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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.

PETITIONER'S REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Andrew F. Lindemann
LINDEMANN LAW FIRM, P.A.
5 Calendar Court, Suite 202
Post Office Box 6923
Columbia, South Carolina 29260
(803) 881-8920

David Pagliarini
Corporation Counsel
Town of Mount Pleasant
100 Ann Edwards Lane
Mt. Pleasant, South Carolina 29465
(843) 849-2020

Counsel for Petitioner

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ARGUMENTS

I. Both the Petition for Writ of Certiorari and the Return demonstrate that there are substantial legal issues that warrant further judicial review and a decision from this Court.

In its return to the petition for writ of certiorari, the Respondent Shem Creek Development Group, LLC ("SCDG") claims that the Petitioner Town of Mount Pleasant ("Town") failed to identify "special and important reasons" for the grant of a writ of certiorari. SCDG goes further to state that the Town did not address any of the factors outlined in Rule 242(b), SCACR. That is not the case.

Throughout its petition, the Town highlighted not only the errors of law committed by the Court of Appeals and the trial court, but it also explained why this case is an excellent candidate for further review on certiorari for numerous reasons, including several of the factors mentioned in Rule 242(b). To recap, the Town explained that this is a case of significant importance and interest both because the multi-day trial resulted in a judgment in the amount of $2,604,316 to be paid by the taxpayers and because the case presents issues of novel contractual interpretation and the application of the appropriate standard of review in a breach of contract action. As to the latter point, the Town stated in its petition that "[t]his 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." *See*, Petition, p. 9. As to the former point, the Town argues that the Court of Appeals and the trial court erred in treating Section 6.01 of the Parking License Agreement ("PLA") as a liquidated damages provision rather than as a limitation of liability clause. Thus, this case presents this Court with the opportunity to educate the bar and bench on

the differences between the two types of clauses and how those clauses are identified and applied under South Carolina law. *See*, Petition, pp. 9-11. Additionally, and perhaps most importantly, the Town pointed out that "the Court of Appeals disregarded *in toto* instructive and controlling precedent from this Court, specifically the *Mathis* and *American Fertilizing* cases," and accordingly, "the issuance of a writ of certiorari is warranted to engage in the proper construction of Sections 6.01 and 8.17." *See*, Petition, p. 16.

Clearly, the Town addressed "special and important reasons" for the grant of a writ of certiorari and addressed why this case warrants further judicial review and a decision from this Court.

In an improper attempt to counteract the Town's description of the important issues raised by this case, SCDG goes outside the record to suggest that this appeal is "unlawful" by suggesting that the appeal to the Court of Appeals and the filing of the petition for writ of certiorari have not been properly authorized by the Town Council. However, that presents a collateral issue not raised below and for which SCDG has not presented any controlling authority or evidence.

II. 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.

As a threshold issue, the Town contends that the Court of Appeals failed to apply the *de novo* standard of review in construing Sections 6.01 and 8.17 of the PLA, which are the heart of the contractual dispute. While the Court of Appeals' reasoning is difficult to decipher because the Court chose not to hold oral argument and then issued a *per curiam* memorandum opinion to adjudicate complex contract issues, the opinion certainly highly suggests that the Court may have

applied the "any evidence" standard rather than a *de novo* standard despite the well-settled principle that "[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). It is equally well settled that "[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). In its memorandum opinion, the Court of Appeals never identifies these controlling principles as part of its string citations. However, the Court does state it is "cognizant of our standard of review " in "affirm[ing] the circuit court's award of damages" (Slip Op. at 2), which at least implies or gives the impression that the Court believed it was *limited* in some respect by the standard of review. That language would not have been used presumably if the Court applied a *de novo* standard, which obviously places no limitations on its adjudication of the dispositive legal issues. Of course, part of the difficulty is the fact that the Court of Appeals did not make its analysis clearly known by use of the string citations. If this case had warranted a formal opinion in the Court of Appeals' view, as arguably it should have, this Court and the litigants would not be embroiled in this guessing game. What is clear, however, is that the Court of Appeals never states that it is determining any questions of law or that it is applying a *de novo* standard.

Remarkably, SCDG baldly claims that the Court of Appeals applied the correct standard of review – despite not taking a definitive position on whether a question of law was presented and the Court applied a *de novo* standard. Instead, SCDG seizes on this uncertainty by arguing that Sections 6.01 and 8.17 are ambiguous and that the trial court may be affirmed by applying an "any evidence" standard. SCDG's reasoning is seriously flawed for the reasons already outlined in the Town's petition but for additional reasons stated herein. It boils down to SCDG

is trying to salvage its win at trial by making an argument that was not adjudicated below – namely that Sections 6.01 and 8.17 are ambiguous.

As a starting point, SCDG has not pointed to any language that the Court of Appeals itself found Sections 6.01 and 8.17 to be ambiguous or that the Court of Appeals concluded that the trial court found Sections 6.01 and 8.17 to be ambiguous. The words "ambiguous" and "ambiguity" do not appear in the Court of Appeals' opinion. Most critically, there is no indication that the Court of Appeals addressed either prong of the "ambiguity" analysis, and in fairness, the reason for that is that the trial court never ruled that Sections 6.01 and 8.17 are ambiguous. The Court of Appeals seems to have acknowledged that with the following cite: "In determining the intention of the parties, a court first look to the language of the contract and if the language is clear and unambiguous, the language alone determined the contract's force and effect." (Slip Op. at 2). That suggests at least that the Court of Appeals recognized that the trial court did not rule that Sections 6.01 and 8.17 are ambiguous.

Certainly, if the Court of Appeals was concluding that the trial court found Sections 6.01 and 8.17 to be ambiguous, as SCDG now suggests, there is no indication that the Court of Appeals addressed the first prong of the analysis. The first prong, as cited above, is clearly a question of law – a judicial determination as to whether the language of a contract is ambiguous – to which a *de novo* standard applies. The Court of Appeals has given no indication in its string cites that it went through that analysis and concluded *as a matter of law* that Sections 6.01 and 8.17 are ambiguous. To reiterate, the words "ambiguous" and "ambiguity" do not appear in the Court of Appeals' opinion.

The fallacy of SCDG's position is also reinforced by the lack of any language in the trial court's 42-page order, with its detailed findings of fact and conclusions of law which SCDG's

counsel drafted and submitted as a proposed order, to suggest that the trial court found Sections 6.01 and 8.17 to be ambiguous. As the Town previously pointed out, 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, and SCDG has pointed to no such findings. Similarly, there are no findings of fact addressing the parties' intended meaning of the term "rental payments due" as used in Section 6.01 and the term "sum owing" as used in Section 8.17. SCDG only mentions paragraph 20, but that paragraph says nothing about the intentions of the parties, nor does it cite to nor discuss any parol evidence addressing what the parties intended by the contractual language at issue. (R. 33). Additionally, as the Town also pointed out, the words "ambiguous" and "ambiguity" do not appear in the trial court's 42-page order.

Notably, SCDG tried to explain away – albeit unsuccessfully -- all of the Town's arguments that the trial court did not rule that Sections 6.01 and 8.17 are ambiguous. SCDG even tried to explain away its own statement in its Court of Appeals' brief admitting that "the trial court did not express whether it found the relevant provisions ambiguous." *See*, Respondent's Court of Appeals' Brief, p. 34. However, SCDG had no retort (or explanation) for paragraph 102 of the "Conclusions of Law" section of the order. To recap, 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 as to the parties' intended meaning of the terms "rental payments due" and "sum owing" (assuming that such evidence was even to exist which it does

not). The trial court obviously found no ambiguity and interpreted Sections 6.01 and 8.17 as a matter of law – which subjected that ruling to a *de novo* standard of review on appeal.

In sum, neither the trial court nor the Court of Appeals found Sections 6.01 and 8.17 to be ambiguous. Neither lower court identifies any parol evidence relied on to interpret the meaning of those contract provisions. SCDG argued for the first time at the rehearing stage before the Court of Appeals 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*. This Court is urged to reject that obvious fallacy and this improper attempt to convert a question of law into a question of fact so as to convince the Court to apply a more advantageous standard of review – a standard that clearly does not apply.

As one additional point on the standard of review, it is telling that SCDG argues that the parties "did not focus" on the standard of review in their briefing to the Court of Appeals. *See*, Return, p. 13. To the contrary, SCDG should speak for itself. It is true that SCDG did not address the standard of review at all in its Court of Appeals' brief. Despite the requirement by Rule 208(b)(1)(D), SCACR, that the parties address the standard of review in their brief, SCDG chose not to do so. Accordingly, there was no disagreement on the standard of review that required a rebuttal from the Town in its reply brief. However, the Town did discuss the applicable standard of review at length in its opening brief and explained as follows:

> The standard of review for questions of law is *de novo*. The appellate court "may reverse where the decision is affected by any error of law." *Murphy v. Owens Corning*, 393 S.C. 77, 710 S.E.2d 454, 457 (Ct. App. 2011). The appellate courts are "free to decide matters of law with no particular deference to the fact finder." *Id*. "It 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). "The 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).

See, Town's Court of Appeals Brief, p. 10. Thereafter, in the arguments section, the Town specifically argued as follows:

> "The construction and enforcement of an unambiguous contract is a question of law for the court." *Id*. Likewise, "[w]hether language is ambiguous is a question of law for the Court." *Hutchinson v. Liberty Life Ins. Co*., 404 S.C. 20, 743 S.E.2d 827, 829 (2013). In the case at bar, SCDG did not take the position that the PLA is ambiguous. More importantly, the trial court never found that any provision of the PLA was ambiguous. Thus, the PLA, including Sections 6.01 and 8.17, present solely questions of law on which this Court is not bound by the decision-making of the trial court.

See, Town's Court of Appeals Brief, p. 15. Thus, the Town did take the clear and definitive position that the applicable standard of review is a *de novo* standard. In its return, SCDG states that the Town "admitted" that the "any evidence" standard applies, but that is entirely false and further demonstrates the need for a writ of certiorari to address this and other important issues for which the Town did not get a fair or correct adjudication from the Court of Appeals.

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.

As to the merits, the Town contends, among other arguments, that the Court of Appeals erred in affirming the trial court's erroneous construction and application of the language of Sections 6.01 and 8.17. The Court of Appeals further erred in disregarding controlling precedent from this 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 construction of the word "due" is the central issue at the heart of the controversy. SCDG insists that "this Court's and the Court of Appeal's [sic] use of the terms 'due' and 'obligation' reveals the terms are commonly used the refer to future indebtedness." *See*, Return, p. 19. That is the reason given that a writ of certiorari is not warranted. However, that is simply not true.

In fact, in the most definitive case on the meaning of "due," this Court ruled 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). Moreover, in *Bluffton Towne Center, LLC v. Gilleland-Prince*, 412 S.C. 554, 772 S.E.2d 882 (Ct. App. 2015), the operative language in the lease did not use the word "due," but in addressing the obligation to pay future indebtedness, the Court of Appeals used the word "due" with the modifying language "during the full term of the lease" or "during the full term" in order to incorporate future indebtedness. 772 S.E.2d at 890, 893. That demonstrates the prevailing construction of "due" means "owing" or "owed" and requires additional modifying language not present in Section 6.01 to incorporate future indebtedness not yet incurred.

In its return, SCDG tries to limit or "narrow" this Court's definition of "due" in *Mathis* by arguing that the context in that case involved a Wage Payment Act claim and that in some inexplicable way that impacts the plain and ordinary meaning of the term. However, what is obvious from that opinion is that this Court was indeed searching for the *plain and ordinary meaning* of the word "due" in its ordinary usage. This Court, in fact, cited to *Webster's Third New International Dictionary* in concluding that "[t]he word 'due' means 'owed or owing as a debt'" and did not include future indebtedness. *Mathis*, 698 S.E.2d at 783. To recap, 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). Clearly, based on this Court's own precedent and the common dictionary definitions, the term "due" – which means "owed," "owing," and "payable" – does not include future indebtedness that has not yet accrued.[1]

The Court is also urged to look cautiously at SCDG's reading of this Court's decision in *In Ex Parte American Fertilizing Co.*, 122 S.C. 171, 115 S.E. 236 (1922). As a reminder, in the Court of Appeals, SCDG purposefully 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. SCDG's analysis of *American Fertilizing* is again abbreviated. To recap, in that case, this Court printed 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*.

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). Thus, by the contract terms, the sole and exclusive remedy is the "rent payments due." Section 6.01 of the PLA says "rent payments due" – not "as may be due" or "as may become due" or "during the full term of the agreement." Thus, the absence of the words "may be" or other expansive language and given the plain and ordinary meaning of "due" as determined by

[1] This Court is not alone in adopting "owing or payable; constituting a debt" as the plain and ordinary meaning of the term "due." *See*, *Benson v. Casa De Capri Enterprises LLC,* 2023 WL 1782022, *12 (D. Ari. 2023) ("But the plain and ordinary meaning of 'due' and 'owing' are clear. Due generally means 'owed at present'"); *Allan Block Corp. v. E. Dillon & Co*., 509 F.Supp.2d 795, 810 (D. Minn. 2007) ("The plain meaning of 'due' is 'immediately enforceable 'or '[o]wing or payable; constituting a debt'").

this Court in *Mathis* (based on common dictionary definitions) compel the conclusion that "rent payments due" does not include future indebtedness. In short, the meaning of "rent payments due" presents an issue of law to which a *de novo* standard applies, and based on the plain and ordinary meaning of "due," the Town prevails.

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.

SCDG also disputes that the trial court simply read into the PLA a rent acceleration clause that does not otherwise exist and was specifically rejected by the parties. As SCDG has previously acknowledged, 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.

SCDG makes the flawed argument that the trial court's acceleration of all rent due over the fifteen year "Rent Period" was not "rent acceleration" because, if it had been "rent acceleration," the future rent payments would not have been reduced to present value. Not surprisingly, SCDG does not cite to any published South Carolina decision for that proposition. SCDG only cites to the unpublished decision of this Court in *Allegiant v. Emerald Inns, Inc.*, Op. No. 2007-UP-325 (Ct. App. 2007), which actually does not support SCDG's position but rather supports the opposite view. In *Allegiant*, the lease included what the trial court found to be an acceleration clause, although the language of that clause is not stated verbatim in the opinion. The trial court allowed the plaintiff to recover "as damages the aggregate of all of the payments

that would have become due under the lease." The Court of Appeals reversed and held that "[t]he correct measure of damages would include the balance due at the time of the default plus the present value of all unaccrued payments at the time of the default." Thus, as the *Allegiant* decision shows, rent acceleration under South Carolina law does include future rent payments that are reduced to present value. That is exactly what the trial court awarded in the case at bar, despite the undisputed fact that the parties agreed to delete a rent acceleration clause from the PLA. As such, the trial court erred in reading a rent acceleration provision into the PLA which does not exist and which the parties agreed would not be part of the agreement, and the Court of Appeals greatly compounded that error by failing to even acknowledge or address the issue at all.

CONCLUSION

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

Respectfully submitted,

LINDEMANN LAW FIRM, P.A.

BY: *s/ Andrew F. Lindemann*

ANDREW F. LINDEMANN #13030
5 Calendar Court, Suite 202
Post Office Box 6923
Columbia, South Carolina 29260
(803) 881-8920

DAVID PAGLIARINI #8850
Corporation Counsel
Town of Mount Pleasant
100 Ann Edwards Lane
Mount Pleasant, South Carolina 29465
(843) 849-2020

Counsel for Petitioner
Town of Mount Pleasant

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