IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

SAM KAZERY — APPELLANT

VS. — CAUSE NO. 2009-CA-01391

GEORGE WILKINSON — APPELLEE

BRIEF OF APPELLEE

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Court may evaluate possible disqualification or recusal.

1. Honorable Patricia Wise
   Chancery Court Judge
   Hinds County, Mississippi
   P. O. Box 686
   Jackson, MS 39215-0686

2. Vernon H. Chadwick, Esquire
   Attorney for George Wilkinson
   1640 Lelia Drive, Suite 210
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3. Thomas M. Bryson, Esquire
   Attorney for Sam Kazery and Arnold Kazery
   5448 I-55 North, Suite E
   P. O. Box 12445
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4. George Wilkinson
   104 Seville Way
   Madison, MS 39110

5. Sam Kazery
   5236 Robinson Road Extension
   Jackson, MS 39204

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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STATEMENT OF THE ISSUES

1. The Trial Court made its findings in this case based on clear and convincing evidence before the Court that Sam Kazery waived his rights to receive written notification of George Wilkinson's options to renew the subject lease.

2. The Trial Court, based on the evidence presented, properly concluded that George Wilkinson exercised his options to renew the subject lease through July 31, 2027.

3. The Trial Court rightfully concluded, based on the evidence presented, that Sam Kazery waived his rights to receive notice.

4. The Trial Court properly concluded that Sam Kazery, in his letter of April 20, 2007, intended to allow George Wilkinson to renew his lease.

5. The Trial Court properly ruled that George Wilkinson's attorney's letter of July 23, 2007 put Sam Kazery on notice that George Wilkinson had previously exercised his 4th and 5th options by notifying Arnold Kazery, and Sam Kazery did not object.

6. The Trial Court properly found that a renewal clause in a lease need not be strictly complied with when using equitable principles regarding a lessee's ignorance or negligence.

7. The Trial Court properly found that a renewal clause of a lease need not be strictly complied with in that the Chancellor found that it would result in a hardship to the lessee.

8. The Trial Court properly denied admitting into evidence Exhibits # 7 and 8.

STATEMENT OF THE CASE

This case began on February 12, 2008 when Sam Kazery filed his Complaint against George Wilkinson seeking certain relief from the Chancery Court of the First Judicial District of Hinds County, Mississippi. The Complaint, among other things, sought forfeiture of George Wilkinson's lease pertaining to two parcels of real estate which are being used as a parking lot in the downtown area of the City of Jackson. George Wilkinson filed an Answer and Counterclaim making Arnold Kazery, the father of Sam Kazery, a defendant, as well as Sam Kazery, to the Counterclaim. The Answer and Counterclaim seeking equitable relief for George Wilkinson included, among other things, waiver, misrepresentation, and estoppel.

The case proceeded through discovery and resulted in a two day trial before the Honorable Patricia Wise, Chancellor, Hinds County, in Jackson, Mississippi on March 3, 2009 and on April 2, 2009. Sam Kazery, Arnold Kazery, and George Wilkinson presented evidence and testimony in the court proceeding.

On July 24, 2009, the Chancellor issued her Order and Opinion in this cause finding that the relief requested in Sam Kazery's Complaint for Declaratory Judgment was DENIED. The Chancellor further found that Sam Kazery had waived and surrendered his rights to object to the renewal of George Wilkinson's lease options four and five to extend the lease to July 31, 2027 for the subject property. She further deemed all other issues moot.

Thereafter, the Appellant, Sam Kazery, filed his Notice of Appeal on August 24, 2009 and his Certificate of Compliance on August 28, 2009 and has

proceeded with his appeal therefrom.

STATEMENT OF THE FACTS

On the 1st day of August, 1966, a Lease was entered into by and between Mrs. Mary Kazery Eyd as the Lessor and Courtesy Inns, Inc., a corporation, as the Lessee. The property leased to Courtesy Inns were two (2) vacant city lots facing Pascagoula Street in the City of Jackson. The lease was for a period of one (1) year, with five (5) recurring options to extend the lease. The lease further required the lessee to pay the taxes on the property and maintain liability insurance to protect lessor's interest. (Ex.1) (R.E. 2)

The Lease provided that the rights of either party may be assigned. On August 23, 1985 George Wilkinson was assigned the Lease from Courtesy Inns, and said Assignment was recorded in the land records of Hinds County on August 29, 1985 with a copy of the lease attached thereto. The property has been used for a parking lot throughout the years, and George Wilkinson now operates the same as a parking lot. The parking lot provides 30% to a half of George Wilkinson 's entire income. (Tr. 171)

The 1st option to extend the lease was exercised by Courtesy Inns on or before July 31, 1967, which extended the lease until July 31, 1987.

On November 6, 1986, an Agreed Judgment was entered into the records which, among other things, authorized and directed Howard Ross, the duly appointed Conservator for Mrs. Mary Kazery Eyd, to execute a warranty deed to Arnold Joseph Kazery Eyd or his designee. However, George Wilkinson testified that he was

not aware of the Agreed Judgment until not very long before the trial. (Tr. 24, 206) (Ex.6)

The record shows that at the time of the Agreed Judgment, Arnold Kazery had a federal tax lien filed against him in the amount of $175,000.00. (Ex. 23)

According to the evidence, on November 10, 1986, a Warranty Deed was executed by Howard Ross and Mrs Mary Kazery Eyd conveying the property to the designees of Arnold Kazery, being George A. Kazery and Sam J. Kazery, the sons of Arnold Kazery. This conveyance was made subject to the Courtesy Inns lease. (Ex. 20) However, this deed was not recorded in the land records until four years later on September 26, 1990, after the death of Mrs. Mary Kazery Eyd in October of 1990. (Tr. 86, 105, 106)

After the Assignment of the Lease to George Wilkinson from Courtesy Inns, George Wilkinson testified that he was told by Howard Ross, the Conservator for Mrs. Mary Kazery Eyd, that Arnold Kazery had become the owner of the lease, the owner of the land, that payments were to be made by him to Arnold Kazery, and that notices were to be given to Arnold Kazery. (Tr. 6, 68, 69, 170, 172, 199, 200, 201, 206, 207) In this regard, George Wilkinson testified:

> "Arnold Kazery accepted 20 years worth of rent from me, and he reported to me that he owned the property, and that the Conservator for Mrs. Eyd also told me that the property was turned over to Arnold Kazery." (Tr. 12)
>
> "History of 20 years of rent payment, history of renewal of the lease to Arnold Kazery." (Tr. 23)

George Wilkinson testified that from the end of 1986 until April 20, 2007, that all monthly rental payments were made to Arnold Kazery, that Arnold Kazery was

insured, that all notices were given to Arnold Kazery, and that he paid all real property taxes as they came due. (Tr. 172, 173, 182) George Wilkinson also testified that Arnold Kazery confirmed that he was the owner of the lease. (Tr. 188)

George Wilkinson further testified that on or before March 31, 1987, the 2nd option to extend the lease for a term of ten (10) years was exercised by notifying Arnold Kazery, whom he believed to be his landlord and lessor, with said extension beginning on August 1, 1987 and running through July 31, 1997. (Tr. 174) No one objected to the notification to Arnold Kazery.

George Wilkinson further testified that he continued to make the monthly rental payments after the second option to extend was made from that point forward to Arnold Kazery, continued to insure Arnold Kazery, said payments were accepted by Arnold Kazery, and that he paid the taxes each year. (Tr. 172, 173) Arnold Kazery also agreed that George Wilkinson paid him every month continuously during that time. (Tr. 151, 159)

Thereafter, the record reflects that on April 15, 1987, George A. Kazery conveyed his one-half interest in the property by deed to Sam J. Kazery, resulting in Sam J. Kazery owning all of the property. Said conveyance was also made subject to the Courtesy Inns lease. However, like the prior deed to George Kazery and Sam Kazery, this deed was not recorded in the land records until three years later on September 26, 1990, after the death of Mrs. Mary Kazery Eyd in October of 1990. (Tr. 105, 106) (Ex. 21)

The testimony also reflects that on or before March 31, 1997, the 3rd option was exercised by George Wilkinson by giving notice, once again, to Arnold

Kazery, whom George Wilkinson continued to believe to be his landlord and the lessor, of his right to extend the lease for another term of ten (10) years, beginning on August 1, 1997 and ending on July 31, 2007. (Tr. 174) Again, no one objected to the notification to Arnold Kazery.

After the 3rd option was exercised, George Wilkinson testified that he continued to insure Arnold Kazery, continued to pay the taxes, and continued to make the monthly rental payments to Arnold Kazery, and the payments were accepted by Arnold Kazery. (Tr. 172, 173, 174)

Thereafter, on June 24, 2004, as in the past, once again, George Wilkinson notified Arnold Kazery, whom he believed to be his landlord and the lessor, that he was extending the lease under the 4th option, which extended the lease through July 31, 2017. Arnold Kazery received notice of this extension and signed for the same. A copy of the Notice, along with the postal confirmation indicating that the same was delivered, was placed in the records. (Tr. 54, 182, 184) (Ex. 28) Again, no one objected to the notification to Arnold Kazery. At the time of this notice there was no interested buyer for the property.

Thereafter, on March 2, 2006, once again, as in the past, George Wilkinson notified Arnold Kazery that he was reconfirming his renewal notice given earlier on June 24, 2004 that extended the lease under the 4th option, and that he was extending the lease under the 5th option, which extended the lease through July 31, 2027. He further noted that the insurance policy naming Arnold Kazery as insured was enclosed therewith. A copy of the Notice, along with the postal confirmation showing it was received by Arnold Kazery, was placed in the records. (Ex.13)

Again, no one objected to the notification to Arnold Kazery.

As a result of the 4th and 5th notices to extend the lease sent to Arnold Kazery, George Wilkinson contends that the lease is now in full force and effect with him as the lessee through July 31, 2027.

As earlier noted, Sam Kazery became an owner of property in 1987, but his interest in the property was not placed in the public records until 1990. However, George Wilkinson was not aware of the execution of the deeds, nor of their recording. The record does not reflect that any notice was given to George Wilkinson of these deeds or their recording of the same. Furthermore, the record does not reflect that the lease was ever assigned to Sam Kazery, and no notice of any assignment has been given to George Wilkinson.

The record further reflects that George Wilkinson periodically received correspondence from Sam Kazery during the 20 year period from 1987 to 2007, and in that regard, George Wilkinson testified that:

> "...I would usually respond to his father, Arnold, because I knew the lease was with him, and I would send him copies of the insurance to show that I had insurance...But anything that was pertinent to the lease, I would usually send to Arnold Kazery when I would get these letters from Sam...And, you know, it was sort of obvious that his son was helping him, or trying to help him in some of these capacities, and – but I would send the information to Arnold." (Tr. 31, 32)

> "I would not have given a whole lot of credence to Sam's requests and demands because he was not my landlord." (Tr. 203)

As stated earlier herein, the 3rd extension had extended the lease until July 31, 2007, and the 4th option had been exercised by George Wilkinson, long before

its deadline, in 2004 and reconfirmed in 2006, which extended the lease until July 31, 2017. Had these extensions not been made, the deadline for the 4th renewal would have been March 31, 2007.

On April 20, 2007, twenty days after the deadline for the renewal period for the 4th option, Sam Kazery sent a letter to George Wilkinson stating that all future rent payments were to be made directly to him and not to Arnold Kazery any longer. He further demanded proof of liability insurance for the previous ten years, and further stated that he was estranged from his father, Arnold Kazery. (Ex. 22) In addition, Sam Kazery stated in his letter:

> "As you well know there's an interested buyer and I am not sure I want to sell at all...If you desire to keep the lease, would you like to join in with me and hire joint counsel?"

George Wilkinson testified that after receiving Sam Kazery's April 20th letter, he contacted Arnold Kazery and was told by Arnold Kazery that the lease had been taken away from him by his son, Sam Kazery, and that Sam Kazery was now the owner of the lease. (Tr. 47, 189) Thereafter, George Wilkinson added Sam Kazery on the insurance, (Tr. 59, 189) and he began to make the monthly rental payments directly to Sam Kazery, instead of Arnold Kazery, and forwarded a letter to Sam confirming the changes. (Ex. 30) However, it appears that these payments, even though they were made payable to Sam Kazery, Arnold Kazery was still the recipient of the monies as shown by the negotiation of the checks. Even though on the stand, Arnold Kazery at first denied receiving the monies, but when presented with his signature on the back of the canceled checks, he admitted that he had received the

monies. (Ex. 24)

Arnold Kazery also admitted that he had been convicted of a felony of grand larceny in Federal Court, and that a substantial federal tax lien had been placed in the records against him. (Tr. 148, 149) (Ex. 23)

Eleven weeks after Sam Kazery's April 20, 2007 letter, Sam Kazery then notified George Wilkinson by another letter dated July 12, 2007 that George Wilkinson had not exercised his option to renew and that the lease would expire by its own terms on July 31, 2007, and he was to vacate the premises. (Ex. 18)

In response to the July 12, 2007 letter of Sam Kazery, on July 23, 2007 a letter was sent by Vernon H. Chadwick, attorney for George Wilkinson, to Sam Kazery which showed that notices had been sent to Arnold Kazery, as in the past, and enclosed copies of the notices of the extensions which had been made. (Ex. 26)

To further assert his claim that notices had been given to Arnold Kazery, which George Wilkinson believed was in accordance with the lease, George Wilkinson recorded the notices of the 4th and 5th extensions of the lease in the land records on July 31, 2007. (Ex. 27)

After Wilkinson's attorney's letter of July 23, 2007 and the recording of the notices in the land records, the record does not reflect that Sam Kazery made any objection to the fact that Arnold Kazery had been noticed for the 4th and 5th options as had been done in the past.

The testimony further shows that after July 31, 2007, George Wilkinson continued to remain in possession of the property, and no eviction proceedings were instituted by Sam Kazery.

As earlier stated in Sam Kazery's April 20, 2007 letter, there was an interested buyer for the property. This interested buyer was a Texas developer whom both Sam Kazery and George Wilkinson had been negotiating with for their respective interests in the property. The negotiations of both parties continued with the developer after Wilkinson's attorney's letter of July 23, 2007. When asked about the negotiations in the trial, Sam Kazery testified that "we can't make a deal because Wilkinson is not happy with the developer's offer." (Tr. 95)

George Wilkinson continued to make the monthly rental payments for the lease after Wilkinson's attorney's letter of July 23, 2007 to Sam Kazery. These checks were not rejected but kept by Sam Kazery. No checks have been returned to George Wilkinson or put into escrow or interpled. (Tr. 116, 207, 209) In fact, at least one of the rent checks was paid at the court hearing. (Tr. 207)

Further, Sam Kazery allowed and expected George Wilkinson to continue to pay the real estate taxes after Wilkinson's attorney's letter of July 23, 2007, which included at the time of the trial the taxes for the years 2007 and 2008. (Tr.172) George Wilkinson has paid these taxes. (Tr. 129, 172)

Also, after Wilkinson's attorney's letter of July 23, 2007, George Wilkinson has continued to maintain insurance with both Arnold Kazery and Sam Kazery as loss payees with coverage from 2007 through 2010 as called for under the lease. (Ex. 31, 32)

On February 12, 2008 (some seven months after Wilkinson's attorney's July 23, 2007 letter) Sam Kazery filed a Complaint for a declaratory judgment in the Chancery Court, with George Wilkinson being served with process by Sam during a

mediation meeting whereby George Wilkinson and Sam Kazery were attempting to mediate the sale of their respective interests to the interested buyer. (Tr. 126)

It was testified at the hearing that during the twenty years that George Wilkinson was leasing the property from Arnold Kazery, he attempted to buy the property from Arnold Kazery, and on one occasion, a letter was sent to Arnold Kazery by George Wilkinson dated February 2, 1999 confirming an offer to purchase the property. (Ex. 29) Arnold Kazery admitted that an offer to purchase the property was made, but that he turned down said offer. Further, business notes made by George Wilkinson on the letter indicated that there were phone conversations about this offer to purchase between Arnold Kazery and George Wilkinson, which further shows that Arnold Kazery was claiming ownership.

George Wilkinson testified that for 20 years, he thought Arnold Kazery owned the property, and the lease, until he got the letter 20 years later from Sam Kazery dated April 20, 2007 saying that he owned it. (Tr. 6, 197)

When asked in Court what George Wilkinson was asking the Court to do, his response was:

> "I'm asking the Court to acknowledge that I have a valid lease on this property so I can continue with my livelihood and also continue to negotiate with trying to accommodate the City and some developers in doing a multi-hundred-thousand-dollar development that is stymied right now a great deal because of this."
> (Tr. 194)

SUMMARY OF THE ARGUMENT

In this case, the Trial Court's ruling is supported by the overwhelming weight of the evidence. The Chancellor based her decision on waiver and equity. As to waiver, she used the definition of waiver from *Taranto Amusement Co., Inc. v. Mitchell Assocs. Inc.* 820 So.2d 726 (Miss. 2002). With regards to equity, the Chancellor used *Koch v. H. & S. Development Co.,* 163 So.2d 710 (Miss. 1964) Sam Kazery cited several cases to object to the Chancellor's findings, but those cases do not support his contentions in the case at bar.

The Trial Court heard the arguments of the parties, answered the legal and factual arguments, had the opportunity to view the witnesses and to assess the truthfulness of their testimony before the Court, and to examine all evidence introduced thereto, and has properly applied the law to the facts in this case. George Wilkinson submits that the findings and action of the Trial Court should be affirmed.

George Wilkinson operates a parking lot in downtown Jackson under a lease which he had been assigned some 20 years prior to the trial. He had reached a point of semi-retirement, of which approximately 30% to 50% of his income was derived from this parking lot.

George Wilkinson always believed his landlord was Arnold Kazery. He had been told by the Conservator for the original landlord that Arnold Kazery was the owner of the lease, the owner of the real property, and that he was to make the payments of rent to Arnold Kazery. Relying on the Conservator's instructions and the actions of Arnold Kazery, during the next twenty years, he paid all rental payments to Arnold Kazery, kept Arnold Kazery insured, and gave all notices to Arnold Kazery

regarding any extensions.

The lease had 5 options to extend. The 1st option had been exercised before George Wilkinson became the lessee. In 1987, George Wilkinson extended the lease under the 2nd option by notifying Arnold Kazery. George Wilkinson also notified Arnold Kazery for the 3rd option, which extended the lease until July 31, 2007. In June of 2004, almost 3 years prior to the 3rd option expiring, he notified once again, Arnold Kazery, exercising his 4th option. This extended the lease until 2017. On March 2, 2006, George Wilkinson exercised his 5th option by notifying Arnold Kazery which extended the lease until 2027. He also exercised his 4th option again in that letter.

On April 20, 2007, Sam Kazery, the son of Arnold Kazery, wrote George Wilkinson a letter informing him that he was no longer to pay Arnold Kazery, but to pay Sam, that he was to furnish insurance insuring Sam Kazery, and stated that there was an interested buyer for the property and asked if George wished to hire joint counsel. Upon receipt of this letter, George Wilkinson called Arnold Kazery to confirm the information in Sam 's letter and to make sure that his landlord was changing from Arnold to Sam. Arnold confirmed it, and George made the changes by paying rent to Sam, by insuring Sam, and responded to Sam that he did not wish to hire joint counsel at that time.

Why the sudden change on April 20th? Sam had been in the picture from time to time – making sure the taxes were paid and other matters, which George Wilkinson believed he was merely helping his father, Arnold. But, George Wilkinson, from the beginning, had always believed that Arnold was his landlord, not Sam. But now, it seemed that a Texas developer wanted to build a multi-million dollar hotel on

the leased site. Obviously, if there was no lease, then Sam Kazery could become a rich man, but George Wilkinson's financial future would be destroyed.

Upon receiving the April 20th letter, George Wilkinson was concerned with the change, but knew his lease was in place until 2027 because he had notified Arnold Kazery, as he had in the past, for the 4th and 5th options. Therefore, if a developer purchased the property, the developer would have to purchase his lease, as well, or, if he didn't purchase the property, George had his income from the parking lot for the future.

On July 12, 2007, Sam Kazery wrote another letter to George Wilkinson telling George that the lease was expiring on July 31st because George had not given Sam notice for the 4th extension, and that he was to vacate the property. Upon receipt of this letter, George Wilkinson's attorney sent a letter dated July 23, 2007 to Sam Kazery furnishing proof that notice had been given, as in the past, to his father, Arnold, in 2004 and in 2006. There is nothing in the record that shows that after Wilkinson's attorney's letter of July 23rd which showed proof of notices to Arnold that Sam Kazery objected to the notices having been given to his father, as they had in the past. Thus, one must believe that Sam Kazery accepted or waived notice having only been given to Arnold, and not himself, if he were the true lessor.

In fact, after Wilkinson's attorney's July 23rd letter, George Wilkinson continued to occupy the property, he continued to pay the rental checks, which contained an increase, to Sam. The checks were not rejected by Sam, but kept, and could be cashed and/or deposited at will. In fact, one of the rent payments was paid in court at the time of hearing. George Wilkinson continued to pay the taxes and

provided insurance. Also, both George Wilkinson and Sam Kazery continued to negotiate with the Texas developer regarding their respective interests. No eviction proceedings were ever commenced by Sam Kazery. These circumstances continued until a Complaint was filed by Sam Kazery in February, 2008 whereby Sam sought the forfeiture of the lease.

After two days of trial and hearing all of the evidence presented thereto, the Chancellor held that Sam Kazery had waived notice to himself of any extensions in the past, and that the letters of April 20th and July 12th of Sam Kazery, his failure to object to the July 23rd letter of Wilkinson's attorney, and his actions and inactions surrounding the same constituted, once again, a waiver to receive notice on Sam Kazery's part.

In addition to waiver, in her opinion, the Chancellor discussed the equity issues set forth in *Koch* which George Wilkinson believes that in addition to waiver, that the Chancellor also granted equitable relief under *Koch*. *Koch* held that there are two exceptions when the renewal clause of a lease need not be strictly complied with to prevent a forfeiture: one, waiver, which the Chancellor granted as described above; and two, where the failure to give notice is not from the lessee's own ignorance or negligence, but from accident, fraud, surprise, or mistake, and the forfeiture will result in a hardship to the lessee, but will do little harm to the lessor.

The Chancellor did not find that failure to give notice to Sam Kazery resulted from George Wilkinson's own ignorance or negligence. If one believes that Sam Kazery was to receive notice instead of Arnold, then it should be considered a mistake, or possibly surprise, on the part of George Wilkinson, since he had believed

Arnold to be his lessor for more than 20 years. Furthermore, the actions and inactions of Sam Kazery and his father, Arnold, constitute misrepresentation (fraud) on their part, which is also addressed in the *Koch* case.

The forfeiture will result in a real hardship to the lessee, George Wilkinson, in that he will lose a great portion of his livelihood, which would be unconscionable, and that to allow the extensions will do little harm to Sam Kazery in that he did not receive the income from the lease for over 20 years, and he knew that the lease could be extended until 2027, plus, he has the right to sell his own interest to any developer as well.

George Wilkinson's circumstances meet all of the tests of *Koch* to grant him equity's protection.

Further, George Wilkinson believes that Sam Kazery should be estopped from attempting to void the lease because of his actions and inactions.

ARGUMENT

The Chancellor was correct in her ruling. She followed the law and applied it properly from the facts in this case and found that Sam Kazery, through his actions and inactions, waived any right of forfeiture of the lease. In addition to waiver, it is believed that she also found that there were equitable circumstances which would also prevent forfeiture of the lease.

In, Sam Kazery's Statement of Issues, he presented 8 issues that he claimed the Chancellor erred in her decision. However, upon examination of his argument, the issues are not dealt with separately, and George Wilkinson's response will likewise have to be responded to in one argument as to the first seven issues.

As to the 8th issue, however, presented in Kazery's Statement of Issues, which states:

> 8. The Trial Court properly denied admitting into evidence Exhibits number 7 and 8, only allowing authentication of a disk at the conclusion of the trial.

George Wilkinson would request that the Court take notice that there is no mention in Sam Kazery's argument regarding this issue. Therefore, George Wilkinson hereby respectfully requests that this issue not be allowed in the Reply Brief in that George Wilkinson will have no opportunity to rebut the same.

The Chancellor, in her opinion, stated the definition of waiver from *Taranto Amusement Co., Inc. V. Mitchell Assocs.,Inc.,* 820 So.2d 726, 729 (Miss. Ct. App. 2002), and used this definition to support her Opinion and findings in the case:

> "To establish a waiver, there must be shown an act or omission on the part of the one charged with the waiver fairly evidencing an intention permanently to surrender the right alleged to have been waived."

Sam Kazery attempted to refute the Chancellor's decision in his argument, by citing, among other cases, *Ewing v. Adams,* 573 So.2d 1364 (Miss. 1990) to support his contention that the Chancellor's Order reflects no basis for finding that Sam Kazery waived notice requirements under the lease prior to March 31, 2007. However, the *Ewing* case deals with waiver regarding the use of property and not notices as in the case at bar.

Sam Kazery further cited in his argument *U.S. Realty 86 Associates v. Security Investments*, 40 P.3d 586 (Utah 2002) as a basis that a stricter standard is necessary for a waiver of a lease renewal option requirement than that which is required for a bilateral contract provision. Once again, however, the *U.S. Realty* case does not apply to the case at bar in that *U. S. Realty* overlooked its duty to timely send a notice of renewal and did not send a notice until 45 days later. The Utah Court held in that case that it was willful and gross negligence on the part of the lessee, but, in the case at bar, the Chancellor did not find willful and gross negligence on the part of George Wilkinson, and the record does not reflect any as well.

Sam Kazery, in his argument, stated that he obtained title to the property by virtue of Warranty Deeds in 1986 and 1987 which were not recorded until 1990. This is not disputed. However, George Wilkinson testified that he was not aware of the recording of these deeds, and he believed that Arnold Kazery was the owner of the property and the lease, not Sam Kazery, throughout the 20 year period that he has

leased the property.

In addition, Sam Kazery stated in his argument that he began correspondence with George Wilkinson prior to 1990, but he used 2 exhibits (#7 and #8) which were not introduced into evidence, but merely identified, and George Wilkinson objects to the reference of these exhibits. George Wilkinson testified that he did receive correspondence from Sam Kazery at times, but that he did not give much credence to it in that he believed that Sam Kazery was merely helping his father at those times. But, if the Court takes consideration of Exhibit #7, George Wilkinson would like to point out to the Court that it was written to George Wilkinson's father, whose company, Courtesy Inns, was the original lessee, and not to George Wilkinson, the appellee in the case at bar. Also, it does not clearly state that Sam Kazery is the owner and/or the lessor. In addition, the correspondence Sam Kazery speaks of in his argument was prior to the recording of the deeds, thus, there was no record title in Sam Kazery at that time. Further, Sam Kazery's argument mentions a letter of November 23, 1992 (Exhibit #12), and it must be pointed out that that letter was signed for by George Wilkinson's wife, and not George Wilkinson. George Wilkinson testified that he did not remember receiving the letter (Tr. 72) and there was hostility at that time between he and his wife, which resulted in a divorce.

There was confusion about the 1997 option to renew regarding a copy of the notice which was sent to Sam Kazery. However, the record is clear that George Wilkinson sent the original notice to Arnold Kazery, and merely a copy was later sent to Sam Kazery. (Tr. 50) Sam Kazery testified that this was not proper notice to him. What is important to note is that Sam Kazery, if he believed it was not proper notice to

him, Sam waived this notice and admitted so in his testimony.

"No, he did not comply in '97, but I let it go..." (Tr. 135)

Even though Sam Kazery stated that the 1997 notice was not proper, for the next ten years, Sam Kazery never made an overt action to George Wilkinson that clearly showed he was the owner of the property, that he was the lessor, that all notices under the lease should be sent to him, that proof of insurance insuring Sam was to be sent to him each year, and that he should be paid the rent, not his father, Arnold, which would make it clear that he, Sam Kazery, was the landlord, and not Arnold, as he did in his April 20, 2007 letter, which was conveniently sent after the March 31, 2007 deadline for the 4th option, when he, Sam Kazery, knew, or should have known, that the deadline to renew had passed.

Sam Kazery also cited *Taranto Amusement Co., Inc. v. Mitchell Assocs., Inc.,* 820 So.2d 726 (Miss. 2002) and stated that this case "is strikingly similar" to the case at bar. That statement is not true in that in *Taranto*, the first two options were exercised in accordance with the lease, and the 3rd option was not noticed at all by the tenant, whereas, in the case at bar, the 1st option renewal was prior to any of the parties now before the Court being involved in the lease. The 2nd and 3rd options, according to Sam Kazery, were not given to him even though he contended that he was the landlord. But, Sam Kazery did nothing to assert this claim and allowed George Wilkinson to continue to lease the property as he had in the past, with the rents being paid and notices being given to his father, Arnold. Also, it must be noted that in the case at bar, notice was given for these two options by George Wilkinson to Arnold

Kazery, whom he believed was his lessor.

However, the Chancellor did use the definition of waiver from the *Taranto* case to state what it takes to establish a waiver, and came to her conclusion that Sam Kazery had waived his rights. In the case at bar, the Chancellor stated in her Opinion that Sam Kazery was aware of his rights since 1987 at minimum, or even since 1990 when the deed was recorded. She further stated in her Opinion and as shown by Sam Kazery's testimony, that Sam Kazery allowed George Wilkinson to remain the leaseholder even after Wilkinson purportedly gave improper notice of his second renewal in 1987.

If Sam Kazery had any rights in 1987, he should have taken action then, when only Arnold Kazery was noticed for the 2nd option. Again, Sam Kazery should have taken action in 1997, when Arnold Kazery was noticed for the 3rd option. He did not take action on either occasion. Thus, Sam Kazery waived these rights and continued the precedent for the future for George Wilkinson to continue to notify Arnold Kazery.

Sam Kazery further attempted to compare the case at bar to *Taranto* by stating in his argument that "An examination of Kazery's action subsequent to the defective notice in 1997 consisted solely of accepting rent from Wilkinson and demanding that he continue paying the property taxes as required." However, this is not the situation in the case at bar. Sam Kazery was **not** receiving the rent from Wilkinson – his father, Arnold, was receiving the rent from George Wilkinson, whom George believed was his landlord.

Vice v. Leigh, 670 So.2d 6 (Miss. 1995) was also cited in Sam Kazery's argument. It appears to be more pertinent to the case at bar if one takes the position that as Sam Kazery testified in court that George Wilkinson continually violated the terms of the lease throughout the 20 year period. The *Vice* case states:

> "Clearly Vice violated the terms of the lease prior to 1990. He entered into three subleases without Leigh's approval; he failed to pay the property taxes promptly; and he failed to pay the rent on time. Equally apparent is that Leigh acquiesced in Vice's conduct prior to August 1990. Although he may not have been pleased, Leigh made no attempt to enforce his rights under the lease. Consequently, Leigh waived his right to object Vice's conduct." *Vice v. Leigh,* 670 So.2d 6, 10 (Miss. 1995)

Further, *Vice* went on to state, relying on an Illinois case, that:

> "Under Illinois law, then, waiver principles clearly apply to options to renew a lease, and conditions or breaches of conditions which are waived by the lessor cannot be revived to prevent exercise of the renewal option...[Otherwise] [it] would permit a lessor to acquiesce in, or even encourage, deviations from lease terms by the lessee, and then rely on those very deviations to refuse renewal of the lease... To permit Leigh to say nothing until the original term of the lease was near its expiration date would give him an unfair advantage..." *Vice v. Leigh,* 670 So.2d 6, 11 (Miss. 1995)

In the case of *Carsten v. Eickhoff,* 323 N.E. 2d 664 (Indiana 1975) cited by Sam Kazery, the case at bar is distinguished from that case in that no notice was given in *Carsten;* however, in the case at bar, notice was given, to Arnold Kazery. In addition, in *Carsten*, the Court said there was no evidence of fraud, accident, surprise, or mistake warranting the grant of equitable relief for failure to give the required notice.

Whereas, in the case at bar, there is obviously mistake, and it is believed by George Wilkinson, misrepresentation on the part of Sam Kazery and Arnold Kazery.

Sam Kazery also cited the case of *Wahlder v. Tiger Stop, Inc.*, 391 So.2d 535 (La. 1980). In the *Wahlder* case, the lessee failed to give notice on time, but a waiver was given because of an oral agreement of the parties, which deviated from the terms of the lease in that even though the notice was not proper, that an oral agreement constituted effective exercise of the extension option. The Louisiana court found for the lessee. In the case at bar, notice was given timely to Arnold Kazery, and the Chancellor, in her Opinion, stated that the April 20, 2007 letter was sufficient proof for one to believe that Sam Kazery waived any notice that may have been improper.

The Chancellor went on to further her position that Sam Kazery had waived his right to receive notice because of the language of the April 20, 2007 letter. On April 20, 2007 when Sam Kazery wrote his letter to George Wilkinson, he is presumed to have known at that time that no proper notice had been received since he is presumed to know all of the conditions set forth under the lease, as well as George Wilkinson. In the words of the Chancellor, "Kazery had full knowledge of his rights as owner of the property to receive proper and correct notice from Wilkinson." However, Sam Kazery stated in his April 20, 2007 letter, the following:

> "As you well know there's an interested buyer and I am not sure I want to sell at all...If you desire to keep the lease, would you like to join in with me and hire joint counsel?"

This statement by Sam Kazery can only lead one to believe that Sam Kazery was waiving his rights, once again, to receive notice as he had in 1987 and

1997.

The Chancellor further stated in her Opinion:

> "Thus, the question becomes: Why did Kazery reference giving Wilkinson more time to 'keep the lease' in Kazery's letter on April 20, 2007, when the time to properly renew had already passed? Could it be that Kazery was once again allowing Wilkinson to improperly renew?"

Waiver is defined as "The intentional or voluntary relinquishment of a known right." *Black's Law Dictionary,* Third Edition, pg 1827.

Thus, as the Chancellor found, Sam Kazery knew, or should have known, that the time for notice had expired on March 31st, twenty days prior to when he wrote the April 20th letter. Also, if Sam Kazery wasn't waiving notice in the April 20th letter, as he did in 1987 and 1997, then why would he want to hire joint counsel with someone who would soon be asked to vacate the premises?

It is presumed that Sam Kazery had a copy of the lease, particularly if he claims he was the lessor, to which he could refer to as to when the deadlines were and when notices had to be given. The requirement of written notice was thus reasonably within the knowledge of both George Wilkinson and Sam Kazery. George Wilkinson gave notice prior to the deadline for the 4th option when he gave notice to Arnold Kazery in 2004 and 2006. Having done this, he believed he had satisfied the terms of the lease for the extensions. However, Sam Kazery, on the other hand, can only be presumed to also have known when the deadline was for the 4th option notice. Therefore, when Sam Kazery wrote the April 20, 2007 letter he had to have known that the deadline for giving notice had already expired. *Geisdorf v. Doughty*, 972 P.2d 67,

73 (Utah 1998) states:

> "...both parties, as signatories, had copies of the Lease Agreement to which they could refer; the requirement of written notice was thus 'reasonably within the knowledge of both parties' ".

Sam Kazery stated in his argument that George Wilkinson intended to exercise his option by the letter of July 23, 2007; however, it is clear that the July 23rd letter was not an intention at all, but to clarify that notice **had been given** on June 24, 2004 to Arnold Kazery, with proof included with the July 23rd letter of the notice renewals and establishing that the lease continued until July 31, 2027. For Sam Kazery in his argument to continuously repeat that the letter of July 23rd intended to exercise the 4th and 5th option is an attempt to mislead the Court.

As found by the Chancellor, Wilkinson's attorney's letter of July 23, 2007 to Sam Kazery specifically put Sam Kazery on notice that George Wilkinson had notified Arnold Kazery of the renewal notices which were sent to Arnold Kazery for the 4th and 5th options. However, the record reflects that Sam Kazery did not, once again, object to Arnold receiving the notices. In fact, there is nothing in the record that shows Sam Kazery did anything to signify that the notices sent to Arnold in 2004 and 2006 were improper. After Wilkinson's attorney's letter of July 23, 2007, Sam kept receiving the rent, as instructed in his April 20th letter. Also, Sam allowed and expected George Wilkinson to pay the taxes and provide insurance coverage. Nor did Sam attempt to evict George Wilkinson. In addition, both George Wilkinson and Sam Kazery continued to negotiate with a perspective buyer for their respective interests after Wilkinson's attorney's letter of July 23, 2007. In fact, the record reflects that Sam Kazery did

nothing to change these circumstances. Seven months later, he filed his Complaint.

For Sam Kazery to argue that the Court's answer to the question "Could it be that Kazery was once again allowing Wilkinson to improperly renew?" was "clearly in the negative" is absurd. In responding to this position, how could George Wilkinson "keep the lease" or "hire joint counsel" if notice had not been given prior to March 31, 2007? On April 20, 2007, when Sam Kazery wrote his letter to George Wilkinson, Sam had a duty to know that the deadline for the renewal notice had already passed, and that any invitation to hire joint counsel regarding the interested buyer can only be construed as knowingly and intentionally waiving any rights that Sam may have had. Otherwise, he should have given his notice in the April 20th letter to George Wilkinson as he did in his July 12, 2007 letter that no notice had been received and the lease would expire on July 31, 2007, rather than string George Wilkinson along, as he did.

Sam Kazery cited *The Wachovia Bank and Trust Co., N.A. v. Rubbish,* 293 S.E.2d 749, 430 (NC 1982) citing that conversations between the lessor and the lessee did not include an express waiver of notice. However, he did not point out that the North Carolina Court found in favor of the lessee in that the lessor would be estopped by prior conduct and by lessee's reliance on it. "... would have 'lulled' defendant into believing written notice was not necessary." which would apply in the case at bar as well.

In his argument, Sam Kazery stated that by Kazery making no attempt to have Wilkinson removed from the property, that this does not constitute a waiver of an option to renew. He cited in support thereof the case of *Homestead Enterprises v. Johnson Products, Inc.,* 540 A.2d 471 (ME 1988). The *Homestead* case is

distinguished from the case at bar in that it deals with whether or not the lessee was in default for selling items which were not allowed by the lease. The *Homestead* lease specifically provided that the right to extend was conditioned upon the lessee not being in default at the time of the exercising of the option. Using the argument of Sam Kazery, the conditions set forth in the *Homestead* case cannot apply in the case at bar because Sam claims no notice was given, not that there was a default at the time notice was given. In addition, there are no express provisions regarding the lease in the case at bar as there were in the *Homestead* case.

Sam Kazery further stated that silence by the landlord after receiving defective notice is implied rejection of such notice, citing *Dyer v. Ryder Student Transportation Services, Inc.*, 765 A.2d 858 (Rhode Island 2001) However, in the *Dyer* case, Ryder (the lessee) obtained an extension for which to exercise his option, but, Ryder never gave his notice to renew the lease. Thus, the lease expired on its own terms. Any payments of rent thereafter would not considered by the Court to revive the original lease because Ryder had given no notice. The Court went on to say in the *Dyer* case:

> "It is clear to this Court that Ryder delayed simply because it wanted to avoid extending the lease if it was not awarded a contract by the city. Unfortunately for Ryder, this was a gamble that it lost." *Dyer v. Ryder Student Transportation Services, Inc.*, 765 A.2d 858, 861 (Rhode Island 2001)

Those circumstances in *Dyer* do not exist in the case at bar. The testimony of George Wilkinson makes it clear that he did not delay in giving notice. He did give notice – in fact, he gave two notices to extend the 4th option. When these notices were furnished

to Sam Kazery in the July 23, 2007 letter of George Wilkinson's attorney, the record reflects that Sam Kazery did nothing thereafter, which can only lead one to believe that once again, Sam Kazery was waiving notice, as he had done in the past. In addition, *Campbell Paint & Varnish Co. v. Hall,* 95 So 641, 687 (Miss. 1920) did address silence by stating that silence may not be sufficient to constitute a waiver. However, *Campbell* made it clear that this does not apply if "such silence exists under circumstances where the seller [lessor] is called on to speak." Sam Kazery was called on to speak in that if he believed that the notices to Arnold were not proper, then he should have made it clear, and not merely remained silent until the filing of his Complaint.

With regards to the statement made by Sam Kazery in his argument concerning checks sent by George Wilkinson, the checks for rent of the leased premises have continued to be paid by George Wilkinson to Sam Kazery, although not deposited by Sam. However, the checks have not been rejected or returned to George Wilkinson, nor have they been interpled with the Court, or dealt with otherwise. Therefore, they can be cashed or deposited at any time that Sam may desire.

Geisdorf v. Doughty, 972 P.2d 67, 72 (Utah 1998) was also cited in Sam Kazery's argument in order to establish his claim that he did not waive notice. However, it is George Wilkinson's position that the *Geisdorf* case clearly explains how the Chancellor did find for George Wilkinson in the case at bar. The *Geisdorf* case states that :

> "...a fact finder should assess the totality of the circumstances to determine whether the relinquishment is clearly intended... any waiver 'must be distinctly made, although it may be express or implied.' "

The Chancellor in the case at bar did assess the "totality of the circumstances" and determined correctly that Sam Kazery, once again, waived notice from George Wilkinson as he had in the past. As the Chancellor found, Sam Kazery waived and surrendered his rights to object to the renewal of George Wilkinson's lease options four and five of the subject property.

George Wilkinson does not agree with Sam Kazery's position in his argument that the Chancellor reached the conclusion that equity was not appropriate in the case at bar based upon Section II of the *Koch* test in *Koch v. H & S Development Company,* 163 So.2d 710, 622 (Miss. 1964)

In fact, George Wilkinson believes that the Chancellor did find that equity was appropriate in the case at bar and ruled correctly. Thus, her Opinion and Order **does** meet Section II of the *Koch* test. In that regard, please consider the following:

- The Chancellor did not find that failure to give notice to Sam Kazery resulted from George Wilkinson's own ignorance or negligence – satisfying part 1 of Section II of the *Koch* test.

- The Chancellor, in referring to Sam being the owner of the property, stated, at most, that Wilkinson's oversight of such could be considered just that, an oversight, mistake, or he could have simply done a cursory review of the tax statement and overlooked the change. In addition, George Wilkinson did give notice to Arnold Kazery because he believed that Arnold was the lessor under the lease, and thus did not give notice to Sam Kazery, which could only be because of mistake. – thus, both circumstances satisfy part 2 of Section II of the *Koch* test. Further, the actions and inactions of both Sam Kazery and Arnold Kazery resulted in misrepresentation by them which should also apply to part 2 of Section II of the *Koch* test which refers to fraud.

- The Chancellor stated that forfeiture of the lease will result in a hardship to George Wilkinson. In that regard, he will lose 30% to

a half of his entire income and/or his ability to sell his interest to a developer – thus satisfying part 3 of Section II of the *Koch* test.

- It will do little harm to Sam Kazery in that he did not receive the income from the lease for 20 years anyway, and he was aware that the lease could be extended until 2027, and he also has the right to sell his interest as the owner of the property to a developer as well – thus satisfying part 4 of Section II of the *Koch* test.

As to any hardship mentioned above by the Court, the Chancellor stated that forfeiture of the lease will result in a hardship to George Wilkinson. She goes on to say that Sam Kazery will also have hardship if George Wilkinson is allowed to be released from the lease. Therefore, it must be understood that if forfeiture does not occur, then neither Sam Kazery or George Wilkinson will suffer a hardship. However, George Wilkinson cannot envision any situation in which Sam Kazery would suffer a hardship if his lease is terminated by the Court. In fact, the opposite would occur. Sam Kazery would receive a windfall at the expense of George Wilkinson.

According to *Koch*, in order to be entitled to equity's protection, George Wilkinson must fall within the positive and negative provisions of one or more of the four exceptions. George Wilkinson falls under all four of the exceptions.

It was only after the lease renewal period had expired that Sam Kazery took action which he should have taken over the 20 year period. If Sam were the owner of both the lease and the land, as he claims, then he should have demanded that rent payments be paid to him, not to his father, Arnold, long before his April 20, 2007 letter. But he didn't. He should have demanded that notice be given to him, not to his father, Arnold, long before the April 20, 2007 letter. But he didn't. He should have demanded proof that he was insured each year long before the April 20, 2007

letter. But he didn't. It was only when a Texas developer came into the picture that he did make these demands.

With reference to the fact that George Wilkinson had received tax statements which showed the title owner to be Sam Kazery, in addition to what the Chancellor stated that it could have been as a result of oversight or mistake on his part, it must be pointed out that George Wilkinson had a duty under the lease to pay the taxes, regardless of who owned the property, and he was paying them to the Tax Collector, not to Sam or Arnold. There was no reason to study the same. But, the fact that Sam's name did appear as owner can surely be considered a mistake on the part of George Wilkinson.

In Sam Kazery's argument, he discussed the ownership of the lease versus the ownership of the property. This can occur and does often occur in the business world. Even if the Chancellor had not found under *Koch* for George Wilkinson, it is believed that she could have found for George Wilkinson under the Doctrine of Estoppel. Sam Kazery, in his Complaint, pled that he was the owner of the land, but never in his Complaint, did he state that he was the owner of the lease. Also, George Wilkinson testified that he believed Arnold Kazery was the owner of the lease, and that he was told by the Conservator for the original lessor and Arnold Kazery that Arnold was the owner of the lease. Since a lease can be owned by one person, and the land owned by another, could it not be presumed that Arnold was truly George's lessor? Thus, on April 20, 2007 when Sam Kazery wrote his letter to George Wilkinson, it was only then that Sam truly put George on notice that he was now the owner of the lease as well as the land when he instructed George Wilkinson, among

other things, to make all future rent payments to him. Therefore, when notice was given by George in 2004 and 2006 for the 4th and 5th options, he gave it to Arnold, who was his lessor, thus the proper person at that time.

> "While the right to let property is an incident of the title and possession, a person may be a lessor and occupy the position of a landlord to the tenant although he is not the owner of the premises let..." 49 Am Jur 2d, Landlord and Tenant, Section 12, 55

In the case of *Pillsbury Investment Company v. Otto,* 65 N.W. 2d 913, (Minn. 1954), the scenario is almost identical to the case at bar. In the *Pillsbury* case the lessor was given notice of a right to extend the lease to the entity that the lessee believed to be his landlord at the time the notice was given. However, the landlord had previously sold his interest in the lease to another, but no notice had been given to the lessee of this transfer. But the payments continued to be made by the lessee as prior to the transfer in that the lessee continued to believe his landlord was still the same. It was only after the deadline had passed for the extension that the lessee learned of the transfer. The Minnesota Court held that:

> "... Hackl was led to believe that Ambassador was still his landlord; that the rental payments due under the lease, as well as the notice of intent to renew it, would therefore have to be given to Ambassador; and finally that the notice given to Ambassador was in full compliance with the terms of the lease. It is clear that he could have done nothing more to protect his rights under the option."

The Minnesota Court further stated that:

> "It is well settled that, while notice to an obligor [George Wilkinson] is not essential to the validity of an assignment as between an assignor [Arnold Kazery] and an assignee [Sam Kazery], until such notice has been

> given, the obligor [George Wilkinson] may continue to regard the assignor [Arnold Kazery] as the owner of the interest or thing assigned."
>
> "...and that the assignor [Arnold Kazery] remains in privity with the obligor [George Wilkinson] insofar as the performance of obligations by the latter is required under the instrument assigned."
>
> "...the burden of proving that the obligor [George Wilkinson] has received either actual or constructive notice of the assignment rests upon the assignee [Sam Kazery]."
>
> "Based upon these principles, it is clear that in the instant case the written notice of intent to exercise the option for extension which was given by Hackl to Ambassador was sufficient to constitute full compliance with all requirements of the lease in respect thereto. It was timely made. It was given to the party known to Hackl as his lessor and to whom rental payments were being made. No notice of the assignment had ever been given to him."

The possibility that a separation of the lessor and owner is further enhanced by the fact that the deed that transferred title to Sam contained the words "subject to" the lease, which could give notice that the lease was separate from the transfer and maybe owned by another.

> "The words 'subject to' in a deed conveying an interest in real property are words of qualification of the estate granted." 23 Am Jur 2d, Deeds, Section 217, 262

Also, George Wilkinson contends that he had relied upon the representations (and omissions) over a 20 year period of both Arnold Kazery (who was made a defendant in this case) and Sam Kazery. Relying on these representations and omissions, George Wilkinson believed that Arnold Kazery was his landlord and always exercised his options to extend the lease by notifying Arnold Kazery, and not Sam

Kazery. Now, Arnold Kazery and Sam Kazery appear to have changed their positions which had existed throughout the years until the April 20, 2007 letter of Sam Kazery to George Wilkinson. Those changes in their positions now result in a detriment or prejudice to George Wilkinson. It appears that the change in their positions was a result of a possible sale of the property for a substantial sum of money, and if the lease were terminated, then the Kazerys would receive all of the monies from the sale, which would be inequitable to George Wilkinson because of their representations and omissions, and he would suffer a substantial loss, and the Kazerys would be unjustly enriched.

> "The doctrine of estoppel requires (1) belief and reliance on some representation, (2) change of position as a result thereof, and (3) detriment or prejudice caused by the change of position..." *First Investors Corp. V. Rayner* 738 So.2d 228, 233, (Miss. 1999)
>
> "Where it would be substantially unfair to allow a party to deny what he has previously induced another party to believe and take action on, equitable estoppel may be enforced." *First Investors Corp. V. Rayner* 738 So.2d 228, 233, (Miss. 1999)
>
> "The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change in position is sternly forbidden." *Dickerson v. Colgrove,* 100 U.S. 578, 580, 25 L. Ed. 618 (1880) *Pan Eastern Exploration Co. v. Hufo Oils,* 855 F.2d 1106 (5th Cir. 1988)
>
> "Simply stated, the doctrine of estoppel provides that, when one who has taken a position whether by written document or representation, action or inaction, upon which another has relied, then he will be prohibited from thereafter adopting a contrary position or one which is

> inconsistent with that originally taken." Law of the Real Estate Business by William B. French and Harold F. Lusk, 1979, pg 29.

Furthermore, in the conclusion of Sam Kazery's argument, George Wilkinson takes issue with Sam Kazery making the statement that it is "undisputed" that Kazery was entitled to receive written notice under the terms and conditions of the lease no later than March 31, 2007 in that this is the whole essence of this case and the arguments of the parties. Therefore, it is not undisputed.

In addition, in the conclusion of Sam Kazery's argument, George Wilkinson taxes issue with Sam Kazery making the statement that it is also "undisputed" that written notification was not given by Wilkinson to Kazery as required in that, once again, this is the whole essence of this case and the arguments of the parties. Therefore, it is not undisputed.

CONCLUSION

"The maxim equity abhors a forfeiture, is recognized by Mississippi jurisprudence. It is wise to avoid forfeitures." *Moore v. Kriebel,* 742 So .2d 139 (Miss. 1999)

Why would George Wilkinson forfeit more than 1/3 of his entire income and destroy his financial future by sending a notice to extend his lease to someone other than Arnold Kazery, whom he believed to be his landlord and lessor?

The evidence is clear that George Wilkinson obviously believed that Arnold Kazery was his landlord and lessor until April 20, 2007 when he received the letter from Sam Kazery stating that, among other things, that all payments of rent would be paid now to him, and not his father, Arnold, which was confirmed by Arnold. A precedent had been set by the actions and inactions of Sam Kazery, and his father, Arnold Kazery, over a 20 year period which obviously led George Wilkinson to base his actions on a reliance demonstrated by their actions and inactions. The law is clear that the actions on the part of Sam Kazery demonstrates an intent not to terminate the lease, as provided for under the law, and that he waived any rights to forfeit the lease.

The Chancellor found for George Wilkinson applying proper law from the facts and the evidence presented thereto, and considered the totality of the circumstances. The witnesses appeared before her, the evidence was presented to her, she had an opportunity to observe the witnesses' demeanor and assess their truthfulness and the factual basis by which this case was decided. She ruled properly.

George Wilkinson respectfully requests that the Court uphold the

Chancellor's decision denying forfeiture of the lease.

Respectfully submitted,

GEORGE WILKINSON

BY: _____
VERNON H. CHADWICK,
HIS ATTORNEY

CERTIFICATE OF SERVICE

I, Vernon H. Chadwick, Attorney for the Appellee, George Wilkinson, do hereby certify that I have this day mailed, postage pre-paid, a true and correct copy of the above and foregoing Brief of Appellee to:

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THIS the 23rd day of March, 2010.

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