

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

Jun 11 2024

APPEAL FROM CHARLESTON COUNTY
Maite Murphy, Circuit Court Judge

S.C. SUPREME COURT

Appellate Case No.: 2024-000636
Case No. 2017-CP-10-5493

Shem Creek Development Group, LLC, Respondent,

v.

The Town of Mount Pleasant, South Carolina, Petitioner.

**RESPONDENT'S RETURN TO
PETITION FOR WRIT OF CERTIORARI**

E. Brandon Gaskins (S.C. Bar No. 73274)
Moore & Van Allen PLLC
78 Wentworth Street
Charleston, SC 29401
Telephone: (843) 579-7000
Facsimile: (843) 579-7099
brandongaskins@mvalaw.com

*Attorney for Respondent
Shem Creek Development Group, LLC*

TABLE OF CONTENTS

Table of Authoritiesii

Counter-Statement of the Questions Presented1-2

Counter-Statement of the Case.....2

Standard of Review.....4

Argument.....5

 I. The Town has not presented “special and important reasons” to
 justify a writ of certiorari.....5

 II. The Court of Appeals applied the correct standard of review based on the
 record indicating that the trial court resolved the interpretation of
 Sections 6.01 and 8.17 of the PLA as a question of fact8

 III. The Court of Appeals correctly affirmed the trial court’s determination
 that Section 6.01 is a liquidated damages clause because the provision
 fixes damages in an amount ascertainable by mathematical
 computation.....14

 IV. The Court of Appeals appropriately rejected the Town’s narrow
 interpretation of Section 6.01 and 8.17 of the PLA.....16

 V. The Court of Appeals correctly rejected the Town’s argument that
 the trial court converted Section 6.01 into a rent acceleration clause
 because all past due rent did not become immediately payable upon
 the Town’s default.....20

 VI. The Court of Appeals properly rejected the Town’s claim that Section 6.01
 constitutes an unenforceable penalty because the Town waived that
 defense and there is ample evidence in the record showing that SCDG’s
 actual damages exceeded the amount of liquidated damages.....22

 VII. The Court of Appeals correctly affirmed the trial court’s denial
 of the Town’s motion to compel the production of a third-party’s
 irrelevant financial records.....23

 VIII. Granting of certiorari is not warranted because the Town received
 meaningful appellate review by the Court of Appeals.....24

Conclusion.....25

TABLE OF AUTHORITIES

CASES

Allegiant v. Emerald Inns Inc., Unpub. Op. No. 2007-UP-325,
2007 S.C. App. Unpub. LEXIS 373 (Ct. App. June 15, 2007).....20

Bannon v. Knauss, 282 S.C. 589, 320 S.E.2d 470 (Ct. App. 1984).....15

Benya v. Gamble, 282 S.C. 624, 321 S.E.2d 57 (Ct. App. 1984).....22

Bluffton Towne Ctr. v. Gilleland-Prince, 412 S.C. 554, 722 S.E.2d 882
(Ct. App. 2015).....12, 19

Brown v. Allstate Ins. Co., 344 S.C. 21, 542 S.E.2d 723 (2001).....9

Callawassie Island Members Club, Inc. v. Dennis, 425 S.C. 193, 821 S.E.2d 667
(2018).....19

D & D Leasing Co. v. Lipson, 305 S.C. 540, 409 S.E.2d 794 (Ct. App. 1991).14-15, 22

Electro-Lab of Aiken, Inc. v. Sharp Constr. Co. of Sumter, Inc.,
357 S.C. 363, 593 S.E.2d 170 (Ct. App. 2004).....8

Ex parte American Fertilizing Co., 122 S.C. 171, 115 S.E. 236 (1922).....5, 17, 18-19

Gaddy v. Bucklew, 580 So. 2d 1180 (Miss. 1990).....7

Jones v. Markiewicz-Qualkinbush, 842 F.2d 1053 (7th Cir. 2016).....7

Mathis v. Brown & Brown of S.C., Inc., 389 S.C. 299, 698 S.E.2d 773
(2010).....5, 17-18

McGill v. Moore, 381 S.C. 179, 672 S.E.2d 571 (2009).....10

Paramount Pictures Corp. v. Johnson Broad., Inc., C/A No. H-04-03488,
2006 U.S. Dist. LEXIS 31433 (S.D. Tex. May 19, 2006).....20

State v. Lyles, 381 S.C. 442, 673 S.E.2d 811 (2009).....4

W. Anderson Water Dist. v. City of Anderson, 417 S.C. 496, 790 S.E.2d 204
(Ct. App. 2016).....12

<i>Wells Fargo Bank, N.A. v. Marion Amphitheatre, LLC</i> , 408 S.C. 87, 757 S.E.2d 557 (Ct. App. 2014).....	14
---	----

STATUTES

S.C. Code Ann. § 5-11-30.....	7
S.C. Code Ann. § 34-31-20(A).....	21
S.C. Code Ann. § 41-10-10(2).....	17

OTHER AUTHORITIES

25 C.J.S. <i>Liquidated Damages</i> § 182.....	15
SCACR Rule 220(b)	24
SCACR Rule 242(b).....	4, 5, 6, 24, 25
SCRCR Rule 50(a).....	11
SCRCR Rule 52(b).....	4
SCRCR Rule 59.....	4, 10
SCRE Rule 201.....	7
Town Code of Ordinances §§ 31.032-.033.....	7

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

- I. Should the Court grant certiorari to review the Court of Appeals' unpublished *per curiam* opinion in the absence of special and important reasons?
- II. Did the Court of Appeals apply the correct standard of review in reviewing the trial court's findings of fact and interpretation of Sections 6.01 and 8.17 of the PLA?
- III. Did the Court of Appeals correctly affirm the trial court's decision that the parties agreed to liquidate damages in the event of a breach of contract by providing an exclusive remedy that fixes damages in an amount ascertainable by mathematical computation?
- IV. Did the Court of Appeals correctly reject the Town's narrow interpretation of the operable terms in Sections 6.01 and 8.17 of the PLA, which defies those terms' ordinary and common meaning?
- V. Did the Court of Appeals correctly reject the Town's argument that the trial court converted Section 6.01 into an acceleration clause when the trial court did not accelerate rent?
- VI. Did the Court of Appeals correctly reject the Town's claim that Section 6.01 is an unenforceable penalty where the Town waived that defense and there is ample evidence showing that SCDG's damages far exceeded the liquidated damages?

- VII. Did the Court of Appeals correctly decide that the trial court did not abuse its discretion in refusing to compel a third-party's irrelevant financial records?
- VIII. Was the Town deprived of "meaningful appellate review" merely because the Court of Appeals issued an unpublished *per curiam* opinion?

COUNTER-STATEMENT OF THE CASE

On October 23, 2017, Respondent Shem Creek Development Group, LLC ("SCDG") commenced this action in the Court of Common Pleas for Charleston County against Petitioner Town of Mount Pleasant (the "Town") for breach of a parking license agreement ("PLA"). Under the PLA, SCDG agreed to construct a parking garage and office complex and rent 132 parking spaces to the Town for public use for a period of 30 years in exchange for the Town's payment of \$185,000 in annual rent for a 15-year rental term. (R. pp. 98-112.) SCDG alleged that the Town anticipatorily repudiated the PLA in response to public opposition to the project and interfered with SCDG's performance under the PLA by (1) enacting zoning amendments that reduced the buildable area on the project site, which, consequently, reduced the number of parking spaces in the garage; (2) rejecting reasonable interpretations of the Town's zoning ordinances that would have allowed SCDG to deliver all 132 public parking spaces; (3) refusing to pay rent into escrow upon commencement of construction; and (4) refusing to provide an estoppel certificate. (*Id.*)

The action was assigned to the Business Court on March 7, 2018. (R. p. 1.) The Honorable Judge Maite Murphy was assigned as the presiding judge. (*Id.*)

On October 22, 2019, the Town filed a motion to compel discovery responses from SCDG and a subpoena response from 101 Coleman Partners, LLC, a third-party which now owns and operates the parking garage. (R. pp. 136-185.) The Town's motion to compel sought financial and parking records related to 101 Coleman Partners' operation of the parking garage. (*Id.*) The trial court provided notice of its denial of the motion to compel on December 11, 2019, which was followed by a written order issued on January 22, 2020. (R. pp. 16-26, 566.)

The case was tried non-jury by Judge Murphy from February 3-6, 2020. On July 13, 2020, the trial court issued a final order entering judgment in favor of SCDG in the amount of \$2,604,316.00, which was based on past unpaid rent plus statutory prejudgment interest and the present value of future rent due under the PLA. (R. pp. 27-72.) In the final order, the trial court concluded that the Town had anticipatorily breached the PLA by repudiating it and further breached it by failing to pay rent and provide an estoppel certificate. (*Id.* at ¶¶ 60-63.) Also, the trial court found that the Town had breached the implied covenant of good faith and fair dealing in the PLA by taking actions that interfered with SCDG's ability to perform fully under the contract. (*Id.* at ¶¶ 64-72.) In ruling in favor of SCDG, the trial court rejected all of the Town's defenses attempting to justify its failure to perform its obligations under the PLA. (*Id.* at ¶¶ 73-100.)

On July 20, 2020, the Town filed Motions for New Trial and To Reconsider, Alter or Amend Order under Rule 52(b) and Rule 59(a) and (e), SCRCF. (R. pp. 470-487.) The trial court denied those motions on September 17, 2020. (R. pp. 73-87.)

The Town filed its notice of appeal on October 16, 2020. (R. pp. 1544-1546.) The Court of Appeals held oral argument on the appeal on October 4, 2023 and later affirmed the trial court's order in an unpublished *per curiam* opinion on January 3, 2024.

The Town filed a petition for rehearing with the Court of Appeals on January 18, 2024, which was denied on March 21, 2024. The Town subsequently filed its Petition for Writ of Certiorari on April 22, 2024.

STANDARD OF REVIEW

Rule 242(b), SCACR, provides that a writ of certiorari “will be granted only where there are special and important reasons.” In considering whether special and important reasons exist, the Court should consider the following factors: (1) where there are novel questions of law; (2) where there is a dissent in the decision of the Court of Appeals; (3) where the Court of Appeals' decision conflicts with a prior decision of the Supreme Court; (4) where substantial constitutional issues are directly involved; and (5) where a federal question is included and the decision below conflicts with a decision of the United States Supreme Court. Rule 242(b), SCACR; *State v. Lyles*, 381 S.C. 442, 443-44, 673 S.E.2d 811, 812 (2009).

ARGUMENT

I. **The Town has not presented “special and important reasons” to justify a writ of certiorari.**

In seeking a writ of certiorari, the Town does not address any of the factors enumerated in Rule 242(b), SCACR, or explain what “special and important reasons” justify the Supreme Court granting certiorari in this case. Instead, the Town merely argues that the Court of Appeals erred in its decision below. While it is not surprising that the Town disagrees with the Court of Appeals’ decision, such disagreement alone is not sufficient to justify certiorari. To be sure, there are no “special and important reasons” warranting further appellate review.

First, this case does not present novel questions of law. This is a typical breach of contract case that involves ordinary issues of contractual interpretation that are resolved by trial courts across the state on a weekly – if not daily – basis. In deciding this case, the Court of Appeals was not drawing on a blank slate, and there are no issues presented to this Court that have not been addressed in some fashion or another by prior precedent.

Second, the Court of Appeals’ decision does not conflict with a decision of either the South Carolina or the United States Supreme Courts.¹ Indeed, it would nearly be impossible for a conflict to arise from the Court of Appeals’ unpublished *per curiam* decision that summarily affirmed the trial court’s judgment. Because the decision

¹ To the extent that the Town argues that the Court of Appeals’ decision conflicts with *Mathis v. Brown & Brown of S.C., Inc.*, 389 S.C. 299, 698 S.E.2d 773 (2010), and *Ex parte American Fertilizing Co.*, 122 S.C. 171, 115 S.E. 236 (1922), those cases are discussed in Section IV, below.

has no precedential effect, this case does not present the Court with an opportunity to resolve potential inconsistencies in South Carolina jurisprudence.

Third, all three appellate judges on the panel joined the Court of Appeals' decision without dissent. By issuing an unpublished *per curiam* decision, the Court of Appeals implicitly found that the issues presented by the Town on appeal were neither difficult to resolve nor the subject of disagreement amongst the appellate judges who carefully considered the matter.

Fourth, the case involves no constitutional or federal law issues.

Because the Town cannot identify any factors under Rule 242(b) that support the granting of certiorari, it instead argues that the case is of "public importance" because the award at issue will ultimately be paid by the Town's taxpayers. (Pet. Writ Cert. p. 24.) Yet, the Town's ostensible regard for the taxpayers is belied by its cavalier breach of the underlying parking license agreement, which created the liability in the first place. As expressly found by the trial court, the Town breached that agreement, along with its implied covenant of good faith and fair dealing, in many ways. Significantly, the Town has not challenged those findings on appeal.

The Town's disregard for its taxpayers has been further demonstrated in its pursuit of this appeal. While the case has been pending on appeal, significant post-judgment interest and additional attorneys' fees have been accruing. Yet, the Town's elected officials have neither held any public discussion about this appeal (and its related costs) nor taken a vote to authorize it, including the present Petition for Writ

of Certiorari.² Not only does the failure to authorize the appeal and the present petition raise questions about the lawfulness of this appeal³, it also undermines the Town’s claim that the matter is of such public importance that this Court should grant certiorari.

Put simply, if the case is not of sufficient importance to warrant a public vote by the Town’s elected leaders to authorize the appeal, then it is not important enough for the Court to review the decision below. Or, put another way, if Town Council members are not willing to go on the record and face accountability for authorizing the appeal, then it is hard to take the Town’s claims of the case’s “public importance” seriously. As a result, the Town’s arguments to persuade the Court to grant certiorari ring hollow and should be rejected.

² The Court may take judicial notice of the meeting minutes of the Town’s Council, which can be found at the following link: <https://sc-mountpleasant2.civicplus.com/agendacenter>. See Rule 201, SCRE, (providing that facts may be subject to judicial notice if they are “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned); *Jones v. Markiewicz-Qualkinbush*, 842 F.2d 1053, 1062 fn. 24 (7th Cir. 2016) (taking judicial notice of City Council meeting minutes). Specifically, the Town’s Council considered the case in various executive sessions, including on August 11, 2020 prior to filing the notice of appeal and on February 13, 2024 prior to filing the Petition for Writ of Certiorari, during the pendency of this case and appeal; however, those meetings do not include any record of Town Council authorizing an appeal or the petition for certiorari.

³ Under the Town’s council form of government, “[a]ll legislative and administrative powers of the municipality . . . shall be vested in the municipal council.” S.C. Code Ann. § 5-11-30. The Town’s ordinances dictate that the Town attorney is “directly responsible to the Mayor and Town Council,” and the Town’s administrator has not been delegated any authority to direct litigation or authorize an appeal. Town Code of Ordinances §§ 31.032-.033. Thus, the authority to prosecute an appeal resides solely with Town Council, and such authority has not been exercised in this case. See *Gaddy v. Bucklew*, 580 So. 2d 1180, 1182 (Miss. 1990) (ruling that City’s appeal was not authorized because majority of council did not approve it).

II. The Court of Appeals applied the correct standard of review based on the record indicating that the trial court resolved the interpretation of Sections 6.01 and 8.17 of the PLA as a question of fact.

The Town's primary argument in support of its Petition for Writ of Certiorari is that the Court of Appeals applied the incorrect standard of review. However, there is no indication from the Court of Appeals' opinion that it applied the wrong standard. To be sure, the opinion clearly states that the Court of Appeals applied the same standard of review urged by the Town in its briefing, which is that the trial court's findings of fact will not be disturbed if there is any evidence to support them and that actions at law tried without a jury are reviewed only for correction of errors of law. (Unpub. Op. No. 2024-UP-007, fn. 1. (citing *Electro-Lab of Aiken, Inc. v. Sharp Constr. Co. of Sumter, Inc.*, 357 S.C. 363, 367, 593 S.E.2d 170, 172 (Ct. App. 2004)).) Thus, the Court of Appeals recognized and applied the correct standard of review.

In this case, the Town assumes that the Court of Appeals reviewed the trial court's interpretation of the relevant provisions of the PLA under the "any evidence" standard. Even if that assumption is correct, there is ample support in the record for the application of that standard, as SCDG previously explained in its return to the Town's petition for rehearing in the Court of Appeals.

Here, the primary question raised by the Town's appeal is whether the trial court's award of damages was correct under Sections 6.01 and 8.17 of the PLA. Significantly, the trial court's interpretations of those pertinent sections of the agreement were set forth in Paragraph 20 of the order's "Findings of Fact." In that paragraph, the trial court found that the parties agreed to liquidate damages under

Section 6.01, and it expressly found that that Section 8.17's survival clause "does not provide for the survival of any rights of the Town, including the right to reduce rent." Because these were findings of fact by the trial court, the "any evidence" standard applied to the Court of Appeals' review of them.

Also, SCDG presented evidence during trial, over the Town's objection based on the parol evidence rule, regarding the parties' negotiations of Section 6.01 to show their intent. (R. pp. 585, 703-705, 1290-1304.) In response to that objection, SCDG's attorney argued that the parties' dueling interpretations of Section 6.01 "suggest[] there's an ambiguity [], in which case parol evidence would be proper." (R. pp. 703-705.) The trial court then overruled the Town's objection and admitted the parol evidence, thereby indicating that it found the section ambiguous. (*Id.*) Moreover, the Town later admitted during the trial that SCDG's counsel took the position that the PLA may be ambiguous. (R. p. 1120.) Thus, the trial proceedings also indicate that the trial court resolved the meaning of Sections 6.01 as a question of fact, thereby making the "any evidence" standard applicable.

To escape the import of this portion of the trial proceedings, the Town attempts to distort the record by arguing that the trial court admitted all parol evidence under *Brown v. Allstate Ins. Co.*, 344 S.C. 21, 27, 542 S.E.2d 723, 726 (2001), but did not rely on it. To support this argument, the Town cites to footnote 5 and paragraph 74 of the conclusions of law of the trial court's order. However, this paragraph and footnote expressly relate to the interpretation of how many parking spaces were required under Sections 1.05 and 1.06 of the PLA, which was an important issue as

to the Town's affirmative defense to its breach of the agreement. This paragraph and footnote and the parol evidence referenced therein have nothing to do with the trial court's interpretation of Sections 6.01 and 8.17. Thus, the Town's argument that the trial court did not consider parol evidence regarding the meaning of Section 6.01 based on a completely unrelated footnote is unconvincing.

The Town's argument that "there is no indication that the trial court relied on any parol evidence that was admitted" is also belied by its prior arguments. For example, in its post-trial motion for reconsideration under Rule 59, SCRPC, the Town argued that the trial court's "attempt to surmise the Town's intent [with respect to Section 6.01] using parole evidence from negotiations is inappropriate." (R. p. 485.) This prior admission directly contradicts the Town's present claim in its Petition for Writ of Certiorari that the trial court failed to consider parol evidence to determine the intent of the parties with respect to Sections 6.01 and 8.17.

Ironically, in its Petition, the Town faults the Court of Appeals for disregarding parol evidence regarding Section 6.01 of the PLA. In Section IV of the Petition, the Town argues that an earlier redlined draft of the agreement, which was admitted into evidence by the trial court, reflects the parties' intention to delete a rent acceleration provision in Section 6.01 and that the trial court's interpretation of Section 6.01 and 8.17 was inconsistent with such intent. Of course, parol evidence of an earlier draft of the agreement can only be considered by this Court (and the lower courts) if these sections are ambiguous. *See McGill v. Moore*, 381 S.C. 179, 188, 672 S.E.2d 571, 576 (2009) ("Where a written instrument is unambiguous, parol evidence is inadmissible

to ascertain the true intent and meaning of the parties.”). In which case, the “any evidence” standard of review must apply.

Not surprisingly, the Town does not attempt to explain the logical incoherence of its argument that Section 6.01 is unambiguous, while also urging the Court to consider parol evidence to adopt its interpretation of Sections 6.01 and 8.17. Regardless, the Town’s attempt to have this Court consider parol evidence to overturn the trial court’s interpretation of Section 6.01 undermines its contention that the Court of Appeals applied the wrong standard of review.

Finally, the Town’s directed verdict and post-trial motions and the trial court’s consideration of them reveal that the trial court’s interpretation of Sections 6.01 and 8.17 was decided as a question of fact. In its motion for directed verdict, the Town relied on parol evidence to support its interpretation of Sections 6.01 and 8.17 that “no rent was due to Plaintiff when it terminated the” PLA and that SCDG was not entitled “to immediate payment of all 15 years of rent payments.” (R. pp. 464-466, 1149-1153.) The trial court denied the Town’s directed verdict motions and expressly ruled “there’s sufficient evidence for the Court to make a determination of **questions of fact.**” (R. p. 1153) (emphasis added). Because directed verdict is appropriate when “the case presents only questions of law,” Rule 50(a), SCRCP, the trial court’s denial of the Town’s motions and express acknowledgement of the existence of questions of fact in direct response to the Town’s arguments regarding Sections 6.01 and 8.17 confirm that their meaning was determined as a question of fact and not as a question of law.

In its Petition for Writ of Certiorari, the Town largely overlooks these portions of the record and instead argues that SCDG’s recognition of the numerous examples justifying the application of the “any evidence” standards is disingenuous, fallacious, and contrary to SCDG’s prior position. In fact, the Town audaciously claims that “SCDG recognizes that it cannot prevail under a *de novo* standard and may only succeed under a more lenient standard of review.” (Pet. Writ Cert. p. 6.) Put simply, this is revisionist history that mischaracterizes SCDG’s arguments on appeal.

To support its argument, the Town emphasizes one incomplete phrase from SCDG’s appellate brief, which is taken out of context, to purportedly show that SCDG “conceded” that the trial court did not find Sections 6.01 and 8.17 ambiguous. (Pet. Writ Cert. pp. 6-7.) However, when viewed in its full context, the statement relied on by the Town merely shows that SCDG encouraged the Court of Appeals to look at the full record to determine whether the trial court found the provisions ambiguous. The full sentence in context is provided below:

Although the trial court did not express whether it found the relevant provisions ambiguous, the Court can discern the trial court’s intent from the order and make reasonable inferences therefrom. *See Bluffton Towne Ctr.*, 412 S.C. at 572, 772 S.E.2d at 892 (stating that an appellate court must construe the trial court’s intent as discerned from the order as a whole). If the Court finds that the trial court found the provisions ambiguous, the trial court’s construction of the PLA must be affirmed if there is any evidence supporting its construction. *See W. Anderson Water Dist. v. City of Anderson*, 417 S.C. 496, 505, 790 S.E.2d 204, 209 (Ct. App. 2016) (affirming trial court’s interpretation of an ambiguous contract under the “any evidence standard for non-jury trials).

(Resp.t’s Br. p. 34, fn. 6.) Thus, SCDG never conceded that the trial court found the provisions to be unambiguous. Instead, just as SCDG does to this Court, it encouraged the Court of Appeals to look at the complete record to determine the trial court’s findings for the purpose of applying the correct standard of review and affirm the trial court’s ruling under the “any evidence” standard. SCDG then applied various canons of contractual construction that apply to ambiguous contractual provisions to demonstrate the correctness of the trial court’s interpretation. (Resp.t.’s Br. pp. 34-37.)

Admittedly, SCDG did not focus on whether the trial court’s findings as to the meaning of Sections 6.01 and 8.17 should be reviewed under the “any evidence” or *de novo* standard in its briefing in the Court of Appeals.⁴ That is because SCDG has consistently contended that the trial court’s ruling was correct and should be upheld regardless of what standard of review is applied. That remains true now. Applying a different standard of review will not lead to a different result⁵, and therefore, there is no justification for this Court to grant certiorari.

⁴ Like SCDG, the Town also did not focus on the applicable standard of review in its briefing in the Court of Appeals. In the Town’s initial brief, it mentions the “any evidence” and *de novo* standards only once. (Pet’r’s Initial Br. p. 10.) And in its reply brief, the phrase *de novo* is never mentioned. However, the Town did argue that the Court of Appeals should “only review[] the evidence ‘not to determine the preponderance of the evidence thereof but to determine whether there is **any evidence** which reasonably supports the factual findings of the judge.’” (Pet’r’s Reply Br. p. 10) (emphasis added). Thus, contrary to the Town’s argument now, the Town actually admitted that the “any evidence” standard applied to the Court of Appeals’ review.

⁵ Even if the Court finds that the Court of Appeals incorrectly applied the “any evidence” standard, it should nevertheless affirm the Court of Appeals’ decision because the trial court’s interpretation of Section 6.01 and 8.17 was correct even if reviewed under the *de novo* standard.

III. The Court of Appeals correctly affirmed the trial court’s determination that Section 6.01 is a liquidated damages clause because the provision fixes damages in an amount ascertainable by mathematical computation.

The Town next argues that the Court should grant certiorari to correct the Court of Appeals’ error in affirming the trial court’s ruling that Section 6.01 is a liquidated damages provision. As explained below, both the trial court’s and Court of Appeals’ rulings on this issue were correct.

A “claim for damages is ‘liquidated’ in character if the amount thereof is fixed, has been agreed upon, or is capable of ascertainment by mathematical computation or operation of law.” *Wells Fargo Bank, N.A. v. Marion Amphitheatre, LLC*, 408 S.C. 87, 91, 757 S.E.2d 557, 559 (Ct. App. 2014). Because Section 6.01 fixes damages to rental payments, which are capable of ascertainment by mathematical computation and operation of law, it meets the definition of a liquidated damages provision.

This conclusion is supported by the Court of Appeals’ decision in *D & D Leasing Co. v. Lipson*, 305 S.C. 540, 409 S.E.2d 794 (Ct. App. 1991). In that case, the default clause at issue required the renter to pay as damages the total unpaid monthly lease payments due under the agreement. *Id.* at 542, 409 S.E.2d at 795. The court held that the monthly lease payments due after termination were recoverable under the default clause and further ruled that the clause “meets the requirements of a valid liquidated damages clause.” *Id.* at 543, 409 S.E.2d at 796.

Like the default clause in *D & D Leasing*, Section 6.01 requires the payment of rent due under the agreement. And although the default clauses in both this case and *D & D Leasing* do not fix a sum certain as damages, the damages under both

clauses are ascertainable by multiplying the rental amounts by the unpaid installments due under the agreements. So just as the default clause in *D & D Leasing* was a “valid liquidated damages clause,” so too is Section 6.01.

To avoid this conclusion, the Town makes two arguments. First, the Town argues that Section 6.01 is a limitation of liability clause rather than a liquidated damages clause, as if the two are mutually exclusive. By its very nature, a liquidated damages clause necessarily limits a contracting party’s liability as established in the contract. And while Section 6.01 includes a waiver of consequential and punitive damages, the Town cites to no authority suggesting that a liquidated damages provision cannot include such a waiver.

Indeed, such provisions are often necessary to demonstrate the parties’ intent of making liquidated damages the sole remedy for a breach. As the Court of Appeals explained in *Bannon v. Knauss*, 282 S.C. 589, 592, 320 S.E.2d 470, 472 (Ct. App. 1984), “parties may agree that the liquidated damages specified in the contract are the sole remedy by breach.” Consistent with that principle, Section 6.01’s waiver of consequential and punitive damages merely reinforces the exclusive nature of the liquidated damages and the unavailability of punitive damages on a contract action. *See 25 C.J.S. Liquidated Damages* § 182 (stating that injured party cannot disregard liquidated damages provision and recover general contract damages). Therefore, the inclusion of language waiving compensatory and punitive damages does not alter the parties’ agreement to establish an exclusive remedy for breach in an amount

ascertainable by mathematical formula, which, by definition, constitutes liquidated damages.

Second, the Town argues that the rental payments due under Section 6.01 in the event of a breach are not liquidated because rent should have been subject to adjustment under Section 1.07(b) of the PLA. Yet, for the reasons decided by the trial court and argued to the Court of Appeals, the Town's arguments fail. The obligation to adjust rent terminated when the PLA was terminated as a result of the Town's breach, and that obligation did not survive such termination under Section 8.17.

Moreover, the Town has never explained how any adjustments could be made when SCDG never operated the parking garage and turned a net profit. Because the Town repudiated its obligations to pay rent, SCDG was forced to abandon its sole ownership in the parking garage, and its successor never operated the garage under the terms of the PLA. Thus, it would be impossible to determine with any degree of certainty if SCDG would have earned an annual net operating profit. Given this impossibility, the Court of Appeals correctly affirmed the trial court's ruling that Section 6.01 was a liquidated damages provision and that SCDG was entitled to rent thereunder.

IV. The Court of Appeals appropriately rejected the Town's narrow interpretation of Section 6.01 and 8.17 of the PLA.

In its Petition for Writ of Certiorari, the Town continues to advance its limited, overly narrow interpretation of the terms "due" and "obligation," as used in Sections 6.01 and 8.17, respectively, in an attempt to avoid any liability for its breach of the

PLA.⁶ Although the Town claims that its interpretation of those terms is supported by this Court’s precedent, specifically *Mathis v. Brown & Brown of S.C., Inc.*, 389 S.C. 299, 698 S.E.2d 773 (2010), and *Ex parte American Fertilizing Co.*, 122 S.C. 171, 115 S.E. 236 (1922), those decisions do not dictate a result different than that reached by the trial court and Court of Appeals.

The Town argues that *Mathis* stands for the proposition that “due” cannot encompass future indebtedness that has not yet accrued, such as future rent. However, *Mathis* has no applicability to this case. In that case, this Court held that the South Carolina Payment of Wages Act does not apply to prospective wages. *Mathis*, 389 S.C. at 318-19, 698 S.E.2d at 783-84. The Court’s holding was based on its interpretation of the term “wages,” which is defined in S.C. Code Ann. § 41-10-10(2) to mean “all amounts at which labor rendered is recompensed.” *Id.* at 318, 698 S.E.2d at 783. The court interpreted this definition as not including prospective wages based on the statute’s use of the past tense of the words “rendered” and “recompensed.” *Id.* According to the court, the “past tense of the word ‘rendered’ suggests services provided in the past. The word ‘recompensed’ too suggests that payment is for labor already completed.” *Id.*

The court’s analysis in *Mathis* demonstrates that its definition of “due” does not apply only to past debts that are owed. Although the court defined “due” in its

⁶ The Town’s arguments in Section V of its Petition for Writ of Certiorari appear to be duplicative or a variation of its arguments in Section III. As a result, those arguments are addressed collectively in this section in the interest of judicial economy.

analysis of the meaning of “wages,” it clearly based its interpretation on the statute’s use of the past tense of “labor rendered.” *Id.* “The word ‘due’ means ‘owed or owing as a debt’ and, as wages are defined by the Act as amounts paid by labor rendered, no wages can be due for future services.” *Id.* (emphasis added).

In contrast to the definition of wages in the Payment of Wages Act, Section 6.01 contains no language suggesting that the parties intended “due” to mean only rent owed at the time of termination. Furthermore, *Mathis* did not involve a contract like the PLA, which included a survival clause that expressly provided that the obligation to pay rent survives after the termination or expiration of the agreement. Therefore, *Mathis* sheds no light on the interpretation of Section 6.01.

Also, the Court’s decision in *Ex parte American Fertilizing Co.* actually supports the interpretation of Section 6.01 adopted by the trial court and affirmed by the Court of Appeals. In that case, the Court agreed that the term “due” could apply to future indebtedness.

Despite this ruling, the Town claims that *Ex parte American Fertilizing Co.* bolsters its narrow interpretation. The Town attempts to portray *Ex parte American Fertilizing Co.* as supportive of its interpretation by focusing on the inclusion of the words “may be” before “due” in the contractual provision in question in that case. While it is true that the analysis in that case was based, in part, on the words “may be,” there is nothing in the opinion suggesting that the Court would have reached a different result had those words been omitted from the provision at issue. Similarly, nothing in *Ex parte American Fertilizing Co.* comes close to supporting the Town’s

assertion that “due’ . . . does not include future indebtedness that has not yet accrued.” (Pet. Writ Cert. p. 13.) Therefore, *Ex parte American Fertilizing Co.* cannot be read to support the Town’s interpretation.

In advancing its narrow interpretation of the terms “due” and “obligation,” the Town continues to disregard how this Court and the Court of Appeals have consistently used those terms to apply to future indebtedness. As pointed out in SCDG’s brief in the Court of Appeals, the decisions in *Callawassie Island Members Club, Inc. v. Dennis*, 425 S.C. 193, 821 S.E.2d 667 (2018), and *Bluffton Towne Ctr. v. Gilleland-Prince*, 412 S.C. 554, 569, 722 S.E.2d 882, 890 (Ct. App. 2015), provide good examples of how South Carolina appellate courts have used “due” and “obligation” according to their ordinary and common meaning to apply to future indebtedness. (Resp’t’s Br. pp. 19-24.)

In response to these examples, the Town conceded that the Supreme Court used “the word ‘obligation’ at times to refer . . . [to] future commitments or future indebtedness.” (Pet’r’s Rep. Br. p. 5.) However, it then tried to minimize such word usage by saying that the Court’s word usage “only shows that some of the Supreme Court’s word choices could have been more carefully selected.” (*Id.*)

Contrary to demonstrating the courts’ carelessness as suggested by the Town, this Court’s and the Court of Appeal’s use of the terms “due” and “obligation” reveals that the terms are commonly used to refer to future indebtedness. As a result, there is no reason for the Court to grant certiorari when its own decisions clearly support

the trial court's interpretation of Sections 6.01 and 8.17, which was affirmed by the Court of Appeals.

- V. **The Court of Appeals correctly rejected the Town's argument that the trial court converted Section 6.01 into a rent acceleration clause because all past due rent did not become immediately payable upon the Town's default.**

The Town also contends that certiorari is warranted because the Court of Appeals "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." (Pet. Writ Cert. pp. 16-17.) In support of this argument, the Town relies on parol evidence regarding a prior draft of the PLA.

Not only is the Town's argument inconsistent with its claim that the Court of Appeals applied the wrong standard of review, it misconstrues what an acceleration clause is. Under the acceleration clause deleted by the Town and approved by SCDG in the prior draft agreement, all rent due for the remainder of the rental period would have come immediately due and payable upon the Town's breach of the agreement without being discounted to present value. (R. p. 789.) As one court has stated, "making all payment due immediately, without any discount to present value, is precisely what any acceleration clause is intended to do." *Paramount Pictures Corp. v. Johnson Broad., Inc.*, C/A No. H-04-03488, 2006 U.S. Dist. LEXIS 31433, *10 (S.D. Tex. May 19, 2006); see also *Allegiant v. Emerald Inns Inc.*, Unpub. Op. No. 2007-UP-325, 2007 S.C. App. Unpub. LEXIS 373, *3, 6 (Ct. App. June 15, 2007) (ruling that trial court erred in accelerating all future rent payments instead of discounting them to present value).

But the trial court did not accelerate rent. Instead, it awarded SCDG (1) unpaid past rent as of the date of trial plus prejudgment interest on each past installment calculated from when each past installment payment came due and (2) future rent accruing after trial with each installment discounted to present value from the date each installment would become due.

While this distinction may seem minor when explained in words, its significance is magnified when applied to the amount of the Town's rental payments due over the entire rent period. The trial court found that the Town breached the implied covenant of good faith and fair dealing in April 2014 with its actions interfering with SCDG's performance of the PLA and repudiated the PLA in February 2015. (R. pp. 49-55 ¶¶ 62-72.) If the trial court had accelerated all rent as being immediately due and payable upon the Town's breach in 2014, then SCDG could have recovered a total award of approximately \$4.2 million based on all fifteen years of annual rent payments totaling \$2,775,000 plus annual prejudgment interest of \$242,812.50 (*see* S.C. Code Ann. § 34-31-20(A)), accruing from April 2014 through the trial date six years later. If the rent payments would have been accelerated to the Town's repudiation of the contract in February 2015, the total award would have been just shy of \$4 million, instead of the actual award of approximately \$2.6 million.

The comparison of the trial court's award to an award based on the acceleration of rent reveals that the Town's argument has no merit. Instead of accelerating rent, the trial court properly applied South Carolina contract law and awarded future rent

discounted to present value. Therefore, the Court of Appeals correctly affirmed the trial court's award, and there is no basis for further review by this Court.

VI. The Court of Appeals properly rejected the Town's claim that Section 6.01 constitutes an unenforceable penalty because the Town waived that defense and there is ample evidence in the record showing that SCDG's actual damages exceeded the amount of liquidated damages.

The Town also seeks certiorari because the Court of Appeals rejected its argument that Section 6.01 constitutes an unenforceable penalty. Although the Town claims that the trial court never ruled on this issue, the trial court expressly ruled that the Town failed to plead its unenforceable penalty defense as an affirmative defense. (*See* Resp't's Br. pp. 37-38; R. pp. 113-135.) Inexplicably, the Town has never acknowledged this ruling on appeal or addressed its obvious waiver of the unenforceable penalty defense by failing to plead it. *See D & D Leasing*, 305 S.C. at 542, 409 S.E.2d at 796 (ruling that defendant waived unenforceability defense by failing to plead it).

Regardless of whether such defense was waived, it is clear from the record that the defense has no merit. During trial, SCDG demonstrated that it suffered damages as a result of the Town's breach that are far in excess of what was awarded by the trial court. (R. pp. 644-647, 701, 716, 828.) Put simply, Section 6.01 saved the Town from a judgment of millions of dollars more than what SCDG was awarded, and as a result, Section 6.01 cannot be considered an unenforceable penalty. *See Benya v. Gamble*, 282 S.C. 624, 630, 321 S.E.2d 57, 61 (Ct. App. 1984) (stating that for a liquidated damages to be an unenforceable penalty, the liquidated amount must be

“so large that it is plainly disproportionate to any probable damage resulting from [a] breach of contract”).

VII. The Court of Appeals correctly affirmed the trial court’s denial of the Town’s motion to compel the production of a third-party’s irrelevant financial records.

The Town next argues that the Court of Appeals erred by summarily affirming the trial court’s denial of a motion to compel the production of certain financial information possessed by an entity that was not a party to the PLA. However, the trial court correctly ruled that the third-party’s financial records were not relevant because the third-party was a separate and distinct entity from SCDG and had no interest in the PLA or the lawsuit between SCDG and the Town. (R. p. 22.)

The Town ignores this aspect of the trial court’s ruling and instead focuses on the separate arguments that Section 6.01 is not a liquidated damages provision or, alternatively, that it imposes an unenforceable penalty. As argued above, neither of the rulings on those issues was incorrect, and the Town’s entire argument relating to the denial of the motion to compel fails as a result.

Yet, regardless of whether Section 6.01 is a liquidated damages provision or an unenforceable penalty, the Town cannot show that the trial court abused its discretion in finding the records irrelevant. As explained above, it would be impossible to determine with any degree of certainty if SCDG would have earned an annual net operating profit to deduct from its damages based on the financial records of a third-party that never operated the parking garage under the PLA. Because the Town did not address this fact before the Court of Appeals, it cannot credibly argue

that the Court of Appeals erred in affirming the trial court's denial of the motion to compel under the highly deferential abuse of discretion standard.

VIII. Granting of certiorari is not warranted because the Town received meaningful appellate review by the Court of Appeals.

Finally, the Town argues that this case is worthy of certiorari because the Court of Appeals issued an unpublished *per curiam* memorandum opinion. According to the Town, the issuance of the decision in this form has deprived the Town of "meaningful appellate review." (Pet. Writ Cert. p. 24.) That argument has no merit as the history of the proceedings below reveal.

This case was assigned to the Business Court and was tried by the same judge who was assigned to the case from its inception and became familiar with its facts and legal issues. On appeal, the legal questions presented by the Town were fully briefed and subject to oral argument. During oral argument, the appellate judges on the panel asked numerous questions that demonstrated their familiarity with the facts and understanding of the legal questions presented. After careful consideration, they concluded that the issues presented by the Town could be resolved in a *per curiam* opinion under Rule 220(b), SCACR. While the Town understandably desires more, there is absolutely no basis to conclude that it was deprived of meaningful appellate review.

Moreover, the fact that this case involves a public entity is not reason, *per se*, to grant further review under Rule 242(b), SCACR. While the case is indeed noteworthy given the audacity with which elected officials repudiated the contractual obligations of the Town, the Town has not appealed the trial court's findings that it

breached the PLA and implied covenant of good faith and fair dealing. Instead, the Town's appeal seeks to convert the PLA's default provision into a termination without cause provision that would allow the PLA to be breached with impunity. While the Town may now attempt to invoke the "public importance" of its cause on appeal, that argument is mere pretext to avoid accountability for repudiating the PLA and shunning its contractual obligations to pay SCDG the rent that it promised.

Ultimately, this appeal does not raise any difficult or novel questions of law or satisfy any other criteria for certiorari to be granted under Rule 242(b). Therefore, the Court should deny the Town's Petition for Writ of Certiorari and finally conclude this matter 10 years after the Town egregiously breached its contractual obligations.

CONCLUSION

For the foregoing reasons, SCDG respectfully requests that the Supreme Court deny the Town's Petition for Writ of Certiorari.

s/ E. Brandon Gaskins
E. Brandon Gaskins (S.C. Bar No. 73274)
Moore & Van Allen PLLC
78 Wentworth Street
Charleston, SC 29401
Telephone: (843) 579-7000
Facsimile: (843) 579-7099
brandongaskins@mvalaw.com

Attorney for Respondent
Shem Creek Development Group, LLC

June 11, 2024
Charleston, South Carolina