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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Maite Murphy, Circuit Court Judge

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.

BRIEF OF RESPONDENT

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II. Did the trial court and Court of Appeals correctly conclude that Sections 6.01 and 8.17 provide for the recovery of rental payments due after termination of the Parking License Agreement based on precedent of this Court ruling that the term "due" may apply to future indebtedness, the clear intent as demonstrated by the four corners of the agreement, and the application of the canons of contractual construction?

III. Did the South Carolina Court of Appeals correctly affirm the trial court's determination that Section 6.01 of the Parking License Agreement is a liquidated damages provision because it limits damages to rental payments in an amount that is capable of ascertainment by mathematical computation?

IV. Did the South Carolina Court of Appeals correctly affirm that the trial court did not accelerate damages as originally rejected by the parties?

V. Did the South Carolina Court of Appeals correctly reject the Town's arguments that Section 6.01 imposes an unenforceable penalty based on the Town's failure to plead that defense and the considerable evidence that SCDG suffered damages far in excess of the amount awarded?

STATEMENT OF THE CASE

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

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

On October 22, 2019, the Town filed a motion to compel discovery responses from SCDG and a subpoena response from 101 Coleman Partners, LLC, a third-party which now owns and operates the parking garage. (R. pp. 136-185.) The Town's motion to compel sought financial and parking records related to 101 Coleman Partners' operation of the parking garage. (*Id.*) The trial court provided notice of its

denial of the motion to compel on December 11, 2019, which was followed by a written order issued on January 22, 2020. (R. pp. 16-26, 566.)

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

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

The Town filed its notice of appeal on October 16, 2020. (R. pp. 1544-1546.) The Court of Appeals held oral argument on the appeal on October 4, 2023 and later affirmed the trial court's order in an unpublished *per curiam* opinion on January 3, 2024. (App. 1- 4.)

The Town filed a petition for rehearing with the Court of Appeals on January 18, 2024 (App. 6-25), which was denied on March 21, 2024. (App. 5.) The Town subsequently filed its Petition for Writ of Certiorari on April 22, 2024, which was granted in part on December 12, 2024.

STATEMENT OF FACTS

I. The Concept

SCDG was formed around 2013 to build and operate a parking garage and office building on the corner of Mill Street and Coleman Boulevard near Shem Creek in Mount Pleasant, South Carolina. (R. p. 568.) After an initial study demonstrated that there was insufficient demand to support a stand-alone parking garage, SCDG's principals approached the Town in 2013 about a public-private partnership in which SCDG would construct a dual-purpose structure consisting of separate office and parking components. (R. pp. 572-579.) Under the proposed public-private partnership, SCDG would construct, own, and operate the office building and parking garage, and the Town would rent spaces that would be reserved for public parking.

II. The Agreement

After SCDG's principals received a positive response from the Town about the public-private partnership, the parties negotiated a parking license agreement that would establish the parties' respective rights and obligations. (R. pp. 569, 584-586, 865-866, 974, 1284-1289.) Overall, the parties came to quick agreement about the principal terms of the PLA, which included the following: (a) SCDG would construct the structure in a form substantially similar to the conceptual rendering of SCDG's architect, which would include 276 total spaces; (b) the Town would pay rent to reserve 132 of those 276 total spaces for public parking on weekdays from 6 AM to 5 PM; (c) the remaining 144 spaces would be reserved for office tenants on weekdays from 6 AM to 5 PM and reserved for public parking at all other times; (d) the license

term was 30 years; (e) the Town would pay to SCDG annual rent of $185,000 for a period of 15 years; (f) the rent could be reduced on a pro rata basis if the garage earned a net operating profit; (g) SCDG would be responsible for financing, constructing, operating, and maintaining the structure; and (h) the Town would have no obligations or risks with respect to the parking spaces beyond paying annual rent. (R. pp. 585-600, 1200-1213.)

One of the few issues subject to negotiation during the drafting of the PLA was the remedies available to SCDG if the Town defaulted. (R. pp. 702-706.) As originally drafted, the PLA's default clause provided that SCDG could accelerate all rent payments such that they became immediately due and owing upon the Town's default. (R. pp. 702-706, 1290-1304.) In addition, SCDG could recoup all expenses incurred in repossessing the premises, subject to the Town's liability being potentially reduced by sums received if SCDG relet the premises. (*Id.*) The original language also omitted any limits on SCDG's ability to recover consequential damages. (*Id.*)

The Town, however, rejected the original language in the default clause and instead proposed fixing the Town's potential liability to the rent payments due under the PLA. (R. pp. 702-706.) The Town's proposed language expressly provided that SCDG "shall be entitled to bring an action for specific performance or breach of contract against [the Town], but agrees that it [sic] sole and exclusive remedy [for the Town's default] shall be Rent Payments due under this Agreement." (R. pp. 1290-1304.) The proposed revision further stated that "[b]oth parties waive any claims that either may have to any consequential or punitive damages." (*Id.*) Also, the

Town's proposed revisions did not include any language allowing the Town's liability to be reduced by income earned from other sources. (*Id.*)

In October 2013, the parties entered into the PLA. (R. pp. 601, 1200-1213.) The Town's revisions to the default clause were included in the executed document, which provides:

> Section 6.01 Definitions. In the event that Licensee (a) fails to pay all or any portion of any Rent or other sum due from Licensee hereunder or pursuant to any exhibit hereto within ten (10) days following written notice; (b) fails to comply with any other obligation of Licensee under this License within 30 days after written notice; or (c) becomes bankrupt, insolvent or files any insolvency or similar bankruptcy, debtor proceedings, then Licensee shall be in default hereunder and Licensor may, at its option and without further notice to Licensee, (i) terminate Licensee's right to use of the Premises, (ii) without terminating this License, re-enter and resume exclusive possession of the Premises, or (iii) declare this License terminated, and may thereupon in either event remove all persons and property from the Premises in any manner permitted by South Carolina law. 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 costs of trial and any appeals.

(*Id.* at § 6.01.) The PLA also includes a "Rights and Remedies" clause that states that the "various rights and remedies herein granted to Licensor shall be cumulative and in addition to any other which Licensor may be entitled by law or in equity, and the exercise of one or more rights or remedies shall not impair Licensor's right to exercise any other right or remedy." (*Id.* at § 6.02.) The parties further agreed to a survival clause, which provides that the "provisions of this License with respect to any obligation of Licensee to pay any sum owing or to perform any act after expiration or

other termination of this License shall survive the expiration or other termination of this License." (*Id.* at § 8.17; R. pp. 709-710.)

III. The Backlash

As the project was being designed in early 2014, cooperation from the Town began to diminish when public opposition arose. (R. pp. 609-611.) The opposition was led by a group called Save Shem Creek, which was organized to stop the garage from being constructed. (*Id.*) According to the Town's administrator, the garage project became the most controversial development project in the Town's recent history. (R. pp. 863-864.) With public opposition growing, the Town took actions that negatively impacted the project and SCDG's ability to provide all 132 public spaces envisioned under the PLA. (R. pp. 612-646.)

Specifically, in April 2014, the Town enacted a zoning code amendment that increased the setback requirements and created an "activity zone" requirement for only a few parcels, including the project site, thereby reducing the site's buildable area. (R. pp. 612-624, 1239-1279.) As a result of loss in buildable area caused by the zoning amendment, the number of parking spaces designed for the garage was reduced. (R. pp. 622-624.)

Over the next few months, SCDG sought from the Town several reasonable accommodations and interpretations of the zoning code that would enable SCDG to provide 132 public spaces under the PLA. (R. pp. 625-648, 1280-1283, 1310-1313.) For example, SCDG's architect argued for an interpretation that a 5' rear setback should apply to the back of the building as set forth in the zoning code, but the zoning

administrator insisted that a 20' side-street setback should apply to the rear of the building. (R. pp. 1064-1070.) That interpretation alone resulted in the loss of sixteen spaces in the parking garage. (*Id.*)

Also, SCDG requested that the parking garage be deemed a "civic use" under the Town's zoning code because civic uses were exempt from the strict requirements for build-to lines, setbacks, and other design elements. (R. pp. 628-642, 1282-1283, 1310-1313.) Instead, the design elements for civic uses are determined by the Town's planning staff in the design review process. (Town Zoning Ordinance § 156.329(N)(5).)[1] At the time, the Town's zoning ordinance defined "civic use" to include "[u]tility, educational, recreational, cultural, medical, protective, governmental, and other uses that provide public or quasi-public services . . . includ[ing], but are not limited to . . . parking structures." (Town Zoning Ordinance § 156.007) (emphasis added). If the Town had deemed the parking garage a "civic use," the Town's planning staff could have approved reduced setbacks and 8 ½' wide stalls, which would have increased the number of spaces in the garage. (R. pp. 639-640; Town Zoning Ordinance § 156.329(N)(5).)

The Town rejected SCDG's request for the parking garage to be considered a civic use. Although the Town's zoning code defined "civic use" to expressly include "parking structures," the Town's attorney incorrectly informed SCDG that "civic use" was not defined by the zoning code. (R. pp. 1282-1283.) He further opined that the

[1] This citation refers to the zoning ordinance section in effect at the time of the request.

parking garage "does not appear to meet any reasonable definition of the term" even though the parking garage was a public-private partnership created to provide public parking and was supported by public funds. (*Id.*)

Ultimately, the Town rejected these and all other attempts by SCDG to provide as many spaces as possible in the garage. (R. pp. 625-648, 876, 1064-1070.) As a result, SCDG designed the garage under the new zoning requirements as interpreted by the Town's staff, which resulted in 234 total parking spaces, 117 public spaces, and additional surface parking on adjacent property. (R. pp. 648, 824, 1076.) The Town approved the modified design in September 2014. (R. pp. 678, 1076.)

IV. The Repudiation

In October 2014, SCDG requested that the Town provide an estoppel certificate confirming that construction of the garage in conformance with the approved design would satisfy SCDG's obligations under the PLA. (R. pp. 671-675, 1307-1309.) Under Section 7.04 of the PLA, the Town was required to deliver, upon request, an estoppel certificate that the PLA was in full force and effect or any defenses thereto. (R. p. 1206.) However, the Town rejected SCDG's request, and instead, the Town administrator sent SCDG a letter stating that the design did not include sufficient parking spaces to comply with the PLA. (R. pp. 675-678, 825, 1220-1222.)

In response, SCDG approached the Town about resolving the dispute about whether SCDG's approved design satisfied the requirements of the PLA. (R. pp. 678-683.) The parties then negotiated a proposed amendment under which the parking

garage would consist of 234 total spaces and 117 public spaces and annual rent would be reduced from $185,000 to $163,800. (R. pp. 678-683, 825-828, 1223-1230.)

The proposed amendment to the PLA was considered by Town Council at its meeting in February 2015. Prior to considering the proposed amendment, the Town administrator presented his analysis of whether SCDG's approved design satisfied the PLA, which was consistent with his prior letter. (R. pp. 877-889, 1231-1238, 1379-1422.) Town Council then unanimously "endorsed" the Town administrator's letter and approved a motion denying any new proposal that may be put forward or submitted by SCDG pertaining to the PLA. (R. pp. 1379-1422.) In discussing this action, Town council members explained that the purpose of the motion was to make it clear that no government money should be spent on the project regardless of the number of spaces. (*Id.*)

V. The Completion

Throughout the design process, SCDG remained committed to building the parking garage, and it persisted in its efforts to complete the project despite the obstacles created by the Town. (R. pp. 647-648, 653-657, 665-666, 686.) As a result of the "activity zone" requirement created by the April 2014 zoning amendment, SCDG was forced to redesign the building and shift its footprint from its original location. (R. pp. 645-647.) However, the boundary of SCDG's leased parcel could not accommodate the shift, and SCDG had to lease more land from the landlord at a considerable expense to make the project work. (*Id.*)

Also, the Town's refusal to provide an estoppel certificate and confirm its obligations to pay rent impacted the financial and ownership structure for the project. (R. pp. 671-675.) The estoppel certificate was important to potential lenders who desired assurances that the Town, backed by its highly-rated AAA credit, would pay rent as required by the PLA, and the Town's refusal to provide these assurances negatively impacted financing for the project. (*Id.*) As a result, SCDG was forced to partner with an equity investor to create a joint venture, 101 Coleman Partners, LLC, to own, build, and operate the office building and parking garage. (R. pp. 716, 828, 1086-1087.) In so doing, SCDG relinquished its sole ownership of the project and retained only a 15% membership interest in the joint venture. (R. p. 828.)

In June of 2016, SCDG provided notice to the Town that it was in breach of the PLA by anticipatorily refusing to pay rent, refusing to provide an estoppel certificate, and violating the covenant of good faith and fair dealing by taking actions to interfere with SCDG's performance under the PLA. (R. pp. 707-709, 1305-1306.) As a result, SCDG terminated the PLA. (*Id.*)

101 Coleman Partners completed the project and received a certificate of occupancy for the garage in July 2017. (R. pp. 781-782, 1318-1319, 1472.) The date of the issuance of certificate of occupancy served as the rental commencement date under the PLA, which is when the Town's first annual rental payment would have been released from escrow pursuant to Sections 1.07 and 1.10 had the Town made the escrow payment and not repudiated the PLA. (R. pp. 782, 1201-1202.)

VI. The Lawsuit and Trial

As a result of the Town's actions, SCDG filed this action in October 2017, asserting a claim for breach of contract based on the Town's repudiation of the PLA and failure to provide an estoppel certificate, accept the garage, and pay rent. (R. pp. 98-112.) The case was tried as a non-jury matter over four days in February 2020, with Judge Murphy presiding. Because it was undisputed that the Town had failed to provide an estoppel certificate and pay rent as required under the PLA, the central issues at trial surrounded whether SCDG's approved design of 117 public spaces, which was 15 less than envisioned under the PLA, justified the Town's non-performance.

After completion of the trial, the trial court issued an order entering judgment in SCDG's favor on the breach of contract claim. (R. pp. 27-72.) The trial court concluded that the Town had committed an anticipatory breach by repudiating the PLA and further breached it by failing to pay rent and provide an estoppel certificate. (R. pp. 48-49 at ¶¶ 60-63.) The trial court also found that the Town breached the implied covenant of good faith and fair dealing in the PLA by taking actions that prevented SCDG from developing the parking garage as envisioned under the PLA and receiving rent thereunder, including (1) adopting zoning amendments that forced SCDG to redesign the garage and provide fewer spaces than originally planned; and (2) rejecting reasonable interpretations of zoning ordinances that would have enabled SCDG to develop the project with the number of public spaces envisioned under the PLA. (R. pp. 49-55 at ¶¶ 64-72.)

In awarding judgment to SCDG, the trial court also rejected the Town's defenses attempting to justify its non-performance under the PLA. (R. pp. 55-66 at ¶¶ 73-100.) The court found that SCDG's design of 89% of the public spaces contemplated by the PLA constituted substantial performance and that any deficiency in the number of spaces provided was not a material breach justifying forfeiture of the PLA. (R. pp. 56-62 at ¶¶ 75-89.)

Based on these findings, the trial court awarded damages to SCDG in the amount of $2,604,316 for (1) unpaid past rent from the date the certificate of occupancy was issued for the garage through the approximate date of trial, plus statutory prejudgment interest, and (2) future rent through the remainder of the rental term discounted to net present value as of the approximate date of trial. (R. pp. 66-67 at ¶¶ 101-103.)

At trial, the Town did not contest SCDG's methodology of calculating rent. (*Id.* at ¶ 102.) Instead, it argued that SCDG was not entitled to rent after the date SCDG terminated the PLA. (*Id.*) The trial court rejected that argument because the default and survival clauses, when considered together, evidenced "the parties' clear intention that the Town's obligation to pay rent for the entirety of the rental term survives the termination of the PLA." (*Id.*)

ARGUMENT

I. The Court of Appeals applied the correct standard of review.

In its appeal to this Court, the Town primarily argues that the Court of Appeals erred by applying the "any evidence" standard of review rather than the *de novo* standard in affirming the trial court's interpretation of Sections 6.01 and 8.17 of the PLA, on which the trial court based its award of damages to SCDG. However, the Court of Appeals applied the same standard of review urged by the Town in its briefing below, which is that the trial court's findings of fact will not be disturbed if there is any evidence to support them and that actions at law tried without a jury are reviewed only for correction of errors of law. (App. 2, fn. 1; Appellant's Br. (Ct. App.). p. 10.)

There is no indication that the Court of Appeals failed to apply this standard correctly. Admittedly, the Court of Appeals did not expressly state in its unpublished *per curiam* opinion that it was applying the *de novo* standard in reviewing the trial court's interpretation of Sections 6.01 and 8.17. However, the Court of Appeals' acknowledgement that its "standard of review extends only to the correction of errors of law" suggests that it applied the *de novo* standard. *See Wilson v. Gandis*, 430 S.C. 282, 291, 844 S.E.2d 631, 636 (2020) (articulating that standard of review on actions tried without a jury extends merely to corrections of law and that trial court's conclusions of law are reviewed under a *de novo* standard).

Nevertheless, the Town assumes that the *de novo* standard was not applied merely because the Court of Appeals' unpublished decision "implies or gives the

impression that the Court believed it was *limited* in some respect by the standard of review." (Pet.'s Br. p. 5.) Put simply, the Town's argument that the Court of Appeals erred in its application of the standard of review is premised almost entirely on a perceived implication or impression drawn by the Town, which was rejected by the Court of Appeals on the Town's Petition for Rehearing. (App. 5.)

However, even if the Court of Appeals reviewed the trial court's interpretation of Sections 6.01 and 8.17 under the any evidence standard alone, there is ample evidence in the record to justify the use of that standard. According to the Town, the review of the trial court's interpretation of those sections presents a question of law, subject to the *de novo* standard, because the trial court "never ruled that Sections 6.01 and 8.17 of the PLA are ambiguous." While it is true that the trial court did not make any express findings that Sections 6.01 and 8.17 are ambiguous, the trial court similarly never ruled that Sections 6.01 and 8.17 of the PLA are unambiguous. Thus, the trial court's silence on whether these sections of the PLA are ambiguous is not indicative of whether it decided their meaning as a question of fact or of law.

As a result of this silence, the Court of Appeals was required to review the trial court's order and the record to determine the appropriate standard of review and the correctness of the trial court's decision thereunder. In fact, SCDG directly encouraged the Court of Appeals to do so in its briefing with the following argument:

> Although the trial court did not express whether it found the relevant provisions ambiguous, the Court can discern the trial court's intent from the order and make reasonable inferences therefrom. *See Bluffton Towne Ctr.*, 412 S.C. at 572, 772 S.E.2d at 892 (stating that an appellate court must construe the trial court's intent as discerned from the

> order as a whole). If the Court finds that the trial court found the provisions ambiguous, the trial court's construction of the PLA must be affirmed if there is any evidence supporting its construction. *See W. Anderson Water Dist. v. City of Anderson*, 417 S.C. 496, 505, 790 S.E.2d 204, 209 (Ct. App. 2016) (affirming trial court's interpretation of an ambiguous contract under the "any evidence" standard for non-jury trials).

(Resp.'s Br. (Ct. App.) p. 34, fn. 6.)

Likewise, this Court should also review the trial court's order and record in their entirety to determine whether the Court of Appeals erred if it applied the any evidence standard. "As a general rule, judgments are to be construed like other written instruments. The determinative factor is the intent of the court, as gathered, not from an isolated part thereof, but from all parts of the judgment itself. Hence, in construing a judgment, it should be examined and considered in its entirety." *Weil v. Weil*, 299 S.C. 84, 90, 382 S.E.2d 471, 474 (Ct. App. 1989) (quoting 46 Am. Jur. (2d) *Judgments* § 73 (1969)). If the judgment is ambiguous or obscure, "the entire judgment role or record may be looked to, examined, and considered for the purpose of interpreting the judgment." 49 C.J.S. *Judgments* § 534.

Here, the order and record in their entirety support the application of the any evidence standard. As a starting point, the trial court's interpretations of Sections 6.01 and 8.17 were set forth in Paragraph 20 of the order's "Findings of Fact." In that paragraph, the trial court found that the parties agreed to liquidate damages under Section 6.01, and it expressly found that that Section 8.17's survival clause "does not provide for the survival of any rights of the Town, including the right to

reduce rent." Because these were findings of fact by the trial court, the any evidence standard applied to the Court of Appeals' review of them.

Also, SCDG presented evidence during trial, over the Town's objection based on the parol evidence rule, regarding the parties' negotiations of Section 6.01 to show their intent. (R. pp. 585, 703-705, 1290-1304.) In response to that objection, SCDG's attorney argued that the parties' dueling interpretations of Section 6.01 "suggest[] there's an ambiguity [], in which case parol evidence would be proper." (R. pp. 703-705.) The trial court then overruled the Town's objection and admitted the parol evidence, thereby indicating that it found the section ambiguous. (*Id.*) Moreover, the Town later admitted during trial that SCDG's counsel took the position that the PLA may be ambiguous. (R. p. 1120.) Thus, the trial proceedings indicate that the trial court resolved the meaning and effect of Sections 6.01 and 8.17 as a question of fact, thereby making the any evidence standard applicable.

To escape the import of this portion of the trial proceedings, the Town attempts to distort the record by arguing that the trial court admitted **all** parol evidence under *Brown v. Allstate Ins. Co.*, 344 S.C. 21, 27, 542 S.E.2d 723, 726 (2001), but did not rely on such parol evidence. To support this argument, the Town cites footnote 5 and paragraph 74 of the conclusions of law of the trial court's order. However, the cited paragraph and footnote expressly relate to the interpretation of how many parking spaces were required under Sections 1.05 and 1.06 of the PLA, which was a separate issue relating to the Town's affirmative defense to its breach of the agreement. This paragraph and footnote and the parol evidence referenced therein have nothing to do

with the trial court's interpretation of Sections 6.01 and 8.17. Thus, the Town's argument that the trial court did not consider parol evidence regarding the meaning of Section 6.01 based on a completely unrelated footnote is unconvincing.

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

Ironically, in its present brief before this Court, the Town faults the Court of Appeals for disregarding parol evidence regarding Section 6.01 of the PLA. In Section IV of its brief, the Town argues that an earlier redlined draft of the PLA, which was admitted into evidence by the trial court, reflects the parties' intention to delete a rent acceleration provision in Section 6.01 and that the trial court's interpretation of Section 6.01 and 8.17 was inconsistent with such intent. (Pet.'s Br. pp. 17-18.) Of course, parol evidence of an earlier draft of the agreement can only be considered by this Court (and the lower courts) if these sections are ambiguous. *See McGill v. Moore*, 381 S.C. 179, 188, 672 S.E.2d 571, 576 (2009) ("Where a written instrument is unambiguous, parol evidence is inadmissible to ascertain the true intent and

meaning of the parties."). In which case, the any evidence standard of review must apply.

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

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

In its brief, the Town largely overlooks these portions of the record and instead argues that SCDG's recognition of the numerous examples justifying the application of the any evidence standards is disingenuous, fallacious, and contrary to SCDG's prior position. In fact, the Town audaciously (and incorrectly) claims that "SCDG recognizes that it cannot prevail under a *de novo* standard and may only succeed under a more lenient standard of review." (Pet.'s Br. p. 6.) The Town then argues that SCDG's rebuttal to the Town's request for rehearing before the Court of Appeals was an attempt to inject new issues or new arguments into case. (*Id.*) Put simply, this is revisionist history that is contradicted by the record.

At trial, the Town argued for the first time that Section 6.01 allows for the recovery of only rent then-due at the time of termination of the PLA. To rebut that argument, SCDG presented parol evidence in the form of testimony and documents to support SCDG's interpretation of Sections 6.01 and 8.17 of the PLA and the parties' intent with respect to those provisions. (R. pp. 702-705, 709-710.) When the Town objected to the introduction of such evidence, SCDG argued to the trial court that the Town's argument regarding the meaning of Section 6.01 suggested an ambiguity that justified the admissibility of parol evidence. (R. p. 704.)

After the conclusion of trial, the Town moved for directed verdict, including on the grounds that no rent was due under Section 6.01 at the time of termination. (R. pp. 1151-53.) SCDG argued in response that there were questions of fact that precluded directed verdict, and the trial court agreed. (R. p. 1153.)

On appeal, SCDG never conceded that the trial court found the provisions to be unambiguous, as the Town falsely claims. Instead, SCDG asserted various arguments demonstrating that the trial court's interpretation of Sections 6.01 and 8.17 is correct under any standard of review. First, SCDG argued that the PLA unambiguously provided for the recovery of rent for its full term. (Resp.'t's Br. pp. 22-25.) Next, SCDG argued that, if the Court of Appeals concluded that the trial court found Sections 6.01 and 8.17 ambiguous, it should affirm the trial court's interpretation under the any evidence standard. (*Id.* at. p. 34, fn. 6.) In support of this argument, SCDG applied various canons of contractual construction that apply to ambiguous contractual provisions to demonstrate the correctness of the trial court's interpretation. (*Id.* at pp. 34-37.) Finally, SCDG argued in the alternative that if the Court of Appeals found that the trial court erred in concluding that these sections of the PLA were unambiguous, it should nevertheless affirm the trial court's decision under Rule 220(c), SCACR, because the trial court's interpretation of the PLA was reasonable and logical under the canons of construction that apply to ambiguous contracts. (*Id.* at. p. 34, fn. 6) (citing *Brooklyn Bridge, Inc. v. S.C. Ins. Co.*, 309 S.C. 141, 145, 420 S.E.2d 511, 513 fn. 2 (1992) (affirming trial court's judgment under Rule 220(c) because trial court's interpretation of contract was reasonable despite incorrectly ruling that it was unambiguous).)

Because SCDG should prevail under any standard, it did not needlessly dissect the record on appeal to determine the appropriate standard of review to defend the trial court's determination below. However, when the Town made this issue the

centerpiece of its petition for rehearing before the Court of Appeals, SCDG merely responded accordingly, just as it does now, by demonstrating that the application of the any evidence standard is more than justified by the entire order and record. (App. 9-13, 30-35.) As a result, the Town's attack on the Court of Appeal's perceived misapplication of the standard of review is without merit.

II. The trial court's interpretation of Sections 6.01 and 8.17 of the PLA to allow for the recovery of rent accruing after termination is correct under any standard.

In its attempt to convince the Court that the trial court and the Court of Appeals erred in their interpretation of Sections 6.01 and 8.17, the Town advances a narrow interpretation of those sections, which would effectively allow the Town to avoid any liability for its breaches of the PLA and bad faith conduct.[2] Specifically, the Town argues that Section 6.01's use of the term "due" and Section 8.17's use of the terms "owing" and "obligation" mean SCDG can recover only rental payments that were unpaid as of the time of the PLA's termination and that future rental payments are unrecoverable. As explained below, the Town's interpretation should be rejected under any standard of review, and the trial court was correct in awarding damages in the form of rent due after the PLA terminated.

A. The terms "due," "owing," and "obligations" can include future indebtedness as demonstrated by the precedent of this Court and this Court's own use of those terms according to their plain and ordinary meaning.

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

As a starting point, the Town's interpretation is based on inapplicable caselaw divorced from the intent of the parties as gleaned from the four corners of the PLA. It is axiomatic that courts should construe contracts liberally "to give effect and carry out the intention of the parties." *Bluffton Towne Ctr. v. Gilleland-Prince*, 412 S.C. 554, 569, 722 S.E.2d 882, 890 (Ct. App. 2015). This requires that the court give effect to all provisions of the contract without isolating any particular clause or phrase. *Id.*

Instead of adhering to this principle in its interpretation of the PLA, the Town attempts to isolate the terms "due," "owing," and "obligation" as used in Sections 6.01 and 8.17 without considering the broader context and other provisions of the PLA. In so doing, the Town attempts to define those terms based on various distinguishable cases that have no bearing on the intent of the parties underlying the PLA. The result of this self-serving attempt is a strained, illogical interpretation that effectively turns the PLA into an agreement that can be repudiated at the convenience of the Town at any time with no liability, despite the fact there is nothing in the PLA that remotely suggests that the parties intended for the PLA to have a termination for convenience provision.

The Town primarily bases its interpretation that the term "due" does not include future indebtedness that has not yet accrued on two cases decided by this Court: *Mathis v. Brown & Brown of S.C., Inc.*, 389 S.C. 299, 698 S.E.2d 773 (2010), and *Ex parte American Fertilizing Co.*, 122 S.C. 171, 115 S.E. 236 (1922). However, those decisions do not dictate a result different than that reached by the trial court and Court of Appeals.

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

Although the court defined "due" in its analysis of the meaning of "wages," it clearly based its interpretation on the statute's use of the past tense of "labor rendered." *Id.* "The word 'due' means 'owed or owing as a debt' and, as wages are defined by the Act as amounts paid by **labor rendered**, no wages can be due for future services." *Id.* (emphasis added). Thus, the *Mathis* court interpreted "due" by looking at the specific context of the Payment of Wages Act and its defined terms. It did not hold, as the Town suggests, that "due" can never encompass future indebtedness.

In contrast to the definition of wages in the Payment of Wages Act, Section 6.01 contains no language suggesting that the parties intended "due" to mean only rent owed at the time of termination. Furthermore, *Mathis* did not involve a contract

like the PLA, which included a survival clause that expressly provides that the obligation to pay rent survives after the termination or expiration of the agreement. Therefore, *Mathis* sheds no light on the interpretation of Section 6.01.

Also, the Court's decision in *Ex parte American Fertilizing Co.* actually supports the interpretation of Section 6.01 adopted by the trial court and affirmed by the Court of Appeals. In that case, the Court agreed that the term "due" could apply to future indebtedness. According to this Court, "the use of the word 'due' does not necessarily imply that the debt has matured. It is often used by business men in the sense of 'owing irrespective of the time of payment.'" *Id.*, 122 S.C. 177, 115 S.E. 236.

Despite this ruling, the Town claims that *Ex parte American Fertilizing Co.* bolsters its narrow interpretation. The Town attempts to portray *Ex parte American Fertilizing Co.* as supportive of its interpretation by focusing on the inclusion of the words "may be" before "due" in the contractual provision in question in that case. While it is true that the analysis in that case was based, in part, on the words "may be," there is nothing in the opinion suggesting that the Court would have reached a different result had those words been omitted from the provision at issue. In fact, the court cited the dictionary definition of the term "due," without any reference to the qualifying phrase "may be," in stating that the term can apply to any debts "irrespective of the time of payment." Similarly, nothing in *Ex parte American Fertilizing Co.* comes close to supporting the Town's assertion that "'due' . . . does not include future indebtedness that has not yet accrued." (Pet.'s Br. p. 13.) Therefore,

Ex parte American Fertilizing Co. cannot be read to support the Town's interpretation.

In advancing its narrow interpretation of Sections 6.01 and 8.17, the Town also disregards how this Court and the Court of Appeals have consistently used those terms to apply to future indebtedness. For example, the Town relies on *Callawassie Island Members Club, Inc. v. Dennis*, 425 S.C. 193, 821 S.E.2d 667 (2018), to argue that the trial court misconstrued the meaning of the term "obligation" and "owing" as they are used in the survival clause found in Section 8.17 of the PLA. However, *Dennis* actually supports the trial court's award of rent payments due after termination of the PLA.

In *Dennis*, this Court ruled that members of a private club had an obligation to continue to pay dues, fees, and other charges after they resigned their membership in the club pursuant to the governing membership documents. The court's decision was based, in part, on its interpretation of a provision stating that "[n]otwithstanding termination, the member shall remain liable for any unpaid club account, membership dues and charges (including food and beverage minimums)." *Id.* at 200, 821 S.E.2d at 671. The club members argued that the term "unpaid" as used in the provision meant dues owed at the time of resignation and not dues accruing after resignation. The court rejected that interpretation and found that the term "unpaid" unambiguously meant any payment the club members were "obligated to make according to the terms of the membership documents that has not been made . . .

[and] that the membership documents include obligations to pay before and after the date of resignation." *Id.* at 201, 821 S.E.2d at 671.

The court's interpretation of the term "unpaid" in *Dennis* applies equally here. The survival clause in Section 8.17 acts similarly as the relevant provisions in *Dennis* that obligated members to continue paying dues after their resignation. Like the provisions in that case, Section 8.17 provides that the "provisions of this License with respect to any obligation of Licensee to pay any sum **owing** or to perform any act **after expiration or other termination of this License** shall survive the expiration or other termination of this License." (R. p. 1209 § 8.17) (emphasis added). The term "owing" means "unpaid." *See* Black's Law Dictionary 1279 (10th ed. 2014). Thus, the terms "owing" and "unpaid," as used respectively in Section 8.17 and the membership documents at issue in *Dennis*, are synonymous. So just as the obligation to pay "unpaid" dues owing under the membership documents continued after the members resigned in *Dennis*, the Town's obligation to pay rent "owing" under the PLA survives the termination of the PLA under Section 8.17. *See also D & D Leasing Co. v. Lipson*, 305 S.C. 540, 409 S.E.2d 794 (Ct. App. 1991) (interpreting "unpaid monthly lease payments" to apply to future lease payments accruing after termination).

Nevertheless, the Town claims that *Dennis* supports its argument that it had no "obligation" to pay rent after the PLA was terminated because of its breach. According to the Town, *Dennis* stands for the proposition that "'obligations' are debts already incurred and thus due or owing, while 'commitments' are debts that will come due in the future after the termination." (Appellant's Br. p. 14.) The Town then

argues that the use of the term "obligation" in Section 8.17 without any mention of "commitments" means that future rental payments cannot be due and owing under the PLA after it is termination.

Put simply, the Town misreads *Dennis*. In its discussion of the terms "obligations" and "commitments," the *Dennis* court explained how those terms were expressly used in the statutory language of the Nonprofit Corporations Act. *Dennis*, 425 S.C at 205, 821 S.E.2d at 673 (interpreting S.C. Code Ann. § 33-31-620(b)). However, the court did not hold that "obligations" means only debts incurred before termination.

Instead, the court held just the opposite – the club members had an "obligation" to continue to pay dues after their resignation. The court used the terms "obligated" and "obligation" repeatedly to refer to dues accruing after resignation:

- "This language unambiguously provides the [club members] are **obligated** to continue to pay all membership dues, fees, and other charges after resignation until their membership is reissued." *Id.* at 200, 821 S.E.2d at 673 (emphasis added).

- "'Unpaid' means any payment the [club members] are **obligated** to make according to the terms of the membership documents that has not been made. We have already discussed that the membership documents include **obligations** to pay before and after the date of resignation." *Id.* at 201, 821 S.E.2d at 671 (emphasis added).

- "When the [club members] entered into this membership agreement, they accepted the **obligation** to continue to pay their membership dues even under difficult circumstances, such as a financial downturn, a health crisis, or a sudden disinterest in being members in the Club. In doing so, however, they also received the benefit of knowing that if other members experienced those circumstances, the other members would likewise be **obligated** to continue to make

> their payments." *Id.* at 202, 821 S.E.2d at 671 (emphasis added).

Therefore, the Town's argument that the term "obligation" as used in Section 8.17 means only those debts accruing before termination of the PLA is directly contradicted by *Dennis*. While the Town concedes that the Supreme Court used "the word 'obligation' at times to refer . . . [to] future commitments or future indebtedness," it tries to minimize such usage by saying that it "only shows that some of the Supreme Court's word choices could have been more carefully selected." (Pet.'s Br. p. 16.)

Contrary to demonstrating the Court's carelessness as suggested by the Town, this Court's use of the terms "due" and "obligation" reveals that the terms are commonly used to refer to future indebtedness. Taken together, the cases relied on by both the Town and SCDG demonstrate that the terms "due," "owing," and "obligation" do not have one meaning with respect to whether they include or preclude future indebtedness. Rather, "due" may mean an indebtedness that has accrued or presently owed in one context, but it may also include future indebtedness in another context. *See, e.g.,, Furrow v. Commissioner*, 292 F.2d 604, 606 (10th Cir. 1961) ("The word 'due' may mean that the debt or obligation to which it is applied has become immediately payable, or it may mean that the debt has become ascertained and fixed, although payable in the future."); *S.T.C., Inc. v. Dep't of Treasury*, 257 Mich. App. 528, 536-36, 669 N.W.2d 594, 599 (Mich. Ct. App. 2003) (defining "due" to mean owing, irrespective of time of payment, and ruling that, as used in statute, the term applies to taxes that are possibly due at a future moment); *Lanward Pub. Co. v. Nat'l Assoc. of Stationary Eng'rs*, 205 Ill. App. 625, 627 (Ill. Ct. App., 1st Dist. 1917)

(defining "due" to mean "owing, irrespective of whether the time of payment has arrived").[3] Indeed, as one court has stated, "[w]hether the word 'due' means a past-due indebtedness accruing presently, or an indebtedness to mature in the future, often depends upon the context of the instrument or statute." *In re J. E. De Belle Co.*, 286 F. 699, 701 (S. D. Fla. 1923).

Thus, neither *Mathis*, *Ex parte American Fertilizing*, nor any other case is dispositive on the issue whether "due," "owing," and "obligation" as used in the PLA includes future rental payments. Instead, that determination must be made based on the review of the particular context in which those terms are used. There is no indication that either the trial court or the Court of Appeals failed to interpret these terms in such manner. Nevertheless, when the PLA is considered based on its four corners alone or within the greater context of its making based on parol evidence, it becomes clear that Sections 6.01 and 8.17 were intended to ensure that the Town was liable for future rent if the PLA was terminated based on the Town's default, as discussed below.

B. The four corners of the PLA interpreted as a whole provide for the recovery of rent payments due after the Town repudiated the PLA.

Because the trial court's award of damages was based on its interpretation of Sections 6.01 and 8.17 of the PLA, the Town's appeal necessarily involves a matter of contractual construction. Courts should construe the contract liberally "to give effect

[3] Likewise, dictionaries have recognized different meanings of "due" to include both (a) "owed at present; having reached the date of payment;" and (b) "owing or owed, irrespective of whether the time of payment has arrived." *See* https://www.dictionary.com/browse/due.

and carry out the intention of the parties." *Bluffton Towne Ctr. v. Gilleland-Prince*, 412 S.C. 554, 569, 722 S.E.2d 882, 890 (Ct. App. 2015). "Where the contract's language is clear and ambiguous, the language alone determines the contract's force and effect." *McGill v. Moore*, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009). This requires that the court give effect to all provisions of the contract without isolating any particular clause. *Bluffton Towne Ctr.*, 412 S.C. at 569, 722 S.E.2d at 890.

When the PLA is considered as a whole, it is clear that the parties intended for the Town to be liable for all rent due under the PLA. Section 6.01 provides that if the Town defaults under the PLA, 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." Nothing in this language, which was drafted by the Town, limits recovery to only rent that had accrued at the time of default or termination. If the parties had intended Section 6.01 to prohibit recovery of future rental payments, it could have done so by expressly providing that SCDG's exclusive remedy was only rent that had accrued at the time of termination or by expressly prohibiting recovery of rent due after termination of the PLA.

In fact, other sections of the PLA show that the parties knew exactly how to utilize language that referred to rent due only at a particular moment as opposed to future indebtedness. In Section 8.03 of the PLA, the parties included an "Accord and Satisfaction" clause, which provides that "[n]o payment by Licensee or receipt by Licensor of a lesser amount than **the then due Rent** herein stipulated shall be deemed

to be other than on account of the earliest stipulated Rent. . ." (R. p. 1207) (emphasis added). By using "then due" to modify the term "rent," the parties made clear that the section referred only to rent "due" at the time of payment or receipt. And if the parties had intended to limit SCDG's recovery to the rent due at the time of default only, they would have similarly used the modifier "then due" in Section 6.01.

Put another way, if "due," as used in the PLA, did not apply to future indebtedness and applied only to rent accrued at a certain time, as the Town argues, then the parties would have had no reason to include "then" before "due" in Section 8.03. Thus, the failure for the parties to use "then due" in Section 6.01 demonstrates that they did not intend to limit recovery for future rent. *See* A. Scalie & B. Garner, Reading Law 170 (2012) ("[W]here [a] document has used one term in one place, and a materially different term in another, the presumption is that the different term denotes a different idea."); *Blue Ocean Int'l Bank LLC v. Golden Eagle Capital Advisors*, 408 F. Supp. 3d 57, 66 (D.P.R. 2019) (declaring that courts should give effect to meaningful variation of terms in contract).

In addition to not limiting the recovery under Section 6.01 to only rent "then due," the parties also agreed that the Town's obligation to pay rent continued after termination of the PLA pursuant to the survival clause found in Section 8.17 of the PLA. Section 8.17's 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. (R. pp. 709-710.) Thus, any construction of the PLA that nullifies the Town's obligation to pay rent after

termination of the PLA would render the survival clause in Section 8.17 meaningless and would lead to an absurd result. *See Stevens Aviation, Inc. v. DynCorp Inc.*, 407 S.C. 407, 417, 756 S.E.2d 148, 153 (2014) ("[A]n interpretation that gives meaning to all parts of the contract is preferable to one which renders provisions in the contract meaningless or superfluous.").

To avoid the conclusion that its interpretation would render Section 8.17 meaningless, the Town contends that the survival clause merely "preserves an already incurred obligation once the PLA expires or is terminated," such as an amount owed as unpaid rent at the time of termination. (Pet.'s Br. p. 15.) However, the survival clause is not needed to ensure that rent "then due" could be recovered under Section 6.01 because Section 6.01 expressly provides for the recovery of that rent, as the Town readily admits. For Section 8.17 to have any meaning with respect to rent due under the PLA, it must apply to rental payments due after expiration or termination in accordance with its plain language.

In further support of its attempt to limit the effect of Section 8.17, the Town also contends that the provision's use of the term "obligation" connotes an intent to apply to "obligations that were incurred prior to termination and not future commitments or future indebtedness," based on its misreading of *Dennis*. As discussed above, *Dennis* shows that the term "obligation" includes continuing – and not just present – obligations.

Regardless of *Dennis*, Section 8.12 of the PLA demonstrates that the Town and SCDG did not intend to create a "distinction between past obligations and future

commitments," as the Town claims. (Pet.'s Br. p. 16.) In Section 8.12, the parties expressly state that "the **payments due** under the License Agreement represent **an ongoing obligation** of the Town of Mount Pleasant." (R. p. 1208) (emphasis added). In this context, it is clear that "due" and "ongoing obligation" refer to the Town's obligation to pay rent, irrespective of time and including into the future. Thus, contrary to the interpretation advanced by the Town, the PLA expressly provides that the payments "due" under the agreement were to be a continuing and "ongoing obligation" of the Town.

In sum, the trial court correctly construed Sections 6.01 and 8.17 together as evidencing "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. p. 67, ¶ 102.) Thus, the award of damages for the entire 15-year rental period was appropriate under the four corners of the PLA and should be affirmed.

C. Even if Sections 6.01 and 8.17 are ambiguous as to whether they provide for the recovery of future rent, the trial court's interpretation of those sections is reasonable and supported by evidence in the record.

At most, the Town's interpretation reveals possible ambiguities as to whether the PLA provided for the recovery of rent due after termination. In construing an ambiguous contract, the court should seek to determine the parties' intent. *Plantation A.D., LLC v. Gerald Builders of Conway, Inc.*, 386 S.C. 198, 205, 687 S.E.2d 714, 718 (Ct. App. 2009). Any ambiguity, doubt, or uncertainty as to a contract's meaning should be resolved against the party who is responsible for the

ambiguous language. *Id.* "Where one interpretation of a contract makes it unusual or extraordinary and another interpretation, equally consistent with the language employed, would make it reasonable, fair, and just, the latter construction prevails." *Koon v. Fares*, 379 S.C. 150, 155, 666 S.E.2d 230, 233 (2008). "Common sense and good faith are the leading touchstones of the construction of a contract, and contracts are to be construed to avoid an absurd result." *Kuznik v. Bees Ferry Assocs.*, 342 S.C. 579, 593, 538 S.E.2d 15, 22 (Ct. App. 2000).

The trial court's interpretation of Sections 6.01 and 8.17 was correct under these rules of construction. First, the Town drafted the language in Section 6.01 fixing damages to the rent payments "due under this Agreement" (R. pp. 704-706, 784-786, 1290-1304), and any ambiguity in that section should be resolved against it.[4] The Town could have proposed language in Section 6.01 that expressly disclaimed liability for rent accruing after termination. It did not. Therefore, it should not receive the benefit of any ambiguity created by its own draftsmanship.

Second, the Town's interpretation of the PLA to completely avoid liability despite its multiple breaches would create an unreasonable, unfair, and unjust result. According to the trial court's unchallenged findings of fact, SCDG took the financial risk of leasing property, hiring architects, and agreeing to construct an expensive

[4] If the Town argues that the *contra proferentem* rule of construction does not apply under Section 8.08, that section expressly provides that the rule does not apply with respect to SCDG's role in the preparation of the PLA. (R. pp. 1207-1208 § 8.08.) When the Town revised Section 6.01, it did not revise Section 8.08 to prohibit the application of the *contra proferentem* rule to its role in drafting the PLA. Thus, *contra proferentem* applies against the Town to any provisions of the PLA that it drafted, such as the relevant language in Section 6.01.

construction project in reliance on the Town's commitment to pay rent for 15 years. (R. pp. 598-599, 715-716.) Soon after SCDG began this process, the Town took actions that interfered with the project, thereby causing SCDG to acquire more property to lease at considerable expense to fulfill its contractual commitments under the PLA. (R. pp. 646-647.) SCDG also undertook the effort and cost of redesigning the garage to increase the amount of spaces after the Town rejected SCDG's attempts to find reasonable solutions to the loss of parking spaces caused by the Town's zoning changes. (R. pp. 701, 828.) Nevertheless, the Town refused to reciprocate SCDG's good faith and now advances a contractual interpretation that seeks to immunize itself from its own bad faith.

Third, the Town's interpretation would lead to the absurd result of turning the PLA into a contract of convenience that could be effectively terminated at will by the Town, thereby exposing SCDG to the financial risk of losing a stable tenant without legal recourse. As the trial court found, having the Town as a partner in the garage project provided a significant benefit to SCDG:

> The primary benefit of the proposed license agreement to SCDG was having a stable revenue stream from the rent paid by a municipality with a AAA credit rating, with rent secured by the general obligation of the Town. Because parking revenue is variable and dependent on various factors such as weather and the desirability of neighboring businesses, having a highly-rated tenant in the Town, which would pay fixed rent for a period of 15 years, improved the likelihood that the development would be profitable and could obtain the necessary financing to make the project a reality.

(R. p. 31 ¶ 13.) Given the importance of the Town's financial security and commitment to pay rent, interpreting the PLA in a manner that lets the Town simply walk away from its future rent obligations defies common sense and would create an absurd result. (R. pp. 598-599.)

Yet that is exactly what the Town seeks here. Common sense and fairness, however, dictate that the PLA should not be interpreted to allow the Town to breach its obligations with impunity. By partnering with the Town, SCDG agreed to incur the risk of acquiring a leasehold and constructing a multi-million dollar parking facility in exchange for the good faith and credit of a secure tenant that would pay its rent, rain or shine. And the PLA should be interpreted to effectuate the parties' intent by holding the Town to its commitment to pay rent during the entirety of the rental period.

III. Although the issue of whether Section 6.01 is a liquidated damages clause is now moot, the Court of Appeals did not err in affirming the trial court's ruling on this issue because the provision fixes damages in an amount ascertainable by mathematical computation.

The Town next argues that the Court of Appeals erred in affirming the trial court's ruling that Section 6.01 is a liquidated damages provision. In support of this argument, the Town claims that Section 6.01 is actually a "limitation of liability clause" instead of a liquidated damages provision. However, at the appeal's current posture, any distinction between a liquidated damages and limitation of liability clause is now immaterial and moot.

The distinction between the two types of provisions is only significant in this case with respect to whether SCDG had a duty to mitigate damages. Before trial, the

trial court refused to compel the production of financial and operational records from 101 Coleman Partners, in part, because Section 6.01 of the PLA provides for liquidated damages, which, thereby, eliminates a party's duty to mitigate damages. (R. pp. 20-21.) The trial court also refused to compel the production of 101 Coleman Partners' documents because they were not relevant. (R. p. 22.) According to the trial court, 101 Coleman Partners is separate and distinct entity from SCDG that had no interest under the PLA and did not operate the garage under the PLA. (R. p. 22.) The Town contends that this ruling precluded it from arguing at trial that SCDG's damages should have been reduced under Section 1.07 of the PLA if the garage operated by 101 Coleman Partners was profitable.

The Town challenged the trial court's denial of its motion to compel before the Court of Appeals. After the Court of Appeals affirmed the trial court's decision, the Town then petitioned this Court to review whether the Court of Appeals erred in affirming the trial court's denial of the Town's motion to compel. However, this Court denied certiorari on that issue, thereby making the trial court's denial of the motion to compel and its ruling regarding the relevance of the documents the law of the case. *See Rodarte v. Univ. of S.C.*, 419 S.C. 592, 599, 799 S.E.2d 912, 915 fn. 9 (2017) (ruling that denial of petition for writ of certiorari renders issue denied the law of the case that cannot be subsequently challenged).

Here, if the Court were to determine that the trial court erred in concluding that Section 6.01 is a liquidated damages provision, it would not matter to the award of damages because the trial court separately held that the information which the

Town attempted to present to reduce damages under Section 1.07 was not relevant. Thus, even if the Town could prevail on its argument that Section 6.01 is not a liquidated damages provision and the Town should have been able to argue that the rent reduction provisions of Section 1.07 applied after the termination of the PLA, the Town still could not introduce any evidence from 101 Coleman Partners' operation of the garage based on the trial court's ruling that such records are not relevant. As a result, the issue regarding whether Section 6.01 is a liquidated damages provision is now moot. *See Wachesaw Plantation E. Cmty. Servs. Ass'n v. Alexander*, 414 S.C. 355, 359, 778 S.E.2d 898, 900 (2015) (explaining that an issue is "moot where a judgment rendered by the Court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the Court.")

Regardless of whether the issue has been mooted, the trial court's determination that Section 6.01 is a liquidated damages clause is nevertheless correct. A "claim for damages is 'liquidated' in character if the amount thereof is fixed, has been agreed upon, or is capable of ascertainment by mathematical computation or operation of law." *Wells Fargo Bank, N.A. v. Marion Amphitheatre, LLC*, 408 S.C. 87, 91, 757 S.E.2d 557, 559 (Ct. App. 2014). Because Section 6.01 fixes damages to rental payments, which are capable of ascertainment by mathematical computation and operation of law, it meets the definition of a liquidated damages provision.

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

Like the default clause in *D & D Leasing*, Section 6.01 requires the payment of rent due under the agreement. And although the default clauses in both this case and *D & D Leasing* do not fix a sum certain as damages, the damages under both clauses are ascertainable by multiplying the rental amounts by the unpaid installments due under the agreements. So just as the default clause in *D & D Leasing* was a "valid liquidated damages clause," so too is Section 6.01.

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

Indeed, such provisions are often necessary to demonstrate the parties' intent of making liquidated damages the sole remedy for a breach. As the Court of Appeals

explained in *Bannon v. Knauss*, 282 S.C. 589, 592, 320 S.E.2d 470, 472 (Ct. App. 1984), "parties may agree that the liquidated damages specified in the contract are the sole remedy by breach." Consistent with that principle, Section 6.01's waiver of consequential and punitive damages merely reinforces the exclusive nature of the liquidated damages and the unavailability of punitive damages on a contract action. *See* 25 C.J.S. *Liquidated Damages* § 182 (stating that injured party cannot disregard liquidated damages provision and recover general contract damages). Therefore, the inclusion of language waiving compensatory and punitive damages does not alter the parties' agreement to establish an exclusive remedy for breach in an amount ascertainable by mathematical formula, which, by definition, constitutes liquidated damages.

Second, the Town argues that the rental payments due under Section 6.01 in the event of a breach are not liquidated because rent should have been subject to adjustment under Section 1.07(b) of the PLA. Yet, for the reasons decided by the trial court and affirmed by the Court of Appeals, the Town's arguments fail. The obligation to adjust rent terminated when the PLA was terminated as a result of the Town's breach, and that obligation did not survive such termination under Section 8.17. That was the basis of the trial court's denial of the motion to compel discussed above, and it is, therefore, the law of the case as a result of this Court's denial of certiorari on the denial of that motion.

Moreover, the Town has never explained how any adjustments could be made when SCDG never operated the parking garage and turned a net profit. Because the

Town repudiated its obligations to pay rent, SCDG was forced to abandon its sole ownership in the parking garage, and its successor, 101 Coleman Partners, never operated the garage under the terms of the PLA. Thus, it would be impossible to determine with any degree of certainty if SCDG would have earned an annual net operating profit. Given this impossibility, the Court of Appeals correctly affirmed the trial court's ruling that the Town was not entitled to any reduction in rent under Section 1.07.

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

The Town also contends that the Court of Appeals "disregarded the fact that the trial court actually read into the PLA a rent acceleration clause that does not otherwise exist and was specifically rejected by the parties." (Pet.'s Br. p. 17.) In support of this argument, the Town relies on parol evidence regarding a prior draft of the PLA, despite also arguing that the *de novo* standard that would preclude the consideration of parol evidence should be applied.[5]

Not only is the Town's argument inconsistent with its claim that the Court of Appeals applied the wrong standard of review, it misconstrues the distinction between the proposed acceleration clause and the trial court's award of damages. Under the draft acceleration clause deleted by the Town and approved by SCDG, all rent due for the remainder of the rental period would have come immediately due and

[5] By arguing that the Court should review parol evidence to determine if future rent can be awarded under Section 6.01, it implicitly argues that the section is ambiguous and, therefore, not subject to *de novo* review.

payable upon the Town's breach of the agreement without being discounted to present value. (R. pp. 789, 1296-1297.) As one court has stated, "making all payment due immediately, without any discount to present value, is precisely what any acceleration clause is intended to do." *Paramount Pictures Corp. v. Johnson Broad., Inc.*, C/A No. H-04-03488, 2006 U.S. Dist. LEXIS 31433, *10 (S.D. Tex. May 19, 2006).

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

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

Town's repudiation of the contract in February 2015, the total award would have been just shy of $4 million, instead of the actual award of approximately $2.6 million.

The comparison of the trial court's award to an award based on the acceleration of rent reveals that the Town's argument has no merit. Instead of accelerating rent according to the original version of Section 6.01, the trial court properly applied South Carolina contract law and awarded future rent discounted to present value. Therefore, the Court of Appeals correctly affirmed the trial court's award, and this Court should affirm this ruling as well.

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

A. The Town waived its affirmative defense that Section 6.01 is an unenforceable penalty by failing to plead it.

The Town argues that, if Section 6.01 is a liquidated damages clause as the trial court concluded, it is an unenforceable penalty. Unenforceability based on a penalty is an affirmative defense that must be pled, and a defendant's failure to plead it results in a waiver of the defense. *D & D Leasing*, 305 S.C. at 543, 409 S.E.2d at 796.

In this case, the Town waived its unenforceable penalty defense by failing to plead it as an affirmative defense. (R. pp. 113-135.) Recognizing this omission, the Town orally moved to amend its pleadings under Rule 15, SCRCP, to assert the defense on the first day of trial just before opening statements. The trial court correctly denied that motion due to the prejudice it would cause SCDG. (R. pp. 565-

566.) Therefore, the Town never pleaded the affirmative defense of an unenforceable penalty, and the Court should reject the defense now because the Town waived it. *See D & D Leasing*, 305 S.C. at 543, 409 S.E.2d at 796 ("Because [defendant] did not plead unenforceability based on the alleged penalty nature of the termination provision, he waived that defense.")

B. Section 6.01 is not an unenforceable penalty because it fixes damages in an amount less than what SCDG suffered as a result of the Town's breach.

Even if the Court considers the Town's unenforceable penalty defense, the evidence in the record sufficiently demonstrates that Section 6.01 is not an unenforceable penalty. For the liquidated damages to be an unenforceable penalty, the liquidated amount must be "so large that it is plainly disproportionate to any probable damage resulting from [a] breach of contract." *Benya v. Gamble*, 282 S.C. 624, 630, 321 S.E.2d 57, 61 (Ct. App. 1984).

The Town's argument that the trial court's award is disproportionate to the probable damages caused by its breach disregards both the law and the facts of this case. The Town confusingly argues that an award of "fifteen years of the rent due is neither fair nor reasonable," despite the Town's contractual commitment in the PLA to pay rent for that entire period. Thus, the award is fair and reasonable because it is consistent with what the Town promised SCDG when it entered into the PLA. Moreover, this Court's decision in *U.S. Rubber Co. v. White Tire Co.*, 231 S.C. 84, 97 S.E.2d 403 (1956), demonstrates that such rent would have been recoverable had there been no liquidated damages clause.

Next, the Town argues that SCDG suffered no damages because the garage has received rental revenues from transient parkers since the garage was completed. This argument ignores that SCDG had the right to charge a reasonable rate for parking in the garage's public spaces under the PLA. (R. p. 1204 § 3.02(c).) Thus, SCDG would have received the parking revenues regardless of the Town's breach, and those fees could not be used to offset the damages that SCDG could recover in the absence of the liquidated damages clause in Section 6.01.

The Town's argument also disregards the fact that SCDG was forced to relinquish its full ownership in the project as a result of the financial implications of the Town's repudiation of the PLA. As a result, SCDG has only a 15% membership interest in the joint venture that now owns and operates the garage. (R. pp. 716, 828.) So, at best, SCDG has only received a minor, indirect benefit from any net revenues generated through garage parking.

And most problematically, the Town's argument assumes that all parking revenues are pure profit without accounting for the expenses associated with constructing, owning, operating, insuring, maintaining, and paying ground rent for the garage. Instead of accounting for expenses, the Town simplistically claims that SCDG has received total parking revenue of more than three times the Town's annual rent to imply that SCDG has received a windfall via the trial court's award. (Pet.'s Br. p. 22.)

In reality, no windfall occurred because SCDG suffered damages far in excess of what was awarded by the trial court, as confirmed by the evidence presented at

trial. (R. pp. 644-647, 701, 716, 828.) For example, if there had been no liquidated damages clause, SCDG could have recovered all actual and consequential damages, including the following:

- The rental payments awarded by the trial court in the amount of $2,604,316; *See Bluffton Towne Ctr.*, 412 S.C. at 568, 772 S.E.2d at 890 (ruling that landlord was entitled to damages measured by amount it would have received as rent for remainder of rental term had there been no default);

- In excess of $1 million in costs associated with renegotiating the leases and acquiring more property to accommodate the Town's elimination of the 5' setback and creation of an activity zone when it amended its zoning ordinance (R. pp. 644-647, 701);

- Lost parking revenue in perpetuity that SCDG could have obtained from the spaces eliminated as a result of the Town's adoption of the zoning amendments that reduced the number of spaces (R. p. 701);

- Additional design fees to conform the project to the Town's zoning amendments (R. pp. 701, 828); and

- The financial loss associated with SCDG's relinquishment of 85% of its ownership in the project after SCDG was forced to abandoned its sole ownership and create a joint venture with an equity investor as a result of the Town's repudiation of the PLA and refusal to pay rent. (R. pp. 716, 828.)

Put simply, Section 6.01 saved the Town from a judgment of millions of dollars more than what SCDG was awarded by the trial court in this case.

Therefore, if the Court finds that the Town did not waive its unenforceable penalty defense, it should nevertheless affirm the trial court's award under Rule 220(c), SCACR, because the evidence demonstrates that the award was not so large

as to be plainly disproportionate to the actual and compensatory damages caused by the Town's breach.

CONCLUSION

For the reasons stated above, SCDG respectfully requests that the Supreme Court affirm the trial court's Order and the Court of Appeals' opinion.

Respectfully submitted,

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March 3, 2025
Charleston, South Carolina