THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Maite Murphy, Circuit Court Judge

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.

APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Shem Creek Development Group, LLC, Respondent,

v.

The Town of Mount Pleasant, South Carolina, Appellant.

Appellate Case No. 2020-001387

Appeal from Charleston County
Maite Murphy, Circuit Court Judge

Unpublished Opinion No. 2024-UP-007
Heard October 4, 2023 – Filed January 3, 2024

AFFIRMED

James J. Hinchey, Jr., of Hinchey Murray & Pagliarini, LLC, of Mount Pleasant; Julia Parker Copeland, of Hinchey Murray & Pagliarini, LLC, of Charleston; David Guy Pagliarini, of Pagliarini Law Firm, LLC, of Daniel Island; Andrew F. Lindemann, of Lindemann Law Firm, P.A., of Columbia; and Claudius O. Tackett, II, of Sheffer Monhollen & Tackett, PLLC, of Louisville, Kentucky, all for Appellant.

E. Brandon Gaskins, of Moore & Van Allen, PLLC, of Charleston, for Respondent.

PER CURIAM: In this breach of contract action, the Town of Mount Pleasant, South Carolina (the Town) appeals, arguing the circuit court erred in (1) awarding Shem Creek Development Group, LLC (SCDG) liquidated damages; (2) failing to find any liquidated damages provision in the Parking License Agreement (PLA) constituted an unenforceable penalty; and (3) denying the Town's motion to compel certain financial records. We affirm.

1. We hold the circuit court did not err in awarding liquidated damages to SCDG under Section 6.01 of Article VI of the PLA, which entitled SCDG to "Rent Payments due under this Agreement" upon the Town's breach of the PLA, and under Section 8.17 of Article VIII, the "Survival of Obligations" provision. Section 6.01 provided in relevant part that "[SCDG] shall be entitled to bring an action for specific performance or breach of contract against [the Town], but agrees that it[s] 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 costs of trial and any appeals." Section 8.17 stated that "[t]he provisions of this License with respect to any obligation of [the Town] to pay any sum owing or to perform any act after expiration or other termination of this License shall survive the expiration or other termination of this License." Being cognizant of our standard of review,[1] we affirm the circuit court's award of damages. *See Chan v. Thompson*, 302 S.C. 285, 289, 395 S.E.2d 731, 734 (Ct. App. 1990) ("The cardinal rule of contract interpretation is to ascertain and give effect to the intention of the parties."); *Barnacle Broad., Inc. v. Baker Broad., Inc.*, 343 S.C. 140, 146–47, 538 S.E.2d 672, 675 (Ct. App. 2000) ("In determining the intention of the parties, a court first looks to the language of the contract and if the language is clear and unambiguous, the language alone determines the contract's force and effect."); *ERIE Ins. Co. v. Winter Constr. Co.*, 393 S.C. 455, 460, 713 S.E.2d 318, 321 (Ct. App. 2011) ("South Carolina law allows parties to prospectively set an amount of damages for breach through the inclusion of a liquidated damages provision."); *id.*

[1] *See Electro-Lab of Aiken, Inc. v. Sharp Constr. Co. of Sumter*, 357 S.C. 363, 367, 593 S.E.2d 170, 172 (Ct. App. 2004) ("An action for breach of contract is an action at law."); *id.* ("In an action at law, on appeal of a case tried without a jury, the appellate court's standard of review extends only to the correction of errors of law."); *id.* ("The trial [court's] findings of fact will not be disturbed upon appeal unless found to be without evidence which reasonably supports the [court's] findings.").

("Such provisions are widely used in construction contracts and have been generally enforced as an appropriate remedy for breach."); *Moser v. Gosnell*, 334 S.C. 425, 431, 513 S.E.2d 123, 126 (Ct. App. 1999) ("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."); *Lewis v. Cong. of Racial Equal. &/or C. O. R. E., Inc.*, 275 S.C. 556, 560, 274 S.E.2d 287, 289 (1981) ("In liquidated-damages cases, the amount is usually a sum certain, or at least the amount is capable of ascertainment by computation."); *Bluffton Towne Ctr., LLC v. Gilleland-Prince*, 412 S.C. 554, 570, 772 S.E.2d 882, 891 (Ct. App. 2015) (reading a commercial lease as a whole and finding the default provision in a commercial lease "provided a specific damages formula" that included "future obligations for damages resulting from [the] breach of the lease" and finding the parties intended that, upon default, the tenant would be liable for the rent due during the entire term of the lease); *id.* at 568, 772 S.E.2d at 890 (recognizing the "modern rule for damages recoverable upon the breach of a lease" by a tenant permits the landlord to recover full damages, both present and prospective, including future rent due).

2. We hold the circuit court did not err in finding the liquidated damages clause did not constitute an unenforceable penalty. *See Tate v. Le Master*, 231 S.C. 429, 441, 99 S.E.2d 39, 45 (1957) ("Whether such a stipulation is one for liquidated damages or for a penalty is, of course, primarily a matter of the intention of the parties."); *DD Dannar v. SC LAUNCH!, Inc.*, 431 S.C. 9, 25 n.5, 846 S.E.2d 883, 891 n.5 (Ct. App. 2020) (considering "(1) 'the anticipated or actual loss caused by the breach'; and (2) 'the difficulty of proof of loss'" from the two-part test in Restatement (Second) of Contracts § 356(1), cmt. b, "for determining whether a purported liquidated damages provision is actually a penalty" (quoting *City of Davenport v. Shewry Corp.*, 674 N.W.2d 79, 85 (Iowa 2004))); *Foreign Acad. & Cultural Exch. Servs., Inc. v. Tripon*, 394 S.C. 197, 204, 715 S.E.2d 331, 334 (2011) (finding if a stipulated sum "is plainly disproportionate to any probable damage resulting from breach of contract, the stipulation is an unenforceable penalty" (quoting *Lewis v. Premium Inv. Corp.*, 351 S.C. 167, 172, 568 S.E.2d 361, 363 (2002))); *DD Dannar*, 431 S.C. at 21, 846 S.E.2d at 889 ("[T]he burden is on the party contesting the characterization set forth in the parties' contract to show that a specified sum is actually a penalty.").

3. We find the circuit court did not err in denying the Town's motion to compel. *See Dunn v. Dunn*, 298 S.C. 499, 502, 381 S.E.2d 734, 735 (1989) (explaining a trial court's ruling on a discovery matter "will not be disturbed on

appeal absent a clear abuse of discretion"); *id.* ("The burden is upon the party appealing from the order to demonstrate the trial court abused its discretion.").

AFFIRMED.

THOMAS, KONDUROS, and GEATHERS, JJ., concur.

The South Carolina Court of Appeals

Shem Creek Development Group, LLC, Respondent,

v.

The Town of Mount Pleasant, South Carolina, Appellant.

Appellate Case No. 2020-001387

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

_____ J.

_____ J.

_____ J.

Columbia, South Carolina

cc:
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APPEAL FROM CHARLESTON COUNTY
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Shem Creek Development Group, LLC,..... Respondent,

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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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January 18, 2024

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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.

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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January 18, 2024

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.

RETURN TO PETITION FOR REHEARING

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Pursuant to Rules 221 and 240, SCACR, and the Court's request to file a return, dated January 30, 2024, Respondent Shem Creek Development Group, LLC ("SCDG") submits this Return to Appellant Town of Mount Pleasant's (the "Town") Petition for Rehearing filed on January 18, 2024. For the reasons stated below, the Town's Petition for Rehearing should be denied in its entirety.

INTRODUCTION

In its Petition for Rehearing, the Town overstates the legal significance of this case to seek a reversal of the trial court's decision awarding SCDG damages caused by the Town's egregious breach of contract. Revealingly, the Town did not appeal the trial court's findings and conclusions as to the breach. Instead, it asks this Court to adopt a tortured interpretation of the contract that would effectively convert the damages provision into a termination without cause provision. Under the Town's construction, the Town could simply walk away from its contractual obligation to pay rent at any time without consequence.

The Court correctly rejected the Town's appeal, but now the Town seeks a rehearing on the primary grounds that the Court deprived it of meaningful appellate review and applied the incorrect standard of review. Neither argument is persuasive.

First, the Town argues that "this is a case of significant importance and interest" that warrants more extensive legal analysis. (Appellant's Pet. Reh'g. pp. 1-2.) While the case is indeed noteworthy given the audacity with which elected officials repudiated the contractual obligations of the Town, this appeal does not raise any difficult or novel questions of law. As the Court's unpublished *per curiam* opinion

suggests, the Town's arguments on appeal are so weak and meritless that they can be summarily disposed of without lengthy analysis in accordance with Rule 220(b)(2), SCACR.

Second, the Town claims that the Court incorrectly applied the "any evidence" standard of review. However, in making this claim, the Town disregards ample evidence in the record showing that the trial court's interpretation of the relevant contractual provisions were determined as questions of fact and, thus, subject to the "any evidence" standard. Not only were the trial court's findings that the parties intended to liquidate damages included in its findings of fact, the record shows that the trial court admitted and relied upon parole evidence to construe the ambiguous provisions of the contract as a question of fact, which the Town confirmed in its post-trial motions. Therefore, the Court correctly applied the standard of review.

In sum, the Town has failed to demonstrate that rehearing of the Court's decision is warranted, and its Petition for Rehearing should be denied.

STANDARD FOR REHEARING

The scope of review for deciding a petition for rehearing is limited to whether the Court "overlooked or misapprehended" a point in reaching its decision. Rule 221, SCACR. Rule 221, SCACR, states: "[a] petition for rehearing shall be in accordance with Rule 240, and shall state with particularity the points supposed to have been overlooked or misapprehended by the court." To obtain a rehearing, a party must demonstrate that the Court overlooked or misapprehended its argument. *Kennedy v. S.C. Retirement Sys.,* 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001).

ARGUMENT

I. The Court's decision complies with Rule 220(b) because it provides the reasoning and authority supporting its decision, except with respect to those issues that are manifestly without merit.

The Court's decision satisfies the requirements of Rule 220(b), SCACR. Under that rule, the Court must state the reasons for the decision as to "every point distinctly stated in the case which is necessary to the decision of the appeal and fairly arising upon the record." However, Rule 220(b)(2) provides that the "Court of Appeals need not address a point which is manifestly without merit." Here, the Court has adequately explained its decision on every point that has merit by stating its reasoning and citing the supporting legal precedent.

To be sure, the Town's brief contained three separate argument sections, and the Court addressed all of those arguments in its decision. While the Court does not address every sub-argument raised by the Town, that is merely a reflection that many of them are manifestly without merit and unworthy of being addressed. For example, the Town spends numerous pages advancing an interpretation of the term "due" as used in the Parking License Agreement ("PLA") that is contrary to common sense based on clearly inapplicable precedent. (Appellant's Br. pp. 13-19.) As argued by SCDG, the term "due" has consistently been interpreted or used by both the Court of Appeals and the Supreme Court to apply to future obligations. (Resp't's Br. pp. 18-25.) Also, the Town failed to offer a reasonable explanation of the survival clause found in Section 8.17 and instead argues for an absurd interpretation that would render the clause meaningless. (Resp't's Br. pp. 34-37.) Given these obvious

weaknesses, there was simply no need for the Court to engage in a lengthy explanation of the reasons for rejecting this argument.

As another example of the meritless positions advanced by the Town, it also needlessly devoted several pages to attacking the trial court's purported failure to rule whether the liquidated damages provision constitutes an unenforceable penalty. (Appellant's Br. pp. 19-22.) In support of that argument, the Town claims that "there is no record of the trial court ever addressing or adjudicating the merits of the unenforceable penalty issue." (Appellant's Br. pp. 19-20, fn. 6.) However, the Town either overlooks or disregards the trial court's express ruling 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 never acknowledges that it waived its unenforceable penalty defense by failing to plead it but nevertheless argues that it is entitled to rehearing on this issue. (Appellant's Pet. Reh'g pp. 13-16.) Put simply, the Town's argument on this issue, like others, is so manifestly without merit that it is not deserving of the "meaningful" legal analysis that it seeks.

II. The Court correctly applied the "any evidence" standard of review because the order and record demonstrate that the trial court interpreted the applicable provisions as a question of fact.

Contrary to the Town's argument, there is no indication that the Court failed to apply the proper standard of review in reviewing the trial court's interpretation of Sections 6.01 and 8.17 of the PLA. Although the Town suggests that the Court applied the "any evidence" standard exclusively by claiming that "there is no

indication that a *de novo* standard was applied,"[1] that is not true. The footnote in the Court's decision accurately states that "the appellate court's standard of review extends only to the correction of errors of law" and that the "trial [court's] findings of fact will not be disturbed upon appeal unless found to be without evidence which reasonably supports the [court's] findings."[2] Thus, the Court recognized and applied the applicability of the "any evidence" standard to the trial court's findings of fact and the *de novo* standard to the trial court's conclusions of law.

Regardless, the trial court's order and record on appeal show that the Court correctly applied the "any evidence" standard in considering whether the trial court erred in awarding liquidated damages under Sections 6.01 and 8.17. In reviewing an order, an appellate court "must look to all parts of the order and the record to ascertain the trial court's intent in issuing the order and [it] must construe the order in the light of what was before the court and the accompanying circumstances."

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[1] The Town also mistakenly claims that SCDG never addressed the standard of review as required by Rule 208(b)(1)(D), SCACR. (Appellant's Pet. Reh'g p. 2.) However, Rule 208(b)(1) applies to the brief of the appellant; whereas, Rule 208(b)(2) applies to the brief of the respondent. Thus, Rule 208(b)(1) did not apply to SCDG's brief. Moreover, the applicable Rule 208(b)(2) clearly states that a respondent need not include a statement of the standard of review unless the respondent is dissatisfied with the standard of review claimed by the appellant. Here, the Town accurately stated in its brief the applicable *de novo* and "any evidence" standards of review for questions of law and fact, respectively. (Appellant's Br. p. 10). It was, therefore, unnecessary for SCDG to restate it. Moreover, SCDG expressly argued in its brief that the trial court's interpretation of Sections 6.01 and 8.17 were correct under either standard of review the Court chose to apply.

[2] The Town's Petition for Rehearing mistakenly claims that this footnote "describes only the 'any evidence' standard." (Appellant's Pet. Reh'g p. 3.) This mischaracterization ignores the Court's express statement that its standard of review extends only to corrections of law.

Sunamerica Financial Corp. v. Equi-Data, Inc., 299 S.C. 175, 178, 383 S.E.2d 8, 10 (Ct. App. 1989); *see also, Bluffton Towne Ctr., LLC v. Gilleland-Prince*, 412 S.C. 554, 572 772 S.E.2d 882, 892 (Ct. App. 2015) (stating that an appellate court must construe the trial court's intent as discerned from the order as a whole). When this principle is applied here, there is sufficient evidence showing that the trial court's interpretations of Sections 6.01 and 8.17 were findings of facts, thereby making the application of the "any evidence" standard appropriate.

First, and most significantly, the trial court included in Paragraph 20 of the order's "Findings of Fact" its finding that the parties agreed to liquidate damages under Section 6.01. (R. pp. 33-34.) In that same paragraph, the trial court also addressed Section 8.17's survival clause, and it expressly found that the "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 applies to the Court's appellate review of them.

Second, the trial court implicitly found Section 6.01 of the PLA ambiguous as revealed by its admission of and reliance upon parole evidence regarding the parties' intent underlying that provision. During trial, SCDG presented evidence, over the Town's objection based on the parole 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 parole

evidence would be proper."[3] The trial court then overruled the Town's objection and admitted the parole evidence, thereby indicating that it found the section ambiguous.[4] Thus, the trial proceedings also indicate that the trial court interpreted Section 6.01 to be ambiguous and resolved that ambiguity as a question of fact, which makes its determination subject to the "any evidence" standard.

Third, the trial court's denial of the Town's motions for directed verdict, involuntary dismissal under Rule 41(b), SCRCP, and entry of judgment under Rule 52, SCRCP, also demonstrates that it resolved the intent and effect of Sections 6.01 and 8.17 as a question of fact. Upon conclusion of SCDG's and the Town's cases, the Town moved for directed verdict, involuntary dismissal, and entry of judgment. (R. pp. 445-469, 1118-1153, 1159-1160.) In those motions, the Town argued that, under Sections 6.01 and 8.17, "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,"

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[3] In its Petition for Rehearing, the Town claims that "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." (Appellant's Pet. Reh'g p. 3.) The cited discussion regarding the Town's parole evidence objection shows again that the Town is misrepresenting the record. Moreover, the Town's counsel admitted that SCDG's counsel took the position that the PLA may be ambiguous. (R. p. 1120.) Thus, the Town's claim that SCDG never took the position that Section 6.01 could be ambiguous is belied by the record.

[4] The Town did not appeal the trial court's admission of the parole evidence regarding Section 6.01. In fact, the Town relies on that same parole evidence to support its interpretation of the liquidated damages provision. (*See* Appellant's Br. p. 15; Appellant's Reply Br. pp. 5-6; Appellant Pet. Reh'g pp. 10-11.) Because the Town wants this Court to consider parole evidence to overturn the trial court's interpretation of Section 6.01, it cannot credibly contend that the *de novo* standard should apply to the Court's review.

just as it argues on appeal. (R. p. 464-466, 1149-1153.) In fact, the Town supported these motions by relying upon the same parole evidence presented by SCDG to convince the trial court of its interpretation of Section 6.01. (R. p. 1152-1153.)

Of course, the trial court denied these motions and rejected the Town's supporting arguments. In so doing, it expressly ruled "there's sufficient evidence for the Court to make a determination of **questions of fact**." (R. p. 1153) (emphasis added). Also, it is important to note that a directed verdict is appropriate when "the case presents only questions of law." Rule 50(a), SCRCP. Considering the trial court's clear ruling that questions of fact exist and denial of directed verdict, there can be no doubt that the trial court's interpretation of Sections 6.01 and 8.17 was determined as a question of fact and not as a question of law. As a result, the "any evidence" standard was correctly applied by the Court.

Fourth, the Town's post-trial motion for reconsideration under Rule 59, SCRCP, confirms that the Town believed that the trial court interpreted Section 6.01 as a question of fact based on the parties' intent. (R. pp. 470-487.) In that motion, the Town argued the trial court erred in awarding damages equal to rent payments for "the entire 15 years when Plaintiff terminated the agreement prior to a Certificate of Occupancy being issued." (R. pp. 486-487.) According to the Town, the trial court's "attempt to surmise the Town's intent using parole evidence from negotiations is inappropriate." (R. p. 487.) This prior admission directly contradicts the Town's present claim in its Petition for Rehearing that the trial court failed to make findings as to the intent of the parties with respect to Sections 6.01 and 8.17, which, according

to the Town, is evidence that the trial court did not find them to be ambiguous. Because the Town previously objected to the trial court's findings as to the parties' intent, it now cannot credibly contend that the trial court failed to make such findings.

Overall, there is ample evidence in the record showing that the trial court found Sections 6.01 and 8.17 to be ambiguous and determined their meaning as a question of fact. The order, trial transcript, and post-trial motions reveal not only that the trial court's interpretation of these PLA sections were findings of fact but also that the Town acknowledged as much. Therefore, the Court properly applied the "any evidence" standard and affirmed the trial court's award of liquidated damages. *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).

III. Regardless of the applicable standard of review, the trial court's ruling and interpretation of the contract was correct and consistent with common sense, good faith, and fairness.

Even if the Court determines that the *de novo* standard of review should apply, the trial court's ruling should nevertheless be affirmed for the reasons explained in SCDG's brief and at oral argument. As previously argued, the trial court's conclusions as to and application of Sections 6.01 and 8.17 were legally correct, regardless of whether those provisions are considered ambiguous or not. (Resp't's Br. pp. 16-37.)

In cases where a contract is unambiguous and the rules of contractual construction do not apply, courts are nevertheless required to apply common sense in construing it. Indeed, "[c]ommon sense and good faith are the leading touchstones of construction of the provisions of a contract; where one construction makes the provision unusual or extraordinary and another construction which is equally consistent with the language employed would make it reasonable, fair, and just, the latter construction must prevail." *C.A.N. Enters., Inc. v. S.C. Health & Human Serv. Fin. Comm'n*, 296 S.C. 373, 377, 373 S.E.2d 584, 586 (2000).

Here, the Town advances an interpretation of Sections 6.01 and 8.17 that is abhorrent to notions of common sense and fairness. Not only are the Town's arguments based on tortured, self-serving interpretations of the terms "due," "obligation," and "owing" that are contrary to their ordinary meanings and usage (*see* Resp't's Br. pp. 18-25), they would effectively convert the PLA into a contract that could be terminated by the Town at-will with no consequence, as the Court recognized during oral argument (*see* Resp't's Br. pp. 17-18, 36-37). Such an interpretation defies common sense, as it would be completely superfluous to include in the contract a defined term and survival clause if it could be effectively terminated at any time without cause or consequence. To be sure, the PLA does not provide the Town with an option to terminate it. And, in this context, the survival clause would serve no purpose if it is construed to allow the Town to simply to walk away from the PLA at its convenience, especially considering the importance to SCDG in securing the Town's financial commitment to pay rent for a defined term. Put simply, there is

nothing in the PLA that would support the Town's interpretation, and the Court correctly rejected it regardless of the standard of review it applied.

IV. The Court did not overlook or misapprehend the Town's other grounds for requesting a rehearing, which are merely restatements of previously made and rejected arguments.

Except for the discussion regarding the standard of review, the Town's Petition for Rehearing is nothing more than a restatement of the arguments previously made in its brief and reply brief. In fact, most of the arguments made in the Petition for Rehearing were copied verbatim from those briefs and pasted into the Petition. (*See* Ex. A – Comparison of Appellant's Pet. Reh'g, Appellant's Br., and Appellant's Reply Br.) In other cases, minor non-substantive changes were made to reflect the different procedural posture of the case now. (*See id.*) However, nothing in the Petition raises anything that was not properly considered by the Court. Because SCDG has already thoroughly addressed the Town's arguments, it would be a waste of the Court's time and resources for SCDG to do so again. Instead, SCDG incorporates by reference the arguments made in its brief and respectfully submits that the Court did not overlook or misapprehend any issues necessary to its decision on appeal.

CONCLUSION

For the foregoing reasons, SCDG respectfully requests that the Court deny the Town's Petition for Rehearing.

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February 16, 2024
Charleston, South Carolina

EXHIBIT A

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.

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.

Appellant's Final Brief

Appellant's Reply Brief

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January 18, 2024

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.

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.

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[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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January 18, 2024

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:

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s/ Andrew F. Lindemann

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.

REPLY MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING

The Respondent Shem Creek Development Group, LLC ("SCDG") has filed its return to the Appellant Town of Mount Pleasant's Petition for Rehearing. That return, and the positions taken by SCDG, are undergirded by multiple fallacies. SCDG's reliance on such fallacies demonstrates the need for a rehearing as well as the issuance of an opinion that provides a meaningful legal analysis of the issues presented for appeal -- which a case of this importance and significance merits.

As a threshold point, the Town is critical that the Court issued a *per curiam* memorandum opinion pursuant to Rule 220(b), SCACR, which does not even specify which provision of Rule 220(b)(1) that it found applicable to the issues raised on appeal. Remarkably, SCDG takes that a

step further and speculates – with no basis in this Court's opinion – that the issues that the Court overlooked and did not address even with a string citation are issues to which the Court applied Rule 220(b)(2), which allows the Court to refuse to address "a point which is manifestly without merit." Rule 220(b)(2), SCACR. This Court's opinion certainly does not cite Rule 220(b)(2) or use any language to suggest that any of the issues on appeal raised by the Town are "manifestly without merit." Obviously, in the application of basic notions of due process, when this Court does find Rule 220(b)(2) applicable, the Court undoubtedly identifies what those issues are. In short, there is no merit to SCDG's contention that issues that SCDG admits are not addressed in *per curiam* opinion are issues to which this Court *silently* applied Rule 220(b)(2). That did not happen.

According to SCDG, those issues include the meaning of the word "due" in Section 6.01 of the Parking License Agreement ("PLA"), which is the central issue at the heart of the controversy. Citing no case law, SCDG insists that "the term 'due' has consistently been interpreted or used by both the Court of Appeals and the Supreme Court to apply to future obligations." *See*, Return, p. 4. That is not true. In fact, in the most definitive case on the meaning of "due," the Supreme 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, this Court 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 a similarly conclusory manner, SCDG states that "no reasonable explanation" was provided by the Town as to the meaning and purpose of Section 8.17, but instead the Town offers "an absurd interpretation that would render the clause meaningless." *See*, Return, p. 4. That is not true, and frankly, by stating its position in a single conclusory sentence, SCDG fails to substantiate its position. In truth, as the Town explained previously, 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 is not "meaningless" based on the plain and ordinary meaning of the phrase "rent payments due." Notably, and as ignored by SCDG, 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.

Yet, SCDG's fallacies are most prominently demonstrated in its discussion of the applicable standard of review, and most notably, the extremes SCDG goes to in trying to convert a question of law into a question of fact in an attempt to avoid the applicable *de novo* standard of review. As a position taken for the first time on rehearing, SCDG now insists that the trial court's interpretation of two contract provisions – Sections 6.01 and 8.17 – presented a question of fact *and indeed was treated by the trial court as a question of fact*. SCDG then goes to great lengths to try to show that to be the case – again despite not taking that position in its appellate

filings until now – now when SCDG recognizes that it cannot prevail under a *de novo* standard and needs this Court to apply the more lenient standard of review.

To recap, the Supreme Court has clearly held 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). Likewise, "[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). And, of course, the standard of review for questions of law is *de novo*.

Thus, Sections 6.01 and 8.17 present a question of fact ***only if the trial court found those contract provisions to be ambiguous.*** The trial court did not do so. The trial court never ruled that Sections 6.01 and 8.17 of the PLA are ambiguous. In fact, SCDG conceded this very point when it stated: "the trial court did not express whether it found the relevant provisions ambiguous." *See*, Respondent's Brief, p. 34. Now, for the first time on rehearing, SCDG argues that "the trial court ***implicitly*** found Section 6.01 of the PLA ambiguous as revealed by its admission of and reliance upon parole [sic] evidence regarding the parties' intent underlying that provision." *See*, Return, p. 7. (Emphasis added). Remarkably, SCDG now insists that the most critical ruling in the case was made "implicitly" in a 42-page order which incidentally was submitted as a proposed order actually drafted by SCDG's counsel.

The fallacy of that argument is easily disproved for numerous reasons. First, in its 42-page order, the trial court made no findings of fact as to the intentions of the parties in the drafting of Sections 6.01 and 8.17. None. SCDG has pointed to no such findings. Second, SCDG claims that the trial court "admitted" and "relied" on parol evidence. SCDG disregards the actual language of the order its own counsel drafted. In explaining that it "admitted" parol

evidence over objection but then did not consider such evidence, the trial court states in footnote #5 as follows:

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

(R. 56). Thus, based on *Brown v. Allstate*, the trial court admitted all evidence, but there is no indication that the trial court relied on any parol evidence that was admitted. Importantly, none of the parol evidence related to Section 6.01 was ever cited in the trial court's 42-page order, and there was no parol evidence even presented as to Section 8.17. There was only a single reference to "parol evidence" in the order, and that was on page 29 and did not address Section 6.01 or Section 8.17. (R. 55).[1] Lastly, if there is any question as to whether the trial court considered parol evidence to determine the parties' intent, the Court should refer to paragraph 102 of the "Conclusions of Law" section of the order. After quoting verbatim the language of Sections 6.01 and 8.17, the trial court writes: "When considered together, as they must, these two provisions evidence the parties' clear intention that the Town's obligation to pay rent for the entirety of the rental term survives the termination of the parking license agreement." (R. 67). Unquestionably, the trial court derived the parties' purported "clear intention" from the trial court's own construction of Sections 6.01 and 8.17 alone and without any consideration of parol evidence. The reason is obvious – the trial court found that Sections 6.01 and 8.17 are unambiguous, and as

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

such, the construction of those provisions presented purely a question of law that the trial court answered – albeit in error. In sum, it is a total fallacy to now claim at the rehearing stage that the trial court "implicitly" found Sections 6.01 and 8.17 to be ambiguous and relied on parol evidence which was never mentioned in its order to interpret the meaning of those contract provisions. This Court is urged to reject that obvious fallacy and this improper attempt to convert a question of law into a question of fact so as to convince this Court to apply a more advantageous standard of review – a standard that clearly does not apply. Quite simply, there is no indication whatsoever – explicitly or implicitly – that the trial court treated Sections 6.01 and 8.17 as being ambiguous and as presenting a question of fact rather than a question of law. To now suggest otherwise is entirely disingenuous on the part of SCDG and amplifies the Town's case that a rehearing is indeed warranted.

Finally, as a last-ditch effort, SCDG resorts back to its additional sustaining ground which this Court correctly did not address or adopt in its *per curiam* opinion. SCDG argues that the Town's interpretation of Sections 6.01 and 8.17 is "abhorrent to notions of common sense and fairness" and would allow the Town to terminate the PLA "with no consequence." *See*, Return, p. 11. However, "[i]t is not the function of the court to rewrite contracts for the parties." *Low County Open Land Trust v. Charleston Southern Univ.*, 376 S.C. 399, 656 S.E.2d 775, 781 (Ct. App. 2008). "Courts only have the authority to specifically enforce contracts that the parties themselves have made; they do not have the authority to alter contracts or to make new contracts for the parties." *Id*. Moreover, the construction of the PLA required by the actual language of Sections 6.01 and 8.17 does not permit the contract to be terminated "with no consequence," as SCDG suggests, given that the Town would be liable for rent payments that accrued at the time

the PLA was terminated. In this case, it was SCDG which terminated the PLA, and it did so ***before any rent payments became due and payable***. That is undisputed.

Importantly, there is no valid basis for excusing SCDG from its burden of proving all three elements of its breach of contract claim, including "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). Here, the failure to prove recoverable damages is fatal to SCDG's claim. Yet, SCDG asks this Court to excuse that failure by urging this Court to rewrite the PLA to provide more favorable terms for SCDG. Quite obviously, that is not the role of this Court.

For the reasons stated, the Appellant Town respectfully requests that the Court rehear its decision in this case and reverse the judgment entered in SCDG's favor, including the award of attorney's fees and costs, and remand for entry of judgment in favor of the Town.

Respectfully submitted,

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