICE	—	—	FOUNDATION	—	—
PILASTER	—	—	SLAB / POLY WARE	—	—
SLAB PLUMBING	—	—	ROUGH PLUMBING	—	—
NAILING	—	—	ROUGH ELECTRICAL	—	—
FRAMING	—	—	BRICK FLASHING	—	—
ROUGH MECHANICAL	—	—	ROUGH FIRE	—	—
INSULATION	—	—	FINAL	—	—
FINAL FIRE	—	—	C/OCCUPANCY	—	X
MOBILE HOME	—	—	SWIMMING POOL	—	—
IGN	—	—	METER SERVICE	—	—
W/O/S	—	—	TILE SIZE	—	—

REMARKS: Need to remove string
2 tied meter Base 0
is connect 2 need factory
over for disconnect
Power Company must be
notified that Seal has
been cut
filled up meter Card

INSPECTOR Dennis Conway #18

RECEIVED BY _____

COUNTY CODE ENFORCEMENT DIVISION
248-1365 / 626-1365 / 756-2121 ext. 365

PERMIT # 78602

281516

WER PERMIT # _____

DATE 9-20-01

NAME Horton Homes Supervisor

LOCATION 116 HWY 14

TIME ARRIVED 1115 TIME DEPART 1145

SETBACKS: FR _____ LT _____ RT _____ RR _____

TYPE INSPECTION		P	I			P	I
TEMP SERVICE		—	—	FOUNDATION		—	—
PILASTER		—	—	SLAB / POLY-WARE		—	—
SLAB PLUMBING		—	—	ROUGH PLUMBING		—	—
NAILING		—	—	ROUGH ELECTRICAL		—	—
FRAMING		—	—	BRICK FLASHING		—	—
ROUGH MECHANICAL		—	—	ROUGH FIRE		—	—
INSULATION		—	—	FINAL		—	X
FINAL FIRE		—	—	C/OCCUPANCY		—	—
MOBILE HOME		—	—	SWIMMING POOL		—	—
IGN		—	—	METER SERVICE		—	—
W/O/S		—	—	TILE SIZE		—	—

REMARKS (1) Handicap ramp & steps
1 2 inch gap
- Need #4 ground & ground
rod. Seal hole in bottom
of disconnect. Must have
cover for disconnect.

INSPECTOR D. Caus

RECEIVED BY _____

COUNTY CODE ENFORCEMENT DIVISION
248-1365 / 626-1365 / 756-2121 ext. 365

PERMIT # 78602 281492

OWNER PERMIT # _____ DATE 9-13-01

NAME Horton Homes Super Center I

LOCATION 116 Hwy 13 N. L.R.

TIME ARRIVED 0945 TIME DEPART 1015

SETBACKS: FR _____ LT _____ RT _____ RR _____

TYPE INSPECTION	P	I		P	I
TEMP SERVICE	—	—	FOUNDATION	—	—
PILASTER	—	—	SLAB / POLY WARE	—	—
SLAB PLUMBING	—	—	ROUGH PLUMBING	—	—
NAILING	—	—	ROUGH ELECTRICAL	—	—
FRAMING	—	—	BRICK FLASHING	—	—
ROUGH MECHANICAL	—	—	ROUGH FIRE	—	—
INSULATION	—	—	FINAL	—	—
FINAL FIRE	—	—	C/OCCUPANCY	—	X
MOBILE HOME	—	—	SWIMMING POOL	—	—
IGN	—	—	METER SERVICE	—	—
VO/S	—	—	TILE SIZE	—	—

REMARKS must have permit
changed from construction trailer
for business

INSPECTOR Don Casey #18

RECEIVED BY _____

PLAINTIFF'S
EXHIBIT

17
10-12-07

REPORT NO: CIR364 CUSTOMER INFORMATION SYSTEM PAGE: 1 09/26/2001
CUTIN / RECONNECT SERVICE ORDERS FOR GLMORRIS

SERVICE ORDER DATE: 09/26/2001 ENTERED BY : EAWATSON

SERVICE ORDER DESCRIPTION: 6-000 CUT-IN SERVICE

SERVICE ORDER COMMENTS: WAITING ON INSP
REC INSP

SERVICE ORDER ADDRESS: 116 HWY 17-LR

SERVICE ORDER SUBDIVISION:

----- CUSTOMER INFORMATION -----

ACCOUNT 6-000-95295

NAME HORTON HOMES SUPERCENTER I ACTIVE

ADDRESS RATE GN DWELL BU
116 HWY 17 N
LITTLE RIVER SC 29566

SERV ADDR 116 HWY 17-LR

PHONE (843)280-7553

----- PREMISE INFORMATION -----

PREMISE

SERV ADDR

SUBDIVISION

DIRECTION

OFFICE 6 BOOK RATE DWELL

----- METER INFORMATION -----

KWH METER JT36 PRES READ

RKV METER 53514 PRES READ

MULT

METER SEAL

SERVICE PERSON

SERVICE CHARGE

CUTIN DATE

FORWARDING ADDR:

CUTIN ACCOUNT NO:

R.383



NEW COMMERCIAL ACCOUNT

Name of Business <u>Horton Homes Super Center I</u>	Type of Business <u>Mobile Home Dealership</u>
Customer ID (check one and provide number) ☒ Federal ID No. <u>57-0920824</u> ☐ Social Security No. <u> </u> - <u> </u> - <u> </u>	Physical Location of Business <u>116 Hwy 17</u> <u>Little River, SC 29566</u>
Mailing Address <u>116 Hwy 17</u> <u>Little River, SC 29566</u>	Telephone Number (where you can be reached between 8 am - 5 pm) <u>(843) 280-7553</u> Approximate Square Footage of Business <u>1100</u>
Previous Business at This Location (if known) <u>SAME</u>	
Have you ever had a business account with Santee Cooper? ☒ Yes ☐ No If yes, name of account and account number, if known: <u>Horton Homes Super Center</u>	
Date Service Required (Mon.-Fri., except holidays) <u>9-19-01</u>	Note: A \$30.00 service charge will be billed for same day service to cover overtime costs for meter installations only.
Exact Service Location (Provide directions; route or box number is not sufficient): <u>Dr. Hwy 17 - 1 1/2 miles north of waterway bridge</u>	
Building Inspection Completed (Required for all new construction or changes to electrical service) ☐ Yes ☒ No	

All meter hubs need to be properly marked (e.g., apt. #, lot #, street #, etc.). Santee Cooper is not responsible for marking meter hubs. The Customer/Contractor is responsible for proper identification on meter hubs. Meters will not be set in the meter hubs that are known to be incorrectly marked or not marked at all.

In the event that my account is determined by Santee Cooper to need a demand meter (usage exceeds 7,500 KWH for any one billing period), I request to be billed on the following rate (check one):

_____ General Service (GS)
_____ General Service Seasonal (GV)

I further understand that I may change this rate only in the month of May and only after receiving service for twelve (12) consecutive months.

Note: Accounts disconnected prior to one year are subject to an unfilled contract charge.

1. Two (2) working days minimum delay in service if only a meter and overhead service drop from a nearby existing pole is required. If you need only a meter, service may take only one (1) day.
2. Ten (10) working days minimum delay in service if your service will be overhead and a pole and/or transformer will have to be installed.
3. Fourteen (14) working days minimum delay in service if your service will be underground and an underground power cable and/or pad mounted transformer will have to be installed.
4. Fourteen (14) working days minimum delay for rental lights.

Name of Company Representative (please print) <u>Sara Keet</u>	Representative's Signature <u>Sara Keet</u>	Date <u>9/18/01</u>

0.963-28979

PERMIT 97071
TO FURNISH POWER SERVICE

(Contractor or Owner)
Horton # Apple Supply Center
(Mailing Address)
116 HWY 17 N.
as compiled with all appropriate safety and health regula-
tions, permits, codes, and ordinances at _____
(City)
Permit # 78602
(Development)
M.S. # 70831
(Street)

In accordance with ACT Number 257 South Carolina
Code of Laws (1975). The utility company or municipality
is hereby authorized to furnish power service to the above
referenced site.

Approved by [Signature]
Title: Horry County Code Enforcement
Approval Date: 9-25-81

2000 60819

HORRY CO.
ST. BK.
LOUIS S.C.
843-758-6333

NOV 26 01

Horry County

4278

PAY TO THE ORDER OF

ROY BEALTY

DATE

11-16-01

\$ 12,500.00

DOLLARS

17

HORTON HOMES SUPERCENTER
119 HWY 17
LITTLE RIVER, SC 29556
(843) 260-7203

HORRY COUNTY STATE BANK
LOUIS, SC 29558

FOR 3 MONTHS INTER. PAYMENT. 11th Nov. 17, Little River, SC

William A. Wilson

2000 80020

HARRY CO.
65 BK
LC # 13.60
843-786-6933

NOV 26 01

HARRY COUNTY
SNEEDVILLE

4288

HORTON HOMES SUPERCENTER
1141 HWY 17
LITTLE RIVER, SC 29566
(843) 200-1533

PAY TO THE ORDER OF Ray Reedy DATE 11-20-11

Suber Howard Jr. brooded + 1/2 \$ 13,500.00

HARRY COUNTY STATE BANK
LORIS, SC 29508

FOR 3 months lease paid to 5/6/2

Lucas Ford

27

DEPOSIT TICKET

PLAINTIFF'S
EXHIBIT

31
10-25-07 gen

RAY REALTY, INC. ESCROW ACCOUNT (EM) P.O. BOX 416 843-249-8383 CONWAY, SC 29526		1272
DATE <u>11/26/01</u>		67-218/533 REF ANCH 01350
PAY TO THE ORDER OF LEON BUTLER	\$ <u>23,750.00</u>	Security Feature Box
TWENTY-THREE THOUSAND SEVEN HUNDRED FIFTY AND NO/100-----DOLLARS		
 CAROLINA FIRST CONWAY, SC 29526		
FOR <u>Horton Homes</u>		AP

R-388

CASHIER'S CHECK

4660

67-198/532

HCB
HORRY COUNTY STATE BANK
P.O. BOX 218 LORIS, S.C. 29509

Horton Homes Inventory ^{Sub} January 2002

Key: 01. East
02. North
03. South
SDH

1) AGF '00	210987 ✓	16x72	Duct.	\$18,870.00 ✓	
2) BMF '01	174520 ✓	41x68	Deut.	\$48,280.00 ✓	OB Lot 22
3) CB '00	87608 ✓	24x68 3+3	Trans.	\$33,029.00 ✓	Long Bay
4) E312 '00	210691 ✓	16x76	Trans.	\$24,850.00 ✓	Glen Boyd
5) STP '00	172996 ✓	27x68	Deut.	\$46,309.00 ✓	OB Lot 72
6) SHO2 '00	172997 ✓	27x66	Deut.	\$39,135.00	Chapman, James
~~7) LSO3 '99~~	~~159905~~	~~27x60~~	~~Bomb.~~	~~\$40,905.00~~	~~Payton, Steven~~
8) BWS '00	211149 ✓	32x40	Deut.	\$31,850.00	OB Lot 63
~~9) APB '01~~	~~176620~~	~~27x60~~	~~Bomb.~~	~~\$32,480.00~~	~~Struth, Allen~~
~~10) ELC '02~~	~~89632~~	~~24x48~~	~~Bomb.~~	~~\$24,785.00~~	~~OB - Barnett, Larry~~
11) AGF '02	212095	16x72	Cash	\$18,225.00	OB Lot 13
12) 02	177147	28x64	Bomb	\$31,445.00	OB - Lot 13
Polo Farms					
10) ELC '01	89025	24x48	Deut.	\$22,220.00	(G.S.) George Floyd
11) RMC '01	173920 ✓	27x56	Deut.	\$29,740.00 ✓	OB Lot 140B
12) TG '99	170796	27x56	Bomb.	\$34,389.00	Long Bay

JDG 177899 ✓ 4-26-02 Bomb 40,505.00 (SDH)

516,117.00

Deutsche
1-800-678-5200
Lot 770-933-9066

DEFENDANT'S
EXHIBIT

11
10-26-07 JAm



OUTDOOR RENTAL LIGHTING

Account Name: Norton Homes Super Center Phone: 843-280-2553
Service Location: 116 Hwy 17
Billing Address: Little River SC 29566
Meter No.: 113E53514 Premise No.: 038069 Installer: _____ Date Installed: _____
Work Request No.: _____ SSN/Fed. ID: 570-92-0824
Comments: _____

Code	Pole Description	Code	Pole Description	Code	Pole Description	Code	Pole Description
A	Wood, Standard 30'	E	Fiberglass, Round, Bronze 20'	G	Wood, Standard 35'	Z	Existing Service Pole
B	Fiberglass, Round, Black 18'	F	Fiberglass, Round, Bronze 40'	H	Wood, Standard 40'	OOA	Alum., Bronze, 35'
D	Aluminum, Standard 25'						

Light Code	Description	No. Requested	Pole Code	Pole Number	Add	Remove	Replace
01	100 HPS Private	1	A	110744	✓		
03	150 HPS Traditional						
04	150 HPS Roadway						
05	150 HPS Modern						
09	250 HPS Roadway						
10	400 HPS Flood						
11	400 HPS Roadway						
13	70 (-) Traffic						
14	71 (+) Traffic						
15	250 HPS Modern						
18	400 HPS Modern						
19	1000 Metal Halide Flood	4	H	110633, 110638, 110636, 110639	✓		
20	1000 Metal Halide Area						
30F	400 Metal Halide Galleria						
30I	1000 Metal Halide Galleria						
V	Vandal Shield						

The undersigned has read and agrees to be bound by the terms of this Outdoor Rental Lighting Agreement.

By: [Signature]
Santee Cooper's Representative

Date: 2/12/02

By: [Signature]
Customer's Signature

Date: 2-12-02

Print Customer's Name: Sara Keet

Account No.: 6-943-28979

CIL011

CUSTOMER INFORMATION SYSTEM

02/14/2002

DISPLAY ACCOUNT INFORMATION FOR 6-963-28979

HORTON HOMES SUPERCENTER I ACTIVE

-----FINANCIAL INFORMATION-----

RATE GN CUTIN 09/26/01 CURRENT BILL: 56.31 03/06/02

116 HWY 17 N

OVER 30: 0.00

LITTLE RIVER SC 29566

DWELL: BU

OVER 60: 0.00

116 HWY 17

OVER 90: 0.00

(843)280-7553 GMAIL:

GACCT:

TOTAL DUE: 56.31

COPIES: 1 REFUND COUNT: 3 FID 570-92-0824

LOAN/PAY DUE: 0.00 03/01/02

TRANSFER ACCT:

PREMISE: 038069

LAST PAYMENT: 69.65 01/29/02

----- METER INFORMATION -----

PENDING COLL: 0.00

MULT

1

PREVIOUS

PRESENT

LAST BILL

DEPOSIT:

200.00 09/18/01

METER NUMBER 01/10/02 02/12/02 CONSUMPTION

INTEREST PAID: 0.00

KWH JT3E53514

03216

03962

746

MIN BILL AMT:

0.00

RKV

BUDGET BILL:

0.00

DMD BILLED:

SEAL NO: G469869

RATE DIFF:

0.00

VOLT CODE:

INT CONT:

GC CREDIT DIFF:

0.00

ACCOUNT OPTION

NAME

METER

SSN/FID

PREMISE

SEAL

B 38069

**SANTEE COOPER
OUTDOOR RENTAL LIGHTING AGREEMENT**

1. Initial Installation and Charges

Units will be installed and electric service will be delivered at charges as set forth by Santee Cooper's "Private Outdoor Lighting Service," Rate Schedule OL-98, as may be revised from time to time, and in accordance with Santee Cooper's Terms and Conditions of Retail Electric Service, available at Santee Cooper's retail offices.

2. Conditions of Service

- (a) Lighting equipment including lamps, fixtures, and the necessary lighting circuits, poles, and fittings will be furnished and installed by Santee Cooper.
- (b) The monthly charges applicable include facilities and energy charges and apply only to fixtures located so as to be furnished energy by existing facilities, poles, and transformers on existing poles, or through the addition of not more than one wood pole for attachment of each lighting fixture. Where extension of primary lines or special facilities or more than one new pole are required, the cost of such construction shall be paid by the Customer.

3. Billing

Bills for service hereunder shall be billed in accordance with Santee Cooper's "Private Outdoor Lighting Service," Schedule OL-98, as may be revised from time to time and become part of and added to the customer's monthly metered account for electric service, and shall be paid in accordance with the Santee Cooper's Terms and Conditions of Retail Electric Service.

4. Maintenance

Santee Cooper assumes the responsibility for ordinary maintenance of poles, equipment and lamps, with maintenance work to be performed during normal working hours at the discretion of Santee Cooper.

5. Continuity of Service

- (a) Santee Cooper shall use reasonable diligence to provide a constant service to the lighting fixtures, but if such service or equipment shall fail or be interrupted, or become defective through acts of nature, or public enemies, or by accident, strikes, labor troubles, or by actions of the elements, or for any cause beyond its reasonable control, Santee Cooper shall not be liable therefore.
- (b) The Customer shall assume responsibility of providing reasonable protection of the lighting installation from accidental collision by motor vehicle and other similar equipment and shall further assume the responsibility of providing the installation protection against vandalism. Damage caused by collision or vandalism will be repaired by Santee Cooper and costs arising out of such repairs will be charged to the responsible party causing the damage.
- (c) Santee Cooper reserves the right to terminate this agreement immediately upon the threat of damage or continued damage to the installed equipment.

6. Term

- (a) This agreement shall become effective on the date the lighting fixtures are first installed and operated and shall remain in effect for a period of three (3) years and thereafter until terminated by either party giving to the other thirty (30) days' notice in writing.
- (b) In the event the Customer transfers, terminates or for any reason discontinues electric service to the property on which rental lighting is installed under the terms of this agreement, the following charges shall become due and payable and may be paid in whole or in part by any deposit for electric service that the Customer may have made: The lesser of (1) the sum of the monthly charges for all remaining months of the effective term of this agreement; or (2) fifty dollars (\$50) for each fixture mounted on existing facilities; or (3) one hundred fifty (\$150) dollars for each fixture and pole that is cause to be removed due to termination of this agreement.
- (c) In the event the Customer wishes to terminate this agreement due to the sale, lease or rental to others of the property on which lights are installed under the terms of this agreement, and the new party wishes to continue the rental agreement, Santee Cooper shall release the Customer of the charges provided for in 6(b) provided the new customer makes application for electric service and signs a rental lighting agreement for the remaining months of the prior the Customer's agreement.

(843) 248-6363

Little River, SC 29566

RETURN THIS UPPER PORTION WITH YOUR REMITTANCE

STATEMENT **TERMS**

DATE 4/16/02

DATE		DESCRIPTION	AMOUNT
		PREVIOUS BALANCE	
		Annual Rent Due	\$50,000.00
		5/15/02 through 5/14/03	
PREVIOUS BAL.	CHARGES	PAYMENTS	NEW BALANCE

RAY REALTY, INC.

PLAINTIFF'S EXHIBIT

21

10-12-07 JRM

THIS DOCUMENT HAS A COLORED BACKGROUND, MICROPRINTING, VOID PANTOGRAPH AND WATERMARK ON THE BACK.

CLEAR CHANNEL
WORLDWIDE

Disbursement Account- Outdoor
P.O. BOX 659512
SAN ANTONIO, TEXAS 78265-9512
(210) 822-7828
APHelpdesk@Clearchannel.com

Wachovia Bank, N.A.
Greenville, South Carolina
In Cooperation W/S Payable If Desired at
Wells Fargo Bank, N.A.
Acct# 67-1/532

CHECK NO. 4
0000296525

CUST. ACCOUNT NO.
Date 01/14/2002 Amount \$ 716.45

PAY EXACTLY *Seven Hundred Sixteen, 400.95/100* 01-22-02 7379 6206-00

PAY TO THE ORDER OF
SANTEE DISCOUNT MOBILE HOMES, INC.
7484 FIVE CHOP ROAD
Santee, SC 29142 USA

Randall May

09810000-FRB COLUMBIA
140003279 0539-0008-9
140003279 01-22-02

153990225 61220012
5936-004

BANK OF CLARENDON MANNING SC 29102
01-18-02

DO NOT WRITE, SIGN / STAMP BELOW THIS LINE
DEPOSITORY BANK ENCLOSURE

X Santee Discount Mobile Homes

7

**PLAINTIFF'S
EXHIBIT**

19
10-17-07 JSm

THIS DOCUMENT HAS A COLORED BACKGROUND, MICROPRINTING, VOID PANTOGRAPH AND WATERMARK ON THE BACK.



Disbursement Account- Outdoor
P.O. BOX 659512
SAN ANTONIO, TEXAS 78265-9512
(210) 812-2828
AT/Helpdesk@Clearchannel.com

Wachovia Bank, N.A.
Greenville, South Carolina
In Cooperation With Payable if Desired at
Wells Fargo Bank, N.A.
Acct#4

CHECK NO.	0000423796
CUST. ACCOUNT NO.	
Date	Amount
07/12/2002	\$ *****1,028.00

PAY EXACTLY *One Thousand Twenty Eight AND 00/100*

PAY TO THE ORDER OF Santee Discount Mobile Homes,
INC.
7464 FIVE CHOP ROAD
Santee, SC 29142 USA

110018896 07-24-02 4100 3711 00

Void After 12 Months From Issue Date

Ramona May

110010000 FRE COLUMBIA
110016896 07-39-0008-00
110016896 07-24-02

053900225

0724002
5724-004
BANK OF CLARENDON MANNING SC 29102
07-23-02

ENCLOSURE HERE
Santee Discount Mobile Homes
DO NOT WRITE / SIGN / STAMP BELOW THIS LINE
DEPOSITION BANK ENDORSEMENT

PLAINTIFF'S
EXHIBIT

20
10-17-07



Ray
Realty
Inc.

CERTIFIED MAIL

June 3, 2002

Mr. Billy Wilson
Santee Mobile Homes
116 hwy. 17 North
Little River, SC 29566

Dear Billy:

Your rent was due on May 15, 2002 and I have not received your payment. I left you a number of messages at your Little River office, but have not heard from you.

Please advise me as to your intentions. The owner, Mr. Butler, would like for you to continue renting the property, but has instructed me to collect the rent or ask you to vacate.

Please contact me by next Monday, June 10th and let me know your plans.

I look forward to hearing from you and hope things are going well.

Sincerely,

RAY REALTY, INC.

J. Charley Ray, CCIM
President

JCR/sl

Enc. Copy of invoice

7000 1530 0005 5836 5981

6302

Billy Wilson

UNDER: COMPLETE THIS SECTION

Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired. Print your name and address on the reverse so that we can return the card to you. Attach this card to the back of the mailpiece, or on the front if space permits.

Title Addressed to:

2. Billy Wilson
White Mobile Homes
Hwy. 17 North
River, SC 29566

COMPLETE THIS SECTION ON DELIVERY

A. Received by (Please Print Clearly) B. Date of Delivery

C. Signature

X *[Signature]*

☐ Agent
☐ Addressee

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type

☒ Certified Mail ☐ Express Mail
☐ Registered ☐ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? (Extra Fee)

☐ Yes

File Number

(Enter from service label)

Form 3811, March 2001

7000 1530 0005 5836 5981

Domestic Return Receipt

102595-01-M-142

DEFENDANT'S EXHIBIT

3

10-13-07 *DS*

NAME

ADDRESS

ITEMS

QUANTITY

UNIT

PRICE

AMOUNT

TOTAL

TAXES

FEES

GRAND TOTAL

DATE

SIGNATURE

INITIALS

REMARKS

DATE

SIGNATURE

INITIALS

REMARKS

DATE

SIGNATURE

INITIALS

REMARKS

DATE

SIGNATURE

INITIALS

REMARKS

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12

13

1350

Ter

Rated

Credit Limit

NAME

ADDRESS

ITEMS

1410

DEBITS

CREDITS

1410

MAINT

ITEMS	1410	DEBITS	CREDITS	1410	MAINT
1 - Manifested Portman	1	5125.00			
4 @ 3/74 06	2	21212.00			
	3	12696.24			
Unenbav m. To the	4	591.52			
Marine Post - Back of America	5	7215.31			
1st int	6	119.77			
110. Funds - New York Times & Pic	7				
	8				
1st int - 1st int	9	444.77			
	10	8002.75			
	11	34122.51			
	12				
	13	5125.74			
	14	11525.38			
	15	114.13			
	16	226.22			
	17				
First Can. Express box	18				
Postage - 1st	19				
1st int - 1st int	20	4925.00			
Securities - 1st int - 1st int	21	1210.00			
US Dept of Health - 1st int - 1st int	22	170.22			
	23	459.20			

NAME 200, JACQUE

ADDRESS

Rating

Credit Limit

DATE	ITEMS	DEBIT	CREDIT	BALANCE
1/1/50	1/1/50	1.50		1.50
1/1/50	1/1/50	2.15		3.65
1/1/50	1/1/50	12.77		16.42
1/1/50	1/1/50	1.96		18.38
1/1/50	1/1/50	18.00		36.38
1/1/50	1/1/50	31.74		68.12
1/1/50	1/1/50	62.00		130.12
1/1/50	1/1/50	42.00		172.12
1/1/50	1/1/50	53.58		225.70
1/1/50	1/1/50	22.87		248.57
1/1/50	1/1/50	18.35		266.92
1/1/50	1/1/50	12.00		278.92
1/1/50	1/1/50	25.11		304.03
1/1/50	1/1/50	60.33		364.36
1/1/50	1/1/50	70.11		434.47
1/1/50	1/1/50	2.05		436.52
1/1/50	1/1/50	10.92		447.44
1/1/50	1/1/50	62.97		510.41
1/1/50	1/1/50	74.87		585.28
1/1/50	1/1/50	48.29		633.57
1/1/50	1/1/50	25.95		659.52
1/1/50	1/1/50	23.75		683.27
1/1/50	1/1/50	1.91		685.18
1/1/50	1/1/50			685.18

10

R.402

Jul 19 02 11:28a

Sara

(843) 280-8192

p.1

Horton Home Supercenter

Fax Cover Sheet

Date: 7-19-02

To: Sandra Cooper

Fax #: 249-6845

Attn: _____

From: Sara Kent

Fax: 843-280-8192

Regarding Account # 6-963-28979. Please
discontinue service as of 7-31-02. Contact
Billy Wilson (843) 357-9068 for confirmation
Thank you.
Sara

Number of Pages including cover sheet: 1



Horton Homes

....because there is a difference
843-280-7553



Account No: 700045-4284-0000
Invoice Date: 08/03/02
Due Date: Upon Receipt
All Service Inquiries: (800) 798-2943

008678307 1.414 0.60

HORTON HOMES SUPER CENTER II

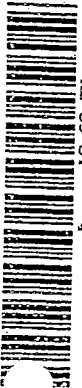
Attn: Accounts Payable
116 HWY 17
LITTLE RIVER, SC 29566
|||||

PLAINTIFF'S
EXHIBIT

36
10-25-04 JAW

It is especially important that you notify INETBA directly at the customer tollfree number listed on your invoice when you wish to modify your long distance service, including adding or deleting lines. For fast, convenient customer service and web based bill payments, you can also visit us at www.customerservicefirst.com <<http://www.customerservicefirst.com>>

PLEASE DETACH AND RETURN THE BELOW PORTION WITH YOUR REMITTANCE.



Please write your account number
700045-4284-0000 on your check
Invoice Date: 08/03/02
Due Date: Upon Receipt
Make checks payable to:
INETBA

LONG DISTANCE SERVICES PROVIDED BY
INETBA OVER FIBER OPTIC FACILITIES

AMOUNT DUE \$ 237.10

AMOUNT ENCLOSED: 76.70

Remit to: INETBA
PO BOX 22108
Tulsa, OK 74121-2108



Summary

Customer Name: HORTON HOMES SUPER CENTER
116 HWY 17
LITTLE RIVER, SC 29566

Customer Number: 700045-4284-0000

Page: 1
Billing Date: 08/03/02
Payment Due Date: UPON RECEIPT

BALANCE BROUGHT FORWARD

PRIOR BALANCE	\$350.94
PAYMENTS	(\$190.54)
ADJUSTMENTS	\$0.00
BALANCE FORWARD	\$160.40

NEW CHARGES

INETBA COMMUNICATIONS CHARGES	\$26.23
FEDERAL TAX/PICC/OTHER FEES/ AND SURCHARGES	\$45.85
ST/LOCAL TAX/USF SURCHARGE	\$4.62
TOTAL NEW CHARGES	\$76.70

NEW BALANCE - PAYMENT DUE UPON RECEIPT

\$237.10





Management Report

For Information Regarding This Invoice or
For Customer Service, Please Call (800) 798-2943

Customer Name : HORTON HOMES SUPER CENTER
Customer Number : 700045-4284-0000

Page: 3
Billing Date: 08/03/02
Payment Due Date: UPON RECEIPT

ORIGINATING NUMBER SUMMARY - 1+

Number	Name	Calls	Total Call Units	Amount
(843) 280-7553		12	69.8	12.81
(843) 280-7573		3	18.5	3.14
(843) 280-8192		12	62.3	10.28
Subtotal:		27	150.6	26.23

AREA CODE SUMMARY - 1+

Area Code	State	Calls	Total Call Units	Amount
706	GEORGIA	2	3.7	0.49
704	NORTH CAROLINA	2	7.0	0.91
910	NORTH CAROLINA	5	17.6	3.33
919	NORTH CAROLINA	2	6.8	0.88
803	SOUTH CAROLINA	10	83.3	14.96
843	SOUTH CAROLINA	5	29.5	5.31
802	VERMONT	1	2.7	0.35
Subtotal:		27	150.6	26.23





1+ CALL DETAIL

Customer Name: HORTON HOMES SUPER CENTER
Customer Number: 700045-4284-0000

Page: 4
Billing Date: 08/03/02
Payment Due Date: UPON RECEIPT

Date	Time	TCU	R	Location	Telephone	Cost
<u>Calls Originating From 843-280-7553</u>						
07/01	11:06A	3.1	D	WHITEVILLE NC	910-642-8413	0.40
	12:05P	3.2	D	FLORENCE SC	843-319-3215	0.58
07/15	10:51A	9.2	D	FLORENCE SC	843-662-8800	1.65
	11:08A	2.5	D	FLORENCE SC	843-662-8800	0.45
07/18	9:09A	1.7	D	SANTEE SC	803-854-3340	0.31
	9:11A	22.4	D	SANTEE SC	803-854-4430	4.01
07/19	8:20A	1.4	N	COLUMBIA SC	803-600-2683	0.26
07/22	9:36A	3.7	D	SEASIDE NC	910-579-4424	0.48
07/24	10:37A	14.0	D	SANTEE SC	803-854-4430	2.51
	12:06P	1.6	D	DIR ASST NC	910-555-1212	1.25
	12:12P	3.9	D	SHELBY NC	704-482-6383	0.51
	12:14P	3.1	D	CHERRYVL NC	704-435-8536	0.40

Totals for: 843-280-7553	Calls	TCUs	Cost
	12	69.8	\$12.81

Calls Originating From 843-280-7573

07/03	1:38P	2.8	D	FLORENCE SC	843-662-8800	0.51
07/08	2:49P	3.9	D	WHITEVILLE NC	910-770-1577	0.51
07/15	12:05P	11.8	D	FLORENCE SC	843-662-8800	2.12

Totals for: 843-280-7573	Calls	TCUs	Cost
	3	18.5	\$3.14

Calls Originating From 843-280-8192

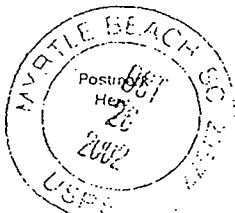
07/01	11:56A	2.7	D	BURLINGTON VT	802-654-8420	0.35
	1:45P	1.9	D	EATONTON GA	706-485-0465	0.25
07/08	1:21P	1.8	D	EATONTON GA	706-485-0465	0.24
07/12	9:54A	3.7	D	DURHAM NC	919-286-1134	0.48
	11:05A	2.5	D	SANTEE SC	803-854-3138	0.45
	11:12A	3.1	D	DURHAM NC	919-286-1134	0.40
07/15	9:43A	5.4	D	SANTEE SC	803-854-3435	0.97
	2:43P	3.2	D	SANTEE SC	803-854-3435	0.58
07/22	10:24A	5.3	D	TABOR CITY NC	910-653-5001	0.69
	2:57P	3.5	D	SANTEE SC	803-854-3138	0.63
	3:02P	7.9	D	SANTEE SC	803-854-3138	1.42
07/24	11:21A	21.3	D	SANTEE SC	803-854-3435	3.82

Totals for: 843-280-8192	Calls	TCUs	Cost
	12	62.3	\$10.28

Totals for: 1+	Calls	TCUs	Cost
	27	150.6	\$26.23

UNITED STATES MAIL RECEIPT
(Domestic Mail Only, No Insurance Coverage Provided)

Postage	\$ 37
Certified Fee	530
Return Receipt Fee (endorsement Required)	125
Restricted Delivery Fee (endorsement Required)	
Total Postage & Fees	\$ 4.42



ETT & WRIGHT, P.A.
ATTORNEYS AT LAW
304-B AZALEA COURT
BEACH, SOUTH CAROLINA 29577

Telephone: (843)449-0781
Telecopier: (843)449-1583
E-mail: barnettlaw@aol.com
(Not for Confidential Communication)

PLAINTIFF'S
EXHIBIT

24
10-17-07 JHM

Post To: Mr. B. H. Wilson
Post Office, Apt. No. [REDACTED]
PO Box No. [REDACTED]
City, State, ZIP: Santee, South Carolina 29142
Form 3800, January 2001 See Reverse for Instructions

October 26, 2002

IPT REQUESTED

RE: Notice of Default Pursuant to Ground Lease Agreement with Leon P. Butler, Jr., dated May 15, 1998

Dear Mr. Wilson:

Our law firm represents Leon P. Butler, Jr., your Lessor pursuant to that certain Ground Lease Agreement dated May 15, 1998, for certain unimproved real property located in Little River Township, Horry County, South Carolina. On behalf of Leon P. Butler, Jr., we are hereby notifying you that you are in default of your obligations pursuant to the Ground Lease Agreement.

As you are aware, Paragraph 29 of the Ground Lease Agreement provides for an automatic exercise of your option to renew the Ground Lease Agreement for an additional one year term unless you furnish written notice to the Lessor, at least ninety (90) days prior to the expiration of the preceding option period, of your intention not to exercise your option to extend the term of the Ground Lease Agreement. As you failed to furnish Mr. Butler with written notice of your intention not to exercise your option to extend the term of the Ground Lease Agreement during the ninety (90) day period ending May 14, 2002, the Ground Lease Agreement was automatically extended for an additional one (1) year option period commencing May 15, 2002 and ending May 14, 2003. Accordingly, pursuant to Paragraph 29 of the Ground Lease Agreement, you are obligated to pay rent to Mr. Butler for the option year commencing May 15, 2002 and ending May 14, 2003, in the amount of FIFTY THOUSAND AND 00/100 (\$50,000.00) DOLLARS. Pursuant to Paragraph 29 of the Ground Lease Agreement your full rent payment was due and payable to Mr. Butler, in advance, on May 15, 2002. As you have failed to pay rent to Mr. Butler for the option year commencing May 15, 2002 and ending May 14, 2003, you are in default of your obligation to pay rent pursuant to the terms of the Ground Lease Agreement.

You have the right to cure the default in your lease obligations within fifteen (15) days after delivery of this written notice to your address by the postal service. In the event that you fail to cure the default in your obligations within fifteen (15) days after delivery of this written notice to your address by the postal service, Mr. Butler will take appropriate measures to recover from you all Rent and all damages sustained by Mr. Butler on account of your breach of the covenants and

LAW OFFICES OF N. DAVID DuRANT AND ASSOCIATES, P.A.
ATTORNEYS AT LAW

N. DAVID DuRANT
KELLY A. SANSONE-GALLEY

SURFSIDE BEACH, SOUTH CAROLINA OFFICE:
1801 GLENNS BAY ROAD
POST OFFICE BOX 14722
SURFSIDE BEACH, SOUTH CAROLINA 29587

TELEPHONE (843) 650-7800
FACSIMILE (843) 650-8090
E-MAIL: nddlaw@scccoast.net

October 31, 2002

Neil D. Wright, Esquire
Barnett & Wright, PA
1304-B Azalea Court
Myrtle Beach, SC 29577

RE: Ground Lease Agreement with Leon P. Butler, Jr., Dated May 15, 1998

Dear Neil:

Please allow this letter to serve as notice to you that our firm represents Billy Wilson in reference to the letter that was forwarded to him concerning the Ground Lease Agreement with Leon P. Butler, Jr.

Unfortunately, I do not have a signed copy of that Lease, and I would request that you forward a fully executed copy of that Lease to my office.

It is my understanding throughout all of the negotiations associated with that Ground Lease that Charlie Ray, a realtor in Conway, South Carolina, was representing Mr. Butler's interest.

In fact, my client advises me that all of his negotiations and all of his dealings were through Charlie Ray. Mr. Wilson never met Mr. Butler nor ever had any dealings with Mr. Butler.

On the latter part of January or first part of February my client advised Mr. Ray that he was not going to extend the ground lease for an additional one year term.

In as much as, Mr. Ray was the agent for Mr. Butler, we believe that there has been sufficient notice to Mr. Butler in this matter that my client was not going to extend the lease term.

Please contact me upon receipt of this letter so that we can discuss this matter further.

PLAINTIFF'S
EXHIBIT

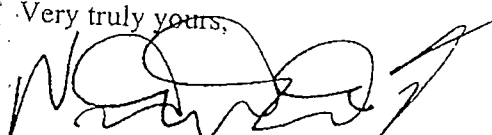
R.412

23
10-17-02 *ds*

Neil D. Wright, Esquire
October 31, 2002
Page 2

With sincere regards, I am

Very truly yours,



N. David DuRant

NDD:jr
Enclosures
Cc: Billy Wilson

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PLAINTIFF'S
EXHIBIT

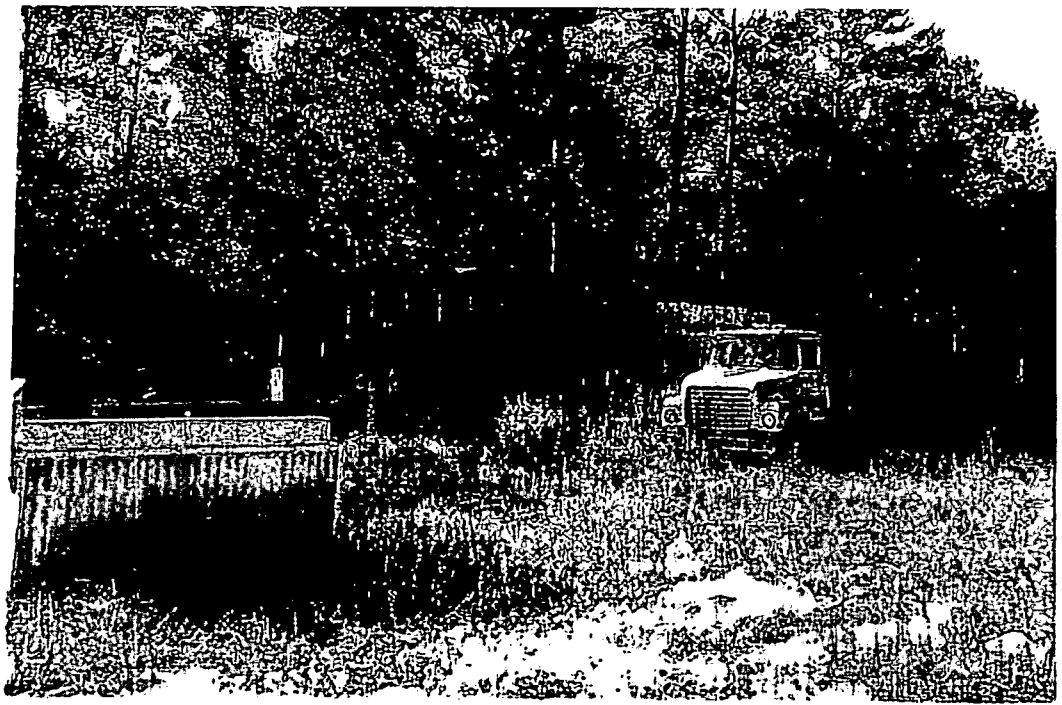
26
10-17-07 98m



PLAINTIFF'S
EXHIBIT

27

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PLAINTIFF'S
EXHIBIT

28
10-17-07 JH



PLAINTIFF'S
EXHIBIT

29
10-17-07 JH

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688087

Prepared by and return to:
N. David DuRant & Associates, P.A.
1801 Glenns Bay Road
Surfside Beach, SC 29575
99-10149NDD

HORRY FILED
COUNTY S.C.
99 AUG -2 PM 2:14
REGISTER OF DEEDS

PLAINTIFF'S
EXHIBIT

Parcel Nos. 195-27-01-083 (LOT 2) HORRY COUNTY ASSESSOR
195-27-01-081 (LOT 4)
195-27-01-074 (LOT 67)
195-27-01-068 (LOT 73) Map Blk Parcel,

32
10-25-07

8.3.99

DEED PREPARED BY LAW OFFICE OF N. DAVID DURANT WITHOUT THE BENEFIT
OF TITLE EXAM.

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

WARRANTY DEED

KNOW ALL MEN BY THESE PRESENTS, THAT WE, SMITH LAND
COMPANY, INC., in the State aforesaid, for and in consideration of
the sum of FIVE DOLLARS and 00/100 (\$5.00) to us in hand paid at
and before the sealing of these presents by BILLY WILSON, the
receipt whereof is hereby acknowledged, have granted, bargained,
sold and released, and by these presents do grant, bargain, sell
and release unto the said BILLY WILSON, his heirs and assigns,
forever, the following described property, to wit:

ALL AND SINGULAR, all that certain piece, parcel or lot
of land, situate, lying and being in the Garden City
Community, County of Horry, State of South Carolina,
being designated as LOTS TWO, FOUR, SIXTY-SEVEN AND
SEVENTY-THREE (2, 4, 67 AND 73), OCEAN BREEZE PLANTATION,
as shown on that certain plat prepared for Richard T.
Smith by Beasley Land Surveying, Inc., dated May 29,
1998, and recorded in the Office of the RMC for Horry
County, South Carolina, on June 24, 1999, in Plat Book
163, at page 108.

The conveyance of the aforesaid real property shall be subject to
all easements, reservations, rights-of-way, restrictions,
encroachments, and covenants of record which may affect the above-
described property and all governmental statutes, ordinances, rules
and regulations.

This being a portion of the property conveyed to Smith Land
Company, Inc., a South Carolina Corporation, the Grantor herein, by
Deed of Land South, A South Carolina General Partnership, dated
July 9, 1998, and recorded July 10, 1998, in the Office of the RMC
for Horry County, in Deed Book 2053 at page 1272.

A TRUE COPY, ATTEST
REGISTER OF MESNE CONVEYANCE

HORRY COUNTY, S. C.

BY *[Signature]*

EXEMPT

BOOK 2173 PAGE 118

118

Grantee(s)' Address: 7464 FIVE CHOP ROAD, SANTEE, SC 29142

TOGETHER with all and singular, the Rights, Members, Hereditaments and Appurtenances to the said Premises belonging, or in anywise incident or appertaining.

TO HAVE AND TO HOLD, all and singular, the said Premises before mentioned unto the said BILLY WILSON, his heirs and assigns, forever.

AND we do hereby bind ourselves and our heirs, assigns and administrators, to warrant and forever defend all and singular the said Premises unto the said BILLY WILSON as hereinabove provided against us and our heirs and any person or persons whomsoever lawfully claiming or to claim the same, or any part thereof.

IN WITNESS WHEREOF, we have hereunto set our Hands and Seals this 27th day of July in the year of our Lord one thousand nine hundred and ninety-nine.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF:

Christine L. Darrin
Witness

Rhonda A. Nelson
Notary

SMITH LAND COMPANY, INC.

THE STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

PERSONALLY appeared before me the above named witness and made oath that she saw the within-named SMITH LAND COMPANY, INC. sign, seal, and as its Act and Deed, deliver the within-written Deed; and that she with the witness named above witnessed the execution thereof.

Christine L. Darrin
Witness

SWORN to before me, this 27th
day of July, 1999.

Rhonda Nelson
Notary Public for South Carolina

My Commission Expires 08/01/05

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

A F F I D A V I T

PERSONALLY appeared before me, the undersigned, who being duly sworn, deposes and says:

Property located at LOT 2,4, 67 AND 73 OCEAN, BREEZE PLANTATION, GARDEN CITY, SC 29576, bearing HORRY County Tax Map Number was transferred by SMITH LAND COMPANY, INC., to BILLY WILSON, this 27th day of July, 1999. The transaction was:

XX an arm's length real property transaction and the sales price paid or to be paid in money or money's worth was \$5.00*.

 not an arm's length real property transaction and the fair market value of the property is \$ *.

The above transaction is exempt, or partially exempt, from the recording fee as set forth in S.C. Code Ann. §12-24-10 et. seq. because the realty is exempt because (RULE).

As required by Code §12-24-70, I state that I am a responsible person who was connected with the transaction as purchaser, seller, or other responsible party connected with the transaction.

I further understand that a person required to furnish this affidavit who wilfully furnishes a false or fraudulent affidavit is guilty of a misdemeanor and, upon conviction, must be fined not more than \$1,000 or imprisoned not more than one year, or both.

SWORN to before me this 27th day of July, 1999.

Rhonda Wilson
Notary Public for South Carolina

My Commission Expires: 08/04/05

*The fee is based on the real property's value. Value means the realty's fair market value. In arm's length real property transactions this value is the sales price to be paid in money or money's worth (e.g. stocks, personal property, other realty, forgiveness of debt, mortgages assumed or placed on the realty as a result of the transaction.) However, a deduction is allowed from this value for the amount of any lien or encumbrance existing on land, tenement or realty before the transfer and remaining on it after the transfer.

FILED
HORRY COUNTY, S.C.

2002 JAN 18 PM 2:21

Prepared by and Return to:
N. David DuRant
Law Office of N. David DuRant & Assoc., P.A.
1801 Glenns Bay Road, Post Office Box 14722
Surfside Beach, SC 29587
Parcel ID No. 195-27-01-068

STATE OF SOUTH CAROLINA

R.M.C.

COUNTY OF HORRY

WARRANTY DEED

KNOW ALL MEN BY THESE PRESENTS, that BILLY WILSON, in the State aforesaid, for and in consideration of the sum of ONE HUNDRED EIGHTEEN THOUSAND ONE HUNDRED FIFTY DOLLARS and 00/100 (\$118,150.00), unto me paid by LISA HAWES, in the State aforesaid, the receipt whereof is hereby acknowledged, has granted, bargained, sold and released and by these presents does grant, bargain, sell, and release unto the said LISA HAWES, for and during their joint lives, and upon the death of either of them, then to the survivor of them, her heirs and assigns, forever, in fee simple, together with every contingent remainder and right of reversion, the following described property, to wit:

ALL AND SINGULAR, all that certain piece, parcel or lot of land, situate, lying and being in the Garden City Community, County of Horry, State of South Carolina, being designated as LOT SEVENTY-THREE (73), OCEAN BREEZE PLANTATION, as shown on that certain plat prepared for Richard T. Smith by Beasley Land Surveying, Inc., dated May 29, 1998, and recorded in the Office of the RMC for Horry County, South Carolina, on June 24, 1999, in Plat Book 163 at Page 108.

The conveyance of the aforesaid real property shall be subject to all easements, reservations, encroachments, and covenants of record which may affect the above-described property and all governmental statutes, ordinances, rules and regulations.

This being a portion of the property conveyed to Billy Wilson herein, by Deed of Smith Land Company, Inc., a South Carolina Corporation, dated July 27th, 1999 and recorded August 2nd, 1999 in Deed Book 2173 at Page 118 in Horry County records.

HORRY COUNTY ASSESSOR
Tax Map #: 195-27-01-068

Map Blk Parcel

Grantee's Address: 833 Marlin Court, Garden City SC 29576

TOGETHER WITH all and singular, the rights, members, hereditaments and appurtenances to the said premises belonging or in anywise incident or appertaining.

TO HAVE AND TO HOLD all and singular the premises before mentioned unto the said Lisa Hawes, for and during their joint lives, and upon the death of either of them, then to the survivor of them, her heirs and assigns, forever, in fee simple, together with every contingent remainder and right of reversion.

AND Grantor does hereby bind heirs and assigns, to warrant and forever defend all and singular the said premises unto the said Lisa Hawes, for and during their joint lives, and upon the death of either of them, then to the survivor of them, her heirs and assigns, forever, in fee simple, together with every contingent remainder and right of reversion against my heirs and against every person whomsoever lawfully claiming, or to claim, the same or any part thereof.

A TRUE COPY, ATTEST
REGISTER OF MESNE CONVEYANCE
HORRY COUNTY, S.C.
BY *[Signature]*

PLAINTIFF'S
EXHIBIT

DEED
2445 0078

STATE 308.10 COUNTY 130.35

EXEMPT

YES

NO

ASSESSOR

R.422

10-25-02 *[Signature]*

WITNESS my Hand and Seal this 17th day of January in the year of our Lord TWO THOUSAND AND TWO and in the TWO HUNDRED AND TWENTY FIFTH year of the Sovereignty and Independence of the United States of America.

Signed, Sealed And Delivered
In The Presence Of:

Christine L. Davis
1st Witness

Billy Wilson (L.S.)
Billy Wilson

Sammy Anderson
2nd Witness

STATE OF SOUTH CAROLINA)

COUNTY OF Albermarle)

PROBATE

PERSONALLY APPEARED BEFORE ME, the undersigned witness, and made oath that he/she saw the within named Billy Wilson Sign, Seal and as his Act and Deed deliver the within written Deed; and that he/she with the other witness subscribed above witnessed the execution thereof.

Sworn to before me this
17th day of January, 2002.

Christine L. Davis
WITNESS (Not Notary)

Sammy Anderson (L.S.)
Notary Public for the Jurisdiction Aforesaid

My commission expires 9-14-11

File # 01-11503

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

AFFIDAVIT

PERSONALLY appeared before me the undersigned, who, being duly sworn, deposes and says:

1. The property being transferred is located at 503 Dundee St, Garden City SC 29576, bearing Horry County Tax Map Number 195-27-01-068, was transferred by Billy Wilson to Lisa Hawes on January 17, 2002.
2. ☒ an arm's length real property transaction and the sales price paid or to be paid in money or money's worth was \$118,150.00*.

☐ NOT an arm's length real property transaction and the fair market value of the property is \$@.
3. The above transaction is exempt, or partially exempt, from the recording fee as set forth in S.C. Code Ann. Section 12-24-10, *et seq.*, because the Deed is (see back of Affidavit): @
4. As required by Code § 12-24-70, I state that I am a responsible person who was connected with the transaction as: Billy Wilson
5. I further understand that a person required to furnish this Affidavit who willfully furnishes a false or fraudulent Affidavit is guilty of a misdemeanor and, upon conviction, must be fined not more than One Thousand and no/100 Dollars (\$1,000.00) or imprisoned not more than one year, or both.

SWORN to before me this 17th

Billy Wilson
Responsible Person Connected with Transaction

day of January, 2002

James Anderson
(Notary Public)

Billy Wilson
Print or Type Name Here

My commission expires 9-14-11

* The fee is based on the real property's value. Value means the realty's fair market value. In arm's length real property transactions, this value is the sales price to be paid in money or money's worth (e.g. stocks, personal property, other realty, forgiveness of debt, mortgages assumed or placed on the realty as a realty of the transaction). However, a deduction is allowed from this value for the amount of any lien or encumbrance existing on land, tenement, or realty before the transfer and remaining on it after the transfer.

772 507

State of South Carolina)
County of Horry)

FILED
HORRY COUNTY, S.C.
MEMORANDUM OF LEASE
2005 NOV 17 PH 4:07

Leon P. Butler, Jr. ("Landlord") has leased to Kenny Hyatt ("Tenant") a parcel of land in Horry County, South Carolina described in Exhibit "A" attached to and incorporated by reference in this Memorandum of Lease (the "Premises"). Certain provisions of the lease (the "Lease") are set forth below:

1. Landlord's Address is: [REDACTED], Conway, SC 29526-5101
2. Tenant's Address is: PO Box 877, Latta, SC 29565
3. The term of the Lease began on the 14th day of May, 2005 and shall continue for a term of one year.
4. The Lease grants to Tenant an option to purchase the Premises during the term of the Lease as set forth in the Lease.
5. The provisions set forth in the above-referenced Lease and amendments, if any, and assignments, if any, are incorporated into and made part of this Memorandum of Lease by reference. In the event of conflict between the terms of this Memorandum of Lease and the terms of the Lease or any amendments to the Lease, the terms of the Lease or the amendment, as the case may be, shall govern.
6. The Lease was assigned to Hyatt & Bryan Enterprises, LLC on November 7th, 2005.

DEFENDANT'S
EXHIBIT
7
10/18/07
351

The parties have executed this Memorandum of Lease as at November 17, 2005.

Landlord:

Leon P. Butler, Jr.
Leon P. Butler, Jr.

Jennifer E. Marshawn
Witness #1

Michael Wright
Witness #2 (Notary)

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

PERSONALLY appeared before me the undersigned witness, who being duly sworn, says that (s)he saw Leon P. Butler, Jr. sign, seal and as their act and deed deliver the within written Memorandum and that she/he, together with the other witness subscribed above, witnessed the execution thereof.

Jennifer E. Marshawn
(Witness)

Sworn to before me this
the day of November, 2005.

Michael Wright (L.S.)
Notary Public for South Carolina
My Commission Expires: 04-1-2014

Witness #1

Margaret Dellechiaie
Witness #2 (Notary)

Tenant and Assignors:

Kenny Hyatt

Assignee:

Hyatt & Bryan Enterprises, LLC

By:

Kenny Hyatt Member

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

PERSONALLY appeared before me the undersigned witness, who being duly sworn, says that (s)he saw Kenny Hyatt sign, seal and as their act and deed deliver the within written Memorandum and that she/he, together with the other witness subscribed above, witnessed the execution thereof.

(Witness)

Sworn to before me this
3rd day of November, 2005.

Margaret Dellechiaie (L.S.)
Notary Public for South Carolina
My Commission Expires: 8/16/2014

Exhibit "A"

Legal Description

ALL AND SINGULAR, that certain tract of unimproved land containing 5.04 acres, more or less, located in Little River Township, Horry County, South Carolina, and being more particularly 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 Register of Deeds for Horry County, South Carolina, said plat being incorporated herein by this reference as fully as if set forth herein verbatim.

870

354

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF GEORGETOWN	)	CIVIL ACTION NO. <u>2006-CP-22-422</u>
LEON P. BUTLER, JR.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	PLAINTIFF'S POST TRIAL MOTIONS
	)	
BILLY WILSON,	)	
	)	
Defendant.	)	
	)	

TO: THE DEFENDANT BILLY WILSON and ROBERT W. MARING, ESQ., ATTORNEY
FOR THE DEFENDANT BILLY WILSON:

Based upon the evidence submitted at the trial of this case and the Plaintiff's Trial Brief, the Plaintiff Leon P. Butler, Jr., hereby moves this Court for a Directed Verdict upon the Plaintiff's cause of action against the Defendant for the following reasons:

1. The Ground Lease Agreement between the Plaintiff, as LESSOR, and the Defendant, as LESSEE, automatically renewed at the expiration of the option period ending May 14, 2002, and the Defendant Billy Wilson is therefore legally obligated to perform the obligations of the LESSEE for the lease period commencing May 15, 2002 and ending May 14, 2003.

The automatic renewal language contained in the Ground lease Agreement between the Plaintiff and the defendant is clear and unambiguous:

"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 supplied)

Paragraph 11 of the Plaintiff's Complaint alleges, and the Defendant's Answer admits, that the Lease Agreement automatically renewed at the expiration of the option period ending 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. Furthermore, the Defendant Billy Wilson conceded upon cross examination that he did not furnish written notice to the Plaintiff LESSOR, at least ninety (90) days prior to the expiration of the option period 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 option period. Under the plain language of the Ground Lease Agreement, the automatic renewal provision that the Defendant requested during the lease negotiations bound him to perform the obligations of the LESSEE for the lease period commencing May 15, 2002 and ending May 14, 2003.

The language of the Ground Lease Agreement clearly defines the obligation of the Defendant to furnish written, as opposed to oral, notice to the Plaintiff of his intention not to renew his lease obligation in order to avoid the automatic renewal provision of the Ground Lease Agreement. The Defendant contends that he orally expressed to the Plaintiff his intention not to renew his lease obligation. However, there is a lack of credible evidence to support the proposition that the Defendant orally expressed to the Plaintiff his intention not to renew his lease obligation. The Defendant concedes that he never spoke with the Plaintiff. The Defendant alleges 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 Lease Agreement for an additional one (1) year option period. Charley Ray denies that the Defendant Billy Wilson verbally notified him that the Defendant did not intend to exercise his option to extend the term

of the Lease Agreement for an additional one (1) year option period. The evidence is, at best, conflicting, and the Defendant exhibited conduct which belies his assertion that he did not intend to exercise his option to extend the term of the Lease Agreement for an additional one (1) year option period. Among other things: (1) the Defendant secured a building permit and made significant improvements to the Leased Premises in September of 2001 (Plaintiff's Exhibit #18) several months after he alleges 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 Lease Agreement; (2) the Defendant entered into an "Outdoor Rental Lighting" agreement with Santee Cooper on February 12, 2002, to erect additional improvements, at the Defendant's expense, on the Leased Premises (Plaintiff's Exhibit #18); (3) the Defendant continued to hold possession of the Leased Premises and conducted business operations on the Leased Premises after the expiration of the option period ending May 14, 2002 (Testimony of Billy Wilson; Testimony of Leon P. Butler, Jr.); (4) the Defendant collected and retained billboard lease revenue in July of 2002, which the Defendant was entitled to receive only if the Defendant was in lawful possession of the Leased Premises at that time. (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). The evidence presented by the Defendant certainly does not carry the Defendant's burden of proof upon the issue of oral notice.

2. The Plaintiff, Leon P. Butler, Jr., produced competent evidence that when the Defendant abandoned the Leased Premises the Defendant abandoned a partially burned mobile home, a truck, and an illuminated sign on the Leased Premises. (Testimony of Leon P. Butler,

Jr.; Plaintiff's Exhibits # 26, 27, 28 and 29). The Defendant conceded upon cross examination that he abandoned the items depicted in Plaintiff's Exhibits # 26, 27, 28 and 29 when he abandoned the Leased Premises. The Plaintiff testified that when he re-let 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.

3. The Plaintiff, Leon P. Butler, Jr., produced competent evidence that he is entitled to reimbursement for 2002 Horry County property taxes in the amount of \$4,982.87 that he paid on March 12, 2003. Upon establishing that the Ground Lease Agreement between the Plaintiff, as LESSOR, and the Defendant, as LESSEE, automatically renewed at the expiration of the option period ending May 14, 2002, the Plaintiff established the Defendant Billy Wilson's legal obligation under the terms of the Ground Lease Agreement to pay the 2002 Horry County property taxes in the amount of \$4,982.87.

4. The Plaintiff, Leon P. Butler, Jr., produced competent evidence that he is entitled to reimbursement for a portion of the 2003 Horry County property taxes, in the amount of \$1,800.75, that he paid on January 9, 2004. Upon establishing that the Ground Lease Agreement between the Plaintiff, as LESSOR, and the Defendant, as LESSEE, automatically renewed at the expiration of the option period ending May 14, 2002, the Plaintiff established the Defendant Billy Wilson's legal obligation under the terms of the Ground Lease Agreement to pay the allocable portion of the 2003 Horry County property taxes that accrued from January 1, 2003 through May 14, 2003 in the amount of \$1,800.75.

5. The Plaintiff, Leon P. Butler, Jr., is entitled to prejudgment interest on all amounts owed by the Defendant, Billy Wilson, for rent and taxes. A Plaintiff is entitled to prejudgment interest, "[I]n 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." §34-31-20(a) South Carolina Code of Laws Ann. (1976) as amended.

In the present case, the Plaintiff, Leon P. Butler, Jr., and the Defendant, Billy Wilson, were both sophisticated businessmen who entered into a detailed Commercial Ground Lease Agreement consisting of NINETEEN (19) pages. There were extensive lease negotiations over a course of several months. Both the Plaintiff and the Defendant were represented by legal counsel during the negotiations. Legal counsel for both parties reviewed several prior drafts of the Lease Agreement and made several changes to the Lease Agreement to make sure that the final draft of the Lease Agreement addressed all issues that may have arisen which would cause a dispute between the Plaintiff and the Defendant. Specifically Paragraph 29 of the Commercial Ground Lease Agreement dealt with amount of payment owed by the Defendant to the Plaintiff and when payment was due to the Plaintiff regarding the option period that is in dispute between the Plaintiff and the Defendant. Paragraph 29 of the Commercial 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 Lease Agreement terms regarding when the payment is due and the amount owed are sufficiently specific to determine the scope of the duties and obligations required by both parties under the terms and conditions of the Lease Agreement. This court should therefore apply the analysis set forth in Babb v. Rothrock, 310 S.C. 350, 426 S.E.2d 789 (1993), Smith-Hunter Construction Company, Inc. v. Hopson, 365 S.C. 125, 616 S.E.2d 419 (2005) and Butler Contracting, Inc., v. Court Street LLC, 369 S.C. 121, 631 S.E.2d 252 (2006). In Babb, the Supreme Court held that the 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, 310 S.C. at 353, 426 S.E.2d at 791. See also, Smith-Hunter, 365 S.C. at 128, 616 S.E.2d at 421; Butler, 369 S.C. at 133, 631 S.E.2d at 259; 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 addition, our Supreme Court in Butler 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 134, 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) (same) and Southern Welding Works, Inc., v. K & S Constr. Co., 286 S.C. 158, 164, 332 S.E.2d 102, 106 (Ct. App. 1985). (same).

It is well settled in South Carolina that the 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, 310 S.C. at 353, 426 S.E.2d at 791. See also, Smith-Hunter, 365 S.C. at 128, 616 S.E.2d at 421; Butler, 369 S.C. at 133, 631 S.E.2d at 259; and Ancrum v. Slone, 29 S.C.L (2 Speers) 594 (1844). Black's Law Dictionary defines sum certain as "any amount that is fixed, settled, or exact." Black's Law Dictionary (8th ed. 2004). By the terms and conditions of the Commercial Ground Lease Agreement, the parties agreed that at the commencement of the fourth one (1) year option period, beginning May 15, 2002, the payment of rent was due and demandable; in addition, the parties agreed that the amount owed under the Lease Agreement was a fixed, settled and exact amount of FIFTY THOUSAND AND 00/100 (\$50,000.00) DOLLARS.

The mere fact that the sum due is disputed by the Defendant, Billy Wilson, does not render the Plaintiff's claim unliquidated for the purposes of an award of prejudgment interest. See, Babb 310 S.C. 350, 426 S.E.2d 789. Using the proper test established by our Supreme Court in Babb and followed by the Court in Smith-Hunter and the Court in Butler, the measure of recovery is fixed by conditions existing at the time the claim arose. Id., 310 S.C. at 353, 426 S.E.2d at 791. 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. On May 15, 2002, the Plaintiff was in compliance under the terms and conditions of the Lease Agreement. The Defendant, Billy Wilson, agreed to pay to the Plaintiff, Leon P. Butler, Jr., in advance, at the commencement of the option period on May 15, 2002, rent in the amount of FIFTY THOUSAND AND 00/100 (\$50,000.00) DOLLARS, unless the Defendant, Billy Wilson, furnished written notice to the Plaintiff, Leon P. Butler, Jr.,...of his intention not to exercise his option to extend the term of this Lease Agreement. Here, no written

notice was furnished by the Defendant Billy Wilson and he remained in possession of the premises at the commencement of the option period, May 15, 2002; therefore the measure of recovery was fixed on May 15, 2002.

The Court in Butler 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.” (Emphasis added) Butler, 369 S.C. at 134, 631 S.E.2d at 259. See also, Lee, 352 S.C. at 88-99, 572 S.E.2d at 302 and Southern Welding Works, Inc., 286 S.C. at 164, 332 S.E.2d at 106. In addition, see 22 Am. Jur. 2d Damages § 698, stating that mitigation is a defense. The Defendant, Billy Wilson, alleges that the Plaintiff, Leon P. Butler, Jr., is not entitled to prejudgment interest based on the false premise that the Plaintiff had a duty to mitigate damages. The duty to mitigate damages is a defense that the Defendant, Billy Wilson, has raised to the Plaintiff’s claim for rent due under the Ground Lease Agreement. Under a strict reading of the Butler case, our Supreme Court has stated that the right of a party to prejudgment interest is based on the character of the claim and not a defense to it, nor is the right of a party to prejudgment interest affected by the rights to discount or offset claimed by the opposing party. Here, the Defendant’s alleged defense of mitigation and claim to mitigation cannot be used to negate or trump the Plaintiff’s right to prejudgment interest, and as such, the Plaintiff is entitled to prejudgment interest.

The Defendant in his trial brief relied solely on Vaughn Development, Inc. v. Westvaco Development Corp., 352 S.C. 576, 642 S.E.2d 757 (Ct. App. 2007), to stand for a proposition of law that would allegedly not entitle the Plaintiff to prejudgment interest on the amount owed by the Defendant. Vaughn Development, Inc., however is not applicable here. In Vaughn

Development, Inc., the Court of Appeals held that the purchaser of property for a residential development was not entitled to an award of prejudgment interest on a breach of contract award against the vendor for the unpaid balance owed for sewer installation because the measure of damages was not fixed. In Vaughn Development, Inc., the contract provided that the sewer installation "shall be adequate and sufficient to provide such quantities, pressures, and capacities as will permit the utilization of the Property as herein contemplated...." The Vaughn Development, Inc. court found that the contract by its terms was not sufficiently specific to determine the extent of work required and the duties and obligations of the parties. The court further found that the parties disputed the methods of installation and whether Westvaco would install the sewer or whether Vaughn Development would hire a subcontractor to do the necessary work, and that all such issues had not been addressed in the contract and therefore the amount of damages could only be measured after a determination of the issues was made.

The uncertainty regarding the extent and nature of the construction required under the terms of the contract in Vaughn Development, Inc., is the primary factor that substantially distinguishes the Vaughn Development, Inc. case from the present case when determining whether a plaintiff is entitled to prejudgment interest and Vaughn Development, Inc., does not apply to the present case.

6. In addition to the above amounts, the Defendant is obligated to pay all of the expenses incurred by the Plaintiff in collecting unpaid obligations pursuant to the Ground Lease Agreement, including a reasonable attorney's fee (Paragraph 18 Default). The Plaintiff has testified concerning collection fees accrued to date and the Plaintiff's attorney fees continue to accrue. The Plaintiff's attorney will submit an Affidavit concerning accrued attorney fees prior to preparation of the Final Order in this matter.

Based upon the evidence submitted at the trial of this case and the Plaintiff's Trial Brief, the Plaintiff Leon P. Butler, Jr., hereby moves this Court for a Directed Verdict upon all of the affirmative defenses asserted by the Defendant for both insufficiency of the defenses as a matter of law and failure of proof of facts to support the asserted defenses.

7. Upon the Defendant's abandonment of the 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. While the South Carolina Supreme Court has not specifically addressed this issue, the weight of authority is 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..."

Other authorities have likewise set forth the majority view that is often referred to as the "traditional view":

"It is hornbook law that when a party to a contract breaches the contract, the nonbreaching party must take steps to mitigate its damages. Because a lease is, however, a creature of the law of real property, many courts have rejected the application of that principle of contract law to the situation where a lessee breaches a lease by abandoning the premises prior to the expiration of the lease term. Many courts follow the traditional view that a lease is a conveyance of an estate in real property for a term and, as such, the lessor may remain out of possession, allow the premises to remain vacant for the remainder of the term, and sue the tenant for the rent that accrues under the lease. Accordingly, under the traditional view, once the lease is executed, the lessee's obligation to pay rent is fixed according to its terms and a landlord is under no obligation or duty to the tenant to relet, or attempt to relet, the abandoned premises to minimize damages. Other justifications for not imposing a duty to mitigate damages on a landlord have been set forth. One court, while acknowledging that a more modern and just viewpoint might be to require mitigation of damages, observed that if the parties so intend, a clause can readily be inserted in a lease to the effect that the landlord's consent to assignment or subletting should not

be withheld unreasonably. Another court stated that a tenant cannot by its own wrong in abandoning the premises impose such a duty upon the landlord. One court also pointed out that parties who engage in transactions based on prevailing law must be able to rely on the stability of such precedents, and that in business transactions particularly, the certainty of settled rules is often more important than whether the established rule is better than another or even whether it is the "correct" rule."

75 ALR 5th at 1

Case Citations:

In holding that the landlord has no duty to mitigate damages by rerenting the property abandoned by a tenant under a lease, the court explained in Sancourt Realty Corporation v. Dowling, 220 A.D. 660, 222 N.Y.S. 288 (1st Dep't 1927), that rent is a fixed compensation for a vested interest and that the contract, to that extent, is executed by the landlord, and the tenant's obligation to pay rent as compensation for the estate is absolute.

The court in Atkinson v. Rosenthal, 33 Mass. App. Ct. 219, 598 N.E.2d 666 (1992), noted that at common-law there was no duty by a landlord to mitigate damages if a tenant vacated the leased premises, pointing out that a lease was the grant of an estate in land, and the landlord owed the tenant only quiet enjoyment. A tenant was considered the owner of the leased premises for a term, the court observed, and if the tenant chose to abandon the premises, that was no concern of the landlord. The court also noted, however, that if a landlord reenters the leased premises for the purpose of reletting, as provided in a written lease, the landlord owes the tenant a duty of reasonable diligence in obtaining fair rent.

A landlord is under no affirmative duty to mitigate any damages arising under a default on a lease agreement by a tenant. Bowdoin Square, L.L.C. v. Winn-Dixie Montgomery, Inc., 873 So. 2d 1091 (Ala. 2003).

If a tenant abandons leased premises without authorization prior to the expiration of the term, the landlord is not required to mitigate damages by re-letting the premises; rather, he may allow the premises to remain vacant and hold the tenant responsible for accruing rent. Allen v. Harkness Stone Co., Inc., 609 S.E.2d 647 (Ga. Ct. App. 2004), reconsideration denied, (Jan. 26, 2005).

In Minnesota, commercial landlords are under no obligation to mitigate damages by reletting abandoned premises. Odens Family Properties, LLC v. Twin Cities Stores, Inc., 393 F. Supp. 2d 824 (D. Minn. 2005) (applying Minnesota law).

Upon a tenant's default, a landlord normally has three options: (1) the landlord can remain out of possession, treat the lease as subsisting and recover rent; (2) the landlord can give notice to the tenant, resume possession and attempt to mitigate the tenant's damages by reletting the premises; or (3) the landlord can re-enter, resume possession in its own right and effectively terminate the lease. Miller v. Gammon & Sons, Inc., 67 S.W.3d 613 (Mo. Ct. App. W.D. 2001).

Commercial landlord had no duty to mitigate damages by reletting premises after tenant vacated prior to expiration of lease. 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).

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 Limited Partnership v. Pier 1 Imports, 113 Ohio App. 3rd 104, 680 N.E.2d 644, 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 or against public policy.

In the present matter, the term negating any duty to mediate 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).

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 (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."

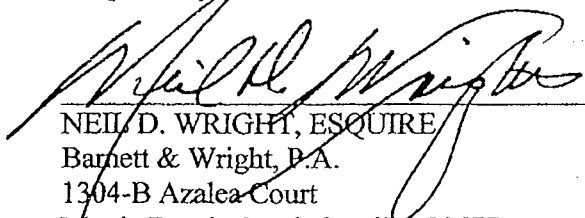
This lease provision is clear and unambiguous and must be given its full legal effect.

As the foregoing authorities demonstrate, the Plaintiff LESSOR, who did not re-enter and take possession of the Leased Premises following the abandonment of the Leased Premises by the Defendant LESSEE, had no duty to mitigate damages during the lease period commencing May 15, 2002 and ending May 14, 2003. However, assuming solely for the sake of argument,

that the Plaintiff LESSOR had a legal duty to relet the Leased Premises for the benefit of the abandoning Defendant LESSEE, the Defendant LESSEE has failed to bear his burden of proof upon his affirmative defense concerning the amount of mitigation offset that the Defendant LESSEE is entitled to receive. Brendle's Stores, Inc., OTR, et al., 978 F.2d 150 (C.A. 4 [SC] 1992). The Defendant LESSEE did not offer the Plaintiff a substitute tenant or exercise its right under the Ground Lease Agreement to assign its leasehold interest or sublease the Leased Premises. The Defendant failed to offer any evidence that the Leased Premises were readily rentable for the portion of the lease year remaining after the Defendant abandoned the Leased Premises and left significant amounts of trash to be removed. Moreover, the Defendant offered no evidence of the reasonable rental value that the Plaintiff could have realized if the Plaintiff had attempted to re-let the Leased Premises for that portion of the lease year. Indeed, the only reasonable conclusion that may be drawn from the evidence in the record is that the property is difficult to rent because of its size, and is suitable for a limited category of businesses. The property has been leased twice. On each occasion it was leased to a mobile home dealer, and on each occasion the property was on the market for approximately two (2) years prior to finding a suitable tenant.

8. The Defendant has failed to bear his burden of proof upon his additional affirmative defenses of novation, accord and satisfaction, and laches.

Respectfully submitted


NEIL D. WRIGHT, ESQUIRE
Barnett & Wright, P.A.
1304-B Azalea Court
Myrtle Beach, South Carolina 29577
(843) 449-0781
Attorneys for the Plaintiff

Myrtle Beach, SC

November 2, 2007

Defendant Billy Wilson submitted a "Letter of Intent" to lease the property on or about February 25, 1998. (Testimony of Charley Ray; Plaintiff's Exhibits #1 through #).

The Defendant Billy Wilson is a sophisticated businessman. Prior to commencing lease negotiations with the Plaintiff's real estate agent, the Defendant Billy Wilson had acquired substantial experience as both a land developer and a mobile home dealer. (Testimony of Billy Wilson). Indeed, the source of the Defendant's interest in leasing the Plaintiff's property was his desire to acquire a site for 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. (Testimony of Billy Wilson). The Defendant Billy Wilson 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 February 25, 1998, there were extensive lease negotiations over a course of several months. Both the Plaintiff and the Defendant were represented by legal counsel during the negotiations. (Testimony of Leon P. Butler, Jr.; Testimony of Billy Wilson; Plaintiff's Exhibits #13 and #14). The equality of the bargaining position of the parties during the negotiations is demonstrated by the various requests and responses set forth in a series of written modifications to the parties' original "Letter of Intent." (Plaintiff's Exhibits #1 through #14; Testimony of Charley Ray; Testimony of Leon P. Butler, Jr.; and Testimony of Billy Wilson). The modification which is the focal point of the dispute between the Plaintiff and the Defendant is a modification which the Defendant insisted upon. The Defendant's initial "Letter of Intent" called for a one year lease with an option to extend the lease for 11 additional one year terms. Under that proposal the Defendant Lessee was obligated to notice the Plaintiff Lessor "90 days prior to the expiration of

each terms of my intention to renew the lease agreement.” (Plaintiff's Exhibit #1) The Defendant Lessee subsequently proposed that “The Lease agreement shall automatically renew from year to year, unless notice is given by Wilson 90 days prior to the expiration date.” (Plaintiff's Exhibit #9) The Plaintiff Lessor agreed to the Defendant's request that the Lease Agreement be modified to provide for the automatic annual renewal of the Lease Agreement and the final Lease Agreement between the parties provides for automatic annual renewal of the Lease Agreement...“Unless the LESSEE furnishes written notice to the LESSOR...of his intention not to exercise his option to extend the term of this Lease Agreement...” (Court's Exhibit #2 emphasis supplied).

The 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 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. (Admitted by the Defendant's Answer to Paragraph 11 of the Plaintiff's Complaint.)

Although the Defendant's Answer admits that the Lease Agreement automatically renewed at the expiration of the option period ending May 14, 2002, (that is, for the period commencing May 15, 2002 and ending May 14, 2003) and the Defendant further concedes that he did not furnish written notice to the LESSOR, at least ninety (90) days prior to the expiration

of the option period 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 option period, the Defendant 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 Lease Agreement for an additional one (1) year option period. (Testimony of Billy Wilson) Charley Ray denies that the Defendant Billy Wilson verbally notified him that the Defendant did not intend to exercise his option to extend the term of the Lease Agreement for an additional one (1) year option period. (Testimony of Charley Ray). Moreover, the Defendant's actions belie his assertion that he did not intend to exercise his option to extend the term of the Lease Agreement for an additional one (1) year option period. Among other things: (1) the Defendant secured a building permit and made significant improvements to the Leased Premises in September of 2001 (Plaintiff's Exhibit #18) several months after he alleges 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 Lease Agreement; (2) the Defendant entered into an "Outdoor Rental Lighting" agreement with Santee Cooper on February 12, 2002, to erect additional improvements, at the Defendant's expense, on the Leased Premises (Plaintiff's Exhibit #18); (3) the Defendant continued to hold possession of the Leased Premises and conducted business operations on the Leased Premises after the expiration of the option period ending May 14, 2002 (Testimony of Billy Wilson; Testimony of Leon P. Butler, Jr.); (4) the Defendant collected and retained billboard lease revenue in July of 2002, which the Defendant was entitled to receive only if the Defendant was in lawful possession of the Leased Premises at that time. (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)

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 reasonably interpreted as normal business operations of the Defendant. As the Plaintiff had not received written notice that the Defendant did not intend to exercise his option to extend the term of the Lease Agreement for an additional one (1) year option period, and as the Plaintiff observed the continuing business operations of the Defendant upon the Leased Premises during the summer of 2002, the Plaintiff reasonably believed that the Lease Agreement had automatically renewed for the period commencing May 15, 2002 and ending May 14, 2003 and that the Defendant was merely late in tendering the agreed upon rent. (Testimony of Leon P. Butler, Jr.)

It was not until the late summer or early fall of 2002 when the Plaintiff again drove by the Leased Premises and observed that the Defendant's mobile home inventory had apparently been removed from the Leased Premises. The Plaintiff does not know the date upon which the Defendant Billy Wilson abandoned the Leased Premises. (Testimony of Leon P. Butler, Jr.). The Defendant Billy Wilson does not know the date upon which he abandoned the Leased Premises. (Testimony of Billy Wilson). At the time that the Plaintiff observed that the Defendant's mobile home inventory had apparently been removed from the Leased Premises, he noted that the Defendant's mailbox and freestanding business signs advertising the Defendant's business and telephone number were still located upon the Leased Premises. The Plaintiff further observed that the Defendant had apparently abandoned a partially burned mobile home, a truck, and an illuminated sign on the Leased Premises. (Testimony of Leon P. Butler, Jr.; Plaintiff's Exhibits # 26, 27, 28 and 29). At that time, the Plaintiff, through his legal counsel, notified the Defendant

of his default in his obligation to pay rent and further notified the Defendant of his right to cure his default. (Plaintiff's Exhibit #24).

The Plaintiff did not re-enter and retake possession of the Leased Premises until May 15, 2003, as the Plaintiff understood that the Lease Agreement had automatically renewed and that the Defendant was entitled to possession of the Leased Premises until May 14, 2003. (Testimony of Leon P. Butler, Jr.) After May 14, 2003, the Plaintiff's real estate agent, Charley Ray, again placed a sign upon the Leased Premises to advise the public of the availability of the property for lease. Despite Mr. Ray's efforts 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).

LEGAL ISSUES

- I. **Did the Ground Lease Agreement between the Plaintiff, as LESSOR, and the Defendant, as LESSEE, automatically renew at the expiration of the option period ending May 14, 2002, so that 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?**

The automatic renewal language contained in the Ground lease Agreement between the Plaintiff and the defendant is clear and unambiguous:

"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 supplied)

This Court is obligated to construe the provisions of the Ground Lease Agreement according to the terms that the parties used. As our South Carolina Court of Appeals recently stated:

"When a contract is unambiguous a court must construe its provisions according to the terms the parties used, understood in their plain, ordinary, and popular sense."

S.C. Farm Bureau Mut. Ins. Co. v. Oates, 356 S.C. 378, 381, 588 S.E.2d 643, 645 (Ct.App.2003).

Moreover, this Court does not have authority to rewrite the contract that the parties have made.

As our South Carolina Supreme Court has stated:

“The general principle in this State is that it is not the function of the court to rewrite contracts for parties.”

Lewis v. Premium Inv. Corp., 351 S.C. 167, 171, 568 S.E.2d 361, 363 (2002).

When the clear language of the Ground Lease Agreement is considered along with the conceded facts in this case, it is clear that the Ground Lease Agreement between the Plaintiff, as LESSOR, and the Defendant, as LESSEE, automatically renewed at the expiration of the option period ending May 14, 2002 and that 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.

Paragraph 11 of the Plaintiff's Complaint alleges, and the Defendant's Answer admits, that the Lease Agreement automatically renewed at the expiration of the option period ending 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. Furthermore, the Defendant Billy Wilson conceded upon cross examination that he did not furnish written notice to the Plaintiff LESSOR, at least ninety (90) days prior to the expiration of the option period 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 option period. Under the plain language of the Ground Lease Agreement, the automatic renewal provision that the Defendant requested during the lease negotiations bound him to perform the obligations of the LESSEE for the lease period commencing May 15, 2002 and ending May 14, 2003.

While the language of the Ground Lease Agreement clearly defines the obligation of the Defendant to furnish written, as opposed to oral, notice to the Plaintiff of his intention not to renew his lease obligation in order to avoid the automatic renewal provision of the Ground Lease Agreement, there is a lack of credible evidence to support the proposition that the Defendant orally expressed to the Plaintiff his intention not to renew his lease obligation. The Defendant concedes that he never spoke with the Plaintiff. The Defendant alleges 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 Lease Agreement for an additional one (1) year option period. Charley Ray denies that the Defendant Billy Wilson verbally notified him that the Defendant did not intend to exercise his option to extend the term of the Lease Agreement for an additional one (1) year option period. The evidence is, at best, conflicting, and, as noted above, the Defendant exhibited conduct which belies his assertion that he did not intend to exercise his option to extend the term of the Lease Agreement for an additional one (1) year option period. The evidence presented by the Defendant certainly does not carry the Defendant's burden of proof upon the issue of notice.

II. Was the Defendant under a 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, and, if so, has the Defendant satisfied his burden of proof with respect to the amount of damages that the Plaintiff could have avoided?

Upon the Defendant's abandonment of the 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. While the South Carolina Supreme Court has not specifically addressed this issue, the weight of authority is that when a 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.

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..."

Other authorities have likewise set forth the majority, often referred to as the "traditional view":

"It is hornbook law that when a party to a contract breaches the contract, the nonbreaching party must take steps to mitigate its damages. Because a lease is, however, a creature of the law of real property, many courts have rejected the application of that principle of contract law to the situation where a lessee breaches a lease by abandoning the premises prior to the expiration of the lease term. Many courts follow the traditional view that a lease is a conveyance of an estate in real property for a term and, as such, the lessor may remain out of possession, allow the premises to remain vacant for the remainder of the term, and sue the tenant for the rent that accrues under the lease. Accordingly, under the traditional view, once the lease is executed, the lessee's obligation to pay rent is fixed according to its terms and a landlord is under no obligation or duty to the tenant to relet, or attempt to relet, the abandoned premises to minimize damages. Other justifications for not imposing a duty to mitigate damages on a landlord have been set forth. One court, while acknowledging that a more modern and just viewpoint might be to require mitigation of damages, observed that if the parties so intend, a clause can readily be inserted in a lease to the effect that the landlord's consent to assignment or subletting should not be withheld unreasonably. Another court stated that a tenant cannot by its own wrong in abandoning the premises impose such a duty upon the landlord. One court also pointed out that parties who engage in transactions based on prevailing law must be able to rely on the stability of such precedents, and that in business transactions particularly, the certainty of settled rules is often more important than whether the established rule is better than another or even whether it is the "correct" rule."

75 ALR 5th at 1

Case Citations:

In holding that the landlord has no duty to mitigate damages by rerenting the property abandoned by a tenant under a lease, the court explained in Sancourt Realty Corporation v. Dowling, 220 A.D. 660, 222 N.Y.S. 288 (1st Dep't 1927), that rent is a fixed compensation for a vested interest and that the contract, to that extent, is executed by the landlord, and the tenant's obligation to pay rent as compensation for the estate is absolute.

The court in Atkinson v. Rosenthal, 33 Mass. App. Ct. 219, 598 N.E.2d 666 (1992), noted that at common-law there was no duty by a landlord to mitigate damages if a tenant vacated the

leased premises, pointing out that a lease was the grant of an estate in land, and the landlord owed the tenant only quiet enjoyment. A tenant was considered the owner of the leased premises for a term, the court observed, and if the tenant chose to abandon the premises, that was no concern of the landlord. The court also noted, however, that if a landlord reenters the leased premises for the purpose of reletting, as provided in a written lease, the landlord owes the tenant a duty of reasonable diligence in obtaining fair rent.

A landlord is under no affirmative duty to mitigate any damages arising under a default on a lease agreement by a tenant. Bowdoin Square, L.L.C. v. Winn-Dixie Montgomery, Inc., 873 So. 2d 1091 (Ala. 2003).

If a tenant abandons leased premises without authorization prior to the expiration of the term, the landlord is not required to mitigate damages by re-letting the premises; rather, he may allow the premises to remain vacant and hold the tenant responsible for accruing rent. Allen v. Harkness Stone Co., Inc., 609 S.E.2d 647 (Ga. Ct. App. 2004), reconsideration denied, (Jan. 26, 2005).

In Minnesota, commercial landlords are under no obligation to mitigate damages by reletting abandoned premises. Odens Family Properties, LLC v. Twin Cities Stores, Inc., 393 F. Supp. 2d 824 (D. Minn. 2005) (applying Minnesota law).

Upon a tenant's default, a landlord normally has three options: (1) the landlord can remain out of possession, treat the lease as subsisting and recover rent; (2) the landlord can give notice to the tenant, resume possession and attempt to mitigate the tenant's damages by reletting the premises; or (3) the landlord can re-enter, resume possession in its own right and effectively terminate the lease. Miller v. Gammon & Sons, Inc., 67 S.W.3d 613 (Mo. Ct. App. W.D. 2001).

Commercial landlord had no duty to mitigate damages by reletting premises after tenant vacated prior to expiration of lease. 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).

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 Limited Partnership v. Pier 1 Imports, 113 Ohio App. 3rd 104, 680 N.E.2d 644, 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 or against public policy.

In the present matter, the term negating any duty to mediate 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).

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 (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 and must be given its full legal effect.

As the foregoing authorities demonstrate, the Plaintiff LESSOR, who did not re-enter and take possession of the Leased Premises following the abandonment of the Leased Premises by the Defendant LESSEE, had no duty to mitigate damages during the lease period commencing May 15, 2002 and ending May 14, 2003. However, assuming solely for the sake of argument, that the Plaintiff LESSOR had a legal duty to relet the Leased Premises for the benefit of the abandoning Defendant LESSEE, the Defendant LESSEE has failed to bear its burden of proof upon its affirmative defense concerning the amount of mitigation offset that the Defendant LESSEE is entitled to receive. Brendle's Stores, Inc., OTR, et al., 978 F.2d 150 (C.A. 4 [SC] 1992). The Defendant LESSEE did not offer the Plaintiff a substitute tenant or exercise its right under the Ground Lease Agreement to assign its leasehold interest or sublease the Leased Premises. The Defendant failed to offer any evidence that the Leased Premises were readily rentable for the portion of the lease year remaining after the Defendant abandoned the Leased Premises and left significant amounts of trash to be removed. Moreover, the Defendant offered no evidence of the reasonable rental value that the Plaintiff could have realized if the Plaintiff

had attempted to re-let the Leased Premises for that portion of the lease year. Indeed, the only reasonable conclusion that may be drawn from the evidence in the record is that the property is difficult to rent because of its size, and is suitable for a limited category of businesses. The property has been leased twice. On each occasion it was leased to a mobile home dealer, and on each occasion the property was on the market for approximately two (2) years prior to finding a suitable tenant.

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

The Plaintiff, Leon P. Butler, Jr., seeks prejudgment interest on the amount owed by the Defendant, Billy Wilson. A Plaintiff is entitled to prejudgment interest, "[I]n 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." §34-31-20(a) South Carolina Code of Laws Ann. (1976) as amended.

The Defendant in his trial brief relied solely on Vaughn Development, Inc. v. Westvaco Development Corp., 352 S.C. 576, 642 S.E.2d 757 (Ct. App. 2007), to stand for a proposition of law that would allegedly defeat the Plaintiff's right to prejudgment interest on the amount owed by the Defendant. Vaughn Development, Inc., however is not applicable here. In Vaughn Development, Inc., the South Carolina Court of Appeals held that the purchaser of property for a residential development was not entitled to an award of prejudgment interest on a breach of contract award against the vendor for the unpaid balance owed for sewer installation because the measure of damages was not fixed. In Vaughn Development, Inc., the contract provided that the sewer installation "shall be adequate and sufficient to provide such quantities, pressures, and capacities as will permit the utilization of the Property as herein contemplated...." The Vaughn

Development, Inc. court found that the contract by its terms was not sufficiently specific to determine the extent of work required and the duties and obligations of the parties. The court further found that the parties disputed the methods of installation and whether Westvaco would install the sewer or whether Vaughn Development would hire a subcontractor to do the necessary work, and that all such issues had not been addressed in the contract and therefore the amount of damages could only be measured after a determination of the issues was made.

The uncertainty regarding the extent and nature of the construction required under the terms of the contract in Vaughn Development, Inc., is the primary factor that substantially distinguishes the Vaughn Development, Inc. case from the present case when determining whether a plaintiff is entitled to prejudgment interest. Vaughn Development, Inc., therefore does not apply to the facts of the present case.

In the present case, the Plaintiff, Leon P. Butler, Jr., and the Defendant, Billy Wilson, were both sophisticated businessmen who entered into a detailed Ground Lease Agreement consisting of NINETEEN (19) pages. There were extensive lease negotiations over a course of several months. Both the Plaintiff and the Defendant were represented by legal counsel during the negotiations who reviewed drafts of the Lease Agreement and made several changes to the Lease Agreement before execution of the final draft to assure that the final draft of the Lease Agreement addressed all issues of concern to the parties to the Lease Agreement. Paragraph 29 of the Ground Lease Agreement deals specifically with the amount of rent owed 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. 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 provisions of the Ground Lease Agreement which specify when the rent payment is due and the amount of the rent owed 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, and therefore Vaughn Development, Inc., does not apply. With respect to the issue of pre-judgment interest, this court should apply the rule adhered to in Babb v. Rothrock, 310 S.C. 350, 426 S.E.2d 789 (1993), Smith-Hunter Construction Company, Inc. v. Hopson, 365 S.C. 125, 616 S.E.2d 419 (2005) and Butler Contracting, Inc., v. Court Street LLC, 369 S.C. 121, 631 S.E.2d 252 (2006).

In Babb, the South Carolina Supreme Court held that the 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, 310 S.C. at 353, 426 S.E.2d at 791. See also, Smith-Hunter, 365 S.C. at 128, 616 S.E.2d at 421; Butler, 369 S.C. at 133, 631 S.E.2d at 259; 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 addition, our Supreme Court in Butler 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 134, 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) (same) and Southern Welding Works, Inc., v. K & S Constr. Co., 286 S.C. 158, 164, 332 S.E.2d 102, 106 (Ct. App. 1985). (same).

It is well settled in South Carolina that the 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, 310 S.C. at 353, 426 S.E.2d at 791. See also, Smith-Hunter, 365 S.C. at 128, 616 S.E.2d at 421; Butler, 369 S.C. at 133, 631 S.E.2d at 259; and Ancrum v. Slone, 29 S.C.L (2 Speers) 594 (1844). Black’s Law Dictionary defines sum certain as “any amount that is fixed, settled, or exact.” Black’s Law Dictionary (8th ed. 2004). By the terms and conditions of the Ground Lease Agreement, the parties agreed that at the commencement of the fourth one (1) year option period, beginning May 15, 2002, the payment of rent was due and demandable; in addition, the parties agreed that the amount owed under the Lease Agreement was a fixed, settled and exact amount of FIFTY THOUSAND AND 00/100 (\$50,000.00) DOLLARS. Indeed, the Plaintiff, by and through his real estate agent, demanded payment of the sum of \$50,000.00 at the commencement of the one (1) year option period beginning May 15, 2002 (Plaintiff’s Exhibit #21)

The mere fact that the sum due is disputed by the Defendant, Billy Wilson, does not render the Plaintiff's claim unliquidated for the purposes of an award of prejudgment interest. See, Babb 310 S.C. 350, 426 S.E.2d 789. Using the proper test established by our Supreme Court in Babb and followed by the Court in Smith-Hunter and the Court in Butler, the measure of recovery is fixed by conditions existing at the time the claim arose. Id., 310 S.C. at 353, 426 S.E.2d at 791. 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. The Lease Agreement automatically renewed on May 15, 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. The automatic renewal provision that the Defendant insisted upon during the lease negotiations bound the Defendant to perform the obligations of the LESSEE for the lease period commencing May 15, 2002 and ending May 14, 2003. The Defendant Billy Wilson 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 was therefore fixed on May 15, 2002.

The Court in Butler 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." (Emphasis added) Butler, 369 S.C. at 134, 631 S.E.2d at 259. See also, Lee, 352 S.C. at 88-99, 572 S.E.2d at 302 and Southern Welding Works, Inc., 286 S.C. at 164, 332 S.E.2d at 106. In addition, see 22 Am. Jur. 2d Damages § 698, stating that mitigation is a defense. The Defendant Billy Wilson's argument that the Plaintiff is not entitled to prejudgment interest is based upon the false premise that the Plaintiff had a duty to mitigate damages. Plaintiff's claim

for rent due under the Ground Lease Agreement is established by the terms and provisions of the Ground Lease Agreement. Mitigation is an affirmative defense that must be established by the Defendant. A close reading of the Butler case reveals that the right of a party to prejudgment interest is based upon the character of the claim and not upon a defense to it, nor is the right of a party to prejudgment interest affected by a right of discount or offset claimed by the opposing party. Here, the Defendant's alleged defense of mitigation and claim to mitigation cannot be used to negate or trump the Plaintiff's right to prejudgment interest, and as such, the Plaintiff is entitled to prejudgment interest.

Respectfully submitted

Myrtle Beach, SC

November 2, 2007

NEIL D. WRIGHT, ESQUIRE
Barnett & Wright, P.A.
1304-B Azalea Court
Myrtle Beach, South Carolina 29577
(843) 449-0781
Attorneys for the Plaintiff
Leon P. Butler, Jr.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF GEORGETOWN	)	CIVIL ACTION NO: 2006-CP-22-422
LEON P. BUTLER,	)	
	)	
PLAINTIFF,	)	
	)	MOTION FOR DIRECTED VERDICT
vs.	)	
	)	
BILLY WILSON,	)	
	)	
DEFENDANT.	)	

Defendant Billy Wilson moves before this court for a directed verdict on the grounds here below stated.

FIRST GROUND

1. Plaintiff has the burden of proving that Defendant breached the contract. Because of the way the contract is structured, in order to prove a breach, Plaintiff must prove there was no notice by Defendant that he did not intend to renew the lease. Plaintiff's failure failed to prove by a preponderance of the evidence that he did not receive notice that Defendant did not want to extend the lease for the May 15, 2002, to May 14, 2003, time period means that, as a matter of law, Defendant is entitled to a ruling in his favor by the Court.

a. The testimony of Plaintiff was as follows:

(1) That he had no communication with Defendant Billy Wilson at any time during the term of the contract.

(2) That all communications concerning the lease were through his agent, Charlie Ray.

(3) That Defendant had a right to rely on statements made by Charlie Ray.

(4) That the contract terms were verbally modified during the May 15, 2001, to May 15, 2002, period by agreement between Plaintiff's agent Charlie Ray and Defendant.

b. The testimony of Charlie Ray was as follows:

(1) That he was the agent for Leon Butler.

(2) That the contract terms were verbally modified during the May 15, 2001, to May 15, 2002, period.

(3) That he had no independent recollection of any of the facts that would substantiate Plaintiff's action before the Court.

(4) That it was possible that he had conversations with Defendant during the January-February 2002 time period but had no recollection of the substance of the conversations.

(5) That he wrote Billy Wilson a letter when the rent payment was not paid on May 15, 2002.

c. The testimony of Billy Wilson was as follows:

(1) That all communications concerning the lease were with Charlie Ray.

(2) That the mobile home business occupying the leased premises was losing money and he was going to shut the business down when he could sell or move the inventory on the leased premises.

(3) That he gave notice to Charlie Ray by telephone conversations in January of 2002 that he did not intend to renew the lease.

(4) That on a prior occasion the contract terms were verbally modified during the May 15, 2001 to May 15, 2002, period.

(5) That his attorney, David Durant, wrote Plaintiff's attorney a letter dated October 31, 2002, corroborating that Defendant had given Charlie Ray notice sometime in January or February of 2002. (See Plaintiff's Exhibit 23).

(6) That his former partner, Jackie Woodbury, was a witness to his telephone conversation with Charlie Ray as to the conversation with Charlie Ray on the issue of notice of non-renewal of the lease.

(7) That he had subsequent conversations with Charlie Ray that he was going to leave the property as quickly as he could, but due to his inventory, if he stayed over, that he would gladly pay for any pro-rata rents.

(8) That he received a letter dated June 3, 2002, from Charlie Ray telling him that Plaintiff would like for him to continue to lease the property. (Plaintiff's Exhibit 22).

d. The testimony of Defendant's witness, Jackie Woodbury, was as follows:

(1) That he is a business partner with Defendant Billy Wilson and former one-third (1/3) partner on the leased premises.

(2) That during the summer of 2001 he got out of the business in Little River and gave his interest to Defendant.

(3) That he had a remaining partnership with Defendant in the Green Sea dealership.

(4) That he and Defendant had a meeting in January 2002 regarding Defendant shutting down the Little River office.

(5) That Defendant asked him at this meeting to take some of the inventory off of the Little River lot and place it at the Green Sea business.

(6) That during the meeting this witness testified Billy Wilson placed a telephone call to a person that Defendant identified as Charlie Ray.

(7) That he heard Billy Wilson state that he was closing down the Little River Office and would not be remaining on the property.

e. The testimony of Defendant's witness, Betty Bryant, was as follows:

(1) That she was Defendant's bookkeeper and secretary at his Santee business.

(2) That she had a meeting with Defendant in January of 2002.

(3) As a result of that meeting, she requested that the Little River Office manager fax her a copy of the inventory at that location. (See Plaintiff's Exhibit 10). The facsimile date stamp on this document was January 31, 2002.

When all the testimony and exhibits are considered, Plaintiff has failed to prove that Defendant did not give verbal notice of his intention to renew the contract. This is an unusual case in that Plaintiff had no direct communication with Defendant. All communications were through his agent, Charlie Ray. His testimony was ambiguous at best. He admitted to having conversations with Defendant. This only corroborated Defendant's testimony and the witnesses' testimony verified that verbal notice was given.

A careful review of the exhibits does shed some light on the case at hand. First, the facsimile from the Little River office to the Santee office does show that Defendant was in the process of moving the inventory off the leased premises in January 2002, six(6) months prior to the renewal date. Thus corroborating his testimony that he did not intend to occupy the leased premises for the

May 15, 2002, to May 14, 2003, time period. The letter from Charlie Ray dated June 3, 2002, also sheds light on the state of affairs that existed at that time. Why would Charlie Ray state in this letter that Mr. Butler would like for him to continue to lease the premises or vacate unless he had already received notice from the Defendant that he did not intend to do so? This letter contradicts the testimony of Charlie Ray and Plaintiff in that they testified that they believed it was a mere oversight that the payment had not been made.

In order to show a breach of contract on the grounds stated in Plaintiff's complaint, it is necessary that Plaintiff prove by a preponderance of the evidence that neither he nor his agent Charlie Ray received notice that Defendant did not intend to renew his contract. Plaintiff has failed to meet his burden of proof. The contract contained a term that notice had to be in writing. Our courts have long held, as a matter of law, that any provision of a contract that requires written modification, which would include notice, is against the public policy of this state. Notice may be made verbally even though the contract itself states that it must be in writing. *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)

SECOND GROUND

Plaintiff failed to mitigate his damages by not making a reasonable good faith effort to re-lease the premises as follows:

1. The testimony of Plaintiff was as follows:
 - a. That he was aware that Defendant had vacated the leased premises during the late summer or early fall 2002.
 - b. That after he became aware that Defendant had vacated the premises, he contacted his attorney, Neil Wright, to send a letter to Defendant. (See Exhibit 24).
 - c. That he did not attempt to re-lease the premises until after the entire year had passed on May 14, 2003, at which time he called Charlie Ray to put up a sign. It is interesting to note that Plaintiff testified that, after the expiration of the one year term, he leased the property.
 - d. That he has no reason to believe that the letter (Plaintiff's Exhibit 24) sent from Defendant's attorney, David Durant, to Plaintiff's attorney was not received.
 - e. That he did not respond to Defendant's attorney's letter (Exhibit 24) which requested a response to Defendant's position that he gave verbal notice that he did not intend to extend the lease for the May 15, 2002, to May 14, 2003, term.

f. That the next action taken by Plaintiff was the filing of the Summons and Complaint almost three (3) years later.

2. The testimony of Charlie Ray was as follows:

a. He was contacted by Plaintiff to put up a sign sometime subsequent to the lease period expiring.

b. He could not remember the date, but said it was possible that the sign was not put up until after the lease period, which is subject of this action, had expired.

c. That he was a licensed realtor with over 30 years experience and a majority of his work is the leasing of commercial property.

d. That in order to properly lease a commercial property a person should hire a realtor, place the property on the multiple listing system (MLS), advertise by placing a sign on the property and advertise the property with other mediums.

e. That at a minimum, a person should at least place a "for lease" sign on the property.

3. The testimony of Billy Wilson was as follows:

a. He never saw any activity on the premises, which is the subject matter of this action, during the lease period that indicated Plaintiff was attempting to re-lease the premises.

b. That he told Charlie Ray that he was not going to occupy the premises for the May 15, 2002, to May 14, 2003, term.

c. That he had his attorney write a letter to Defendant's attorney stating that he was not going to occupy the premises and that he had previously given notice to Charlie Ray.

The law is well settled in South Carolina that a party claiming a breach of contract is under a duty to minimize his damages.

In order to meet his duty under the law to minimize his damages, Plaintiff must act reasonably within the bounds of common sense, fair dealing and use reasonable expenditures to re-lease the property. The duty to mitigate damages cannot be circumvented by language in a contract that attempts to negate this duty since the duty to mitigate is an unspoken part of every contract entered into in this state. A clause stating otherwise would be against the public policy. In addition, such a clause would be in the nature of a penalty, which is frowned upon by our courts. *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 legal hornbook, South Carolina Damages by Terry Richardson and Daniel Haltiwanger-Contract Damages 4-6.

This case is somewhat unique in that the Court need not look at the reasonableness of the Plaintiff's efforts to mitigate his damages because he testified that he made no effort. As a matter of law he is not entitled to the relief requested in his complaint. Plaintiff testified that he knew that Defendant had vacated the premises and his attorney had received notice from Defendant's attorney that he would not be occupying the premises. Therefore, the argument that he thought that the Defendant might regain possession is without merit. There was no evidence submitted which would even suggest such a possibility.

It is blatantly obvious that an owner of property cannot sit idly by after regaining possession of his property during a lease period, allow the property to remain vacant and do nothing to re-lease the property, and then seek damages under the terms of the lease.

THIRD GROUND

Plaintiff failed to provide competent evidence as to the costs of cleanup damage he is claiming in his complaint.

The testimony of Plaintiff was as follows:

- a. That he stated the cleanup damages would be approximately \$2,500.00.
- b. That he did not have any invoices or other evidence as to the costs of cleanup.
- c. That he never actually cleaned up the property.

Plaintiff's testimony is too speculative. No cleanup, no bills, and no evidence. Plaintiff has failed to carry the burden of proof and therefore his request for relief in this matter must be denied by the court.

FOURTH GROUND

Plaintiff is not entitled to prejudgment interest as a matter of evidence and as a matter of law on the following grounds:

The testimony of Plaintiff was as follows:

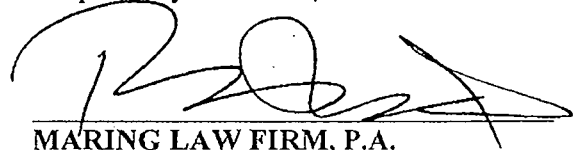
1. That the contract did not provide for any prejudgment interest.
2. That he was entitled to prejudgment interest as a matter of law.

First the contract and the testimony of Plaintiff clearly show that there is no right to prejudgment interest as a matter of contract. Therefore, for Plaintiff to prevail, he must have a statute on which to base his demand.

There is no applicable statutes in South Carolina allowing prejudgment interest in this matter. The account stated and sum certain provisions of § 34-31-20 does not apply for the following reasons: In the first place, this is not an account. In addition, Plaintiff in this matter is under a duty to mitigate damages. As a matter of law, this 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 Plaintiff by Defendant is contingent upon whether 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. As our Court has stated on many occasions, "an award of prejudgment interest is not proper if the measure of recovery is not fixed by conditions existing at the time the claim arose." *Keane v. Low Country Pediatrics, P.A.*, 372 S.C. 176, 641 S.E. 2d 53 S.C. App. 2007

Respectfully submitted,



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 Defendant

Georgetown, SC
November 2, 2007

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF GEORGETOWN	)	CIVIL ACTION NO: 2006-CP-22-422
LEON P. BUTLER, JR.,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	DEFENDANT'S REPLY BRIEF
	)	
BILLY WILSON,	)	
	)	
DEFENDANT.	)	
	)	

LEGAL ISSUES

I. Did the lease agreement between Plaintiff and Defendant automatically renew at the expiration of the option period ending May 14, 2002?

Counsel in his trial brief continuously regurgitates the fact that the lease requires that notice be in writing. He cites cases about the court not having the authority to rewrite the contract. I am sure Plaintiff's counsel is well aware that our courts have held on numerous occasions that such a term in a contract requiring written notice is void as against public policy. *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).

The Defendant and several witnesses testified that verbal notice was given to Plaintiff's agent, Charlie Ray, that Defendant was not renewing the lease. The testimony of Plaintiff was that he never dealt with Defendant. That all matters concerning the lease was handle for him by his agent, Charlie Ray. This agent's testimony was ambiguous. Taken as a whole, his testimony could easily be viewed as conflicted on the issue of whether Billy Wilson gave him notice.

In addition, there is the letter from Defendant's attorney to Plaintiff's attorney (Plaintiff's Exhibit 23) not only corroborating Defendant's position on notice to Plaintiff through his agent,

Charlie Ray, but also reaffirming that Defendant would not be returning to the property. Plaintiff's failure to respond for almost three years is an acknowledgment that the contents of that letter were true. Silence in such a matter and the delay of almost three years before bringing a complaint speaks volumes in favor of Defendant's position.

Plaintiff's counsel emphasizes that Defendant stayed past the prior lease period and relies on that fact to bolster his almost non-existent evidence that Defendant did not give him notice that he was not going to exercise his option to renew the lease for another year. Defendant did in fact stay for a couple of months longer. However, his testimony was that he told Charlie Ray that he might not be off the premises by the expiration of the option period concerning the lease, but that he was willing to pay a pro-rata rent for any period he remained past the option period.

According to opposing counsel's trial brief, Plaintiff drove by the site in late summer or early fall and knew that the premises were vacated. Despite this, he has not even to this day made a demand for the prorated rent. It is interesting to note that all the testimony leans toward the Defendant vacating the premises in July or August. If the court decided to assess rent against Defendant for that period, the prorated amount would \$137.00 per day plus a reasonable attorney's fee for the collection of the same and pro-rata amount of 2002 taxes.

The burden is not upon Defendant to show that he has not breached the contract. This burden lies squarely upon the shoulders of Plaintiff. The complainant has failed to prove that he did not receive notice. Therefore, his cause of action must fail.

II. Did Plaintiff have a duty to mitigate his damages and if such a duty existed, did Plaintiff attempt to do so by seeking another lessee for the property?

Plaintiff's counsel in his brief states that our South Carolina Supreme Court has not specifically addressed the issue of whether a lessor has a duty to mitigate his damages. After making this statement, he goes into a five (5) page discussion on cases from other jurisdictions that

he believes is the majority rule in the country. He is simply mistaken on the law. Following the minority rule, our Supreme Court has, on many occasions, ruled on this very issue. In 1927, our court stated that a lessor, "might have awaited the expiration of the term, and, upon a showing of reasonable efforts to minimize his damage, sued for the damage actually sustained, the agreed rental less rental which he had in the meantime received or with proper effort should have received." *Simon v. Kirkpatrick*, 141 S. C. 251, 139 S. E. 614. The issue of a landowner's duty to minimize his damages when there was a breach of a lease raised its head again in the case of *Gentry v. Recreation Inc.*, 192 S. C. 429, 7 S. E. 2d 63. There the court held the damages to the lessor, "must be affected by the duty of minimizing damages." In a later case involving the lease of a four hundred acre tract, our Supreme Court held that it was the duty of the lessors to minimize their damages as far as they could reasonably do so. *Burkhalter et al. v. Townsend*, 139 S. C. 324, 138 S. E. 34. Again in the case of *United Rubber Company v. White Tire Company*, 231 S. C. 84, 97 S. E. 2d 403 (1956), our Supreme Court reiterated the long established law governing these matters. It stated that, "The measure of such damages is the amount that she would have received as rent for the remainder of the term, had there been no default, less such amount as she may receive from the new tenant, for it was her duty to minimize her damages."

III. Plaintiff's counsel argues in his brief that even if he is wrong on the law concerning his position that mitigation is not required, his client is still not barred from recovering damages.

He bases this on his belief that Defendant has failed to carry the burden of proof. What burden is necessary in a case where Plaintiff's undisputed testimony is that he did not attempt to re-lease the property during the year, which is the subject matter of this action? Even Plaintiff's own agent testified that the Plaintiff did not have him take any action to lease the property during this period. Although he did have him take action to lease the property as soon as the period of the alleged lease was over. In the light most favorable to Plaintiff, his position was that he waited the

year because he was afraid Defendant might return. This testimony is simply not credible. His agent's letter to Defendant (Plaintiff's Exhibit 22) states that Defendant was in default and demanded Defendant either pay the rent or vacate. Also, there is the letter to Plaintiff's attorney (Exhibit 23) stating that the option was not exercised and that Defendant would not be returning to the premises. And, of course, under the terms of the contract, Plaintiff had a right to declare the lease ended when payment was not received and the right to take possession of the property. However, if the court still believes this is not sufficient evidence, there is the testimony of Defendant. A person whom Plaintiff's counsel acknowledges in his brief, is a sophisticated businessman who has substantial experience in land development. Defendant testified that he, as the owner, would have taken reasonable steps to re-lease the property by hiring a realtor, placing the property on the multiple listing system, advertise and place a sign on the property. Also, Plaintiff's own agent, Charlie Ray, testified that he had experience in leasing commercial property and that it was his opinion that a person attempting to lease property would take following steps: (1) hire a real estate agent; (2) placing a sign on the property advertising it for lease; (3) place the property on the Multiple Listing System (MLS); and (4) advertise.

According to the brief of opposing counsel, Plaintiff drove by the site and knew by late summer or early fall that Defendant had vacated the premises. In addition Defendant's attorney wrote Plaintiff's attorney a letter (Plaintiff's Exhibit 23) stating that Defendant had given notice that he was not going to exercise his option, and furthermore that he was not going to return to the property. Therefore, from all the testimony, no question exists on the issue that Defendant had vacated the property and was not returning. It is interesting to note that in none of the below cited cases was our appellate court concerned with the lessee proving that a lessor/owner had failed to act reasonably to mitigate damages when (a) the property at issue was in possession of said lessor/owner and (b) the lessor/owner had taken no action to mitigate his/her damages. As a matter of law, once

Defendant showed that Plaintiff had not attempted to re-lease the property, the burden shifted to Plaintiff to prove to the court that it was not feasible to do so. Defendant believes a close reading of the following cases support this legal proposition: *B. H. Hutson v. Cummins Carolina, Inc.*, 280 S. C. 552, 314 S. E. 2d 19 S. C. App. (1984); *Burkhalter et al. v. Townsend*, 139 S. C. 324, 138 S. E. 34 (1927); *Mid- Continent Refrigerator Company v. Willie C. Way*, 263 S. C. 101, 208 S. E. 2d 31 (1974).

IV. In his trial brief, Plaintiff's counsel asserts that the only reasonable conclusion that may be drawn from the evidence in the record is that the property is difficult to rent.

Is that why Plaintiff waited until the year had expired before he attempted to rent it? That is simply not his testimony. Interestingly, once he did take action, the place was leased. Counsel's argument must fail because it is contradicted by the testimony in the record and such a statement is nothing more than mere speculation.

V. Another argument of opposing counsel is that Plaintiff did not have to attempt to re-lease the premises because the contract states that if there is a breach, he does not have to attempt to mitigate his damages.

Can one really believe that our courts would void a provision in a contract, a term which requires that any modification must be in writing and then turn around and rule that it is all right to violate public policy by upholding a provision in a contract that negates the duty to mitigate Plaintiff's damages? The answer is that our courts would certainly never issue such an opinion.

VI. Is Plaintiff entitled to prejudgment interest?

Plaintiff relies on § 34-31-20(a) as his basis for claiming prejudgment interest on any sums the court may find he is entitled to in this action. Plaintiff's reliance on this statute is misplaced. This is not an account nor is a liquidated sum involved. Plaintiff's counsel has cited many cases in support of his position on prejudgment interest. A review of them, however, only strengthens Defendant's argument. In summary, they stand for the proposition that prejudgment interest is not

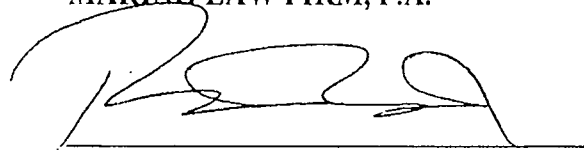
proper if the measure of recovery is not fixed at the time the claim arose; or the sum is not capable of being reduced to certainty; or the amount of damages is not fixed by conditions existing at the time the claim arose. Under any of these standards, Plaintiff's action on this matter must fail because the lessor under the facts of this case had a duty to mitigate his damages. Thus, there was at the time of the breach, if in fact there was a breach, an intermediate question that had to be decided before the damages could be ascertained. In this case, damages could only be measured after this determination had been made. If it were otherwise, there would be no duty to mitigate, and as a matter of law there does exist such a duty.

VII. Is Plaintiff entitled to damages for cleaning up the property?

Defendant assumes that Plaintiff has abandoned his position on this issue since he failed to argue it in his motion for a directed verdict and in his trial brief. Nevertheless, Defendant, out of an abundance of caution, would rely on the position he filed with this court in his motion for a directed verdict.

Respectfully submitted,

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 Defendant

Georgetown, SC

November 9, 2007

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF GEORGETOWN	)	CIVIL ACTION NO. <u>2006-CP-22-422</u>
LEON P. BUTLER, JR.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	PLAINTIFF'S REPLY TO
	)	DEFENDANT'S REPLY BRIEF
BILLY WILSON,	)	
	)	
Defendant.	)	
	)	

LEGAL ISSUES

- I. **The Lease Agreement between the Plaintiff, as LESSOR, and the Defendant, as LESSEE, automatically renewed for an additional one year term upon the expiration of the option period ending May 14, 2002, and the Defendant is therefore legally obligated to perform the obligations of the LESSEE during the lease period commencing May 15, 2002 and ending May 14, 2003.**

The Lease Agreement between the Plaintiff and Defendant automatically renewed for an additional one (1) year term (May 15, 2002 to May 14, 2003) as the Defendant failed to furnish written notice to the Plaintiff, at least ninety (90) days prior to the expiration of the then current lease 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. Paragraph 11 of the Plaintiff's Complaint alleges, and the Defendant's Answer admits, that the Lease Agreement automatically renewed at the expiration of the option period ending May 14, 2002, as the Defendant did not furnish written notice 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. Furthermore, the Defendant conceded upon cross examination that he did not furnish written notice to the Plaintiff at least ninety (90) days prior to the expiration of

the option period 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 option period.

The undisputed testimonial and documentary evidence in this case establishes that the Defendant LESSEE specifically requested the inclusion of the automatic renewal provision in the Lease Agreement. The automatic renewal provision provides that the LESSEE'S option to extend the lease term for an additional one (1) year option period shall be deemed to be exercised automatically 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 this Lease Agreement. The automatic renewal provision of the Lease Agreement imposes an affirmative obligation upon the LESSEE to "opt out" of the automatic renewal and the unambiguous language of the Lease Agreement 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 the automatic renewal of the lease term. Moreover, the provisions of the Lease Agreement specifically require that the written notice be signed by the LESSEE and transmitted to the LESSOR by registered or certified mail, return receipt requested:

"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."

In his reply brief, counsel for the Defendant argues that the provision in the subject Lease Agreement which requires written notice of the LESSEE'S intention not to exercise his option to extend the term of this Lease Agreement "is void as against public policy." As authority for that alleged principle of law, counsel for the Defendant offers 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, 357 S.E.2d 421 (1988). A careful reading of the authorities cited by counsel for the Defendant reveals that they do not address, even remotely, the issue of whether a lease provision which requires written notice of a party's intentions concerning exercise of an option to extend the term of a lease is void as against public policy. Counsel for the Defendant has clearly misstated the holdings of these cases in a desperate attempt to find support for the unsupportable legal proposition that is the cornerstone of the Defendant's specious argument that a lease provision which requires written notice of a party's intentions concerning exercise of an option to extend the term of a lease is void as against public policy.

The fallacy of the Defendant's argument is demonstrated by the numerous authorities that 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 Company v. Walgreen Properties, Incorporated, et al., 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. Finance Co., 266 N.C. 214, 146 S.E.2d 97 (N.C. 1966); 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 International, Inc., v. Summa Corporation, 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. 618 (applying Georgia Law).

Faced with the fact that he did not give written notice to the Plaintiff of his intention not to renew the Lease Agreement as required to avoid the automatic renewal provision of the Lease Agreement, the Defendant is forced to allege that there was an oral modification of the Lease Agreement that excused his compliance with the literal terms of the written Lease Agreement. That argument also fails.

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 (7th Cir. 1998). A valid modification of a contract must satisfy all the criteria essential for a valid original contract, [Sauner v. Public Service Authority of South Carolina, 354 S.C. 397, 581 S.E.2d 161 (2003); Roberts v. Gaskins, 327 S.C. 478, 486 S.E.2d 771 (Ct. App. 1997)] including offer, acceptance, and consideration. See also Robinson v. Ada S. McKinley Community Services, Inc., 19 F.3d 359 (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.C. 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 (4th Cir. 1963). The minds of the parties must meet as to any proposed modification. Americorp Financial, Inc. v. Zelch, 61 Fed. Appx. 925 (6th Cir. 2003).

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). That burden is on the Defendant Billy Wilson, who alleges a modification of the Lease Agreement in the instant case. Furthermore, an oral contract modifying a written contract must be proved by the party relying on the oral modification. Dault v. Schulte, 31 Mich. App. 698, 187 N.W.2d 914 (Mich. App. 1971). Again, that burden is upon the Defendant Billy Wilson, who alleges an oral modification in the instant case.

Whether parties have orally agreed to modify the terms of a written contract is a question of fact. The South Carolina National Bank, 295 S.C. 107, 357 S.E.2d 421. 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, Oklahoma, 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)] or mutual assent. 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 new contract's terms. R.I.-Fondedile, S.A. v. C.E. Maguire, Inc., 610 A.2d 87 (R.I. 1992).

When viewed in light of the requirements that the Defendant must satisfy in order to successfully carry his burden of proof that the parties orally agreed to modify the Lease Agreement's provisions concerning written notice, it is clear that the Defendant has not carried his burden of proof. There simply is no credible evidence that the Plaintiff LESSOR and the Defendant LESSEE mutually agreed to modify the Lease Agreement's requirement that the LESSEE furnish written notice to the LESSOR of his intention not to renew the Lease Agreement.

Defense counsel's reply brief states that the Defendant and several witnesses testified that the Defendant verbally informed the Plaintiff's real estate agent, Charley Ray, that the Defendant did not intend to renew the Lease Agreement. That statement is a blatant misrepresentation of the evidence. The only evidence offered to corroborate the Defendant's alleged verbal notice that he did not intend to renew the Lease Agreement was the testimony of the Defendant's business partner, Jackie Woodbury, who allegedly overheard a telephone conference between the Defendant and someone whom the Defendant referred to as "Charley", during which the Defendant allegedly stated that he did not intend to renew the Lease Agreement. In that regard, the testimony of the Defendant, who has a significant financial interest in the outcome of this litigation, must be regarded with some skepticism as his recollection of events is likely colored by his significant financial interest in the matter. Likewise, the testimony of the Defendant's business partner, Jackie Woodbury, must be closely

scrutinized as a result of his readily apparent bias. Close scrutiny of this testimony for evidence of bias is particularly necessary in light of Charley Ray's express denial that the Defendant verbally notified him of his intention not to renew the term of the Lease Agreement, and the Defendant's actions which belie his assertion that he did not intend to renew the term of the Lease Agreement. Among other things: (1) the Defendant secured a building permit and made significant improvements to the Leased Premises in September of 2001, months after he allegedly verbally notified Charley Ray that he did not intend to exercise his option to extend the term of the Lease Agreement; (2) the Defendant entered into an "Outdoor Rental Lighting" agreement with Santee Cooper on February 12, 2002, to erect additional improvements; (3) the Defendant continued to hold possession of the Leased Premises and conducted business operations after expiration of the option period ending May 14, 2002; (4) the Defendant collected and retained billboard lease revenue in July of 2002, and (5) the Defendant never responded to a rental invoice, telephone messages and correspondence forwarded to the Defendant requesting a statement of his intentions.

Moreover, even if the testimony of the Defendant and Jackie Woodbury concerning the Defendant's alleged telephone conference with Charley Ray is accepted at face value, it falls far short of the proof that the Defendant must present to successfully establish a mutual agreement between the Defendant and the Plaintiff Leon P. Butler, Jr., to modify the Lease Agreement's requirement that the LESSEE furnish written notice to the LESSOR of his intention not to renew the Lease Agreement. The Defendant concedes that he never spoke with the Plaintiff. The Plaintiff and Charley Ray both testified that Charley Ray's authority was limited and that as between the Plaintiff and Charley Ray, all decision making authority concerning the Lease Agreement was reserved to the Plaintiff. The Plaintiff clearly testified that he did not agree to

modify the Lease Agreement and that he relied upon the terms of the written Lease Agreement. In light of this testimony, the Defendant has failed to demonstrate that the minds of the parties to the Lease Agreement met upon a modification of the Lease Agreement's requirement that the LESSEE furnish written notice to the LESSOR of his intention not to renew the Lease Agreement. See, Board of Education of City of Albuquerque, supra; Marnon, supra; Americorp Financial, Inc, supra. Nor has the Defendant shown that the parties demonstrated both a subjective and objective intent to be bound by the new contract's terms. See, R.I.-Fondedile, S.A., supra.

Defendant's counsel argues that the Plaintiff should have made a demand for prorated rent, even though it is clear that neither the Plaintiff nor the Defendant knows the date upon which the Defendant abandoned the leased premises. The Plaintiff did not re-enter and re-take possession of the Leased Premises until May 15, 2003 as the Plaintiff correctly understood that the Lease Agreement had automatically renewed and that the Defendant was entitled to possession of the Leased Premises until May 14, 2003. (Testimony of Leon P. Butler, Jr.). The Plaintiff further correctly understood that the Defendant owes rent for the entire lease year (May 12, 2002, through May 14, 2003) as the Defendant was entitled to possession of premises for the entire lease year and, accordingly, it was not incumbent on the Plaintiff to make a demand for prorated rent. The Plaintiff has clearly demanded payment of the full amount of the rent due.

Defendant's counsel argues that the burden is not upon the Defendant to show that he has not breached the contract and that the burden lies squarely upon the shoulders of the Plaintiff to establish the Defendant's breach. While that is a correct statement of the Plaintiff's burden of proof, the evidence in the record clearly establishes that the Plaintiff has carried his burden of proof. The written Lease Agreement which provides for automatic renewal of the lease term for

one (1) year in the absence of timely written notice of the Defendant LESSEE'S intention not to renew is in evidence. The Defendant has admitted, in his Answer and in his testimony on cross-examination, that he did not deliver the requisite written notice of his intention not to renew in accordance with the terms of the Lease Agreement. The Defendant further concedes that he has not paid the rent and the taxes payable with respect to the May 15, 2002 though May 14, 2003 lease year. The Plaintiff has thus established his prima facie case. The Defendant attempts to excuse his failure to perform by arguing that he "opted out" by giving a verbal notice of his intention not to renew, which the Defendant argues was permissible by virtue of an oral modification of the Lease Agreement. On those issues, the Defendant has the burden of proof and he has failed to carry his burden.

II. The Plaintiff was not legally obligated to mitigate his damages following the Defendant's abandonment of the leased premises as the Plaintiff did not re-enter and re-take possession of the leased premises and did not otherwise terminate the Lease Agreement.

Upon the Defendant's abandonment of the 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 Lease Agreement. The South Carolina Supreme Court has not specifically addressed the issue of whether a lessor has a duty to mitigate his damages when the lessee abandons the leased property and the lessor does not re-enter and re-take possession of the premises or otherwise terminates the lease. However, the weight of authority is clear that when a 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, unless: a) the landlord re-enters and takes possession, b) the landlord terminates the lease, c) the landlord accepts the tenant's surrender or d) the landlord

does something inconsistent with the tenant's right to possession of the property during the leasehold term. In some jurisdictions there is a blurring of the distinction among the four factors stated above. For example, re-entering and re-taking possession by the landlord may be considered an acceptance of the tenant's surrender or may be considered as action inconsistent with the tenant's rights to possession of the property during the leasehold term. See, Flack v. Sarnosa Oil Corp., 293 S.W.2d 688 (Tex. Civ. App. 1956) (holding where the landlord has accepted the tenant's offer of surrender by the abandonment, the test is whether the landlord takes possession for his own use or in his own interest); and Babsdon Co. v. Thrifty Parking Co., 149 So.2d 566 (Fla. App. 1963) (holding the landlord acted inconsistently with the tenant's rights if he re-enters and re-lets ostensibly as the tenant's agent).

Defendant's counsel argues that the Plaintiff had a duty to mitigate his damages and cites four cases which he offers in support of the proposition that the Plaintiff has a blanket duty to mitigate his damages. Upon reading Simon v. Kirkpatrick, 141 S.C. 251, 139 S.E. 614 (1927), Gentry v. Recreation Inc., 192 S.C. 429, 7 S.E. 63 (1940), Burkhalter et al. v. Townsend, 139 S.C. 324, 138 S.E. 34 (1927) and United Rubber Company v. White Tire Company, 231 S.C. 84, 97 S.E.2d 403 (1956), it is clear that those cases do not stand for a blanket proposition that when a tenant abandons the leased property the landlord is under a 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. Of the cases cited by Defendant's counsel that pertain to leases, the duty to mitigate arose only after the landlord had either a) accepted the tenant's offer of surrender of the lease property or b) the landlord terminated the lease agreement by retaking possession of the premises, or c) the landlord terminated the lease agreement, or d) the landlord

did something inconsistent with the tenant's right to possession of the property during the leasehold term.

In Simon, the lessee refused to take possession of the premises. The Court held that while the lessor may terminate the lease and release the lessee, he is not bound to do so. After stating that the lessor is not required to terminate the lease agreement, the court found that the plaintiff lessor in that case affirmatively terminated the lease agreement and precluded the defendant lessee from any further right or benefit under the lease agreement and that because of the plaintiff lessor's affirmative termination, the plaintiff lessor was not entitled to recover rent after the date of termination. In Burkhalter, after the defendant lessee had abandoned the premises, the plaintiff lessor regained possession of the premises and then advertised the premises for rent. The court said that it was the plaintiff lessor's duty to minimize the lessor's damages. Burkhalter is distinguishable from the instant case as the Plaintiff LESSOR in the instant case did not take possession of the property during the lease term. Gentry dealt with an acceleration clause which the plaintiff was relying upon in an attempt to collect future unearned rent. In Gentry, the defendant failed to pay rent, ceased to operate his business, locked the doors and delivered the keys to the agent of the plaintiff, who accepted the keys on behalf of the plaintiff. This acceptance of the keys amounted to an acceptance of surrender. The Gentry Court held that: "...the removal by the lessee had the effect of restoring possession of the premises to the lessors...". The Gentry Court held there was then a duty to minimize damages. Gentry, 192 S.C. at 432, 7 S.E.2d at 66. Gentry is distinguishable from the case at bar as the Plaintiff in the instant case did not accept a surrender of the leased premises, but rather held the leased premises available for the return of the Defendant LESSEE and/or any assignee or subtenant of the Defendant LESSEE. In Unites States Rubber Company, the Court held that the

Landlord's re-entry and re-letting following tenant's abandonment of the property and default in payment of rent constituted termination of the lease, terminating liability for future rent and imposing a duty to minimize damages. It is apparent that the facts of each case relied upon by the Defendant are distinguishable from the facts in the instant case. In the present case, there was no termination of the lease agreement, there was no acceptance of surrender, there was no re-entry and re-letting of the premises, and there was no act on behalf of the Plaintiff that was inconsistent with the Defendant's right to continued possession. If the Plaintiff LESSOR had taken such action, the Defendant LESSEE would not have had any further right to possession of the leased premises under the Lease Agreement and possession of the premises would belong to the LESSOR. If the Plaintiff had either accepted the tenant's offer of surrender, or had re-entered and retaken the possession of the premises, or had terminated the lease, or had taken action inconsistent with the Defendant's right to possession of the property during the leasehold term, thereby obtaining possession of the property, then the Plaintiff would have had a duty to mitigate his damages. Here, however, none of those conditions occurred and the right to possession of the property remained with the Defendant until the expiration of the lease term on May 14, 2003. The cases relied upon by the Defendant therefore do not apply. Instead this court should follow the more reasoned majority rule.

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

§ 12.1 Tenant's Obligation To Pay Rent (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.

See Plaintiff's Trial Brief for Comment *i* to Restatement § 12.1 which states that the Restatement follows the majority rule and explains the rationale for the rule.

Other authorities have likewise set forth the majority rule, often referred to as the "traditional view," holding that the landlord has no duty to mitigate damages by reentering the property abandoned by a tenant under a lease, 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. 1992); Bowdoin Square, L.L.C. v. Winn-Dixie Montgomery, Inc., 873 So.2d 1091 (Ala. 2003); Allen v. Harkness Stone Co., Inc., 609 S.E.2d 647 (Ga. Ct. App. 2004); Odens Family Properties, LLC v. Twin Cities Stores, Inc., 393 F.Supp. 2d 824 (D. Minn. 2005); 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).

III. In any event, the Plaintiff is entitled to the full amount of his damages because the Defendant failed to bear its burden of proof that the Plaintiff's damages could have been avoided or reduced.

As the foregoing authorities demonstrate, the Plaintiff LESSOR, who did not re-enter and take possession of the Leased Premises following the abandonment of the Leased Premises by the Defendant LESSEE, had no duty to mitigate damages during the lease period commencing May 15, 2002 and ending May 14, 2003. However, in his Reply Brief, counsel for the Defendant takes issue with the argument set forth in Plaintiff's Trial Brief that assuming

solely for the sake of argument, that the Plaintiff LESSOR had a legal duty to re-let the Leased Premises for the benefit of the abandoning Defendant LESSEE, the Defendant LESSEE failed to bear his burden of proof upon his affirmative defense concerning the amount of mitigation offset that the Defendant LESSEE is entitled to receive. See, Brendle's Stores, Inc., OTR, et al., 978 F.2d 150 (C.A. 4 [SC] 1992) (holding under South Carolina law, burden of showing failure to mitigate damages fails on party asserting claim).

The proposition that the party who claims damages should have been minimized has the burden of proving that they could reasonably have been avoided or reduced is set forth in Tri-Continental Leasing Corp. v. Stevens, Stevens & Thomas, P.A., 287 S.C. 338, 342, 338 S.E.2d 343, 346 (Ct. App. 1985). In that opinion, the South Carolina Court of Appeals held that the party who claims damages should have been minimized has the burden of showing that the course of action to minimize damages was feasible, what the cost of minimization of damages would be, and **whether they would, in fact, reduce the damages caused by the Defendant's breach.** Id., 287 S.C. 342-43, 338 S.E.2d at 346-47. The Georgia Court of Appeals, in Branon v. Ellbee Pictures Corporation, which was cited and followed by the South Carolina Court of Appeals in Tri-Continental Leasing Corp., stated:

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

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

Here, the Defendant failed to offer any "such proof" which would "include sufficient data to allow the jury (fact finder) to reasonably estimate how much the damages could have been mitigated." See Branon, supra. There was no evidence that the Defendant offered Plaintiff a substitute tenant or exercised its right to assign its leasehold interest or sublease the Leased Premises to a third party. The Defendant failed to offer any evidence that the Leased Premises were readily rentable for the portion of the lease year remaining after the Defendant abandoned the Leased Premises and left significant amounts of trash to be removed. The only reasonable conclusion that may be drawn from the evidence in the record is that the property is difficult to rent because of its size and the amount of rent required (\$50,000.00 per year), that it is suitable for a limited category of businesses, that it has been leased only twice, and on each occasion it was on the market for approximately two (2) years prior to finding a suitable tenant. (Testimony of Charley Ray and Leon P. Butler, Jr.). The Defendant, in his Reply Brief, rests on the mere fact that Charley Ray testified that the Plaintiff did not have him take any action to lease the property until after the expiration of the lease term (May 14, 2003). The Defendant offered no proof that if the Plaintiff had acted prior to May 14, 2003 that the course of action, would, in fact, have reduced the damages caused by the Defendant's breach. See, Tri-Continental Leasing Corp., supra. Moreover, the Defendant failed to produce sufficient data or evidence to estimate how much the damages could have been mitigated. See, Branon, supra.

Defense counsel argues in his Reply Brief that the Plaintiff had a right to declare the lease ended when payment was not received and take possession of the property. While it is clear that those rights were available to the Plaintiff LESSOR under the terms of the Lease Agreement as well as applicable law, it is equally clear that the Plaintiff LESSOR was not legally obligated to avail himself of those remedies upon abandonment of the Leased Premises by the Defendant

LESSEE. The language in the Lease Agreement which reserves such rights to the LESSOR is permissive in nature and the law likewise affords the Plaintiff several options, one of which is to do nothing and await the return of the LESSEE. See, Restatement (Second) of Property: Landlord & Tenant § 12.1, supra..

Defense counsel argues in his Reply Brief that "no question exists on the issue that Defendant had vacated the property and was not returning." That simply is not an accurate statement of the unvarnished facts. From the perspective of the Plaintiff LESSOR there was a legitimate question about whether the Defendant LESSEE would return prior to the expiration of the lease term. As the documentary evidence clearly demonstrates the Defendant LESSEE'S mailbox and freestanding business signs advertising the Defendant LESSEE'S business and telephone number were still prominently located upon the leased premises. Likewise, the documentary evidence clearly demonstrates that the Defendant left a valuable mobile home hauler upon the leased premises. The Defendant was entitled to possession of the leased premises until May 14, 2003 under the terms of the Lease Agreement, the Defendant had apparently stored valuable personal property on the leased premises, the Defendant conducted normal business operations on the leased property for at least several months following the expiration of the previous option period, and the Defendant collected billboard rent in July of 2002 that he was not entitled to collect unless he was in lawful possession of the leased premises. Given that factual scenario, there was a legitimate question about whether the Defendant had permanently vacated the leased premises.

In the Defendant's Reply Brief, counsel makes the following rhetorical statement: "It is interesting to note that in none of the below cited cases was our appellate court concerned with the lessee proving that a lessor/owner had failed to act reasonably to mitigate damages when (a)

the property at issue was in possession of said lessor/owner and b) the lessor/owner had taken no action to mitigate his/her damages,” and then cites the cases of B.H. Hutson v. Cummins Carolina, Inc., 280 S.C. 552, 314 S.E.2d 19 (Ct. App. 1984), Burkhalter et al. v. Townsend, 139 S.C. 324, 138 S.E. 34 (1927), and Mid-Continent Refrigerator Co. v. Willie C. Way, 263 S.C. 101, 208 S.E.2d 31 (1974). It is apparent that all of these case were decided prior to Tri-Continental Leasing Corp. v. Stevens, Stevens & Thomas, P.A., 287 S.C. 338, 342, 338 S.E.2d 343, 346 (Ct. App. 1985), which sets forth the controlling principle that the party who claims that damages should have been minimized has the burden of proving they could reasonably have been avoided or reduced.

IV. Section IV of the Defendant's Reply Brief does not contain any citation of legal authority which requires explanation or response.

Section IV of the Defendant's Reply Brief does contain a statement of fact which requires a brief explanation to place the statement in its proper context. Defense counsel, characterizing the efforts of the Plaintiff to re-let the leased premises, states: “Interestingly, once he did take action, the place was leased.” The clear implication of counsel's statement is that the leased premises could have been readily leased by the Plaintiff. That implication is at odds with the evidence in this case which indicates that the property was not re-let, despite the efforts of the Plaintiff's real estate agent, until May of 2005, two (2) years after the termination of the Defendant's lease term.

V. Section V of the Defendant's Reply Brief does not contain any citation of legal authority which requires explanation or response.

The failure of the Defendant to offer any legal authority in support of the argument set forth in Section V of the Defendant's Reply Brief speaks volumes about the acceptance of the Defendant's reasoning by the appellate courts of our country. In response to the Defendant's

argument, the Plaintiff relies upon the authorities and arguments set forth in Section II of the Plaintiff's Trial Brief, and in particular the arguments and references pertaining to New Towne Limited Partnership v. Pier 1 Imports, 113 Ohio App. 3rd 104, 680 N.E.2d 644 and Weingarten/Arkansas, Inc., v. ABC Interstate Theatres, Inc., 306 Ark. 64, 811 S.W.2d 295 (1991), which are incorporated herein by this reference.

VI. Plaintiff is entitled to pre-judgment interest because it is a right that is not affected by any alleged discounts, offsets or defenses claimed by the Defendant.

The Plaintiff seeks prejudgment interest on the amount owed by the Defendant. The Plaintiff is entitled to prejudgment interest under §34-31-20(a) of South Carolina Code of Laws Ann. (1976), as amended. Plaintiff's Trial Brief sets forth the authorities which authorize an award of prejudgment interest under the facts of this case. In his Reply Brief, counsel for the Defendant argues that prejudgment interest may not be properly awarded in this case under the cited authorities as the measure of recovery was not fixed at the time the claim arose, the sum was not capable of being reduced to certainty, and the amount of damages was not fixed by conditions existing at the time the claim arose. In making that argument, counsel for the Defendant ignores that the authorities cited by the Plaintiff hold that the 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.** (emphasis added) See, 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, 128, 616 S.E.2d 419, 421 (2005); Butler Contracting, Inc. v. Court Street, LLC, 369 S.C. 121, 133, 631 S.E.2d 252, 259 (2006); Ancrum v. Slone, 29 S.C.L (2 Speers) 594 (1844); Lee v. Thermal Engineering Corp., 352 S.C. 81, 88-89, 572 S.E.2d 298, 302 (Ct. App. 2002); and Southern Welding Works, Inc., v. K & S Const. Co., 286 S.C. 158, 164, 332 S.E.2d 102, 106 (Ct. App.

1985). The South Carolina Supreme Court in Robert E. Lee & Co., Inc. v. Commission of Public Works of the City of Greenville, 248 S.C. 92; 149 S.E.2d 59 (1966) stated the rule very simply: "...by the decisions of South Carolina, wherever a party stipulates in writing to pay money on a certain day, or on the performance of any stipulation or contract, interest is allowed." The Babb Court made it clear that the Plaintiff's right to prejudgment interest will not be defeated by offsets claimed by the Defendant in defense of the Plaintiff's claim: "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.

According to Paragraph 29 of the Lease Agreement, which set forth the **agreement of the parties, the agreed upon rent for the lease option period commencing May 15, 2002 and ending May 14, 2003, was the exact amount of \$50,000.00, and the payment was demandable on May 15, 2002**, as the Lease Agreement provides that rent shall be paid in advance. (emphasis added). All of the elements necessary to authorize an award of prejudgment interest are present. Babb, *supra*; Smith-Hunter Const. Co., *supra*; Butler Contracting, Inc., *supra*; Ancrum, *supra*; Lee, *supra*; Southern Welding Works, Inc., *supra*; Robert E. Lee & Co., Inc., *supra*.

In Butler Contracting, Inc. v. Court Street, LLC, 369 S.C. 121, 133, 631 S.E.2d 252, 259 (2006), the South Carolina Supreme Court held that, "[t]he right of a party to prejudgment interest is not affected by rights of discount or offset claimed by the opposing party. It is the character of the claim and not the defense to it that determines whether prejudgment interest is allowable." (emphasis added) Butler, 369 S.C. at 134, 631 S.E.2d at 259. *See also*, Lee, 352 S.C. at 88-89, 572 S.E.2d at 302 and Southern Welding Works, Inc., 286 S.C. at 164,

332 S.E.2d at 106. The Court in Robert E. Lee & Co., Inc., held the same thing but stated it a little differently, holding:

Where a claim is certain and liquidated but is reduced by reason of the existence of an unliquidated setoff thereto, interest is properly allowable on the balance found to be due from the time it was due and demandable. The right to interest on a claim is not lost because of the existence of an offset which is itself liquidated. It follows that if the claim of the plaintiff is liquidated it matters not whether the offset claimed by a defendant is liquidated or unliquidated and the plaintiff is entitled to interest on the balance found to be due after deduction of such offset.

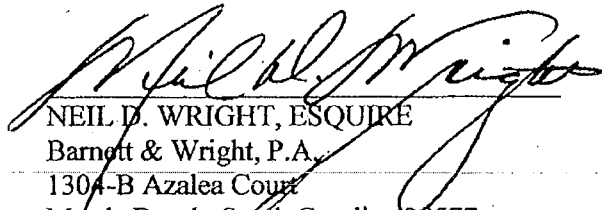
Robert E. Lee & Co., Inc., 248 S.C. at 100; 149 S.E.2d at 62. The Defendant's argument that the Plaintiff is not entitled to prejudgment interest is clearly without merit. The Defendant's theory is based entirely upon the false premise that the Plaintiff had a duty to mitigate his damages. Under the Butler line of cases, mitigation, no matter if you consider it a discount, an offset, or a defense, will not affect the right of a party to prejudgment interest. Butler, 369 S.C. at 134, 631 S.E.2d at 259. See also, Lee, 352 S.C. at 88-89, 572 S.E.2d at 302; Southern Welding Works, Inc., 286 S.C. at 164, 332 S.E.2d at 106 and Robert E. Lee & Co., Inc., 248 S.C. at 100; 149 S.E.2d at 62. The Plaintiff is entitled to prejudgment interest.

VII. Plaintiff is entitled to damages for cleaning up the property.

Defense counsel erroneously assumes that Plaintiff has abandoned his claim for damages for clean up of the leased premises. Please see Paragraph 2 of Plaintiff's motion for a directed verdict. The Plaintiff made a prima facie case for entitlement to damages for cleaning up the property. The Lease Agreement provided that the Defendant was to return the lease premises in the same condition as Defendant received it. The Plaintiff testified that when he went to the premises, that the Defendant's mailbox and freestanding business signs advertising the Defendant's business and telephone number were still located upon the Leased Premises. The Plaintiff testified that the Defendant had abandoned a partially burned mobile home, a truck, and an illuminated sign

on the Leased Premises. (Testimony of Leon P. Butler, Jr.; Plaintiff's Exhibits # 26, 27, 28 and 29). The Defendant conceded upon cross examination that he abandoned the items depicted in Plaintiff's Exhibits # 26, 27, 28 and 29 when he abandoned the Leased Premises. The Plaintiff testified that when he re-let 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. (Testimony of Leon P. Butler, Jr.). The Plaintiff is therefore entitled to damages for the clean up of the premises.

Respectfully submitted


NEIL D. WRIGHT, ESQUIRE
Barnett & Wright, P.A.
1304-B Azalea Court
Myrtle Beach, South Carolina 29577
(843) 449-0781
Attorneys for the Plaintiff
Leon P. Butler, Jr.

Myrtle Beach, SC

November 21, 2007

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

**NOTICE OF MOTION AND MOTION
FOR RECONSIDERATION PURSUANT
TO RULES 52(b), 59(c), AND 60(a) SCRPC**

VS.

Defendant.

YOU WILL PLEASE TAKE NOTICE that the Plaintiff, through his undersigned counsel, above the Honorable Willard D. Hanna, Jr., Special Referee for Georgetown County, South Carolina, on the 10th day after service hereof or as soon thereafter as counsel might be heard, pursuant to Rules 52(b), 59(e), and 60(a) SCRPC, to reconsider and alter or amend the Final Order of the Special Referee in the above-captioned Action issued by the Special Referee in this matter on March 27, 2009, and filed of public record in this matter on April 1, 2009. The Defendant's Motion is made pursuant to Rules 52(b) and 60 (a) SCRPC, and is based upon the following grounds:

R.495

2. The Special Referee erred in failing to conclude as a matter of law that the Plaintiff is entitled to Judgment against the Defendant for all fees charged by the Special Referee and paid by the Plaintiff. The error is that Paragraph 18 of the subject Ground Lease Agreement specifically provides that the Lessee shall be liable for payment of the Lessor's costs of collection and the charges of the Special Referee are in fact a cost of collection incurred by the Lessor.

3. The Special Referee erred in failing to find that the Defendant did not present evidence to satisfy his burden of proof with respect to his affirmative defense of failure of the Plaintiff to mitigate damages. The error is that the Defendant, as the proponent of that affirmative defense, bears the burden of proof with respect to that affirmative defense and the Defendant did not introduce evidence concerning the amount of damages that the Plaintiff could have avoided by efforts to mitigate the damages that he suffered. (Please see proposed Findings of Fact 46, 48, and 49 of Plaintiff's proposed Final Order Ending Action of December 16, 2008.)

4. The Special Referee 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 error is that controlling South Carolina precedent provides that a "... party who claims damages should have been minimized has the burden of showing that the course of action to minimize damages was feasible, what the cost of minimization of damages would be, and whether they would, in fact, reduce the damages caused by the Defendant's breach." Tri-Continental Leasing Corp. v. Stevens, Stevens & Thomas, P.A., 287 S.C. 338, 342, 338 S.E.2d 343, 346 (Ct. App. 1985). The Defendant did not offer any evidence that the Leased Premises were readily rentable for the portion of the lease year remaining after the Defendant abandoned the Leased Premises and did not offer any evidence to support a reasonable estimate of the amount of damages that could have

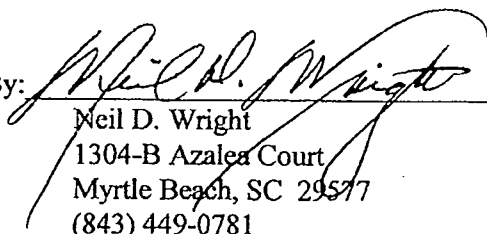
been mitigated if the Plaintiff had taken actions to mitigate his damages prior to May 15, 2003. The only reasonable conclusions that can be drawn from the evidence in the record is that the property is difficult to rent because of its size, that the Plaintiff leased the property on only two occasions, and on each occasion it was on the market for approximately two (2) years prior to being leased. (Please see proposed Conclusion of Law 34 of Plaintiff's proposed Final Order Ending Action of December 16, 2008.)

This Motion will be based upon the law of South Carolina and the record in this case, including the pleadings and documentary evidence.

Myrtle Beach, SC
April 9, 2009

BARNETT & WRIGHT, P.A.

By:


Neil D. Wright
1304-B Azalea Court
Myrtle Beach, SC 29577
(843) 449-0781
nwright@barnettandwright.com
Attorneys for Plaintiff

Robert W. Maring
Laura Mitchum Moyer

MARING LAW FIRM, P.A.
Attorneys at Law

P.O. Box 478
Georgetown, SC 29442

February 18, 2009

VIA FACSIMILE & U.S. MAIL

Willard D. Hanna, Jr., Esquire
Hanna Law, P.A.
4420 Oleander Drive, Suite 101
Myrtle Beach, SC 29577

RE: *Leon P. Butler, Jr. vs. Billy Wilson*
Civil Action No. 2006-CP-22-422

Dear Bill:

I have had the opportunity to read and review the proposed Order for the above referenced case and make the following comments based upon your direction to Mr. Wright in preparing the Order.

You specifically stated in your instructions that you did not make any findings of fact or conclusions of law as to the issue of mitigation of damages in the case because the terms of the contract specifically provided that the Lessor had no duty to mitigate. I believe the following changes should be made to the Order to reflect your instructions:

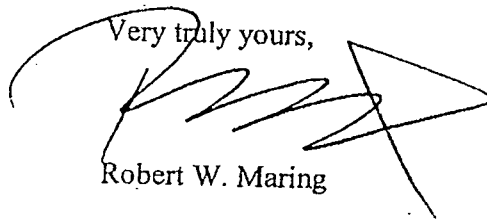
1. The last paragraph contained on P 12 should be changed/or deleted to reflect your instructions regarding no findings as to mitigation.
2. Paragraph 46 should be changed or deleted to reflect your instructions regarding no findings as to mitigation.
3. Legal Issue IV contained on page 22 should be deleted in its entirety to reflect your findings on mitigation.
4. Paragraph 32 starting on page 45 of the Order should be deleted in its entirety to reflect your instructions.
5. Paragraph 34 starting on page 46 of the Order should be deleted in its entirety to reflect your instructions.

Willard D. Hanna, Jr., Esquire
Hanna Law, P.A.
Leon P. Butler, Jr. vs. Billy Wilson
February 18, 2009
Page 2

If you would like for me to prepare a new draft based on the above, I will be happy to do so.

Please call if you have any questions. With kindest regards, I am

Very truly yours,

A handwritten signature in black ink, appearing to be 'R. Maring', with a large, sweeping flourish extending to the right.

Robert W. Maring

RWM:amp

cc: Neil D. Wright, Esquire
Barnett & Wright, PA

Robert Maring

From: Bill Hanna [bill@hannalawonline.com]
Sent: Thursday, February 19, 2009 11:21 AM
To: 'Robert W. Maring'; 'Neil D. Wright'
Subject: Re: Butler vs. Wilson (Special Referee)

Neil, I believe that Robert is correct with regard to my ruling on the mitigation issue. I believe that the deletions he suggests are in order and that paragraph 33 on page 45 would be controlling on the issue and the words "in the alternative" should be deleted. Robert, if we don't have objection from Neil by Monday, please make the corrections and forward them to me.
Thanks.

Bill Hanna

Hanna Law, P.A.
4420 Oleander Drive, Ste. 101
Myrtle Beach, SC 29577
843.839.2710 (phone)
843.839.2730 (fax)

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1
2 STATE OF SOUTH CAROLINA
3 COUNTY OF GEORGETOWN
4

IN THE COURT OF COMMON
PLEAS
FIFTEENTH JUDICIAL
CIRCUIT

2006-CP-22-422

5
6
7 LEON P. BUTLER, JR.

8 PLAINTIFF,

9 -VS-

10 BILLY WILSON,

11 DEFENDANT.
12
13

14 MOTION HEARING BEFORE WILLARD D. HANNA, ESQ.,
15 SPECIAL REFEREE IN THE ABOVE ENTITLED MATTER.
16

17 TAKEN BY JERRY S. MABRY, VERBATIM REPORTER AND
18 NOTARY PUBLIC FOR THE STATE OF SOUTH CAROLINA ON
19 JUNE 2, 2009 IN THE OFFICE OF WILLARD D. HANNA,
20 GLENN'S BAY DRIVE, SURFSIDE BEACH, SOUTH CAROLINA.

21 ****THIS IS AN OFFICIAL TRANSCRIPT GOVERNED BY**
22 **25A SOUTH CAROLINA CODE ANN. REGS. 67-615D (SUPP.**
23 **2000). THE UNAUTHORIZED COPYING OF THIS DOCUMENT**
24 **IS DEEMED TO BE CONVERSION OF AN ASSET BELONGING TO**
25 **THE COURT REPORTER.**

1 MR. MARING: WHAT I'M TRYING TO ASK
2 THOUGH, NEIL, IN TERMS OF THE MATTER OF
3 CONTROVERSY WOULD HAVE RENT AND TAXES ...

4 MR. WRIGHT: AND INTEREST.

5 MR. MARING: AND YOUR CLAIM OF INTEREST.
6 NOW, THE BREACH OF THIS LEASE TOOK PLACE
7 BETWEEN MAY 12TH OF '02 THROUGH, I GUESS
8 IT WOULD BE MAY 11TH ...

9 MR. WRIGHT: MAY 14TH OF THE FOLLOWING
10 YEAR.

11 MR. MARING: OF '03. THIS CASE WAS NOT
12 FILED UNTIL JUST LITERALLY A FEW DAYS
13 PRIOR TO THE STATUTE OF LIMITATIONS ...
14 THE THREE YEAR STATUTE OF LIMITATIONS
15 RUNNING ON THE CASE, CORRECT?

16 MR. MARING: CORRECT.

17 MR. MARING: SO, IN TERMS OF WHETHER OR
18 NOT ... AND, OF COURSE, THAT'S CERTAINLY
19 ... I'M NOT CONCEDED THE PRE-JUDGMENT
20 INTEREST IS PROPER BUT THE FACT OF THE
21 PRE-JUDGMENT INTEREST WAS DUE TO THE FACT
22 OF THE LONG DELAY IN ACTUALLY FILING THE
23 SUIT. WOULD YOU AGREE WITH THAT?

24 MR. WRIGHT: I WOULD AGREE THAT THE
25 AMOUNT ... CERTAINLY WE HAD OFFERED TO

1 PROVIDES IS THAT THE AWARD OF THE
2 ATTORNEY'S FEES BASED ON CONTRACTS IS
3 LEFT TO THE DISCRETION OF THE TRIAL COURT
4 AND THE ITEMS TO BE CONSIDERED ARE THE
5 NATURE, EXTENT AND DIFFICULTY OF SERVICES
6 RENDERED. THAT'S THE FIRST ITEM. SECOND
7 IS THE TIME AND LABOR NECESSARILY DEVOTED
8 TO THE CASE. THE THIRD ITEM IS THE
9 PROFESSIONAL STANDING OF COUNSEL, AND I
10 DO BELIEVE THAT MR. LEITER WOULD PROBABLY
11 ALSO ADDRESS THAT ISSUE. THE FOURTH ITEM
12 IS CONTINGENCY OF COMPENSATION, WHICH IS
13 NOT APPLICABLE IN THIS CASE. FIVE, THE
14 FEE CUSTOMARILY CHARGED IN THE LOCALITY
15 FOR SIMILAR LEGAL SERVICES. I BELIEVE
16 MR. LEITER WILL ADDRESS THAT, AND SIXTH
17 ITEM IS THE BENEFICIAL RESULTS OF TAINT,
18 AND YOUR HONOR, I HAD ANOTHER ITEM THAT I
19 WOULD LIKE TO MARK FOR THE COURT'S
20 CONSIDERATION. THAT IS A COPY OF A
21 LETTER THAT WAS SENT TO ME BY MR. MARING.
22 I BELIEVE IT WAS THE DAY BEFORE TRIAL,
23 OUTLINING THE DEFENDANT'S PROPOSAL FOR
24 SETTLEMENT IN THE CASE, WHICH WAS FOR
25 \$19,756.00. YOUR HONOR, THE TERMS OF THE

1 RESULT OF TAINT, THE ORDER IN THIS CASE
2 WAS FOR \$133,887.75. THAT, I BELIEVE,
3 IS, IN FACT, SIX AND A HALF TIMES WHAT
4 THE OFFER WAS THAT WAS ON THE TABLE FROM
5 THE DEFENDANT. SO, IN TERMS OF THE
6 BENEFIT OBTAINED, I THINK MY CLIENT
7 CERTAINLY OBTAINED THE BENEFIT OF OUR
8 SERVICES.

9 MR. MARING: I'LL AGREE WITH THE SIX
10 CRITERIA. THAT'S WELL ESTABLISHED IN
11 SOUTH CAROLINA THAT THOSE ARE THE EXTENT,
12 AND I WOULD ... CERTAINLY I'M NOT GOING
13 TO ADDRESS THE PROFESSIONAL STANDING OF
14 COUNSEL. I WOULD CONCEDE ON THE RECORD
15 THAT MR. WRIGHT IS A ... I WILL NOT EVEN
16 ATTEMPT TO CROSS EXAMINE HIM ON HIS
17 PROFESSIONAL STANDING. I THINK HE
18 CERTAINLY ... I'M NOT TRYING TO ARGUE MY
19 CASE FOR HIM, BUT I'M NOT GONNA ADDRESS
20 THAT. IN TERMS OF THE FEE CUSTOMARILY
21 CHARGED IN THE LOCALITY FOR SIMILAR LEGAL
22 SERVICES, I DON'T BELIEVE THAT ... WHILE
23 I BELIEVE THAT AN HOURLY RATE IS NOT IN
24 QUESTION, THE AMOUNT OF TIME THAT WAS
25 DIVERTED TO THIS CASE IS WHAT I'M

1 OBJECTING TO, YOUR HONOR. WHILE THE FEE
2 WAS PROBABLY EVEN LOW IN SOME CASES FOR
3 AN ASSOCIATE TIME, THAT THE AMOUNT OF
4 TIME ULTIMATELY CAME TO THE AMOUNT OF FEE
5 CHARGED WAS EXCESSIVE, AND IN TERMS OF
6 THE DIFFICULTY THE LEGAL SERVICES
7 RENDERED, I DON'T BELIEVE THAT WHILE
8 THERE WERE ... I AGREE THAT WE DIDN'T
9 CONCEDE ON ISSUES. THERE WAS ONE ISSUE
10 THAT WAS HIGHLY DIFFICULT IN TERMS OF
11 THIS CASE. IT WAS A LEASE CASE AND WE
12 WERE TALKING ABOUT CONTRACT INTERPRETA-
13 TION AND INTERPRETATION OF PRE-JUDGMENT
14 INTEREST. SO, AGAIN, MY FOLLOWING THE
15 FACTORS, AND ALSO, IN TERMS OF THE
16 CONTRACT ITSELF TALKS IN TERMS OF REASON-
17 ABLE ATTORNEY'S FEES. AND, I THINK
18 THAT'S MY OBJECTION IN TERMS OF JUST THE
19 AMOUNT OF TIME DEVOTED WAS EXCESSIVE AND
20 BY APPLYING THE SIX FACTORS, I DO BELIEVE
21 THAT THE COURT SHOULD ADJUST THE FEES
22 ACCORDINGLY.

23 MR. HANNA: IN MY REVIEW OF THE MATERIALS
24 THAT HAVE BEEN PROVIDED TO ME AND
25 REFLECTING BACK ON THE TRIAL AND THE

1 DEBATE AT THE VERY LEAST. SO I'M GONNA
2 RULE AGAINST YOU ON THOSE TWO GROUNDS.
3 WHAT'S THE NEXT ITEM FOR DISCUSSION?

4 MR. WRIGHT: YOUR HONOR, THE NEXT ITEM
5 DEALS WITH THE MATTER OF THE DEFENDANT'S
6 AFFIRMATIVE DEFENSE OF FAILURE OF THE
7 PLAINTIFF TO MITIGATE DAMAGES. YOUR
8 HONOR, OUR PROPOSED ORDER, AND IF I MAY,
9 I'M GOING TO ASK TO HAVE THIS MARKED AS
10 PART OF THE RECORD. YOUR HONOR, WITH
11 REFERENCE TO PLAINTIFF'S EXHIBIT NUMBER
12 "5" ...

13 MR. HANNA: LET ME GET ONE THING ON THE
14 RECORD. I'M GONNA MARK THIS AS AN
15 EXHIBIT BUT I'M NOT GONNA MARK IT INTO
16 EVIDENCE BECAUSE I DON'T THINK IT'S
17 ANYTHING THAT I SHOULD BE RELYING ON, BUT
18 FOR THE PURPOSES YOU'RE EXPOUNDING ON
19 YOUR POSITION, I'M GONNA LET YOU MARK IT
20 AS AN EXHIBIT. IS THAT FAIR?

21 MR. WRIGHT: THAT'S FAIR.

22 MR. MARING: NO OBJECTION, YOUR HONOR.

23 MR. WRIGHT: YOUR HONOR, IN PLAINTIFF'S
24 EXHIBIT "5", WHICH IS A COPY OF THE
25 PROPOSED ORDER THAT THE PLAINTIFF

1 SUBMITTED ON DECEMBER 16TH OF FINDINGS OF
2 FACTS 46, 48 AND 49 DEALT WITH THE ISSUE
3 OF THE FAILURE OF THE DEFENDANT TO
4 ACTUALLY PRESENT ANY EVIDENCE CONCERNING
5 STEPS THAT THE PLAINTIFF COULD HAVE TAKEN
6 TO MITIGATE DAMAGES AND THE EFFICACY OF
7 THOSE ATTEMPTS AT MITIGATION. IT'S OUR
8 POSITION THAT UNDER THE LAW THE DEFENDANT
9 WHO RAISES THE AFFIRMATIVE DEFENSE OF
10 MITIGATION HAS THE OBLIGATION TO PRESENT
11 EVIDENCE THAT THE PLAINTIFF COULD REASON-
12 ABLY HAVE MITIGATED DAMAGES. THERE WAS
13 NO SUCH EVIDENCE SUBMITTED. I UNDER-
14 STAND THAT YOUR HONOR TOOK THE POSITION
15 THAT BECAUSE OF THE LANGUAGE IN THE LEASE
16 THAT NULLIFIED ANY OBLIGATION ON THE PART
17 OF THE LANDLORD TO MITIGATE DAMAGES BUT
18 YOU FELT THAT IT WAS SUPERFLUOUS.
19 NEVERTHELESS, THE DEFENDANT HAS ASSIGNED
20 AS AN ERROR YOUR DECISION TO RELY UPON
21 THAT PROVISION OF THE LEASE. WE FEEL AS
22 AN ADDITIONAL SUSTAINING GROUND FOR THE
23 PLAINTIFF'S POSITION THAT WE SHOULD HAVE
24 BEEN PERMITTED IN THE FINAL ORDER TO HAVE
25 IT REFLECT THAT THERE WAS NO EVIDENCE OF

1 MITIGATION PRESENTED.

2 FINAL ORDER ENDING ACTION

3 MARKED FOR IDENTIFICATION

4 AND INTRODUCED INTO EVIDENCE

5 AS DEFENDANT'S EXHIBIT "5".

6 MR. HANNA: MR. MARING, YOU HAVE
7 ADDRESSED THE DUTY TO MITIGATE AS ONE OF
8 YOUR MOTIONS FOR RECONSIDERATION. IT
9 ~~MIGHT BE APPROPRIATE IF WE ADDRESSED BOTH~~
10 ~~OF THEM AT ONE TIME. SO, IF I UNDERSTAND~~
11 ~~WHAT MR. WRIGHT IS SAYING IS THAT HE~~
12 ~~UNDERSTANDS THAT THERE WAS NO DUTY TO~~
13 ~~MITIGATE, BUT IN CASE YOU PREVAIL ON YOUR~~
14 ~~SECOND EXCEPTION, THEN HE WOULD BE~~
15 ~~ENTITLED TO GO BACK AND ARGUE THAT THERE~~
16 ~~WAS NO EVIDENCE IN SUPPORT OF YOUR~~
17 ~~AFFIRMATIVE DUTY TO MITIGATE. WHY DON'T~~
18 ~~YOU ADDRESS THOSE TWO ISSUES FOR ME.~~

19 MR. MARING: YOUR HONOR, THE FIRST ISSUE
20 IN TERMS OF NO EVIDENCE, I DON'T AGREE
21 THERE WAS NO EVIDENCE THAT WAS SUBMITTED
22 AS TO THE ISSUE OF MITIGATION. CHARLEY
23 RAY, WHO WAS MR. BUTLER'S REALTOR TESTI-
24 FIED THAT HE WAS THE PERSON THAT WAS THE
25 PERSON THAT MR. BUTLER USED IN TERMS OF

1 ATTEMPTING TO GET RENTALS. THAT HE AND
2 MR. BUTLER DID NOTHING IN TERMS OR
3 ATTEMPTING TO RENT THE PROPERTY. MR. RAY
4 GAVE A LITANY OF THINGS THAT HE WOULD
5 HAVE DONE ... OR SAID THAT WOULD HAVE
6 BEEN DONE OR SHOULD HAVE BEEN DONE TO RE-
7 LET THE PROPERTY, YOUR HONOR, AND I DON'T
8 THINK WE GOT INTO THAT ISSUE IN TERMS OF
9 ... YOU RULED THAT YOU WEREN'T GOING TO
10 GET INTO THE ISSUE OF MITIGATION SIMPLY
11 BECAUSE IT WAS GONNA BE THE COURT'S
12 RULING THAT THE PROVISION OF THE LEASE,
13 WHICH MR. BUTLER ALSO TESTIFIED TO THAT,
14 THAT HE DID NOT ATTEMPT TO MITIGATE
15 BECAUSE THE PROVISIONS OF THE LEASE
16 PROVIDED FOR THAT. THAT HE DIDN'T HAVE
17 TO. THAT WAS IN EVIDENCE AS WELL AND THE
18 COURT RELIED ON THAT AND THE COURT RULED
19 ON THAT. SO, IN TERMS OF WHETHER OR NOT
20 THERE WAS EVIDENCE, I WOULD SUBMIT TO THE
21 COURT THAT THERE WAS EVIDENCE THAT WAS
22 PRESENTED TO THE COURT IN TERMS OF
23 MITIGATION, NOT IN THE ORDER BECAUSE;
24 ONE, I DIDN'T HAVE THE ABILITY TO WRITE
25 THE ORDER AND WASN'T IT RULED BY THE

1 COURT THAT MITIGATION WAS AT ISSUE. DUE
2 TO YOUR DECISION THAT THE PROVISION OF
3 THE CONTRACT WAS RULED ON THAT PARTICULAR
4 MATTER. IN TERMS OF WHETHER OR NOT THE
5 COURT IS GOING TO CHANGE ITS POSITION NOW
6 REGARDING, I BELIEVE, IS NUMBER ...
7 LOOKING AT MY MOTION NOW.

8 MR. HANNA: I BELIEVE IT'S NUMBER "2".

9 MR. MARING: MY NUMBER "2". IT'S MY
10 POSITION THAT IT IS AGAINST PUBLIC POLICY
11 TO ALLOW A PARTY TO, BY CONTRACT, AVOID
12 THE DUTY TO MITIGATE DAMAGES. THAT'S THE
13 CRUX OF THAT ARGUMENT THAT IT IS AGAINST
14 PUBLIC POLICY. AND, AGAIN, I'M GOING TO
15 RELY ON MY REPLY BRIEF THAT WAS FILED IN
16 THIS CASE. THE COURT HAS HAD AN OPPOR-
17 TUNITY, ALONG WITH A LITANY OF CASE LAW,
18 THAT INDICATED THAT ... OR MY READING OF
19 THE LAW, THAT YOU CANNOT CONTRACT AWAY
20 THE DUTY TO MITIGATE. SO, THAT'S MY
21 POSITION ON THIS. NEIL'S ARGUMENT, AND
22 THEN AGAIN, ON MINE AS WELL.

23 MR. HANNA: LET ME INQUIRE ABOUT ONE
24 THING YOU SAID, MR. MARING, AND IT'S BEEN
25 A LONG TIME SINCE WE HEARD THIS. IT'S

1 BEEN OVER A YEAR NOW. SO, MY MEMORY
2 MIGHT NOT BE THE BEST ON THIS, BUT I
3 DON'T USUALLY PROHIBIT PEOPLE IN A
4 SPECIAL REFEREE SITTING FROM GOING INTO
5 WHATEVER THEY WANT TO. I DON'T RESTRICT
6 THEIR TESTIMONY, EVEN THOUGH I MIGHT RULE
7 AGAINST `EM. I DON'T RECALL HAVING HAND-
8 CUFFED YOU IN ANY WAY WITH REGARDS TO
9 PUTTING IN THE RECORD PROOF ON THAT ISSUE
10 THAT YOU WANTED TO. CAN YOU ENLIGHTEN ME
11 A LITTLE BIT MORE IN THAT YOU MADE THE
12 COMMENT THAT I MADE A RULING AND CUT YOU
13 OFF AND DIDN'T LET YOU ...
14 MR. MARING: NO, I DIDN'T SAY YOU CUT ME
15 OFF, YOUR HONOR. WHAT I SAID WAS THE
16 COURT MADE THE FINDING ... I'M TALKING
17 ABOUT IN TERMS OF MY ... I SHOULD NOT
18 HAVE SAID IN THE HEARING. IN MY ... WHEN
19 YOU ASKED ME TO REVIEW THE ORDER, YOU
20 INDICATED IN TERMS OF MY TRYING TO GO OUT
21 AND ELICIT FACTS THAT COULD HAVE
22 SUPPORTED THE ISSUE OF MITIGATION. I'M
23 NOT TALKING ABOUT IN TERMS OF THE HEARING
24 ITSELF. IN TERMS OF WHAT I BELIEVE TO BE
25 FACTS IN TERMS OF MITIGATION.

1 MR. HANNA: SO YOU MADE YOUR FULL SHOWING
2 IN THAT REGARD AT THE HEARING?

3 MR. MARING: WHATEVER WAS AT THE HEARING,
4 YOUR HONOR, AND, OF COURSE, IT WAS OUR
5 POSITION AT THE HEARING THAT ONCE IT WAS
6 SHOWN THAT THE PLAINTIFF MADE NO ATTEMPTS
7 TO MITIGATE THAT THERE WAS A BURDEN
8 SHIFTING BACK TO THE PLAINTIFF TO SHOW

9 ~~THAT HE MADE OR SHOULD HAVE MADE REASON-~~
10 ABLE STEPS AT THAT POINT IN TIME. IF
11 YOU'VE GOT A YEAR AGO, YOUR HONOR, THAT
12 ISN'T WHAT I'M ARGUING HERE TODAY.

13 MR. HANNA: I JUST WANTED TO MAKE SURE.
14 THE REASON I WANTED TO MAKE SURE OF THAT
15 POSITION IS THAT I FEEL LIKE THAT THE
16 ISSUE HAS BEEN EXPOSED THROUGH THE COURSE
17 OF THE TESTIMONY TO WHATEVER DEGREE IS
18 NECESSARY FOR REVIEW BY A SUPREME COURT.
19 I DON'T FEEL LIKE IT'S NECESSARY FOR ME
20 TO MAKE A SECONDARY FINDING 'CAUSE I
21 THINK IF THEY RULE AGAINST ME WITH
22 REGARDS TO THAT, THERE'S CERTAINLY ENOUGH
23 IN THE RECORD TO REVIEW THAT ISSUE AND I
24 DON'T THINK THEY'LL BE SENDING IT BACK
25 DOWN TO ME. I THINK THEY CAN HANDLE

1 THAT. SO, I GONNA LEAVE THAT ISSUE UP TO
2 THEM IN THE EVENT THEY RULE AGAINST ME ON
3 THE CONTRACT ISSUE.

4 MR. MARING: THAT'S FINE, YOUR HONOR.

5 MR. WRIGHT: YOUR HONOR, THE NEXT ITEM
6 THAT WE HAD, ITEM FOUR, DEALS WITH
7 ANOTHER PART OF THE ORDER BUT, FRANKLY,
8 IT'S STILL THE SAME ISSUE WITH RESPECT TO
9 MITIGATION. IN THIS ITEM NUMBER FOUR OF
10 MY MOTION FOR RECONSIDERATION, IT DEALS
11 WITH A CONCLUSION AS A MATTER OF LAW.
12 WHEREAS, ITEM NUMBER THREE THAT WE JUST
13 DEALT WITH DEALT WITH THE MATTER OF
14 FINDINGS OF FACTS. SO, IT'S THE SAME
15 ISSUE FROM ANOTHER STANDPOINT.

16 MR. HANNA: SAME RULING.

17 MR. MARING: I UNDERSTAND, YOUR HONOR.

18 MR. WRIGHT: THOSE ARE ALL OF MY ISSUES
19 ON MY MOTION FOR RECONSIDERATION.

20 MR. HANNA: THANK YOU, MR. WRIGHT. MR.
21 MARING, LET'S TAKE YOURS UP.

22 MR. MARING: THANK YOU, YOUR HONOR.

23 YOUR HONOR, I'M BASICALLY RENEWING THE
24 SAME MOTIONS THAT WERE FILED AT THE
25 ACTUAL CONCLUSION OF THE CASE. I BELIEVE

1 THERE WERE SIX FILED AT THAT TIME AND
2 THESE ARE THE SAME SIX THAT THE COURT HAD
3 AN OPPORTUNITY TO REVIEW AT THAT POINT IN
4 TIME. THE FIRST IS THAT THE EVIDENCE AND
5 TESTIMONY SHOWED THAT THE PLAINTIFF HAD
6 RECEIVED ADEQUATE NOTICE THAT THE DEFEN-
7 DANT DID NOT INTEND TO RE-LET THE
8 PREMISES BY THE PREPONDERANCE OF THE
9 EVIDENCE. ~~THAT WAS BASED ON THE TESTI-~~
10 MONY OF MY CLIENT DEALING WITH THE AGENT
11 FOR THE PLAINTIFF. THAT THE AGENT KNEW
12 THAT THE DEFENDANT DID NOT INTEND TO RE-
13 LET THE PREMISES AND THAT WAS SUFFICIENT
14 NOTICE. NOTWITHSTANDING THE ARGUMENT MR.
15 WRIGHT IS GOING TO BRING UP THAT THE
16 LEASE PROVIDED FOR A WRITTEN NOTICE. SO,
17 IT IS OUR CONTENTION THAT THE EVIDENCE
18 AND TESTIMONY SHOW THAT THEY HAD RECEIVED
19 ADEQUATE NOTICE TO TERMINATE THE LEASE.
20 MR. HANNA: MR. WRIGHT, DO YOU HAVE A
21 RESPONSE?
22 MR. WRIGHT: WELL, YOUR HONOR, IT'S THE
23 SAME ISSUE THAT WE HAD DISCUSSED IN OUR
24 MOTIONS AND IN OUR BRIEF. AND THAT IS
25 THAT THE EXCLUSIVE METHOD OF PROVIDING

1 NOTICE IS AS SET FORTH IN THE LEASE AND
2 THAT IT HAS TO BE IN WRITING. IT HAS TO
3 BE SENT TO THE LANDLORD AND IT HAD TO BE
4 SENT TO ME AS COUNSEL FOR THE LANDLORD.
5 THE DEFENDANT ADMITTED ON CROSS EXAMINA-
6 TION THAT HE HAD NEVER PROVIDED ANY
7 WRITTEN NOTICE. HE FURTHER PROVIDED THAT
8 HE DID NOT PROVIDE ANY ORAL NOTICE
9 DIRECTLY TO MY CLIENT. HIS WHOLE ARGU-
10 MENT IS THAT HE PROVIDED ORAL NOTICE TO
11 MR. RAY. MR. RAY DENIED THAT HE HAD
12 RECEIVED SUCH NOTICE, AND, AGAIN, THE
13 BURDEN OF PROOF HERE ON THIS ISSUE ... ON
14 THIS MODIFICATION OF THE LEASE THAT WOULD
15 PERMIT ANYTHING OTHER THAN WRITTEN NOTICE
16 IS ON THE DEFENDANT. THEY FAILED TO
17 SATISFY THAT BURDEN. AS WE HAVE
18 PROVIDED, THERE IS AMPLE AUTHORITY THAT
19 LEASE PROVISIONS REQUIRING WRITTEN NOTICE
20 ARE, IN FACT, FAVORED BECAUSE THEY
21 RESOLVE DISPUTES ABOUT WHO SAID WHAT TO
22 WHOM WHEN EVERYTHING IS ORAL. SO,
23 THEY'VE NOT BEEN ABLE TO CARRY THAT
24 BURDEN. SO, I FEEL THE EVIDENCE IS
25 PRETTY CLEAR AND SUPPORTS YOUR HONOR'S

1 POSITION IN THE ORDER.

2 MR. HANNA: I DON'T SEE ANYTHING NEW IN
3 THE MOTION THAT I HAVEN'T ALREADY BEEN
4 OVER. I DON'T THINK IT'S APPROPRIATE.
5 BY THE WAY, MR. MARING, I DON'T KNOW
6 WHETHER THIS WAS ERROR ON YOUR PART OR
7 NOT, BUT YOUR MOTION SAYS RULE 60. I
8 WOULD ASSUME YOU'RE GOING UNDER 59 AS
9 ~~OPPOSED TO 60?~~

10 MR. MARING: THAT'S CORRECT, YOUR HONOR.

11 MR. HANNA: LET THE RECORD REFLECT THE
12 CHANGE IN THE NOTICE ON THAT SO THERE
13 WON'T BE ANY PROBLEMS WITH THAT ON THE
14 APPEAL.

15 MR. MARING: YOUR HONOR, I DON'T BELIEVE
16 WE NEED TO GO ON THE ISSUE OF NUMBER
17 THREE AGAIN. THAT GOES BACK TO MITIGA-
18 TION. ON THE ISSUE OF NUMBER FOUR THAT
19 THE PLAINTIFF DID NOT PRESENT ANY
20 COMPETENT EVIDENCE TO SUBSTANTIATE A
21 \$2500.00 CLEAN UP EXPENSE, AND, YOUR
22 HONOR, THERE WAS NO ... MY RECOLLECTION
23 OF THE TESTIMONY WAS THAT THE DEFENDANT
24 APPROXIMATED \$2500.00 FOR THE CLEAN UP.
25 HE DID NOT PRESENT A BILL. HE DIDN'T

1 PRESENT WHAT HE PAID. IT WAS AN APPROXI-
2 MATION OF WHAT THE CLEAN UP WAS. THAT
3 WAS MY RECOLLECTION OF THE TESTIMONY AND
4 THAT WAS THE REASON FOR ME FILING THE
5 POST-JUDGMENT ... OR THE POST-JUDGMENT
6 MOTION AS WELL AS BRINGING IT UP HERE IN
7 A MOTION FOR RECONSIDERATION. IT JUST
8 WASN'T COMPETENT EVIDENCE TO SUBSTANTIATE
9 THE \$2500.00 AWARD.

10 MR. WRIGHT: YOUR HONOR, IN THAT REGARD,
11 I AGREE WITH ROBERT IN PART IN THAT THE
12 PLAINTIFF TESTIFIED THAT HE ASSUMED IT
13 WAS AROUND \$2500.00 TO CLEAN IT UP, BUT
14 ROBERT FORGOT A VERY CRITICAL PIECE OF
15 TESTIMONY BY THE PLAINTIFF. THE PLAIN-
16 TIFF TESTIFIED THAT HE MADE AN AGREEMENT
17 WITH THE NEXT OCCUPANT, NEXT TENANT, TO
18 GIVE HIM A CREDIT OF \$2500.00 ON HIS RENT
19 FOR CLEANING THAT UP BECAUSE THEY ASSUMED
20 THAT WOULD BE THE APPROXIMATE AMOUNT OF
21 THE CLEAN UP. SO, MY CLIENT DID NEGOTI-
22 ATED AWAY \$2500.00 IN RENT FOR THAT
23 CLEAN UP THAT WAS THEN PERFORMED BY THE
24 THIRD PARTY.

25 MR. HANNA: ANY RESPONSE, MR. MARING?

1 MR. MARING: YOUR HONOR, AGAIN, THERE WAS
2 NO LEASE PROVIDED. I DON'T BELIEVE THERE
3 WAS AN EXHIBIT PROVIDED, AND IN ANY CASE,
4 YOUR HONOR, IT GOES TO THE CREDIBILITY OF
5 THE WITNESSES, YOUR HONOR.

6 MR. HANNA: I THINK IT GOES TO THE WEIGHT
7 OF THE EVIDENCE AND HE DID TESTIFY, I
8 BELIEVE, AS MR. WRIGHT INDICATED. SO, ON
9 ~~THE BASIS OF THAT, I'M GONNA LET THAT~~
10 STAND ALSO. PRE-JUDGMENT INTEREST,
11 NUMBER FIVE.

12 MR. MARING: YOUR HONOR, THE PLAINTIFF
13 RELIED ON 343120(a) AS A BASIS FOR
14 CLAIMING THE PRE-JUDGMENT INTEREST ON
15 THAT, THAT HE MAY BE FOUND ENTITLED TO
16 THIS ACTION. YOUR HONOR, MY POSITION IS
17 THAT THE RELIANCE IS MISPLACED. THAT ...
18 THIS IS MY ACCOUNT FOR A LIQUIDATED SUM
19 THAT IN LIGHT OF THE MITIGATION ARGUMENT,
20 WHICH WE'VE BEAT TO DEATH HERE TODAY, BUT
21 IN LIGHT OF THAT, THERE WAS NO FIXED
22 AMOUNT DUE, DUE TO THE ISSUE OF WHETHER
23 OR NOT SOME PORTION OF THE LEASE SHOULD
24 BE ABATED BASED ON A FAILURE TO MITIGATE
25 DAMAGES. THEREFORE, IT'S THE DEFENDANT'S

1 POSITION THAT THIS IS NOT A CLAIM THAT
2 343128 CONTEMPLATES. WE'VE ARGUED ALL
3 THESE NUMEROUS TIMES, YOUR HONOR. I'M
4 GOING TO END THERE. I THINK YOU'VE BEEN
5 PROVIDED THE CASE LAW. MR. WRIGHT HAS
6 DONE THE SAME THING.

7 MR. HANNA: I WAS GONNA SAY. I DON'T SEE
8 ANYTHING NEW THERE. I THINK YOU'RE
9 PROTECTED FOR THE PURPOSES OF APPEAL IF
10 THAT'S WHAT YOU WERE ATTEMPTING TO DO,
11 BUT I DON'T SEE ANYTHING NEW THAT WE
12 HAVEN'T ALREADY BEEN OVER. ANY COMMENT,
13 MR. WRIGHT?

14 MR. WRIGHT: NO, YOUR HONOR. I THINK WE
15 ARE HUNDRED PERCENT CORRECT.

16 MR. MARING: YOUR HONOR, WE'VE ALREADY
17 ADDRESSED NUMBER SIX, AND, YOUR HONOR,
18 THAT WAS THE BASIS OF OUR MOTION FOR
19 RECONSIDERATION.

20 MR. HANNA: ANYTHING ELSE?

21 MR. MARING: NOT FROM OUR SIDE.

22 MR. HANNA: ALRIGHT. WE'VE DEALT WITH
23 THE ATTORNEY'S FEES. WE'VE DEALT WITH
24 PLAINTIFF'S MOTION FOR RECONSIDERATION.
25 WE'VE DEALT WITH DEFENDANT'S MOTION FOR

1 RECONSIDERATION. ANYTHING ELSE THAT WE
2 NEED TO DEAL WITH TODAY?

3 MR. WRIGHT: YOUR HONOR, WE DO HAVE SOME
4 ADDITIONAL ATTORNEY'S FEES AND I HAVEN'T
5 COMPUTED THE AMOUNT OF TIME THAT WE HAD
6 TODAY BECAUSE I DIDN'T KNOW HOW LONG THIS
7 HEARING WAS GOING TO LAST. BUT THAT
8 WOULD BE OUR ADDENDUM TO OUR ATTORNEY FEE
9 AFFIDAVIT. THE TIME THAT WE'VE SPENT
10 SINCE THE ORDER WAS FILED OF RECORD.

11 MR. HANNA: I DON'T KNOW THAT IT WOULDN'T
12 BE APPROPRIATE FOR MR. MARING TO RESPOND
13 TO THAT AT THIS TIME BECAUSE HE HASN'T
14 SEEN THAT BEFORE. WE'D INDICATED BEFORE
15 WE GOT STARTED THAT WE WOULD DEAL WITH
16 MOTIONS FOR RECONSIDERATION ON THE ORDER
17 FOR ATTORNEY'S FEES. LIKE I SAID, BY
18 TELEPHONE, WE'LL ADDRESS HIS RESPONSE AT
19 THAT TIME. IS THAT FAIR ENOUGH?

20 MR. MARING: THAT'S FINE, YOUR HONOR.

21 MR. WRIGHT: SURE.

22 MR. HANNA: WE'LL ADDRESS THAT WHEN WE
23 GET THE MOTION FOR RECONSIDERATION.
24 ANYTHING ELSE?

25 MR. WRIGHT: THAT'S IT.

1 MR. MARING: THAT'S IT, YOUR HONOR.
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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 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 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)

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 (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 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

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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 though May 14, 2003 lease year.

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 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

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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. _____ Attorney Fees-per Affidavit of Plaintiff's counsel

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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 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.

With respect to the Defendant's affirmative defense that the Plaintiff failed to mitigate his damages, the Defendant did not present any evidence that he offered the Plaintiff a substitute tenant for the Leased Premises or that he exercised his right to assign his leasehold interest or sublease the Leased Premises to a third party. Likewise, the Defendant did not present any evidence that the Leased Premises were readily rentable for the portion of the lease year remaining after the Defendant abandoned the Leased Premises. The Defendant did not present any evidence with respect to his additional affirmative defenses of novation, accord and satisfaction, and laches.

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 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.

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.

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.

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 the Defendant neither offered the Plaintiff a substitute tenant nor exercised his rights under the Ground Lease Agreement to assign his leasehold interest or sublease the Leased Premises to a third party when he abandoned the Leased Premises,

47. 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.

48. Based upon the greater weight of the evidence, I find that the subject property is difficult to rent because of its size, that it has been leased by the Plaintiff on two occasions, and that on each occasion it was on the market for approximately two (2) years prior to being leased.

49. I find that the Defendant failed to offer any evidence to support a finding that the Plaintiff could have rented the Leased Premises for the remainder of the lease term following the Defendant's abandonment of the Leased Premises.

50. 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.

51. 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

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- 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. _____ 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 Defendant, as the proponent of the affirmative defense of failure to mitigate damages, satisfied 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?
- V. Whether the Plaintiff is entitled to an award of pre-judgment interest?

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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); Turman v. MacLachlan, 257 Ga. 69, 354 S.E.2d 825 (Ga. 1987); In re Joyner, 74 B.R. 618 (Bkrcty.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:

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“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

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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 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. Banchero, 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.

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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 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 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 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. Has the Defendant, as the proponent of the affirmative defense of failure to mitigate damages, satisfied 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?

Assuming for the sake of argument that the Plaintiff was under a legal duty to mitigate his damages, the Defendant nevertheless failed to present evidence 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. See, Brendle's Stores, Inc., v. OTR, et al., 978 F.2d 150 (C.A. 4 [SC] 1992) (holding under South Carolina law, that the burden of showing failure to mitigate damages falls on the party asserting that claim). The proposition that a party who claims

damages should have been minimized has the burden of proving that they could reasonably have been avoided or reduced is set forth in Tri-Continental Leasing Corp. v. Stevens, Stevens & Thomas, P.A., 287 S.C. 338, 342, 338 S.E.2d 343, 346 (Ct. App. 1985). In that opinion, the South Carolina Court of Appeals held that the party who claims damages should have been minimized has the burden of showing that the course of action to minimize damages was feasible, what the cost of minimization of damages would be, and whether they would, in fact, reduce the damages caused by the Defendant's breach. Id., 287 S.C. 342-43, 338 S.E.2d at 346-47. The Georgia Court of Appeals, in Branon v. Ellbee Pictures Corporation, which was cited and followed by the South Carolina Court of Appeals in Tri-Continental Leasing Corp., stated:

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

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

Here, the Defendant failed to offer any proof which would enable the fact finder to reasonably estimate how much the damages could have been mitigated. See Branon, supra. The Defendant did not present evidence that he offered the Plaintiff a substitute tenant or exercised his right to assign his leasehold interest or sublease the Leased Premises to a third party. The Defendant also failed to offer evidence that the Leased Premises were readily rentable for the portion of the lease year remaining after the Defendant abandoned the Leased Premises and left

significant amounts of trash to be removed from the Leased Premises. Indeed, the only reasonable conclusions that may be drawn from the evidence in the record are that the property is difficult to rent because of its size, that it was leased by the Plaintiff on only two occasions, and on each occasion it was on the market for approximately two (2) years prior to being leased. (Testimony of Charley Ray and Leon P. Butler, Jr.). The Defendant offered no proof that if the Plaintiff had acted prior to the expiration of the lease term (May 14, 2003) the damages caused by the Defendant's breach would have been reduced. See, Tri-Continental Leasing Corp., supra.

V. 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 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 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.

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.

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 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

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 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 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. In the alternative, 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. In the alternative, I 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. Brendle's Stores, Inc., v. OTR, et al., 978 F.2d 150 (C.A. 4 [SC] 1992); Tri-Continental Leasing Corp. v. Stevens, Stevens & Thomas, P.A., 287 S.C. 338, 342, 338 S.E.2d 343, 346 (Ct. App. 1985). "... party who claims damages should have been minimized has the burden of showing that the course of action to minimize

damages was feasible, what the cost of minimization of damages would be, and whether they would, in fact, reduce the damages caused by the Defendant's breach." *Id.*, 287 S.C. 342-43, 338 S.E.2d at 346-47. The Defendant did not offer any evidence that the Leased Premises were readily rentable for the portion of the lease year remaining after the Defendant abandoned the Leased Premises and did not offer any evidence to support a reasonable estimate of the amount of damages that could have been mitigated if the Plaintiff had taken actions to mitigate his damages prior to May 15, 2003. The only reasonable conclusions that can be drawn from the evidence in the record is that the property is difficult to rent because of its size, that the Plaintiff leased the property on only two occasions, and on each occasion it was on the market for approximately two (2) years prior to being leased.

35. 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.

36. 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 and costs incurred by the Plaintiff, 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

WDH, Jr. _____

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.	_____	Attorney Fees

ORDERED

IT IS THEREFORE ORDERED, that the Plaintiff have judgment against the Defendant in the amount of \$ _____, 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 \$ _____ 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 \$ _____ 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 \$ _____ 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 \$ _____, including:

WDH, Jr. _____

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.	_____	Attorney Fees

AND IT IS SO ORDERED.

December ____, 2008

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

WDH, Jr. _____

JOHN TO ADDRESS:

Factors to be considered

Expert Witness Fees

STATE OF SOUTH CAROLINA
COUNTY OF GEORGETOWN

IN THE ☒ COURT OF COMMON PLEAS
☐ FAMILY COURT

LEON P. BUTLER

☐ Plaintiff

v.

BILLY WILSON.

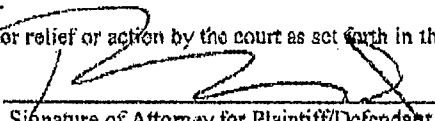
☒ Defendant

CASE NO.

2006 - CP - 22 - 422

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

check box above indicating submitting party

Name and SC Bar # of Plaintiff's Attorney Neil D. Wright #6240 Barnett & Wright, PA 1304 A Azalea Court Myrtle Beach, SC 29577 Telephone: (843) 449-0781		Name and SC Bar # of Defendant's Attorney Robert W. Maring #8810 Maring Law Firm, P.A. Post Office Box 478 Georgetown, SC 29442 telephone: (843) 545-9544 fax: (843) 545-9735	
☒ MOTION HEARING REQUESTED (attach written motion and complete SECTION I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTION II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II AND III)			
SECTION I: Hearing Information			
Nature of Motion: <u>Motion for Reconsideration</u> Estimate Time Needed: <u>1 hour</u> Court Reporter Needed: YES / NO			
SECTION II: Motion/Order Type			
☒ Written motion attached ☐ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.			
 Signature of Attorney for Plaintiff/Defendant		April 6, 2009 Date submitted	
SECTION III: Motion Fee			
☒ PAID-AMOUNT: <u>\$25.00</u> ☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support (check reason) ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ ☐ Other:			
JUDGE'S SECTION			
☐ Motion Fee to be paid upon filing of the attached order. Other:		JUDGE _____ CODE: _____ Date: _____	
CLERK'S VERIFICATION			
Collected by: _____ (print name)		DATE FILED	
☐ MOTION FEE COLLECTED: _____ ☐ CONTESTED-AMOUNT DUE: _____			

SCCA/233 (1/2003)

STATE OF SOUTH CAROLINA)

COUNTY OF GEORGETOWN)

LEON P. BUTLER,)

PLAINTIFF,)

vs.)

BILLY WILSON,)

DEFENDANT.)

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

MOTION FOR RECONSIDERATION

2009 APR -7 PM 3:07
CLERK OF COURT

TO: PLAINTIFF AND HIS ATTORNEY NEIL WRIGHT, ESQUIRE

PLEASE TAKE NOTICE that, pursuant to Rule 60, South Carolina Rules of Civil Procedure (SCRCP), ten (10) days hereafter, or as soon thereafter as the matter may be heard, Plaintiffs will move before the Court for an Order reconsidering the Order dated March 27, 2009 and filed on April 1, 2009, in the Office of the Clerk of Court for Georgetown County.

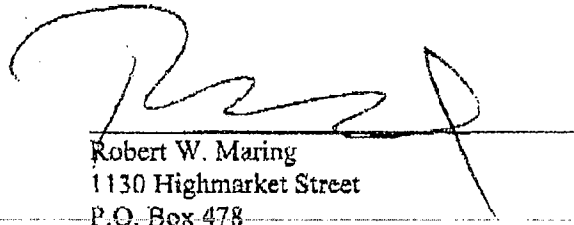
Said motion shall be based on the following grounds:

- (1) That the evidence and testimony showed that the Plaintiff had received adequate notice that the Defendant did not intend to re-let the premises by the preponderance of the evidence;
- (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;
- (3) The Court erred in not considering the evidence offered by the Defendant on the issue of mitigation;
- (4) Plaintiff did not present competent evidence of the damages as to the cleanup of the property;
- (5) Plaintiff was not entitled to pre-judgment interest;

(6) That the attorney's fees awarded by the Court were excessive and unreasonable (Defendant had reserved the right by agreement to fully address the attorney's fees issue at the reconsideration hearing including cross-examination of Plaintiff's attorney); and

(7) Such other grounds raised by the Defendant during the trial of the case, The Defendant will supplement this motion with a memorandum of law.

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 Defendant

Georgetown, SC

April 6, 2009

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

CERTIFICATE OF MAILING

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MARION J. WHITE
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I, Annette M. Powers, an employee of Maring Law Firm, P.A. do hereby certify that I deposited a copy of the Motion Cover Sheet and Motion for Reconsideration in the U.S. Mail, First Class Postage prepaid, on the 7th day of April, 2009, addressed as follows:

Willard D. Hanna, Jr., Esquire
Nexsen Pruet
P.O. Box 14610
Surfside Beach, SC 29587

Neil D. Wright, Esq.
Barnett & Wright, P.A.
1304-B Azalea Court
Myrtle Beach, SC 29577

Annette M. Powers
Annette M. Powers

Sworn to before me this
7th of April, 2006

Marion J. White
Notary Public for South Carolina
My Commission Expires: 6/11/13

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Willard D. Hanna, Jr., Special Referee

Case No. 2006-CP-22-422

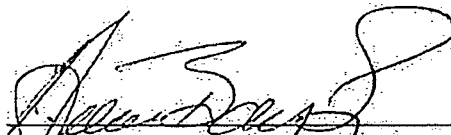
Leon P. Butler, Jr. Respondent,

v.

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

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Amended Record on Appeal contains
all material proposed to be included by any of the parties and not any other material.



Howell V. Bellamy, Jr., Esquire

George W. Redman, III, Esquire

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

Post Office Box 357

Myrtle Beach, SC 29578

Telephone: (843) 448-2400

Facsimile: (843) 448-3022

Attorneys for Respondent

Myrtle Beach, SC
July 23, 2012

THE STATE OF SOUTH CAROLINA
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APPEAL FROM GEORGETOWN COUNTY
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Willard D. Hanna, Jr., Special Referee

Case No. 2006-CP-22-422

Leon P. Butler, Jr. *Respondent,*

v.

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

AMENDED FINAL BRIEF OF APPELLANT

Howell V. Bellamy, Jr., Esq., SCB #00642
George W. Redman, III, Esq., 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 for Appellant

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I. STATEMENT OF ISSUES ON APPEAL

- A. Did the Special Referee err in Finding and Concluding that Butler was not actually notified that Wilson did not renew the Lease for the Property, where the only competent evidence indicates Notice of Non-Renewal was given to Butler's agent contemporaneously with, and as Part of, the agreed upon Oral Modification where:
1. Charley Ray was Butler's Exclusive Paid Agent, and Handled All Communications Related to the Lease;
 2. Charley Ray's Testimony is Inherently Biased and Contradictory, and Therefore Not Competent or Credible;
 3. The only Competent Evidence in the Record Indicates that Charley Ray Received Notice of Non-Renewal of the Lease as Part of the Acknowledged Modification of the Lease; and,
 4. Leon Butler, as the Principal, held out Charley Ray as His Exclusive Paid Agent for All Communications Related to the Lease?
- B. Did the Special Referee err in finding and concluding that a Landlord does not have a duty to mitigate damages in South Carolina, where the Tenant has vacated the premises pursuant to the Landlord's written instructions; the Landlord's lawyer declared default and provided a very limited cure period; and, the Landlord knew that the Property had been vacated?
- C. Did the Special Referee err by failing to conclude that a contractual provision which purportedly provides that the Landlord does not have a duty to mitigate is an unenforceable penalty clause, where the Landlord instructed the tenant to vacate the Property, and where the Landlord intentionally and willfully refused to mitigate so that he could preserve, and thereby have this Court enforce, his contractual claim to accelerate an entire years worth of rent payments?

- D. Did the Special Referee err in refusing to consider the evidence offered by Appellant Wilson on the issue of mitigation?
- E. Did the Special Referee err in finding that Plaintiff was entitled to Pre-Judgment Interest, where the Plaintiff failed to make any effort to mitigate his damages?

II. STATEMENT OF THE CASE

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

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

the Special Referee entered the forty-four (44) page Final Order Ending Action, whereby judgment was rendered against the Defendant in the amount of \$133,887.75.

(R. p. 10) Thereafter both Parties filed post-trial Motions for Reconsideration pursuant to Rules 52(b), 59(e), and 60(a) of the *South Carolina Rules of Civil Procedure*. (R. pp. 429, 461, 495) After a hearing held June 2, 2009, the Order of the Special Referee was filed August 23, 2011 (R. p. 55):

1. Granting Plaintiff's Motion to Alter or Amend Final Order Pursuant to Rule 60(a) SCRPC, to Identify the Defendant as William L. Wilson, a/k/a Billy Wilson;
2. Denying Plaintiff's Motion to Reconsider and Alter or Amend Pursuant to Rules 52(b) and 59(e), SCRPC;
3. Denying Defendant's Motion for Reconsideration Pursuant to Rule 59(e), SCRPC; and,
4. Granting Defendant's Motion for Deposit of Funds with Clerk.

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

III. STATEMENT OF FACTS

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

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

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

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

[Wilson] shall have the option to renew this lease for fourteen (14) successive one (1) year terms, upon the exact same terms and conditions as set forth herein, except that the annual rent for each one (1) year option periods shall be as set forth hereinafter. Rent shall be paid, in advance, at the commencement of each option period. ... For the fourth one (1) year option period, May 15, 2002 through May 14, 2003, the annual rent shall be FIFTY THOUSAND AND 00/100 (\$50,000.00) DOLLARS. ... Unless [Wilson] furnishes written notice to [Butler], at least ninety (90) days prior to the expiration of the original lease term ... of his intention not to exercise his option to extend the term of this Lease Agreement for an additional one (1) year option period, [Wilson's] option to extend the lease term for an additional one (1) year option period shall be deemed to be exercised automatically.

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

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

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

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

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

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

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

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

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

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

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

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

As you have failed to pay rent to Mr. Butler for the option year commencing May 15, 2002, and ending May 14, 2003, you are in default of your obligation to pay rent pursuant to the terms of the Ground Lease Agreement.

You have the right to cure the default in your lease obligations within fifteen (15) days ...

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

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

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

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

IV. STANDARD OF REVIEW

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

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

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

V. ARGUMENT

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

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

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

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

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

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

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

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

Q: DID MR. WILSON EVER TELL YOU THAT HE WAS NOT GOING TO RENEW THE LEASE FOR THE PERIOD MAY 15, 2002 THROUGH MAY 14, 2002?

A: NO.²

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

Q: SO, MY QUESTION IS, IN 2001, THE PARTIES ORALLY AGREED TO MODIFY THE PAYMENT TERMS OF THE LEASE, CORRECT?

A: CORRECT, YES.

Q: FOR THAT YEAR?

A: YES, SIR.

Q: THEY DIDN'T SIGN IT?

A: THEY DIDN'T.

² Tr. Trans., Ray, R. p. 130.

Q: IT WAS NOT IN WRITING?

A: IT WASN'T.³

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

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

A: YES, SIR.

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

A: NO.

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

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

³ Tr. Trans., Ray, R. pp. 133-134.

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

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

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

A: I DON'T RECALL THAT CONVERSATION.

Q: ISN'T IT POSSIBLE?

A: OH, YES, IT'S POSSIBLE.⁵

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

⁴ Tr. Trans, R. p. 140.

⁵ Tr. Trans., Ray, R. p. 142.

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

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

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

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

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

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

Q: DID YOU GIVE NOTICE TO CHARLEY RAY THAT YOU WERE NOT GOING TO EXERCISE THE TERMS AND TO RE-LEASE IN JANUARY OF 2002?

A: YES, SIR.⁸

A: I TOLD CHARLEY WHEN I TALKED WITH HIM IN JANUARY. I SAID, “CHARLEY, YOU NEED TO GO AHEAD AND PUT UP A SIGN AND TRY TO START RENTING IT.”⁹

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

Q: NOW, I WANT TO BE CLEAR ABOUT THIS. YOU’RE TELLING US THAT IN JANUARY OF 2002, YOU REMEMBER A CONVERSATION WITH MR. RAY WHERE YOU TOLD HIM YOU DEFINITELY WEREN’T STAYING BEYOND MAY 15TH? ...

A: ... I TOLD HIM IN JANUARY, I SAID, “I WON’T BE HERE ... AT THE END OF THIS LEASE, I’LL BE GONE. YOU NEED TO PUT

⁶ Tr. Trans., Wilson, R. p. 197.

⁷ *Id.*, R. p. 197.

⁸ *Id.* R. p. 208.

⁹ *Id.*, R. pp. 201-202.

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

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

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

¹⁰ *Id.*, R. p. 230.

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

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

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

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

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

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

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

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

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

Q: AND IT'S TRUE THAT YOU HIRED MR. RAY TO ACT AS YOUR EXCLUSIVE AGENT IN TRYING TO OBTAIN A RENTER, CORRECT?

A: YES.¹⁴

Q: FROM THE DATE OF THE INITIAL LETTER OF INTENT THE DATE OF EXECUTION OF THE LEASE ..., HAD YOU HAD ANY VERBAL COMMUNICATION AT ALL WITH MR. BILLY WILSON?

A: NO, NONE AT ALL.

Q: ... UP UNTIL THE DATE THAT YOUR DEPOSITION WAS TAKEN LAST WEEK ..., HAD YOU HAD ANY VERBAL COMMUNICATION AT ALL WITH MR. WILSON?

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

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

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

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

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

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

¹⁵ Tr. Trans., Butler, R. p. 160.

¹⁶ Tr. Trans., Butler, R. p. 177.

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

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

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

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

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

[I]t appears that the weight of authority holds that when a tenant abandons leased property the landlord is under no duty to attempt to re-let the leased property for the balance of the term of the lease to mitigate the tenant's liability under the lease, including his liability for rent.

This majority view is set forth in the Restatement (Second) of Property: Landlord & Tenant¹⁷

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

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

¹⁷ Final Or. p. 29, R. p. 38.

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

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

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

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

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

138 S.E. 34, 37 (1927), the Supreme Court held that where the plaintiffs sued for damages due to the defendant's breach of his renting contract, "It was their duty to minimize their damages as far as they could reasonably do so." Likewise, in *Gentry v. Recreation, Inc.*, 192 S.C. 429, 7 S.E.2d 63, 66 (1940), the Supreme Court held that the measure of actual damages "must be affected by the duty of minimizing damages, especially since the removal by the lessee had the effect of restoring possession of the premises to the lessors."

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

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

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

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

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

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

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

The Special Referee erroneously concluded:

[A]ny duty of [Butler] to mitigate the damages that he suffered as a result of the [Wilson’s] failure to perform his obligations under the [Lease] was negated by the following lease provision which specifically annuls any duty to mitigate ... :

“There shall be no obligation on the part of the Lessor to re-let nor any liability on his part for failure to re-let, and [Wilson’s] liability shall not be diminished or affected by [Butler’s] failure to re-let.”²²

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

²¹ Final Or., R. p. 40.

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

terminated ...”²³ Inasmuch as the Special Referee specifically found as fact that Butler “did not take any action to terminate the [Lease] or [Wilson’s] right to possession of the Leased Premises,”²⁴ there can be no question that this clause does not apply.

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

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

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

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

²³ Lease, R. p. 334, ¶ 18

²⁴ Final Or. at R. p. 27, ¶ 35.

There is, however, quite an obvious difference between the acceleration of an ordinary debt and the acceleration of rent. In the case of ordinary debt the debtor has already received the entire consideration, either in money or in property, while in the case of rent an acceleration would require him to pay for that which he has not yet received.

While this clause might not be considered unconscionable, we think it may be justly and reasonably construed as in the nature of a penalty and thus so far enforceable as to support a cause of action against the lessee for the actual damages sustained, the measure of which must be affected by the duty of minimizing damages.

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

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

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

²⁵ See Trial Brief, R. p. 470.

3. In June 2002, Ray's very first default letter on behalf of Butler specifically instructed Wilson to either pay rent or vacate the premises. (Tr. Trans., Butler, R. p. 165);
4. Wilson had vacated the Property by July 31, 2002, and was willing to pay rent and incidental expenses for this time period. (Tr. Trans., Wilson, R. pp. 207, 233; Monthly Expenditures, ending July 26, 2002, R. p. 398; Santee Cooper Turn-Off Notice, July 19, 2002, R. p. 404; Inetba Phone Invoice, ending July 24, 2002, R. p. 405);
5. Counsel for Wilson had formally notified Butler's lawyer that Wilson was no longer utilizing the Property on October 31, 2002 (R. p. 412); and,
6. Butler drove by the Property in November of 2002, and visually confirmed that Wilson had vacated the premises. (Final Or., R. pp. 26-27, ¶ 31-36; Tr. Trans., Butler, R. p. 186; Tr. Exhs., R. pp. 415, 417).

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

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

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

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

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

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

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

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

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

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

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

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

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

²⁷ Order of Aug. 23, 2011, R. p. 58.

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

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

A: I THINK YOU NEED MORE THAN THAT.

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

A: THAT'S CORRECT.²⁸

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

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

²⁸ Tr. Trans., Ray, R. pp. 46-47.

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

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

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

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

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

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

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

VI. CONCLUSION

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

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

Respectfully submitted,

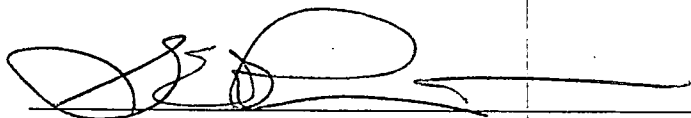
**BELLAMY, RUTENBERG, COPELAND,
EPPS, GRAVELY & BOWERS, P.A.**

Post Office Box 357

Myrtle Beach, South Carolina 29578-0357

(843) 448-2400

Attorneys for Appellant, William L. Wilson



Howell V. Bellamy, Jr.,

George W. Redman, III,

SCB #00642

SCB #72365

Myrtle Beach, South Carolina

August 12, 2012.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Willard D. Hanna, Jr., Special Referee

Case No. 2006-CP-22-422

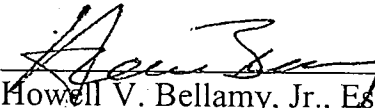
Leon P. Butler, Jr. Respondent,

v.

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

CERTIFICATE OF COUNSEL

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


Howell V. Bellamy, Jr., Esquire
George W. Redman, III, Esquire
**BELLAMY, RUTENERG, COPELAND,
EPPS, GRAVELY & BOWERS, P.A.**
Post Office Box 357
Myrtle Beach, SC 29578
Telephone: (843) 448-2400
Facsimile: (843) 448-3022
Attorneys for Respondent

Myrtle Beach, SC
August 12, 2012

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Case No. 2006-CP-22-422

Leon P. Butler, Jr.

Respondent,

v.

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

Appellant

BRIEF OF RESPONDENT

Neil D. Wright, Esq. SCB #6240
BARNETT & WRIGHT, P.A.
1304-B Azalea Court, Suite B
Myrtle Beach, South Carolina 29577
Telephone: (843) 449-0781 ext. 23
Attorneys for Respondent
Leon P. Butler, Jr.

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I. STATEMENT OF ISSUES ON APPEAL

1. SHOULD THE APPELLANT'S APPEAL BE DISMISSED BY REASON OF THE APPELLANT'S FAILURE TO ADHERE TO THE REQUIREMENTS OF THE SOUTH CAROLINA APPELLATE COURT RULES WITH RESPECT TO PREPARATION OF APPELLANT'S BRIEF AND DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL?
2. SHOULD THE APPELLATE COURT REFUSE TO CONSIDER ALL ARGUMENTS ASSERTED BY APPELLANT THAT ARE GROUNDED UPON THE DOCTRINE OF LACHES AS THE DEFENSE OF LACHES WAS NOT RAISED TO THE TRIAL COURT BY THE APPELLANT, WAS NOT RULED UPON BY THE TRIAL COURT, AND CONSEQUENTLY HAS NOT BEEN PRESERVED FOR APPEAL?
3. THE SPECIAL REFEREE CORRECTLY RULED THAT THE GROUND LEASE AGREEMENT BETWEEN THE RESPONDENT LESSOR AND THE APPELLANT LESSEE AUTOMATICALLY RENEWED FOR THE LEASE PERIOD COMMENCING MAY 15, 2002 AND ENDING MAY 14, 2003, SO THAT THE APPELLANT LESSEE IS LEGALLY OBLIGATED TO PERFORM THE OBLIGATIONS OF THE LESSEE UNDER THE GROUND LEASE AGREEMENT FOR THE LEASE PERIOD COMMENCING MAY 15, 2002 AND ENDING MAY 14, 2003.
4. THE SPECIAL REFEREE CORRECTLY RULED THAT THE RESPONDENT LESSOR AND THE APPELLANT LESSEE DID NOT AGREE TO MODIFY THEIR GROUND LEASE AGREEMENT TO ELIMINATE THE REQUIREMENT THAT THE APPELLANT LESSEE FURNISH WRITTEN NOTICE TO THE RESPONDENT LESSOR OF THE APPELLANT LESSEE'S INTENTION NOT TO EXERCISE HIS OPTION TO EXTEND THE TERM OF THE GROUND LEASE AGREEMENT.
5. THE SPECIAL REFEREE CORRECTLY RULED THAT THE RESPONDENT LESSOR WAS NOT UNDER A LEGAL DUTY TO MITIGATE THE DAMAGES THAT HE SUFFERED AS A RESULT OF THE APPELLANT LESSEE'S FAILURE TO PERFORM HIS OBLIGATIONS UNDER THE GROUND LEASE AGREEMENT.
6. THE FINAL ORDER ENDING ACTION ISSUED BY THE SPECIAL REFEREE SHOULD BE AFFIRMED UPON THE ADDITIONAL SUSTAINING GROUND THAT THE APPELLANT, AS THE PROPONENT OF THE AFFIRMATIVE DEFENSE OF FAILURE TO MITIGATE DAMAGES, FAILED TO SATISFY HIS BURDEN OF PROOF WITH RESPECT TO THE AMOUNT OF DAMAGES THAT THE

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

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

II. STATEMENT OF THE CASE

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

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

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

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

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

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

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

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

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

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

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

1. That the evidence and testimony showed that the Plaintiff had received adequate notice that the Appellant did not intend to re-let the premises.
2. That the Special Referee erred in asserting that the Plaintiff did not have the duty to mitigate his damages due to the contract provision in the Ground Lease Agreement.
3. That the Special Referee erred in not considering the evidence offered by the Appellant on the issue of mitigation.
4. That the Special Referee erred in awarding the Plaintiff damages for removal of trash abandoned by the Appellant Wilson as the Plaintiff did not present competent evidence of the damages as to the cleanup of the property.
5. That the Special Referee erred in awarding the Plaintiff pre-judgment interest as the Plaintiff was not entitled to pre-judgment interest.
6. That the attorney's fees awarded to the Plaintiff by the Special Referee were excessive and unreasonable.

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

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

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

1. That the Final Order Ending Action be altered or amended pursuant to Rule 60(a) SCRCF to correctly identify the Appellant Wilson as William L. Wilson a/k/a Billy Wilson.
2. To correct the Special Referee's error in failing to find that the Appellant Wilson did not present evidence to satisfy his burden of proof with respect to his affirmative defense of failure of the Respondent Butler to mitigate damages.
3. To correct the Special Referee's error in failing to conclude as a matter of law that the Appellant Wilson failed to satisfy his burden of proof with respect to the amount of damages that the Respondent Butler could have avoided by efforts to mitigate the damages that he suffered. (R. pp. 495-497)

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

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

III. STATEMENT OF FACTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. STANDARD OF REVIEW

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

V. ARGUMENT

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

SCACR 210 (c) pertaining to the content of the Record on Appeal provides that...

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"§ 12.1 Tenant's Obligation To Pay Rent

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

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

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

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

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

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

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

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

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

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

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

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

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

"In this case, the lease contains a provision which specifically annuls any duty to mitigate. Parties of equal bargaining power are free to enter into any agreement the terms of which are enforceable at law. (Citations omitted) A rental agreement may include any terms which are not inconsistent with or prohibited by law, (Citations omitted) or against public policy.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

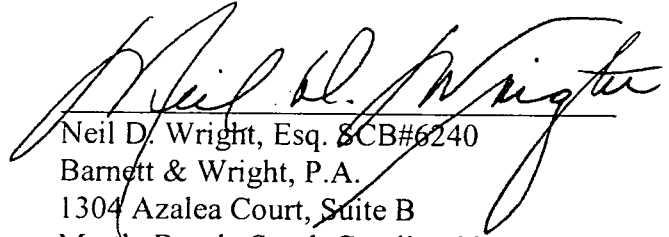
Likewise, Paragraph 10 of the Ground Lease Agreement obligates the Appellant Wilson to pay the Horry County real estate taxes assessed against the Leased Premises during the lease term and provides that the Lessor may pay such taxes if the Lessee fails to do so, "... in which case the amount so paid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

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

CONCLUSION

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

Respectfully submitted,



Neil D. Wright, Esq. SCB#6240
Barnett & Wright, P.A.
1304 Azalea Court, Suite B
Myrtle Beach, South Carolina 29577
(843) 449-0781 ext. 23
Attorneys for Respondent
Leon P. Butler, Jr.

This 3rd day of August, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Willard D. Hanna, Jr., Special Referee

Case No. 2006-CP-22-422

Leon P. Butler, Jr.

Respondent,

v.

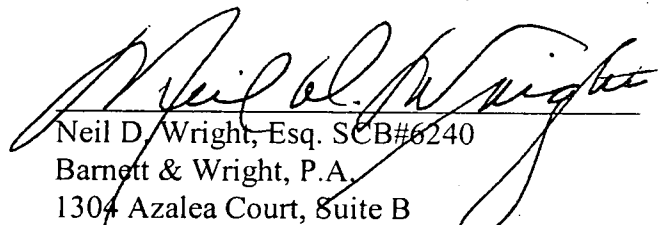
William L. Wilson a/k/a Billy
Wilson

Appellant.

CERTIFICATE OF COUNSEL

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

August 13, 2012


Neil D. Wright, Esq. SCB#6240
Barnett & Wright, P.A.
1304 Azalea Court, Suite B
Myrtle Beach, South Carolina 29577
(843) 449-0781 ext. 23
Attorneys for Respondent
Leon P. Butler, Jr.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Willard D. Hanna, Jr., Special Referee

Case No. 2006-CP-22-422

Leon P. Butler, Jr. Respondent,

v.

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

AMENDED FINAL REPLY BRIEF OF APPELLANT

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

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I. ARGUMENTS IN REPLY

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

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

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

A. INCOMPLETE STANDARD OF REVIEW

Respondent's standard of review only discusses a portion of the applicable standard, as it specifically fails to note that "[w]here mixed questions of fact and law are presented, the legal conclusions to be drawn are not entitled to the same deference." *Chambers v. Pingree*, 351 S.C. 442, 449, 570 S.E.2d 528, 532 (Ct. App. 2002). Further, where the wrong legal conclusions are drawn or the law

misapplied, the Court is obligated under this standard of review to correct such errors. *Id.* at 454, 570 S.E.2d at 534.

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

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

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

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

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

C. CONTROLLING LEGAL AUTHORITY NOT DISCUSSED OR DISTINGUISHED

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

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

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

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

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

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

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

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

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

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

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

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

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

¹ *See* Tr. Trans. Butler, R. p. 183.

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

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

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

² Resp. Br. at 6.

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

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

F. MISQUOTE CONCERNING NOTICE OF NON-RENEWAL

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

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

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

G. ISSUE PRESERVATION: LACHES

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

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

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

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

H. DOCUMENTS WITHIN RECORD ON APPEAL

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

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

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

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

II. CONCLUSION

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

Respectfully submitted,

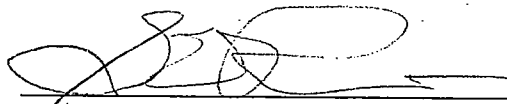
**BELLAMY, RUTENBERG, COPELAND,
EPPS, GRAVELY & BOWERS, P.A.**

Post Office Box 357

Myrtle Beach, South Carolina 29578-0357

(843) 448-2400

Attorneys for Appellant, William L. Wilson



Howell V. Bellamy, Jr., SCB #00642

George W. Redman, III, SCB #72365

Myrtle Beach, South Carolina

August 12, 2012

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Willard D. Hanna, Jr., Special Referee.

Case No. 2006-CP-22-422

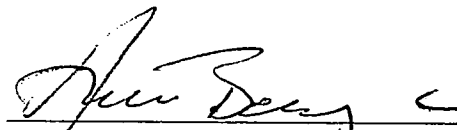
Leon P. Butler, Jr. Respondent,

v.

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

CERTIFICATE OF COUNSEL

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



Howell V. Bellamy, Jr., Esquire

George W. Redman, III, Esquire

BELLAMY, RUTENERG, COPELAND,

EPPE, GRAVELY & BOWERS, P.A.

Post Office Box 357

Myrtle Beach, SC 29578

Telephone: (843) 448-2400

Facsimile: (843) 448-3022

Attorneys for Respondent

Myrtle Beach, SC
August 12, 2012