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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Maite Murphy, Circuit Court Judge

Op. No. 2024-UP-007
(S.C. Ct. App. filed January 3, 2024)
Case No. 2017-CP-10-5493

Shem Creek Development Group, LLC,.. Respondent,

v.

The Town of Mount Pleasant, South Carolina,.. Petitioner.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for the Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the South Carolina Court of Appeals on March 21, 2024.

QUESTIONS PRESENTED

I. Did the South Carolina Court of Appeals err in failing to apply a *de novo* standard of review in reviewing the trial court's construction and interpretation of Sections 6.01 and 8.17 of the Parking License Agreement?

II. Did the South Carolina Court of Appeals err in affirming the trial court's treatment of Section 6.01 of the Parking License Agreement as a liquidated damages provision rather than as a limitation of liability clause?

III. Did the South Carolina Court of Appeals err in affirming the trial court's erroneous construction and application of the language of Sections 6.01 and 8.17 of the Parking License Agreement and in disregarding controlling precedent from the South Carolina Supreme Court construing the plain and ordinary meaning of the term "due" as used in Section 6.01 and the term "sum owing" as used in Section 8.17?

IV. Did the South Carolina Court of Appeals err in failing to consider or address that the trial court actually read into the Parking License Agreement a rent acceleration clause that does not otherwise exist and was specifically rejected by the parties?

V. Did the South Carolina Court of Appeals err in affirming an award of liquidated damages of $2,604,316 constituting fifteen years of rent payments when the Parking License Agreement provides that the "sole and exclusive remedy" is the rent payments due at the time of the termination of the agreement and at the time of termination there were no rent payments due and payable?

VI. Did the South Carolina Court of Appeals err in its cursory adjudication of the trial court's failure to address and accept the argument that Section 6.01 of the Parking License Agreement, if a liquidated damages provision, constitutes an unenforceable penalty?

VII. Did the South Carolina Court of Appeals err in summarily affirming the trial court's denial of the Petitioner's motion to compel seeking financial records related to the operation of the parking garage?

VIII. Did the South Carolina Court of Appeals err in summarily deciding this case of public importance, legal complexity, and substantial financial exposure to the taxpayers under the purview of Rule 220(b), SCACR, thereby providing only string citations of "black letter" law and no legal analysis applying that law to the critical issues presented?

STATEMENT OF THE CASE

This is a breach of contract action. The Respondent Shem Creek Development Group, LLC ("SCDG") brought an action against the Petitioner Town of Mount Pleasant ("Town") alleging state law claims for breach of contract and quantum meruit/unjust enrichment.[1] The contract claim focused on a Parking License Agreement ("PLA") that was entered between SCDG and the Town on October 17, 2013. (R. 1200-1213). The PLA involved a project "consisting of a multi-level structured parking garage, comprised of 276 total parking spaces, and a proposed office complex" to be built on Coleman Boulevard in the Shem Creek area of Mount Pleasant. (R. 1201). The license agreement involved 132 of the 276 total parking spaces. (R. 1201).

On June 23, 2016, before the project was built, SCDG terminated the PLA and sued for breach of contract. (R. 1429-1430). SCDG alleged that the Town was in breach of the PLA by anticipatorily refusing to pay the first year's rent into escrow, by refusing to provide an estoppel certificate, and by violating the implied covenant of good faith and fair dealing by taking actions to interfere with SCDG's performance under the agreement. SCDG alleged, among others, that the Town Council improperly enacted amendments to the zoning ordinances and refused to agree to an amendment of the PLA after SCDG realized that it could not provide the promised number of parking spaces. (R. 98-112).

After discovery, the case was tried non-jury by Circuit Court Judge Maite Murphy from February 3-6, 2020. On July 13, 2020, Judge Murphy issued a Final Order entering judgment in favor of SCDG on the breach of contract action in the amount of $2,604,316. (R. 27-72). The

[1] The quantum meruit/unjust enrichment claim was not pursued at trial. (R. 46).

Town filed post-trial motions, including a motion for new trial absolute and a motion to reconsider, alter or amend under Rule 52(b). (R. 470-487). Those motions were denied by order filed on September 17, 2020. (R. 73-87).

The Petitioner Town appealed to the Court of Appeals which affirmed by a *per curiam* memorandum opinion filed January 3, 2024.

The Petitioner Town then filed a petition for rehearing, which was summarily denied by an order issued on March 21, 2024.

ARGUMENTS

I. The South Carolina Court of Appeals erred in failing to apply a *de novo* standard of review in reviewing the trial court's construction and interpretation of Sections 6.01 and 8.17 of the Parking License Agreement.

The Court of Appeals failed to apply the proper standard of review, and as a result, the Court of Appeals reached the incorrect decision. In construing the critical provisions of the Parking License Agreement ("PLA"), the Court of Appeals applied the "any evidence" standard rather than a *de novo* standard. In fact, nowhere in the Court's opinion is there any indication that a *de novo* standard was applied.

Critically, the trial court never ruled that Sections 6.01 and 8.17 of the PLA are ambiguous. In the briefing stage, SCDG previously conceded this very point: "the trial court did not express whether it found the relevant provisions ambiguous." *See*, Respondent's Brief, p. 33. The trial court likewise made no findings of fact as to the intent of the parties with respect to Sections 6.01 and 8.17, which is further evidence that the trial court did not find the provisions to be ambiguous. As the record reflects, SCDG did not take the position that Sections 6.01 and 8.17 are ambiguous in its pleadings or at trial.

As this Court has clearly held, "[i]t is a question of law for the court whether the language of a contract is ambiguous." *Callawassie Island Members Club v. Dennis*, 425 S.C. 193, 821 S.E.2d 667, 669 (2018). More importantly, "[t]he construction of a clear and unambiguous contract presents a ***question of law*** for the court." *South Carolina Department of Transportation v. M&T Enterprises of Mt. Pleasant, LLC*, 379 S.C. 645, 667 S.E.2d 7, 13 (Ct. App. 2008). (Emphasis added). Of course, the standard of review for questions of law is *de novo*. Thus, the Court of Appeals was required to apply a *de novo* standard to its review of the

construction of the key contract provisions, including Sections 6.01 and 8.17.

However, after giving a brief description of Sections 6.01 and 8.17, the Court of Appeals writes: "[b]eing cognizant of our standard of review, we affirm the circuit court's award of damages." *See*, Slip Op. at 2. The standard of review is referenced in footnote 1, which describes only the "any evidence" standard, which has no applicability to the Court of Appeals' review of a trial court's rulings on the construction of clear and unambiguous contract provisions as we have in this case.[2] Quite obviously, the Court of Appeals applied the incorrect standard of review and then refused to correct that clear error on rehearing. On this initial basis, a writ of certiorari is warranted so that a *de novo* standard of review may be properly applied to the contract construction issues that predominate the dispute between the parties.

SCDG recognizes that it cannot prevail under a *de novo* standard and may only succeed under a more lenient standard of review. Thus, in an attempt to salvage its victory in the Court of Appeals, SCDG argued for the first time at the rehearing stage that the trial court's interpretation of the two contract provisions – Sections 6.01 and 8.17 – presented a question of fact *and indeed was treated by the trial court as a question of fact*. SCDG then went to great lengths to try to show that to be the case – again despite not taking that position in its appellate filings until rehearing.

To reiterate, Sections 6.01 and 8.17 present a question of fact ***only if the trial court found those contract provisions to be ambiguous***. The trial court did not do so. The trial court never ruled that Sections 6.01 and 8.17 of the PLA are ambiguous. As mentioned above, SCDG actually conceded this very point during the briefing stage when it stated: "the trial court did not

[2] From a reading of the Court of Appeals' memorandum opinion, there is no indication that the Court found any ambiguity. The words "ambiguity" and "ambiguous" do not appear in the memorandum opinion.

express whether it found the relevant provisions ambiguous." *See*, Respondent's Brief, p. 34. Nonetheless, for the first time on rehearing, SCDG argued that "the trial court ***implicitly*** found Section 6.01 of the PLA ambiguous as revealed by its admission of and reliance upon parole [sic] evidence regarding the parties' intent underlying that provision." *See*, Return, p. 7. (Emphasis added). Remarkably, SCDG then insisted that the most critical ruling in the case was made **"implicitly"** in a 42-page order which incidentally was submitted as a proposed order actually drafted by SCDG's counsel.

The fallacy of that argument is easily disproved for numerous reasons. First, in its 42-page order, the trial court made **no findings of fact** as to the intentions of the parties in the drafting of Sections 6.01 and 8.17. **None**. SCDG can point to no such findings. Second, SCDG claims that the trial court "admitted" and "relied" on parol evidence. Yet, SCDG disregards the actual language of the order its own counsel drafted. In explaining that it "admitted" parol evidence over objection but then did not consider such evidence, the trial court states in footnote #5 as follows:

> Because the case was tried non-jury, the Court permitted SCDG to present this evidence subject to the objections of the Town. *See Brown v. Allstate Ins. Co.*, 344 S.C. 21, 27, 542 S.E.2d 723, 726 (2001) ("A trial judge's role in a bench trial is to admit all evidence and then evaluate in a nonjury setting.") As explained below, it is not necessary for the Court to determine whether the parking license agreement required SCDG to design the parking garage with no less than 276 total and 132 public spaces; therefore, the Court did not rely on such evidence in its findings of fact and conclusions of law stated herein.

(R. 56). Thus, based on *Brown v. Allstate*, the trial court admitted all evidence, but there is no indication that the trial court relied on any parol evidence that was admitted. Importantly, none of the parol evidence related to Section 6.01 was ever cited in the trial court's 42-page order, and there was no parol evidence even presented as to Section 8.17. There was only a single reference

to “parol evidence” in the order, and that was on page 29 and did not address Section 6.01 or Section 8.17. (R. 55).[3] Lastly, if there is any question as to whether the trial court considered parol evidence to determine the parties’ intent, the Court should refer to paragraph 102 of the “Conclusions of Law” section of the order. After quoting verbatim the language of Sections 6.01 and 8.17, the trial court writes: “When considered together, as they must, these two provisions evidence the parties’ clear intention that the Town’s obligation to pay rent for the entirety of the rental term survives the termination of the parking license agreement.” (R. 67). Unquestionably, the trial court derived the parties’ purported “clear intention” from the trial court’s own construction of Sections 6.01 and 8.17 alone and without any consideration of parol evidence. The reason is obvious – the trial court found Sections 6.01 and 8.17 to be unambiguous, and as such, the construction of those provisions presented purely a question of law that the trial court answered – albeit in error. In sum, it is a total fallacy for SCDG to claim at the rehearing stage or now before this Court that the trial court “implicitly” found Sections 6.01 and 8.17 to be ambiguous and relied on parol evidence which was never mentioned in its order to interpret the meaning of those contract provisions. This Court is urged to reject that obvious fallacy and this improper attempt to convert a question of law into a question of fact which SCDG undertook only in a desperate attempt to convince the Court of Appeals that it correctly applied the “any evidence” standard of review – a standard that clearly does not apply. Quite simply, there is no indication whatsoever – explicitly or implicitly – that the trial court treated Sections 6.01 and 8.17 as being ambiguous or as presenting a question of fact rather than a question of law. To now suggest otherwise is entirely disingenuous on the part of SCDG and amplifies the Town’s

[3] Notably, there is no recitation of any parol evidence in the “Findings of Fact” section of the 42-page order.

case that the issuance of a writ of certiorari is indeed warranted. This case would also provide this Court with the opportunity to educate the bar and bench on these critical issues relating to the standard of review, which are too often overlooked as insignificant but are far from insignificant particularly in breach of contract actions.

II. The South Carolina Court of Appeals erred in affirming the trial court's treatment of Section 6.01 of the Parking License Agreement as a liquidated damages provision rather than as a limitation of liability clause.

The Court of Appeals erred in finding that the trial court correctly treated Section 6.01 of the PLA as a liquidated damages provision. The trial court referred to Section 6.01 as "a default clause that liquidates damages." (R. 33). Section 6.01 states in pertinent part as follows:

> In addition, Licensor shall be entitled to bring an action for specific performance or breach of contract against Licensee, but agrees that it [sic] *sole and exclusive remedy shall be the Rent Payments due under this Agreement*. Both parties waive any claims that either may have to any consequential or punitive damages, and agree that the prevailing party in any dispute shall be entitled to an award of costs and attorney's fees, including the cost of trial and any appeals.

(R. 1205). (Emphasis added).

However, in actuality, Section 6.01 is a limitation of liability clause. In its memorandum opinion, the Court of Appeals does not specifically address this issue even though the string citation does include a couple references to "liquidated damages." *See*, Slip Op. at 2-3. In other words, the Court of Appeals never ruled that Section 6.01 is not a limitation of liability clause, nor did the Court of Appeals provide any analysis of the issue. It is erroneously left to speculation and conjecture.

Under South Carolina law, a limitation of liability clause is a type of exculpatory clause which extinguishes liability for certain types of claims or damages. *See*, *Gladden v. Boykin*, 402

S.C. 140, 739 S.E.2d 882 (2013) ("[t]his Court has generally upheld limitations of liability and exculpatory clauses, finding they are commercially reasonable"). In contrast, a liquidated damages provision is used to "allow parties to prospectively set an amount of damages for breach." *Erie Insurance Co. v. Winter Construction Co.*, 393 S.C. 455, 713 S.E.2d 318, 321 (Ct. App. 2011). They are different. Section 6.01 is a limitation of liability clause.

"In liquidated-damages cases, the amount is usually a sum certain, or at least the amount is capable of ascertainment by computation." *Dixie Bell, Inc. v. Redd*, 376 S.C. 361, 656 S.E.2d 765, 769 (Ct. App. 2007). Moreover, liquidated damages are defined as "[a]n amount contractually stipulated in contrast to unliquidated damages which are damages that cannot be determined by a fixed formula, so they are left to the discretion of the judge or jury." *Id*. Importantly, Section 6.01 does not provide for a sum certain, nor does Section 6.01 provide for the ascertainment of damages by a fixed mathematical calculation. In order for damages to be ascertained for a breach, the factfinder needs a factual basis for determining the rental payments due at the time of the breach as well as the "adjustments" to the Fixed Minimum Rent based on the financial performance of the parking garage. A determination of those "adjustments" under Section 1.07(b) requires a factual basis that may be subject to disputed evidence and thus would not be capable of determination as a sum certain. Accordingly, Section 6.01 is not a liquidated damages provision.

In an attempt to maintain that Section 6.01 is a liquidated damages provision, as the trial court erroneously ruled, SCDG has argued that only a portion of Section 1.07 entitled "Rent" remains applicable while the remainder of Section 1.07 "does not survive" the termination of the PLA. The Court of Appeals' memorandum opinion – consisting of primarily string citations and no analysis -- does not indicate one way or the other whether the Court of Appeals agreed with

SCDG's argument, but if the Court of Appeals did adopt that reasoning (which it apparently did), there is no basis in the contract or in law for that contrived dichotomy. In effect, SCDG contends that the amount of rent payable as damages is based strictly on Section 1.07(a), which provides for "Fixed Minimum Rent" of $185,000 per year for the fifteen-year "Rent Period," but SCDG (as did the trial court) then reads out of the contract the language in Section 1.07(a) making the "Fixed Minimum Rent" "subject only to the adjustments set forth herein." (R. 1201-1202). Those "adjustments," as detailed in Section 1.07(b), are based upon the "Net Operating Profit" derived from the operation of the parking garage. Under Section 1.07(b), when the operation of the parking garage results in an annual net operating profit, the "Fixed Minimum Rent" is to be reduced by a pro rata share based on the formula agreed upon. (R. 1202).

In effect, SCDG insists that the "adjustments" constitute a "right" that somehow was extinguished by the termination of the PLA. Nonetheless, SCDG relies on the "Rent" portion of the PLA to claim damages. If a portion of that Section 1.07 survives the termination, the entirety of the provision survives – not just the portion cherry-picked by SCDG and the trial court. In fact, if the trial court's interpretation of Sections 6.01 and 8.17 is correct, then the survival of the entirety of Section 1.07 beyond termination *is required by Section 8.17*. If that is not the case, SCDG's theory of liability fails and the Town cannot be liable for future rental payments at all. This Court is respectfully requested to issue a writ of certiorari to properly address these issues of law using a *de novo* standard of review.

III. The South Carolina Court of Appeals erred in affirming the trial court's erroneous construction and application of the language of Sections 6.01 and 8.17 of the Parking License Agreement and in disregarding controlling precedent from the South Carolina Supreme Court construing the plain and ordinary meaning of the term "due" as used in Section 6.01 and the term "sum owing" as used in Section 8.17.

The trial court ruled that SCDG is entitled to damages in the amount of rent for the initial fifteen years of the "License Term" reduced to present value. (R. 66). The trial court reached that conclusion by misinterpreting and misapplying two provisions of the PLA, specifically Sections 6.01 and 8.17. In its memorandum opinion, the Court of Appeals likewise misapplied the applicable law, and as noted above, failed to apply a *de novo* standard in reviewing what is a question of law.

On appeal, SCDG argued that the trial court correctly construed those two provisions together to find that the parties intended to make the Town liable for all rents that would become due during the entire fifteen years of the "Rent Period" in the event of a default. That construction, however, is counter to the plain and ordinary meaning of the language used in Section 6.01.

As indicated, Section 6.01 is a limitation of liability clause that limits the remedy available to *both* parties in the event of a default. Using mandatory terms, Section 6.01 provides that the "sole and exclusive remedy *shall* be the Rent Payments *due* under this Agreement." (R. 1205). (Emphasis added). Section 6.01 further provides that "[b]oth parties waive any claims that either may have to any consequential or punitive damages." (R. 1205). Thus, by the contract terms, the sole and exclusive remedy is the "rent payments due." The Town cited but the Court of Appeals did not even acknowledge or address in its memorandum opinion this Court's precedential authority demonstrating that "[t]he word 'due' means 'owed or owing as a

debt.'" *Mathis v. Brown & Brown of South Carolina, Inc.*, 389 S.C. 299, 698 S.E.2d 773, 783 (2010). That definition is also consistent with Black's Law Dictionary, which defines "due" as "owing or payable; constituting a debt." Black's Law Dictionary (11th ed. 2019). The term "due" – which means "owed," "owing," and "payable" – does not include future indebtedness that has not yet accrued.[4]

This interpretation is also supported by the 1922 case cited by SCDG in its Court of Appeals brief – although SCDG disingenuously did not include the *full* citation and analysis in its brief in an attempt to give the false impression that this Court was construing the meaning of the word "due" in that case. In *Ex Parte American Fertilizing Co.*, 122 S.C. 171, 115 S.E. 236 (1922), which was also not cited or specifically discussed by the Court of Appeals in its memorandum opinion, this Court published the trial court's decision and then "affirmed for the reasons therein stated." 115 S.E. at 238. The trial court was actually construing the words "may be due," and concluded that "the words 'may be due' contemplate future indebtedness." *Id.* Referring to "may be due," the trial court wrote:

> The phrase has a prospective slant. The use of the word "due" does not necessarily imply that the debt has already matured. It is often used by businessmen in the sense of "owing irrespective of the time of payment." Century Dictionary. In the case of *Shoemaker v. Smith*, 37 Ind. 128, the court says: "The words 'may be' are peculiarly appropriate to express the future and not the past." In the case of *Griggs v. St. Paul*, 56 Minn. 150, 57 N.W. 461, a contractor drew an order on the city for a certain sum of money, authorizing the deduction thereof "from any money which may be due me on account of the grading of Park avenue." The court held that the words "may be due" did not refer exclusively to what was presently due and payable at the date of the order, but also included moneys that might thereafter become due and

[4] Notably, the string citation in the memorandum opinion does not include any dictionary or legal definition of the term "due" which represents the plain and ordinary meaning of that term.

> payable under the contract. The court said: "The word 'may', as here used, implies, contingency, possibility, or probability and is broad enough to include whatever might become due and payable."

Id. Thus, the trial court in *American Fertilizing* placed great weight on the use of the words "may be" which allowed the court to find that future indebtedness was included.

Of course, the language in Section 6.01 of the PLA says "due" – not "may be due." Critically, it is the use of the words "may be" that led this Court in *American Fertilizing* to find that future indebtedness was also recoverable. Thus, the absence of the words "may be" and the explanation given by this Court in *Mathis* compel the conclusion that "rent payments due" does not include future indebtedness. In error, the Court of Appeals disregarded the significance of precedent from this Court, specifically the *Mathis* and *American Fertilizing* cases, in assessing a proper construction of the controlling language in Section 6.01.

In an attempt to construe the word "due" differently from the plain and ordinary meaning cited in *Mathis*, SCDG also cited to *Bluffton Towne Center, LLC v. Gilleland-Prince*, 412 S.C. 554, 772 S.E.2d 882 (Ct. App. 2015). That case must have had some bearing on the Court of Appeals' decision in that it was included in a string citation. However, *Bluffton* is not controlling nor even instructive. In *Bluffton*, the default section of the lease at issue did not even include the word "due" so the court was not even construing a lease provision that used the word "due." Instead, the court in *Bluffton* simply used the word "due" in writing its opinion, but on each occasion where the word "due" is used, the *Bluffton* court followed it with the modifying language "during the full term of the lease" or "during the full term." 772 S.E.2d at 890, 893. Thus, as the *Bluffton* court used the word "due" as part of the vernacular, it required modification by the phrase "during the full term of the lease" in order to be read as including future indebtedness. Accordingly, the *Bluffton* case does not support the notion that the word "due" –

without any modifying language – means more than what this Court found in *Mathis* – "owed" or "owing" which is not inclusive of future indebtedness that has not yet accrued.

The trial court, as affirmed by the Court of Appeals, also misconstrued and misapplied Section 8.17, which is captioned "Survival of Obligations." Section 8.17 reads: "The provisions of this License with respect to any obligation of Licensee to pay any sum owing or to perform any act after expiration or other termination of this License shall survive the expiration or other termination of this License." (R. 1209). The trial court referred to Section 8.17 as the "survival clause." (R. 66).

According to SCDG, Section 8.17 "expresses the parties' intent that the Town's obligation to pay rent survives the expiration or other termination of the PLA because rent is the only payment obligation that the Town had under the PLA." *See*, Respondent's Brief, p. 17. SCDG then reasoned that Section 8.17 is rendered meaningless if it does not apply to indebtedness for future, non-incurred rent payments. That reasoning is flawed for several reasons. First, Section 8.17 preserves an already incurred obligation once the PLA expires or is terminated. Thus, if at the time of termination, the Town owed some amount of incurred but unpaid rent, the termination of the lease does not extinguish that existing indebtedness. In effect, Section 8.17 would not be "meaningless," as SCDG suggests, when construed as the Town contends it should be based on the plain and ordinary meaning of the phrase "rent payments due."

Additionally, the Town's reading of Section 8.17 is also correct given the phrase "sum owing." Like the use of the word "due," as discussed above, the use of the phrase "sum owing" means the sum that was already incurred and is due and payable. That is also consistent with the definition of "due" in *Mathis* such that "[t]he word 'due' means 'owed or owing as a debt.'"

Mathis, 698 S.E.2d at 783. "Due" and "owing" are synonyms.

Finally, SCDG engaged in a misreading of this Court's opinion in *Callawassie Island Members Club, Inc. v. Dennis*, 425 S.C. 193, 821 S.E.2d 667 (2018), to argue that the term "obligation" as used in Section 8.17 refers to future indebtedness. While SCDG points to this Court's use of the word "obligation" at times to refer interchangeably to both past or already-incurred indebtedness as well as future commitments or future indebtedness, that only shows that some of this Court's word choices could have been more carefully selected. What is important is the actual holding in *Dennis*, where this Court drew the distinction created by statute, namely Section 33-31-620(b), between what the Court itself called "two categories of debt for which a resigned member continues to be responsible after resignation: (1) 'obligations incurred … before resignation' and (2) 'commitments made before resignation.'" 821 S.E.2d at 673. That is the very point that the Town has made in reliance on *Dennis* – that there is a distinction between past obligations and future commitments. Section 8.17, given the totality of the language used, addresses obligations that were incurred prior to termination and not future commitments or future indebtedness.

In sum, because the Court of Appeals disregarded *in toto* instructive and controlling precedent from this Court, specifically the *Mathis* and *American Fertilizing* cases, the issuance of a writ of certiorari is warranted to engage in the proper construction of Sections 6.01 and 8.17.

IV. The South Carolina Court of Appeals erred in failing to consider or address that the trial court actually read into the Parking License Agreement a rent acceleration clause that does not otherwise exist and was specifically rejected by the parties.

The Court of Appeals also disregarded the fact that the trial court actually read into the PLA a rent acceleration clause that does not otherwise exist and was specifically rejected by the

parties. As SCDG acknowledges, the record is undisputed that the parties specifically agreed to delete a rent acceleration clause that had been written into an earlier draft. That was admitted in testimony by one of SCDG's principals, Tyler Flesch. (R. 705, 784-785). However, the record reflects that the trial court read Sections 6.01 and 8.17 as allowing for rent acceleration, and that constitutes reversible error. This is an error of law which the Court of Appeals never addressed and which also warrants the issuance of a writ of certiorari.

To reiterate, in awarding fifteen years of rent at $185,000 per year as a lump sum, the trial court provided for rent acceleration that is not part of the contract and was not the intent of the parties. Yet, even assuming SCDG is entitled to future rent payments under Rule 6.01, which is nonetheless inconsistent with the term "due" as construed by this Court in *Mathis*, *supra*, the proper remedy would be an order requiring the Town to make the future rent payments as they come due. In addition, the calculation of the annual rent payment should be subject to the entirety of Section 1.07, including the rent reduction provision that allowed for "adjustments" based on the financial performance of the parking garage. (R. 1201-202). The trial court erred in reading the allowance for such "adjustments" when calculating the Fixed Minimum Rent out of the contract. Section 1.07 sets the Fixed Minimum Rent at $185,000 per "License Year" and that rent is "subject only to the adjustments set forth herein." (R. 1201). Those "adjustments" are a part of the calculation of the yearly rental payment, and contrary to the trial court's determination were not extinguished upon the termination of the PLA by SCDG. To the contrary, assuming the trial court's analysis of Section 8.17 correctly applies to future rent payments (which the Town denies in the analysis above), the Town's future obligations included "to pay rent." The calculation of "rent" is determined by Section 1.07 *in its entirety*. The trial court erred in selectively cherry-picking the provisions of Section 1.07 that apply beyond

termination. If Section 8.17 includes a future "obligation" by the Town to pay rent, as the trial court has concluded, then that rent must be calculated to include the "adjustments" to which the parties agreed, including the provisions in Section 1.07(b). This is another error of law that the Court of Appeals did not address even by a string citation in its memorandum opinion. It bears repeating that the errors committed by the trial court are not factual such that the "any evidence" standard of review applies. To the contrary, the Town has raised errors of law for which the proper standard of review is *de novo*.

V. The South Carolina Court of Appeals erred in affirming an award of liquidated damages of $2,604,316 constituting fifteen years of rent payments when the Parking License Agreement provides that the "sole and exclusive remedy" is the rent payments due at the time of the termination of the agreement and at the time of termination there were no rent payments due and payable?

The Court of Appeals also failed to recognize that the trial court erred in awarding liquidated damages of $2,604,316, which represents the amount of unpaid rent over the initial fifteen years of the "License Term" reduced to present value. (R. 66). Section 1.07, which is captioned "Rent," provides that the Town agreed to pay $185,000 in annual rent, subject to "adjustments" based upon the financial performance of the parking garage. (R. 1201-1202). The payment of the rent in the amount of $185,000 for the first "License Year" was required to be paid into escrow upon the commencement of construction by SCDG, with the payment being released from escrow on the "Rent Commencement Date," that being the date of the issuance of the certificate of occupancy by the Town. (R. 1201-1202).

The parking garage was completed, and the certificate of occupancy was issued on July 28, 2017. (R. 1472). That was the date that the first rent payment was due. However, SCDG had terminated the PLA on June 23, 2016, more than a year prior to the issuance of the certificate

of occupancy. (R. 1429-1430). As a result, neither the "Rent Commencement Date" nor the "License Term" had even started when SCDG terminated the agreement. Thus, ***no rent was due and payable when the PLA was terminated by SCDG***.

Nonetheless, the trial court ruled that SCDG was entitled to damages in the amount of the rent for the initial fifteen years of the "License Term" reduced to present value. (R. 66). The trial court reached that conclusion by misinterpreting and misapplying two provisions of the PLA, specifically Section 6.01 and Section 8.17, for the reasons discussed above.

Under South Carolina law, "[t]he elements for breach of contract are the existence of a contract, its breach, and damages caused by such breach." *Johnson v. Little*, 426 S.C. 423, 827 S.E.2d 207, 210 (Ct. App. 2019). The failure of proof of any of those elements is fatal to the recovery for breach of contract. Here, SCDG failed to prove damages, and judgment should have been entered as a matter of law for the Town. That error justifies that issuance of a writ of certiorari.

VI. The South Carolina Court of Appeals erred in its cursory adjudication of the trial court's failure to address and accept the argument that Section 6.01 of the Parking License Agreement, if a liquidated damages provision, constitutes an unenforceable penalty.

The Town has also argued that the trial court erred in failing to address and accept the argument that Section 6.01 of the Parking License Agreement, if a liquidated damages provision, constitutes an unenforceable penalty. In its memorandum opinion, the Court of Appeals disposed of the merits of that issue with a single conclusory sentence: "We find the circuit court did not err in finding the liquidated damages clause did not constitute an unenforceable penalty." *See*, Slip Op. at 3. The string citation that followed likewise does not elucidate the Court's reasoning.

The Court of Appeals' ruling, however, is contrary to the trial record. The Court of Appeals found that the trial court "did not err in finding the liquidated damages clause did not constitute an unenforceable penalty." *See*, Slip Op. at 3. In actuality, the trial court never ruled on this issue. Quite simply, there is no record of the trial court ever addressing or adjudicating the merits of the unenforceable penalty issue.

"South Carolina law allows parties to prospectively set an amount of damages for breach through the inclusion of a liquidated damages provision." *Erie Insurance Co. v. Winter Construction Co.*, 393 S.C. 455, 713 S.E.2d 318, 321 (Ct. App. 2011). "The question of whether a sum stipulated to be paid upon breach of a contract is liquidated damages or a penalty is one of construction and is generally determined by the intention of the parties." *Moser v. Gosnell*, 334 S.C. 425, 513 S.E.2d 123, 126 (Ct. App. 1999). "The determination does not necessarily depend upon the language used in the contract." *Id*. "Rather, the determination depends upon the nature of the contract in light of the circumstances, and the attitude and intentions of the parties." *Id*. In *Erie*, this Court further explained:

> [W]here the sum stipulated is reasonably intended by the parties as the predetermined measure of compensation for actual damages that might be sustained by reason of nonperformance, the stipulation is for liquidated damages; and where the stipulation is not based upon actual damages in the contemplation of the parties, but is intended to provide punishment for breach of the contract, the sum stipulated is a penalty.

Erie, 713 S.E.2d at 321. Moreover, "[i]n order to determine whether the sum named in a contract as a forfeiture for noncompliance is intended as a penalty or liquidated damages, *it is necessary to look at the whole contract, its subject-matter, the ease or difficulty in measuring the breach in damages and the magnitude of the stipulated sum*, not only as compared with the value of the subject of the contract, but in proportion to the probable consequences of the breach."

Erie, 713 S.E.2d at 322. (Emphasis added). "When … the sum stipulated is plainly disproportionate to any probable damage resulting from breach of contract, the stipulation is an unenforceable penalty." *Lewis v. Premium Investment Corp.*, 351 S.C. 167, 568 S.E.2d 361, 363 (2002).

In the present case, SCDG argues that "rent payments due under the Agreement" allows it to recover all of the rent payments for the initial fifteen years of the PLA as if it was fully performed. To award fifteen years of the rent due is neither fair nor reasonable, but rather a penalty. Such a remedy is plainly disproportionate to any actual damages suffered by SCDG due to the alleged breach. The record, in fact, reflects that the parking garage project was completed in 2017, and has been operational since that time. Tyler Flesch testified that the parking garage has been "successful" and at the time of trial had "served over 150,000 transient parkers." (R. 650-652). Thus, SCDG has received revenue from parking fees and will presumably continue to do so through the fifteen-year term. At the time of trial in February 2020, the parking garage had been operational for approximately thirty months, meaning that SCDG (and its joint venturer) had approximately 60,000 transient parkers per year. If each patron paid three dollars in parking fees, that would equal the $185,000 yearly rent payment that would have been paid by the Town, not including any "adjustments" under Section 1.07, ***meaning that SCDG sustained no actual damages***. Realistically, the parking fees for each patron have far exceeded three dollars. Assuming that the average parking fee is $10, the total revenue would be more than three times the yearly rent payment, which again shows that SCDG incurred no actual damages.

It is important to recognize that the Town was barred by the trial court from conducting discovery regarding the financial performance and operation of the parking garage. As discussed in more detail below, the trial court improperly denied a motion to compel seeking the types of

financial information which would have allowed more precise evidence of the revenue stream already received by SCDG. (R. 16-26). Thus, the Town was denied the opportunity to show with more precision how SCDG has incurred no actual damages, and instead, has actually profited from the termination of the PLA.

In sum, the evidence in the record, despite the trial court's denial of the motion to compel, is still sufficient to demonstrate without reasonable dispute that the yearly rental payments, if a stipulated sum, are plainly disproportionate to any actual damages (or probable damages) already sustained by SCDG or that will be sustained over the fifteen-year period. Clearly, the liquidated damages provision, as claimed by SCDG, constitutes an unenforceable penalty. The trial court as well as the Court of Appeals erred in failing to address this issue and reach that obvious conclusion. This Court is respectfully requested to issue a writ of certiorari to address the merits of this defense.

VII. The South Carolina Court of Appeals erred in summarily affirming the trial court's denial of the Petitioner's motion to compel seeking financial records related to the operation of the parking garage.

Finally, as to the trial court's denial of the Town's motion to compel, the Court of Appeals summarily affirmed that ruling without any explanation as to how or why the trial court did not abuse its discretion.

As the Town demonstrated, the trial court abused its discretion in denying the motion to compel and depriving the Town of the opportunity to conduct discovery related to SCDG's damages claim, including information that was relevant to issues of mitigation and rent reduction under Section 1.07(b) of the PLA. The trial court found that the financial information was not relevant because Section 6.01 includes a liquidated damages provision. That represents an

erroneous construction of the PLA as a matter of law. As already addressed above, the language in Section 6.01 is not a liquidated damages provision but rather is a limitation of liability clause. Moreover, as also discussed above, there is no legal basis for the trial court to rule that Section 1.07(b) has no applicability to the calculation of the rent due under the PLA. Clearly, Section 1.07 sets the Fixed Minimum Rent at $185,000 per "License Year" and that rent is "subject only to the adjustments set forth herein." (R. 1201-1202). Accordingly, those "adjustments" are a part of the calculation of the yearly rental payment and, contrary to the trial court's ruling, were not extinguished upon the termination of the PLA by SCDG.

In sum, the denial of the motion to compel deprived the Town of valuable and needed financial information that would have provided relevant and admissible evidence for mitigation purposes, to address the "adjustments" to the Fixed Minimum Rent through the date of trial, and to determine the probable damages for future "License Years." Moreover, even assuming the trial court is correct that Section 6.01 is a liquidated damages provision, this discovery was still relevant to a determination whether the liquidated damages amount constitutes an unenforceable penalty. The financial information would have been relevant to showing with more precision whether the sum stipulated is plainly disproportionate to the actual damages (or probable damages) resulting from any breach of contract. As a result, this Court is respectfully requested to address the merits of this argument and to find that the Town is entitled, at the very least, to a new trial absolute on issues of liability and damages.

VIII. The South Carolina Court of Appeals erred in summarily deciding this case of public importance, complexity, and substantial financial exposure to the taxpayers under the purview of Rule 220(b), SCACR, thereby providing only string citations of "black letter" law and no legal analysis applying that law to the critical issues presented.

The Court of Appeals issued an unpublished *per curiam* memorandum opinion pursuant to Rule 220(b), SCACR. The Court of Appeals, however, did not specify which provision of Rule 220(b)(1)(A)-(D) that it found applicable to the issues raised on appeal. More importantly, the string citations included as the supporting authorities for the memorandum opinion are not dispositive of the issues on appeal raised by the Town and fail to provide the litigants with the bases for the Court's decision to affirm the trial court below. The issuance of a memorandum opinion has not provided the Town with meaningful appellate review as warranted by this important case involving a multi-day trial resulting in a judgment in the amount of $2,604,316 to be paid by the taxpayers and involving issues of novel contractual interpretation and significant public importance.

To reiterate, the Town submits this is a case of significant importance and interest – one that the Court of Appeals believed was significant enough to warrant oral argument. A case of this public importance and monetary impact to the taxpayers of Mount Pleasant should not be decided pursuant to Rule 220(b)(1) with only string citations of "black letter" law but no legal analysis applying that law to the critical issues presented. There is no question that Rule 220(b)(1) has its purpose and has been ruled applicable to the Court of Appeals. *See*, *In re Memorandum Decisions by Court of Appeals*, 322 S.C. 53, 471 S.E.2d 456 (1993). The Town is not challenging that authority. Indisputably, there are many appeals coming before our appellate courts that may be properly and efficiently disposed of under Rule 220(b)(1) without infringing on the concepts of due process and fundamental fairness. This is not one of them. The Town respectfully submits that a

writ of certiorari is also warranted as this case provides an opportunity for this Court to issue further guidance on the types of cases where Rule 220(b)(1) may be properly invoked by the Court of Appeals.

CONCLUSION

Based on the foregoing discussion, the Petitioner Town of Mount Pleasant respectfully requests that this Court grant its petition for a writ of certiorari.

Respectfully submitted,

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