THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM CHARLESTON COUNTY
Maite Murphy, Circuit Court Judge

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

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S.C. SUPREME COURT

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

v.

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

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# REPLY BRIEF OF PETITIONER

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### I. The South Carolina Court of Appeals erred in failing to apply a *de novo* standard of review in reviewing the trial court's construction and interpretation of Sections 6.01 and 8.17 of the Parking License Agreement.

As a threshold issue, the Petitioner Town of Mount Pleasant contends that the Court of Appeals failed to apply the *de novo* standard of review in construing Sections 6.01 and 8.17 of the PLA, which are the heart of the contractual dispute. While the Court of Appeals' reasoning is difficult to decipher because the Court chose not to hold oral argument and then issued a *per curiam* memorandum opinion to adjudicate complex contract issues, the opinion highly suggests that the Court may have applied the "any evidence" standard rather than a *de novo* standard despite the well-settled principle that "[i]t is a question of law for the court whether the language of a contract is ambiguous." *Callawassie Island Members Club v. Dennis*, 425 S.C. 193, 821 S.E.2d 667, 669 (2018). It is equally well settled that "[t]he construction of a clear and unambiguous contract presents a question of law for the court." *South Carolina Department of Transportation v. M&T Enterprises of Mt. Pleasant, LLC*, 379 S.C. 645, 667 S.E.2d 7, 13 (Ct. App. 2008). In its memorandum opinion, the Court of Appeals never identifies these controlling principles as part of its string citations. However, the Court of Appeals does state it is "cognizant of our standard of review" in "affirm[ing] the circuit court's award of damages" (App. 2), which at least implies or gives the impression that the Court believed it was *limited* in some respect by the standard of review. That language would not have been used presumably if the Court applied a *de novo* standard, which obviously places no limitations on its adjudication of the dispositive legal issues. Of course, part of the difficulty is the fact that the Court of Appeals did not make its analysis clearly known by use of the string citations. If this case had warranted a formal opinion in the

Court of Appeals' view, as arguably it should have, this Court and the litigants would not be embroiled in this guessing game. What is clear, however, is that the Court of Appeals never states that it is determining any questions of law or that it is applying a *de novo* standard.

In response, the Respondent Shem Creek Development Group ("SCDG") baldly claims that the Court of Appeals applied the correct standard of review – despite not taking a definitive position on whether a question of law was presented and the Court applied a *de novo* standard. Instead, SCDG seizes on this uncertainty by arguing that Sections 6.01 and 8.17 are ambiguous and that the trial court may be affirmed by applying an "any evidence" standard. SCDG's reasoning is seriously flawed for the reasons already outlined in the Town's opening brief but for additional reasons stated herein. It boils down to SCDG is trying to salvage its win at trial by making an argument that was not adjudicated below – namely that Sections 6.01 and 8.17 are ambiguous.

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

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

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

SCDG also desperately tries to convince this Court that the trial court did consider parol evidence. As the Town pointed out in its opening brief, however, the trial court cited *Brown v. Allstate Ins. Co.*, 344 S.C. 21, 542 S.E.2d 723 (2001), for the proposition that "[a] trial judge's

role in a bench trial is to admit all evidence and then evaluate in a nonjury setting." 542 S.E.2d at 726. (R. 56). Thus, based on *Brown*, the trial court admitted all evidence, and 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). Yet, SCDG calls the Town's position on the trial court's lack of reliance on parol evidence as "unconvincing," but quite simply, there is no recitation of any parol evidence in the "Findings of Fact" section of the 42-page order. Certainly, SCDG has pointed to none.

Notably, SCDG tried to explain away – albeit unsuccessfully -- all of the Town's arguments that the trial court did not rule that Sections 6.01 and 8.17 are ambiguous. SCDG even tried to explain away its own statement in its Court of Appeals' brief admitting that "the trial court did not express whether it found the relevant provisions ambiguous." *See*, Respondent's Court of Appeals' Brief, p. 34. However, SCDG had no retort (or explanation) for paragraph 102 of the "Conclusions of Law" section of the order. To recap, after quoting verbatim the language of Sections 6.01 and 8.17, the trial court writes: "When considered together, as they must, these two provisions evidence the parties' clear intention that the Town's obligation to pay rent for the entirety of the rental term survives the termination of the parking license agreement." (R. 67). Unquestionably, the trial court derived the parties' purported "clear intention" from the trial court's own construction of Sections 6.01 and 8.17 alone and without any consideration of parol evidence as to the parties' intended meaning of the terms "rental payments due" and "sum owing" (assuming that such evidence was even to exist which it does

not). The trial court obviously found no ambiguity and interpreted Sections 6.01 and 8.17 as a matter of law – which subjected that ruling to a *de novo* standard of review on appeal. Despite that clear finding by the trial court *as a matter of law*, SCDG attempts to falsely portray the decision-making by the trial court as deciding a factual matter. SCDG point blank tells this Court that "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." *See*, Respondent's Brief, p. 18. SCDG makes that assertion despite paragraph 102 of the "Conclusions of Law" section of the order *and* despite its own acknowledgement that "the trial court did not make any express findings that Sections 6.01 and 8.17 are ambiguous." *See*, Respondent's Brief, p. 16.

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

As one additional point on the standard of review, it is telling that SCDG explains that "it did not needlessly dissect the record on appeal to determine the appropriate standard of review" in its briefing to the Court of Appeals. *See*, Respondent's Brief, p. 22. It is true that SCDG did not address the standard of review at all in its Court of Appeals' brief. Despite the requirement by Rule 208(b)(1)(D), SCACR, that the parties address the standard of review in their brief,

SCDG chose not to do so. Accordingly, there was no disagreement on the standard of review that required a rebuttal from the Town in its reply brief. However, the Town did discuss the applicable standard of review at length in its opening brief and explained as follows:

> The standard of review for questions of law is *de novo*. The appellate court "may reverse where the decision is affected by any error of law." *Murphy v. Owens Corning*, 393 S.C. 77, 710 S.E.2d 454, 457 (Ct. App. 2011). The appellate courts are "free to decide matters of law with no particular deference to the fact finder." *Id*. "It is a question of law for the court whether the language of a contract is ambiguous." *Callawassie Island Members Club v. Dennis*, 425 S.C. 193, 821 S.E.2d 667, 669 (2018). "The construction of a clear and unambiguous contract presents a question of law for the court." *South Carolina Department of Transportation v. M&T Enterprises of Mt. Pleasant, LLC*, 379 S.C. 645, 667 S.E.2d 7, 13 (Ct. App. 2008).

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

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

*See*, Petitioner's Court of Appeals Brief, p. 15. Thus, the Town did take the clear and definitive position that the applicable standard of review is a *de novo* standard. In its brief, SCDG suggests that the Town "admitted" that the "any evidence" standard applies, but that is entirely false and further demonstrates that the Town did not get a fair or correct adjudication from the Court of Appeals.

## II. The South Carolina Court of Appeals erred in affirming the trial court's erroneous construction and application of the language of Sections 6.01 and 8.17 of the Parking License Agreement and in disregarding controlling precedent from the South Carolina Supreme Court construing the plain and ordinary meaning of the term "due" as used in Section 6.01 and the term "sum owing" as used in Section 8.17.

As to the merits, the Town contends, among other arguments, that the Court of Appeals erred in affirming the trial court's erroneous construction and application of the language of Sections 6.01 and 8.17. The Court of Appeals further erred in disregarding controlling precedent from this Court construing the plain and ordinary meaning of the term "due" as used in Section 6.01 and the term "sum owing" as used in Section 8.17.

The construction of the word "due" is the central issue at the heart of the controversy. SCDG insists that "this Court's use of the terms 'due' and 'obligation' reveals that the terms are commonly used to refer to future indebtedness." *See*, Respondent's Brief, p. 30. However, that is simply not true. In fact, in the most definitive case on the meaning of "due," this Court ruled that "[t]he word 'due' means 'owed or owing as a debt.'" *Mathis v. Brown & Brown of South Carolina, Inc.*, 389 S.C. 299, 698 S.E.2d 773, 783 (2010). Moreover, in *Bluffton Towne Center, LLC v. Gilleland-Prince*, 412 S.C. 554, 772 S.E.2d 882 (Ct. App. 2015), the operative language in the lease did not use the word "due," but in addressing the obligation to pay future indebtedness, the Court of Appeals used the word "due" with the modifying language "during the full term of the lease" or "during the full term" in order to incorporate future indebtedness. 772 S.E.2d at 890, 893. That demonstrates the prevailing construction of "due" means "owing" or "owed" and requires additional modifying language not present in Section 6.01 to incorporate future indebtedness not yet incurred.

In its brief, SCDG tries to limit or "narrow" this Court's definition of "due" in *Mathis* by arguing that the context in that case involved a Wage Payment Act claim and that in some inexplicable way that impacts the plain and ordinary meaning of the term. However, what is obvious from that opinion is that this Court was indeed searching for the *plain and ordinary meaning* of the word "due" in its ordinary usage. This Court, in fact, cited to *Webster's Third New International Dictionary* in concluding that "[t]he word 'due' means 'owed or owing as a debt'" and did not include future indebtedness. *Mathis*, 698 S.E.2d at 783. To recap, that definition is also consistent with Black's Law Dictionary, which defines "due" as "owing or payable; constituting a debt." Black's Law Dictionary (11th ed. 2019). Clearly, based on this Court's own precedent and the common dictionary definitions, the term "due" – which means "owed," "owing," and "payable" – does not include future indebtedness that has not yet accrued.

The Court is also urged to look cautiously at SCDG's reading of this Court's decision in In *Ex Parte American Fertilizing Co.*, 122 S.C. 171, 115 S.E. 236 (1922). As a reminder, in the Court of Appeals, SCDG purposefully did not include the *full* citation and analysis in its brief in an attempt to give the false impression that this Court was construing the meaning of the word "due" in that case. SCDG's analysis of *American Fertilizing* is again abbreviated. To recap, in that case, this Court printed the trial court's decision and then "affirmed for the reasons therein stated." 115 S.E. at 238. The trial court was actually construing the words "may be due," and concluded that "the words 'may be due' contemplate future indebtedness." *Id*.

As indicated, Section 6.01 is a limitation of liability clause that limits the remedy available to *both* parties in the event of a default. Using mandatory terms, Section 6.01 provides that the "sole and exclusive remedy shall be the Rent Payments *due* under this Agreement." (R. 1205). Thus, by the contract terms, the sole and exclusive remedy is the "rent payments due."

Section 6.01 of the PLA says "rent payments due" – not "as may be due" or "as may become due" or "during the full term of the agreement." Thus, the absence of the words "may be" or other expansive language and given the plain and ordinary meaning of "due" as determined by this Court in *Mathis* (based on common dictionary definitions) compel the conclusion that "rent payments due" does not include future indebtedness.

In its brief, SCDG also resorts to several new arguments that were not made in the trial court or in the Court of Appeals, including in its response to the petition for rehearing. SCDG cites to other, unrelated provisions in the PLA to suggest that "rent payments due" in Section 6.01 is ambiguous or otherwise should not be given its plain and ordinary meaning.

For example, SCDG cites to the Section 8.03, which provides: "No payment by Licensee or receipt by Licensor of a lessor amount than the then due Rent herein stipulated shall be deemed to be other than on account of the earliest stipulated Rent." (R. 1207). SCDG argues that "then due Rent" in Section 8.03 must have a different meaning than "Rent Payments due" in Section 6.01. However, there is no discrepancy or conflict in meaning between the terms, particularly when "then due rent" is read in context. The full phrasing is "then due Rent herein stipulated," and Section 8.03 is an accord and satisfaction provision which confirms that payment of a lesser amount is not a waiver nor constitutes an accord and satisfaction. Notably, neither the trial court nor the Court of Appeals cited to or even mentioned this language in Section 8.03, and certainly neither court used Section 8.03 to find that the term "due" is ambiguous.

Similarly, as a new argument not made in the lower courts, SCDG cites Section 8.12, which provides in pertinent part as follows:

> Licensee represents to Licensor that all necessary action has been undertaken to authorize this contractual obligation of the Licensee,

> and that the payments due under this License Agreement represent an ongoing obligation of the Town of Mount Pleasant. The Licensee may make this license contract beyond the term of the governing members of the municipal corporation entering into the License, since the subject matter of this License is an exercise of the Licensee's business and proprietary powers, and does not involve the exercise of a legislative function or the governmental power of the Licensee.

(R. 1208). SCDG points to the reference to "ongoing obligation" to suggest that the Town was liable for all future rent payments due under the PLA. However, Section 8.12 must be read within its actual context, which was to confirm that the Council members entering the contract could bind future councils to this agreement in accordance with state law. Specifically, as this Court has explained, "[w]hen a municipal contract extends beyond the terms of the governing members of the municipality entering into the contract, the subject matter of the contract will determine its validity." *City of Beaufort v. Beaufort-Jasper County Water & Sewer Authority*, 325 S.C. 174, 480 S.E.2d 728, 731 (1997). Thus, "if the contract involves the legislative functions or governmental powers of the municipal corporation, the contract is not binding on successor boards or councils." *Id*. In short, with Section 8.12, the Town was only confirming its authority to enter a multi-year contract and was not binding the Town to any future indebtedness should the PLA be terminated in the interim. Again, it is worth noting that neither the trial court nor the Court of Appeals cited to or even mentioned this language in Section 8.12, and certainly neither court used Section 8.12 to find the Town liable for future indebtedness.

Nonetheless, SCDG's argument suggests an additional point worth considering. Consistent with SCDG's interpretation, arguably the inclusion of the word "due" in Section 6.01 is superfluous or meaningless if the parties truly intended that the remedy for breach to be *all* rent payments in the PLA, including future payments. If that were the intent, Section 6.01 should have read the "sole and exclusive remedy shall be the Rent Payments under this

Agreement." The word "due" could have been excluded. But the word "due" was not excluded. It is a critical and meaningful term in Section 6.01, and that term should be given its plain and ordinary meaning.

In sum, the meaning of "rent payments due" is not ambiguous and was not found to be ambiguous in the lower courts. Accordingly, the construction of the term presents an issue of law to which a *de novo* standard of review applies, and based on the plain and ordinary meaning of "due," the Town should prevail.

## III. The Respondent's attempt to raise an ambiguity in the Parking License Agreement at this stage in the litigation should be rejected for both procedural and substantive reasons.

Despite no finding of an ambiguity in the trial court or the Court of Appeals, SCDG asks this Court to rule that Sections 6.01 and 8.17 of the PLA are ambiguous and should be construed against the interests of the Town. There are many flaws with this argument.

First, the ambiguity of Sections 6.01 and 8.17 was never an issue in the trial court. SCDG did not take the position that those sections are ambiguous in its pleadings or at trial. This is an issue raised for the first time on appeal.

Second, as discussed at length, the trial court never ruled that Sections 6.01 and 8.17 are ambiguous. SCDG concedes this point: "the trial court did not make any express findings that Sections 6.01 and 8.17 are ambiguous." *See*, Respondent's Brief, p. 16. 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.

Third, by raising ambiguity presumably as an additional sustaining ground, SCDG is improperly attempting to use Rule 220(c), SCACR, to convert an issue of law into an issue of

fact and then to ask the appellate court to serve as the factfinder. There is no precedent allowing an appellate court to become a factfinder and then decide an additional sustaining ground on a fact issue that the trial court never addressed. The only authority cited by SCDG is *Brooklyn Bridge, Inc. v. South Carolina Ins. Co.*, 309 S.C. 141, 420 S.E.2d 511 (Ct. App. 1992), in which the Court of Appeals agreed with the trial court that the insurance policy language at issue was unambiguous. But, in the alternative, the Court of Appeals found that, even if the insurer's interpretation were reasonable, that still presented only an issue of law because, in the insurance context, where the "policy is susceptible of more than one reasonable interpretation, one of which would provide coverage, coverage must be found as a matter of law." 420 S.E.2d at 513. Thus, the Court of Appeals in *Brooklyn Bridge* decided an issue of law, which is well within its province under Rule 220(c). The Court of Appeals did not, however, use its authority under Rule 220(c) to decide the case based on factual findings that were made for the first time on appeal and not in the trial court. Yet, that is precisely what SCDG is asking this Court to do. SCDG suggests that this Court could find Sections 6.01 and 8.17 to be ambiguous and then decide by a preponderance of the evidence what the parties intended. It is well settled that when construing a contract, "[t]he issue of intent is a question for the factfinder." *Harleysville Group Ins. v. Heritage Communities, Inc.*, 420 S.C. 321, 803 S.E.2d 288, 302 (2017). Yet, in its appellate capacity, this Court only reviews the evidence "not to determine the preponderance of the evidence thereof but to determine whether there is any evidence which reasonably supports the factual findings of the judge." *Townes Associates v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773, 776 (1976).

Fourth, SCDG argues that Section 6.01 should be construed against the Town because it drafted that provision. Note that SCDG does not claim that Section 8.17, which it also contends

is ambiguous, was drafted by the Town. Nonetheless, SCDG's position, on its face, is contrary to Section 8.08 of the PLA, which states: "There shall be no interpretation or construing of this License favorable or unfavorable to either party by virtue of its preparation by Licensor [SCDG]." (R. 1208). Thus, not only does SCDG admit being the preparer of the PLA (and not just portions of it), but Section 8.08 denies both parties the benefit of the rule of construction that favors the interpretation proffered by the non-drafting party. In this case, the PLA was the result of an arms-length negotiation by sophisticated parties represented by counsel, and accordingly, it should not be construed in favor of or against either party on the basis of who drafted the provisions at issue.

Finally, SCDG argues that the Town's interpretation of Sections 6.01 and 8.17 would create an "unreasonable, unfair, and unjust result" and would allow the Town to breach the PLA "with impunity." 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 a breach of contract with impunity, 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, SCDG terminated the PLA before any rent payments became due and payable. Nonetheless, 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). The failure to prove recoverable damages is fatal to SCDG's claim. Yet,

SCDG asks this Court to excuse that failure by asking this Court to rewrite the PLA to provide more favorable terms. Plain and simple, that is not the role of this Court.

## IV. The South Carolina Court of Appeals erred in affirming the trial court's treatment of Section 6.01 of the Parking License Agreement as a liquidated damages provision rather than as a limitation of liability clause.

The Town asserts that the trial court erred in ruling that Section 6.01 of the PLA is a liquidated damages provision. In actuality, Section 6.01 is a limitation of liability clause. In its response, SCDG argues that "any distinction between a liquidated damages and limitation of liability clause is now immaterial and moot." *See*, Respondent's Brief, p. 38. SCDG argues mootness based on this Court's denial of a writ of certiorari on the Town's challenge to the denial of a motion to compel which sought financial records related to the operation of the parking garage. Of course, this Court did grant a writ of certiorari to review the following question: "Did the South Carolina Court of Appeals err in affirming the trial court's treatment of Section 6.01 of the Parking License Agreement as a liquidated damages provision rather than as a limitation of liability clause?" It is doubtful that this Court intended to grant certiorari to review an "immaterial" or "moot" question.

Moreover, if the Court reverses on this issue and grants a new trial absolute, it would still be *SCDG's burden to prove its damages*, which requires a calculation of "rent" under all of the provisions of Section 1.07 of the PLA and not cherry-picked provisions. SCDG addresses this argument as if the Town somehow possesses the burden of proving (or disproving) SCDG's damages under the PLA. That is obviously not the case, nor did either of the lower courts rule that the Town had that burden of proof. Thus, the assertion that the damages claimed by SCDG

cannot be disputed because a discovery order – not a dispositive order -- is not being reviewed by this Court is meritless.

As to the merits of this issue, SCDG does not necessarily disagree that Section 6.01 is a limitation of liability clause. Instead, SCDG argues that a liquidated damages clause can also be a limitation of liability clause. That is not correct. To recap, 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.

Moreover, as the Town has shown, 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. In short, despite SCDG's suggestion otherwise, Section 6.01 is not a liquidated damages provision.

Nonetheless, 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. As the Town has previously argued, there is no basis in the contract or in law for that contrived dichotomy. Notably, SCDG does not even attempt to justify or support its argument. Instead, in a single, conclusory sentence without any supporting authority, SCDG merely writes: "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." *See*, Respondent's Brief, p. 42. However, an issue is typically treated as abandoned where it is stated "in a short, conclusory statement without supporting authority." *Fields v. Melrose Limited Partnership*, 312 S.C. 102, 439 S.E.2d 283, 285, n.3 (Ct. App. 1993). *See also*, *Glasscock, Inc. v. United States Fidelity & Guaranty Co.*, 348 S.C. 76, 557 S.E.2d 689 (Ct. App. 2001).

Interestingly, however, SCDG does make the argument that rent adjustments as required by Section 1.07(b) cannot be calculated because SCDG never operated the parking garage. That only reinforces the Town's position that "Rent Payments due," as intended by the plain and ordinary language of Section 6.01, does not include future rent indebtedness. As SCDG readily admits, the future rent indebtedness cannot be calculated. Certainly, Section 6.01 did not contemplate the parties engaging in the impossible.

## V. The South Carolina Court of Appeals erred in failing to consider or address that the trial court actually read into the Parking License Agreement a rent acceleration clause that does not otherwise exist and was specifically rejected by the parties.

The Town 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. This issue is not addressed in the memorandum opinion. Nonethless, in response, SCDG asserts that "the Court of Appeals correctly rejected the Town's

argument that the trial court converted Section 6.01 into a rent acceleration clause." *See*, Respondent's Brief, p. 43. Not surprisingly, SCDG points to no specific language in the Court of Appeals' decision to even remotely suggest that the Court of Appeals considered *and rejected* the Town's position.

Nonetheless, as SCDG has previously acknowledged, the record is undisputed that the parties specifically agreed to delete a rent acceleration clause that had been written into an earlier draft. That was admitted in testimony by one of SCDG's principals, Tyler Flesch. (R. 705, 784-785). However, the record reflects that the trial court read Sections 6.01 and 8.17 as allowing for rent acceleration, and that constitutes reversible error.

SCDG makes the flawed argument that the trial court's acceleration of all rent due over the fifteen year "Rent Period" was not "rent acceleration" because, if it had been "rent acceleration," the future rent payments would not have been reduced to present value. Yet, SCDG does not cite any published South Carolina decision for that proposition. In opposing the issuance of the writ of certiorari, SCDG did cite to an unpublished decision of the Court of Appeals in *Allegiant v. Emerald Inns, Inc.*, Op. No. 2007-UP-325 (Ct. App. 2007), but SCDG has now abandoned that citation. That is likely because *Allegiant* actually does not support SCDG's position but rather supports the opposite view. In *Allegiant*, the lease included what the trial court found to be an acceleration clause, although the language of that clause is not stated verbatim in the opinion. The trial court allowed the plaintiff to recover "as damages the aggregate of all of the payments that would have become due under the lease." The Court of Appeals reversed and held that "[t]he correct measure of damages would include the balance due at the time of the default plus the present value of all unaccrued payments at the time of the default." Thus, as the *Allegiant* decision shows, rent acceleration under South Carolina law does

include future rent payments that are reduced to present value. That is exactly what the trial court awarded in the case at bar, despite the undisputed fact that the parties agreed to delete a rent acceleration clause from the PLA. As such, the trial court erred in reading a rent acceleration provision into the PLA which does not exist and which the parties agreed would not be part of the agreement, and the Court of Appeals greatly compounded that error by failing to even acknowledge or address the issue at all.

## CONCLUSION

Based on the foregoing discussion and analysis, the Petitioner Town of Mount Pleasant respectfully renews its request that this Court reverse the decision of the South Carolina Court of Appeals. The Town of Mount Pleasant further renews its request that this Court reverse the judgment entered in favor of the Respondent Shem Creek Development Group, including the award of attorney's fees and costs, and remand for entry of judgment in favor of the Town. In the alternative, the Petitioner Town renews its request 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.

Respectfully submitted,

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