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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Maite Murphy, Circuit Court Judge

Appellate Case No. 2020-001387
Case No. 2017-CP-10-5493

Shem Creek Development Group, LLC,..... Respondent,

v.

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

PETITION FOR REHEARING

The Appellant Town of Mount Pleasant petitions the South Carolina Court of Appeals for a rehearing of the Court's recent decision in *Shem Creek v. Town of Mount Pleasant*, Op. No. 2024-UP-007 (S.C. Ct. App. filed January 3, 2024).

The grounds for the Appellant's petition for rehearing are addressed in detail in the supporting memorandum filed herewith and incorporated herein.

The Appellant's petition for rehearing is based on the Court's decision in *Shem Creek v. Town of Mount Pleasant*, Op. No. 2024-UP-007 (S.C. Ct. App. filed January 3, 2024); the supporting memorandum filed herewith; the briefs and Record on Appeal; Rule 221(a), SCACR; Rule 224, SCACR; and other rules of court.

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MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING

The Appellant Town of Mount Pleasant has petitioned this Court for a rehearing of its decision in *Shem Creek v. Town of Mount Pleasant*, Op. No. 2024-UP-007 (S.C. Ct. App. filed January 3, 2024). The Appellant respectfully submits that the following points were overlooked or misapprehended by this Court in affirming the judgment entered by the court below:

I.

This Court issued an unpublished *per curiam* memorandum opinion pursuant to Rule 220(b), SCACR, although the Court does not specify which provision of Rule 220(b)(1) that it found applicable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 Appellant and fail to provide the litigants with the bases for the Court's decision to affirm the court below. With all due respect, the issuance of a memorandum opinion has not provided the Appellant with meaningful appellate review as warranted by this important case involving a multi-day trial resulting in a judgment in the amount of $2,604,316.00 and involving issues of novel contractual interpretation and significant public importance.

In short, the Appellant submits this is a case of significant importance and interest – one that this panel believed was significant enough to warrant oral argument – and should not be decided pursuant to Rule 220(b) with only string citations of "black letter" law but no legal analysis applying that law to the critical issues presented. In fact, as discussed further below, there are issues of contractual construction that the Court does not even address by any of the string citations.

II.

As an important threshold issue, the Appellant respectfully submits that the Court failed to apply the proper standard of review. In construing the critical provisions of the Parking License Agreement ("PLA"), the Court applied the "any evidence" standard rather than a *de novo* standard. Nowhere in the Court's opinion is there any indication that a *de novo* standard was applied.

Moreover, the Respondent Shem Creek Development Group, LLC ("SCDG") never contested the Appellant's discussion of the applicable standard of review. In fact, SCDG never even addressed the applicable standard of review in its brief, despite the requirement of Rule 208(b)(1)(D), SCACR, to do so.

Critically, the trial court never ruled that Sections 6.01 and 8.17 of the PLA are ambiguous. The SCDG concedes this 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. Moreover, 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. Hence, that is not an issue that could have been raised for the first time on appeal. Indeed, despite SCDG's improper attempt to interject that issue for the first time on appeal, there is no indication that this Court found any ambiguity. The words "ambiguity" and "ambiguous" do not appear in the Court's memorandum opinion. Instead, it appears that the Court found the contractual provisions to be unambiguous.

As the Supreme 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). Of course, the standard of review for questions of law is *de novo*. Thus, this Court 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 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's review of a trial court's rulings on the construction of clear and unambiguous contract provisions as we have in this case. With due respect, the incorrect standard of review was applied. The Appellant requests a rehearing with a *de novo* standard of review applied to the contract construction issues that predominate the dispute between the parties and the issues on appeal.

III.

This Court has overlooked or misapprehended that the trial court erred as a matter of law in ruling that Section 6.01 of the PLA is a liquidated damages provision. The trial court refers 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, this Court 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, this Court never rules that Section 6.01 is not a limitation of liability clause nor does this Court provide any analysis of the issue. It is left for 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 argues 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. This Court's memorandum opinion does not indicate one way or the other whether the Court agrees with SCDG's argument, but if the Court did adopt that reasoning, the Town submits that 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. The Court is respectfully requested to address these issues of law on rehearing by applying a *de novo* standard of review.

IV.

The trial court ruled that the Respondent 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 Parking License Agreement ("PLA") , specifically Sections 6.01 and 8.17. In its opinion, this Court overlooked or misapprehended the Town's arguments, 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 of the PLA.

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 this Court did not even acknowledge or address in its memorandum opinion the South Carolina Supreme Court 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). This 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.[1]

This interpretation is also supported by the 1922 case cited by SCDG in its brief – although SCDG disingenuously did not include the *full* citation and analysis in its brief in an attempt to give the false impression that the Supreme 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 this Court, the Supreme Court printed the trial court's decision and then "affirmed for the reasons therein stated." 115 S.E. at

[1] 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.

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 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 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." It is the use of the words "may be" that led the Supreme Court in 1922 to find that future indebtedness was also recoverable. Thus, the absence of the words "may be" and the explanation given by the Supreme Court in *Mathis* compel the conclusion that "rent payments due" does not include future indebtedness. Respectfully, this Court overlooked the significance of the *Mathis* and *Ex Parte 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 cites 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 this Court's

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 this Court was not even construing a lease provision that used the word "due." Instead, this Court simply used the word "due" in writing its opinion, but on each occasion where the word "due" is used, this 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 this 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 the Supreme Court found in *Mathis* – "owed" or "owing" which is not inclusive of future indebtedness that has not yet accrued.

In its response brief, SCDG also misconstrued and misapplied Section 8.17. SCDG argued that 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, this 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 the Supreme 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 the Supreme 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 the Supreme Court's word choices could have been more carefully selected. What is important is the actual holding in *Dennis*, where the Supreme 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.

V.

This Court has also overlooked or misapprehended 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 that this Court failed to address.

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 the Supreme 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 this

Court 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*.

VI.

In sum, this Court overlooked and misapprehended 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.

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.

On rehearing, the Court is respectfully requested to remand for entry of judgment in favor of the Town. 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.

VII.

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, this Court 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.

This Court's ruling also is contrary to the trial record. This Court 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, the 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 erred in failing to address this issue and reach that obvious conclusion. This Court is respectfully requested to address the merits of this defense rather than to merely rule that the trial court correctly found that the liquidated damages clause did not constitute an unenforceable penalty.

VIII.

Finally, as to the trial court's denial of the Town's motion to compel, this Court 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, on rehearing, 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.

CONCLUSION

For the reasons stated, the Appellant Town respectfully requests that the Court rehear its decision in this case. On rehearing, the Appellant Town respectfully requests that the Court reverse the judgment entered in favor of the Respondent Shem Creek Development Group, including the award of attorney's fees and costs,[2] and remand for entry of judgment in favor of the Town. In the alternative, the Appellant Town requests that the Court remand for a new trial absolute on all liability and damages issues in accordance with S.C. Code Ann. § 15-33-125.

[2] In its order filed July 13, 2020, the trial court cited Section 6.01 of the PLR which states: "Both parties … 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). Relying that provision, the trial court found that SCDG qualifies as a prevailing party and ordered that it is entitled to an award of attorney's fees and costs. (R. 67). Because the judgment in SCDG's favor should be reversed, the Court is also requested to reverse the award of attorney's fees and costs.

Respectfully submitted,

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Mount Pleasant, South Carolina 29465
(843) 849-2020

Counsel for Appellant Town of Mount Pleasant

January 18, 2024

RECEIVED
Jan 18 2024
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Maite Murphy, Circuit Court Judge

Appellate Case No. 2020-001387
Case No. 2017-CP-10-5493

Shem Creek Development Group, LLC,..... Respondent,

v.

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

CERTIFICATE OF SERVICE

Pursuant to Section (d)(1) of the Supreme Court' s Order Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (As Amended May 6, 2022), the undersigned employee of Lindemann Law Firm, P.A., counsel for the Appellant Town of Mount Pleasant, does hereby certify that service of the **Petition for Rehearing** and **Memorandum in Support of Petition for Rehearing** in the above-captioned matter was made upon all counsel of record by email only this the 18th day of January 2024 as follows:

E. Brandon Gaskins, Esquire
Moore & Van Allen, PLLC
Email: brandongaskins@mvalaw.com

Claudius O. Tackett, II, Esquire
Claude Tackett Law Firm, LLC
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David G. Pagliarini, Esquire
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s/ Andrew F. Lindemann

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ANDREW F. LINDEMANN*
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Email: andrew@ldlawsc.com

**Also Admitted in North Carolina*

January 18, 2024

Via Email Only
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Email: ctappfilings@sccourts.org

RE: Shem Creek Development Group, LLC v. The Town of Mount Pleasant, South Carolina
Appellate Case Number: 2020-001387
Civil Action Number: 2017-CP-10-5493
Our File Number: 79.20381

Dear Ms. Kitchings:

Pursuant to Section (b)(2)the Supreme Court's Order Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (as amended May 6, 2022), please find enclosed for filing the **Petition for Rehearing** and the **Memorandum in Support of Petition for Rehearing** with regard to the above referenced appeal. By copy of this letter, I am serving copies on all counsel of record by email only pursuant to Section (d)(1) of the same Supreme Court Order. My firm's $50.00 check for the filing fee will be mailed to the Court via U.S. Mail.

If you have any questions, please advise. Thank you for your assistance.

Sincerely,

LINDEMANN LAW FIRM, P.A.

Andrew F. Lindemann

AFL/jmb
Enclosures

cc: E. Brandon Gaskins, Esquire *(w/ Enclosures, Via Email Only)*
David Pagliarini, Esquire *(w/ Enclosures, Via Email Only)*